IN THE MATTER OF:

An Inquiry Made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America

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ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF

AN INQUIRY MADE BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL PURSUANT TO SECTION 42 OF THE SPECIAL IMPORTS MEASURES ACT RESPECTING MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

Secretariat File

No. CDA-92-1904-02

Panel: John D. Richard, Q.C., Chairperson
James R. Chalker, Q.C.
James P. McIlroy
Michael D. Sandler, Esq.
Martin J. Ward, Esq.

April 7, 1993

James Smellie, Osler Hoskin & Harcourt, argued for the Complainant Carpet & Rug Institute. With him on the brief was Peter A. Magnus.

Geoffrey C. Kubrick, McCarthy Tétrault, argued for the Participants Diamond Rug & Carpet Mills Inc., Mannington Carpets, Sunrise Carpet Industries, Holytex Carpet Mills, and Victory Carpet Corporation.

James L. Shields, Soloway Wright, argued for the Participants World Carpets Inc.

Brian J. Barr argued for the Respondent the Canadian Carpet Institute.

Clifford Sosnow and Brenda Swick-Martin argued for the Respondent the Canadian International Trade Tribunal.

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I. INTRODUCTION

This Binational Panel was constituted pursuant to Chapter 19 of the Canada-United States Free Trade Agreement ("FTA") to review a May 6, 1992 decision ("Decision") of the Canadian International Trade Tribunal ("CITT" or "Tribunal"). The Tribunal decided that the dumping of machine tufted carpeting[1] originating in or exported from the U.S. had caused, was causing and was likely to cause material injury to the production of like goods in Canada.

The Complainant, the Carpet & Rug Institute ("CRI") in its written submissions, challenged the Tribunal's decision on the grounds that it erred:

(1) In specifically finding that dumping alone, and not merely in concert with numerous other economic and market factors caused material injury;

(2) In failing to properly consider evidence of the cumulative impact of all such economic and market factors in assessing the cause of injury to the domestic industry;

(3) In finding that material injury was caused by dumping, despite the absence of sufficient specific evidence to demonstrate that material injury in the form of lost sales, price suppression or other relevant indicia was caused by the dumping of like goods;

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[1] With pile predominantly of nylon, other polyamide, polyester or polypropylene yarns. Excluding carpeting and floor coverings of an area less than five square meters, oriental, machine or hand woven carpets, braided, knotted, hooked and needle punched mats and rugs, carpets made of wool/wool blends or fine animal, cotton, acrylic and modacrylic, viscose and other man-made textile materials.

(4) In finding that material injury was caused by dumped imports from a substantial number of exporters, notwithstanding the absence of allegations of injury against such exporters, nor any evidence in support of such finding;

(5) In inferring a causal relationship between dumping and material injury on the basis of the volume of dumped goods and significance of the margins of dumping;

(6) In failing to determine the degree to which injury to the domestic industry was caused by its own importing activities;

(7) In not taking full account of paragraph I of Article 4 of the GATT Code,[2] as specifically required by paragraph 42(3) of the Special Import Measures Act ("SIMA");[3] and,

(8) In its determination of the constitution of "like goods" within the meaning of subsection 42(1) of SIMA.

During oral submissions, counsel for the Complainant informed the Panel that their argument could be grouped under four broad headings:

(1) Standard of review;

(2) Injury and causality;

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[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, signed in Geneva, Switzerland on December 17, 1979, GATT BISD 25 (1980), incorporated into Canadian law by subsection 42(3) of the Special Import Measures Act ("SIMA"), R.S.C. 1985, c.S-15 and Article 1902 of the Canada-United States Free Trade Agreement [hereinafter the Anti-dumping Code].

[3] R.S.C. 1985, c.S-15 (as amended).

(3) GATT Anti-Dumping Code, Article 4, paragraph 1;

(4) Determination of "like goods."

For the reasons more fully set forth in its Opinion hereafter, on the basis of the administrative record, the applicable law, the written submissions of the parties, and the public and in camera hearing held in Ottawa on January 11 and 12, 1993, the Panel:

Affirms in part and *Remands* in part.

II. PROCEDURAL HISTORY

Following the filing of a dumping complaint by the Canadian Carpet Institute ("CCI") and National Carpet, a Division of NCM Carpet Mills Inc., and a notice of preliminary determination of dumping by the Deputy Minister of National Revenue for Customs and Excise ("Revenue Canada") which was published in Part I of the January 4, 1992 edition of the Canada Gazette, the Tribunal commenced a material injury inquiry under section 42 of SIMA. The Tribunal held ten days of public and in camera hearings in Ottawa commencing on March 16, 1992. The Final Determination by the Deputy Minister for Revenue Canada was made on March 18, 1992 and published in Part I of the April 4, 1992 edition of *The Canada Gazette*. The Tribunal's decision and its statement of reasons were issued on April 21, 1992 and May 6, 1992, respectively.

A Binational Panel Review was requested on May 27, 1992 pursuant to Article 1904:4 of the FTA. Briefs were filed by the Complainant CRI, and the Respondents CCI and CITT. No briefs were filed by

(1) Diamond Rug & Carpet Mills Inc., Mannington Carpets, Sunrise Carpet Industries, Hollytex Carpet Mills, and Victory Carpet Corporation, and

(2) World Carpets Inc.,

although counsel for both appeared before the Panel during the hearing.

Three motions were brought pursuant to Rule 63 of the Rules of Procedure for Article 1904 Binational Panel Reviews ("Rules") during the course of this Panel Review. All three

motions were disposed of without personal appearance by the participants in accordance with the provisions of Rule 66(1).

The first motion, brought by General Felt Industries Inc., requested that their complaint be discontinued. By order dated October 28, 1992 the motion was granted.

The second motion, brought by the Complainant CRI, requested an Order for the extension of time for commencement of oral argument before the Panel. The grounds for this motion were that prejudice would result to the Complainant CRI if the Panel hearing occurred before the release of the decision of another Binational Panel reviewing the Final Determination. The Panel, upon considering that Article 1904:14 of the FTA provides that the Rules shall result in a final decision within 315 days of the date on which a request for a Panel is made, that Article 1904:2 provides that a Panel Review shall be based upon the administrative record, that section 41.1 of SIMA states that a new inquiry can be commenced by the CITT in the event of a remand of the Final Determination, and that adherence to the time period would not result in unfairness or prejudice to a participant or the breach of a general legal principle of the country in which the final determination was made, denied the motion by Order dated December 22, 1992.

The third motion, also brought by the Complainant CRI, requested an Order that the brief of the CITT be struck or removed from the record. The grounds for this motion were that the brief filed by the CITT did not comport with the general legal principles concerning standing of a tribunal, which a Canadian court would apply to a review of a CITT determination. The Panel, upon considering that Article 1904:7 of the FTA provides that the competent investigating authority that issued a final determination shall have the right to appear and be represented by counsel before the panel, that Article 1904 of the FTA provides that the investigating authority

is a participant in a Binational Panel Review, that Rule 60(3) provides that the investigating authority may file a brief in the Binational Panel Review, and that the decision of the Supreme Court of Canada in CAIMAW v. Paccar of Canada Ltd.[4] held that a tribunal has standing to make submissions not only explaining the record but also to show that it had jurisdiction to embark upon the inquiry, and that it had not lost that jurisdiction through a patently unreasonable interpretation of its powers, denied the motion by Order dated December 22, 1992.

Following the Panel hearing held January 11 and 12, 1993, the parties were requested to provide a post-hearing brief identifying "thirty lost sale accounts," which were discussed by counsel for both the Complainant CRI and the Respondents during oral submissions. The information requested by the Panel regarding these accounts was specific and direct. The parties were asked not to provide any information beyond that in the administrative record or to provide any argument in the post-hearing brief. An opportunity for a written reply brief was given. Post-hearing briefs were submitted by the CRI, the CCI and the CITT.

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[4] [1989] 2 S.C.R. 983 at 1014, 1016-7 [hereinafter Paccar].

III. OPINION

A. Standard of Binational Panel Review

Pursuant to FTA Articles 1904:3 and 1911 this Panel is required to apply the standard of review "that a court of the importing Party would apply to a review of a determination of the competent investigating authority." In Canada, it is the standard of review found in s. 28(1) of the Federal Court Act, as limited by the so-called privative clause in s. 76(1) of SIMA, which provides that subject to certain exceptions, "every order or finding of the Tribunal under this Act is final and conclusive." In these circumstances, courts in Canada will apply either the "patently unreasonable" standard or the "correctness" standard:

> 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. . . .[5]

The parties before us agreed that the first standard, the "patently unreasonable" standard, applies to the "causation" issue raised by the Complainant. Because this case raises difficult issues concerning how that standard is to be applied, we discuss it in some detail.

Until recently, courts in Canada were extremely reluctant to review *the manner* in which expert boards or tribunals reached their findings and determinations. If a decision cited any evidence a board or tribunal "might have" relied on to support that decision and so long as the

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[5] U.E.S. Local 298 v. Bibeault, [1988] S.C.R. 1048 at 1086.

tribunal did not appear to act without regard to the material before it or its legislative authority, such decision would not be deemed patently unreasonable. As stated in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.[6] , a reviewing panel was limited to the following inquiries:

> Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

Earlier Federal Court of Appeal cases involving review of decisions of the CITT and its predecessors similarly adhered to this circumscribed standard of review. In Re Y.K.K. Zipper Co. of Canada Ltd.[7] the Court said:

> This was a question of fact determined by a statutorily created body having the legal authority and expertise necessary to evaluate the evidence and to make such a finding.

The Court went on:

> It would be quite improper, therefore, for this Court to disturb such finding unless it be satisfied that there was no evidence upon which it could have been made or that a wrong principle was applied in making it.[8]

Similar language appears in Sarco Canada Limited v. Anti-Dumping Tribunal.[9] In Japan Electrical Manufacturers Association, et al. v. the Anti-Dumping Tribunal, et al.,[10]

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[6] [1979] S.C.R. 227, at 237 [hereinafter "C.U.P.E."].

[7] [1975] F.C. 68. (C.A.).

[8] Ibid. at 75.

[9] [1979] 1 F.C. 247 (C.A.).

[10] [1987] 12 C.E.R. 260 (F.C.A.).

it was alleged amongst other grounds that the Tribunal had failed to examine properly the question of whether dumping was the cause of material injury to the production in Canada of like goods. The Court simply ascertained whether the Tribunal had weighed matters that were within its expertise, and did not examine whether the result logically flowed from the evidence:

> In my view, the tribunal's duty was to weigh and balance the various factors which contributed to the injury, not only the factors attributable to the dumped imports but any and all contributing non-dumping factors as well. From the evidence referred to supra, I think it clear that the tribunal did weigh and balance all of the contributing factors and after applying its particular knowledge and expertise, made the findings herein impugned. In such circumstance, its decision should not be disturbed unless there was no evidence upon which those findings could have been based or unless a wrong principle was applied in making those findings.[11]

In Remington Arms of Canada Limited v. Les Industries Valcartier Inc.,[12] the Court went a step further and seemed to inquire whether evidence existed to support each of the Tribunal's conclusions:

> In my opinion, those attacks are without merit in that it is clear from the record that the Tribunal weighed the evidence adduced before it, both that which was helpful and harmful to the positions adopted by the applicant and the intervenors (hereinafter referred to as Winchester), and made their decision based thereon. I can find no error in the application of any principle by the Tribunal nor were any conclusions made without at least some evidence to support them.[13]

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[11] Ibid. at 268.

[12] [1982] 1 F.C. 586 (C.A.) [hereinafter Remington Arms].

[13] Ibid. at 588.

Three relatively recent decisions seem to have broadened the scope of review. They are: the Paccar case cited above, National Corn Growers Association v. Canada (Import Tribunal),[14] and Lester (W.W.) v. U.A.J.A.P.P.I., Local 740,[15]

In Paccar, La Forest, J., in one of the majority opinions, referred to the duty of the Court to review "how" a tribunal had reached its result, in order to assure that it had a rational basis:

> 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.[16]

Sopinka, J., in joining the majority, stated:

> Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true.[17]

This emphasis on reviewing a tribunal's analysis, and whether a logical relationship existed between the grounds and premises of a decision, marked a notable change in the standard of review.

The second of these cases, Corn Growers, was concerned with a finding of the Canadian Import Tribunal (the "CIT", predecessor of the CITT) made pursuant to s. 42 of SIMA. The

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[14] [1990] 2 S.C.R. 1324 [hereinafter Corn Growers].

[15] [1990] 3 S.C.R. 644 [hereinafter Lester].

[16] [1989] 2 S.C.R. at 1004.

[17] Ibid. at 1018.

CIT had conducted an inquiry respecting the importation into Canada of U.S. grain corn. The Tribunal had concluded that U.S. subsidies of grain corn had caused, were causing and were likely to cause material injury to the production in Canada of like goods. The Court was unanimous in the result (it supported the majority decision of the CIT) but divided four to three on the approach to judicial review. The majority of the Court took a more expansive view of the role of a Court in reviewing decisions of expert tribunals. Speaking for the majority, Gonthier, J., began by citing the applicable "patently unreasonable" standard of review:

> The cases clearly establish that the Court should not interfere with an expert tribunal's decision unless the interpretation of the Tribunal was patently unreasonable.[18]

He continued:

> Although the terms of Section 28 of the Federal Court Act are quite broad in scope, it is to be remembered that courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.[19]

Gonthier, J., however, noted that even in the presence of the privative clause in the SIMA, courts may be required to undertake an "in-depth" analysis of both the record and the tribunal's decision in order to evaluate its reasonableness:

> Given this provision, this Court, therefore, will only interfere with the Tribunal's ruling if it acted outside the scope of its mandate by reason of its conclusions being patently unreasonable.

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[18] Supra, note 5 at 1367.

[19] Ibid, at 1369.

> In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable, but this can only be understood upon an in-depth analysis.[20]

Mr. Justice Gonthier then went on, at page 1379, to analyze the finding of material injury. Appellants had contended that world supply and demand conditions and resulting world prices, rather than U.S. subsidies, were the cause of injury. Mr. Justice Gonthier quoted the evidence from the Tribunal's decision (1) that "the productive capacity of the U.S., and thus its ability to exert influence on the international market, is shown to be overwhelming," (2) that "the dramatic decline in the international price for grain corn is, in very large measure, a direct consequence of" the U.S. subsidies at issue, and (3) that the open nature of the Canadian market resulted in the subsidy-affected world prices to be transferred to Canada. Thus, Mr. Justice Gonthier traced a logical link in the Tribunal's decision from the U.S. subsidies, to world prices, to Canadian prices and to material injury. He went on to say, at the bottom of page 1382, that it was not unreasonable for the Tribunal to infer, that given the open nature of the Canadian market and given that the United States was the only viable source for imports, that American stocks not used for domestic consumption would flow into Canada in greater amounts. He, thus, concluded:

> Given these observations by the majority of the Tribunal, I cannot adhere to the view that there was no evidence, with respect to price, indicating that material injury had been caused, was caused and was likely to be caused to corn producers in Canada. Having regard to the evidence before the Tribunal, it cannot be said that its finding of a causal link between American price and injury to the Canadian market was patently unreasonable.[21]

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[20] Ibid. at 1370.

[21] Ibid. at 1381.

It is clear from his reasons that Mr. Justice Gonthier did analyze, in some detail, the manner in which the Tribunal arrived at its conclusion, tracing the evidentiary links from the finding of subsidies to the causation of material injury.

In the third case, Lester, the Court again was divided, not only in the scope of judicial review but also in the result. Speaking for the majority, McLachlin, J. at p. 668, referred to the patently unreasonable test, and stated the governing principle had been explained by Dickson, J., (as he then was) in Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association:[22]

> A Tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an enquiry but, in the course of that enquiry, 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 the provisions of the Act so as to embark on an enquiry or answer a question not remitted to it.[23]

The Lester decision involved an application by an employer for judicial review of a decision of the Newfoundland Labour Relations Board which had decided that where an employer establishes two companies, one union, the other non-union, the sharing of management expertise between the two companies brought them within the scope of the successor rights provisions of the Labour Relations Act of Newfoundland. After an analysis of the Newfoundland Labour Relations Act, 1977, McLachlin, J. reviewed not only the text of the Labour Relations Board's decision and how it had reached its result, but also other portions of

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[22] [1975] 1 S.C.R. 382.

[23] Id. at 389.

the administrative record for potentially supportive evidence. McLachlin, J., in continuing to discuss the application of the "patently unreasonable" test, said:

> As stated at the outset, the Court in reviewing labour decisions is not concerned with whether or not the decision is 'correct' but rather is concerned with whether or not the decision is 'patently unreasonable'. If there is any evidence capable of supporting a finding of successorship, the Court will defer to the Board's finding even though it may not have reached the same conclusion. However, absent such evidence, the decision must fall.
>
> Although the testimony before the Board was sometimes contradictory, my review of the transcript reveals that there was no evidence to support the Board's conclusion that a transfer or other disposition had taken place.[24]
>
> * * *
>
> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board of this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere. [25]

It is obvious from the statement "only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact," that the Court is saying not only must the relevant evidence be examined but also this evidence must be viewed reasonably. Thus, it is not a question of whether there is no evidence, but rather whether the evidence relied on is capable of supporting the tribunal's findings of fact (that is, evidence that rationally or logically supports the findings).

While, in the Corn Growers case, the Court appeared to examine only the reasons articulated by the tribunal, McLachlin, J., in Lester, refused to accept how the Board had

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[24] Lester, [1990] 3 S.C.R., at 688-89.

[25] Id., at 669.

reconciled "contradictory" testimony, but instead she examined the full record for evidence capable of supporting a finding that a transfer of assets had occurred. Significantly the Court in Lester did not simply defer to the Board's expertise on matters within its jurisdiction or to the Board's findings from the evidence. Thus, McLachlin, J., in Lester, concluded at p. 692:

> I conclude that, while the evidence demonstrates a certain level of cooperation between the two companies, there is no evidence of any disposition by Lester to Planet, either of work, assets or expertise. The evidence is incapable of supporting the Board's conclusion that there had been a disposition under § 89 of the Act.

And at p. 694:

> Having concluded that there is no evidence of transfer or disposition sufficient to satisfy § 89 of the Act and that the decision of the majority was by consequence patently unreasonable, I find it unnecessary to consider the additional argument that no employees were affected by the alleged disposition. (Emphasis added).

Mr. Justice Vancise of the Court of Appeal of Saskatchewan in an article addressing the standard of judicial review applicable to labour tribunals, commented on the decision of McLachlin, J. in Lester, He stated:

> "McLachlin J. did not, however, find that the interpretation given the legislation was patently unreasonable. She asked, instead, whether there was evidence capable to support the finding of successorship--but not as defined by the Board--as defined by her. She found after a review of the transcript that the "evidence was incapable" of supporting the tribunal's conclusion that there had been a disposition under s.89 of the Act. In another place she speaks of there being "no evidence... sufficient" to satisfy a s.89 transfer.
>
> What is interesting is that there was "some evidence" but not, in her opinion, "sufficient evidence" to support a transfer on her interpretation of the section; an interpretation of the very issue which the Board was called upon to decide and which it was agreed was within its jurisdiction to decide. Thus the evidence required must be tailored to the basic premise, that is, the correct interpretation of the meaning of successorship as found by the Court not by the labour tribunal.
>
> She appears to follow the lead of Sopinka J., in Paccar by establishing certain basic premises, i.e., the correct approach to successorship, which then gives the

> court the right to assess the reasonableness of the decision and hence to examine the evidentiary base necessary to satisfy the criteria developed by the court, not the criteria on which the decision was based as a result of the interpretation given the section by the labour tribunal.[26]

The majority of the panel agrees with Mr. Justice Vancise' analysis of the decision of McLachlin J. in Lester, and adopts this analysis as one of the basis of our decision on the appropriate standard of review.

Our review of the evolution of the "patently unreasonable" standard leads to the following observations about how that standard is applied today:

1. Courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal, acting within its jurisdiction where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or the law. Corn Growers, at 1369.

2. A reviewing panel today must review "how" a tribunal reached any challenged finding or decision to determine whether it has a rational basis, and it must make at least such "evaluation of the merits" so as to satisfy itself that there is a "logical relationship" between the ultimate findings in a decision and the evidence supporting them. Paccar, at 1004, 1018.

3. A reviewing panel today may have to perform "an in-depth analysis" in analyzing the manner in which a tribunal arrived at its findings and decision and their logical ties to the evidence. Corn Growers, at 1370.

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[26] "From the Cornfields of Ontario to Double Breasting in Newfoundland - What Does It All Mean - The Standard of Judicial Review Applicable to Labour Tribunals" as contained in Work Unemployment and Justice, a collection of papers presented at St. Andrew by the Sea, New Brunswick on October 16-19, 1991 by the Canadian Institute for the Administration of Justice.

4. If a reviewing Panel finds that the decision of a specialized tribunal cannot be sustained on any reasonable interpretation of the facts or where the evidence viewed reasonably is incapable of supporting the tribunal's findings of fact, the tribunal's decision will be deemed patently unreasonable. Put another way, if a rational or logical relationship does not exist between the evidence and the decision of the tribunal, such decision will be deemed patently unreasonable. Lester, at 669, 688-89.

5. On judicial review, the courts in Canada are free to examine not only the findings and observations made by the Tribunal in its reasons, but also the entire administrative record. The Federal Court Act and its Rules as well as the provisions of Chapter 19 of the FTA and its Rules, expressly provide that the administrative record will be provided. Such an examination of the record was performed in the Lester case.

6. The purpose of the "patently unreasonable" standard is to assure curial deference to the expertise of specialized tribunals with respect to matters within their expertise and jurisdiction, and a reviewing panel is not to attempt to substitute its findings in these matters for those of the tribunal.[27]

These principles do not reach one circumstance central to our decision. There may be situations where a reviewing panel is asked to consider technical evidence in the administrative record which has not ostensibly been analyzed or relied on in the expert tribunal's decision and which may, upon expert analysis, be found to provide a logical relationship to the tribunal's findings (and thus capable of supporting those findings). The problem in such situations is

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[27] Lester, at 669. See also Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] S.C.R. 1722 at 1746.

whether the reviewing panel itself should perform that analysis or ask the expert tribunal to do so on remand. This is such a case. The principle of curial deference mentioned in point 6 of the above summary suggests we do the latter. And we have done so, below.

B. Causation Of Past And Present Injury

With respect to each of the three categories of "like goods" of machine-tufted carpeting, being, residential, commercial, and artificial grass carpeting, the Tribunal found that the Canadian Domestic industry had suffered "material injury" and that dumping was the "cause" of that material injury. (As noted, the complaint by General Felt Industries Inc. has been discontinued and Complainant CRI does not challenge the decision with respect to artificial grass.)

Regarding residential carpeting and commercial carpeting, Complainant CRI does not dispute the conclusion that the Canadian industry has been "materially injured." Nor does CRI dispute the following findings by the Tribunal with regard to past and present material injury:

(1) there was a 19 percent drop in the overall domestic demand between 1988 and 1991;

(2) sales from domestic production dropped precipitously during the same period outpacing the market decline;

(3) the share held by imports displayed considerable growth at the expense of the domestic industry. Imports of U.S. carpeting by parties other than the Canadian industry moved from a 5 percent share in 1988 to a 31 percent share in 1991;

(4) there was a rapid decline in the financial performance of the industry, particularly in 1990 and 1991;

(5) Employment levels and utilization of capacity dropped steadily throughout the period.[28]

Therefore, these aspects of the decision are also affirmed. What is disputed is the evidentiary support for the Tribunal's further conclusion that "dumping" was the cause of that injury.

1. Legal Standard On Causation

The Tribunal stated the legal standard on causation, from Article 3(4) of the Antidumping Code:

> It must be demonstrated that the dumped imports are, through the effects. . .of dumping, causing injury within the meaning of this Code. There may be other factors[29] which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.[30]

Two consequences follow from this standard of causation. *First*, it must be "demonstrated" that dumping is causing injury within the meaning of the Anti-Dumping Code. The use of the term "demonstrated" seems to require a showing, or analysis, beyond conclusory findings by an expert tribunal. *Second*, dumping need not be the sole cause of material injury. It must, however, be segregated from other causes.[31] As confirmed by the CITT's counsel at the Panel Hearing, it must be shown that "dumping in and of itself was enough to cause material

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[28] Statement of Reasons, pp. 18-20.

[29] Such factors include, inter alia, the volume and prices of imports not sold at dumped prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

[30] Statement of Reasons, p. 20.

[31] Id., p. 20.

injury."[32] Both aspects of this causation standard are important to our decision. When examining the Tribunal's decision under the standard of review, we must ascertain whether the evidence is reasonably capable of supporting an ultimate finding that it has been demonstrated that dumping in and of itself is a cause of material injury.

2. Tribunal's Conclusions About Causation

The Tribunal expressed its opinion on causation in these terms:

> In the Tribunal's opinion, the dumping has been a cause of the significant increase in U.S. imports, the serious loss of market share by the domestic industry, the erosion and suppression of domestic prices, and the consequent material declines in all industry performance indicators.[33]

The Tribunal stated several other conclusions about the impact of dumping: "The Tribunal is satisfied that, except for the dumping, U.S. imports of the subject goods would not have penetrated the Canadian market as deeply or as rapidly as they did." Id., p. 24. "This case is about how the dumping has made a difficult situation worse" and "a bridgeable gap unbridgeable." Id.

Complainant CRI asserts that these are mere conclusions and that the evidence does not rationally support these conclusions. Under the applicable standard of review, we must attempt to ascertain whether there is any evidence in the record capable of supporting the necessary conclusion that "dumping in and of itself was enough to cause material injury" -- i.e., that there is a rational nexus between the required conclusion and the evidence.

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[32] Panel Hearing Tr. p. 253.

[33] Statement of Reasons, p. 20.

To find a rational nexus between the evidence and the required conclusion on "causation", including the GATT Code standard that causation be "demonstrated," one must undertake analysis of how dumping has affected price levels and/or the domestic industry's loss of sales in the marketplace. The analysis can be performed in both macroeconomic and microeconomic terms. The Tribunal discussed both.

3. "Macro" Analysis By The Tribunal

The Tribunal's "macro" analysis focused on (a) the impact of other factors besides dumping, (b) the price sensitivity of carpet sales, and (c) the extent of dumping found by the Deputy Minister.

a. Analysis of Other Factors. The Tribunal discussed several non-price factors that may have caused the material injury:

- Wide style selection and quicker introduction of new carpet fashions from U.S. imports;
- Better service and marketing practices for U.S. imports including more flexibility on minimum orders;
- Cost advantages of U.S. imports; and
- Freight advantages of U.S. imports.

The Tribunal concluded that these factors were present in the market before 1989 and, thus, could not have been responsible for the surge in U.S. imports from 1989 to 1991.[34]

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[34] Statement of Reasons, pp. 21-23.

CRI contends that the Canadian-U.S. Free Trade Agreement ("CUSTA") enhanced the importance of these non-price advantages of U.S. imports after 1989, and that this phenomenon was overlooked by the Tribunal. We simply note that the Statement of Reasons does not address such an alleged phenomenon, and that, as part of the additional analysis we are directing the Tribunal to perform on remand, this alleged phenomenon may be relevant.

The Tribunal also discussed "price" factors other than dumping: the tariff reductions on carpet imports under CUSTA (2% per year from 1989 to 1991) and the advantage acquired by U.S. imports from a strengthening of the Canadian dollar against the U.S. dollar (12% in the aggregate from 1988 to 1991). Regarding the CUSTA tariff reductions, the Tribunal stated:

> The Tribunal considers that it was primarily this event which altered the equilibrium that had previously existed in the Canada-United States carpeting trade. . . .
>
> The Tribunal is of the view that the "push" provided by the tariff declines under CUSTA was magnified by the continued strengthening of the Canadian dollar against the U.S. currency.[35]

The Tribunal did not indicate whether it attempted to correlate these strong "price" causes to the actual decline in average unit prices found by the staff (and discussed in Part III.B.5.b below). Nor does the Statement of Reasons attempt to quantify the impact on price declines of another price factor, decreased demand during the 1991 recession (through, for example, an elasticity analysis). If these non-dumping price causes had been cumulated and then correlated to the actual price declines in the marketplace, such an analysis might have shown that these causes could not have accounted for the price declines; or it might have shown otherwise. As

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[35] Statement of Reasons, p. 24.

it stands, with respect to the analysis of the non-dumping factors in the Statement of Reasons, a logical nexus between the evidence regarding these other factors and the conclusion that "dumping in and of itself caused material injury" is not revealed.

b. Analysis of Price Sensitivity. Citing evidence in the record, the Tribunal concluded that carpet sales had a high degree of price sensitivity during the 1991 recession, when dumping was found. There is a definite logical nexus between the cited evidence and this finding. Price sensitivity, however, is a condition, not a cause. It is a backdrop against which dumping and other factors are to be analyzed.

c. Analysis of Deputy Minister's Dumping Finding. The crux of the "macro" analysis in the Statement of Reasons is the following:

> The Tribunal notes that in the face of a soft home market, and despite poor market conditions in Canada, U.S. exports to Canada continue to climb. The Tribunal is satisfied that, except for the dumping, U.S. imports of the subject goods would not have penetrated the Canadian market as deeply or as rapidly as they did. The Tribunal finds that the volume of dumped goods and the margins of dumping are significant. The weighted average margin of dumping of almost 12 percent equals the percentage change in the value of the Canadian dollar against the U.S. dollar over the past four years.[36]

That U.S. exports climbed in a soft, price sensitive market suggests the presence of price-related causes (CUSTA tariff reductions, exchange rate changes, weakened demand, and/or dumping). The existence of 12% average dumping margins (for those sales found dumped) does not

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[36] Statement of Reasons, pp. 24-25.

reasonably demonstrate that dumping was a cause of lost market share, import penetration or declining prices. The spread between import and domestic prices, and the relationship between that price spread and each of the price factors (CUSTA tariff declines, exchange rates, demand decline and dumping) must be analyzed to lay a basis for any such conclusion. Thus, the Tribunal itself acknowledged that the key issue is whether the dumping caused a price gap to become too wide so that either customers had to switch to imports or domestic producers had to cut prices. To make a reasonable finding that *dumping* had such an effect, the Tribunal should have set forth some rational analysis of domestic prices, import prices, the gap that in this industry would lead purchasers to switch (if the domestic price was not cut) and how dumping and other price factors related to any such gap.

The Tribunal's discussion, however, appears to ask one to take it on faith that such an analysis could be done. The Tribunal clearly is entitled to take the Deputy Minister's determination of dumping margins into account.[37] That case, however, does not say that the Tribunal's decision can dispense with an analysis of how dumping margins as found by the Deputy Minister relate to price declines or price spreads. Without such an analysis, we cannot determine if there is a rational relationship between price declines or lost market share, on the one hand, and the margins and volumes of dumping, on the other. In the words of GATT Code Article 3(4), the link between dumping and material injury is not "demonstrated" by the conclusory references to the Deputy Minister's findings, lost market share, import penetration, and the soft market.

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[37] Re Remington Arms of Canada Limited, supra.

d. Analysis of Aftermath of Preliminary Determination. A type of indirect "macro" analysis is to determine if the domestic industry's situation has improved following a preliminary finding of dumping. The Tribunal made such a determination with respect to market indicators in the three months following the preliminary determination. Logically, its probative value is limited.

Every preliminary dumping determination brings some commercial uncertainty for imports and some relief for a domestic industry in the initial weeks following a determination. The uncertainty appears to have been compounded in this case by (1) the preliminary finding's failure to distinguish between carpet sold in rolls and carpet sold in cuts, and (2) a large number of new styles of imported carpets for which there was no specific dumping margin assigned.

On the "rolls/cuts" issue, the record indicates that the Preliminary Determination set "average" margins for rolls and cuts combined, and that in the months following the Preliminary Determination there was considerable commercial uncertainty about what the separate margins would be on each.[38] On the "new styles" issue, there was testimony that "most products sold currently [three months after the preliminary determination] in the marketplace were probably not investigated" and that the resulting commercial uncertainty affected sales of imported carpet.[39] Because of these circumstances, in the three months between the preliminary finding and the Tribunal's hearing, there was no rational way to conclude, or

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[38] See CST Vol. 5: Tribunal Transcript of In Camera Hearing, pp. 931-940; Tribunal Transcript of Public Hearing, pp. 1148-49, 1178-79.

[39] CST Vol. 4: Tribunal Transcript of Public Hearing, p. 774-75.

"demonstrate," that a decline in imports (and upturn in domestic sales) was attributable to a removal of past dumping.

4. "Micro" Analysis By The Tribunal

The Tribunal appears to have made a deliberate choice to restrict the development of "micro" evidence: it chose not to send Purchaser Questionnaires to the retailers in the market. When used, such questionnaires often produce a wealth of data regarding specific lost sales (and the quantities involved) and direct price comparisons between imported and domestic goods competing for the same account.

Instead, the Tribunal left it to the domestic producers to develop their own evidence and allegations of lost sales. The Tribunal stated "that if particulars of an allegation are not given, the Tribunal will not be able to give that allegation very much weight."[40]

The domestic producers presented 154 allegations of lost sales. As it turns out, most were rebutted. With considerable understatement, the Tribunal recognized "that the industry has had difficulty identifying the correct source of dumping in respect to many of its lost accounts."[41] The Tribunal found itself in the position of relying not on the specifics of the allegations of lost sales it had asked the domestic industry to adduce, but rather on the Deputy Minister's Final Determination of dumping for these accounts:

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[40] CST Vol. 3: Tribunal Transcript of Public Hearing, p. 467.

[41] Statement of Reasons, p. 25.

> The U.S. mills that participated in the hearings were also found to be dumping according to the Final Determination. In most cases, . . . the margins of dumping are at levels that the Tribunal considers significant. Therefore, while the examples selected by the industry may not fully reflect the dumping activities of U.S. mills, this does not contradict the fact that U.S. mills were selling dumped goods in substantial volumes to Canadian accounts.[42]

Unfortunately, this again confronts us with a missing link, for although the domestic industry's evidence was to the effect that there were some 154 allegations of lost sales due to dumped prices, there was no analysis in the Tribunal's decision to show that these alleged lost sales had been lost due to dumped prices. The Deputy Minister's finding showed there had been dumping and in substantial volumes, but it did not show that the 154 accounts purchased imports over domestic goods based on dumped prices.

Counsel for CCI contends that the Tribunal was permitted to make an "inference" of causation in these circumstances. To accept the argument, one must in essence say that the Tribunal does not have to set out probative evidence of an actual link between dumping found on specific accounts and any reduced domestic sales volumes to those same accounts. One may infer a fact (a link between dumping and lost sales) from evidence sufficient to support the existence of that fact (for example, if there were testimony, affidavits or questionnaire responses from some of these 154 accounts regarding their purchasing decisions). Here, however, the Tribunal has inferred a link between two ultimate facts (a dumping finding, and purchases of imported goods by the 154 accounts), based solely on an inference. It is an inference without independent evidence cited to support it.

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[42] Id., pp, 25-26.

Counsel for the CITT and the CCI have also called our attention to the following passage from the case of Sacilor Acieries v. Anti-Dumping Tribunal:

> In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. . . . Simple common sense would indicate that the introduction of a large amount of goods at low prices into a market at a time it is in a process of rapid contraction is capable of producing material injury to the other participants in that market.[43]

While conclusions may be inferred from "the potency of certain facts", potent facts of causation (as opposed to dumping or injury) are not disclosed in the Tribunal's Statement of Reasons. We find no analysis that rationally demonstrates that dumping (rather than other factors, like the exchange rates or CUSTA tariffs) created lost sales to the identified 154 accounts. What makes the analysis particularly difficult for us is that the specific evidence of actual lost sales is limited. As discussed below, counsel for CCI and the CITT have acknowledged that their case today focuses on only 30-32 allegations of lost sales of the 154 originally advanced. The Tribunal's Statement of Reasons does not make any specific analysis of what precisely caused lost sales within these 30-32 or 154 accounts. In short, we as a Reviewing Panel cannot say that the Tribunal's linkage between the Deputy Minister's Final Determination and lost sales is sustainable on any rational basis or on any reasonable interpretation of the facts.

5. Other Evidence And Analysis In the Record

We have discussed to this point only evidence cited in the Statement of Reasons. Under the principles of the Paccar, Corn Growers and Lester cases, Counsel for all parties have invited

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[43] (1985) 9 C.E.R. 210, at 214 (F.C.A.).

us to roll up our sleeves, delve into the record, and see if we can extract evidence capable of rationally supporting the required conclusion of "causation".

Counsel have referred us to other evidence. Our problem is that some of this evidence appears to require the development of expert analysis before one can say if it is capable of supporting the conclusion. Curial deference requires us to seek such analysis from the administrative agency having the expertise to perform it.

We, therefore, turn to the evidence cited to us by counsel for the CITT and the CCI, and to those areas requiring further expert analysis.

a. The 30-32 "Surviving" Lost Sale Allegations. All of the parties have focused on certain of the specific lost sales allegations. During the Panel Hearing, counsel for CITT and CCI emphasized that exactly 30 of the 154 allegations of lost sales had withstood cross-examination.[44] Following the Panel Hearing, we could not ascertain what the 30 were or what was the evidence concerning them, so we requested that Post-Hearing Briefs be filed. The Post-Hearing Briefs of the CITT and CCI each identified 31 accounts (30 of which were in common), thus making 32 accounts in all. The names of these accounts are set out in the Post-Hearing Briefs presented to the Panel.

The significance of these 30 to 32 accounts is difficult for us to evaluate in the first instance. As background, during 1991 total imports were about 28 million sq. meters (or 39% of the Total Apparent Market of 72.1 million sq. meters).[45] During the Deputy Minister's

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[44] Panel Hearing Tr., pp. 278, 290, 291.

[45] Statement of Reasons, p. 12 (Table 1).

period of investigation, being January to March, 1991 (the "POI"), one might assume that one-quarter of this total, or about 7.5 million square yards of imports were sold. The volume covered by these 30-32 accounts do not, in the aggregate, approach even 0.5% of this quantity. Many of these accounts involved dumped sales in relatively small aggregate quantities, or a relatively small portion of the alleged lost sales were at dumped prices. There was no purchaser testimony on the qualitative significance of these particular accounts (a representative of one account, Alexanians, testified but not on these issues).

Since the Tribunal has not specifically focused on these 30-32 accounts, and since we are not able to analyze in the first instance whether the above evidence is capable of supporting the conclusion on causation, this matter should be referred for analysis to the agency having the requisite expertise. On remand we direct the Tribunal to undertake an analysis of these 30 to 32 accounts, including an analysis of whether their volumes are quantitatively or qualitatively significant.

b. The Staff's Price Study. Counsel for the CITT cited a price analysis performed by the staff.[46] The Public Staff Report discusses the average unit prices, in 1990 and 1991, on sales (a) by domestic producers to each of their ten largest accounts, and (b) by exporters to each of their ten largest accounts. In tabular form, it appears to show the following:

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[46] CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol. 6, Confidential Staff Report at 66 to 77.

Year	Avg. Unit Price Domestic	Avg. Unit Price Import	Difference
1990	$9.90	$9.49	$0.41 (4%)
1991	9.03	8.87	0.16 (2%)
Change:	-0.87 (9%)	-0.62(7%)	

We cannot determine if dumping or other price factors (such as CUSTA tariffs or exchange rates) account for the "differences" shown, or whether these other factors plus the recession (and decline in demand) account for the change from 1990 to 1991. Counsel for the CITT asserts that exchange rates and tariff declines in 1991 account for only 3.5% in downward price pressure. The above table, however, shows the difference between domestic and import average unit prices as found by the staff in 1991 (the year dumping was found) was only 2% -- which may have been attributable to non-dumping factors.

We also tried to determine the effect on prices of eliminating dumping on just those accounts on which the staff's price study was based. Those accounts are shown in CST Vol. 6, Confidential Staff Report, pp. 66-77. However, we could not determine how average domestic unit values would have changed in the above table. It is conceivable that this evidence, once analyzed by the Tribunal, would be capable of supporting the conclusion on causation. We are not an appropriate body to do that analysis ab initio. On remand we direct the Tribunal to undertake such an analysis based on the evidence in the record.

c. Domestic Price Decline in 1991. Counsel for the CITT also cited a staff finding of a 13 cent decline in the domestic average price per square meter over the course of 1991.[47] No evidence was cited of any average price movement over a similar period for imports, whether upward or downward. When measured against the average unit values from the staff's price study, a 13 cent movement would be less than 1.5 percent. We have no basis to attribute that movement to any particular factor. The combined effect of the CUSTA tariff decline and exchange rate movement in 1991 (a combined 3.5 percent) may have accounted for the entire 13 cent decline. Again, the Tribunal is the appropriate body to analyze these matters and, on remand, we direct it to undertake such an analysis, if one is possible, based on the evidence in the record.

Counsel for the CITT also cited a differential in 1991 between a combined tariff/exchange rate effect of 3.5% and the average dumping margin of 12%. We note that the 12% was an average found only for those sales that were dumped (not for all import sales) and only during a three month POI. How a 12% margin relates to an average 13 cent (1.5%) domestic price decline over all of 1991 is similarly beyond our competence to evaluate in the first instance and should be considered by the Tribunal in connection with the analysis directed above.

6. Conclusion

For these reasons, both in reviewing "how" the Tribunal reached its determinations and in reviewing other evidence in the administrative record, we have been unable to ascertain a

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[47] CST Vol. 4, Public Staff Report at 1.214.82;

logical or rational relationship between the evidence we have reviewed and the Tribunal's determination that dumping caused material injury, or between that evidence and the demonstration of causation required under the GATT Code. Under the current standard of review, that determination must be deemed patently unreasonable.

C. Causation Of Future Injury

The Tribunal concluded that dumping was likely to cause future injury.[48] Complainant CRI did not include in its briefs or oral submissions any special argument regarding causation of future injury. Their complaint seeking panel review does, however, purport to challenge this portion of the decision.[49] CRI's written and oral submissions regarding causation could be construed to apply to future as well as past injury.

We note that the Tribunal's Statement of Reasons is unclear as to whether the Tribunal's conclusion regarding the causation of future injury depends upon its conclusion regarding causation of past injury:

> With regard to the future, the Tribunal sees no relief in sight from the intense competitive pressures which gave rise, *in the past*, to the dumping and *the consequent* material injury to the domestic injury.[50]

Although the Statement of Reasons later refers to a factor that is peculiarly germane to likely future injury ("considerable over-capacity"), it is unclear whether the Tribunal actually

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[48] Statement of Reasons, p. 27.

[49] Complaint, p.2.

[50] Statement of Reasons, p. 27 (italics added).

determined that causation of likely future injury was independent of its analysis of causation of past injury.

In view of these uncertainties and since we are remanding on the issue of causation of past injury, we are also directing that the Tribunal clarify this point and provide an analysis of the evidence in the record regarding causation of future injury.

D. Imports by Domestic Industry Under GATT Code Art. 4(1)

Complainant CRI contends that domestic producers in Canada imported substantial quantities of the U.S. carpet under investigation and increased its sales of imported U.S. carpet from 1% to 8% of the market. CRI asserts that the Canadian industry's importing activities contributed in a meaningful way to the increase in U.S. imports and that GATT Code Article 4(1) required the Tribunal to consider excluding those Canadian producers who are themselves importers of the dumped product. CRI also asserts that The Tribunal improperly failed to determine the degree to which injury was caused by the domestic industry's own importing activities. Since these issues concern matters within the Tribunal's jurisdiction, the "patently unreasonable" standard of review applies.

Significantly, GATT Code Article 4(1) does not obligate exclusion of domestic producers who import. It is permissive and nonmandatory:

> when producers . . . are themselves importers of the allegedly dumped product, the industry *may* be interpreted as referring to the rest of the producers.

GATT Code Art. 4, subparagraph 1(i) (italics added). The one mandatory aspect of Article 4(1) is to interpret the term "domestic industry" "as referring to the domestic producers as a

whole . . . or to those of them whose collective output of the products constitutes a major proportion of the total domestic production . . . ."[51] The Tribunal certainly met this obligation, determining that CCI and National accounted for over 75% of domestic production in 1991.[52] The Statement of Reasons also discloses in some detail the role played by imports of U.S. Carpet by Canadian Producers, and the portion of the lost market share of the domestic industry as a whole that those particular imports represented.[53] This is evidence upon which the Tribunal could have rationally decided not to exclude those domestic producers who imported. It is also evident that the Tribunal did consider the degree of injury attributable to imports by the domestic industry.

Moreover, by explicitly determining under GATT Code Article 4(1) that CCI and National were representative of the domestic industry, the Tribunal implicitly determined that producer-members of CCI who imported were also sufficiently representative of the domestic industry. In these circumstances, the determination that CCI and National were representative of the "domestic industry" cannot be said to be patently unreasonable. Nor can it be said of the Tribunal's consideration of imports by the domestic industry.

E. The "Like Goods" Determination

Complainant CRI notes that the Deputy Minister determined that separate dumping margins should be ascertained for individual carpet styles while, for purposes of determining

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[51] Induction Motors (CDA-91-1904-01), (1990) 4 T.C.T. 7065, p. 7085.

[52] Statement of Reasons, p. 11.

[53] Statement of Reasons, pp. 19-20.

"like goods" under ss. 42(1) of the SIMA, the Tribunal lumped all styles together into the broad categories of commercial and residential carpeting. CRI contends that it was an error for the Tribunal to adopt a definition of "like goods" that differed from the categories upon which the Deputy Minister ascertained dumping margins. Since this issue concerns a question within the Tribunal's jurisdiction, the "patently unreasonable" standard of review applies.

CRI cites no legal authority for its proposition, and the decision of one other Binational Panel has found to the contrary.[54] As a matter of law, therefore, the Tribunal's failure to adopt the same categories used by the Deputy Minister was not, in and of itself, patently unreasonable.

CRI does not explicitly contend that the Tribunal's determination of "like goods" was not reasonably based on the evidence. In any case, the Statement of Reasons refers to evidence that would rationally support the "like goods" determination. In finding three categories of like goods, namely, residential carpeting, commercial carpeting and artificial grass, the Tribunal pointed to evidence that the uses and characteristics of residential and contract residential carpeting closely resemble each other, that they are generally made of the same fibers and have the same general uses.[55] It also referred to evidence that the characteristics and uses of residential and commercial carpeting did *not* closely resemble each other and that while some overlap existed between commercial and residential carpeting, it was limited in nature. On this evidence, the Tribunal concluded that the two categories were not like goods.[56] The

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[54] Certain Beer Originating in or Exported From the United States of America . . . . (CDA-91-1904-01) (August 6, 1992), p. 24.

[55] Statement of Reasons, pp 9-10.

[56] Id.

Tribunal also cited differences between nylon and polypropylene categories of commercial carpeting and found they were not sufficient to lead to a finding that they were separate sub-categories of like goods -- that they essentially served the same end use and that their physical differences were not sufficiently distinct.[57] There was a logical relationship between this evidence and the categories found by the Tribunal and, thus, the Panel finds that the determination of "like goods" was not patently unreasonable.

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[57] Id.

IV. RELIEF

For the reasons stated above, the Panel hereby:

Affirms the Tribunal's determinations that the CCI represented a major proportion of the domestic production of commercial carpeting and of residential carpeting and that those Canadian producers who are themselves importers of the dumped product need not have been excluded from the domestic industry, under GATT Code Article 4(1);

Affirms the Tribunal's determination of "like goods" under s. 42(1) of SIMA, even though its determination of "like goods" categories differed from the categories of goods for which the Deputy Minister found dumping margins;

Remands the Tribunal's determination that dumping has "caused" past and present material injury, and directs the Tribunal on remand to determine whether dumping in and of itself caused material injury and to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following:

1. An analysis in detail of the 30 to 32 accounts involving lost sales allegations referred to in the post-hearing briefs of the CITT and CCI before the Panel, including an analysis of whether they are quantitatively (by volume) or qualitatively significant, and how (if at all) they reasonably support a determination of causation;
2. An analysis in detail of the staff's price study in CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol. 6, Confidential Staff Report at 66 to 77, and how (if at all) it reasonably supports a determination of causation. In this regard, the Tribunal should

analyze (1) how dumping margins and volumes found by the Deputy Minister relate to price movements identified in the staff's study and (2) how other non-dumping factors (both price and non-price) relate cumulatively to those price movements and/or lost sales or market share shifts;

3. An analysis in detail of the staff finding of a 13 cent decline in the domestic average price per square meter over the course of 1991 referred to in CST Vol. 4, Public Staff Report at 1.214.82, and how (if at all) it reasonably supports a determination of causation;

Remands the Tribunal's determination that dumping is likely to "cause" future material injury, and directs the Tribunal on remand to determine whether dumping in and of itself is likely to cause material injury (and whether such determination depends on the existence of dumping as a cause of past injury) and to demonstrate the rational basis for such determination by detailed analysis of the evidence in the record; and

Affirms the Tribunal's decision in all other respects.

The foregoing is not intended to preclude the Tribunal, in its decision on remand, from setting forth any additional analysis of evidence in the record.

The Panel directs the Tribunal to complete its reconsideration and to issue these determinations with the above-referenced analyses and supporting reasons within forty-five (45) days of the date of this decision.

Signed in the original by:

April 6, 1993	James Chalker, Q.C.
DATE	James Chalker, Q.C.
April 6, 1993	James P. McIlroy
DATE	James P. McIlroy
April 5, 1993	Michael D. Sandler
DATE	Michael D. Sandler

V. DISSENTING OPINION OF CHAIRPERSON JOHN D. RICHARD

A. Standard of Binational Panel Review

In Canada, the current standard of judicial review of the decision of a statutory tribunal, in the presence of a privative clause, can be summarized as follows:

(1) Courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or the law;

(2) However, a tribunal may lose jurisdiction if it has erred, no matter how reasonably, in its interpretation of a legislative provision which defines and limits its jurisdiction. In that case, the tribunal must correctly interpret such statutory provision.[58]

The Complainants in this panel review have not claimed that the investigating authority lost jurisdiction because it had erred in the interpretation of a statutory provision defining or limiting its jurisdiction. The Complainants have alleged that the finding of the Canadian International Trade Tribunal ("CITT" or "Tribunal"), to the effect that the dumping of machine tufted carpeting from the United States into Canada is causing and is likely to cause material injury to the production into Canada of like goods, is patently unreasonable.

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[58] There are additional grounds for judicial review based on denial of natural justice or bias.

There are three recent decisions of the Supreme Court of Canada where the scope and standard of judicial review have been discussed. They are: National Corn Growers Association v. Canada (Import Tribunal),[59] Lester (W.W.) v. U.A.J.A.P.P.I., Local 740,[60] and Canada (A.G.) v. Public Service Alliance of Canada.[61]

The Corn Growers case was concerned with a finding of the Canadian Import Tribunal (the "CIT", predecessor of the CITT) made pursuant to section 42 of the Special Import Measures Act ("SIMA").[62] The CIT had conducted an inquiry respecting the importation into Canada of grain corn originating in or exported from the U.S. The Tribunal had concluded that the subsidizing of U.S. grain corn had caused, was causing and was likely to cause material injury to the production in Canada of like goods and that a countervailing duty could accordingly be imposed. In interpreting section 42 of SIMA, the majority of the CIT had consulted the terms of the GATT Subsidies Code and had adopted a broad interpretation of the Canadian legislation, one which took into account in the determination of the material injury, not only the actual imports but also the potential imports that according to it would certainly ensue absent a price response by the Canadian producers. The Court was unanimous in the result (it supported the majority decision of the CIT) but divided four to three on the approach to judicial review. The majority of the Court took a more expansive view of the role of a Court on judicial review.

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[59] [1990] 2 S.C.R. 1324 [hereinafter Corn Growers].

[60] [1990] 3 S.C.R. 644 [hereinafter Lester].

[61] [1991] S.C.R. 614 [hereinafter Public Service].

[62] R.S.C. 1985, c. S-15 (as amended).

Speaking for the majority, Justice Gonthier noted that the issue raised in the appeal was whether the decision of the Tribunal was patently unreasonable so as to warrant the intervention of the Court pursuant to section 28 of the Federal Court Act. He stated:

> The cases clearly establish that the Court should not interfere with an expert tribunal's decision unless the interpretation of the Tribunal was patently unreasonable.[63]

Justice Gonthier added that this involved a consideration of whether the Tribunal's conclusion, on the evidence, that American subsidization of imports had caused, was causing, and was likely to cause material injury to Canadian producers was patently unreasonable. He stated:

> Although the terms of section 28 of the Federal Court Act are quite broad in scope, it is to be remembered that courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.[64]

He continued that this principle was now widely recognized by the courts and noted that in this particular case, section 76 of SIMA provided that the Tribunal's decision, with certain limited exceptions, is final and conclusive. Justice Gonthier then added:

> Given this provision, this Court, therefore, will only interfere with the Tribunal's ruling if it acted outside the scope of its mandate by reason of its conclusions being patently unreasonable.

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[63] Supra, note 2 at 1367.

[64] Ibid. at 1369.

> In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable, but this can only be understood upon an in-depth analysis. Such was the case in the C.U.P.E. decision where it was found that the Board's interpretation of the legislation at issue was reasonable even though it was not the only reasonable one. Similarly, understanding of the issues raised by the appellants herein as to the reasonableness of the Tribunal's decision requires some analysis of the relevant legislation and the way in which the Tribunal has interpreted and applied it to the facts.[65]

Justice Gonthier, on behalf of the majority then reviewed the Tribunal's use of the GATT to interpret the Canadian legislation and its interpretation of section 42 of SIMA. He concluded that the Tribunal did not act unreasonably in consulting the GATT and that it was not unreasonable for the Tribunal, in its interpretation of section 42 of SIMA, to consider potential as well as actual imports. Having regard to the broad wording of the GATT Subsidies Code provisions (Article 6, paragraphs 1, 2, 3, and 4) it was not unreasonable and was therefore open to the Tribunal to make a finding of material injury, even in the absence of an increase in the amount of imports. He quoted the decision of British Steel Corp. v. U.S., a decision of the U.S. Court of International Trade upholding a finding of material injury despite low levels of import. He referred to that Court's statement that "an absence of a direct correlation between price depression and the volume of imports does not necessarily exonerate the imports as a causal factor of the price depression."[66]

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[65] Ibid. at 1370.

[66] 6 I.T.R.D. 1065 (1984) at 1072.

Justice Gonthier then went on, at page 1379, to analyze the finding of material injury. He stated that one of the appellants' main contention, in this case was that the Tribunal reached its decision in the absence of any cogent evidence to support its conclusion of material injury. The appellants had suggested that there was no objective evidence upon which it could be shown that greater amounts of import would flow into Canada, and that the Tribunal had simply ignored the SIMA and GATT requirements that there be a causal link between the injury and subsidized imports. Justice Gonthier reviewed the observations of the majority of the members of the Tribunal on the impact on prices of U.S. policies and programs and concluded that:

> Given these observations by the majority of the Tribunal, I cannot adhere to the view that there was no evidence, with respect to price, indicating that material injury had been caused, was caused and was likely to be caused to corn producers in Canada. Having regard to the evidence before the Tribunal, it cannot be said that its finding of a causal link between American price and injury to the Canadian market was patently unreasonable.[67]

He went on to say, at the bottom of page 1382, that it was not unreasonable for the Tribunal to infer, that given the open nature of the Canadian market, and given that the United States was the only viable source for imports, that American stocks not used for domestic consumption would have flowed into Canada in greater amounts. He said that it could reasonably assume that Canadian buyers would purchase the products at issue at the lowest price available, and that, absent an appropriate price response by Canadian producers, a significant amount of American goods would penetrate the Canadian market.

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[67] Supra, note 2 at 1381.

It is clear from his reasons that Justice Gonthier did analyze, in some detail, the manner in which the Tribunal arrived at its conclusion.

In the Lester case, the issues raised before the Supreme Court on judicial review were:

(1) Whether the Board had the jurisdiction to enter into the inquiry as to if successorship under the relevant Labour Legislation had occurred; and, if so,

(2) whether the exercise of its jurisdiction was patently unreasonable.

Again the Court was divided in this case, not only on the scope of judicial review but also in the result. Speaking for the majority, Justice McLachlin again referred to curial deference to a decision of a specialized tribunal in the presence of a privative clause, where that tribunal had the initial jurisdiction to determine the matter before it. She noted that this was a case of the alleged misapplication of a statutory provision and the test was whether the Board's interpretation was so patently unreasonable that its construction could not be rationally supported by the relevant legislation. She stated:

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.[68]

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[68] Supra, note 3 at 669.

In this case she noted that the attack was on the basis of the Labour Board's decision. First, it was submitted that the Board misconstrued the provisions of its Act and second, it was suggested that there was no evidence capable of supporting the Board's conclusion that a transfer took place. After an analysis of the Act, Justice McLachlin concluded that in the absence of a common employer provision in the legislation, there was only one question left to be resolved and that was whether there was any evidence upon which the majority of the Labour Board could have found that a transfer or other disposition had occurred.[69] She then went on to state:

> As stated at the outset, the Court in reviewing labour decisions is not concerned with whether or not the decision is 'correct' but rather is concerned with whether or not the decision is 'patently unreasonable'. If there is any evidence capable of supporting a finding of successorship, the Court will defer to the Board's finding even though it may not have reached the same conclusion. However, absent such evidence, the decision must fall.[70]

She then continued:

> Although the testimony before the Board was sometimes contradictory, my review of the transcript reveals that there was no evidence to support the Board's conclusion that a transfer or other disposition had taken place.[71]

Justice McLachlin concluded:

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[69] Ibid. at 687.

[70] Ibid.

[71] Ibid. at 688.

> The absence of evidence establishing a transfer or disposition under s. 89 of that Act renders the Board's decision patently unreasonable.[72]

She repeated:

> Having concluded that there is no evidence of transfer or disposition sufficient to satisfy s. 89 of the Act and that the decision of the majority was by consequence patently unreasonable, I find it unnecessary to consider the additional argument that no employees were affected by the alleged disposition.[73]

In both cases above, Justice Wilson on behalf of the minority referred to the limited nature of judicial review in the presence of a privative clause. She argued that this was a clear indication from the legislature that the ordinary courts were not the appropriate forums for review of the decisions of specialized tribunals. She also observed that it was not appropriate for courts to undertake a meticulous analysis of a tribunal's reasoning as was done by the majority in both the Corn Growers and the Lester case.

The third decision of the Supreme Court was the Public Service case. In this case, which again involved labour relations, all of the judges agreed on the standard of judicial review, although there was a dissent on the result.

The issue in this case was whether the word "employees" contained in the Act was intended by Parliament to be left to the Board to interpret or whether it was a provision limiting jurisdiction. If it was the latter, then the Board's interpretation was reviewable if it was wrong. However, if the interpretation was intended to be left to the Board, then

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[72] Ibid. at 693.

[73] Ibid. at 694.

its decision was not reviewable unless the interpretation placed upon it was patently unreasonable.

Justice Sopinka on behalf of the majority formulated the standard of review.[74] Since he stated that he was in substantial agreement with the principles stated by the dissenting judge, we can proceed on the basis that this Court composed of seven judges, reached agreement on the standard of review.

Justice Sopinka stated that the distillation of this complex area of the law was made by Justice Beetz in U.E.S., Local 298 v. Bibeault,[75] where he wrote:

> 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 the recent decision of this Court in CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, La Forest J. stated (at p. 1003):
>
> 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

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[74] Supra, note 4 at 628.

[75] [1988] 2 S.C.R. 1048 at 1086.

function; see Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227 [hereinafter C.U.P.E.].[76]

Justice Cory, who dissented in the result, summarized the scope of judicial review as follows:

> C.U.P.E., and the decisions referred to above, make it clear that an administrative tribunal will, in ordinary circumstances, lose jurisdiction only if it acts in a patently unreasonable manner.
>
> However, two subsequent decisions of this Court indicate that an administrative tribunal may lose jurisdiction if it has erred, no matter how reasonably, in its interpretation of a legislative provision limiting its powers.[77]

He concluded that where a tribunal acts within its area of expertise, it is carrying out its mandate and its decision cannot be reviewed on the basis of correctness.[78] All of the cases recognized that the test for review was a "severe test," as stated by the present Chief Justice in Blanchard v. Control Data Limited.[79]

Justice Cory also added his understanding of the approach taken in the United States.

> To summarize the American approach, if there is substantial evidence in the record upon which the tribunal could base its decision, and the

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[76] Supra, note 4 at 628-9. In the Paccar case, Justice La Forest also wrote, at page 1003, that:
> This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions of the tribunal.

[77] Ibid. at 652-3.

[78] Ibid. at 662.

[79] [1984] 2 S.C.R. 476 at 493.

> resolution of questions of law and the statutory interpretation made by the tribunal are reasonable, its decision will be upheld. The American approach recognizes that legislators have determined that administrative tribunals play an important role in today's complex society. It acknowledges their expertise and pays judicial deference to their opinions. The position has been expressed with a clarity that makes it easy to apply in the most complex situations.[80]

These three recent decisions of the Supreme Court appear to have broadened the scope for judicial review. However, "patently unreasonable" is still the test, regardless of how it is applied. Any conclusion on a material fact which was reached where there is no evidence to support it, will result in a decision which is "patently unreasonable."[81] If a finding which is central to the tribunal's decision is based on a total lack of evidence, the decision is rendered patently unreasonable. Where a tribunal has jurisdiction to determine questions of fact (such as in the present case), the reviewing panel should defer to those findings unless they are patently unreasonable.

As stated by Justice McLachlin, speaking for the majority in the Lester case:

> If there is any evidence capable of supporting a finding of successorship, the court will defer to the board's finding even though it may not have reached the same conclusion. However, absent such evidence, the decision must fall.[82]

Finally, I would contrast the standard of judicial review of findings of fact, made by a tribunal in the course of an inquiry which it was authorized by statute to conduct, with the standard that an appellate court would apply to findings of fact of a trial judge. The

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[80] Supra, note 4 at 648.

[81] See Ontario (Ministry of Social Services) v. O.P.S.E.U. (1992), 74 D.L.R. (4th) 173 at 183 (Ont.C.A.).

[82] Supra, note 3 at 418.

Supreme Court of Canada, in the decision reported under the name of Lapointe v. Hôpital Le Gardeur,[83] stated that an appellate court should not interfere with the findings and conclusions of fact of a trial judge failing a manifest error. This principle of non-intervention also applies when the only issue is the interpretation of the evidence as a whole.

In a later decision of the Supreme Court of Canada, Dickason v. University of Alberta,[84] Justice Cory speaking on behalf of the majority, examined what deference should be paid to findings of fact of a specialized tribunal. He stated that:

> The principle of deference to findings of fact made at first instance has been to a large extent adopted in reviewing the decisions of administrative tribunals, although the standard of review of decisions made by administrative bodies will always be governed by their empowering legislation. Where the legislature has enacted a privative clause restricting review it has been held by this Court that appellate courts must defer to a tribunal's finding of fact. See: National Corn Growers Assn. v. Canada (Import Tribunal) [1990] 2 S.C.R. 1324; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644, and Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057, [1990] 1 S.C.R. 1298.
>
> In Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 at 1746, this Court further recognized that curial deference must be given to findings made within the field of specialized knowledge of an administrative decision-maker.[85]

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[83] [1992] 1 S.C.R. 351.

[84] [1992] 2 S.C.R. 1103.

[85] Ibid. at 1125. In the Bell Canada case, Justice Gonthier stated at pages 1745-6:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.

The Federal Court of Appeal, in a recent decision under the name of Uniforms Town & Country Inc. v. Labrie,[86] stated that an appellate court should not reverse the trial judge in the absence of palpable and overriding error which affected his assessment of the facts.

When considering the Corn Growers case, it is useful to note that the court considered three issues, two having to do with the Tribunal's statutory interpretation of SIMA and the GATT Subsidies Code, and one with the Tribunal's finding of fact on a causal link between prices and injury. With respect to the third issue, Justice Gonthier spoke for the majority.[87]

He stated, at page 1367, that a reviewing panel must consider whether the Tribunal's conclusion, that the dumped imports that caused, was causing and was likely to cause material injury to Canadian producers was patently unreasonable, on the evidence. The court could only interfere with the finding of the Tribunal if it was found that its decision could not be sustained on any reasonable interpretation of the facts or of the law. The question of the nexus or causal link between subsidized imports (or threatened imports) and the material injury was clearly raised in the Corn Growers case. Counsel for the appellants in Corn Growers alleged that the Tribunal reached its decision in the absence

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[86] (1992) 44 C.P.R. (3d) 514.

[87] The issue was framed as follows at pages 1367-8:

> (3) whether the Tribunal's conclusion, on the evidence, that American subsidization of imports had caused, was causing and was likely to cause material injury to Canadian producers was patently unreasonable.

of any cogent evidence to support its conclusion of material injury and that there was no objective evidence to support the Tribunal's finding.

Justice Gonthier, at page 1380, wrote that upon close examination of the Tribunal's decision, he must disagree with the appellants that there was no evidence in this case upon which a finding of material injury could be made. At page 1381, he stated that given the observations by the majority as contained in their reasons, he could not adhere to the view that there was no evidence with respect to price indicating that material injury had been caused, was caused and was likely to be caused to corn producers in Canada. On the contrary, having regard to the evidence before the Tribunal, he found that it could not be said that its finding of a causal link between American price and injury to the Canadian market was patently unreasonable. He recognized that the Tribunal could draw inferences and assumptions from the evidence. Given the evidence before the Tribunal, he found that its reasoning and conclusions were not unreasonable and should not be disturbed.

Justice Gonthier recited the grounds on which he reached this finding as follows:

> In my opinion, it was not unreasonable for the Tribunal [CIT] to infer in this case, given the open nature of the Canadian market and given that the United States is the only viable source for imports, that American stocks not used for domestic consumption would have flowed into Canada in greater amounts. It could reasonably assume that Canadian buyers will purchase the products at issue at the lowest price available, and that, absent an appropriate price response by Canadian producers, a significant amount of American goods would penetrate the Canadian market.[88]

As a result, these decisions of the Supreme Court of Canada stand for the proposition that if there is no evidence to support a finding or conclusion which is central

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[88] Ibid. at 1382.

to the tribunal's decision, the decision is rendered patently unreasonable. However, if there is any evidence capable of supporting a finding, the reviewing panel should not reweigh the evidence. It is only where the decision cannot be sustained on any reasonable interpretation of the facts that a reviewing panel should intervene.

If there was any doubt as to what "patently unreasonable" means, it was cleared up by Justice Cory in a judgment of the Supreme Court of Canada released March 25, 1993.[89] Speaking for the majority he wrote:

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.[90]

In arriving at this conclusion, he referred to the dictionary definition of "patently" and "unreasonable":

> It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet any test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "not having the faculty of reason, irrational, not acting in accordance with reason or good sense". Thus based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason,

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[89] Attorney General of Canada v. Public Service Alliance of Canada , Court File No. 22295, judgment released March 25, 1993 (as yet unreported).

[90] Ibid. at 24.

> then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.[91]

In reaching this conclusion, Justice Cory also cited Justice LaForest (Dickson C.J. concurring) in the decision of CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, as authority for the proposition that the decision of a board or tribunal must be more than wrong in the opinion of a court or reviewing body, it must be patently unreasonable.[92]

As framed by Justice Gonthier in the Corn Growers case, the proper issue to consider on judicial review of a decision of the Canadian Import Tribunal (now the Canadian International Trade Tribunal) is "whether the decision of the Tribunal is patently unreasonable so as to warrant the intervention of the Court pursuant to s. 28 of the Federal Court Act." [93]

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[91] Ibid. at 23.

[92] Ibid. at 24.

[93] Ibid. at 1367. Note that Bill C-115, An Act to implement the North American Free Trade Agreement, 3d Sess., 34th Parl., 1991-92-93 (First Reading, February 25, 1993), subclause 221(1) repeals section 76 of SIMA, which is the privative clause providing that:

> ... every order or finding of the Tribunal under this Act is final and conclusive.

Replacing it is the following relevant wording:

> ... an application for judicial review of an order or finding of the Tribunal under this Act may be made ... on any of the grounds set out in subsection 18.1(4) of the Federal Court Act.

B. Analysis of the Tribunal's Decision

The Tribunal's decision reads as follows:

> The Canadian International Trade Tribunal hereby finds that the dumping in Canada of the aforementioned goods [machine tufted carpeting originating in or exported] from the United States of America has caused, is causing and is likely to cause material injury to the production in Canada of like goods.

The record of the Tribunal's inquiry, as well as the administrative record in these proceedings, consists of all Tribunal exhibits, including the public and confidential replies to questionnaires, all exhibits filed by the parties at the hearing, and the transcripts of all proceedings. As part of its inquiry, the Tribunal sent detailed questionnaires to Canadian manufacturers and importers of the subject goods requesting production, financial, import and marketing information, as well as other information, covering the period from January 1, 1988 to December 31, 1991. From the replies to the questionnaire and other sources, the Tribunal's staff prepared public and confidential pre-hearing staff reports covering that period. The Tribunal's staff reports were made part of the record of the inquiry.

The product covered by the Tribunal's inquiry is described in the preliminary determination of dumping made by Revenue Canada as machine tufted carpeting with pile predominantly of nylon, other polyamide, polyester or polypropylene yarns, excluding automotive carpeting and floor covering of an area less than five square metres, originating in or exported from the United States of America. The term "predominantly" is interpreted to mean the fibre which predominates by weight over any other single fibre.

The subject carpeting is produced on tufting machines. The standard roll size for most styles of carpeting is 12 feet in width and 125 feet in length.

The Canadian Carpet Institute ("CCI"), which is an association of Canadian manufacturers of carpeting and other textile floor coverings, claimed that its members account collectively for more than 75 percent of all Canadian production of machine tufted carpeting. The domestic manufacturers of machine tufted carpeting are located across Canada. National Carpet accounted for more than 80 percent of the domestic production of artificial grass carpeting. The Carpet and Rug Institute ("CRI") is a U.S. national association whose membership comprises U.S. manufacturers of carpets and rugs, including machine tufted carpeting subject to the Tribunal's inquiry. All U.S. manufacturers that export the subject goods to Canada are members of the CRI. The U.S. manufacturers and exporters of tufted carpeting are located primarily in the States of Georgia and North Carolina, while other manufacturers are located in South Carolina and California.

Revenue Canada identified more than 1,000 Canadian importers of the subject carpeting. These importers were national or regional floor covering and carpet distributors, retailers or manufacturers. Some non-resident importers were also identified.

The Tribunal considered two preliminary issues. The first issue was that of like goods. The Tribunal noted that under subsection 42(1) of SIMA, it must inquire into whether the dumping of goods is causing material injury to "the production in Canada of like goods." Accordingly, it must determine what the like goods are, within the meaning of subsection 42(1) of SIMA. The Tribunal found that there were three sub-categories of

like goods; namely, residential carpeting, commercial carpeting and artificial grass. The Tribunal was of the view that the uses and characteristics of residential and contract residential carpeting closely resembled each other and were, therefore, like goods. The Tribunal was of the view that the characteristics and uses of residential and commercial carpeting did not closely resemble each other and were, therefore, not like goods for the purposes of its inquiry. The Tribunal found that while some overlap existed between commercial and residential carpeting, it was limited in nature. The Tribunal also found that the differences between the nylon and polypropylene categories of commercial carpeting were not sufficient to lead to a finding that they were separate sub-categories of like goods. Finally, the Tribunal was of the opinion that artificial grass constituted a sub-category of like goods.

One of the issues raised by the Complainant was whether the Tribunal erred in its determination of the constitution of "like goods" within the meaning of subsection 42(1) of SIMA. The Tribunal fully canvassed the issue of like goods and determined for the purposes of its inquiry that there were three sub-categories of goods. It examined the question of material injury and the causal link between the injury and the dumped imports in respect of the total market and in respect of each of the three sub-categories of goods. The Tribunal limited its inquiry to the goods described in the preliminary determination but did not apply any wrong principle in arriving at its finding on like goods. The Complainant raised this issue in its written brief, it did not pursue it in oral argument before the Panel.

The second preliminary issue considered by the Tribunal was the standing of the domestic industry. Having determined that there were three sub-categories of like goods, the Tribunal considered whether the collective output of the CCI and National (the producer of artificial grass) represented a major proportion of the total domestic production of like goods. It found that the CCI and National accounted for over 75 percent of the domestic production of machine tufted carpeting, including artificial grass, in 1991. The Tribunal was therefore satisfied that the CCI and National represented a major proportion of the domestic production of machine tufted carpeting. Furthermore, the Tribunal was satisfied that the CCI represented a major proportion of the domestic production of commercial and residential carpeting and that National represented a major proportion of the domestic production of artificial grass carpeting.

The Complainant alleged that the Tribunal erred in not taking full account of paragraph 1 of Article 4 of the GATT Anti-dumping Code[94] as specifically required by paragraph 42(3)(a) of SIMA. Pursuant to this paragraph, the Tribunal must fully take into account paragraph 1 of Article 4 of the Anti-dumping Code in determining the term "domestic industry." The obligation imposed on the Tribunal by paragraph 42(3)(a) of SIMA and paragraph 1 of Article 4 of the Anti-Dumping Code is to interpret the domestic industry as referring to the domestic producers of the like products as a whole, or to those of them whose collective output of the products constitutes a major proportion of the total domestic production. Subparagraph 1(i) of Article 4 of the Anti-dumping Code allows the

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[94] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, signed in Geneva, Switzerland on December 17, 1979, GATT BISD 25 (1980).

Tribunal to exclude from the term "domestic industry" any producers who are themselves importers of the dumped goods.[95] However, it is clear that this provision is permissive and therefore discretionary. The administrative record indicates that the Tribunal did consider the fact that some of the producers in Canada were also importers of the subject goods. The record also discloses that, in this case, the Complainant did not seek to have the Tribunal exercise its discretion to exclude from the term domestic industry those producers who were found to be importers of the subject goods. Therefore, there is nothing patently unreasonable with the CITT's decision respecting the term "domestic industry."

The Complainant attacked the Tribunal's decision principally on the basis that it had failed to establish a causal link between the injury and the dumping. This necessarily involves an analysis of the basis upon which the Tribunal arrived at its conclusion both as to material injury to the production in Canada of like goods, and the causal relationship between such injury and the dumping as found by Revenue Canada.

Before embarking on this analysis it is useful to have in mind certain pronouncements of the Federal Court of Appeal concerning the finding of dumping by Revenue Canada and the function of the Tribunal. In the Remington Arms of Canada Limited v. Les Industries Valcartier Inc. case, the Federal Court of Appeal dealt with the margin of dumping calculated by the Deputy Minister at the preliminary and final determination stages. The Court considered that it was a given fact which the Tribunal

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[95] 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.

may consider to be relevant, when taken in conjunction with other facts properly found in reaching its conclusion on the question of material injury to Canadian producers of like goods. The Court stated:

> From all of the foregoing, I do not think that it can be doubted that the calculation of the margin of dumping is a matter for the Deputy Minister both at the preliminary and final determination stages. It is a fact which must be accepted by the Tribunal as part of the reasons of the Deputy Minister in his preliminary determination of dumping. It is not a conclusion which it can alter or upon which it may admit evidence for the purpose of alteration in the course of its inquiry to ascertain material injury pursuant to section 16 of the Act. But, by the same token, it is a given fact which the Tribunal may consider to be relevant when taken in conjunction with other facts properly found, in reaching its conclusion on the question of material injury to Canadian producers of like goods. Moreover, as I see it, it may be particularly relevant in deciding whether there is a likelihood of material injury in the future.[96]

In the 1982 case of Japan Electrical Manufacturers Association v. the Anti-Dumping Tribunal, the Court described the type of inquiry which the Tribunal must conduct under the predecessor of section 42 of SIMA. It stated:

> The inquiry of the Tribunal must relate, therefore, to the goods described in the preliminary determination but is not limited to the very goods which have been found by the Deputy Minister to have been dumped. Moreover, if the decision of the Tribunal must relate to the effect of the dumping (past, present and future) of goods described in the preliminary determination, it is not restricted to the effect of the dumping which, according to the preliminary determination, has occurred in the past. It is only the description of the goods in the preliminary determination which sets the limits of the inquiry of the Tribunal. In the present case, a mere reading of the preliminary determination made by the Deputy Minister

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[96] [1982] 1 F.C. 586 at 591-2.

> shows that it applied to all electric generators of the type described coming from Japan whatever be their date of importation.[97]

In the Hitachi Limited v. the Anti-Dumping Tribunal case, an appeal from a judgment of the Federal Court of Appeal affirming a decision of the Anti-dumping Tribunal, the question presented to the Supreme Court, as stated in the headnote, was the following question of law:

> [W]hen the Anti-dumping Tribunal made a finding of material injury or likely material injury in respect of export of television sets from Japan, was it required to relate its finding to each exporter, or could it make such a finding in respect of all goods from Japan, irrespective of whether in the case of some exporters there was no evidence of injury or likely injury.[98]

In brief reasons, Chief Justice Laskin of the Supreme Court of Canada ruled that the Anti-dumping Tribunal was empowered by subsection 16(3) of the Anti-dumping Act (now section 42 of SIMA) to make the finding which was challenged in those proceedings.

In the 1987 case of Japan Electrical Manufacturers Association v. the Anti-Dumping Tribunal,[99] it was alleged amongst other grounds that the Tribunal had failed to properly examine the question of whether dumping was the cause of material injury to the production in Canada of like goods. The applicant claimed that the Tribunal erred in law by failing to assess the injury caused by non-dumping factors, and by failing to weigh any injury caused by dumping against injury caused by all non-dumping causes. The Court

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[97] [1982] 2 F.C. 816 at 818-9 (C.A.).

[98] [1979] S.C.R. 93.

[99] [1987] 12 C.E.R. 260 (F.C.A.), Heald J.

noted that the Tribunal had considered the factors other than dumping which contributed to the injury and continued:

> In my view, the tribunal's duty was to weigh and balance the various factors which contributed to the injury, not only the factors attributable to the dumped imports but any and all contributing non-dumping factors as well. From the evidence referred to supra, I think it clear that the tribunal did weigh and balance all of the contributing factors and after applying its particular knowledge and expertise, made the findings herein impugned. In such circumstance, its decision should not be disturbed unless there was no evidence upon which those findings could have been based or unless a wrong principle was applied in making those findings.[100]

In the case of Sacilor Acieries and the Anti-Dumping Tribunal,[101] the Court stated:

> If the presence of foreign goods in the domestic market at dumped prices results in domestic producers being obliged either to lose sales or to sell their own product at a loss, then it is open to the Tribunal to make a finding that the dumping has caused injury. Of course, there may be other factors which may have contributed to the injury. As a matter of common sense, it seems to me that there almost always will be. Such matters as efficiency, quality, cost control, marketing ability, accuracy in forecasting, good luck, and a host of others come to mind. It is the function of a specialized, expert tribunal such as this one to weigh and balance those factors and to decide the importance to be given to each.

He then went on:

> In the Tribunal's words already quoted above, 'seven points of market share were lost to dumped imports' and the latter 'underpriced industry products on bids for major products'. I cannot read those words as being

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[100] Ibid. at 268.

[101] (1985) 9 C.E.R. 210 (F.C.A.), Hugessen J. [hereinafter Sacilor].

> anything but a finding of a causal connection between the dumping and the injury.

He added:

> In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. Realistically this is a question of fact.[102]

In the present case, the Tribunal examined economic indicators of the Canadian market for machine tufted carpeting. The Tribunal looked at trends in production, imports and prices during the period from 1988 to 1991. It also reviewed the financial performance of the industry. In addition to its examination of the aggregate market for tufted carpeting, the Tribunal examined the submarkets. The following was the result of its examination:

(1) There was a 19 percent drop in the overall domestic demand between 1988 and 1991;

(2) Sales from domestic production dropped precipitously during the same period outpacing the market decline;

(3) The share held by imports displayed considerable growth at the expense of the domestic industry. Imports of U.S. carpeting by parties other than the Canadian industry moved from a 5 percent share in 1988 to a 31 percent share in 1991;

(4) There was a rapid decline in the financial performance of the industry, particularly in 1990 and 1991; and,

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[102] Ibid. at 214.

(5) Employment levels and utilization of capacity dropped steadily throughout the period.

Revenue Canada reviewed the imports of carpeting from 61 exporters in the United States. During Revenue Canada's period of investigation, from January 1, 1991, to March 31, 1991, these exporters shipped 4.6 million square metres of the subject goods to Canada. Of these exports, 61 percent were found to have been dumped. The margins of dumping per exporter ranged from 1.9 percent to 51.3 percent with a weighted average margin of dumping of 11.97 percent.

The Tribunal's inquiry was conducted pursuant to section 42 of SIMA. The Complainants agreed that the Tribunal had properly embarked upon the inquiry and had jurisdiction to conduct the inquiry in issue. The Tribunal noted that it was required to determine whether dumped imports of the subject goods have caused, are causing or are likely to cause material injury to the production in Canada of like goods pursuant to section 42 of SIMA. The Tribunal recognized that this determination involved two separate issues: first, whether the evidence established that Canadian producers had suffered material injury and second, whether the evidence established a causal link between the material injury and the dumped imports. The Tribunal examined the effects of dumping on each of the three sub-categories of goods. It found that in terms of material injury, the margins of dumping and the industry performance indicators for both residential and commercial sub-categories reflected trends and orders of magnitude that parallelled machine tufted carpeting when considered as a whole. In terms of the causal link between material injury and dumped imports, the Tribunal considered that the issues that arose in

this case were applicable to each sub-category of like goods. Accordingly, the Tribunal's analysis addressed the issues of material injury and causality for machine tufted carpeting as a whole. However, the Tribunal did make a separate finding with respect to residential and commercial carpeting and artificial grass carpeting. As noted earlier, General Felt Industries withdrew its complaint which had been directed at the finding concerning artificial grass carpeting.

With respect to the residential and commercial market segments, the Tribunal concluded that the dumping of the subject goods had caused and was causing material injury to domestic production of machine tufted carpeting as a whole as well as broken down into residential and commercial sub-categories of like goods. The Tribunal also made a finding with regard to the future. It concluded that the dumping of the subject goods was likely to cause material injury to domestic production of machine tufted carpeting as a whole as well as broken down into residential and commercial sub-categories of like goods. The Tribunal gave separate and additional reasons for its finding of likelihood of injury.

In arriving at its conclusion, the Tribunal first examined the question of material injury. It viewed the range of factors which gave an indication of injury to the Canadian industry. This information was provided to the Tribunal in response to its questionnaires, as well as from additional evidence adduced at the hearing. It noted that the domestic demand declined in 1990 and 1991 and that domestic production and profitability fell significantly. As well, there were sharp declines experienced in employment and in utilization of plant capacity. The Tribunal was of the view that the decline in the domestic

industry's production and sales volume went well beyond what could be attributed to the market shrinkage caused by the recession. It observed that by the end of 1989, imports of U.S. tufted carpeting surged, more than doubling the sales volume and market share recorded in 1988. As the recession grew deeper in 1991, U.S. carpeting sales continued to climb, both in absolute terms and as a percentage of the declining market. From 1988 to 1991, the U.S. share of the Canadian market soared from 6 percent to 39 percent, driving the share of domestically produced goods down from 94 percent in 1988 to 61 percent in 1991.

In addressing the issue of material injury, the Tribunal also considered the effects of changes in the composition of the domestic industry from 1988 through to 1991. During that period, six mills ceased operation in Canada and two new small mills started up operations. The Tribunal was of the view that the evidence showed that the market share represented by this substantial pool of business went entirely to U.S. mills. This was business that the existing Canadian mills endeavoured to obtain and had the capacity to take on. The Tribunal observed that U.S. imports not only took the market share represented by the six mills which ceased operations, they also took market share from the remaining firms.

The Tribunal considered imports of U.S. carpeting by Canadian mills. It concluded that there was no evidence to suggest that Canadian mills were importing U.S. goods as part of a strategy to reduce their Canadian production. In any event, imports of U.S. goods by Canadian mills represented only a portion of their loss of market share.

In summary, the Tribunal found a significant increase in import market share during the period under review. There was a corresponding loss in market share experienced by domestic producers which resulted in a substantial underutilization of domestic capacity and major reductions in employment. The low production levels put upward pressure on unit costs; a particularly acute problem in a high, fixed-cost, capital-intensive industry such as the carpeting industry. This in turn squeezed the industry's margins resulting in substantial losses. The Tribunal therefore concluded that the significant increase in U.S. imports since 1989 had caused and was causing material injury to domestic producers.

The Tribunal next addressed the question of causality. The Complainant in this proceeding, and the participants who supported its position, did not challenge the finding of the Tribunal that the Canadian producers had experienced serious material injury to their production in Canada of like goods. However, they alleged that this injury was attributable to other factors than dumping and that the Tribunal had failed to establish a reasonable link between the injury and the dumping.

With respect to the other factors which cannot be attributed to the dumped imports, the Tribunal referred to paragraph 4, Article 3 of the Anti-Dumping Code. The Tribunal noted that this provision of the Anti-dumping Code required that the dumped imports be a cause of material injury. However, the dumped imports do not have to be the only cause of material injury. The Anti-dumping Code requires the investigating authority to ensure that injury caused by other factors is not attributed to dumped imports. The Tribunal observed that its conclusion that dumping had been a cause of the significant increase in

U.S. imports, the serious loss of market share by the domestic industry, the erosion and suppression of domestic prices, and the consequent material declines in all industry performance indicators did not deny the fact that dumping was one of several factors interacting, in this case, to injure the domestic industry. The Tribunal then proceeded to assess these various factors.

One of the non-attributable factors advanced by U.S. exporters and Canadian importers of the subject goods was that the carpeting industry was a fashion industry and that U.S. mills were fashion leaders. The Tribunal observed that up until 1988, Canadian carpeting satisfied the taste of the vast majority of Canadian consumers. There may have been examples where Canadian producers lagged behind United States producers in the introduction of new styles, however, in most cases, these styles and new fibres or their equivalent were available from Canadian mills soon thereafter. The Tribunal concluded that the significant increase in U.S. imports was not explained by these considerations.

Another non-attributable factor examined by the Tribunal dealt with certain marketing practices and programs of the Canadian mills, such as no minimum order limits. After reviewing these practices, the Tribunal was not persuaded that these factors were primarily responsible for the surge in U.S. imports.

Another non-attributable factor which the Tribunal examined was the allegation that U.S. mills were more cost efficient than Canadian mills, especially in the low-end commodity products. The Tribunal observed that the performance differences in the comparison between the higher cost Canadian mills and the leading U.S. mills would be narrowed if the comparison were made against more efficient Canadian mills.

The other non-attributable factors advanced by the exporters and importers were the effect that tariff declines under the Free Trade Agreement ("FTA") and the favourable exchange rates had on the prices of U.S. carpeting sold in Canada. The Tribunal was of the view that the push provided by the tariff declines under the FTA was magnified by the continued strengthening of the Canadian dollar against the U.S. currency. The Tribunal stated that it was convinced that, while the FTA tariff declines and the strong Canadian dollar enhanced the competitiveness of U.S. mills exporting to Canada, dumping was nevertheless a cause of material injury to the domestic industry. By driving prices and industry sales down, the dumping had obstructed the industry's ability to finance the investments in plant and technology that were required for the industry to remain competitive. The Tribunal noted that Canadian mills had invested substantial funds in modernization and took steps to enhance their cost competitiveness, and that the cost of raw materials had declined substantially in the case of some Canadian mills. According to the Tribunal the dumping tended to offset such cost reductions and maintained U.S. cost advantages.

The Tribunal observed that the high end of the market might not be as price sensitive as the lower end of the market. However, the Tribunal observed that witnesses testified that a substantial proportion of the market comprised commodity-type carpeting where price was the primary, if not the only consideration. Even in the middle-to-high end of the market, during a recession, price takes on added importance for consumers. The Tribunal observed that while price is one of several factors influencing the purchasing decision, most consumers only buy carpet "on sale". The Tribunal noted that in the face

of a soft home market, and despite poor market conditions in Canada, U.S. exports to Canada continued to climb. The Tribunal stated it was satisfied that, except for the dumping, U.S. imports of the subject goods would not have penetrated the Canadian market as deeply or as rapidly as they did. The Tribunal found that the volume of dumped goods and the margins of dumping were significant. The weighted margins of dumping were almost 12 percent.

There was evidence that the industry had lost sales or had to reduce prices in many instances. The Tribunal recognized that the Canadian industry had difficulty in identifying the correct source of dumping in respect to many of its claimed lost accounts. Counsel for the exporters were able to provide many examples where the industry erred in identifying their clients as having dumped goods at the named account and in other cases that the subject goods had not been sold to the named account during the January to March 1991 period of investigation. However, some of the claims were substantiated.

However, the Tribunal did not base its decision on the specific claims of lost sales advanced in evidence by the Canadian industry. Even if the examples selected by the industry did not fully reflect the dumping activities of U.S. mills, the Tribunal was of the opinion that this did not contradict the fact that U.S. mills were selling dumped goods in substantial volumes to Canadian accounts.

The Tribunal observed that this case was about how the dumping had made a difficult situation worse. The Tribunal was satisfied that the industry could derive, and was deriving, meaningful benefits from the elimination of dumping. The application of anti-dumping duties, according to the Tribunal, would still leave in some cases Canadian

prices at higher levels than U.S. prices for comparable products. However, the Tribunal observed, it did not follow that material injury from dumping could not ensue merely because of the existence of such price differences. According to the Tribunal, in this situation dumping caused material injury by making a bridgeable gap unbridgeable. The reason for this is that it was not uncommon for a domestic industry to enjoy some price premium over freight and duty paid imports and still maintain market share. However, everything has a price and if the price gap became too wide, customers would have little alternative but to switch suppliers.

There was ample evidence of price suppression and price erosion in the Canadian market. Based on replies to questionnaires from producers and importers, the evidence disclosed that the average selling price of imported and domestically produced goods declined in the period under review. The Canadian industry could respond to low priced imports by either reducing prices to meet competitive offers or by maintaining prices and losing volume and market share. The evidence revealed both a decline in prices and loss of market share. Given the volume of the dumped imports and the significant average margin of dumping determined by Revenue Canada (both in the preliminary and final determinations of dumping) and the price suppression and lost volume which occurred in the Canadian market, it was not unreasonable for the Tribunal to conclude that the price suppression was a cause of material injury to the Canadian industry.

The Tribunal concluded that the dumping of the subject goods had caused and was causing material injury to domestic production. With regard to the future, the Tribunal saw no relief in sight from the intense competitive pressures which gave rise to the dumping and the consequent material injury to the domestic industry. It noted the prospect for prices to remain under downward pressure because of ongoing recessionary conditions and the declining tariffs under the FTA. Market conditions in the United States appeared only slightly better than those in Canada. In both countries, despite industry rationalization, there remained considerable overcapacity. On both sides of the border there was competition for market share to achieve the high levels of plant loading necessary for efficient production, and this was likely to continue unabated. The Tribunal therefore concluded that the dumping of the subject goods was likely to cause material injury to domestic production.

The Tribunal must determine whether the allegedly dumped goods have caused, are causing or are likely to cause material injury to the production in Canada of like goods. In other words, there must be some connection or link between the dumping and the injury. A determination such as this is one of fact by a statutorily created body having the legal authority and expertise necessary to evaluate the evidence and to make such a finding.[103] As stated by Justice Hugessen in the Sacilor case, "the study of causes is the examination of the potency of certain facts in the production of certain results."[104] The drawing of inferences is part of the raison d'être for the existence

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[103] See Sarco Canada Ltd. v. Anti-Dumping Tribunal, [1979] 1 F.C. 247 (C.A.).

[104] Supra, note 44 at 214.

of the Tribunal, which has the necessary experience and expertise to draw the requisite conclusions. It is its most important function.[105] Based on the criteria for judicial review as outlined in the Corn Growers and Lester cases, the reviewing panel can intervene only where there is no evidence of causality sufficient to satisfy subparagraph 42(1)(a)(i) of SIMA.

There was evidence upon which the Tribunal could conclude, as it did, that the dumping of the goods in issue has caused, is causing and is likely to cause material injury to the production in Canada of like goods.

The Tribunal determined that the Canadian industry had been injured (past, present and future) by imports of the subject goods from the U.S. (both as a whole and for the three subcategories of goods). It considered the non-dumping factors present in the marketplace and their impact on the injury to the domestic producers. It considered macro and micro economic factors. It is not for us to reweigh these factors. The Tribunal concluded, on the evidence before it, that there was a correlation between the injury and the dumping and that the injury caused by the dumping was material.

There was evidence in the record from which the Tribunal could reasonably draw the inferences and reach the conclusion it did. Specifically:

(1) A substantial proportion of the market comprised commodity-type carpeting where price was the primary, if not the only consideration;

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[105] See Deputy Minister of National Revenue (Customs and Excise) v. Amoco Petroleum Company Ltd. (1985) 13 C.E.R. 102 (F.C.A.).

(2) While price was one of several factors influencing the purchasing decision, most consumers only bought carpet "on sale";

(3) In the face of a soft home market, and despite poor market conditions in Canada, U.S. exports to Canada continued to climb;

(4) The volume of dumped goods and the margins of dumping were significant with the weighted average margin of dumping being almost 12 percent;

(5) From 1988 to 1991, the U.S. share of the Canadian market soared from 6 percent to 39 percent, driving the share of domestically produced goods down from 94 percent in 1988 to 61 percent in 1991;

(6) The industry had lost sales or had to reduce prices in many instances;

(7) The industry could derive, and was deriving, meaningful benefits from the elimination of dumping;

(8) There was ample evidence of price suppression and price erosion in the Canadian market; and,

(9) In both countries, despite industry rationalization, there remained considerable overcapacity.

The question of causality is one that falls within the pragmatic and functional definition of the Tribunal's jurisdiction. It is clearly within its area of expertise. In these circumstances a court or a reviewing panel should only intervene if the Tribunal has made a patently unreasonable error. It cannot be said, in my view, that its decision cannot be maintained on any reasonable interpretation of the facts. It was open to the Tribunal to make the finding it did. Having regard to the evidence before the Tribunal, it cannot be

said that its finding of a causal link between the allegedly dumped goods and the injury to Canadian production was patently unreasonable. I am satisfied that the decision of the Tribunal is not patently unreasonable.

C. Disposition

In view of the foregoing, and pursuant to subsection 77.15(3) of SIMA, I would confirm the Tribunal's decision in all respects.

Signed in the original by:

April 5, 1993 — John D. Richard

DATE — John D. Richard

VI. DISSENT OF PANELIST MARTIN J. WARD

Although I find myself in agreement with many of the observations of the majority and I believe that they have set forth the better practice for the Canadian International Trade Tribunal (the Tribunal or CITT) to follow when rendering a decision, I am constrained by the holdings in the cases cited by Chairman Richard, especially National Corn Growers Association v. Canada (Import Tribunal)[106] and the recently decided Supreme Court case of Attorney General of Canada v. Public Service Alliance of Canada[107] , to join the dissent of Chairman Richard. I will briefly set forth my reasons for my dissent as they relate to causality since they may not be totally in harmony with Chairman's Richard's reasons. Otherwise, I join in his dissent.

Although all the panelists in this case are in agreement as to the proper standard of review to be employed in this case, that is, that the findings of the Tribunal will not be disturbed unless it is found that the decision of the Tribunal cannot be sustained on any reasonable interpretation of the facts or of the law, Corn Growers at 1369, the majority and the minority part ways in the application of this standard to the case at bar.

The majority seems to find that the standard of review, as set forth in the trilogy of recent Supreme Court of Canada cases, Corn Growers, Lester (W.W.) v. U.A.J.A.P.P.I., Local 740,[108] and CAIMAW v. Paccar of Canada Ltd.,[109]

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[106] [1990] 2 S.C.R. 1324 (hereinafter Corn Growers).

[107] Court File No. 22295, judgment released March 25, 1993 (hereinafter Public Service II).

[108] [1990] 3 S.C.R. 644.

requires that special tribunals make a demonstration on the record of the logical connection between the evidence and its findings by specific reference in its findings to the evidence supporting each of its propositions. It appears that the majority relies upon Article 3:4 in the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) to conclude that there be such specific demonstrations. Article 3:4 states:

> It must be demonstrated that dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. (Emphasis added).

However, this provision of the GATT is not specifically incorporated into the Special Import Measures Act (SIMA).[110] The question then becomes what effect does this provision of the GATT have on SIMA. Although the Court in Corn Growers did not address itself to this issue, the majority did find that where there is an ambiguity in the statute it is appropriate to refer to the GATT for guidance. In so doing, the Court employed a liberal interpretation of the word "imports" in the GATT to harmonize it so as to include "potential" imports. The Court then found that the Tribunal's consideration of potential imports was reasonable.

It appears to me that, considering this liberal interpretation, the Court would find that the level of demonstration necessary to uphold a Tribunal's decision is the demonstration made in the Corn Growers case at 1382-83, if it found an ambiguity in SIMA relating to the demonstration necessary to support a finding of causation and resorted to the GATT for guidance. The Court in Corn Growers, supra at 1382-83, held:

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[109] [1989] 2 S.C.R. 983.

[110] R.S.C. 1985, c. S-15 (as amended).

> In my opinion, it was not unreasonable for the Tribunal to infer in this case, given the open nature of the Canadian market and given that the United States is the only viable source for imports, that American stocks not used for domestic consumption would have flowed into Canada in greater amounts. It could reasonably assume that Canadian buyers will purchase the product at issue at the lowest price available, and that, absent an appropriate price response by Canadian producers, a significant amount of American goods would penetrate the Canadian market. Given these circumstances, I accordingly find that the tribunal's reasoning and conclusions were not unreasonable and should not be disturbed. (Emphasis added).

Hence, the Court found that the demonstration necessary to link injury to subsidies could be made by reasonable inferences and assumptions. It did not require the kind of demonstration that the majority seems to require.

The quoted language of Corn Growers, above, can be applied to the case under consideration as well with a like finding. As such, I do not find the Tribunal's decision to be patently unreasonable or clearly irrational, and, therefore, I find it should be upheld.

The CITT made a number of findings that were reasonable, which Chairman Richard outlined in his decision at pp. 75-76.

There is no question that there was material injury to the Canadian industry. There is at least one interpretation of the facts that is not patently unreasonable that would support a finding that dumping did cause material injury. From the evidence, the Tribunal could reasonably conclude that the commodity at issue was price sensitive. The Tribunal was also required to accept the finding of Revenue Canada that the commodity at issue was dumped at a weighted average margin of almost 12% and that there was a large volume of the dumped imports (61%). It is not a patently unreasonable assumption that such

dumping of a price sensitive product would adversely affect Canadian producers. In connection with this, the Tribunal noted that it found the volume and margins of the dumped goods to be significant. The Tribunal also found that the Canadian industry was afforded relief by the imposition of anti-dumping duties. The Tribunal made other findings such as lost sales, price suppression, and a reduced ability to finance necessary improvements so that Canadian producers could be competitive. It was not unreasonable on the part of the Tribunal to conclude, based on the evidence, that a cause of material injury was the dumping, considering the volume and margin of dumping and considering the price sensitivity of the commodity at issue, coupled with the finding that the imposition of anti-dumping duties resulted in relief for the domestic industry.

Counsel for the complainant, Carpet and Rug Institute, argued that the decrease in prices resulting from the currency exchange rate, which had the effect or reducing American prices by 12%, was significant and noted that the injury caused to the Canadian producers resulted from this decrease as well as the decrease in tariffs caused by the Canadian-U.S. Free Trade Agreement and other factors. While it is true that in the present case, there are a number of other factors causing downward pressure on prices, the Tribunal did consider those factors and found that they did not account for all the injury to the Canadian industry.

Although the Tribunal made what I would consider some errors in viewing the evidence, it was entitled to make errors as long as its decision is not patently unreasonable. As the Court in Public Service II, supra at 24, found:

> It is not enough that the decision of the Board is wrong in the eyes of the court...

The Court, ibid at 23, held:

> it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.

I cannot say, based on the evidence, that the Tribunal's decision was clearly irrational; therefore, I concur with Chairman Richard that it was not patently unreasonable to find that there was sufficient evidence to support a finding of material injury by means of dumping.

Further, while I am close to my colleagues' position in the majority opinion concerning the demonstration necessary to show causation in the findings of the Tribunal and I think the Tribunal and the public would be better served by such demonstration, I do not find that under the applicable standard it is essential. I find that in this case there is enough evidence so that the Complainants cannot overcome the "very strict test" that is set out in the Supreme Court decisions. I believe that if the Tribunal's decision were reviewed by the appropriate Court in Canada, in whose place this panel sits, the Tribunal's decision would be affirmed. Except as my views may differ from those of the Chairman, I join in Chairman Richard's dissent.

Signed in the original by:

April 5, 1993 — Martin J. Ward

DATE — Martin J. Ward

IN THE MATTER OF:

An Inquiry Made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America (Injury)

CDA-92-1904-02

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF

AN INQUIRY MADE BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL	:	Secretariat File
PURSUANT TO SECTION 42 OF THE SPECIAL IMPORTS MEASURES ACT	:	No. CDA-92-1904-02
RESPECTING MACHINE TUFTED CARPETING ORIGINATING IN OR	:	
EXPORTED FROM THE UNITED STATES OF AMERICA (INJURY)	:	

Panel: John D. Richard, Chairperson
Jean-Gabriel Castel
James Chalker
Michael D. Sandler
Martin J. Ward

PANEL DECISION FOLLOWING
REVIEW OF A DETERMINATION ON REMAND

January 21, 1994

Peter Magnus, Smith Lyons Torrance Stevenson & Mayer, appeared for the Carpet & Rug Institute.

James L. Shields, Soloway Wright, appeared for the World Carpets Inc.

Brian J. Barr appeared for the Canadian Carpet Institute.

Hugh Cheetham and Debra Steger appeared for the Canadian International Trade Tribunal.

OPINION AND ORDER OF THE PANEL

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I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Chapter 19 of the *Canada-United States Free Trade Agreement* ("FTA") to review the final determination of injury by the Canadian International Trade Tribunal ("CITT" or "Tribunal") respecting the dumping of machine tufted carpeting originating in or exported from the United States of America dated May 6, 1992 (Inquiry NQ-91-006).

On April 7, 1993, the Panel, in Canadian Secretariat File No. CDA-92-1904-02, acting pursuant to its authority under section 77.15 of the *Special Import Measures Act*, remanded, in part, the finding of the CITT in Inquiry No. NQ-91-006.

First, the Panel remanded the Tribunal's determination that dumping has "caused" past and present material injury, and directed the Tribunal on remand to determine whether dumping in and of itself caused material injury and to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following:

(a) An analysis in detail of the 30 to 32 accounts involving lost sales allegations referred to in the post-hearing briefs of the CITT and the Canadian Carpet Institute ("CCI") before the Panel, including an analysis of whether they are quantitatively (by volume) or qualitatively significant, and how (if at all) they reasonably support a determination of causation;

(b) An analysis in detail of the staff's price study in CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol.6, Confidential Staff Report at 66 to 77, and how (if at all) it reasonably supports a determination of causation. In this regard, the Tribunal should analyze (1) how dumping margins and volumes found by the Deputy Minister relate to price movements identified in the staff's study and (2) how other non-dumping factors (both price and non-price) relate cumulatively to those price movements and/or lost sales or market share shifts;

(c) An analysis in detail of the staff finding of a 13 cent decline in the domestic average price per square metre over the course of 1991 referred to in CST Vol. 4, Public Staff Report at 1.214.82, and how (if at all) it reasonably supports a determination of causation.

Second, the Panel remanded the Tribunal's determination that dumping is likely to "cause" future material injury, and directed the Tribunal on remand to determine whether dumping in and of itself is likely to cause material injury (and whether such determination depends on the existence of dumping as a cause of past injury) and to demonstrate the rational basis for such determination by detailed analysis of the evidence in the Record.

A. The CITT's Determination on Remand ("DOR")

On May 25, 1993, the CITT, pursuant to section 77.16 of the *Special Import Measures Act* issued a Determination on Remand ("DOR") in which it found that the dumping of certain machine tufted carpeting originating in or exported from the United States of America has caused and is causing material injury to the production in Canada of like goods. It also found that the dumping of the subject goods is likely to cause material injury to the production in Canada of like goods.

On June 9, 1993, the Carpet & Rug Institute ("CRI") filed a Notice of Motion indicating that it would challenge the CITT's DOR and requested a hearing so that the Panel could hear oral submissions. On June 17, 1993, the Panel considered both the CRI's motion and a motion by the CCI requesting that a hearing regarding the DOR be denied. Pursuant to Rule 75(4) of the Panel Rules, the Panel ordered a review of the Tribunal's DOR and set the hearing date for July 22, 1993.

On July 22, 1993, one of the Panelists, James McIlroy, withdrew from the Panel. On October 29, 1993, Jean-Gabriel Castel was named to the Panel to replace Mr. McIlroy. A Notice of Resumption of the review and hearing was therefore issued. The Panel set a new date, December 20, 1993, for the hearing on remand and set January 21, 1994 as the date for its decision. The hearing on remand was held on December 20 with counsel for the CRI, the CCI and the Tribunal making written and oral submissions to the Panel.

B. Position of the Participants

CRI challenges the DOR and seeks a written decision pursuant to Rule 75(5):

(a) That the DOR fails to respond to the specific directions of the Panel to demonstrate, through a detailed analysis of the Administrative Record, a rational basis for its finding of causation of past, present and future injury;

(b) That the finding of the CITT, in its DOR, that "dumping, in and of itself, has caused, is causing and is likely to cause material injury to Canadian production of the subject goods" is unsupported by evidence on the Record; and

(c) That the case be further remanded to the CITT with a direction to dispose of the matter in a manner consistent with the CITT's failure to establish that the evidence on the Record supports a finding that dumping has caused, is causing and is likely to cause material injury.

Both the CITT and the CCI request that the DOR be affirmed in all respects. In their Response, they contend that:

(a) The Tribunal did not commit a patently unreasonable error of law or fact in its DOR when it concluded that the dumping of certain machine tufted carpeting, originating in or exported from the United States of America, in and of itself, has caused and is causing material injury to the production in Canada of like goods;

(b) The Tribunal did not commit a patently unreasonable error of law or fact in its DOR when it concluded that the dumping of certain machine tufted carpeting, originating in or exported from the United States of America, in and of itself, is likely to cause material injury to the production in Canada of like goods;

(c) And more specifically that the manner in which the Tribunal responded to each of the directions of the Panel in its DOR was not inconsistent with the directions of the Panel.

II. STANDARD OF REVIEW BY THE PANEL

As was stated by the Panel *In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (Injury)*, CDA-91-1904-02, decided on February 8, 1993, the scope of a Panel's inquiry in a review of a DOR is much narrower than the scope of its review of the Tribunal's original Determination. It is not open to the Panel to revisit the original Determination with respect to any issue not covered by the Remand. "The Panel's inquiry in reviewing the DOR is thus limited to deciding whether the Tribunal addressed the question[s] that the Panel directed to it, followed the Panel's instructions, and in so doing reached a result that is not patently unreasonable and is supported by at least some evidence in the Tribunal's investigative record" (at pp. 2-3).

The present Panel applies this standard of review, as set out in this section, and as further articulated in these Reasons.

III. PANEL DECISION

For the reasons more fully set forth in its Opinion, on the basis of the Administrative Record, the applicable law, the written submissions of the parties, and the public hearing held in Ottawa on December 20, 1993, the Panel: *Affirms* in part and *Remands* in part.

A. Causation of Past and Present Injury

As to the first analysis which the Panel called for, relating to the thirty to thirty-two accounts involving lost sales allegations, referred to in the post-hearing briefs of the CITT and CCI, the Tribunal stated:

> The Tribunal notes that, in quantitative terms, these accounts, which were intended simply to be illustrative of the effects of dumping, were not significant. What is qualitatively significant about the 32 accounts is that almost all of them involve an admission of almost dumping of some sort by one or more U.S. exporters. However, the Tribunal's original analysis and its subsequent detailed analysis further to this remand indicate that, even where dumping has been admitted, the volumes of dumped goods and the margins of dumping involved are relatively insignificant.
>
> ... the Tribunal did not base its decision on the specific claims of the lost sales advanced in evidence by the Canadian industry. The Tribunal has nothing more to say about the allegations relating to lost accounts.
>
> CITT's Determination on Remand (DOR) at page 11.

With regards to the second analysis ordered by the Panel, the Tribunal instead conducted a new study, limiting the number of exporters to Canada and the number of Canadian manufacturers. This new study will be addressed below.

Concerning the third analysis ordered by the Panel in its Opinion and Order, that is, an analysis of the staff finding of a 13 cent decline in the domestic average price per square metre over the course of 1991, and how it reasonably supports a determination of causation, the Tribunal stated at page 11 of the DOR:

> However, in the Tribunal's judgment, the values contained in the unit income statement, by themselves, do not reveal anything definitive about the effects of dumping compared to the effects of other factors in causing price declines.

In short, the Tribunal did not perform any of the analyses called for by the Panel in its Opinion. However, as referenced above, the Tribunal did a new analysis of its data (1993 Price Study). Consequently, the Tribunals DOR will be acceptable only if its 1993 Price Study establishes the critical nexus between injury and dumping.

In discussing the second analysis called for by the Panel, that is, an analysis of the staff's price study and how it reasonably supports a determination of causation, the Tribunal stated as follows on page 3 of the DOR:

> The amalgamated price data included in the original examination reflected a vast array of different carpet styles and qualities produced by numerous U.S. and Canadian manufacturers with different marketing strategies and, in some cases, significantly different operating efficiencies and cost structures. In reviewing this examination of prices on remand, the Tribunal considers that a revealing comparison of actual price movements of imported and domestic carpet can be derived from the same data by focusing on certain companies that are comparable, rather than on the full range of companies included in the original examination. To this end, as directed by the Panel, the Tribunal has conducted a detailed price analysis and has based it on a subset of the information contained in the original price examination. This subset focusses on sales to the 10 largest accounts of 2 exporters and 4 domestic producers.

The two exporters selected were Shaw Industries, Inc. ("Shaw") and Queen Carpet Corporation ("Queen"). The four Canadian firms selected by the Tribunal were Peerless Carpet Corporation, Kraus Carpet Mills Limited, Richmond Carpet Mills, and Venture Carpets Limited. The Tribunal found that the Canadian firms chosen were among the most stable and efficient producers. In the 1993 Price Study the Tribunal found that both average domestic and average import prices declined between 1990 and 1991. Moreover, the Tribunal stated, in 1990 average import prices were below average domestic prices by 43 cents. This price differential favouring U.S. imports remained relatively constant in 1991, despite declining U.S. prices between 1990 and 1991, because Canadian prices fell by approximately the same amount as import prices over this period.

To determine the effect of dumping on prices, the Tribunal estimated an average per unit dollar value for dumping on the basis of the average prices for Shaw and Queen. The prices it had arrived at, earlier noted, were netted to their F.O.B. Dalton, Georgia values. The dumping values were then derived using these F.O.B. prices and the weighted average dumping margins for Shaw and Queen, as determined by the Deputy Minister in his final determination or adjusted downward to reflect the volume of undumped goods exported to Canada by these producers. The result was a combined weighted average dumping value of 33 cents per square metre and 35 cents per square metre in 1990 and 1991, respectively. Adding these values to the actual prices found for Queen and Shaw in 1990 and 1991 reduced the gap between a non-dumped import price and domestic price to 10 cents in 1990 and 6 cents in 1991.

However, in the Written Submissions of the CRI, challenging the CITT's DOR, the CRI stated, at paragraphe 6.4.2, that the results of the Tribunal's new analysis "are fundamentally flawed in that the analysis is based on erroneous data. The results, therefore, *do not* and *cannot* support a finding of causation of material injury."

At the hearing held on December 20, 1993, counsel for CRI referred to the letter of February 25, 1992, from James L. McCormick, Jr., Director, Sales Administration and Market Research for Shaw Industries, Inc., to the Secretary, Canadian Trade Tribunal, to which letter was attached "an amended response to the Importer's Questionnaire on Machine Tufted Carpeting." The letter went on to state: "Please replace the submission mailed to you on

January 22, with this one." Counsel for CRI, at the Remand Hearing before the Panel, indicated that the new information provided in the submission of February 25, 1992 was provided to the Tribunal since Shaw had discovered that the information that it had previously provided did not account for terms of sale. This, counsel stated, caused an error of approximately 30% in pricing information originally presented to the Tribunal. Thus, according to counsel, the new figures, referred to as the corrected figures, would demonstrate a higher price for Shaw's goods in Canada than the Canadian manufacturers' prices for like merchandise.

Counsel for both the CITT and CCI argued that the Tribunal did not strike the original submission by Shaw from the record; and, therefore, was free to choose whichever figures it chose to rely upon. Counsel for both the CITT and CCI stated that neither Shaw nor counsel for the CRI explained the substitution of data by Shaw.

Counsel for the CRI directed the Panel's attention to the list of exhibits for the CITT's hearing on this issue. The list of exhibits contain many references to amended exhibits or statements. Counsel also noted that during almost two days of testimony before the Tribunal, Mr. McCormick was not questioned or cross-examined about the submission of the new figures.

The Tribunal, in its DOR, did not explain why it did not rely upon the figures submitted in February of 1992 by Shaw in conducting its 1993 Price Study. Certainly, if the figures submitted by Shaw in February of 1992 are correct and the Tribunal routinely allowed corrections to be made, the failure to rely upon them in conducting its price study could result in a patently unreasonable finding. The Tribunal should explain why it failed to use the corrected figures submitted by Shaw.

Accordingly, the Panel remands the DOR to the Tribunal with instructions to conduct another price study using the corrected figures submitted by Shaw. The Tribunal may also do a study separating Shaw from Queen.

B. Causation of Future Injury

In the Opinion and Order of the Panel on April 7, 1993, the Panel was of the view that it was unclear whether the Tribunal actually determined that causation of likely future injury was independent of its analysis of causation of past injury. In view of these uncertainties, and since the Panel was remanding on the issue of causation of past injury, it also directed that the Tribunal clarify this point and provide an analysis of the evidence in the Record regarding causation of future injury.

Accordingly, the Panel remanded the Tribunal's determination that dumping is likely to "cause" future material injury, and directed the Tribunal on remand:

> [T]o determine whether dumping in and of itself is likely to cause material injury (and whether such determination depends on the existence of dumping as a cause of past injury) and to demonstrate the rational basis for such determination by detailed analysis of the evidence in the record.

In its DOR made on May 25, 1993, the Tribunal confirmed its finding that dumping is likely to cause material injury. Its DOR on this issue reads as follows:

> **Future Injury**
>
> The Tribunal confirms its finding that dumping is likely to cause material injury. In addition to the reasons provided in the finding, the Tribunal adds that, given the competitive nature of U.S. and Canadian carpet prices, it is clear that anti-dumping duties are necessary to help offset the advantage conferred by dumping. This advantage has helped U.S. carpet imports to surge into Canada in unprecedented volumes, despite ongoing weak market conditions in Canada, especially in 1990 and 1991.
>
> This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, these conditions are likely to persist for some time and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

> The Tribunal further notes that CUSFTA provided for a 10-year transition period, beginning in 1989, during which the Canadian industry could gradually adjust to lower tariffs. In the opinion of the Tribunal, the effect of continued dumping at the levels established by the Deputy Minister would be to virtually eliminate the remaining portion of this transition period. As the Tribunal observed in its statement of reasons, "[d]umping has further reduced the time required by the Canadian industry to make the necessary adjustments to compete effectively in a North-American free-trade environment."
>
> For greater certainty having regards to the specific direction in the remand, the Tribunal considers that this determination does not depend solely on the existence of dumping as a cause of past injury, for the reasons given above.

In its challenge to the DOR, the CRI alleged that with respect to the Panel's direction concerning future injury, the Tribunal:

(a) failed to determine whether dumping in and of itself is likely to cause material injury;

(b) failed to determine the extent to which its finding of future injury depended on the existence of dumping as a cause of past injury and the significance of its finding on past injury in imputing future injury and causation; and

(c) failed to demonstrate a rational basis for confirming its original finding of April 21, 1992 concerning future injury by detailed analysis of the evidence on the record.

In its response, the Tribunal directed the Panel to the Recommendations concerning Determination of Threat of Material Injury adopted by the Committee on Anti-Dumping Practices on October 21, 1985 (which is an agreed interpretation of Article 3:6 of the Anti-Dumping Code). The CADP Recommendations state:

> In making a determination regarding threat of material injury, with due regard to Article 3 of the Anti-Dumping Code, the administering authority should consider *inter alia* such factors as:
>
> > a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importations thereof;
> >
> > sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports;

> whether exports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further exports; and
>
> inventories in the importing country of the product being investigated.
>
> It is understood that no one of these factors by itself can necessarily give decisive guidance but that the totality of factors considered must lead to the conclusion that further dumped exports are imminent and that unless protective action is taken, material injury would occur.[1]

The CADP Recommendations also state:

> However, as the Anti-Dumping Code provides, anti-dumping relief based on the threat of injury must be confined to those cases where the conditions of trade clearly indicate that material injury will occur imminently if demonstrable trends in trade adverse to domestic industry continue or clearly foreseeable adverse events occur.[2]

Counsel for the Tribunal submitted that the Tribunal in its DOR considered a number of the factors set out in paragraph 9 of the CADP Recommendations, for instance, with regard to increases in the rate of dumped imports, with respect to over capacity in the United States, with respect to the price suppressing or price depressing effect of U.S. imports on domestic prices as well as other factors germane to the issue of threat of injury such as the competitive nature of the market for the subject goods, soft demand conditions in the United States and the impact dumping was having on the adjustments being made by the Canadian industry in response to the changing competitive conditions.

At the December 20, 1993 hearing on the review of the DOR, the Panel directed counsel for the Tribunal as well as counsel for the CCI, if it wished, to provide in writing with specific references to the administrative record only, and without argument, references identifying the evidence supporting the Tribunal's following future injury findings on remand:

(1) soft demand conditions in the United States;

(2) large U.S. carpet manufacturing over-capacity;

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[1] Committee on Anti-Dumping Practices, *Recommendations Concerning Determination of Threat of Material Injury*, adopted by the Committee on 21 October, 1985 (ADP/25), *BISD*, 32nd, Supp., Geneva, March 1986, at p. 182-184, at paragraph 9 ("*CADP Recommendations*").

[2] *Ibid.* at paragraph 5.

(3) the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round the clock to achieve maximum operational efficiencies.

The CRI was given a similar opportunity. Both the Tribunal and the CRI filed a list of specific evidence in the administrative record in response to the Panel's request under each of the three headings.

Following its review of the Administrative Record, the Panel concludes that there was evidence in the Administrative Record on which the Tribunal could make a finding of soft demand conditions in the United States, large U.S. carpet manufacturing over-capacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. The Panel is also satisfied that there is evidence on the record to support the finding of a surge of imports of the subject goods into Canada from the United States.

The Panel is of the opinion that there was evidence on the Administrative Record to support the Tribunal's finding of future injury and that its finding of future injury was not patently unreasonable[3] or clearly irrational[4] in the circumstances. The Panel therefore affirms the Tribunal's finding of future injury in this case.

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[3] *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1367.

[4] *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at 963-4.

IV. ORDER

For the reasons stated above, the Panel hereby:

AFFIRMS the Tribunal's determination that dumping is likely to cause future material injury.

REMANDS the Tribunal's determination that dumping has caused past and present material injury and directs the Tribunal on remand as follows:

1. To explain, why it failed to use the corrected figures submitted by Shaw.

2. To conduct another price analysis using the corrected figures submitted by Shaw.

3. The Tribunal may also prepare a price analysis in which it deals separately with Shaw and Queen.

DIRECTS the Tribunal to issue its Determination on Remand within 21 days of the date of this decision.

SIGNED IN THE ORIGINAL BY:

JOHN D. RICHARD, Chairperson

JAMES CHALKER

JEAN-GABRIEL CASTEL

MARTIN J. WARD

Issued on this 21st day of January, 1994.

OPINION OF PANELIST MICHAEL D. SANDLER CONCURRING IN PART AND DISSENTING IN PART

I concur in the decision and opinion of the majority of the Panel with respect to the determination of past and present injury. I dissent from the majority's decision with respect to future injury.

The Tribunal's Determination on Remand, as it concerns future injury, placed me in a difficult position. The Opinion and Order of the Panel of April 7, 1993 directed the Tribunal on remand "to determine whether dumping in and of itself is likely to cause material injury . . . and to demonstrate the rational basis for such determination *by detailed analysis of the evidence in the record.*" Opinion and Order of the Panel at 39 (emphasis added). In contrast with its treatment of past and present injury, the Tribunal's Determination on Remand regarding future injury did not include any "detailed analysis of the evidence in the record" — or, indeed, cite any evidence in the record. It did, however, purport to base the future injury determination on certain factual conclusions or findings:

> This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, *these conditions are likely to persist for some time* and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

Determination on Remand at 12 (emphasis added).

In essence, these factual conclusions or findings are that there were certain past conditions (a surge northward, soft U.S. demand conditions, large U.S. overcapacity, and a production imperative) and, in addition, that *all* of these past conditions "are likely to persist for some time." Since the Tribunal did not tell us whether any of these factual conclusions or findings were not essential to its decision, I found it necessary to proceed on the basis that the future injury determination was based on all of them.

Under the "patently unreasonable" standard of review, each factual conclusion or finding essential to the determination being reviewed must be based on evidence in the administrative

record — evidence logically *capable* of supporting the particular factual conclusion or finding to which that evidence relates.[5]

As the majority's opinion notes, the absence of any citation to particular evidence in the "future injury" portion of the Determination on Remand made it difficult for us to assess whether there was evidence logically capable of supporting the Tribubal's factual conclusions. For that reason, we asked that the parties immediately after the Panel's December 20 hearing file a list of citations and excerpts of evidence in the record supporting each of these factual conclusions (except the conclusion regarding the "surge northward" which was supported by evidence in the Tribunal's original decision).

Having reviewed the citations and excerpts the parties submitted after the December 20 Panel hearing, I, like the majority of the Panel, saw evidence in the record capable of supporting the *past* existence of each of the conditions embodied in the Tribunal's factual conclusions (or findings) regarding future injury. I, however, could not find evidence capable of supporting the additional conclusions that *all* of these conditions "are likely to persist for some time."

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[5] The Panel's Opinion and Order of April 7, 1993 stated the following summary of the standard of review:

1. Courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or the law.

2. A reviewing panel today must review "how" a tribunal reached any challenged finding or decision to determine whether it has a rational basis, and it must make at least such "evaluation of the merits" so as to satisfy itself that there is a "logical relationship between the grounds of the decision and the evidence supporting it. *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 at 1004, 1018.

3. A reviewing panel today may have to perform "an in-depth analysis" in analyzing the manner in which a tribunal arrived at its findings and decision and their logical ties to the evidence. *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1370.

4. In performing this analysis, if a reviewing panel finds that "there is any evidence supporting" the finding or conclusion–that is, evidence that provides the logical relationship to the finding or conclusion–it will not be deemed patently unreasonable. *Lester (W.W.) v. U.A.J.A.P.P.I., Local 740*, [1990] 3 S.C.R. 644 at 687-688.

5. On judicial review, the courts in Canada are free to examine not only the findings and observations made by the Tribunal in its reasons, but also the entire administrative record. The *Federal Court* Act and its Rules as well as the provisions of Chapter 19 of the FTA and its Rules, expressly provide that the administrative record will be provided. Such an examination of the record was performed in the *Lester* case.

6. The purpose of the "patently unreasonable" standard is to assure curial deference to the expertise of specialized tribunals with respect to matters within their expertise and jurisdiction, and a reviewing panel is not to attempt to substitute its findings in these matters for those of the tribunal. *Bell Canada* v. *Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] S.C.R. 1722 at 1746.

There may be situations where a reviewing panel is asked to consider evidence in the administrative record that has not been ostensibly analyzed in the expert tribunal's decision and which may, upon expert analysis, be found to provide a logical relationship to the tribunal's findings (and thus capable of supporting those findings). Curial deference leads to the conclusion that the reviewing panel itself *not* perform that analysis, but that the expert tribunal do so on remand.

In particular, the uncontroverted evidence cited to us following the December 20 Panel hearing was that there was "soft U.S. demand" during the first quarter 1991 caused by the Gulf War and U.S. recession. There was also evidence, apparently uncontroverted, that U.S. shipments had noticeably increased afterwards, in late 1991 and early 1992 before the Tribunal issued its original decision. Looking at what was cited to us following the Panel's hearing ("Post-Hearing Citations") — and in the absence of any analysis of *evidence* in the Determination on Remand itself — I could not find evidence logically capable of supporting the factual conclusion that soft U.S. demand was "likely to persist for some time."

I found ambiguous the evidence regarding whether "large U.S. carpeting manufacturing overcapacity" would be likely to persist for some time. The Post-Hearing Citations refer to "chronic" (not large or continuous) overcapacity in both the U.S. and Canadian industries. No evidence was cited regarding the magnitude of U.S. overcapacity during the period of investigation (there was evidence from 1987), or regarding how any overcapacity was affected by subsequent U.S. plant closures. I found myself in the awkward position of having to make my own inferences about what the word "chronic" meant and about other evidence cited, without the benefit of the Tribunal's own analysis of the evidence (including specific discussion of the inferences it made).

This is not a case where we are weighing evidence of the Canadian industry against conflicting evidence of U.S. exporters. That is not permitted under the "patently unreasonable" standard. My problem was in how to review a Determination on Remand, which cited four conditions as *jointly* "likely to persist for some time" and which did not give me any guidance as to whether the determination was still supportable if I did not find evidence capable of supporting the continuing persistence of one or more of those conditions. As noted above, I did not find evidence capable of supporting the continuing persistence of soft U.S. demand.[6]

Under these circumstances and since we are remanding in any event the determination on past and present injury, I believe the appropriate course would have been to remand also the future injury determination to the expert tribunal and direct it

(1) to state which of its factual conclusions is essential to its determination of future injury, and

(2) to analyze for us the *evidence* in the record supporting each of those essential factual conclusions and either (i) if the evidence supports each such conclusion,

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[6] The majority's opinion does not clarify (1) whether all members of the majority found evidence in the record "capable of supporting" all of the Tribunal's factual conclusions (including that "soft U.S. demand" was likely to persist) – or (2) whether the majority was deciding that not all of the factual conclusions need be backed by such evidence and that the unsupported conclusions were not essential to the "future injury" determination. In my view, the Tribunal's decision is "patently unreasonnable" unless either (i) each factual conclusion on which the decision is purportedly based is backed by evidence logically capable of supporting it, or (ii) unless the expert tribunal on remand clarifies that any unsupported factual conclusions are not essential to its decision and the remaining supported factual conclusions are legally capable of sustaining the decision.

to state how it does so, and (ii) if it does not support each such conclusion, to issue a negative determination on future injury.

SIGNED IN THE ORIGINAL BY:

MICHAEL D. SANDLER

DATED: January 21, 1994.

IN THE MATTER OF:

An Inquiry Made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America

CDA-92-1904-02

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF

AN INQUIRY MADE BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL	:	Secretariat File
PURSUANT TO SECTION 42 OF THE SPECIAL IMPORTS MEASURES ACT RESPECTING MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	:	No. CDA-92-1904-02

Panel: John D. Richard, Q.C., Chairperson
Jean-Gabriel Castel, Q.C.
James Chalker, Q.C.
Michael D. Sandler, Esq.
Martin J. Ward, Esq.

PANEL DECISION AND ORDER FOLLOWING REVIEW OF A DETERMINATION ON REMAND

April 21, 1994

Brian Barr, Maclaren Corlett, counsel for the Canadian Carpet Institute
Peter A. Magnus, Smith, Lyons, Torrance, Stevenson & Mayer, counsel for the Carpet and Rug Institute
Hugh J. Cheetham, counsel for the Canadian International Trade Tribunal

By Motion pursuant to Rule 75(3)(a), the Canadian Carpet Institute, on March 3, 1994, challenged the Determination on Remand issued by the Canadian International Trade Tribunal on February 11, 1994 (sometimes referred to as DOR-2). This Determination on Remand was issued by the Tribunal in response to the Panel's decision issued on January 21, 1994 following the review of an earlier Determination on Remand dated May 25, 1993 (sometimes referred to as DOR-1).

In its decision issued on January 21, 1994, the Panel affirmed the Tribunal's determination that dumping is likely to cause material injury. In its reasons, the Panel stated:

> Following its review of the administrative record, the Panel concludes that there was evidence in the administrative record on which the Tribunal could make a finding of soft demand conditions in the United States, large U.S. carpet manufacturing over-capacity, as well as a production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. The Panel is also satisfied that there is evidence on the record to support the finding of a surge of imports of the subject goods into Canada from the United States.
>
> The Panel is of the opinion that there was evidence on the administrative record to support the Tribunal's finding of future injury and that its finding of future injury was not patently unreasonable or clearly irrational in the circumstances. The Panel therefore affirms the Tribunal's finding of future injury in this case.

The panel remanded the Tribunal's determination that dumping has caused past and present material injury and directed the Tribunal on remand as follows:

(1) to explain why it failed to use the corrected figures submitted by Shaw;

(2) to conduct another price analysis using the corrected figures submitted by Shaw;

(3) the Tribunal may also prepare price analysis in which it deals separately with Shaw and Queen.

In its Determination on Remand, issued on February 11, 1994, the Tribunal stated:

> "The Canadian International Trade Tribunal, under s.77.16 of the *Special Import Measures Act*, hereby finds, as a result of the binational Panel's specific direction on remand, that the dumping of certain machine tufted carpeting originating in or exported from the United States of America, has not caused and is not causing material injury to the production in Canada of like goods."

The Tribunal responded to each of three directions made by the Panel.

(1) With respect to the use of Shaw's original figures the Tribunal stated that the analysis in the 1993 price study was based on the information in the staff reports. Neither the figures in these sections of the staff report nor Shaw's amended figures were tested during the Tribunal's inquiry, because the parties and the Tribunal did not focus on aggregate pricing data.

(2) With respect to the pricing analysis based on Shaw's amended figures, the Tribunal stated that when Shaw's amended figures are combined with Queen's average Canadian selling prices, the result is that Canadian producers enjoy a substantial price advantage of some 22 to 23 percent over Shaw and Queen's combined prices, even when the effects of

dumping are taken into account.

(3) With respect to the separate analysis of Shaw's and Queen's pricing information, the Tribunal was of the view that a price analysis based on a comparison of the average selling prices of the four Canadian producers used in the 1993 price study to Shaw by itself, or to Queen by itself would not provide, in this case, a sample for U.S. imports of a sufficient size for the Tribunal to rely on the results of such an analysis. Further, the Tribunal also had concerns with respect to the amended figures submitted by Shaw. Therefore, the Tribunal chose not to prepare a separate price analysis of Shaw's and Queen's pricing information.

In its conclusion, the Tribunal noted that the Panel, at page 5 of its decision issued on January 21, 1994, had stated that the Tribunal's finding of past and present injury "will be acceptable only if its 1993 price study establishes the critical nexus between injury and dumping." The Tribunal went on to state that it did not believe that Shaw's amended figures were reliable. It stated that it was difficult for the Tribunal to believe that the rapid and dramatic gains in the market share by U.S. carpets, from 6 percent in 1988 to 39 percent in 1991, could have occurred if U.S. carpets were not aggressively priced against Canadian carpets.

The Tribunal went on to state that as neither set of figures submitted by Shaw was tested by cross-examination or any other means during the Tribunal's inquiry, the Tribunal did not consider, in light of the Panel's direction, that either set of figures was sufficiently reliable to support a determination of past and present injury. In light of the Tribunal's concerns expressed above, the Tribunal was of the view that there was insufficient evidence before it in this Determination on Remand to allow it to conclude that the 1993 Price Study using Shaw's amended figures establishes the critical nexus between injury and dumping as directed by the Panel.

The Tribunal went on to conclude:

Therefore, as the Tribunal has been directed by the Panel to rely

> solely on the 1993 Price Study, the Tribunal has no option but to find in this Determination on Remand, that dumping, in and of itself, has not caused and is not causing material injury to the production in Canada of like goods.

The statement of relief claimed by the Canadian Carpet Institute in its challenge to the Tribunal's Determination on Remand reads as follows:

> An Order pursuant to Rule 75(5) remanding the Determination on Remand of February 11, 1994 for reconsideration by the Tribunal of the Panel's remand of January 21, 1994 with the instructions that the "price analysis" which the Tribunal is directed to perform by remands 2 and 3 thereof is not limited to the "1993 Price Study" referred to at line 3 of page 4 of the Tribunal's Determination on Remand of February 11, 1994.

The Canadian Carpet Institute claims that in limiting itself in the Determination on Remand of February 11, 1994 to the 1993 Price Study, the Tribunal committed an error of jurisdiction or in the alternative, the Tribunal's interpretation of the Panel's January 21, 1994 remand decision as an instruction which limited it to the 1993 Price Study was patently unreasonable. Accordingly, the Canadian Carpet Institute submits that the Determination on Remand ought to be returned to the Tribunal with the instructions that the Tribunal reconsider the January 21, 1994 remands without being restricted to the 1993 Price Study.

The Tribunal did not file a response to the challenge to its Determination on Remand. By letter dated March 23, 1994, counsel for the Tribunal indicated that it would not be filing a response to the challenge made by the Canadian Carpet Institute on March 3, 1994.

The Carpet and Rug Institute filed a response to the Notice of Motion challenging the Determination on Remand. The document states that it is a response to a Notice of Motion

pursuant to Rule 75(3)(b), in support of the Tribunal's Determination on Remand that the dumping has not caused and is not causing material injury, and seeking remand of the question of future injury as a consequence thereof.

The relief requested by the Carpet and Rug Institute is as follows:

> **5.1** An Order of the Panel that:
> (a) the Tribunal's determination that dumping has not caused and is not causing material injury is affirmed;
>
> (b) the case be further remanded to the Tribunal with the direction to dispose of the matter in a manner consistent with the failure of the evidence to support a finding that dumping is likely to cause material injury.

It is to be noted that the Panel in its decision of January 21, 1994 remanded to the Tribunal only the question of past and present injury. It specifically affirmed the Tribunal's determination of future injury.

Prior to filing its response, the Carpet and Rug Institute filed a motion pursuant to Rule 63 requesting inter alia an Order granting leave, pursuant to Rule 20(3), to file out of time a challenge to the Tribunal's Determination on Remand of February 11, 1994 and further requesting that the Panel re-examine its decision of January 21, 1994 for the purpose of correcting an accidental oversight, namely its decision to affirm the Tribunal's decision of future injury. It requested that the Tribunal substitute its affirmation of future injury by a decision that the issue of future injury be remanded to the Tribunal. The Panel issued an Order on March 22, 1994 dismissing the Motion brought by the Carpet and Rug Institute.

On March 21, the Panel also dismissed a motion brought by the Canadian Carpet Institute pursuant to Rule 63 for an Order confirming that the Panel's decision of January 21, 1994 was

a final decision insofar as the Panel thereby affirmed the Tribunal's determination that dumping was likely to cause future material injury and directing the Canadian Secretary to forthwith issue a Notice of Completion of Panel Review pursuant to Rule 80. It is to be noted that the Completion of Panel Review is dealt with in Rule 79A of the Article 1904 Panel Rules which took effect on February 12, 1994 and which govern all ongoing panel reviews that are being conducted pursuant to Article 1904.

The Rules which apply to this challenge to this Tribunal's Determination on Remand are those which took effect on February 12, 1994. Accordingly, the Panel's review of the Tribunal's action on remand is governed by Rule 75 and in particular in the instant case by subrule 75(3), which reads as follows:

> **75(3)** If, on remand, the investigating authority has not supplemented the record,
>
> (a) any participant who intends to challenge the Determination on Remand shall file a written submission within 20 days after the date on which the investigating authority filed the Determination on Remand with the panel; and
>
> (b) any response to the written submissions referred to in subrule (a) shall be filed by the investigating authority, and by any participant filing in support of the investigating authority, within 20 days after the last day on which such written submissions may be filed.

The investigating authority (the Tribunal) did not supplement the record in its Determination on Remand. Accordingly, any participant who intended to challenge the Determination on Remand issued on February 11, 1994 was required by the Rules to do so no later than March 3, 1994 and any person who wished to file a response to the challenge was required to do so by the Rules no later than March 23, 1994. Subrule 75(3)(b) provides that any response to a challenge shall be filed by the investigating authority and by any participant filing in support of the investigating authority. (Emphasis added)

The only action taken on remand by the investigating authority in the Determination on Remand issued by it on February 11, 1994 dealt with the issue of past and present injury. It did

not deal with the question of future injury which had not been remanded to it by the Panel, and had been affirmed by the Panel in its decision issued on January 21, 1994.

In the response to the Notice of Motion made by the Canadian Carpet Institute challenging the Tribunal's Determination on Remand, counsel for the Carpet and Rug Institute stated "As a practical matter, CRI initially made a commercial decision not to take this matter further. CRI's position was that it supports the Tribunal's reversal with respect to past and present injury. CRI's decision was predicated upon an assumption that the Tribunal's decision in DOR-2 would be the final chapter in this chain of proceedings." Counsel also stated "Following DOR-2, CRI had elected, in the absence of any challenge to DOR-2, to take no further steps in these proceedings." Counsel raises the fact that on March 3, 1994, the last date it was possible to do so under the Rules, the Canadian Carpet Institute filed a written submission to challenge DOR-2 before the Panel. It is apparent from the above statements of counsel that the CRI had decided to accept the Tribunal's Determination on Remand and that it was fully aware of its right to challenge the Determination on Remand within the time limits specified in Rule 75. In effect, what the CRI is seeking to do is to reverse the Panel's affirmation of future injury made in its decision issued on January 21, 1994. It is not seeking to challenge the action taken by the Tribunal in DOR-2 wherein it concluded that there was no past or present injury. On the contrary, the CRI supports this action on remand. In CRI's response to CCI's Notice of Motion it takes the position that the Tribunal's recision of past and present injury in DOR-2 should be affirmed by the Panel.

Counsel for the CRI states "By seeking to raise, in conjunction with its response to the CCI Challenge, what amounts to a collateral challenge of DOR-2, CRI is, in effect, attempting the equivalent of a cross-appeal in civil proceedings." However, Rule 75 is limited to a review of the action taken by the investigation authority pursuant to a remand of the panel. The Tribunal's finding of future injury was affirmed by the Panel in its decision of January 21, 1994. The Panel did not remand the question of future injury to the Tribunal. The only matter remanded to the Tribunal in this Panel's decision of January 21, 1994 was the issue of past and

present injury and not future injury. The Tribunal's action on remand was limited to a determination of the issue of past and present injury. It is that action of the Tribunal that this panel is called upon to review under Rule 75.

Further, the CRI did not challenge the Determination on Remand issued by the Tribunal on February 11, 1994. Accordingly, pursuant to Rule 75(3)(b), the CRI is limited to filing a response in support of the investigating authority. It cannot under the guise of supporting the action on remand by the investigating authority also seek to challenge the decision of the panel by having it withdraw its affirmation of future injury and remand the question of future injury to the Tribunal with a direction to dispose of the matter in a manner consistent with the failure of the evidence to support a finding of future injury.

Subrule 75(5) provides that where a Remand Determination is challenged, the panel shall issue a written decision within ninety (90) days of the Determination on Remand being filed either affirming the Determination on Remand or remanding it to the investigating authority. This Panel is of the opinion that the Carpet and Rug Institute cannot now challenge before this Panel under Rule 75 the affirmation of future injury which this Panel made in its decision of January 21, 1994.

In any event, this Panel's affirmation of future injury was based on the following finding of the Tribunal in its first Determination on Remand issued on May 25, 1993 (DOR-1).

> The Tribunal confirms its finding that dumping is likely to cause material injury. In addition to the reasons provided in the finding, the Tribunal adds that, given the competitive nature of U.S. and Canadian carpet prices, it is clear that anti-dumping duties are necessary to help offset the advantage conferred by dumping. This advantage has helped U.S. carpet imports to surge into Canada in unprecedented volumes, despite ongoing weak market conditions

in Canada, especially in 1990 and 1991.

This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, these conditions are likely to persist for some time and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

The Tribunal further notes that CUSFTA provided for a 10-year transition period, beginning in 1989, during which the Canadian industry could gradually adjust to lower tariffs. In the opinion of the Tribunal, the effect of continued dumping at the levels established by the Deputy Minister would be to virtually eliminate the remaining portion of this transition period. As the Tribunal observed in its statement of reasons, [d]umping has further reduced the time required by the Canadian industry to make the necessary adjustments to compete effectively in a North-American free-trade environment.

> For greater certainty having regards to the specific direction in the remand, the Tribunal considers that this determination does not depend solely on the existence of dumping as a cause of past injury, for the reasons given above.

Turning now to the challenge by the Canadian Carpet Institute to the Tribunal's Determination on Remand with respect to past and present injury, it is to be noted that this is the second Determination on Remand issued by the Tribunal as a result of Panel action. In the first remand issued on April 7, 1993 the Panel remanded, in part, the finding of the CITT dated May 6, 1992 in Inquiry NQ-91-006. It remanded the Tribunal's determination that dumping has "caused" past and present material injury, and directed the Tribunal on remand to determine whether dumping in and of itself caused material injury and to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following:

(a) An analysis in detail of the 30 to 32 accounts involving lost sales allegations referred to in the post-hearing briefs of the CITT and the Canadian Carpet Institute ("CCI") before the Panel, including an analysis of whether they are quantitatively (by volume) or qualitatively significant, and how (if at all) they reasonably support a determination of causation;

(b) An analysis in detail of the staff's price study in CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol. 6, Confidential Staff Report at 66 to 77, and how (if at all) it reasonably supports a determination of causation. In this regard, the Tribunal should analyze (1) how dumping margins and volumes found by the Deputy Minister relate to price movements identified in the staff's study and (2) how other non-dumping factors (both price and non-price) relate cumulatively to those price movements and/or lost sales or market share shifts;

(c) An analysis in detail of the staff finding of a 13 cent decline in the domestic

average price per square meter over the course of 1991 referred to in CST Vol. 4, Public Staff Report at 1.214.82, and how (if at all) it reasonably supports a determination of causation.

On May 25, 1993, the Tribunal issued a Determination on Remand (DOR-1) confirming its finding of past and present injury. In its action on remand, the Tribunal did not perform any of the analysis called for by the Panel, but did a new analysis of its data identified as the 1993 Price Study which was based on the CST Vol. 6, Confidential Staff Report at 66 to 77. The 1993 Price Study compared the average Canadian selling prices of the two principal U.S. exporters, Shaw Industries, Inc. (Shaw) and Queen Carpet (Queen), with the average selling prices of four of the most stable and efficient Canadian producers. The results of the 1993 Price Study, and the conclusions that the Tribunal drew from it, were outlined in detail in the Tribunal's Determination on Remand.

On June 9, 1993, the Carpet and Rug Institute, on behalf of U.S. carpet producers, filed a challenge to the Tribunal's Determination on Remand. The CRI alleged that the result of the Tribunal's new analysis was fundamentally flawed as it was based on erroneous data and therefore the results could not support a finding of causation of material injury (past or present). Also, the Tribunal did not explain why it did not rely on revised data submitted by Shaw during the course of the Tribunal's original inquiry. Since the Tribunal in DOR-1 did not perform any of the analysis called for by the Panel in its decision of April 7, 1993, the Panel in its decision issued on January 21, 1994 stated that the Tribunal's DOR would be acceptable only if the new analysis of the Tribunal's data (its 1993 Price Study) established the critical nexus between injury and dumping. Accordingly, the Panel remanded the Tribunal's determination that dumping has caused past and present material injury and directed the Tribunal on remand as follows:

(1) to explain why it failed to use the corrected figures submitted by Shaw;

(2) to conduct another price analysis using the corrected figures submitted by Shaw;

(3) the Tribunal may also prepare price analysis in which it deals separately with Shaw and Queen.

In its action on remand dated February 11, 1994, the Tribunal stated that it was of the view that as neither set of figures submitted by Shaw was tested by cross-examination or any other means during the Tribunal's inquiry, the Tribunal did not consider, in light of the Panel's direction, that either set of figures was sufficiently reliable to support a determination of past and present injury and that there was insufficient evidence before it to allow it to conclude that the 1993 Price Study using Shaw's amended figures established the critical nexus between injury and dumping as directed by the Panel. In these circumstances, the Tribunal made a finding that there was no past or present injury.

This Panel is of the opinion that the Tribunal in so deciding did not commit any error which amounted to an error of jurisdiction or any other reviewable error.

At the hearing to review the DOR-1 held on December 20, 1993, counsel for each of the participants agreed that the appropriate standard of review was that set out by the panel in the Beer (Injury) case (CDA-91-1904-02) decided on February 8, 1993. This standard was recited in this panel's decision of January 21, 1994 as follows:

> As was stated by the Panel *In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (Injury),* CDA-91-1094-02, decided on February 8, 1993, the scope of a Panel's inquiry in a review of a DOR is much narrower than the scope of its review of the Tribunal's original Determination. It is not open to the Panel to revisit the original Determination with respect to any issue not covered by the Remand. "The Panel's inquiry in reviewing the

> DOR is thus limited to deciding whether the Tribunal addressed the question[s] that the Panel directed to it, followed the Panel's instructions, and in so doing reached a result that is not patently unreasonable and is supported by at least some evidence in the Tribunal's investigative record".

It has now been urged on this Panel by counsel for the CRI that since January 1, 1994, the applicable standard of review is now the less onerous one of "correctness" or "reasonableness", depending on the context, rather than "patent unreasonableness". Counsel for the CCI referred to the Tribunal's interpretation of its remanded instructions as "clearly wrong" and thereby patently unreasonable. This Panel finds that the Tribunal addressed the questions that the panel directed to it and in so doing reached a result that is neither patently unreasonable or unreasonable.

Therefore, this Panel affirms the Tribunal's action on remand that the dumping of certain machine tufted carpeting originating in or exported from the United States of America, has not caused and is not causing material injury to the production in Canada of like goods.

This Order constitutes an Order under subrule 75(5) and is the final action in the Panel review. Accordingly, the Panel directs the Canadian Secretary to issue a Notice of Final Panel Action pursuant to Rule 79A of the Article 1904 Panel Rules.

SIGNED IN THE ORIGINAL BY:

JOHN D. RICHARD, Chairperson

JEAN GABRIEL CASTEL

JAMES CHALKER

MICHAEL D. SANDLER

MARTIN J. WARD

Issued on this 21st day of April, 1994

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
	)	
The finding of material injury	)	
made by the Canadian International	)	Secretariat File No.
Trade Tribunal respecting machine	)	CDA-92-1904-02
tufted carpeting originating in or	)	
exported from the United States	)	

ORDER

Upon consideration of the motion pursuant to Rule 75(3)(a) challenging the Determination on Remand issued by the Canadian International Trade Tribunal on February 11, 1994, filed on behalf of the Canadian Carpet Institute, and upon all other papers and proceedings herein, it is hereby

ORDERED that the motion is dismissed.

SIGNED IN THE ORIGINAL BY:

JOHN D. RICHARD, Chairperson

JEAN GABRIEL CASTEL

JAMES CHALKER

MICHAEL D. SANDLER

MARTIN J. WARD

Issued on this 21st day of April, 1994