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

In the matter of:
CERTAIN MALT BEVERAGES FROM
THE UNITED STATES OF AMERICA (Injury)

CDA-95-1904-01

DECISION OF THE PANEL

ON REVIEW OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL FINDING

November 15, 1995

Before: Ms. Wilhelmina K. Tyler, (Chair)
Mr. Bruce Aitken, Esq.
The Hon. Frank G. Evans
Mr. Frank R. Foran, Q.C.
Prof. Gilbert R. Winham

Hearings: August 21 and August 22, 1995, Ottawa, Ontario, Canada.

APPEARANCES:

The Complainants:

Mr. C. J. Flavell, Q.C., Mr. Geoffrey C. Kubrick and Mr. Christopher J. Kent on behalf of Molson Breweries (Western Division), Labatt Breweries of British Columbia, Pacific Western Brewing Company (A Division of Pacific Pinnacle Investments Ltd.) and The Brewers Association of Canada (collectively, the "Complainants").

In Opposition to the Complainants:

Mr. John T. Morin, Q.C., Mr. Michael J. W. Round and Mr. Bill Alberger, on behalf of G. Heileman Brewing Company, Inc. ("Heileman");

Mr. Allan H. Turnbull and Mr. Paul D. Burns, on behalf of The Stroh Brewery Company ("Stroh");

Mr. P. John Landry, Esq. on behalf of Pabst Brewing Company ("Pabst").
(collectively the “United States” Brewers)

On Behalf of the Canadian International Trade Tribunal:

Mr. John L. Syme and Mr. Joël J. Robichaud.

TABLE OF CONTENTS

INTRODUCTION

This Binational Panel ("Panel") was convened pursuant to Article 1902(2) of the North American Free Trade Agreement ("NAFTA"). The Panel was constituted in response to a complaint which was filed with the NAFTA Secretariat (Canadian Section) on February 2, 1995 (the "Complaint"). The complaint was filed by Molson Breweries (Western Division), Labatt Breweries of British Columbia and the Pacific Western Company (a division of Pacific Pinnacle Investments Ltd.) ("Complainants"), pursuant to Rule 39 of the NAFTA Article 1904 Panel Rules.[1]

The subject matter of the Complaint is certain malt beverages, imported or originating from the United States of America, defined by the Canadian International Trade Tribunal (the "Tribunal") as follows:

"[m]alt beverages, commonly known as beer, of an alcoholic strength by volume of not less than 1.0 percent and not more than 6.0 percent, packaged in bottles or cans not exceeding 1,180 ml. (40 oz), originating in or exported from the United States of America by or on behalf of Pabst Brewing Company, G. Heileman Brewing Company Inc. and by The Stroh Brewery Company, their successors and assigns, for use or consumption in the province of British Columbia ('Certain Malt Beverages')".[2]

For the purposes of this Panel review, the genesis of the dispute lies in the decision of the Tribunal, dated October 2, 1991 ("First Order"). In the First Order, the Tribunal found that Certain Malt Beverages originating in or exported from the United States of America were causing or were likely to cause material injury to the production of like goods in the British Columbia market. This market was found to be a regional market pursuant to s. 42(3)(a) of the *Special Import Measures Act* ("*SIMA*").[3]

By notice dated May 25, 1994, the Tribunal initiated a review of its First Order. A review hearing was held from September 26 to September 28, 1994. By Order, dated December 2, 1994 ("Decision"), the Tribunal rescinded the finding of material injury pursuant to s. 76(4) of *SIMA*. In the Complaint, it was alleged that the Tribunal erred in its Decision by rescinding the injury finding in respect of Certain Malt Beverages exported from the United States of America. Specifically, the Complainants alleged that the Tribunal made errors in the nature of jurisdiction, law and fact in its review under s. 76(2) of *SIMA*.[4]

---

1 North American Free Trade Agreement.

2 Administrative Record, Vol. 1, p. 8.

3 R.S.C. 1985, c. S-15, as amended.

4 Section 76 (2) provides as follows:
"(a)t any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Deputy Minister or any other person or of any government, review the order or finding and, in the making of the review, may re-hear any matter before deciding it."

In the Decision, the Tribunal found that it had the jurisdiction to revisit the question of the existence of a regional industry subsequent to having confirmed its existence in the First Order.[5] The Tribunal referred to Article 4.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("*Anti-dumping Code*")[6] and determined that it could find a regional industry to exist only in the exceptional circumstances, specifically when all, or almost all, of the regional production is sold in the regional market and when the demand for the product is not, to any substantial degree, supplied by producers outside the regional market.[7]

The Tribunal then reviewed the record evidence and found that subsequent to 1991, the British Columbia beer industry increased its sales to other provinces and that breweries located outside British Columbia made significant yearly increases in terms of both volume and the percentage share of the British Columbia market.[8] The Tribunal noted that the data for 1992, 1993, and the first quarter of 1994 showed a sustained pattern of interprovincial trade over the entire period. The Tribunal went on to hold that the level and duration of this trade was significant and not temporary.[9] The Tribunal determined that the increased flow of beer into and out of British Columbia was attributable, in part, to changes in the regulatory environment in Canada generally, and particularly, in British Columbia.[10]

In terms of the regulatory environment, the Tribunal found the following to be especially significant: first, the **Intergovernmental Agreement** (1991) between the federal and provincial governments contained provisions to eliminate certain discriminatory practices against beer on the basis of origin; second, pursuant to the **Agreement in Principle** (April 25, 1992), certain provincial policies pertaining to imported beer were eliminated. These policies were directed at, *inter alia*, access to points of sale, warehousing, delivery and cost of service markups; third, pursuant to the **Memorandum of Understanding** (August 5, 1993), certain unimplemented terms of the **Agreement in Principle** came into force. At this juncture, imported beer was permitted to be privately distributed and given access to points of sale formerly available only to domestic beer produced in British Columbia, and fourth, the **Agreement on Internal Trade** (July 18, 1994), which came into force July 1, 1995, obligated the provinces to eliminate measures which operated as obstacles to interprovincial trade in beer.

In sum, the Tribunal determined that the conclusion and implementation of the above referenced agreements contributed to the relaxation of restrictions on international and interprovincial trade in beer. This relaxation increased, in part, interprovincial beer flows in and out of the British Columbia market in terms of volume and duration, precluding the continued

---

5 Decision, p. 14

6 *GATT*, [1980] B.I.S.D. 26th Supp., 35th Sess. at 171, Article 4.1

7 Decision, p. 14

8 *Id*., p. 15

9 *Id*., p. 17

10 *Id*., p. 17

existence of an isolated regional market in British Columbia. In so far as British Columbia was no longer a market requiring special regional protection, and injury against the entire market was not at issue, the injury determination was rescinded.

The issues raised by the Complainants and for the Panel's review are categorized by the Panel as follows. First, what is the standard of review to be utilized by this Panel in its review of the Tribunal Decision? Second, did the Tribunal have the authority to revisit the regional industry issue? Finally, did the Tribunal err in its decision that a regional industry no longer existed based on trade flows of Certain Malt Beverages into and out of the British Columbia market?

STANDARD OF REVIEW

Statutory Authority

The statutory authority for panel review is found in the relevant provisions of NAFTA and the *Federal Court Act*.[11] 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 present case, since Canada is the "importing party", general legal principles of Canadian law are to be applied in this review.[12] When invoked, binational panel review replaces judicial review by the Federal Court of Canada. The Panel must apply the general jurisprudence that is applicable to the Federal Court in its review of the Tribunal's Decision.

NAFTA Annex 1911 defines the standard of review as the grounds set forth in subsection 18.1(4) of the *Federal Court Act*.[13] Subsection 18.1(4) provides that the Tribunal's decisions will be reviewed on the grounds that it:

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

---

11 R.S.C. 1985, c. F-7 (as amended).

12 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.

13 *Supra*, footnote 11.

Jurisdiction

In determining the standard of review, a reviewing court or Panel shall distinguish between questions concerning the limits of a tribunal's jurisdiction and questions falling within a tribunal's jurisdiction.[14] Questions of jurisdiction and questions within jurisdiction are subject to different standards of review.

To determine whether a particular question is a matter of jurisdiction or a matter within jurisdiction, the court will ask: "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?"[15] To answer this question, a pragmatic and functional analysis must be conducted which requires the reviewing court, or, in this case, the Panel, to examine:

> ...not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.[16]

The goal of this analysis is to determine whether the legislature intended that the question at issue be decided by the tribunal acting within its jurisdiction or by the courts.[17] This functional and pragmatic analysis has been endorsed in numerous Supreme Court of Canada cases and is settled law in Canada.[18] This Panel will conduct a pragmatic and functional analysis to determine whether a matter is one of jurisdiction or one within jurisdiction, in order to apply the appropriate standard of review.

Questions of Jurisdiction

Questions of jurisdiction concern the interpretation of a legislative provision limiting a tribunal's powers. Judicial review will be limited to errors of jurisdiction resulting from an error in interpreting that legislative provision. If the Tribunal proceeds to make a decision on an incorrect assessment of its jurisdiction, the decision is reviewable.[19]

---

14 *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 ("*Bibeault*").

15 *Id.*, p. 1087.

16 *Id.*, p. 1088.

17 *Canadian Broadcasting Corporation v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 at p. 179 ("*CBC*").

18 See, for example, *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*CAIMAW*"); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614 ("*PSAC No.1*"); *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC No.2*"); *Dayco (Canada) Ltd. v. CAW-Canada*, [1993] 2 S.C.R. 230 ("*Dayco*"); *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 ("*Mossop*"); CBC, Id.

19 *Bibeault, supra*, footnote 14, at p. 1086.

The standard of review for an error of jurisdiction is "correctness".[20] The Panel must determine whether the Tribunal correctly applied the relevant legislative provision granting its powers. If correctly applied, the decision on questions of jurisdiction will be upheld. However, if the Tribunal is incorrect in its application of its jurisdiction, the Panel must remand with instructions for the Tribunal to correct the error.

Questions Within Jurisdiction

Errors of Law

Errors of law go to a Tribunal's interpretation of its statutory authority, or other legal issues in anti-dumping within its jurisdiction. On antidumping and injury matters, the enabling statute of the Tribunal is *SIMA*.[21] Prior to *SIMA*, the *Anti-dumping Act* [22] of 1968 dealt with dumping and injury matters and provided the precursor to the Tribunal (the Anti-dumping Tribunal) with both a finality and a privative clause. When *SIMA* replaced the Anti-dumping Act in 1984, the privative clause was deleted although the finality clause remained. When *SIMA* was again revised in 1993, the finality clause was removed and specific provision was made for judicial review of Tribunal decisions pursuant to subsection 76(1).

Where an enabling statute provides for a broadly worded privative clause, the applicable standard of review for alleged errors of law is the standard of "patent unreasonability". That standard provides that a tribunal's decision would be interfered with when it was not rational on its face:

> 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.[23]

The applicability of the standard of patent unreasonability for alleged errors of law must be reconsidered as *SIMA* no longer contains a privative or finality clause. The evolution of *SIMA* from including privative and finality clauses to judicial review is clear indication of the intent of

---

20 See, for example, *Bibeault, supra*, footnote 14; *Dayco, supra*, footnote 18; *CAIMAW, supra,* footnote 18; *Syndicat des employes de production du Quebec et de l'Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 ("*Syndicat*"). See, also, *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported from the United States of America (Injury)*, (1995), CDA-94-1904-04 ("*Corrosion Resistant Steel Sheet*"); *Synthetic Baler Twine With a Knot Strength of 200 Lbs or less Originating in or Exported from the United States of America*, (1995), CDA-94-1904-02 ("*Synthetic Baler Twine*"); *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not Originating in or Exported from the U.S.A.*, (1994), CDA-93-1904-06 ("*Carbon Steel Plate*"); *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America (Injury)*, (1994), CDA-93-1904-09 ("*Cold-Rolled Steel Sheet*"); *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States (Injury)*, (1994), CDA-93-1904-07 ("*Hot-Rolled Carbon Steel Sheet*").

21 Also, the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supplement) ("*CITT Act*").

22 R.S.C. 1970, c. A-15

23 *PSAC No.2, supra,* footnote 18 at 964

Parliament to accord lesser deference to the decisions of the Tribunal.[24] However, recent case law from the Supreme Court of Canada establishes the level of judicial deference accorded to decisions of an administrative tribunal is determined not necessarily by the absence of a privative clause, but in the context of the tribunal's expertise .

In *Mossop*, Mr. Justice La Forest stated that:

> ...even absent a privative clause, the courts will give a considerable measure of deference [to highly specialized bodies] on questions of law falling within the area of expertise of these bodies because of the role and functions accorded to them by their constituent Act...[25]

In *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*,[26] Sopinka J., discussed the factors to be considered in determining the standard of review:

> Determining the appropriate standard of review, therefore, is largely a question of interpreting these legislative provisions in the context of the policy with respect to judicial deference.
>
> The legislative provisions in question must be interpreted in light of the nature of the particular tribunal and the type of questions which are entrusted to it. On this basis, the court must determine what the legislator intended should be the standard of review applied to the particular decision at issue, having due regard for the policy enunciated by this Court that, in the case of specialized tribunals, decisions upon matters entrusted to them by reason of their expertise should be accorded deference.[27]

In *Pezim v. British Columbia (Superintendent of Brokers)*, the Court articulated the standard of review as a spectrum that ranges from a standard of reasonableness to that of correctness.[28] At the reasonableness end, where deference is at its highest, these are cases where a tribunal is protected by a privative clause, is deciding a matter within its jurisdiction and where there is no right of appeal. At the correctness end, where deference is at its lowest, these are cases where there is a statutory right of appeal. However, the Supreme Court stated:

---

24 *Mossop*, *supra*, footnote 18, p. 584

25 *Id*., p. 584.

26 [1993] 2 S.C.R. 316 ("*Bradco*").

27 *Id*., p. 332.

28 [1994] 2 S.C.R. 557 ("*Pezim*") at 590

> [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.[29]

In the case at hand, the Tribunal's decision is not protected by a privative clause but there is no right of appeal from its decisions. The only right is the right of judicial review pursuant to subsection 76(1) of *SIMA*. This case also falls between the two extremes of the standard of review. Based on the foregoing, it is necessary to examine the Tribunal's legislative mandate and expertise to determine the appropriate level of deference.

The Tribunal is empowered to conduct inquiries on matters relating to Canada's trade interests, as well as to hear complaints by domestic producers.[30] Further, the Tribunal can hear appeals on injury findings and, under sections 42 and 43 of *SIMA*, it has the duty to determine whether material injury to a domestic industry has been, is or will be caused by goods found to have been dumped.

The Supreme Court of Canada has found the Tribunal to be a specialized administrative body with expertise in the area of dumping, injury and regional industry.[31] The issues dealt with by the Tribunal in the case at hand fall squarely within its specialized function. Taking into account legislative intent as expressed in the aforementioned legislative history of *SIMA*, and previous Canadian jurisprudence and panel decisions, the Tribunal's findings on questions of law will be accorded considerable deference by this Panel.[32]

Errors of Fact

Section 18.1(4)(d) of the *Federal Court Act* provides that a tribunal's determination can be reviewed for errors of fact when the tribunal "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."[33]

Based on this, the standard of review for questions of fact is a very high level of deference. The Panel takes note of the recent Federal Court of Appeal decision *Stelco Inc. v. Canada (Canadian International Trade Tribunal)*.[34] In that decision, the Court held that it could not see any practical difference between the standard set out in Section 18.1(4)(d) of the Federal

---

29 *Id.*, p. 591.

30 *Supra*, footnote 22, s. 16.

31 See, *infra*, footnote 65.

32 *Synthetic Baler Twine, supra*, footnote 20: *Corrosion Resistant Steel Sheet, supra*, footnote 20.

33 *Supra*, footnote 11.

34 May 23, 1995, No.: A-360-93 (F.C.A.).

Court Act and the standard of patent unreasonability.

The Panel also takes note of the decision of the Supreme Court of Canada in *Lester(W.W.) (1978)Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740* ("*Lester*").[35] In reviewing a decision of the Newfoundland Labour Relations Board on the successorship of companies, the Court stated:

> 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.[36]

Following the standard enunciated in *Lester*, this Panel will interfere with the Tribunal's decision "[o]nly where the evidence, viewed reasonably, is incapable of supporting a tribunal's finding of fact..."[37]

The Panel will not re-weigh the evidence that was before the Tribunal.[38] However, the Panel will require that the Tribunal had evidence to support its decision.

---

35 [1990] 3 S.C.R. 644, ("*Lester*").

36 *Id.*, pp. 687-88.

37 *Id.*, p. 669.

38 *Japan Electrical Manufacturers' Assn. v. Anti-dumping Tribunal*, [1982] 2 F.C. 816 (F.C.A.), at p. 818.

ISSUES

I. Does the Tribunal Have the Jurisdiction to Assess the Existence of a Regional Industry on a Review Inquiry?

The two issues before this Panel regarding the appropriate standard of review to be applied are: first, does the Tribunal have the jurisdiction to assess the existence of a regional market on a review inquiry and, if so, whether the application of the regional market criteria is a jurisdictional question?

The Complainants argue that whether the Tribunal can take into account the provisions of Article 4 of the *Anti-dumping Code* in the context of a review conducted under Section 76 of *SIMA* is a matter of jurisdiction on which the Tribunal must be correct. The Panel notes that the Tribunal acknowledges that this is in fact a jurisdictional issue.[39]

The Complainants allege the Tribunal erred in redetermining the existence of a "regional industry" in its review proceeding conducted pursuant to Subsection 76(2) of *SIMA*[40] and Article 4.1 of the *Anti-dumping Code.*[41] In essence, the Complainants argue that neither *SIMA* nor the *Anti-dumping Code* confers upon the Tribunal jurisdiction to make such a decision, except in the context of an *initial* injury inquiry.

This Panel is of the view that the Tribunal was correct in the Decision that the issue of regional industry could be revisited in a review inquiry. This Panel concludes that the Tribunal had such authority and that it properly considered the existence of a regional industry as the threshold question in its review proceedings for the following reasons.

SIMA directs the Tribunal, in certain specified circumstances, to conduct an inquiry to determine whether dumping has caused, is causing or is likely to cause material injury to a domestic industry.[42] *SIMA* defines the term "material injury" to mean a material injury to the production in Canada of like goods.[43] *SIMA* further directs the Tribunal to examine the provisions of Article 4.1 of the *Anti-dumping Code* when undertaking an analysis of material injury to the production in Canada of like goods in a dumping or subsidization case.[44] Article 4.1 of the *Anti-dumping Code* states the conditions under which the Tribunal may find the existence of a domestic industry, that is, "domestic producers as a whole of the like products or ...those of them whose collective output of the products constitutes a major proportion of the total domestic

---

39 Tribunal's Brief, p. 8.

40 *SIMA, supra,* footnote 3.

41 *Anti-dumping Code, supra,* footnote 6

42 *SIMA, supra,* footnote 3, s. 42

43 *Id*., s. 2

44 *Id*., s. 42(3)

production of those products..."[45] The *Anti-dumping Code* also authorizes the Tribunal, under certain conditions, to find the existence of a regional industry upon which the Tribunal may also conduct a material injury finding as follows:

> [I]n exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if *(a)* the producers within such market sell all or almost all of their production of the product in question in that market, and *(b)* the demand in that market is not to any substantial degree supplied by the producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.[46]

After making an initial finding of a material injury to a domestic or regional market, Tribunal is authorized to review such finding as follows:

> At any time after the making of an order or finding described in any of sections 3 to 6, the Tribunal may, on its own initiative or at the request of the Deputy Minister or any other person or of any government, review the order or finding and, in the making of the review, **may re-hear any matter** before deciding it[47] (emphasis added).

Subsection 76(2) of *SIMA* does not contain any language that serves to qualify or limit the Tribunal's review power. The Complainants contend, however, that because *SIMA's* primary objective is to protect the domestic industry from material injury caused by dumped or subsidized goods, the Tribunal lacks jurisdiction, within the context of a review proceeding, to reconsider whether a regional industry exists. The Complainants maintain that subsection 76(5) of *SIMA* contemplates, once an initial finding of material injury has been made, that there will be a five-year period of anti-dumping protection to allow domestic producers to rationalize, improve efficiency and enhance international competitiveness. The Complainants argue that *SIMA*'s primary objective would be thwarted if domestic producers had the burden of establishing, throughout the course of the protected five-year period, all the requirements of a regional industry under Article 4.1 of *Anti-dumping Code*. The Complainants also assert that this burden would be contrary to

45 *Anti-dumping Code, supra,* footnote 6

46 *Id*., art. 4.1(ii)

47 *SIMA, supra,* footnote 3, s. 76(2)

the Tribunal's previous practice, as noted in *Countertop Microwave Ovens*[48], and *Yellow Onions*.[49] Furthermore, Complainants allege, it is illogical to apply the Article 4.1 requirements in a review context, because the natural consequence of the imposition of definitive anti-dumping duties, as a result of the initial finding of material injury, would have alleviated, or at least reduced, the injury suffered by the domestic industry. Thus, Complainants submit, the Tribunal was faced with two pivotal issues in its review proceeding: (1) the vulnerability of production in Canada to renewed dumping and (2) the propensity or likelihood of dumping being resumed. The Complainants assert that the Tribunal erred in failing to consider either of these issues.

This Panel is not persuaded by the Complainants' contentions for several reasons. First, a plain reading of Subsection 76(5) reveals no statutory five-year grace period from Tribunal review of orders or findings made by it. Subsection 76(5) states that a material injury finding will continue only in cases in which the Tribunal "has not initiated a review pursuant to subsection (2) with respect to an order or finding. . . ."[50] Moreover, Subsection 42(3)(a) of *SIMA* requires the Tribunal "in considering ***any*** question relating to the production in Canada of any goods or the establishment in Canada of that production..." to ***fully*** consider the provisions of Article 4.1 of the *Anti-dumping Code* in a dumping case (emphasis added)[51]. Such provisions include the requirements under which the Tribunal may find the existence of a regional industry.[52] Therefore, given the plain meaning of the relevant provisions of *SIMA* and the *Anti-dumping Code*, this Panel finds nothing in either statute to limit the Tribunal's authority to review the existence of a regional industry.

Second, this Panel concludes that the panel decisions cited by Complainants do not support its proposition that the Tribunal lacks authority to re-hear the regional industry issue in a review proceeding. If anything, the panel's decision in *Yellow Onions* supports the Tribunal's position that the decision of the existence of a domestic or regional market is a threshold issue, which must be settled before addressing the determinative issues of a material injury.[53] In spite of the fact that neither party challenged the existence of a regional market, the Tribunal in *Yellow Onions* addressed whether the Article 4 regional market conditions were met before considering the question of material injury.[54] This Panel does not find *Countertop Microwave Ovens*, the

---

48 *Countertop Microwave Ovens Originating in or Exported from Japan, Singapore and the Republic of Korea* (1986), RR-1-86 *("Countertop Microwave Ovens")*

49 *Fresh, Whole, Yellow Onions Originating in or Exported from the United States of America, for Use or Consumption in the Province of British Columbia* (1992), RR-91-004 *("Yellow Onions")*

50 *SIMA, supra*, footnote 3, s. 76(5)

51 *Id*., s. 42(3)(a)

52 *Anti-dumping Code, supra* footnote 6, Art. 4.1. A review of the negotiating history of the Anti-dumping Code reveals no such five (5) year grace period. See also The GATT Uruguay Round: A Negotiating History (1986-1992), T. Stewart (1993 Kluwer Law and Taxation Publishers) at 225, citing the Anti-dumping Code.

53 *Yellow Onions, supra,* footnote 49, p.5

54 Id, pp. 4 - 5.

other panel decision cited by the Complainants, to support their position because it involved a different provision of *Anti-dumping Code* and addressed an entirely different issue.[55]

The Decision reflects that it cautioned the Complainants at the time of its initial material injury finding in 1991, that it contemplated the possibility of conducting a future review of material injury findings, including the fundamental issue of a regional industry, upon the occurrence of anticipated changes in the regulatory scheme "affect[ing] the isolation of the beer market in British Columbia."[56] Relying on subsection 76(2) of *SIMA*, the Tribunal noted in its finding that it had discretion to "re-hear" the issue in the review of its earlier finding in a manner consistent with the objectives of *SIMA*.[57] Moreover, as the Tribunal has earlier concluded, the principle objective of *SIMA* "is to protect industries against injurious dumping and subsidization *while fulfilling Canada's obligation under GATT* with respect to the treatment of dumping and subsidization."[58]

For the reasons stated, this Panel concludes that the Tribunal correctly decided that it had authority, in the context of its review, to rehear all matters relevant to its initial decision of material injury, and that upon such rehearing, it was obligated to take fully into account the provisions of paragraph 1 of Article 4 of the *Anti-dumping Code* concerning the continued existence of a regional industry. Thus, the Tribunal properly considered whether market circumstances had changed since its initial inquiry and whether the domestic producers should no longer be considered a regional industry within the meaning of the *Anti-dumping Code*.

Under Article 4, paragraph 1 of the *Anti-dumping Code*, the Tribunal must determine, in a proper case, whether the domestic producers should be considered a "separate industry" within the meaning of the "exceptional circumstances" set forth in subparagraph (ii) of that article. The Tribunal must make a decision of this threshold issue, both at the time of its initial inquiry regarding material injury and upon a subsequent reconsideration of that issue. Thus, in a review proceeding conducted pursuant to Section 76(2) of *SIMA*, the Tribunal must determine whether market circumstances have changed and whether the domestic producers should no longer be considered a separate industry.

---

55 *Countertop Microwave Ovens* , *supra*, footnote 48

56 Decision, p. 13.

57 *Id.*

58 *Solid Urea Originating in or Exported From the German Democratic Republic and The Union of Soviet Socialist Republics For Use or Consumption in Eastern Canada (Canadian Territory East of the Manitoba-Ontario Border)*(1988), 15 C.E.R. 277, at page 290. (emphasis added)*("Solid Urea")*

II. What is the Standard of Review to be Applied to the Application of the Regional Market Criteria?

The Complainants argue that even if the Tribunal can review the existence of a regional market in a review inquiry, the determination of a regional industry pursuant to subsection 42(3)(a) of *SIMA* and Article 4.1 of the *Anti-dumping Code* is also a question of jurisdiction on which the Tribunal must be correct. The Complainants take the position that the regional market criteria contained in subparagraph (ii) of Article 4.1 must be determined by the Tribunal before it may assert jurisdiction to decide the issue of material injury. Subsection 42(3)(a) of *SIMA* and Article 4.1 of the *Anti-dumping Code* are asserted by the Complainants to be mandate-defining in nature and therefore a jurisdictional issue.[59] The Complainants rely on the decision of the binational panel in *Certain Beer*, in which the Panel stated:

> We note at the outset that we review this aspect [isolated or regional market] of the Tribunal's finding concerning isolated market under the "correctness" test..., since the isolated or regional nature of the market is a determination which the CITT must make before it may assert jurisdiction to decide the issue of material injury.[60]

This Panel notes the recent Supreme Court of Canada case *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*.[61] In that case, the court reaffirmed that the pivotal distinction between matters of law and matters of jurisdiction does not depend on which questions a tribunal chooses to answer first and that the courts should be reluctant to characterize a provision as jurisdictional unless it is clear that it should be so labelled.

The question of whether the determination of a regional industry is a matter of jurisdiction or a matter within the Tribunal's jurisdiction must be answered by conducting the functional and pragmatic analysis called for in *Bibeault*.[62] The Panel must examine the wording of the enactment conferring jurisdiction on the Tribunal, the purpose of the statute creating the Tribunal, the reason for the Tribunal's existence, the area of expertise of the Tribunal's members and the nature of the problem before the Tribunal.

SIMA is the legislation conferring jurisdiction on the Tribunal to conduct inquiries to determine whether the dumping of goods into Canada has caused, is causing or is likely to cause material injury to a domestic industry. The Tribunal also conducts inquiries into complaints by domestic producers and hears appeals on aspects of anti-dumping and countervailing duty orders pursuant to *SIMA*. The Tribunal's tasks are not limited to interpretations of domestic law.

---

59 Complainants' Reply Brief, pp. 4-7.

60 *Certain Beer Originating in or Exported from the United States of America by or on behalf of G. Heileman Brewing Company Inc. and Pabst Brewing Company and the Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia (Injury)*, (1992), CDA-91-1904-02, pp. 15-16.

61 *Supra*, footnote 17.

62 *Supra*, footnote 14.

Subsection 42(3)(a) of *SIMA* provides that in a dumping case, in considering any question relating to the production in Canada of any goods, the Tribunal shall take into account the provisions of Article 4.1 of the *Anti-dumping Code*, which include the regional industry criteria.

The Tribunal was established by the *Canadian International Trade Tribunal Act* ("*CITT Act*").[63] The *CITT Act* empowers the Tribunal to conduct inquiries, consider complaints by domestic producers and hear and determine appeals on dumping and injury matters under section 16. Under section 18, the Tribunal shall inquire into and report to the Governor in Council on matters relating to economic, trade or commercial interests of Canada.

By virtue of section 17, the Tribunal has been given all the powers, rights and privileges of a superior court of record. These powers concern witnesses, documents and the enforcement of its orders.

The Tribunal is an administrative body vested with the responsibility of serving in a quasi-judicial and advisory role in the area of international trade. In *National Corn Growers Assn. v. Canada (Import Tribunal)*, Wilson J., discussed at page 1336 the importance of the role that specialized tribunals have today.

> Part of this process [of moving towards a more sophisticated understanding of the role of administrative tribunals] has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that makes sense given the broad policy context within which that agency must work:[64].

The Tribunal has been recognized as a specialized administrative body with expertise in dealing with issues of anti-dumping, injury and other trade-related matters. In *National Corn Growers*, Wilson J., acknowledged that the Canada Import Tribunal (the predecessor to the present day Tribunal) was "staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing with a large volume of trade related cases..."[65] The Tribunal's expertise was also acknowledged by the binational panels in *Corrosion Resistant Steel*

---

63 *Supra*, footnote 21, s.3

64 [1990] 2 S.C.R. 1324 (*"National Corn Growers"*)

65 *Id.*, p. 1348.

Sheet, Hot-Rolled Carbon Steel Sheet and *Cold-Rolled Steel Sheet.*[66]

Subsection 42(3)(a) of *SIMA* provides that in a dumping case relating to the production in Canada of any goods, the Tribunal must take into account the provisions of Article 4.1 of the *Anti-dumping Code.* Consequently, it is for the Tribunal to assess the regional nature of a market. To do this, the Tribunal must implement and interpret specific statutory provisions and international agreements concerning the nature of regional industry, and it must analyze factual economic data regarding outflows and inflows of product in a regional market. The application of the regional market criteria in Article 4.1 of the *Anti- dumping Code* is not a general legal question, but rather goes to the core of the Tribunal's expertise. Conversely, for a court or Panel to review the Tribunal's determination on regional industry on the basis of "correctness", the court or Panel would be required to answer questions for which it is not prepared. In *National Corn Growers*, Wilson J., cautioned courts about intervening in a decision of a specialized administrative tribunal:

> Faced with the highly charged world of international trade and a clear legislative decision to create a tribunal to dispose of disputes that arise in that context, it is highly inappropriate for courts to take it upon themselves to assess the merits of the Tribunal's conclusions about when the government may respond to another country's use of subsidies. If courts were to take it upon themselves to conduct detailed reviews of these decisions on a regular basis, the Tribunal's effectiveness and authority would soon be effectively undermined.[67]

Having considered the sphere of international trade law, the Tribunal's specialization of duties as well as the nature of the problem before the Tribunal, it is the finding of this Panel that Parliament intended that the determination of a regional industry is a question to be answered by the Tribunal rather than by the courts. Therefore, the Tribunal's determination of whether a regional industry exists falls squarely within the Tribunal's jurisdiction and expertise and is entitled to considerable deference by this Panel.

This Panel recognizes that its finding, that the determination of regional industry is a question within the Tribunal's jurisdiction is in apparent conflict with the earlier panel decision in *Certain Beer.* However, in *Certain Beer* the panel did not have the benefit of later Canadian decisions, which have uniformly endorsed the pragmatic and functional analysis. Thus, *Certain Beer* may be distinguished on that ground.

---

66 *Supra*, footnote 20.

67 *Supra*, footnote 64, pp. 1349-1350.

III. Did the Tribunal Err in Determining That British Columbia No Longer Constitutes a Regional Market for Packaged Beer?

A. Finding of a Regional Market (Outflows)

Article 4.1(ii) of the *Anti-dumping Code* provides that in order for a tribunal to find that a regional market exists, two tests must be satisfied.[68]

The first test, which refers to outflows, is that the producers within the market sell all or almost all of their production of the product in question in that market. The second test, which refers to inflows, is that demand in the market is not to any substantial degree supplied by the producers of the product in question located elsewhere in the territory.

If either of these two tests are not met, then a regional market cannot be found to exist.

The Complainants argue that in reaching the conclusion that British Columbia no longer constitutes a regional market for packaged beer, the Tribunal:

> (a) committed an error of law by ignoring jurisprudence of the Tribunal which establishes that the regional market criteria as set out in Article 4.1 of Anti-dumping Code could be found to be met where trade flows were in the range of 20%;
>
> (b) erred by ignoring the uncontradicted evidence that recent outflow numbers were a transitional, and temporary phenomenon relating to the introduction of new beer which required specific new technologies; and
>
> (c) erred by relying on irrelevant considerations relating to the 1991 Intergovernmental Agreement, the Canada-US Memorandum of Understanding ("MOU") and agreement in principle and the Agreement on Internal Trade.

The "All or Almost All" Test

Article 4.1 of *Anti-dumping Code* provides that one of the two criteria that must be met for a regional market to exist is that the producers within the market must sell all or almost all of their production in that market. Neither *SIMA* nor Article 4 of *Anti-dumping Code* provides any guidance as to what constitutes all or almost all of the production of the product in question.

Counsel for the Complainants argued that the Tribunal erred in law in misinterpreting and misapplying its own precedents. These precedents, it was argued, support the proposition that the all or almost all test can be met where outflows of production from the market are in the range

---

68 *Supra*, footnote 46.

of 20%. The Complainants rely on cases such as *Fresh Cauliflower* [69] and *Reinforcing Bars*[70] to support their contention that a threshold for allowable outflows in a regional market is in the range of 20%. The Complainants argue that the Tribunal's failure to follow or even to address its own precedents establishing this alleged threshold constitutes reversible error.

At page 18 of the Decision, the Tribunal states that it has reviewed all of the regional industry cases heard by it and its predecessors and was of the view that "in no case, where flows into and out of a market were of the magnitude of the flows in the present case, has a regional industry been found to exist". The Panel has also reviewed the cases cited by the Complainants. While these cases indicate that the Tribunal considers that outflows of more than 20% do not meet the "all or almost all" test, the cases also indicate that the Tribunal has not developed a stringent 20% rule that will be automatically or uniformly applied.

Previous decisions of the Tribunal do not in any way constitute precedent for the application of a mathematical formula.[71] This was acknowledged by the Complainants in oral argument when they stated that "20% is very much a broad band 20 plus/minus. Twenty per cent is not a magic number".[72] As stated above, the standard of review applicable to the Tribunal's interpretation of the law is that of considerable deference. The Tribunal's decision is not contrary to law simply for failure to apply a percentage test within a specific range.

The Tribunal does not apply fixed percentages automatically and uniformly in such a way as to fetter its discretion. It examines each case on its merits. "[T]he evidence on the record indicates that the B.C. beer industry sold 24 and 22 percent of its packaged beer production in other provinces in 1992 and 1993, respectively."[73] This was up from "5 and 7 percent" of its production [sold] in other provinces in 1990 and 1991, respectively."[74] This evidence exceeded the 20% figure propounded by the Complainants in at least two of the years examined by the Tribunal. The Panel is of the view the Tribunal did consider its previous cases but relied on the particular evidence before it to make its decision that the "all or almost all" test was not met in this case.

---

69 *Fresh Cauliflower Originating in or Exported from the United States of America* (1993) Inquiry No. NQ-92-003, *("Fresh Cauliflower")*

70 *Certain Hot-Rolled Carbon Steel Concrete Reinforcing Bars, Bars and Structurals originating in or exported from Mexico and the United States of America for use or consumption in the province of British Columbia* (1988), 15 C.E.R. 253 *("Reinforcing Bars").*

71 *Domtar Inc. v. Quebec (Commission d'appel en matiere de lesions professionnelles),* [1993] 2 S.C.R. 756, and *Carbon Steel Plate, supra*, footnote 20.

72 Panel Review Public Hearing Transcript, Volume 1, p 89.

73 Decision, p. 15

74 Decision, p. 15.

Temporary Nature of Outflows

The Complainants next assert that the Tribunal did not address their argument that recent inflows and outflows from the B.C. market were a transitional, and temporary phenomenon relating to the introduction of packaged "draft beer" and "ice beer", both of which required specific new technologies. The Complainants argued that there was absolutely no evidence that this phenomenon would reoccur and that the flows would continue at the level they had in 1992 - 93. In support of this contention, counsel for the Complainants referred to the statistics for the second quarter of 1994 which indicated that the outflows of packaged beer from the B.C. market declined over the same period in 1993. The Complainants argued that these figures demonstrate that the significant flows attributable to technological change have abated.

The second quarter 1994 numbers were provided to the Tribunal, at the Tribunal's request, after the hearing. All parties were provided the opportunity to comment on them. The Complainants argue that the second quarter 1994 figures demonstrate a marked decrease in outflows over the same quarter in 1993. They further argue that the high outflow numbers were a temporary phenomenon caused by the introduction of what the Complainants called technology beers and that these numbers indicated a trend of decreasing flows out of the British Columbia market.

The Panel notes that the first quarter numbers of 1994 show a marked increase in outflows over the same quarter of the previous year, although the second quarter shows a decrease from the second quarter of 1993. The Panel also notes the Tribunal did not purport to base its finding of continued future interprovincial trade flows on any one quarter but stated that it looked to the outflow numbers from 1992, 1993 and first quarter of 1994. As stated above, the Panel will accord a very high level of deference to the Tribunal's findings of fact. We are not prepared to interfere with the Tribunal's finding on the basis that one quarter, albeit the most recent quarter, was not specifically commented on in arriving at its conclusion that the trend in interprovincial trade in beer is likely to continue.

Further, this Panel has reviewed the evidence before the Tribunal to assess the Complainants' claim that there was no evidence upon which the Tribunal could conclude that the trend in inter-provincial trade is likely to continue. The Panel has concluded that the Tribunal had sufficient evidence to make the above findings.[75]

The Tribunal rejected the Complainants' argument that the increased level of trade in packaged beer should be viewed as a temporary phenomenon which resulted primarily from the introduction of new beers, such as genuine draft and "ice beer" which required the use of new brewing technologies. Review of the record shows there was evidence which entitled the Tribunal to reject this argument and to conclude that "new products are a way of life in the brewing industry [and] together with the manner in which production of new products is established, suggests that the trend in interprovincial trade in beer is likely to continue".[76]

---

75 Public Transcripts, Volume 11, pp. 50, 140-151, 157-160, 168 - 169.

76 Decision, p. 17.

International and Interprovincial Trade Agreements

The Complainants argue that the Tribunal relied on irrelevant considerations and suspect conclusions in basing any of its decision on the Intergovernmental Agreement (1991), the MOU or the Agreement in Principle or the Agreement on Internal Trade. The Complainants argue that there was uncontroverted evidence on the record which established that the Interprovincial Agreement (1991) did not increase interprovincial beer flows. The Complainants further argue that the Tribunal based its decision on irrelevant considerations when it based its decision on the MOU and the Agreement in Principle as these agreements deal with trade between Canada and the U.S. and not interprovincial trade. Finally, the Complainants argue the Tribunal committed an error in basing its decision in part on the Agreement on Internal Trade which was not yet in force.

The Panel is of the view that the agreements referenced by the Tribunal in the Decision were referred to, not so much for their direct effect on trade flows, but because the Tribunal found that these agreements had contributed to the British Columbia Liquor Distribution Branch's ("LDB") relaxation of restrictions on interprovincial and international trade in beer. The Tribunal was recognizing a freer and more flexible regulatory environment which was demonstrated by the various governments concluding agreements aimed at reducing structural trade barriers. At page 18 of the Decision, the Tribunal stated:

> The Tribunal is of the view that the conclusion of the various referenced interprovincial and international agreements relating to trade in beer has contributed substantially to the LDB's relaxation of restrictions on interprovincial and international trade in beer. This, in turn, has led to increased interprovincial trade in packaged beer, both into and out of British Columbia.

The Tribunal referenced excerpts from the transcripts of the public hearing and the in-camera hearing held before it in support of its view. We have reviewed the transcripts and conclude that the Tribunal had evidence upon which to conclude that the various inter-provincial and international agreements relating to trade in beer have contributed to the LDB's relaxation of restrictions on inter-provincial and international trade in beer.[77] This evidence supports the finding that the relaxation has led, in part, to increased inter-provincial trade in packaged beer into and out of British Columbia.

The Tribunal is a specialized agency that is called upon to weigh and evaluate evidence, make findings of fact and draw inferences from the evidence in an international trade context. Given the expertise of the Tribunal and the standard of review accorded to findings of fact, this Panel will not reweigh the evidence, nor substitute its view for that of the Tribunal on any of the above issues raised by the Complainants.

---

[77] Public Transcripts, Volume 11, pp. 71-73, 74.
Protected Transcripts, Volume 12, pp. 31, 32-33, 38-40, 84-85.

B. Finding of a Regional Market (Inflows)

As discussed in relation to outflows, in order to make a finding of a regional industry, both the outflows and inflows tests must be satisfied. If either of these tests is not met, then a regional industry does not exist.

The Complainants argue that the test for inflows requires that in determining whether an alleged regional market is supplied "to any substantial degree" by inflows, such inflows must be assessed in terms of the regional demand for domestic product, and not the total regional demand. They argue that the Tribunal failed to make any such assessment in the present case. Finally, they allege the Tribunal misinterpreted its own precedents on inflows, which led it to misapply the "not to any substantial degree" test in the instant case.

The Tribunal's submission is that neither *SIMA* nor the *Anti-dumping Code* provide any guidance as to the meaning of "not to any substantial degree" and, consequently, the determination of what level of trade is necessary to satisfy that requirement falls squarely within the Tribunal's jurisdiction and expertise. In support of its finding that the "not to any substantial degree" test was not met, the Tribunal found that "[w]ith respect to B.C. sales of packaged beer produced by Canadian breweries located outside British Columbia, the evidence indicates, that subsequent to 1991, such sales have made significant year-over-year increases in both volume and percentage share of the B.C. market."[78]The Tribunal stated that there was no case on record which found a regional market to exist where flows into a market were of the magnitude of the flows in the present case.

The United States' Brewers take the position that no definition or numerical figure was provided by Parliament to interpret the meaning of "not to any substantial degree". The interpretation is left to the discretion of the Tribunal in each particular case. Therefore, the Brewers submit that the Tribunal did not wrongly decide that the inflow of products from outside British Columbia was to a substantial degree.

The Tribunal has previously decided cases concerning the issue of whether or not inflows existed to a substantial degree for the purpose of determining the existence of a regional industry. In *Solid Urea* [79], the Canadian Import Tribunal ("C.I.T.") found that shipments of solid urea produced in western Canada accounted for 11.5 percent of the eastern Canadian market, that is, the total regional market. Based on that, the Tribunal concluded.

> The demand for domestic product in the eastern market was therefore supplied to a substantial degree by western producers although the total demand in that market was not.[80]

---

78 Decision of the Tribunal, p. 15 citing *Protected Prehearing Staff Report*, August 5, 1994, Tribunal Exhibit RR-94-001-6 (protected), Administrative Record, Vol. 2 at 23.

79 *Solid Urea*, *supra*, footnote 58.

80 *Id.*, p. 289.

What this means is that shipments of solid urea from western Canada accounted for 11.5 percent of the total demand in the eastern Canadian market (i.e., domestic products plus imports), and were considered "not substantial" in relation to total demand. However, once imports were removed (which must be done under Article 4.1(ii) to arrive at a percentage of regional demand for domestic products), shipments of solid urea from western Canada to eastern Canada were held to be "substantial", although this figure was not published in the decision.

In *Reinforcing Bars*,[81] the C.I.T. assessed inflows in terms of the total regional market and found that shipments of the subject goods by other Canadian producers accounted for 20-27 percent of the total market. This figure does not exclude sales data attributed to imports as required by Article 4.1(ii). The C.I.T. in *Reinforcing Bars* did not provide a figure indicating percentage of regional demand for domestic product, which is relevant to the determination of the "not to any substantial degree" test. Although, no figure was provided, the C.I.T. held that inflows were substantial[82] and that a regional market did not exist.

In the case at hand, the Tribunal stated that in *Solid Urea*:

> ...the CIT found that a regional market did not exist, on the ground that there was an 11.5 percent inflow of solid urea into the market from other provinces.[83]

The Tribunal stated that in *Reinforcing Bars*:

> ...the CIT found that an isolated market did not exist, on the basis that between 20 and 27 percent of the B.C. market for the goods in question was supplied by production from other provinces.[84]

The Complainants submit that the above statements constitute legal error. The Tribunal misinterpreted *Solid Urea* by implying that the figure of 11.5 percent was the share of the regional market for domestic products supplied from other provinces, when in fact it was the share of the regional market for domestic products (plus imports) supplied from other provinces. In *Reinforcing Bars*, the Tribunal relied on the figures of 20-27 percent which represents the share that production from the other provinces held of the total B.C. market (including imports), instead of using figures, as Article 4.1(ii) requires, that represent the share of the B.C. market for domestic product (not including imports).

The Complainants claim that the figures for inflows in terms of regional demand for domestic product in both *Solid Urea* and *Reinforcing Bars* are higher than the inflows in the present case. By their calculation, the figures for inflows in terms of regional demand for

---

81 *Reinforcing Bars*, *supra*, footnote 70.

82 *Id*, p. 262.

83 Decision, p. 16

84 *Id.*, pp. 15-16.

domestic product in *Solid Urea* is 29 percent, while Heileman's calculation is 22 to 29 percent.[85] Therefore, the Complainants' position is that the Tribunal used the wrong figures for comparison to the current case, and had they used the right figures, they would not have found that demand in the regional market in British Columbia was supplied to any substantial degree by producers outside British Columbia.

We agree that the figures from *Solid Urea* and *Reinforcing Bars* were misinterpreted or erroneously applied by the Tribunal. However, the Panel is uncertain what effect this misinterpretation had on the Tribunal's conclusion that:

> In no case, where flows into and out of a market were of the magnitude of the flows in the present case, has a regional industry been found to exist. In the present case, given the consistent pattern of a significant movement of packaged beer both into and out of British Columbia, the Tribunal is of the view that there is no longer a regional industry in packaged beer in British Columbia.[86]

It is not clear to the Panel whether the Tribunal based its conclusion regarding inflows on the evidence before it and found that it did not meet the "not to any substantial degree" test, or whether the Tribunal simply measured the level of inflows against the numbers used in the *Solid Urea* and *Reinforcing Bars* cases which it misinterpreted. The Panel is of the opinion that the Tribunal has not fulfilled adequately its statutory obligation under section 45(1) of *SIMA* to provide "...a statement of facts and reasons that caused it to be of [an] opinion...". The Panel believes that pivotal issues, such as inflow and outflow determinations in the context of a regional industry determination, must be handled with enough depth for this Panel to understand the steps the Tribunal made in arriving at its findings.

On the one hand, if the Tribunal's finding on inflows was based on the evidence before it, then it is a finding of fact which the Tribunal was entitled to make. Neither *SIMA* nor the legislator has seen fit to provide any guidance as to the meaning of "not to any substantial degree." The lack of a legislative definition obliges the Tribunal to determine what magnitude of inflows is necessary to satisfy the "not to any substantial degree" test. As it is required to do, the Tribunal found evidence that could have supported a finding that inflows were substantial,[87] but it is unclear what relation that evidence had to the Tribunal's decision.

On the other hand, if the Tribunal measured the inflows against the numbers used in *Solid Urea* and *Reinforcing Bars* and which it misinterpreted or erroneously applied to arrive at its conclusion then this is an error of law which could lead to interference by a reviewing panel.

---

85 Complainants' calculation of 29 percent for *Solid Urea* found at p. 48 of Complainants' Reply Brief; Heileman's calculation for 22-29 percent for *Reinforcing Bars* provided in handout given during oral hearing before Panel.

86 Decision, p. 18.

87 *Supra*, footnote 76.

In any event, the Panel finds that uncertainty in the Tribunal's decision on inflows is immaterial to the result. This is because the test for a regional market is conjunctive. Both of the Tribunal's findings regarding inflows and outflows must be reversible for a material error to have been made in the determination that a regional market no longer exists. As no reviewable error on outflows was made, this matter need not be remanded to the Tribunal. Since the Tribunal found that the domestic producers no longer constituted a regional industry, and had evidence upon which to make its finding related to outflows and inflows, it did not err in declining to make a decision of the issues of vulnerability to injury and propensity to dump.

CONCLUSION

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

Signed in the Original by:

Wilhelmina K. Tyler (Chair)
Wilhelmina K. Tyler (Chair)

Bruce Aitken, Esq.
Bruce Aitken, Esq.

Hon. Frank G. Evans
Hon. Frank G. Evans

Frank R. Foran, Q.C.
Frank R. Foran, Q.C.

Prof. Gilbert R. Winham
Prof. Gilbert R. Winham

Issued on the 15th day of November, 1995.