

**ARTICLE 1904**  
**BI-NATIONAL PANEL REVIEW PURSUANT TO THE**  
**NORTH AMERICAN FREE TRADE AGREEMENT**

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In the Matter of:

CERTAIN CONCRETE PANELS, REINFORCED  
WITH FIBERGLASS MESH, ORIGINATING IN  
OR EXPORTED FROM THE UNITED STATES  
OF AMERICA AND PRODUCED BY OR ON  
BEHALF OF CUSTOM BUILDING PRODUCTS,  
ITS SUCCESSORS AND ASSIGNS, FOR USE  
OR CONSUMPTION IN THE PROVINCE OF  
BRITISH COLUMBIA OR ALBERTA (Injury)

CDA-97-1904-01

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**DECISION OF THE PANEL**  
ON REVIEW OF THE CANADIAN INTERNATIONAL  
TRADE TRIBUNAL FINDING

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**August 26, 1998**

Before: Mr. Paul C. LaBarge, (Chair)  
Mr. Henri C. Alvarez,  
Ambassador David E. Birenbaum,  
Mr. Warren E. Connelly, Esq.,  
Prof. Maureen Irish

**Hearing:** May 28, 1998, Ottawa, Ontario, Canada

**Appearances:**

***The Complainant***

Mr. Jeffrey S. Thomas on behalf of Custom Building Products, Inc.

***In Response to the Complainant***

Mr. Riyaz Dattu on behalf of CGC Inc.

***On Behalf of the Canadian International Trade Tribunal***

Mr. Hugh J. Cheetham

and Ms. Heather S. Grant on behalf of the Canadian International Trade Tribunal

*note: no appearance was made in opposition to the Complainant.*

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## I INTRODUCTION

This bi-national panel (the “Panel”) was convened pursuant to Article 1904(2) of the *North American Free Trade Agreement* (“NAFTA”) to review a finding of the Canadian International Trade Tribunal (the “CITT”). The Panel was constituted in response to the complaint filed with the NAFTA Secretariat (Canadian Section) on August 19, 1997, pursuant to Rule 39 of the NAFTA Article 1904 Panel Rules by Custom Building Products, Inc., a U.S. exporter of subject goods to Canada (the “Complainant”). In its complaint, it was submitted by the Complainant that the CITT had committed errors of jurisdiction, law and fact in its finding issued June 27, 1997, that the dumping of subject goods has caused material injury to the production in Canada of like goods.

The subject matter of the complaint is certain concrete panels, imported or originating from the United States of America, which have been defined as follows:

concrete panels, reinforced with fiberglass mesh, originating in or exported from the United States of America and produced by or on behalf of Custom Building Products, its successors and assigns, for use or consumption in the Province of British Columbia or Alberta.<sup>1</sup>

## II ADMINISTRATIVE HISTORY AND PANEL PROCEEDINGS

Pursuant to a complaint filed by Bed-Roc Industries Limited, a domestic producer of subject goods (“Bed-Roc”), Revenue Canada commenced an investigation into alleged dumping on November 29, 1996. On February 27, 1997, Revenue Canada issued a preliminary determination of dumping with respect to the subject goods pursuant to subsection 38(1) of the *Special Import Measures Act* (“SIMA”),<sup>2</sup> which determination was confirmed by a final determination issued by Revenue Canada on May 27, 1997, pursuant to SIMA paragraph 41(1)(a). Revenue Canada determined that the subject goods exported to the regional market of British Columbia and Alberta by the Complainant were dumped by a weighted average margin of 35.72% based on export prices calculated under SIMA section 24. Revenue Canada further found that the margin of dumping on the subject goods was not insignificant and the actual volume of dumped subject goods was not negligible.

Following the Revenue Canada preliminary determination of dumping, the CITT undertook an injury inquiry, including public and *in camera* hearings in Vancouver, British Columbia, on May 28 and 29, 1997. At these hearings, both Bed-Roc and the Complainant were represented by counsel, as was CGC Inc., an importer of non-subject goods (“CGC”). On June 27, 1997, the CITT issued its finding in which it found that the dumping in Canada of the subject goods originating or exported from the United States of America has caused material injury to the domestic Canadian

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<sup>1</sup> Tribunal Exhibit NQ-96-004-1 (public), Administrative Record Vol 1 at 2.

<sup>2</sup> R.S.C. 1985 c.S-15, as amended.

regional market. A statement of reasons for such finding was issued by the CITT on July 14, 1997 (“Tribunal Decision”).

The CITT determined that Bed-Roc constituted the sole domestic producer of subject goods in the regional market of British Columbia and Alberta, into which the Complainant sold dumped subject goods to its wholly-owned Canadian subsidiary Custom Building Products of Canada Ltd. (“Custom Canada”) for resale in the regional market, and CGC sold non-subject goods. The CITT found that Bed-Roc suffered injury caused by the Complainant’s dumped prices for subject goods and considered other factors which were described as being “minimal.”<sup>3</sup>

Although the Complaint was filed on August 19, 1997, the filing of briefs with the NAFTA Secretariat - Canadian Section was not completed until January 19, 1998, and the Panel was not constituted until February 4, 1998. Consequently, the Panel hearing was set down for May 28, 1998; in order to accommodate these delays, the Panel, on its own motion, extended the date for its decision in this matter to August 26, 1998. A further motion was determined on May 21, 1998, in which it was held that a letter from Bed-Roc to the Panel dated January 16, 1998, was a “pleading” but not a “brief” for the purposes of this review. At that time, the Panel further held that Bed-Roc would not be permitted to present oral argument before the Panel in respect of this review as it had not filed a brief within the stipulated time limits.

Public and *in-camera* hearings were held before the Panel on May 28, 1998, at which counsel for the Complainant, the CITT and CGC appeared and presented oral argument. Also at the Panel hearings, all counsel were asked to prepare supplementary briefs in regard to the standard of review pursuant to the Supreme Court of Canada decision in *Pasiechnyk v. Saskatchewan (Workers’ Compensation Board)*<sup>4</sup>. Supplementary briefs were presented by the Complainant and the CITT on June 4, 1998.

For the reasons set forth herein, 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, Ontario on May 28, 1998, the Panel hereby affirms the decision of the CITT.

### III STANDARD OF REVIEW

The Panel is constituted under NAFTA Article 1904 to review a determination of the CITT in accordance with the anti-dumping law of Canada. The Panel is directed to apply “relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of...[Canada]...would rely on such materials....”<sup>5</sup> In conducting the review, the Panel is to

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<sup>3</sup> Tribunal Decision at 13.

<sup>4</sup> [1997] 2 S.C.R. 890.

<sup>5</sup> NAFTA, Art. 1904(2).

use the general legal principles that a Canadian court would apply to a CITT determination and the standard of review set out in section 18.1(4) of the *Federal Court Act*.<sup>6</sup>

The Panel's role is to apply domestic law including relevant administrative law and act as Canadian courts would within the limits set by NAFTA. As indicated by NAFTA, the panel process is to be conducted under the same principles as a domestic application for judicial review of a decision of an administrative agency. The statutory standard of review of the *Federal Court Act*<sup>7</sup> (“FCA”) is incorporated into NAFTA and made applicable to the Panel.

FCA paragraphs 18.1(4)(a), (c) and (d), concerning jurisdiction, law and fact, respectively, are relevant to this review.

### ***Issues of Jurisdiction***

The FCA provides that a court may grant relief if it is satisfied that an administrative agency:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;<sup>8</sup>

The purpose of jurisdictional review is to ensure that an administrative agency conforms to the mandate assigned to it by the legislators; as a creature of statute, an agency can only act as authorized by its empowering legislation.

Canadian case law has established that in dealing with questions relating to its jurisdiction, an agency's interpretation must be correct. If an agency answers a jurisdictional question incorrectly and mistakenly acts without or beyond its jurisdiction, the agency's decision will be void. On jurisdictional questions, the standard of review is correctness and a court will not defer to an agency's interpretation.

To decide whether a question is jurisdictional and thus subject to the correctness standard, courts use a “pragmatic and functional” test.<sup>9</sup> Under this test, a court examines the legislation in question, the purpose of the statute creating the agency, the expertise of members of the agency and the nature of the problem at issue. The goal is to reveal legislative intent as to who should decide the particular issue - the agency or the court. Questions involving issues of interpretation central to the purpose for the creation of the agency and requiring the exercise of the specialized expertise of agency members are likely to be found to be within the agency's jurisdiction. Other questions

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<sup>6</sup> NAFTA, Art. 1904(3), Annex 1911.

<sup>7</sup> R.S.C. 1985, c.F-7, as amended.

<sup>8</sup> FCA par. 18.1(4)(a).

<sup>9</sup> *Union des employés de service, local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at 1088.

concerning general legislation and requiring the legal expertise of courts may be found to be jurisdictional and thus reviewable on the correctness standard.

In the briefs filed and arguments presented, the Complainant and the CITT agree that for jurisdictional questions, the standard of review is correctness. The Panel also agrees and adopts that standard for any jurisdictional questions.

### *Issues of Law*

The FCA provides that a court may grant relief if it is satisfied that an administrative agency:

- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record.<sup>10</sup>

For questions of law that are not jurisdictional, Canadian courts will show deference to agency interpretation in light of the legislative choice to establish the agency. In response to privative clauses shielding agencies from review, courts have decided that they will intervene in such questions only if the agency's interpretation was patently unreasonable.<sup>11</sup> In the absence of a privative clause, courts may apply a deferential standard chosen from a range of standards to fit the matter and agency at issue.<sup>12</sup>

As in *Bibeault*, courts apply a functional analysis to select the appropriate standard. Factors examined will include the wording of any privative clauses present, the expertise of agency members concerning the matter at issue, the purpose of the legislation as a whole and the relevant provision in particular, and the nature of the problem as involving a question of law or fact. In *Pezim*, the Supreme Court of Canada described the range of standards as follows:

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the 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

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<sup>10</sup> FCA, par. 18.1(4)(c).

<sup>11</sup> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983; *Pasiechnyk*, *supra*.

<sup>12</sup> *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. 46.

right of appeal....

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights.<sup>13</sup>

In *National Corn Growers Assn. v. Canada (Import Tribunal)*,<sup>14</sup> the Supreme Court of Canada applied the standard of patent unreasonableness in upholding an injury determination from the Canadian Import Tribunal, the predecessor of the CITT. The determination related to the imposition of countervailing duties. At the time, SIMA contained a provision stating that the Tribunal's decisions were final and conclusive. The Court treated this provision as a privative clause leading to the review standard of patent unreasonableness. That provision was removed when the legislation was revised at the beginning of 1994;<sup>15</sup> the decisions of the CITT are not now protected by any privative clause.

In the briefs filed, both the Complainant and the CITT submit that the appropriate review standard for questions of law is the standard applied in *Pezim*, "considerable deference," a standard towards the patent unreasonableness end of the spectrum. In its supplementary brief, the CITT argues that this represents a high degree of deference, appropriate for the CITT even in the absence of a privative clause, given the context of the CITT's expertise.<sup>16</sup> The Panel agrees and adopts the standard of considerable deference for review of questions of law involved in the injury determination in light of the CITT's highly specialized expertise in regulatory and economic matters.<sup>17</sup> It may be noted that the CITT's level of expertise is compared to the expertise of domestic Canadian courts and not to the expertise of bi-national panel members. Under Annex 1901.2 of NAFTA, bi-national panel members are selected in part on the basis of familiarity with international trade law, a criterion that may not apply in the selection of judges for domestic Canadian courts. The Panel is nevertheless directed to conduct its review on the basis of the domestic standard and will accord considerable deference to the CITT's interpretations of questions of law within its jurisdiction.

In *Southam*, the Supreme Court of Canada explained the difference between patent

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<sup>13</sup> *Pezim, supra*, at 590.

<sup>14</sup> [1990] 2 S.C.R. 1324.

<sup>15</sup> *North American Free Trade Agreement Implementation Act*, S.C. 1993, c.44, s.217(1).

<sup>16</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 584, at 595.

<sup>17</sup> *Pushpanathan, supra*, at para. 34.



unreasonableness and a middle ground or reasonableness standard as follows:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. ... This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem (See *National Corn Growers Assn. [supra]*...). But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.<sup>18</sup>

Whatever the precise level of deference, it is clear that the Panel’s task includes examination of the legislation and the record in order to reach a decision on the CITT’s interpretation of questions of law. Although that examination may be detailed and is not restricted to the obvious or evident, the Panel accepts that the “considerable deference” standard appropriate for judicial review of injury determinations is very close in result to the standard of patent unreasonableness. On legal questions within jurisdiction, after examination and study, the Panel will remand only if it finds that the CITT’s decision cannot be sustained on any reasonable interpretation of the law.<sup>19</sup>

### ***Issues of Fact***

The FCA provides that a court may grant relief if it is satisfied that an administrative agency:

- (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.<sup>20</sup>

The Complainant and the CITT both submit that this provision describes the patent unreasonableness standard as applied to questions of fact. It is clear that the provision requires a review of the CITT’s factual conclusions. The statutory standard, in other words, is not whether there is any evidence at all, but rather whether there is any evidence that, viewed reasonably, is capable of supporting the CITT’s findings of fact.<sup>21</sup> The Panel agrees that it is required to review for reasonableness, showing a high level of deference in light of the CITT’s expertise and superior ability to weigh and assess the evidence. The Panel will remand only if it finds that the CITT’s

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<sup>18</sup> *Southam, supra*, at 777.

<sup>19</sup> cf. *National Corn Growers Assn., supra*, at 1369-1370.

<sup>20</sup> FCA, par. 18.1(4)(d).

<sup>21</sup> *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.

decision cannot be sustained on any reasonable interpretation of the facts.<sup>22</sup>

The classification of questions as either factual or legal will indicate the approach to be taken on review. In *Pezim*, the Supreme Court of Canada dealt with an alleged error concerning whether newly acquired information was a material change in the value of corporate assets.<sup>23</sup> Referring to *Pezim*, the Court in *Southam* expressed the distinction between questions of fact and questions of law as follows:

It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case....

...Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.<sup>24</sup>

It is possible, then, that a conclusion applying a legal rule might represent both a question of law with precedential value in future cases and a question of fact, either specific or general.

A general conclusion may be based on several specific findings. If the Panel decides, on the applicable standard of review, that one or more of those specific findings cannot be sustained, the panel must then proceed to an examination of the general conclusion. Two approaches are possible, both rooted in deference to the CITT. If it is not clear what weight, if any, should be attached to the specific finding, the Panel might decline to re-weigh the evidence and remand the matter for reassessment by the CITT.<sup>25</sup> On the other hand, in accordance with the deference standard discussed above, the Panel should not remand if there is other evidence that, viewed reasonably, is capable of supporting the general conclusion.

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<sup>22</sup> cf. *National Corn Growers Assn.*, *supra*, at 1369-1370.

<sup>23</sup> *Pezim*, *supra*.

<sup>24</sup> *Southam*, *supra* at 767-768.

<sup>25</sup> *Canadian Pasta Manufacturers' Assn. v. Aurora Importing & Distributing Ltd.*, [1997] F.C.J. 493; See: *Re Dry Pasta*, [1997] C.I.T.T. 55; *Canada (Canadian Wheat Board) v. Unicone Industriali Pastai Italiani*, [1998] F.C.J. 173.

#### **IV THE CAUSATION STANDARD**

The Complainant's grounds for review are based primarily on the CITT's conclusions related to causation. The Complainant claims that the CITT applied a legally incorrect standard of causation, and alleges a number of specific errors related to the identification or application of the appropriate standard of causation.

The requirement that the Tribunal undertake a causation analysis flows from the terms of SIMA, section 42(1) which provides in relevant part as follows:

- 42(1) The Tribunal...shall make enquiry with respect to such of the following matters as is appropriate in the circumstances:
- (a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods
    - (i) has caused injury or retardation or is threatening to cause injury....

SIMA, section 2(1) defines "injury" as "...material injury to a domestic industry." Although SIMA itself does not expressly provide further with respect to the nature of the causal relationship that must be established between the dumped goods and material injury, the Regulations under SIMA do prescribe a number of factors:

##### **Injury, Retardation or Threat of Injury**

37.1(1) For the purposes of determining whether the dumping or subsidizing of any goods has caused injury or retardation, the following factors are prescribed:

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

- employment, wages, growth or the ability to raise capital,
  - (ii.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods, and
  - (iii) in the case of agricultural goods, including any goods that are agricultural goods or commodities by virtue of an Act of Parliament or of the legislature of a province, that are subsidized, any increased burden on a government support programme; and
  - (d) any other factors that are relevant in the circumstances.
- ...
- (3) For the purposes of determining whether the dumping or subsidizing of any goods has caused injury or retardation or is threatening to cause injury, the following additional factors are prescribed:
    - (a) whether a causal relationship exists between the dumping or subsidizing of any goods and injury, retardation or threat of injury, on the basis of
      - (i) the volumes and prices of imports of like goods that are not dumped or subsidized,
      - (ii) a contraction in demand for the goods or like goods,
      - (iii) changes in patterns of consumption of the goods or like goods,
      - (iv) trade-restrictive practices of, and competition between, foreign and domestic producers,
      - (v) developments in technology,
      - (vi) the export performance and productivity of the domestic industry in respect of like goods, and
      - (vii) any other factors that are relevant in the circumstances; and
    - (b) whether any factors other than the dumping or subsidizing of the goods has caused injury or retardation or is threatening to cause injury.<sup>26</sup>

Thus, the legislation establishes three requirements for a finding of material injury: material injury; injury caused by the dumping; and a consideration of other factors to ensure that injury caused by those factors is not attributed to the dumping.

The international obligation which provides the basis for the causation requirement in SIMA section 42(1) is found in Article VI:6 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), as elaborated upon by *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "WTO Anti-Dumping Agreement"), and in particular Article 3 of the WTO Anti-Dumping Agreement.

GATT 1994 Article VI:6 provides that:

No Member shall levy any anti-dumping...duty on the importation of any product...unless it determines that the effect of the dumping...is such as to cause...material injury to an

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<sup>26</sup> Special Import Measures Regulations, S.O.R./84-927.

established domestic industry....

The relevant parts of Article 3 of the WTO Anti-Dumping Agreement which elaborate on this requirement provide:

- 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.
- 3.2 ...With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree....
- 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports....

In considering the effect of GATT 1994, Article VI:6 and Article 3 of the WTO Anti-Dumping Agreement, it is important to remember that the CITT applies these obligations to the extent that they are incorporated into SIMA and its Regulations<sup>27</sup>. In interpreting legislation which has been enacted with a view towards implementing international obligations, it is reasonable for a tribunal to examine the domestic law in the context of the international obligation. An effort should be made to arrive at an interpretation consonant with a relevant international obligation.<sup>28</sup> This is the case here; the Panel's review of the relevant provisions of SIMA and its Regulations indicates that they are substantially similar to the comparable provisions of the GATT 1994 and the WTO Anti-dumping Agreement.

In their briefs and oral argument, counsel for the Complainant and the CITT emphasized certain aspects of the causation standard articulated in previous decisions of the CITT, the Courts, and bi-national panels under NAFTA. Counsel for the Complainant emphasized the requirement of

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<sup>27</sup> *Synthetic Baler Twine with a Knot Strength of 200 LBS or Less Originating In or Exported From the United States of America*, CDA-94-1904-02 (April 10, 1995), at 16-18.

<sup>28</sup> *National Corn Growers, supra*, at 1371.

positive evidence that dumping “in and of itself” caused material injury. He also argued that in undertaking the required causation analysis, the CITT was required to consider price as an essential factor and the evidence must show injury at both a macro and micro level. Counsel for the CITT, on the other hand, submitted that the exact nature of the causal relationship between dumped imports and material injury was a matter within the CITT’s expertise and that there was no single standard against which to judge the CITT’s analysis of causality.

In the Panel’s view, these elements are not necessarily inconsistent and, in fact, fall within the standard the CITT was required to apply. It must be noted that SIMA does not specify the exact nature of the causal relationship which must be established between dumped imports and material injury for the purposes of SIMA section 42(1)(a)(i). In previous decisions of the Courts and of a bi-national panel under NAFTA, the determination of causation has been held to be within the expertise of the CITT.<sup>29</sup> In *Corrosion-Resistant Steel*, the bi-national panel held that causation is largely a question of fact and that “...it is clear that the determination of cause under s.42 of SIMA is within the jurisdiction entrusted to the CITT and at the centre of the CITT’s expertise.”<sup>30</sup>

With respect to the material injury component of the test under SIMA section 42(1), it is clear that injury may take a number of forms. Material injury can be shown by loss of sales, price suppression, or price erosion. The bi-national panel in *Synthetic Baler Twine* found that dumped imports can be a cause of material injury even if they are not always or even predominantly the lowest priced imports. What is required is a showing that the dumped imports contribute, at a sufficient level, to price erosion, price suppression or lost sales.<sup>31</sup>

In evaluating the issue of causation, a distinction must be made between the effects of dumping and the mere presence of dumped goods in the market. In order to express this distinction, a number of authorities have used the expression that the dumping must “in and of itself” have caused material injury. In the Panel’s view, this expression is only one way of expressing the requirement that dumping be an effective cause of material injury. It is another way of expressing the requirement for a causal nexus or a rational connection between the dumped goods and material injury. Previous bi-national panel decisions under NAFTA have utilized these various expressions to convey the same meaning.<sup>32</sup>

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<sup>29</sup> *Sacilor Aciéries v. Anti-Dumping Tribunal* (1986), 60 N.R. 371 (F.C.A.); *National Corn Growers, supra*; *Certain Corrosion-Resistant Steel Sheet Products Originating In or Exported From the United States of America (Injury)*, CDA 94-1904-04 (July 10, 1995).

<sup>30</sup> *Corrosion-Resistant Steel, supra*, at 13.

<sup>31</sup> *Synthetic Baler Twine, supra*, at 28.

<sup>32</sup> *Machine-Tufted Carpeting Originating in or Exported from the United States of America (Injury)*, CDA-92-1904-02 (April 7, 1993), at 20; *Hot-Rolled Carbon Steel Products Originating in or Exported from the United States of America (Injury)*, CDA-93-1904-07 (May 18, 1994), at 30-32.

With respect to the degree to which dumping must cause material injury, it is clear from decisions of the Courts and of previous bi-national panels that dumping must only be “a” cause of injury. In this regard, this Panel agrees with the following finding of the bi-national panel in *Hot-Rolled Carbon Steel*:

SIMA itself does not specify the required degree of causal relationship between dumping and material injury or exactly what must be considered in a causal analysis. In past decisions, the tribunal, or its predecessor, found that dumped imports constituted a “significant” or “direct” cause of injury or that a “significant proportion” of material injury was attributable to the effects of dumping. More recently, in *Machine-Tufted Carpeting*, the tribunal found that dumped imports must be “a cause” of material injury. There is no single administrative standard against which to judge the tribunal’s analysis of causality in this case. To a certain extent, this may be inevitable because the tribunal’s analyses are driven largely by economics and market analyses of various products and industries, which may dictate that different weight must be given to different factors and different cases.<sup>33</sup>

While dumping need not be the sole cause of material injury, it must be distinguished from other causes in order to ensure that injury caused by those factors is not attributed to the dumping. It is the function of the CITT, within its expertise, to weigh and balance other factors or causes of injury.<sup>34</sup> However, the CITT is not required to quantify precisely and “account for” the impact of all other potential causes in determining whether material injury has been caused by dumped goods.<sup>35</sup>

The important remaining element in the determination of causation is the nature and extent of evidence required. In its brief, the Complainant relied on a passage from *Machine-Tufted Carpeting* which states that the use of the term “demonstrated” in the WTO Anti-Dumping Agreement and its predecessor, “...seems to require a showing, or analysis, beyond conclusory findings by an expert tribunal.”<sup>36</sup> In the Panel’s view, this formulation is consistent with that used by other bi-national panels. For example, in *Hot-Rolled Carbon Steel* the bi-national panel held that the standard described as “positive evidence demonstrating a causal relationship between dumping and material injury”<sup>37</sup> was not patently unreasonable. In the Panel’s view, there is not a significant distinction between these two expressions of the standard for assessing the evidence required to find that dumping has caused material injury. They both express the requirement for some reliable evidence establishing a causal nexus between dumped imports and injury. The law does not support the distinction the Complainant claims between micro and macro level evidence; providing the

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<sup>33</sup> *Hot Rolled Carbon Steel, supra*, at 31-32.

<sup>34</sup> *Sacilor Aciéries, supra*, at 374.

<sup>35</sup> *Synthetic Baler Twine, supra*, at 20.

<sup>36</sup> Complainant’s Brief at 18.

<sup>37</sup> *Hot-Rolled Carbon Steel, supra*, at 32.

requirement for reliable evidence is met, there is no basis for requiring or necessarily distinguishing between macro and micro level evidence in every case. In this regard, the Panel notes that the Supreme Court of Canada has held that a tribunal is entitled to draw inferences from the evidence in finding causation or injury.<sup>38</sup>

**Issue (a)**

The Complainant submitted that:

In concluding that Custom Canada's sales to CanWel and to other customers were at weighted average margins of dumping of 36 per cent, the Tribunal made a conclusion unsupported by any evidence on the record and therefore committed a reviewable error of fact.<sup>39</sup>

In its decision, the CITT stated as follows:

In late 1995, Custom Canada approached CanWel and, in the spring of 1996, successfully concluded an agreement with CanWel to act as its distributor for concrete panels. As the Deputy Minister's final determination makes clear, these sales to CanWel, as well as Custom Canada sales to other customers, were made at weighted average margins of dumping of 36 percent.

The Deputy Minister's May 27, 1997 final determination finds the following:

As Custom Building Products of Canada is a wholly-owned subsidiary of the exporter, the Department conducted a reliability test on the declared selling prices prior to the preliminary determination. A comparison of the export prices calculated under section 24 and paragraph 25(1)(c) of SIMA revealed that the declared selling prices were acceptable for purposes of determining export prices. Consequently, export prices were determined under section 24 of SIMA.<sup>40</sup>

The Complainant submits that there was no evidence upon which the CITT could find a weighted average margin of dumping of 36 per cent because such dumping margin was found to exist only on the intra-corporate sales by the Complainant to its wholly-owned Canadian subsidiary, Custom Canada.<sup>41</sup> The Complainant argues that because export prices were not based on resales by Custom Canada, the Deputy Minister's final determination of dumping provides no useful analysis

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<sup>38</sup> *National Corn Growers Ass'n, supra; Sacilor Aciéries, supra.*

<sup>39</sup> Complainant's Brief at 15.

<sup>40</sup> Tribunal Exhibit NQ-96-004-4 (public), Administrative Record Vol. 1 at 40.16.

<sup>41</sup> Complainant's Brief at 21.



of prices charged by Custom Canada to CanWel or any other customers, and says little about any margin of dumping that Bed-Roc may have faced in the marketplace.<sup>42</sup> The Complainant submits that this is an evidentiary gap, as there is no evidence that the dumping margin was passed on to customers in the Canadian market.<sup>43</sup> The Complainant argues that there must be a remand because the CITT cannot simply assume that the margin has been passed on and the error filters through the CITT's entire causation analysis.<sup>44</sup>

In its submissions, the CITT states that the passage identified by the Complainant should be interpreted as a finding that all sales by Custom Canada to its customers benefitted from the dumped prices at which subject goods were sold by the Complainant.<sup>45</sup> The CITT further argues that it is not required to determine whether the dumping margin was passed through to purchasers and that the causal link between the dumping and injury is supported by the evidence before the CITT.

Under SIMA, the Deputy Minister is fixed with the duty to determine whether dumping exists and, if so, to determine the margin of dumping. The determination of the CITT in respect of its jurisdiction is not the margin of dumping but rather the question of material injury. In this regard, at issue for the CITT is not the margin of dumping, but the causal nexus between the dumping and the material injury, if any.<sup>46</sup>

SIMA section 24 is the primary method of determining a product's export price, with section 25 representing an alternate method of determining such export price under certain circumstances in which section 24 is not appropriate. SIMA section 25 may be used to determine a product's export price when it is determined that an export price under section 24 is unreliable because the sale of subject goods was between associated persons. This comes about as a result of SIMA paragraph 25(1)(b), which allows section 25 to be used to determine export price instead of section 24 if "the Deputy Minister is of the opinion that the export price, as determined under section 24, is unreliable."

The CITT noted that the Deputy Minister had based export prices on the Complainant's transfer prices to Custom Canada.<sup>47</sup> However, in the portion of the Decision referred to by the Complainant above, the CITT applied the average dumping margin to resales by Custom Canada to its customers. The Panel agrees with the Complainant that this statement, that resales were made

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<sup>42</sup> Complainant's Brief at 21-22.

<sup>43</sup> Complainant's Brief at 22.

<sup>44</sup> Complainant's Brief at 22.

<sup>45</sup> CITT Brief at 24.

<sup>46</sup> SIMA, s. 42.

<sup>47</sup> Tribunal Decision at 3.

at a 36 percent margin of dumping, is an error of fact since it is not supported by material before the CITT.

In addition, the Panel further finds that the CITT's assumption that the 36 per cent weighted average margin applied to Custom Canada's resales constitutes an interpretation of SIMA that cannot be sustained on any reasonable interpretation of the statute and thus is an error of law. The reliability test in section 25(1)(b)(i) of SIMA prevents related parties from practising hidden dumping by importing product at inflated transfer prices and then reselling in Canada at dumped prices. If the reliability test had produced higher margins of dumping using Custom Canada's resale prices, the Deputy Minister could have used those resale prices for the calculation of export prices. The fact that the Deputy Minister found the transfer prices in this investigation reliable does not indicate that Custom Canada's resale prices would have produced the same 36 per cent average margin.

Because the Panel agrees with counsel for the CITT that the CITT is not required to trace the dumping margin through each level in the distribution system to the ultimate end user, the Panel does not order a remand on this issue. Once it has been found that imports were dumped, there is no requirement that margins be calculated at each intervening level by either the Deputy Minister or the CITT. The CITT's inquiry involves determining the presence or absence of evidence supporting a price based effect such as price erosion, price suppression, undercutting or lost sales, not necessarily direct comparisons of any prices with normal values as determined under SIMA or the tracing of dumping margins. This is not a situation in which the errors taint the whole decision or in which the matter must be referred back to the CITT for expert re-weighing of evidence.<sup>48</sup> As explained elsewhere in this decision, there was material before the CITT that supports its finding of causation; therefore, the Panel declines to remand on this issue.

#### **Issue (b)**

The Complainant submitted that:

In concluding that the establishment of new pricing arrangements between the Complainant and Custom Canada was an element establishing causation, the Tribunal failed to undertake any specific analysis as to how these new arrangements, in and of themselves, had any specific effect on the prices of like goods in Canada, and therefore committed a reviewable error of law and fact.<sup>49</sup>

The CITT concluded that the Complainant's September 1995 transfer pricing arrangement with Custom Canada was a factor that led to Bed-Roc's injury. According to the CITT, this arrangement allowed the Complainant to sell its concrete panels directly to Custom Canada at cost plus 5 percent, which was 25 percent below prices previously paid to the Complainant. With the

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<sup>48</sup> *Canadian Pasta Manufacturers' Association, supra*, at paras. 28, 31.

<sup>49</sup> Complainant's Brief at 15.

benefit of these low prices, Custom Canada aggressively priced its sales in Canada.<sup>50</sup>

The CITT also determined that, in addition to the September 1995 pricing agreement, the Complainant and Custom Canada eliminated the freight cost advantage enjoyed by Bed-Roc in the Canadian market, further increasing the price advantage enjoyed by Custom Canada over Bed-Roc.<sup>51</sup> In this regard, the CITT explained that because concrete panel is a relatively bulky product, the cost of shipping imported panels from the United States to Canada is a significant element in the ultimate price paid by Canadian consumers. The CITT concluded that, to reduce this price element, Custom Canada paid the freight costs on a considerable portion of the shipments purchased from the Complainant and delivered to its customers in British Columbia and Alberta, goods which already benefitted from the September 1995 pricing agreement.<sup>52</sup>

The CITT determined that these complementary pricing strategies allowed Custom Canada to offer price reductions to attract customers. Without the advantage of the dumped prices offered by the Complainant, the CITT reasoned, Custom Canada would not have been in a position to price its products as aggressively as it did.<sup>53</sup> Considering this evidence, the CITT concluded that the dumping of merchandise by the Complainant was a cause of Bed-Roc's injury.<sup>54</sup>

The CITT did not commit an error of law or fact by concluding that the change in the transfer pricing arrangement between Custom Canada and the Complainant was a major factor that led to Bed-Roc's injury. A definite logical nexus exists between the evidence cited by the CITT and its finding. Accepting, as we must, the Deputy Minister's determination of dumping by the Complainant, and given the evidence of the existence and impact of the new transfer pricing agreement referred to above, it is reasonable to conclude that dumped merchandise from the Complainant played a significant part in Custom Canada's aggressive pricing after September 1995. Indeed, the CITT cited evidence to support its conclusion: a Custom Canada employee testified that Custom Canada needed low prices from the Complainant in order to lower its own prices.<sup>55</sup> The CITT also noted that Custom Canada experienced strong sales growth at a time when prices were in a general decline.<sup>56</sup> Given this evidence, it is reasonable to conclude, as the CITT did, that

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<sup>50</sup> Tribunal Decision at 10.

<sup>51</sup> Tribunal Decision at 10.

<sup>52</sup> Tribunal Decision at 10.

<sup>53</sup> Tribunal Decision at 11.

<sup>54</sup> Tribunal Decision at 13.

<sup>55</sup> Tribunal Decision at 10.

<sup>56</sup> Tribunal Decision at 8.

dumping by the Complainant to Custom Canada was a cause of Bed-Roc's injury.<sup>57</sup>

The Complainant argues that the CITT erroneously based its conclusion in this respect on a statement that, "sales to CanWel, as well as Custom Canada sales to other customers, were made at weighted average margins of dumping of 36 percent."<sup>58</sup> The Complainant maintains that the Deputy Minister made no determination of whether sales from Custom Canada to CanWel were at dumped prices.<sup>59</sup> However, pursuant to SIMA sections 24 and 25, which govern the Deputy Minister's determination, the Deputy Minister is not required to determine whether sales made from one Canadian entity to another were at dumped prices.

As discussed above, because the Deputy Minister did not determine whether sales from Custom Canada to CanWel were at dumped prices, the CITT's statement that "sales to CanWel...were made at weighted average margins of dumping of 36 percent" is incorrect. Nevertheless, the CITT is certainly permitted to draw reasonable inferences as to matters within its expertise, including as to whether sales by Custom Canada to CanWel reflected the benefits of dumping on sales to Custom Canada.

As summarized above, the record reflects ample evidence to support the conclusion reached by the CITT, *i.e.* that Custom Canada's pricing to its customers reflected some or all of the dumped pricing on sales by the Complainant to Custom Canada. In particular, the CITT found that Custom Canada began to offer lower prices to its customers soon after the Complainant lowered its prices to Custom Canada.<sup>60</sup>

The Complainant contends that the CITT did not complete the third step of the causation analysis - a consideration of other factors to ensure that injury caused by those factors is not attributed to dumping. Before the CITT, the Complainant argued that Bed-Roc's failure to sell on a national basis, its lack of a dedicated marketing staff, and sales by CGC were the real causes of Bed-Roc's injury.<sup>61</sup> However, the CITT did consider these factors and concluded that, despite these potential disadvantages, Bed-Roc had been able to establish a strong market position before the Complainant lowered its prices. The CITT reasoned that because Bed-Roc's injury followed a drop

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<sup>57</sup> The Pre-Hearing Staff Report explains that price ranks second only to quality when purchasers of concrete panels evaluate factors considered in choosing a source of supply. Tribunal Decision at 8; Tribunal Exhibit NQ-96-004-6 (public), Administrative Record Vol. 1 at 63.

<sup>58</sup> Tribunal Decision at 11.

<sup>59</sup> Complainant's Brief at 22.

<sup>60</sup> Tribunal Decision at 10; transfer price lowered in September 1995 and market reduction announced in October 1995.

<sup>61</sup> Tribunal Decision at 5, 12. Before the Panel, the Complainant did not maintain the position that sales by CGC were a cause of Bed-Roc's injury.

in the Complainant's prices, while these other factors remained relatively constant, the injury was caused, at least in part, by the change in prices.<sup>62</sup> The Panel, therefore, finds that the CITT's conclusion was supported by an adequate consideration of other factors.

Similarly, the Complainant contends that the CITT should have taken into account a difference between the products sold by Custom Canada and Bed-Roc. Custom Canada sold ½ inch thick panels which were claimed to be more attractive to consumers than Bed-Roc's 7/16 inch thick panels, because they are the same thickness as drywall and, therefore, easier to use. The implication is that consumers chose Custom Canada's product because of ease of use, not because of low price.<sup>63</sup> The CITT's survey of consumer preferences found, however, that consumers place a high priority on price.<sup>64</sup> The CITT could reasonably conclude, therefore, that while ½ inch thick panels may have been preferred, price was a more important factor in the purchase decision. Moreover, Custom Canada's employees told the CITT that they were aware that to gain customers, they would have to lower prices.<sup>65</sup> This testimony supports the CITT's conclusion that there was a causal connection between dumping and injury.

The Complainant also contends that Bed-Roc's injury was caused not by low market prices, but by Bed-Roc's failure to produce ½ inch panels, which the Complainant claims are cheaper to produce than 7/16 inch panels.<sup>66</sup> However, notwithstanding the cost of producing 7/16 inch thick panels, the CITT compared the cost differential to the reduction in the Complainant's prices and could reasonably infer, therefore, that the price reduction was a factor in Bed-Roc's injury.

### **Issue (c)**

The Complainant submitted that:

In concluding that Bed-Roc's allegations of price erosion and lost sales at specific accounts were largely borne out, the Tribunal applied a legally incorrect standard of causation and thereby exceeded its jurisdiction. In the alternative, in applying an incorrect causation test the Tribunal committed a reviewable error of law.<sup>67</sup>

The CITT stated that it examined Bed-Roc's price erosion and lost sale allegations and

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<sup>62</sup> Tribunal Decision at 12-13.

<sup>63</sup> Transcript of Public Panel Hearing at 34.

<sup>64</sup> See, e.g., Tribunal Exhibit NQ-96-004-6 (public), Administrative Record Vol. 1 at 63.

<sup>65</sup> Tribunal Decision at 11.

<sup>66</sup> Transcript of Public Panel Hearing at 34-35.

<sup>67</sup> Complainant's Brief at 16.

determined that those allegations were “largely borne out”. The CITT concluded that Bed-Roc’s “total sales losses” occasioned by price erosion and lost sales “contributed significantly” to Bed-Roc’s injury even though the total sales losses were not large. The CITT next stated that the more important point was that Custom Canada’s sales of dumped merchandise to a distributor, CanWel, allowed CanWel to lower its prices to certain accounts that it was able to acquire from Bed-Roc, and that this had an adverse impact on Bed-Roc’s overall prices and caused Bed-Roc to lower its prices to other customers.<sup>68</sup> At the May 28, 1997 hearing before the CITT, a witness from CanWel acknowledged that CanWel needed pricing assistance to compete with Bed-Roc.<sup>69</sup>

The Complainant argues that the CITT’s conclusions were deficient in two respects. First, the Complainant repeats its previous argument that the CITT improperly concluded that Custom Canada made sales to CanWel at dumped prices.<sup>70</sup> Second, the Complainant argues that the CITT’s conclusion constituted a jurisdictional error because the CITT failed to explain how Bed-Roc lost certain customers identified in its lost sales allegations.<sup>71</sup> According to the Complainant, Bed-Roc lost certain accounts notwithstanding its pricing.<sup>72</sup> In light of this allegation, the Complainant argues that the CITT committed an error in jurisdiction by ignoring pricing of these accounts in making its causation determination, because the CITT allegedly analyzed the effects of dumped imports, rather than the effects of “dumping” by Custom Canada.<sup>73</sup> The Complainant also asserts, in the alternative, that the CITT’s conclusion constituted an error in law.<sup>74</sup>

Counsel for the CITT responded by first pointing out that the Complainant’s pricing analysis as to one customer is not accurate.<sup>75</sup> Counsel then argues that, regardless of the relationship between CanWel’s and Bed-Roc’s prices at certain accounts, CanWel significantly reduced its prices to these accounts in response to Bed-Roc’s attempt to regain them.<sup>76</sup> Counsel asserts that the CITT properly concluded that the resulting price erosion and suppression caused by sales of the dumped merchandise materially injured Bed-Roc because it was forced to further lower prices in an attempt

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<sup>68</sup> Tribunal Decision at 11.

<sup>69</sup> Tribunal Decision at 11.

<sup>70</sup> Complainant’s Brief at 25. We need not repeat our rejection of that argument here.

<sup>71</sup> Complainant’s Brief at 25-28

<sup>72</sup> Complainant’s Brief at 26-27.

<sup>73</sup> Complainant’s Brief at 27.

<sup>74</sup> Complainant’s Brief at 28.

<sup>75</sup> CITT Brief at 27-28.

<sup>76</sup> CITT Brief at 28.

to maintain and regain market share.<sup>77</sup>

The Panel finds that the CITT reasonably inferred that Custom Canada's sales to CanWel reflected the benefit of dumping for the reasons explained earlier in this decision. Regarding the Complainant's second argument concerning Bed-Roc's lost sales and price erosion allegations, whether the CITT's allegedly erroneous analysis raises an issue of jurisdiction, law, or fact must first be determined, because the result will establish the applicable standard of review. If the CITT's action raises a question of jurisdiction, then the applicable standard of review is correctness. If the CITT's action raises a question of law, then the standard is considerable deference. If the CITT's action raises a question of fact, then the standard is patent unreasonableness.

As discussed above, a question involving an issue of interpretation central to the purpose for the creation of the agency and requiring the exercise of the specialized expertise of the agency members, is likely to be found within the agency's jurisdiction. The issue here is the CITT's analysis of Bed-Roc's lost sales and price erosion allegations and the CITT's subsequent conclusion that Bed-Roc's "total sales losses" (which, read in context, covers its losses due both to lost sales and price erosion) contributed to the material injury which it suffered.

SIMA section 42(1)(a)(i) grants the CITT the authority to inquire:

- (a) in the case of any goods to which the preliminary determination applies, as to whether the dumping ... of the goods
  - (i) has caused injury or retardation or is threatening to cause injury....

The CITT's authority to conduct such an analysis and to make a determination of causation based on its analysis is central to the authority granted under SIMA. The CITT exercised its specialized expertise by applying the requirements established in SIMA section 42 to the facts obtained in its investigation. This is the very purpose for which the CITT was created. For these reasons, we find no issue of jurisdiction. We also find that the CITT's interpretation was one reasonably open to it and thus does not present an issue of law. Rather, the question presented is one of fact.

The Complainant's reliance on *Deputy M.N.R., Customs and Excise v. General Electric Canada Inc.*<sup>78</sup> is misplaced. In that case, the Federal Court of Appeal held that the CITT exceeded its jurisdiction when it made a determination that was within the jurisdiction of the Deputy Minister of National Revenue for Customs and Excise as expressly provided by SIMA section 38(1)(a)(ii).<sup>79</sup> Conversely, in this case, the CITT interpreted and applied SIMA section 42 which specifically

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<sup>77</sup> CITT Brief at 29.

<sup>78</sup> (1994) 170 N.R. 341 (F.C.A.).

<sup>79</sup> *General Electric, supra*, at para. 9.

identifies the CITT as the appropriate agency to apply that provision.

In summary, the CITT did not exceed its jurisdiction or commit an error of law in determining that Bed-Roc's lost sales and price erosion allegations supported its claim that it suffered material injury as a result of imports of the dumped merchandise. Accordingly, the Panel will apply the standard of review for a question of fact, patent unreasonableness, in reviewing the CITT's determination.

With respect to errors of fact, the patent unreasonableness standard requires the Panel to affirm the CITT's decision if it can be sustained on any reasonable interpretation of the facts. Based upon this standard, the Panel finds that the CITT's analysis of Bed-Roc's lost sales and price erosion allegations and its resulting conclusion that Bed-Roc's total sales losses contributed to the material injury which it suffered as a result of the dumped imports is not patently unreasonable.

First, contrary to the Complainant's position, the CITT's finding that Bed-Roc's lost sales and price erosion allegations were "largely borne out" was not predicated solely upon the CITT finding that all of Bed-Roc's lost sales allegations were correct. Second, the Complainant failed to sustain its allegations with respect to the seven selected accounts. CanWel's pricing was not consistently greater than Bed-Roc's and, in addition, CanWel lowered its prices for a significant number of the examined accounts.<sup>80</sup> Custom Canada's sale to CanWel of merchandise that was imported from the Complainant at dumped prices certainly contributed to CanWel's ability to lower its prices to those accounts.

Third, the Complainant has no rebuttal to the evidence showing that Bed-Roc's prices were eroded over time.<sup>81</sup> Bed-Roc's hearing testimony amply linked this erosion to price competition from Custom Canada and its distributor, CanWel. Fourth, the Complainant's focus on specific lost sales allegations overlooks all of the other price erosion evidence in the record.<sup>82</sup> Although the CITT's decision could have been clearer regarding whether the CITT considered Bed-Roc's lost sales alone or these lost sales together with allegations of erosion of Bed-Roc's prices, the CITT's use of the term "total sales losses"<sup>83</sup> shows that the CITT's analysis considered both indicia of injury. It was not patently unreasonable for the CITT, therefore, to rely on all of this evidence to conclude that Bed-Roc's lost sales and price erosion allegations were "largely borne out."

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<sup>80</sup> Tribunal Decision at 12 and also Tribunal Exhibit NQ-96-004-28.1 (protected), Administrative Record, Vol. 6.3 at 18-19.

<sup>81</sup> Tribunal Decision at 12 and also see, e.g. Tribunal Exhibit NQ-96-004-7 (protected) at Figure 1 and related text, Administrative Record, Vol. 2 at 25-26. See also Schedule 1 to that Exhibit.

<sup>82</sup> See Tribunal Decision at 12 and Tribunal Exhibit NQ-96-004-A-2 (protected), Administrative Record, Vol. 14.

<sup>83</sup> Tribunal Decision at 11.



The Complainant nevertheless asserts that the CITT's determination that Bed-Roc was materially injured as a result of the low priced imports failed to properly consider the price comparisons between Bed-Roc and CanWel with respect to specific accounts.<sup>84</sup> As noted above, however, this was not uniformly the case, and more importantly the historic spread between Custom Canada's price and Bed-Roc's price declined dramatically over time, making CanWel that much more competitive with Bed-Roc. Thus, the CITT did not solely rely upon the price differences between CanWel and Bed-Roc as an indication of causation. Instead, the CITT regarded Bed-Roc's "total sales losses" as examples of CanWel's ability to lower its prices to other customers as a result of Custom Canada's sales of subject merchandise to CanWel at dumped prices.<sup>85</sup> Regardless of whether Bed-Roc was willing to undersell CanWel in these particular instances to maintain market share, the lost sales constituted compelling evidence that CanWel's sales of dumped merchandise purchased from Custom Canada suppressed prices, which in turn materially contributed to the injury suffered by Bed-Roc. Therefore, the CITT's reliance, in part, on evidence of Bed-Roc's lost sales in making its causation determination is based upon a reasonable interpretation of the facts on record.<sup>86</sup>

#### **Issue (d)**

The Complainant submitted that:

In concluding that the establishment of a new distribution arrangement between Custom Canada and CanWel was the "straw that broke the camel's back," and in taking into account in its causation analysis the CanWel sales lost by Bed-Roc that resulted from this new distribution arrangement, the Tribunal committed a reviewable error of law or a conclusion unsupported by any evidence on the record.<sup>87</sup>

The CITT held that CanWel's distribution agreement with Custom Canada ultimately "broke the...back" of Bed-Roc.<sup>88</sup> The CITT explained that the new distribution agreement allowed Custom Canada to sell concrete panel to CanWel at lower prices benefitting from the dumping.

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<sup>84</sup> Complainant's Confidential Brief at 27.

<sup>85</sup> Tribunal Decision at 11-12 ("More importantly, Custom Canada's dumped prices to CanWel allowed CanWel to lower its prices to these accounts, which had a broader impact on Bed-Roc's overall prices and forced the company to lower its prices to other customers.").

<sup>86</sup> The Complainant asserts that the CITT is required to take into account evidence at the "micro level" in its causation analysis (Complainant's Brief at 20). Regardless of whether the Complainant's argument is correct, however, the CITT's consideration of Bed-Roc's total sales losses shows that the CITT indeed included evidence at the micro level in its causation analysis and that this micro level evidence supports the CITT's determination.

<sup>87</sup> Complainant's Brief at 16.

<sup>88</sup> Tribunal Decision at 11.

Consequently, the agreement and its concomitant pricing structure allowed CanWel to compete with Bed-Roc in terms of price. Bed-Roc, in turn, announced price decreases and extended free freight to certain customers. Custom Canada responded to Bed-Roc's price decreases by lowering its prices and offering special short term pricing and inventory credit to CanWel.<sup>89</sup>

The Complainant argues that the CITT's decision constitutes an error of law or a conclusion unsupported by any evidence on the record. As noted above in the discussion of Issue (b), however, the record is replete with evidence that reasonably supports the CITT's decision. Moreover, the CITT's decision in this matter is entitled to deference because it falls squarely within the CITT's expertise. In other words, the CITT could reasonably conclude, from the evidence on the record, that the lower prices offered by the Complainant to Custom Canada were a substantial factor in the injury ultimately suffered by Bed-Roc.

The CITT explained that Custom Canada was able to entice CanWel to enter into a distribution agreement because Custom Canada could offer CanWel low prices from dumped imports.<sup>90</sup> The CITT was justified in giving lesser weight to evidence suggesting that CanWel ceased purchasing from Bed-Roc for non-price reasons.<sup>91</sup> The CITT instead found that Custom Canada's short-term special pricing agreement with CanWel, which allowed CanWel to purchase panels from Custom Canada at low prices, contributed to Bed-Roc's price erosion and lost sales.<sup>92</sup> The Panel cannot say that this conclusion is an error of law or a conclusion that is not reasonably supported by evidence on the record.

#### **Issue (e)**

The Complainant submitted that:

In concluding that the sales of "contractor board" by Custom Canada not only gained sales for Custom Canada but also served to restrain prices, the Tribunal made a conclusion unsupported by any evidence on the record and therefore committed a reviewable error of fact.<sup>93</sup>

Contractor board has been described by the CITT as concrete panels that "were not prime

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<sup>89</sup> Tribunal Decision at 11.

<sup>90</sup> Tribunal Decision at 11.

<sup>91</sup> Tribunal Exhibit NQ 96-004-6 (public), Administrative Record Vol. 1 at 64, Table 10; price is the second most important factor to concrete panel purchasers.

<sup>92</sup> Tribunal Decision at 11.

<sup>93</sup> Complainant's Brief at 16.

quality,” but that had “very low prices” that “were appealing to a number of purchasers.”<sup>94</sup>

The Complainant submits that the CITT did not refer to any evidence that prices charged by Custom Canada for contractor board had any identifiable price effects on Bed-Roc or in the market generally, and that no such evidence was before the CITT in any event. There being no evidence on which to substantiate the CITT’s conclusions, the Complainant submits that the CITT’s finding is a patently unreasonable error of fact.<sup>95</sup>

In its submissions, the CITT states that its finding with respect to the issue of contractor board was based on evidence before it. Furthermore, the CITT submits that any finding on contractor board was intended to be a general conclusion about the effects of its sale or offering in the market and not that such product was being sold to any of Bed-Roc’s customers.<sup>96</sup>

In its finding, the CITT stated the following:

[i]n addition, shortly after the new pricing arrangements were in place, Custom Canada began to import contractor board. Although these concrete panels were not prime quality, it is clear from the evidence that Custom Canada’s very low prices for this product were appealing to a number of purchasers. In fact the evidence reveals that 9 percent of Custom Canada’s imports of panels in the first nine months of 1996 consisted of this low-priced product. Given the small size of the regional market, there can be no doubt that the contractor board prices not only gained sales for Custom Canada but also, to some extent, served to restrain prices in the market as a whole.<sup>97</sup>

The evidence relied upon by the CITT takes the form of the *viva voce* evidence from Custom Canada’s employees given at the CITT’s public hearings. This evidence explicitly states that “about ... nine per cent” of Custom U.S.’s total sales to Custom Canada consisted of contractor board,<sup>98</sup> and that such contractor board was offered for sale by Custom Canada to distributors who “account for a large percentage of [its] sales.”<sup>99</sup>

While the CITT’s conclusion that sales of contractor board restrained prices of the subject goods in the market as a whole is generally poorly supported, the Panel does not consider the

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<sup>94</sup> Tribunal Decision at 10.

<sup>95</sup> Complainant’s Brief at 32.

<sup>96</sup> CITT Brief at 31-32.

<sup>97</sup> Tribunal Decision at 10.

<sup>98</sup> Transcript of Public Hearing (public), Administrative Record Vol. 17 at 95.

<sup>99</sup> Transcript of Public Hearing (public), Administrative Record Vol. 17 at 106.

conclusion to be patently unreasonable as such an inference could reasonably be drawn from the evidence on the record. However, the Panel finds the determination of gained sales to be unsupported by any evidence on the record and, as such, an error of fact. The Panel, however, declines to remand on this issue because the decision of the CITT in respect of material injury is supported by other material before it.

**Disposition**

For the reasons set forth above, the Panel hereby affirms the decision of the CITT.

SIGNED in the original by:

Paul C. LaBarge (Chairman)  
Paul C. LaBarge (Chairman)

Henri C. Alvarez  
Henri C. Alvarez

David E. Birenbaum  
David E. Birenbaum

Warren E. Connelly  
Warren E. Connelly

Maureen Irish  
Maureen Irish

ISSUED on the 26<sup>th</sup> day of August 1998.