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

IN THE MATTER OF:

Synthetic Baler Twine With A Knot Strength Of 200 Lbs or less Originating in or Exported from the United States of America	: :	Secretariat file No. CDA-94-1904-02

Panel: Robert E. Ruggeri, Esq., Chairman
Edward C. Chiasson, Q.C.
Prof. David A. Gantz
Jane C. Luxton, Esq.
Prof. Leon E. Trakman

DECISION OF THE PANEL
(April 10, 1995)

Appearances:

John B. Laskin and John P. Koch argued for Bridon Inc. & Bridon Pacific Ltd.

John Syme argued for Canadian International Trade Tribunal. With him on the brief was Joel J. Robichaud.

Paul LaBarge argued for Tecsyn International, Inc. With him on the brief were David Liston and Greg Kanargelidis.

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OPINION AND ORDER OF THE PANEL

INTRODUCTION

This Binational Panel was constituted pursuant to Chapter 19 of the North American Free Trade Agreement ("NAFTA") to review an April 22, 1994 finding of the Canadian International Trade Tribunal ("CITT" or "Tribunal"). The Tribunal found that the dumping of synthetic baler twine with a knot strength of 200 pounds or less originating in, or exported from, the United States of America had caused, was causing, and was likely to cause material injury to the production of like goods in Canada.

The Complainants, Bridon Cordage, Inc. and Bridon Pacific Limited, in their written submissions challenged the Tribunal's finding on several grounds:

> Did the Tribunal commit an error of law or jurisdiction in the manner in which it applied, or failed to apply, the GATT Antidumping Code and other GATT-related rules? Did the Tribunal commit an error by not having segregated and quantified the other potential causes of injury to the Canadian industry when it determined material injury to the domestic market under Special Import Measures Act?
>
> Did the Tribunal commit errors of law and/or fact in the manner in which it analyzed the price effects of imports from Europe (primarily Portugal), customer purchasing patterns, price leadership, and the Canadian market structure, when determining that dumped imports from the United States caused material injury to Canadian producers?
>
> Did the Tribunal commit errors of law and/or fact by considering non-price factors such as the geographical proximity of U.S. producers and the structure of in-season sales? Did it commit error by not considering such other non-price factors as the 1994 buying season, the actions of the largest Canadian producer of the like merchandise, and other aspects of the effects of European-sourced sales in determining material injury?

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 participants, and the public and *in camera* hearing held in Ottawa on January 5, 1995, the Panel:

Affirms in part and *Remands* in part.

PROCEDURAL HISTORY

Following the filing of a dumping complaint by TecSyn International, Inc., and a notice of preliminary determination of dumping by the Deputy Minister of National Revenue for Customs and Excise ("Deputy Minister") which was published on January 15, 1994[1], the Tribunal commenced a material injury inquiry under section 42 of the Special Import Measures Act ("SIMA"). The Deputy Minister's investigation of dumping covered importations of the subject goods from January 1 to June 30, 1993. On March 23, 1994, the Deputy Minister made a final determination of dumping with regard to the subject goods.[2] The Tribunal held two days of hearings in Ottawa on March 28 and 29, 1994. The Tribunal's Finding was issued on April 22, 1994 and its Decision and Statement of Reasons were issued on May 9, 1994.

A Binational Panel was requested pursuant to Article 1904 of the NAFTA. Briefs were filed by the Complainants and the Respondents CITT and TecSyn. Counsel for the Complainants and the two Respondents appeared before the Panel during the hearing.

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1 *Canada Gazette*, Part 1, Vol. 128, No. 3, 258-59 (January 15, 1994).

2 *Canada Gazette*, No. 14, 2014-15 (April 2, 1994).

I. STANDARD OF REVIEW

Binational panels are directed by NAFTA Article 1904(3) to apply:

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

In the case of Canada, Annex 1911 defines the standard of review as the grounds set forth in subsection 18.1 (4) of the Federal Court Act.[3] Subsection 18.1(4) provides that the Tribunal's decisions will be reviewed on the grounds that it:

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

In arriving at an appropriate standard of review, NAFTA panels are required to consider, among other factors, "general legal principles".[4] NAFTA Article 1904(3) directs binational panels

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[3] R.S.C.1985, c.F-7.

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

to apply the same general legal principles that a Federal Court is required to apply in a judicial review.

There is a consensus among the participants in this case, and the Panel agrees, that the standard of review for questions of jurisdiction, including issues of natural justice, is "correctness". The tribunal concerned must be "correct" on questions of jurisdiction in order to be upheld. If the Tribunal is incorrect, the Panel is required to remand, with instructions for the tribunal to correct the error.[5]

The Panel holds, in this case, that no error of jurisdiction occurred. The Tribunal acted within its jurisdiction in terms of subsection 18.1(4) of the Federal Court Act. We find no instance in which it exceeded its statutory power.

The standard of review in issue in this case is limited to issues of law and fact. The standard of review ordinarily applied to questions of fact is that there must be a "rational connection" between the facts and the tribunal's finding. The Panel will remand only if "the evidence, viewed reasonably, is incapable of supporting [the Tribunal's] finding...."[6] Such evidence need not be substantial; nor

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[5] See, e.g., *Public Service Alliance v. Canada (A.G.)*, [1991] 1 S.C.R.614; *U.E.S. Local 286 v. Bibeault*, [1988] 2 S.C.R.1048; *Syndicat des employés de production du Quebec et de l'Acadie v. Canadian Labour Relations Board*, [1984] 2 S.C.R.412. See, also, *Certain Beer originating in or exported from the United States of American by G.Heileman Brewing Company, Inc., Pabst Company, and the Stroh Brewing Company for use or consumption in the Province of British Columbia*, dated August 6, 1992, Canadian Secretariat, File CDA-91-1901-01, at pp.11-13; *In the Matter of: Final Determination of Dumping made by Revenue Canada Customs and Excise, Regarding certain Machine Tufted Carpeting originating in or exported from the United States of America*, dated May 19, 1993, Canadian Secretariat, File CDA-92-1904-01 at 7-9.

[6] *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 at 669. [*Hereinafter* referred to as *Lester*.]

need the Panel arrive at the same determination as the Tribunal in light of it.[7] The standard of review traditionally applied to alleged errors of law is "patent unreasonability". That test prescribes that a tribunal's determination be upheld unless it is contrary to reason or good sense, as when it is irrational. The test does not apply simply because the tribunal concerned is wrong on an issue of law.

> 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.[8]

The "patent unreasonability" test gives rise to a very exacting standard of review. As was stated by McLachlin J. in *W.W. Lester Ltd. v. U.A., Local 740* [9]

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the labour board in this case... Only ... where the interpretation placed on the legislation is patently unreasonable, can a court interfere.[10]

In the case of *Blanchard v. Control Data Canada Ltd.*[11], Lamer J., as he then was, stressed that the "patent unreasonability" test required an exceptional degree of deference to be given to the tribunal's decision. He asserted that patent unreasonability "is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this court has applied and continues to apply."[12]

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7 *Id.* at 668-69.

8 *See, e.g., Canada (A.G.) v. Public Service Alliance of Canada,* [1993] 1 S.C.R.941, at 964.

9 *Lester, supra* note 6 at 406.

10 *Id*.

11 (1984), 14 D.L.R.(4th) 289 at 302.

12 *Id*. Any evidence in support of the tribunal's finding is sufficient to satisfy the "patent unreasonability" standard. "[I]f there is any evidence capable of supporting a finding ... the

Despite its customary application to errors of law, the "patent unreasonability" test does not apply in every case of an alleged error of law. Rather, it may apply when a privative clause[13] excludes judicial review of the Tribunal's decision, or it may not apply to the extent that legislation or court decisions vary from it. This Panel has reconsidered the application of the "patent unreasonability" test for two related reasons. First, the present case follows a change in the *Special Import Measures Act*,[14] in which the Tribunal's privative clause has been deleted. Second, this development has particular significance in light of the Supreme Court's decision in *Pezim v. British Columbia (Superintendent of Brokers*).[15] The Court stated that whether a Tribunal's decision was protected by a privative clause was "crucial" in determining the degree of deference to be accorded to its

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court will defer to the Board's finding even though it may not have reached the same conclusion." McLachlin J. in *Lester*, *supra* note 6 at 418. In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd. (Bradco)*, [1993] 2 S.C.R. 316, 340, Sopinka J. added: "Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges disagree with its decision."

[13] Privative clauses are described as follows. "It is common for legislative bodies, when establishing a new administrative tribunal, to include in the constituent statute a "privative clause", which is a provision purporting to exclude judicial review of the tribunal's decision. Privative clauses come in a variety of fairly standard forms. There is the "finality clause", which declares that the decisions of the tribunal shall be "final" and not subject to review; the "exclusive jurisdiction" clause declares that the tribunal's jurisdiction to decide issues before it is exclusive and unreviewable; the "no-certiorari clause" declares that certiorari and other remedies which would otherwise be available for review purposes are not available to review the tribunal's decisions; and one could also include "notice clauses" and "limitation clauses" which exclude review unless prior notice has been given or unless proceedings are brought within a short time." Peter Hogg, *Constitutional Law of Canada* 197 (Carswell, 1992).

[14] R.S.C.1985, c.S-15 (as amended), [*hereinafter* referred to as *SIMA*.]

[15] [1994] 2 S.C.R.557, [*hereinafter* referred to as *Pezim*.]

decisions.[16]

In view of this deletion of the privative clause from section 76(1) of the SIMA,[17] and the modified approach adopted by the Supreme Court to the standards of review in *Pezim*, the Panel will review herein the standard of review that ought to apply in the case at hand.[18]

Effective January 1, 1994, the SIMA was amended to implement certain of Canada's obligations under Chapter Nineteen of the NAFTA. Among these changes, the Tribunal's privative clause, previously found in section 76(1), was deleted. Specific provision was made instead for judicial review of orders and findings of the Tribunal.[19] While the Panel is unwilling to speculate as to the specific intention of the legislature in deleting the Tribunal's privative clause from section 76(1), it considers that deletion relevant in determining the standard of review to apply here, particularly in light of *Pezim*.

In *Pezim*[20] the Supreme Court of Canada recently articulated the standard of reviews as a spectrum. Iacobucci J., writing for the Court, articulated a spectrum of standards of review ranging

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16 *Id.* at 590.

17 On this issue, *see National Corn Growers Association v. Canada (Import Tribunal)*, [1990], 2 S.C.R.1324, at 1370. *See, also, the Binational Panel Decision in Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States (Injury),* CDA-93-1904-07, Decision of 18 May, 1994 [*hereinafter*, *Hot-Rolled Steel*] at 13-15.

18 On the inference that a change in legislation is remedial, *see* the Interpretation Act, R.S.C.1985, c.1-23, section 12.

19 North American Free Trade Agreement Implementation Act, S.C. 1993, c.44, section s.17(1).

20 *Supra* note 15.

from reasonableness to correctness, including patent unreasonability.[21] He stated that the precise standard to apply in each case depends upon an analysis of the function of a tribunal.[22] Under the heading, "Principles of Judicial Review", Iacobucci J. emphasized that what is "crucial is whether or not the agency's decisions are protected by a privative clause".[23] He evaluated in the following manner the standard of review that ought to apply in the absence of a privative clause:

> What is an appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?[24]

Based on the specialized mandate of the British Columbia Securities Commission and the issue addressed by it, the Supreme Court concluded that the Commission's decision was entitled to "considerable deference". Iacobucci J. stated the issue in *Pezim* in this way:

> [E]ven where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.[25]

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[21] *Pezim, supra* note 15, at 589-90 *discussed in Canadian Broadcasting Corporation v. CLRB, S.C.C.* January 27, 1995 at 14-15.

[22] *Id.*

[23] *Pezim, supra* note 15 at 590 *quoted in Canadian Broadcasting Corporation* at 14. The approach of the Supreme Court in *Pezim* is consistent with that taken by the Binational Panel in *Hot-Rolled Steel*. There, after a review of the function of the Tribunal, the Panel concluded that "the applicable standard of review for errors of law within the specialized jurisdiction of the Tribunal is patent unreasonability." It went on to say that "this conclusion is given support by the existence in SIMA of the privative clause."

[24] *Pezim* at 588.

[25] *Id.* at 591.

Applying the reasoning of *Pezim*, it is apparent that the Tribunal in the case at hand continues to exercise a specialized function which the elimination of the privative clause did not alter. It is not disputed that the issues dealt with by the Tribunal fell within its specialized function. As a result, even in the absence of a privative clause, the decisions of the Tribunal are entitled to "considerable deference".

Beyond stating that the deference to be accorded the Tribunal concerned ought to be "considerable", the Supreme Court in *Pezim* did not determine the precise extent of deference to be applied in each specific case. Iacobucci J. noted, instead, that the degree of deference "ranges from the standard of reasonableness to that of correctness".[26] He elaborated as follows:

> At a reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal.[27]

The *Pezim* case involved a tribunal's decision from which there was a statutory right of appeal, but which was not protected by a privative clause. As a result, the Court held that the applicable standard of review fell between the two extremes of correctness and patent unreasonability. It held further that the decision of the Securities Commission was not subject

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[26] *Id.* at 590.

[27] *Id.*

to the patently unreasonability standard, but to a standard of "considerable deference".[28]

In the current case, while the Tribunal's decision is not protected by a privative clause, there is no right of appeal from its decisions. The only right that arises is one of judicial review. There is no reason, in logic or law, to conclude that it is entitled to anything less than "considerable deference". While that deference does not extend to the point of patent unreasonability, it resides close to that end of the spectrum of deference.

Complainants contend that, because binational panels are themselves expert in international trade, the Tribunal is not entitled to the same degree of deference that ordinarily would be accorded to it by the Federal Court. The Panel disagrees. Pursuant to the NAFTA, Article 1904(1), binational panel review replaces judicial review by domestic courts in certain defined circumstances. Paragraph 3 of Article 1904 provides:

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

Annex 1911 states that the standard of review for Canada means "the grounds set out in subsection 18.1(4) of the *Federal Court Act*." Under section 18.1(4) the Federal Court is obliged by law to give "considerable deference" to the decisions of the Tribunal. In fulfilling their mandate to "apply the standard of review... that a court of the importing Party otherwise would apply" binational panels are obliged to apply the same standard that would be used by the Federal Court.

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[28] Canadian courts have since begun to interpret the reasoning of the Supreme Court in *Pezim*. Some judges have suggested that "considerable deference" equates with "patent unreasonability". *See, for example, Sivasamboo, et al. v. The Minister of Citizenship and Immigration, F.C.T.D.*, November 30, 1994, Richard J. (unreported) at 18. It is difficult to accept such a conclusion in all cases, although in extreme cases this might be so. *See, for example, United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Limited* [1993] 2 S.C.R.316 at 332; and *Lester, supra* note 6 at 406.

There is also a practical need for holding that binational panels should apply the same standard of review as that used by the Federal Court. This need is for certainty, consistency, and predictability in decision-making. In antidumping cases, where the Tribunal's investigation involves companies from countries that are both NAFTA Parties and non-Parties, the Tribunal's final injury determination could result in simultaneous review before both the Federal Court and a binational panel. Taking the Complainant's argument to its logical conclusion, the result would be that different standards of review would be applied to different participants in exactly the same circumstances. There is no indication in the NAFTA or in the SIMA that such a result was intended. To hold that the Tribunal is not entitled to the same degree of deference accorded by the Federal Court would unjustifiably open the door to forum shopping.

In advancing this argument, Complainants rely on certain provisions of the NAFTA respecting the qualifications of panelists. They also rely on the pronouncements of the Supreme Court of Canada in *Canada (Attorney General) v. Mossop*[29] and *Pezim*. In *Pezim*, the Court stated:

> At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases ... where the tribunal has no greater expertise than the court on the issue in question...[30]

Paragraph 1 of the NAFTA, Annex 1902.2, states that Chapter Nineteen Panelists

> shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgement and *general familiarity with international trade law*.

[Emphasis added.] Complainants assert that these criteria qualify binational panelists as "experts". Based on the concept of relative expertise articulated in *Mossop* and *Pezim*, they argue that this Panel

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[29] [1993] 1 S.C.R.554, [*hereinafter* referred to as *Mossop]*.

[30] *Pezim, supra* note 15 at 590.

has the same relative degree of expertise as the Tribunal and therefore, that the Tribunal's decisions on issues of fact and law within its jurisdiction should not be entitled to deference. They conclude that a correctness standard should be applied in these circumstances.

The Panel holds that the requirement that panelists be familiar with international trade law under paragraph 1 of the NAFTA, Annex 1902.2 is not intended to modify the standard of deference that is ordinarily accorded an expert tribunal. The requirement that panelists be familiar with international trade law assists panelists to fulfil their mandate by making it easier for them to understand the types of issues that are dealt with by the Tribunal. The panel's expertise is somewhat analogous to the specialization which sometimes develops in divisional courts. That specialization does not alter the substantive mandate undertaken by the courts. Nor ought it to do so here.

The Panel holds that the standard of review applicable to these proceedings with respect to issues of jurisdiction is correctness. With respect to issues of fact or law within the Tribunal's area of expertise, the standard of review is considerable deference.

II. ERRORS OF LAW AND FACT

Complainants allege a number of errors of jurisdiction, law and/or fact with respect to the Tribunal's finding that dumped synthetic baler twine imported from the United States has caused material injury to Canadian producers of like goods. The Panel has elected to address these issues as follows:

A. Did the Tribunal commit an error of law or jurisdiction in the manner in which it applied, or failed to apply, the GATT Antidumping Code[31] and other GATT-related rules? Did it commit error by failing to segregate and quantify the other potential causes of injury to the Canadian industry when it determined material injury to the domestic market under SIMA?[32]

B. Did the Tribunal commit errors of law and/or fact in the manner in which it analyzed the price effects of imports from Europe (primarily Portugal), customer purchasing patterns, price leadership, and the Canadian market structure, when determining that dumped imports from the United States caused material injury to Canadian producers?

C. Did the Tribunal commit errors of law and/or fact by considering non-price factors such as the geographical proximity of U.S. producers and the structure of in-season sales? Did it commit error by not considering such other non-price factors as the 1994 buying season, Poli-Twine's[33] own

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[31] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade dated December 17, 1979, GATT BISD (1980) [*hereinafter* "the GATT Antidumping Code"].

[32] Special Import Measures Act, R.S.C. 1985, c.S-15, §§.41(1), 42, 76(1), 77.011(5), 77.015(1) [*hereinafter* "SIMA"].

[33] Poli-Twine is the largest Canadian producer. *CITT's Statement of Reasons* at 4. For domestic production percentages *see CITT's Statement of Reasons* at 10 (table 3).

actions, and other aspects of the effects of European-sourced sales in determining material injury?

In this analysis, the Panel is mindful of the very narrow standard of review applicable to these issues -- the "considerable deference" necessarily afforded by this Panel to the Tribunal's analysis of the law and interpretation and application of the facts, as discussed in Part I of this opinion. It is also self-evident that the various alleged errors of law discussed in section A are related to the questions of law and fact discussed in sections B and C, as most share a common theme: Collectively, they constitute a fundamental critique of the manner in which the Tribunal analyzed causal factors *other* than the dumped U.S. source imports that affected pricing of synthetic baler twine in the Canadian market, and the resulting impact on Canadian producers. The Panel has included citations to the record, where appropriate, on account of the fact that many of the alleged errors disputed the adequacy of support in the record for the Tribunal's determinations.

A. Did the Tribunal Commit Errors of Laws or Jurisdiction in the Manner in Which it Treated Possible Causal Factors Other Than Dumped Imports from the United States?

1. The Relationship of Canada's GATT Obligations to SIMA in Determining Material Injury.

SIMA Section 42(1)(a) requires the Tribunal to determine whether dumping of the subject goods has caused, is causing or is likely to cause material injury to the domestic market.[34] The Tribunal, acting under SIMA, found that "price erosion had taken place over the period under review"[35] and that "the industry suffered price erosion and price suppression caused by the dumped

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[34] Special Import Measures Act, R.S.C. 1985, c. S-15.

[35] *CITT's Statement of Reasons* at 12; *see* testimony of Nolin, public transcript at 46-49.

imports and that this price-based injury was sufficiently large to be material."[36]

Complainants allege that the Tribunal, in making this determination, failed to follow the "legal standard" for the determination of causation set out in Article 3(4) of the GATT Antidumping Code, which provides in pertinent part that

> 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 which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.[37]

Likewise, Complainants allege that the Tribunal failed to apply the GATT Antidumping Committee Recommendation[38] criteria in making its determination of threat of future injury[39]. As indicated in Part I of this opinion, the Panel has concluded that the alleged errors are alleged errors of law, not of jurisdiction. Leaving aside for the moment whether the Tribunal's determination actually complied with GATT standards as explained in the Code and in the Antidumping Committee Recommendation, the Panel observes that the Tribunal was obligated to apply Canada's GATT obligations *only* to the

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[36] *CITT's Statement of Reasons* at 14; *see* testimony of Nolin, public transcript at 46-49.

[37] *See Complainant's Brief* at 21. The 1979 GATT Antidumping Code was superseded on January 1, 1995, for Canada, the United States and at least 79 other nations by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which is one of the Multilateral trade agreements" enacted as part of the 1994 Agreement on Establishing the World Trade Organization. *Department of Foreign Affairs and International Trade. Agreement Establishing the World Trade Organization. Canadian Statement on Implementation, Canada Gazette* Part I, Dec. 31, 1994, at 4847. However, the 1979 Code is applicable to the instant proceeding.

[38] GATT Committee on Antidumping Practices Recommendation concerning Determination of Threat of Material Injury adopted by the Committee on 21 October 1985 (ADP/25), GATT BISD 32S/182 [*hereinafter* "the GATT Committee Recommendation"].

[39] *Complainant's Brief* at 22-24.

extent they are incorporated into the domestic legislation (SIMA[40]) and administrative regulations of Canada. As a previous panel has noted,

> GATT obligations are Canadian law and are to be applied by the Tribunal and this Panel only if they are implemented into domestic law. Otherwise they may be referred to in interpreting ambiguous terminology intended to implement Canada's obligations, or to guide the promulgation of domestic legal rules to implement them.[41]

In a concurring opinion in *National Corn Growers*[42], Justice Wilson stated the following as to judicial review of the Tribunal's interpretation of its own "constitutive" legislation:

> Similarly, I do not think that it is this Court's role on an application for judicial review to look beyond the Tribunal's statute to determine whether the Tribunal's interpretation of that statute is consistent with Canada's international obligations.

There is no question that the Tribunal must apply SIMA and that SIMA is Canada's controlling interpretation of Canada's obligations under the GATT. This requires the Tribunal to look only to SIMA for its duties and obligations and not independently to any of the GATT requirements,

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[40] Special Import Measures Act, R.S.C. 1985, c.S-15.

[41] *Certain Cold-Rolled Steel Sheet Originating in or Exported From the United States of America (Injury),* (CDA-93-1904-09; 13 July 1994 at 27).

[42] *National Corn Growers Association v. Canada (Import Tribunal),* [1990] 2 S.C.R. 1324 at 1348-1349.

though it may look to either the Antidumping Code or the Recommendations for guidance.[43]

In light of the authority cited above, the Tribunal may in its discretion refer to Canada's GATT obligations, but it is never *required* to consider them on a separate basis beyond its application of SIMA. The Tribunal, therefore, could not have committed error by not considering the GATT obligations since it was not obligated to do so. In any event, the Panel is not persuaded by the Complainant's allegation that the Tribunal's reasoning conflicts with the GATT standards. The essence of the Tribunal's findings, as summarized above, is that dumped imports from the United States have caused price erosion and price suppression, and that this price-based injury was material. In reaching this conclusion, the Tribunal considered, *inter alia*, the volume, price and other impacts of imports from Portugal and the United States of the product on the Canadian market[44] as dictated by the GATT Code.

Moreover, there appears to be no credible evidence suggesting that the impact of injury from factors other than dumped imports from the United States was attributed to the injury caused by those dumped imports, even though the two necessarily were analyzed at the same time.[45] Under these circumstances, the Panel is not prepared to conclude that as a matter of law the Tribunal's analysis was insufficient to meet the standard set out in Article 3(4) of the 1979 GATT Antidumping Code.

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[43] *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating In or Exported From the United States (Injury)*, (CDA-93-1904-07, 18 May 1994 at 58, 59) *citing Machine Tufted Carpeting Originating in or Exported From the United States of America* (CDA-92-1904-02; 7 April 1993 at 8.).

[44] *CITT's Statement of Reasons* at 11-13.

[45] *CITT's Statement of Reasons* at 13-14.

2. The Tribunal is Not Required, in Determining the Impact of Various Causal Factors, to Quantify and Segregate All Other Possible Causes of Injury.

Complainants also contend that the Tribunal erroneously violated its legal duty under SIMA and the GATT Antidumping Code by failing to "account separately for the effects of each of the other factors and to isolate the price effects of dumping".[46] This would have essentially required the Tribunal to quantify each and every factor that might be a cause of material injury, not limited to dumped goods from the United States.

In the view of the Panel, Complainant misapprehends the legal requirements for determining causation. As another Panel has stated, "on a plain reading of section 42(1)(a) of SIMA, the Tribunal is required to inquire as to the causal link which may exist between dumping and material injury."[47] The dumping of the subject goods must in and of itself be a cause of material injury to domestic producers. However, there is no requirement that the dumped goods be the *only* cause or even the major or most significant cause. Rather, it is sufficient as a matter of law that the dumped goods be a direct and material cause of injury:

> Canada's international obligations under the GATT require that anti-dumping or countervailing-duties be imposed only where it has been determined that there is a direct link between the dumped or subsidized imports and the material injury to Canadian producers.[48]

It is true that the effects of dumping must be segregated from other causes, and the Tribunal is required under its SIMA obligations to determine whether the dumped goods are cause of material

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[46] *Complainant's Brief* at 22.

[47] *Certain Beer from the United States of America* (CDA-91-1904-02; 26 August 1992 at 25).

[48] *Department of External Affairs. North American Free Trade Agreement, Canadian Statement on Implementation, Canada Gazette* Part I, January 1, 1994, p. 200.

injury. However, neither SIMA nor the GATT rules as incorporated in SIMA require that the other causes be calculated or quantified beyond what is necessary to assure that injury from dumped goods is not being attributed to those other causes.

Nor is there any legal or practical basis for demanding that the Tribunal quantify the other causes or use a specific formula in segregating the potential causes of injury. As the Federal Court has aptly 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 tribunal such as this one [the CITT] to weigh and balance those factors and to decide the importance to be given to each.[49]

As a practical matter, the Tribunal will necessarily weigh various causes in making its injury determination, as it has in this case, but it is an arduous, unnecessary and in some cases virtually impossible task for the Tribunal to quantify or otherwise precisely "account for" the impact of all other potential causes in making its determination of whether material injury is caused by dumped imports.

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[49] *Sacilor Aciereies v. Anti-Dumping Tribunal* (1986), 9 C.E.R. 210 (Fed.C.A.) at 214.

B. Did the Tribunal Commit Errors of Law and/or Fact in The Manner in Which it Analyzed the Relationship of Various Factors Affecting Price in Determining Causation?

1. The Tribunal's Analysis of Portuguese Sales and Customer Purchasing Patterns was Within the Requirements of the Law and Supported by Facts in the Administrative Record.

Complainants further argue that by failing to segregate the price effects of sales by European producers, particularly the Portuguese, the Tribunal failed to account specifically for the impact of IPCO's pricing and purchasing policies in causing material injury to the domestic producers.[50] They suggest that, by not distinguishing these effects, the Tribunal is aggregating the effects on Canadian producers of non-dumped goods with those of dumped goods from the United States. Complainants also challenge major aspects of the Tribunal's analysis of the Canadian synthetic baler twine market. In particular, they dispute the Tribunal's determination as to how prices within that market were determined, including but not limited to the impact of dumped U.S. sales and non-dumped Portuguese sales on the Canadian market and Canadian prices.[51]

These arguments, linked to price leadership, [52] fail to recognize that, as a practical matter, the Tribunal must consider all "relevant" factors in determining whether the dumped goods have caused material injury. So long as the Tribunal bases its determinations of the price effects of dumped goods on Canadian producers, it is not an error if the Tribunal considers other factors which might be an independent cause of material injury, such as the effects of non-dumped imports from Portugal.

Here again, the factual situation is significant. The Tribunal observed that "there are clearly

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[50] *Complainant's Brief* at 26.

[51] *Complainant's Brief* at 25-26.

[52] *See* subpart B(3) for discussion of price leadership issues.

advantages for IPCO to have more than one supplier of the subject goods, not only in terms of price, but also in terms of security of supply."[53] There was sufficient testimony and evidence of record to support the Tribunal's finding in this regard.[54] The Tribunal further determined that, notwithstanding IPCO's buying practices, *all* sellers' prices were required to be competitive with the low bid price:

> [T]he Tribunal found nothing altruistic about IPCO's purchasing decisions with regard to synthetic baler twine. IPCO insists that each bidder's prices be competitive with other suppliers in the Canadian market, which then allows IPCO to source from several suppliers at the same time and always at competitive prices which benefit IPCO's member cooperatives.[55]

Thus, given the facts before the Tribunal, the Panel holds that neither the price leadership, or co-leadership, of Portuguese suppliers in their dealings with IPCO, precludes a finding that dumped imports *from the United States* are a cause of material injury. Even if U.S. producers had simply matched the Portuguese prices in many or even most cases, Canadian producers would have been forced to meet the lower prices offered by Portuguese or U.S. suppliers or be effectively excluded from the market. While the low-priced dumped U.S. sales may not have caused lost sales to Canadian producers in most instances, they clearly contributed to price erosion within the Canadian market. This is especially evident from the fact that dumped imports from the United States were large in absolute volume and more than twice the volume of non-dumped imports from Portugal.[56]

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[53] *CITT's Statement of Reasons* at 13; *see* testimony of Rettaler, confidential transcript at 107, 128.

[54] *See* testimony of Rettaler regarding Poli-Twine's capacity, public transcript at 19-20, confidential transcript at 108-109.

[55] *CITT's Statement of Reasons* at 13; *see* testimony of Rettaler on price as a factor (i.e., competitive pricing), confidential transcript at 120-121, 127-128; testimony of Nolin regarding price-driven nature of market, public transcript at 43-44, 52-53.

[56] *CITT's Statement of Reasons* at 9, table 2.

Even assuming that there had been no evidence on the record demonstrating price leadership by the U.S. producers[57], this Panel is still not persuaded, as a matter of law, that meeting a prevailing price set by another foreign exporter in an affected market is a valid defense to an antidumping action on grounds of absence of injury. The 1979 GATT Antidumping Code, in evaluating the criteria governing a determination of injury, inquires, *inter alia*, "whether there has been a significant price undercutting by the dumped imports *as compared with the price of a like product of the importing country."*[58] Complainants do not claim that the prices of U.S. dumped goods are not undercutting Canadian prices. They claim only that the reason for lower U.S. prices is to meet other import competition.[59] Following the GATT Code, dumped prices are to be compared to domestic prices. In determining that imports give rise to "significant price undercutting," material injury may be present. That is the situation here.

2. The Tribunal's Analysis of Price Discrimination, and the Market Structure as Factors in Determining Causation Did Not Constitute Error.

By definition, dumping is price discrimination between the export price and the price at which the Product is sold in the exporting market.[60] In the present case, there clearly *is* price discrimination,

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57 Which is not the case; *see* part B(3), below.

58 GATT Antidumping Code, Art. 3.2 (emphasis added).

59 *See* part C(2), below.

60 "[A] product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product, exported from one country to another is less than the comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting country." 1979 GATT Antidumping Code, Art. 2.1.

a difference in price between the Canadian and United States markets. Revenue Canada found dumping margins of 16.6 and 14.0 percent for the two U.S. producers.[61]

Thus, in determining whether injury exists, the Tribunal must consider the effects of pricing in the Canadian market, i.e., has the dumped price of U.S. synthetic baler twine caused material injury to the Canadian producers? In making this determination, the Tribunal may reasonably inquire as to the manner in which prices are determined in the Canadian market, including evidence of price leadership. In this case it may consider selling practices for both "booking" and "in-season" sales.

As a result of its analysis, the Tribunal found that there was erosion of the price structure caused by the dumping of United States-produced synthetic baler twine. It also found that "price erosion had taken place over the period under review"[62] and that "the industry suffered price erosion and price suppression caused by the dumped imports and that this price-based injury was sufficiently large to be material."[63] The Tribunal based this decision in part on the following:

> Selling prices for the subject goods between 1990 and 1993 were reduced by approximately 6 percent. In 1993, Poli-Twine had to reduce its original price quotations to IPCO by a substantial amount in order to secure business that would otherwise have gone to [U.S.] suppliers, whose low prices were only made possible by dumping. Those price reductions had a material effect on the firm's profitability.[64]
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> ....

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61 *CITT's Statement of Reasons* at 6.

62 *CITT's Statement of Reasons* at 12; *see* testimony of Nolin, public transcript at 46-49.

63 *CITT's Statement of Reasons* at 14; *see* testimony of Nolin, public transcript at 46-49.

64 *CITT's Statement of Reasons* at 14; *see* testimony of Nolin, public transcript at 48, confidential transcript at 4-5, 42-45, 48, 96-97, 127.

> The Tribunal is persuaded that competitive pressures in Canada arise predominantly from U.S., rather than Portuguese, suppliers of synthetic baler twine. While Portuguese imports are obviously a factor in the price determination process, there is no doubt in the Tribunal's mind that the United States, by virtue of its dominant share of the import market and its ability to compete in the in-season market, plays the key role among exporters in determining price levels in the Canadian market.[65]

We are persuaded by the Tribunal's reasoning. In determining the effect of dumped goods on price it is crucial to consider the structure of the market. This is especially necessary here, since baler twine is a commodity sold primarily on the basis of price.[66] There are two selling seasons during which synthetic baler twine is sold in Canada. First, there is a booking season/shipping season during which time most deliveries occur. Second, there are "fill-in" or "in-season" sales that occur while baler twine is being used during the season, to satisfy spot shortages.[67]

Evidence on the record established that, during the booking season, the price was set either by the U.S. producers, so that they remained competitive with the Portuguese producers,[68] or by the Portuguese producers themselves. Low prices were created by competition among Canadian goods, non-dumped Portuguese (or other European) goods, and dumped goods from the United States.

Further evidence on the record established that the price for in-season sales was determined

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[65] *CITT's Statement of Reasons* at 14; *see* testimony of Rettaler on Western Canada market, confidential transcript at 84-85, 95, testimony of Nolin, public transcript at 35-36, 53; Nolin testimony on direct competition with Canadian producers, public transcript at 47, confidential transcript at 58-59, 84-85, 107, 111.

[66] *CITT's Statement of Reasons* at 15, *see* testimony of Rettaler on twine as a commodity, public transcript at 64-65; testimony of Rettaler regarding price as a factor, confidential transcript at 120-121, 127-128.

[67] *See CITT's Statement of Reasons* at 5; *see* testimony of Nolin, public transcript at 18, 22, testimony of Rettaler, public transcript at 61-62.

[68] *See* testimony of Nichols, Nolin and Rettaler, confidential transcript at 10, 39, 42-45, 96-97, 127, testimony of Nolin, public transcript at 34-35.

by the prices set during the prior booking season. From this the Tribunal inferred that Canadian manufacturers of baler twine could not increase their prices during this period without loss of sales or without having to provide rebates to existing customers.[69] The Tribunal also recognized that the U.S. manufacturers have an advantage over European producers of baler twine in being able to serve the in-season market due to the U.S. manufacturers' proximity to the Canadian market. This proximity, the Tribunal maintained, has further enabled U.S. producers to erode market prices in Canada during the in-season:

> Foreign suppliers also have different capacities to respond to in-season demand in the markets in both Eastern and Western Canada. ...The smaller volumes and speedy delivery required for those in-season sales are claimed to preclude competition from offshore suppliers, such as those in Portugal that ship their twine to Canada by ocean freight. In contrast, US manufacturers of synthetic baler twine are geographically closer to markets in Western Canada than Poli-Twine and are, therefore, well placed to serve this in-season market.[70]

Further, testimony before the Tribunal indicated that U.S. producers were able to compete more effectively in the Western Canadian market on account of their proximity to that market, in part because of reduced freight costs.[71] On the basis of this evidence, the Tribunal found that Portuguese baler twine did not compete as directly in the Western Canadian markets as did U.S. twine, and that only Canadian and U.S. suppliers were active during the in-season.[72]

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[69] *See* testimony of Rettaler, public transcript at 84-85, 87; confidential transcript at 11 1-112. *See* testimony of Nolin, public transcript at 54. *See* testimony of Nolin, confidential transcript at 3-5, 7-8.

[70] *CITT's Statement of Reasons* at 13; *see* testimony of Rettaler regarding situation of U.S. producers in Western Canada, public transcript at 86-87, confidential transcript at 84-85, 95.

[71] *CITT's Statement of Reasons* at 13-14; *see* testimony of Nolin regarding freight factor in Western Canada market, public transcript at 35-36, 53.

[72] *CITT's Statement of Reasons* at 13; *see* testimony, *supra* notes 35 & 36.

Given these market conditions, the booking price is effectively the *ceiling* for the in-season sales price as long as U.S. producers remain in the market, because that competition prevents the Canadian in-season price from being raised above that "competitive price". This, of course, is price suppression, in this instance as a result of dumped goods from the United States. The Panel finds that, as the in-season market for synthetic baler twine comprised about 20 percent of the annual Canadian market for synthetic baler twine during the period under investigation and that U.S. producers suppressed prices in that market,[73] the Tribunal could reasonably have concluded that the U.S. producers caused material injury there. In any event, regardless of whether this Panel if reviewing the issue *de novo* would fully agree with the Tribunal's analysis, there is evidence on the record to support the Tribunal's finding of price suppression by U.S. source sales. Moreover, it is evident to the Panel that consideration of the Canadian market structure by the Tribunal was necessary to permit the Tribunal to accurately analyze the price effects of dumped goods on domestic prices.

3. The Tribunal's Analysis of the Effects of Price Leadership was Supported by the Record.

Complainants also allege that the Tribunal erred both in determining the manner in which prices were set in the Canadian market and in identifying the producers who were responsible for setting those prices. They contend, as noted above, that the price leader in some cases were Portuguese, not U.S., producers. They contend further that, since U.S. producers were not price leaders, they could not have been the cause of material injury.

These allegations ignore evidence of U.S. price leadership in the in-season and some evidence in

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[73] *CITT's Statement of Reasons* at 13; *see* testimony of Nolin, public transcript at 19, 20.

the booking season.[74] They also misconstrue the law on the subject. Dumped imports may be a cause of material injury even if they are not always or even predominantly the lowest-priced imports. All that is required is a showing that dumped imports contribute, at a sufficient level, to price erosion or price suppression or to lost sales.[75] The establishment of a causal link between dumping by U.S. producers and the erosion of prices in Canada is sufficient to support a finding of material injury. By selling at prices lower than the U.S. home market price, U.S. producers contributed to erosion of the domestic prices in Canada and caused material injury to Canadian producers.[76]

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[74] *See* testimony of Nolin, confidential transcript at 42-43, 45; testimony of Rettaler, confidential transcript at 96-97. Admittedly the record is sparse on this issue, perhaps in part because the Complainants did not respond to the Tribunal's questionnaire. (*See* discussion at pages 193-198 of public transcript of Panel hearing.)

[75] *See, also,* discussion above, subpart C(l).

[76] *CITT's Statement of Reasons* at 13; *see* testimony of Nolin, confidential transcript at 42-45.

C. Did the Tribunal Commit Errors of Law and/or Fact by Considering Non-Price Factors and Failing to Consider Other Factors in its Determination of Material Injury?

l. Consideration of Allegedly "Irrelevant" Non-Dumping Factors by the Tribunal is Supported by the Facts of This Case.

Complainants also allege that the Tribunal committed further legal and factual errors in "allowing its determination on the issue of causality in respect of past and present injury to be affected by considerations other than the demonstrated price effects of the dumped imports".[77] These considerations were the "geographical advantages of American producers over Canadian producers and the more limited effect on American than on Canadian producers' primary market of in-season sales in Canada at reduced prices."[78]

Geographical proximity, as noted earlier, is a relevant factor to consider in this case since it was the ability of the United States producers to compete in the in-season market that allowed them to continue selling dumped goods year round. The Tribunal is well-justified in treating other non-price factors as relevant where those factors might assist it in analyzing and understanding the price effects of dumped imports.

The structure of the Canadian market generally and the market effects of the dumped goods in the in-season, as discussed above, are crucial considerations in determining whether dumping caused injury. The Tribunal would not be fulfilling its obligations if it did not analyze the structure and functioning of the market and the resulting impact on determination of prices. In this case, the Tribunal properly considered how the prices in the Canadian markets were determined and how the injury to the Canadian producers occurred.

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[77] *Complainant's Brief* at 26.

[78] *Complainant's Brief* at 26-27.

2. Other Alleged Errors of Law or Fact Are Not Such as to Constitute Reversible Error.

Complainants argue that the Tribunal, in its material injury determination, should have taken into account price and sales information relating to the year 1994.[79] The Panel disagrees. The results of the 1994 buying season and how they might relate to the question of dumping of the subject goods on the Canadian market are not properly before this Panel. Evidence relating to the 1994 buying season was apparently unavailable to the Tribunal during its inquiry, which was completed with a finding of injury on April 22, 1994, well before the end of the 1994 season. Any implications derived from that season are therefore at best speculative.[80] This Panel is only permitted to review evidence that was available to the Tribunal in the course of its inquiry.

Complainants also argue that the Tribunal committed reviewable error by failing to segregate and account for the effects of Poli-Twine's own actions.[81] They intimate that Poli-Twine's restructuring -- not dumped goods from the United States -- was the reason for its loss of market share. The Tribunal, in fact, considered this domestic producer's actions and found that it did have an effect on the market. However, the effect of such restructuring by Poli-Twine was to increase its rate of return from sales, not reduce it:

The rates of return were also lower in both 1992 and 1993 than they were in 1990,

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[79] *Complainant's Brief* at 24.

[80] Counsel for Complainants argued that the fact that 1994 in-season prices were the same as 1993 prices, even with the absence of U.S. producers, demonstrated that U.S. sales could not have been a cause of material injury. *(Complainant's Brief* at 10, 24.) One could just as well argue that with the presence in the market of dumped U.S. imports, 1994 summer prices would have been even lower, continuing the trend downward beginning in 1991. (*See CITT's Statement of Reasons* at 10, Table 3.)

[81] *Complainant's Brief* at 26.

> in spite of extensive cost-cutting measures put in place by Poli-Twine. Poli-Twine's efforts in this regard included cuts in personnel, the negotiation of wage and rent concessions, the consolidation of warehousing operations and the sourcing of its polypropylene resin requirements on the cheaper spot market.[82]

The Tribunal found that the actions of Poli-Twine saved the producer from suffering greater losses due to the dumped goods. This action, however, did not negate the material injury that Poli-Twine sustained as a result of dumped goods in the Canadian market:

> In the Tribunal's view, the positive financial effects of those measures on Poli-Twine's bottom line conceal the true magnitude of the injury actually caused by the dumping of the subject goods. Had Poli-Twine not implemented those cost-cutting measures, its net reduction in profitability would have been much more severe.[83]

Not only did the Tribunal find that the restructuring masked the true extent of the injury from the dumping, it found that the restructuring was, in effect, made necessary by the dumping. The restructuring was in response, in part, to Poli-Twine's falling prices which have been shown to have been caused by the dumped goods.[84] Therefore, there is no support in the record for the Complainants' contention that the restructuring caused self-inflicted injury. Rather, the record suggests that the restructuring reflects simply another form of injury caused by the dumped goods.

The effects of European, especially Portuguese, sales on the Canadian market have already been discussed by the Panel.

Accordingly, given the high degree of deference the Panel must afford to the Tribunal's interpretation of the law and analysis of the facts before it, as well as the evidence on the record before the Tribunal, the Panel affirms the Tribunal's determination that dumped U.S. imports of

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[82] *CITT's Statement of Reasons* at 14; *see* testimony of Nichols, confidential record at 17-19.

[83] *Statement of Reasons* at 14; *see* testimony of Nichols, confidential transcript at 17-19.

[84] *CITT's Statement of Reasons* at 14.

synthetic baler twine are a cause of material injury to the Canadian producers.

III. FUTURE INJURY

As noted above, the Panel accords a high degree of deference to the Tribunal's conclusions of fact and law. (*See* discussion in Part I above.) The amount of evidence required in order to sustain the Tribunal's findings of fact is modest. Nor is it necessary that the Panel would reach the same determination as the Tribunal on the basis of that evidence. This, however, does not mean the Tribunal's determination will be upheld in the absence of *any* evidence in the record to support its conclusions. Such is the situation we find here.

While, based on the history of dumping causally linked to injury that the Tribunal found and we sustain, it may be logical to assume that injury will continue as long as conditions remain the same, we are unwilling to hold that such an assumption is the equivalent of evidence. Such a course would negate the need for affirmative evidence of future injury and would read out of the antidumping law the fundamental principle that determinations must be based on evidence in the record.

Respondents urge that the Tribunal's decision in *National Corn Growers Association v. Canada*, [1990] 2 S.C.R. 1324, 1382, upheld a future injury finding on the basis of such an assumption. A close examination of that opinion, however, reveals numerous references to evidence in the record on which the Tribunal's inference was based. *See, e.g., Corn Growers*, at 1380-81 (citing evidence on price, nature and function of the Chicago market, specifics of spot and futures pricing, and inferences drawn from the evidence). Such underlying evidence is absent in this case.

The Tribunal here based its conclusion on the "belief" that Poli-Twine will be faced with the same market conditions as in the recent past, the assertion that exporters suffer no consequences in their home market for dumping in Canada, and the view that as long as the U.S. has excess production, injury will continue, *Reasons* at 15. These assertions may or may not be true, and if so would appear to support a conclusion of future injury, but there are not -- on the basis of anything that has been brought to our attention in the briefs or oral argument -- in the record as established facts. The record references that have been offered in support amount to conjecture, falling short of evidence.

The Panel is not unaware of the difficulties the Tribunal may have encountered in amassing evidence relating to future injury, particularly with respect to U.S. capacity figures and the anticipated effects on the U.S. market of future dumping in Canada. The respondents assert that U.S. complainants added to the Tribunal's burden by allegedly refusing to supply requested data. Regardless of whether that assertion is true -- and this issue was not squarely before the Panel -- alternative channels were open to the Tribunal to discharge its responsibility to adduce some evidence, however modest, in support of its determination that future injury is likely. As matters now stand, the record as presented to us "is incapable of supporting [the Tribunal's] finding." *Lester (W.W.)(1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry, Local 740*, [1990] 3 S.C.R. 644 at 669.

Accordingly, we remand to the Tribunal below, with instructions to identify what evidence in the record establishes the likelihood of future injury or, failing that, to reopen the record to obtain such evidence.

IV. RELIEF

For the reasons stated above, the Panel hereby:

Affirms the Tribunal's determination that dumping of the subject goods has caused past and present material injury; and

Remands the Tribunal's determination that continued dumping would likely cause material injury to production in Canada of like goods, with instructions to identify what evidence in the record establishes the likelihood of future injury or, failing that, to reopen the administrative record to obtain such evidence.

The Panel directs the Tribunal to complete its reconsideration and to issue its determination within sixty (60) days of the date of this decision.

SIGNED IN THE ORIGINAL BY:

Robert E. Ruggeri, Chairman
Robert E. Ruggeri, Chairman

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