

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

In the Matter of

**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 CON-
SUMPTION IN THE PROVINCE OF BRITISH
COLUMBIA (INJURY)**

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Secretariat File

No. CDA-91-1904-02

Panel: Michael H. Greenberg, Chairman
Lawrence J. Bogard
Jean-Gabriel Castel, Q.C.
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August 26, 1992

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Columbia, Molson Breweries (B.C.) and Pacific Western Brewing Company. With him on the brief was Geoffrey C. Kubrick.

TABLE OF CONTENTS

OPINION AND ORDER OF THE PANEL

I. INTRODUCTION	1
II. PROCEDURAL HISTORY	3
III. BACKGROUND AND SUMMARY OF TRIBUNAL DECISION	4
IV. OPINION	11
A. Standard of Binational Panel Review	11
B. Isolated or Regional Market	14
C. Concentration	17
D. Injury to Producers of All or Almost All Production	22
E. Causality	24
V. RELIEF	39
VI. CONCURRING OPINION OF CHAIRMAN GREENBERG	40
A. Standard of Binational Panel Review	41
B. Concentration of Imports	45
C. Causality	48

OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Binational Panel was constituted pursuant to Chapter 19 of the Canada-United States Free Trade Agreement ("FTA") to review an October 17, 1991 decision ("Decision") of the Canadian International Trade Tribunal ("CITT" or "Tribunal"). The Tribunal decided that the dumping of certain beer¹ exported from the U.S. by Pabst Brewing Company ("Pabst"), G. Heileman Brewing Company, Inc. ("Heileman") and The Stroh Brewery Company ("Stroh") (collectively referred to hereafter as "Complainants") has caused, is causing and is likely to cause material injury to the production in British Columbia of like goods. Central to the CITT's Decision was its determination that British Columbia ("B.C.") constituted an isolated or regional market for beer and that the B.C. regional beer industry was materially injured by the imports.

Complainants challenge the CITT decision on the grounds that the Tribunal incorrectly found:

1. B.C. constitutes an "isolated market" under subparagraph 1(ii) of Article 4 of the Antidumping Code ("Code"),²

¹ Malt beverages, commonly known as "beer," of an alcoholic strength of not less than 1% nor more than 6% packaged in bottles or cans not exceeding 40 oz. Decision, p.1.

² Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, signed in Geneva, Switzerland on December 17, 1979, GATT BISD 25 (1980), incorporated into Canadian Law by paragraph 42(3)(a) of the Special Import Measures Act ("SIMA"), R.S.C., 1985, c.S-15.

in view of the recent agreement contemplating the dismantling of interprovincial barriers to the Canadian domestic beer trade;

2. there was "a concentration of dumped imports into [the B.C.] isolated market,"³ in light of the limited penetration of dumped imports into the B.C. market and as a percentage of total beer imports into Canada;

3. "the dumped imports are causing injury to the producers of all or almost all of the production within [the B.C.] market,"⁴ because the Tribunal did not make a separate injury determination as to each of the three B.C. beer producers but only an aggregate injury determination; and

4. the cost of the switch in packaging of the beer from bottles to cans must be included as a factor in determining that the dumped imports were "causing material injury" to the "producers of all or almost all of the production in [the B.C.] market," because the switch from bottles to cans was due to consumer preference and not to dumping, i.e., underpricing by the imports.

For the reasons more fully set forth in its Opinion hereafter, on the basis of the administrative record, the applicable law, the written submissions of the parties, and the hearings held on June 1 and 2, 1992 at which all parties were heard, the Panel unanimously:

REMANDS, with instructions, to the CITT for a redetermination as to whether the dumping of imports, rather than the presence of dumped imports, is "causing [material] injury to the producers of all or almost all of the production within [the B.C.] market."

³ A requirement for a determination under subparagraph 1(ii) of Article 4 of the Antidumping Code.

⁴ Also a requirement for a determination under subparagraph 1(ii) of Article 4 of the Code.

AFFIRMS the CITT Decision in all other respects.

The Chairman files a concurring opinion relating to the standard of review which follows the Majority opinion. In his view the proper standard of review of the CITT's Decision is the "patently unreasonable" test, mandated by the Supreme Court of Canada for review of non-jurisdictional determinations by administrative tribunals protected by a legislative privative clause, such as the CITT, and not the "correctness" test applied by the Majority.

II. PROCEDURAL HISTORY

Following the filing of a dumping complaint by Molson Brewery B.C., Ltd. ("Molson"), Labatt Breweries of British Columbia ("Labatt") and Pacific Western Brewing Company ("PWB"), and a notice of a preliminary determination of dumping by the Deputy Minister of National Revenue for Customs and Excise (the "Deputy Minister") which was published in the June 22, 1991 Canada Gazette, the Tribunal commenced its material injury inquiry under section 42 of SIMA. A final determination by the Deputy Minister "that the subject imports were dumped by nearly 30 percent on a weighted average basis" was rendered on August 30, 1991 and published on September 21, 1991.⁵ The Tribunal held public and in camera hearings from September 4 to 6 and 9 to 12, 1991, at which the B.C. beer producers, Molson, Labatt, and PWB, the Complainants, and the Director of Investigation, Competition Act, all were represented. The Tribunal's material injury finding was issued on October 2, 1991 and its

⁵ Decision, pp. 1, 19.

Reasons were published October 17, 1991.⁶

Heileman timely requested this Panel Review on October 16, 1991.⁷ Complainants filed their complaints on November 15, 1991. After all interested parties had the opportunity to file initial briefs, answering and reply briefs, two days of hearings were held by this Panel in Ottawa on June 1 and 2, 1992.

III. BACKGROUND AND SUMMARY OF TRIBUNAL DECISION

The three brewery companies, Labatt, Molson and PWB (collectively referred to hereafter as the "B.C. Brewers"), which initiated the proceeding below, account for 99% of the beer production in British Columbia. They complained of dumping in B.C. by Complainants. In response, the Deputy Minister limited his investigation to imports of the subject goods into the B.C. market during the period January 1, 1990 to March 31, 1991. As noted, he made a final determination of dumping on that basis⁸ which led to the Tribunal's material injury determination here under review.

The B.C. Brewers argued that the Tribunal should find that B.C. was an isolated, regional market within the meaning of Article 4 of the Code and subsection 42(3)(a) of SIMA and that all four criteria for a finding of material injury to their regional industry from the subject imports had been

⁶ *Id.* at 1-2.

⁷ FTA, Art. 1904.4.

⁸ The overall weighted average margin of dumping was 29.8%, with weighted average margins for each exporter of 33.6% for Heileman, by far the largest exporter, and 14.9% and 15.7% for Pabst and Stroh respectively. Decision, p.4.

met.⁹ Subparagraph 1(ii) of Article 4 of the Code, incorporated by reference into section 42 of SIMA, provides:

in 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 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.

As noted, the B.C. Brewers accounted for 99% of beer production in B.C. The Tribunal found that the B.C. Brewers made 95% of their domestic sales of packaged beer in the B.C. market. There was no factual dispute that less than 1% of the domestic packaged beer consumed in B.C. during the period 1987 to 1990 was supplied by producers located in the other provinces of Canada. Consequently, the Tribunal determined that criteria (a) and (b) had been met, and that the B.C. Brewers could be regarded as a separate regional industry. Therefore, the Tribunal concluded, the circumstances of the B.C. market for the subject goods constituted the "exceptional circumstances" contemplated by Article 4, subparagraph 1(ii).¹⁰

The Tribunal took note of the Intergovernmental Agreement on Beer Marketing Practices of January 1, 1991. However, it concluded that there was no clear evidence that the Agreement would

⁹ Decision, p. 5.

¹⁰ Decision, pp. 13-14.

be implemented, and that the interprovincial barriers affecting the isolation of the B.C. beer market would be dismantled, in the near future. It was the CITT's view that, should there be a change in the regulatory scheme as a result of the Agreement, a GATT panel report, or for other reasons, the appropriate avenue of relief would be a changed circumstances review under section 76 of SIMA.¹¹

The Tribunal next turned to the "two mandatory conditions concerning injury to [the B.C.] industry" which had to be met if there were to be an affirmative finding, and examined first whether there was "a concentration of dumped imports into [the B.C.] market."¹²

In discussing the "concentration" question, the Tribunal reviewed the only prior Canadian decisions explicitly addressing the subject, Recreational Vehicle Entrance Doors¹³ and Solid Urea.¹⁴ It noted that in Recreational Vehicle Entrance Doors, two alternative tests were employed: (1) the "penetration", also called the "distribution", test (hereafter referred to as the distribution test) which compares the volume of imports used in the regional market to the volume of imports used in the national territory as a whole and (2) the "density test" which compares the volume of dumped imports into the regional market to the total regional market volume. There, both tests had been met. In Solid Urea, it only was found necessary to apply the distribution test because 100% of the dumped

¹¹ Decision, pp. 5, 14.

¹² Id. at 14.

¹³ Recreational Vehicle Entrance Doors, Produced or Exported by, or on Behalf of Elixis Industries, Gardena, California, United States of America, for Use or Consumption in the Provinces of Alberta and British Columbia (1989), 16 C.E.R.174 ("Recreational Vehicle Entrance Doors").

¹⁴ 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 Ontario-Manitoba Border) (1988), 15 C.E.R. 277 ("Solid Urea").

imports had been destined for the regional market.¹⁵

The Tribunal then stated it would apply the distribution test in this case. It noted that the use of the words "a concentration" in subparagraph 1(ii) of Article 4, indicated that there could be more than one regional market within a national territory such as Canada, where different provincial regulatory systems could result in several isolated regional markets,¹⁶ with different proportions of the overall Canadian beer consumption.¹⁷

While stating it would apply the distribution test to determine whether there was a concentration of imports in the B.C. market, the Tribunal proceeded to apply what was a new variant of that test. Rather than comparing absolute volume figures, the Tribunal compared the percentage of subject imports entering the B.C. market to the percentage of total Canadian beer consumption represented by the B.C. market. Thus, because 29% of the subject imports into Canada were consumed in B.C. in 1990, the year during which dumping sales were found, as compared to B.C.'s 10% share of total annual Canadian beer consumption, the Tribunal arrived at a 2.9 ratio.¹⁸

The Tribunal noted that subparagraph 1(ii) calls for an examination of concentration of

¹⁵ Decision, p. 14.

¹⁶ While not mentioned in the Tribunal's opinion, the administrative record, as discussed in the hearings before this Panel, indicated that the subject U.S. beer imports were entering two provinces in addition to B.C., *i.e.*, Alberta and Ontario, with a somewhat greater proportion in the former and a much lesser proportion in the latter. Hearing Transcript, p.290.

¹⁷ Decision, pp. 14-15.

¹⁸ The CITT noted that the ratios for 1989 and 1988 were 2.0 and 4.1 respectively. The Tribunal did not rely on the imports' absolute percentage penetration of the B.C. market, which reached a maximum of 8.1% in 1990, falling to 6.6% in the first quarter of 1991. Decision, pp.7, 17-18.

"dumped imports." It confessed to a "practical difficulty" in carrying out this mandate because the Deputy Minister only had investigated dumped imports in B.C. in response to the B.C. Brewers' complaint. No formal investigation was made into dumping into other Canadian provinces and territories. The Tribunal stated that it sought to fill this lacuna with information from Revenue Canada, provided at its request, estimating margins of dumping and volumes of subject imports into other provinces.¹⁹

With the apparent intention of bolstering its concentration finding, the Tribunal went on to note that, based upon this additional information, the B.C. market was found to account for 41 percent of "all dumped, and estimated dumped, subject imports into Canada in 1990."²⁰

The Tribunal last dealt with the second mandatory condition of subparagraph 1(ii) of Article 4 concerning injury, "that the dumped imports are causing injury to the producers of all or almost all of the production within[the B.C.] market." Preliminarily, the Tribunal made its statutory determination of whether there was "material injury" to the B.C. regional industry.

The CITT found a significant increase in import market share, and price suppression. It found that the price suppression was responsible, in large measure, for an erosion in gross profits and net income of the B.C. industry. This erosion in gross profits, said the Tribunal, "was augmented by cost increases associated with the switch from the use of bottles to that of can package configurations." The Tribunal concluded that the magnitude of the injury to the B.C. industry was "material" and "that producers representing almost all of the production in British Columbia have been, and are being,

¹⁹ Decision, pp. 2, 15.

²⁰ Decision, p. 15.

materially injured."²¹

Turning to the issue of causality, the Tribunal summarized its findings as follows:

[T]he Tribunal is convinced that the price suppression and, to a lesser degree, the costs associated with the switch from bottles to cans were responsible for the financial deterioration of the B.C. industry. The Tribunal is also satisfied that the price suppression and the costs associated with the switch from bottles to cans were caused by the presence of dumped imports.²²

The Tribunal concluded, on the basis of these factual findings, that the dumping of the subject imports had caused and was causing "material injury to all three producers [Molson, Labatt and PWB]." And, as almost all of the B.C. industry was materially injured by the dumped imports, "the fourth condition relating to a regional industry is now met."²³

The Tribunal, looking to the future, stated that the recent imposition of a "cost of service" charge on imports would only bring a temporary increase in import prices. Absent the maintenance of dumping duties, Heileman would resume dumping and "continue gaining market share at the expense of the B.C. industry." Therefore, the Tribunal concluded, "the dumping of the subject imports is likely to cause material injury" to the B.C. industry.²⁴

²¹ *Id.* at 18.

²² Decision, p. 20.

²³ *Id.*

²⁴ The Tribunal also denied Stroh's and Pabst's requests for exclusion from the dumping order based upon their claim that their imports were minimal. Neither Stroh nor Pabst raised the issue on this review. Decision, p.20.

IV. OPINION

The Panel hereafter discusses the issues raised on this review:

A. Standard of Binational Panel Review

This binational panel review of a definitive decision of the CITT is conducted pursuant to Chapter 19 of the FTA.²⁵

Article 1904:1 of the FTA provides that the Parties "shall replace judicial review of final anti-dumping and countervailing duty determination with binational panel review". According to Article 1904:3 of the FTA: "The Panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." Since in the present case Canada is the "importing Party", Article 1911 requires the panel to apply the standard of review set forth in section 28(1) of the Federal Court Act,²⁶ as interpreted by Canadian courts.

Section 28(1) reads as follows:

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:

²⁵ Canada-United States Free Trade Implementation Act, S.C. 1988, c. 65, and Part II of the Special Import Measures Act, R.S.C. 1985, c. S-15.

²⁶ R.S.C. 1985, c. F-7.

- (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Section 76(1) of SIMA, which states that subject to certain limited exceptions "every order or finding of the Tribunal under this Act is final and conclusive," constitutes a statutory privative clause that further circumscribes the scope of binational panel review.²⁷

The effectiveness of the statutory privative clause protecting the CITT depends upon the application of two separate tests established by the Supreme Court of Canada in U.E.S. Local 298 v. Bibeault.²⁸ Speaking on behalf of the Court, Mr. Justice Beetz stated:

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

1. If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review;
2. If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.²⁹

For an error to be patently unreasonable the members of the panel must "focus their inquiry

²⁷ National Corn Growers Association v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324, at 1370 (per Gonthier, J.); Certain Dumped Integral Horsepower Induction Motors, One Horsepower (1 HP) to Two Hundred Horsepower (200 HP) Inclusive with Exceptions, Originating in or Exported from the United States of America (1991), 4 TCT 7065, at 7072.

²⁸ [1988] 2 S.C.R. 1048.

²⁹ [1988] 2 S.C.R. 1048, at 1086.

on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it..."³⁰ In other words, how did the CITT arrive at this result? The patently unreasonable test gives "curial deference... to the opinion of the lower tribunal on issues which fall squarely within its area of expertise."³¹ The patently unreasonable test is used to identify an error of law on a matter within the Tribunal's jurisdiction and thereby avoid the effect of a privative clause. This test has no application to questions of jurisdiction in the narrow sense of the word as the CITT must not be allowed to expand its jurisdiction beyond that granted by legislation. Curial deference has no place in this context.

As for the second test which is usually referred to as the "correctness test", it applies to jurisdictional errors which result "generally in an excess of jurisdiction or a refusal to exercise jurisdiction at the start of the hearing, during it, in the findings or in the order disposing of the matter."³² This test is the only one applicable to CITT decisions contravening section 28(1)(a) of the Federal Court Act. Depending upon their nature, errors of law falling within section 28(1)(b) of this Act are subject to either the correctness test or the patently unreasonable test.

³⁰ CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, at 1004, per LaForest, J.

³¹ Bell Canada v. Canada (C.R.T.C.), [1989] 1 S.C.R. 1722, at 1746.

³² Syndicat des employés de production du Québec et de l'Acadie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412, per Beetz, J., at 420-21.

B. Isolated or Regional Market

Complainant Stroh has alleged that the CITT incorrectly concluded that British Columbia constituted a regional market or industry for the subject goods, because it erred in concluding that the requirements of the regional or isolated market "exception" of subsection 42(3) of SIMA and paragraph 1(ii) of Article 4 of the GATT Dumping Code had been met. The GATT Code, Article 4, paragraph 1(ii), provides in pertinent part:

in 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 producers of the product in question located elsewhere in the territory.

The CITT found these two criteria of the GATT Code to have been satisfied. The combined sales of packaged beer in British Columbia by the three B.C. producers accounted for at least ninety-five percent ("all or almost all") of their domestic sales, while penetration into the B.C. market of beer from other provinces was minimal -- i.e., demand in B.C. was not supplied "to any substantial degree" by producers located elsewhere in Canada.³³ Stroh complains, however, that the CITT erred in not finding that dynamic changes in interprovincial beer marketing practices would, in the foreseeable future, undermine the isolated nature of the B.C. beer market.³⁴ As the impetus for this change, Stroh cites the Intergovernmental Agreement on Beer Marketing Practices, resulting from a GATT panel decision addressing those practices, and testimony before the Tribunal concerning this

³³ Decision, p. 13.

³⁴ Solid Urea, at 288, supra, n. 14.

Agreement.

We note at the outset that we review this aspect of the Tribunal's finding concerning isolated market under the "correctness" test, explained above, 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. (See further discussion of standard of review in the related section below concerning "Concentration.")

The Tribunal thoroughly considered the impact in the foreseeable future of the Intergovernmental Agreement on the isolated nature of the B.C. market. It concluded:

There was no clear evidence before the Tribunal of whether the interprovincial barriers affecting the isolation of the beer market in British Columbia will be effectively dismantled or removed in the near future. With respect to the Intergovernmental Agreement on Beer Marketing Practices, the Tribunal heard evidence that it had not yet been implemented by the government of British Columbia and that the implementation of that Agreement will not result in any foreseeable changes in the existing regulatory system. The Tribunal heard evidence that the major remaining barrier is distribution practices and it is anticipated that this barrier will be discussed by a technical committee established as part of the Agreement. Should there be a change in the regulatory regime that would affect the isolation of the beer market in British Columbia as a result of any GATT panel report, federal-provincial negotiations or other reasons, it would be possible to review the matter under section 76 of SIMA.³⁵

The Panel has carefully reviewed the CITT's finding on regional market and the evidence in support thereof in light of complainant Stroh's concerns. The Panel concludes that the Tribunal did not err in finding that British Columbia constituted an isolated or regional market for the subject goods.

³⁵ Decision, p. 14.

C. Concentration

Complainants have alleged that the CITT committed a reviewable error in finding that there was a concentration of dumped imports into the British Columbia market.

Section 42(3)(a) of SIMA requires the CITT to take into account Article 4(1)(ii) of the Anti-dumping Code which provides in pertinent part that, where there is an isolated market:

[I]njury 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." (Emphasis added)

At the outset, this Panel is of the opinion that the CITT's finding of "a concentration of dumped imports" is a jurisdictional question which must be resolved before the Tribunal has the authority to decide the issue of material injury in an isolated market case. Applying section 28(1)(b) of the Federal Court Act and the tests formulated in U.E.S. Local 298 v. Bibeault, the question at issue concerns a legislative provision which limits the CITT's power to proceed with the issue of material injury. In other words the CITT has jurisdiction to find injury to the production of all or almost all of the production within the isolated market of British Columbia only if a concentration of dumped imports existed in that market. Section 42(3)(a) of SIMA which incorporates Article 4(1)(ii) of the Anti-dumping Code creates an exception to the general rule that material injury must be caused to the production in Canada as a whole of like goods. Therefore the Panel has reviewed the finding of concentration in British Columbia using the correctness test.

In its final decision, the CITT considered and applied Recreational Vehicle Entrance Doors³⁶ which enunciated two alternative tests to determine concentration. The first is the "distribution test" which compares the volume of imports consumed in the regional market to the volume of imports consumed in the national territory as a whole. The second test is the "density test" which compares the volume of dumped imports within the regional market to the total regional market volume. The CITT also referred to Solid Urea³⁷, which found that the requirement of concentration was met solely on the basis of the distribution test.

In the present case, the CITT decided that on the basis of the distribution test alone, the dumped imports constituted a concentration into the British Columbia regional market. The record showed that for the years 1988, 1989, and 1990, 37 percent, 20 percent and 29 percent, respectively, of the total dumped imports into Canada were consumed in the province of British Columbia. Furthermore, the CITT reinforced the distribution test by combining it with what may be called the "ratio test" which involves a comparison of the market share of total subject imports (subject goods exported by Complainants) into British Columbia to British Columbia's market share of total Canadian consumption of packaged beer. In 1988, 1989 and 1990, the market share of the subject imports into British Columbia were 4.1, 2.0 and 2.9 times greater, respectively, than British Columbia's market share of total Canadian consumption of packaged beer.

Complainants took issue with this interpretation of the requirement of concentration set out in Article 4(1)(ii) of the Anti-dumping Code. They argued that both the distribution test and the density test should have been applied and that in the circumstances, there was no concentration of

³⁶ n. 13, supra.

³⁷ n. 14, supra.

dumped imports into British Columbia.

Complainants further argued that, applying the distribution test, consumption in British Columbia of 29 per cent of the total subject imports in Canada was not enough to constitute a concentration, as according to the Webster's Third New Dictionary concentration means a "bringing to a common centre". That is, in absolute volume terms, there must be a preponderance of subject imports flowing into an isolated market as compared to the rest of the territory. The application of the density test, Complainants contend, leads to a similar conclusion since only 6.2, 6.3, and 8.1 percent of the British Columbia packaged beer market in 1988, 1989 and 1990 respectively, were held by the subject imports. This is considerably less than the proportion held by the subject imports in Recreational Vehicle Entrance Doors. Further, the market share held by Respondents exceeded 90 percent of the total regional market. Complainants also maintained that it was incorrect and patently unreasonable to combine the distribution test with the new "ratio test" which took into consideration British Columbia's share of the subject imports into Canada compared to its share of total packaged beer consumption in Canada, asserting that no foundation had been laid for this test.

Respondents replied that the issue was not subject to the correctness standard of review on the ground that section 42(3) (a) of SIMA which incorporates Article 4(1)(ii) of the Anti-dumping Code is not a provision which confers jurisdiction on the CITT or limits its powers. The proper test is whether in interpreting Article 4(1)(ii), the CITT exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its functions.

Respondents also submitted that the CITT had properly applied the distribution test and that its comparison of British Columbia's share of subject imports into Canada to British Columbia's share of total packaged beer consumption in Canada was an appropriate and rational basis to determine the

issue of a concentration of dumped imports into the British Columbia isolated market supported by SIMA.

The Panel is of the opinion that, where appropriate, the CITT must be able to develop new tests of concentration and that this case is one such instance. In the circumstances, the CITT was correct when it used the distribution test to the exclusion of the density test and combined it with the "ratio test" to determine concentration. Its interpretation of the phrase "a concentration of dumped imports into such an isolated market" found in Article 4(1)(ii) of the Anti-dumping Code is consistent with a plain reading of this language. Therefore, the CITT did not lose its jurisdiction over the question of injury to the producers of all or almost all of the production of packaged beer within British Columbia.

If the Panel had held that the issue of injury was within the jurisdiction of the CITT and that the alleged error of law was subject to the patently unreasonable test, it would have come to the conclusion that the CITT did not err in a patently unreasonable manner, as its interpretation of concentration can be rationally supported by the relevant legislation. The CITT would not have exceeded its jurisdiction as there was sufficient evidence on the record to support the finding of concentration.

To conclude on this issue, the CITT applied the right tests although it might have used partially incorrect data with respect to the "ratio test" for which no proper foundation had been laid. That concentration may occur in other regional markets in Canada flows from the language of Article 4(1)(ii) of the Anti-dumping Code. However, it is not necessary to establish the existence of several regional markets to conclude that, in the circumstances, 29 percent consumption in British Columbia of the subject imports into Canada constitutes a concentration especially when reinforced by the "ratio

test." On the basis of the distribution test alone, there was "a concentration of dumped imports" into British Columbia.

Care should be exercised by the CITT when dealing with figures which should not be estimates only. Were it not for the fact that almost 100 percent of the subject imports into British Columbia were dumped, the Panel might have found in favor of Complainants on the issue of concentration as the application of the tests adopted by the CITT must be based upon accurate data.

D. Injury to Producers of All or Almost All Production

The Panel is not persuaded by Complainants' argument that the CITT improperly analyzed the economic condition of the producers of all or almost all production of beer in British Columbia as an aggregate industry rather than as individual producers. This argument rests principally on the CITT's use of the term "B.C. industry" in its determination where it might have identified the three B.C. brewers by name.

The language of the CITT's determination is clear, however, that the Tribunal's analysis was not conducted on an aggregate industry basis. With respect to material injury, the CITT concluded: "[P]rice suppression led to a steady erosion in gross profits and net income before taxes for all three producers."³⁸ Similarly, the CITT concluded with respect to causality that "the dumping of the subject imports has caused and is causing material injury to all three producers."³⁹ Thus, the CITT stated clearly that its conclusions were based on the economic condition of each of the three B.C.

³⁸ Decision, p. 16 (Emphasis added).

³⁹ Id. at 20 (Emphasis added).

beer producers, all of which were suffering material injury. Because all three B.C. beer producers were suffering material injury, the CITT could accurately and reasonably refer in its determination to injury to the B.C. industry, collectively, without excepting any individual producers. The fact that the Tribunal could and did refer to the injury of the industry collectively does not detract from the conclusion that all three B.C. producers were suffering material injury.

Moreover, the Panel's review of the CITT's administrative record confirms that the Tribunal's conclusions were not based on an analysis of the industry in the aggregate.

Complainants themselves do not analyze the economic condition of individual B.C. producers. Rather, Complainants analyze individual economic factors pertinent to material injury (i.e., market share, profitability, costs of converting to cans) and demonstrate that the individual B.C. producers were not affected equally with respect to each element of material injury. This analysis does not address whether the collective effect of these economic factors on individual producers comprises material injury as to each producer. It does not, therefore, demonstrate that the CITT's determination was without factual basis. The Panel concludes that the CITT did analyze the condition of each B.C. producer with respect to injury and causality, and affirms the determination in this respect.

E. Causality

Pursuant to section 42(1)(a) of SIMA, the Tribunal is vested with jurisdiction to inquire, inter alia, as to whether the dumping of the goods to which the preliminary determination of dumping applies has caused, is causing, or is likely to cause material injury, or would have caused material injury except for the fact that a provisional duty was imposed in respect of the goods.

Complainants in this proceeding allege that the Tribunal acted beyond or refused to exercise its jurisdiction as set out in section 28(1)(a) of the Federal Court Act or, alternatively, erred in law as envisioned by section 28 (1)(b) of this Act, when it concluded that the costs associated with the switch from the use of bottles to the use of cans contributed to the material injury to the British Columbia brewers caused by the dumping of the goods by the named U.S. exporters.

More particularly, Complainants allege that by considering the costs associated with the switch from bottles to cans in assessing material injury, *i.e.*, by taking into account irrelevant considerations, the Tribunal exceeded its jurisdiction, set forth in section 42(1)(a) of SIMA, to inquire as to whether the dumping was a cause of material injury. In this respect, Complainants support their position that this is a ground for review by reference to section 28(1)(a) of the Federal Court Act. In the alternative, Complainants allege that the Tribunal erred in law in interpreting the term "dumping" as it appears in section 42(1)(a) of SIMA, a reviewable error pursuant to section 28(1)(b) of the Federal Court Act.

Respondents argue that the Tribunal did not attribute injury caused by factors other than the dumping of the subject goods to the dumped imports and that there was a causal link between the dumped imports into British Columbia and the material injury suffered by British Columbia brewers. They allege further, that the standard of review to be applied is that of patent unreasonableness.

On a plain reading of section 42(1)(a) of SIMA, the Tribunal is required to inquire as to the causal link which may exist between dumping and material injury. This section does not permit the Tribunal to make inquiry as to the existence of a causal link between extraneous factors and material injury. If the Tribunal inquires into subject matter other than that in which SIMA vests it with jurisdiction, it may be said that the Tribunal acted beyond or refused to exercise its jurisdiction.

In the case of Hui v. Canada (Minister of Employment and Immigration)⁴⁰ Mr. Justice Stone, for the Federal Court of Appeal, citing Lord Reid in Anisminic Ltd. v. Foreign Compensation Commission⁴¹ noted:

[A] person exercising a statutory power of decision exceeds his jurisdiction where, *inter alia*, his decision is based on some matter which under relevant statutory provision he "had no right to take into account" ...⁴²

In such a situation, a decision by an administrative tribunal would be subject to review pursuant to section 28 (1)(a) of the Act. As was noted by Mr. Justice Beetz in Syndicat des employés de production de Québec et de l'Acadie v. Canada Labour Relations Board:

s. 28 (1)(a) of the *Federal Court Act* does not apply to the error as such, but quite apart from any error, to the excess of jurisdiction or refusal to exercise it, that is, the exercise by an administrative tribunal of a power denied to it by the [relevant legislation] or the refusal to exercise a power imposed on it by the [relevant legislation]. Section 28 (1)(a) does not distinguish between types of excess of power, the stages of the hearing at which they occur and the circumstances causing them. It applies to any excess of power.⁴³ (Emphasis added)

In conducting such a review, the correctness standard is the appropriate one to be employed by this Panel. As Mr. Justice Beetz went on to say, once a question or issue has been determined to be jurisdictional:

[I]t does not matter whether an error as to such a question is doubtful, excusable or not unreasonable, or on the contrary is excessive, blatant or patently unreasonable. What makes this kind of error fatal,

⁴⁰ [1986] 2 F.C. 96.

⁴¹ [1969] 2 A.C. 147 (H.L.).

⁴² [1986] 2 F.C. 96, at 103.

⁴³ [1984] 2 S.C.R. 412, at 439. ("Syndicat des employés").

whether serious or slight, is its jurisdictional nature; and what leads to excluding the rule of the patently unreasonable error is the duty imposed on the [reviewing court] to exercise the jurisdiction conferred on it by s. 28 (1)(a) of the *Federal Court Act*

Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision. ...

This is why the superior courts which exercise the power of judicial review do not and may not use the rule of the patently unreasonable error once they have classified an error as jurisdictional. (Emphasis added)⁴⁴

Thus, while it might be thought that a jurisdictional error in a particular case is also patently unreasonable, this is not the reasoning to be applied by the reviewing court. Rather, the reasoning to be applied is the ultra vires nature of the decision given by the administrative tribunal.

It is to be noted that in its Statement of Reasons for its decision, the Tribunal did not make any express attempt to define or otherwise interpret the meaning of the term "dumping" as it appears in section 41 (1)(a) of SIMA.

In its Statement of Reasons, the Tribunal analyzed the effects of a number of factors which it found, as a fact, gave rise to injury to the B.C. producers. These factors included price suppression, loss of market share and the cost implications to Molson and Labatt of the switch from the use of bottles to that of can package configurations. In each case the Tribunal described, in one way or another, the manifestation of injury.

In summarizing its findings, the Tribunal listed the factors which resulted in manifestation of material injury, as distinct from injury. The Tribunal indicated that "price suppression was responsible

⁴⁴ Syndicat des employés at 441-2.

in large measure, for the steady erosion in gross profits and net income before taxes for the B.C. industry."⁴⁵ It concluded further that the "erosion in gross profits was augmented by cost increases associated with the switch from the use of bottles to that of can package configurations," and that "the B.C. industry lost market share to subject imports over the review period."⁴⁶ In summary, the Tribunal concluded that "the magnitude of the injury to the B.C. industry was, and is, material and that producers representing almost all of the production in British Columbia have been, and are being, materially injured."⁴⁷

The Tribunal did not conclude that each or any of the three factors manifesting injury was sufficient, by itself, to give rise to a finding of material injury. Nor did the Tribunal conclude that each of the three B.C. producers in question suffered or were suffering material injury as a result of each or any of the factors manifesting material injury. While it may be said that the Tribunal set out its reasons in connection with the B.C. industry, as opposed to each of the B.C. producers, in order to protect confidentiality, nonetheless it failed to indicate that the threshold of material injury, as opposed to injury, had been manifested as a result of any or each of the three specified factors. Therefore, the Panel is unable to conclude that the Tribunal found individual B.C. producers suffered material injury as a result of price suppression, loss of market share, or the costs associated with the switch from bottles to cans, rather than on the combined effects of two or more of these factors.

In the context of the causality issue, and therefore in the context of whether or not the Tribunal conducted the correct inquiry, the Panel is not persuaded that the Tribunal concluded that

⁴⁵ Decision, p. 18.

⁴⁶ Id.

⁴⁷ Id.

producers representing all or almost all of the production in British Columbia had been or were being materially injured by statutorily relevant factors. Given the many references by the Tribunal to the costs associated with the switch from bottles to cans both in respect of its material injury analysis and in its causality analysis, and inasmuch as material injury was concluded by the Tribunal only after ostensibly adding together the manifestations of the three factors, (i.e., price suppression, loss of market share and the costs associated with the switch from the use of bottles to cans), it appears to the Panel that the Tribunal could not find the manifestation of material injury without combining the effects of at least the factors of price suppression and the switch from the use of bottles to the use of cans.

The foregoing was particularly significant in the context of the Tribunal's analysis of causality.⁴⁸

The Tribunal reviewed the effects of price suppression on the financial performance of the B.C. industry. It did not, however, find as a fact or as a mixture of fact and law that price suppression caused material injury.

The Tribunal likewise analyzed the financial implications of the switch from bottles to cans, at least insofar as Molson and Labatt were concerned. The Tribunal formed the view that "given the consumer preference for cans, the domestic producers had to fight the dumped imports of beer in cans with domestic product packaged in cans."⁴⁹ The Tribunal recognized further that "the decisions by the major B.C. breweries to compete with cans rather than bottles caused a major shift from bottled

⁴⁸ In its analysis, the Tribunal did not address the impact on material injury caused by loss of market share. The Panel takes no issue with this approach.

⁴⁹ Decision, p. 19.

to canned product, which had cost implications to the major breweries and contributed to their poorer financial performance."⁵⁰

In this respect, the Panel concluded that the Tribunal made a finding of fact relating to consumer preference for cans. The Panel concluded that the Tribunal analyzed the effect of the price of the dumped cans in its analysis of price suppression. The Tribunal noted that the canned configuration was chosen over bottles, a choice which was made in the context of consumer preference, without enunciating or, for that matter, concluding, that the preference was price driven. The Tribunal also considered the effect of other cost factors but dismissed them as a cause of material injury.

In its conclusion, which contained its ratio decidendi, the Tribunal indicated that it was "convinced that the price suppression and, to a lesser degree, the costs associated with the switch from bottles to cans, were responsible for the financial deterioration of the B.C. industry."⁵¹ Once again, the Tribunal coupled (i) the factor of price suppression, and (ii) the distinguished factor of costs associated with the switch from bottles to cans, in concluding that they combined to cause the financial deterioration of the B.C. industry. The Tribunal indicated its satisfaction that the "price suppression and the costs associated with the switch from bottles to cans were caused by the presence of dumped imports."⁵² Again, the Tribunal coupled these two factors in stating the cause of the two factors which were combined in its conclusion that material injury was manifested. In its final conclusion or opinion, the Tribunal found that "the dumping of the subject imports has caused and

⁵⁰ Id.

⁵¹ Decision, p. 20.

⁵² Id.

is causing material injury to all three producers."⁵³

It is to be noted that the Tribunal was satisfied that a causal link existed between the dumping and the material injury on the basis of the "presence of dumped imports." While such a conclusion may be implicitly correct in relation to price suppression (as price suppression can be caused by sales of dumped imports, or the existence of dumped imports, overt offerings of dumped imports, or the existence of dumped imports known to customers to be available), the same cannot be said of the costs associated with the switch from bottles to cans absent a conclusion that the consumer preference for cans was price driven. In the latter context, dumping cannot be equated with the presence of dumped imports because dumping, as defined by SIMA, is price related.

Article 2.1 of the Anti-Dumping Code stipulates that:

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

If the costs associated with the switch from bottles to cans resulted from a consumer preference resulting from factors other than price, it is incorrect to state that dumping, *i.e.*, pricing, created such a cost impact. This is particularly so given the Tribunal's material injury analysis which distinguished the causal effects of consumer preference and the causal effects of price suppression.

The Panel concludes that in forming its conclusion, based on the above-noted findings, that the dumping of the subject imports has caused and is causing material injury to all three producers, the CITT failed to find that price suppression alone, and hence the dumping of the subject imports, has caused and is causing material injury to all three producers.

⁵³ Decision, p. 20.

The Panel is also persuaded that the CITT failed to conclude that the dumping manifested in price suppression caused material injury to all three producers. The Panel notes that the threshold of material injury is higher in regional market cases than would otherwise be the case in respect of the CITT's inquiry under section 42 of SIMA in that the Tribunal is obliged to find material injury caused by dumping to producers of all or almost all of the production in the regional market. In engaging its jurisdiction, the CITT was obliged in this case to conclude that price suppression (and/or any other price-related factors linked to dumping) was a cause of material injury to producers of all or almost all of the production in the regional market. Given the relative volume of production of each of Molson and Labatt compared to B.C. production as a whole, at the very least it was necessary for the Tribunal to conclude that each of Molson and Labatt suffered material injury caused by pricing factors linked to dumping. The Panel does not necessarily distinguish the third B.C. producer in this respect; it notes merely that the CITT did not feel it was necessary to discuss the impact of the costs associated with the switch from the use of bottles to cans on such producer.

In summary, the CITT was obliged to find that dumping factors, such as price suppression, were a cause of material injury in the case of Molson and Labatt, if not the third producer. As the CITT found that the threshold of material injury, as opposed to injury, was met in connection with the B.C. producers only by coupling the effects of price suppression and the costs associated with the switch from bottles to cans, and as it combined these factors in finding that dumping was a cause of material injury, it failed to conduct the inquiry required and hence acted beyond its jurisdiction. Details of the remand and instructions associated therewith are set out below under the heading of Relief.

Complainants allege, in the alternative, that the CITT erred in law by misinterpreting the term

"dumping" as it appears in section 42 of SIMA. In this respect, both Complainants and Respondents referred the Panel to Article 3:4 of the Code, which deals with causality. Article 3:4 states:

It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of the Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by the other factors must not be attributed to the dumped imports. (Emphasis added.)

In a footnote to the GATT text, it is further stated:

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

Although neither counsel for Complainants nor counsel for Respondents disputed the ability of the CITT or the Panel to refer to Article 3:4 of the Code for the purpose of interpreting SIMA, the Panel notes that SIMA was designed to implement Canada's GATT obligations. As was noted by Mr. Justice Gonthier for the Supreme Court of Canada in National Corn Growers Assn. v. Canadian Import Tribunal:

[I]n circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement. In interpreting legislation which as been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations. . . .

[M]ore specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be

rejected.⁵⁴

The Code, in dealing with the question of causality, does not make a distinction between material injury as found in a regional market as opposed to a national territory.

The Code requires that it be demonstrated that the dumped imports are, "through the effects of dumping", causing injury within the meaning of the Code. The Panel concludes that this requires the CITT to examine the effects of dumping as defined by SIMA which, in turn, it concludes requires an examination of the effects of pricing.

As noted above, the Code goes on to caution that there may be other factors which at the same time are injuring the industry but that such injuries caused by other factors must not be attributed to the dumped imports. In a footnote, the Code refers to a non-exhaustive list of such factors. The list includes changes in the patterns of consumption. Thus, the Code clearly envisions improper attribution of changes in the patterns of consumption to dumped imports which may, by their nature, cause such changes in patterns. The caution requires the Tribunal to distinguish between the effects of the pricing of the dumped imports from the effects of other characteristics of the dumped imports. The Panel concludes that the CITT failed to make the necessary distinction.

As noted earlier, the CITT did not overtly demonstrate that it placed a particular interpretation on the term "dumping" in reaching its conclusions. Thus, the Panel finds that the error of the Tribunal is reviewable under section 28(1)(a) of the Federal Court Act. If it can be said that the CITT implicitly interpreted the term "dumping," then such error in interpretation would be reviewable under section 28(1)(b) of this Act.

In determining the standard of judicial review of such an error of law, the Panel must

⁵⁴ [1990] 2 S.C.R. 1324, at 1371 ("National Corn Growers").

distinguish between errors in interpreting provisions which confer or limit the jurisdiction of the CITT and those which do not. In many cases, there is a fine line to be drawn between provisions which confer jurisdiction and those which do not.

In the case of U.E.S. Local 298 v. Bibeault⁵⁵, the Supreme Court of Canada laid down a new approach to determining when a tribunal's decision could be classified as a jurisdictional one and therefore subject to a stricter standard of judicial review. The court favoured a pragmatic and functional analysis which assessed whether the legislature intended the question to be within the tribunal's jurisdiction. If a court determines that a matter was intended to be within the tribunal's functional jurisdiction, then intervention is warranted only if the tribunal's interpretation was patently unreasonable. If the question concerned a legislative provision limiting the tribunal's jurisdiction, the tribunal's decision was subject to review if not correct.

In CAIMAW v. Paccar of Canada Ltd., Mr. Justice La Forest noted, that this "restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal", and that:

[w]here, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making patently unreasonable error of law in the performance of its function.⁵⁶

As noted by Mr. Justice Beetz in Syndicat des employés, a jurisdictional error is one whereby the tribunal exceeds or refuses to exercise the powers entrusted to it, and "relates generally to a provision which confers jurisdiction, that is, one which describes, lists and limits the powers of an

⁵⁵ n. 28, supra.

⁵⁶ [1989] 2 S.C.R. 983, at 1003.

administrative tribunal, or which is [translation] 'intended to circumscribe the authority' of that tribunal... ."57

The Panel has formed the conclusion that the very jurisdiction vested with the Tribunal is to conduct the inquiry into the causal link between dumping and material injury. By misinterpreting the term "dumping", and hence causation, the CITT erred in determining the causal link to be found between dumping and material injury, and thus exceeded its jurisdiction. The correctness test is the standard of review in such circumstances. The Panel finds that the CITT incorrectly interpreted the term "dumping", and hence causation, and thus exceeded its jurisdiction.

It should be noted that even if the error in interpretation giving rise to the error in law is construed as non-jurisdictional, the panel is of the view that the interpretation placed by the Tribunal on the term "dumping" in connection with causation was patently unreasonable.

In order to determine when a tribunal has exceeded its jurisdiction by making a patently unreasonable error in law, the courts have adopted the so-called "rational basis" test, as enunciated by the Supreme Court of Canada in its decision in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.⁵⁸ In that case it was held that the proper test was whether the tribunal's interpretation was "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review".

The most recent word on the matter from the Supreme Court of Canada was in National Corn Growers, where Mr. Justice Gonthier noted that in the presence of a privative clause, the courts "will only interfere with the findings of a specialized tribunal where it is found that the decision of that

⁵⁷ n. 32, supra, at 420.

⁵⁸ [1979] 2 S.C.R. 227.

tribunal cannot be sustained on any reasonable interpretation of the facts or of the law."⁵⁹

The provisions of SIMA and the Code cannot be rationally interpreted so as to permit the CITT to attribute other factors, which at the same time are injuring the industry, to the dumped imports.

Therefore, the Panel would have likewise remanded the case to the CITT on grounds founded in section 28(1)(b) of the Federal Court Act based on either standard of review.

V. RELIEF

In view of the foregoing, and pursuant to its authority under SIMA section 77.15, the Panel hereby:

Affirms the CITT's determination that an isolated market for beer exists in British Columbia;

Affirms the CITT's determination that a concentration of dumped beer originating in the United States exists in British Columbia; and

Remands the decision of the CITT to the Tribunal for a determination as to whether the dumping of beer originating in the United States, rather than the presence of dumped beer originating in the United States, has caused and is causing material injury to the producers of all or almost all beer production in British Columbia. On remand, the CITT shall state whether price-suppression, or any other such price-based harm caused by the dumping of the subject imports, supports a determination that the subject imports have caused, are causing or are likely to cause material injury

⁵⁹ n. 54, supra, at 1369-1370.

to producers of all or almost all of the production within the B.C. market.

The Panel directs the CITT to complete its reconsideration and issue a revised determination with a full explanation of its reasons therefore within 75 days of the date of this decision.

VI. CONCURRING OPINION OF CHAIRMAN GREENBERG

I agree with the results reached by the Majority but believe the Panel should have arrived at those results by a different route. In my view, CITT determinations on the issues of interpretation and application of section 42(3)(a) of SIMA and Article 4, sub-paragraph 1(ii) of the Code, are not of a jurisdictional nature in the narrow sense. Therefore, this Panel should not apply a "correctness" standard of review, in effect substituting its judgment for that of the Tribunal. Rather, the Panel should have applied the "patently unreasonable" test mandated by the Supreme Court of Canada in the National Corn Growers case for nonjurisdictional determinations by the Tribunal.⁶⁰

In my view, this difference is fundamental. It affects the credibility of the binational panel review process, which should include a proper curial deference to the expertise of the administrative agencies entrusted with the task of interpreting and applying the national antidumping and countervailing duty laws. As an ad hoc panel, we should be particularly sensitive to act with the judicial restraint called for by the Canadian Supreme Court in mandating the "patently unreasonable" standard of review for alleged errors of law and fact by the CITT.

⁶⁰ National Corn Growers Assn. v. Canadian Import Tribunal, [1990] 2 S.C.R. 1324.

A. Standard of Binational Panel Review

The reviewing authority of this Panel rests on Article 1904 of the FTA and its implementation in Part II of SIMA. Article 1904.3 provides:

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

Since Canada is the "importing Party," Article 1911 refers the Panel to section 28(1) of the Federal Court Act,⁶¹ which grants jurisdiction to the Court of Appeal to hear applications for review of a decision or order of a federal tribunal such as the CITT, on the ground, inter alia, that the tribunal:

erred in law in making its decision or order, whether or not the error appears on the face of the record.⁶²

There is a restriction on the breadth of such a review deriving from section 76(1) of SIMA, which provides in pertinent part, "every order or finding of the Tribunal under this Act is final and conclusive." This has been held by the Canadian Supreme Court to be a "privative clause."⁶³ Where a tribunal, such as the CITT, is protected by such a privative clause, its decisions, except those on jurisdictional matters, may not be disturbed on appeal unless the decision in question is "patently unreasonable."

This test is intended to give "curial deference ... to the opinion of the lower tribunal

⁶¹ R.S.C. 1985, c.F-7.

⁶² Sec. 28(1)(b).

⁶³ National Corn Growers, supra., at 1370.

on issues which fall squarely within its area of expertise."⁶⁴ The question for the reviewing body is not whether it agrees with the decision of the tribunal, but rather whether there is a rational basis for the decision of the tribunal.

[T]he courts, in the presence of a privative clause, will only interfere with the findings of the tribunal where it is found that the decision of the tribunal cannot be sustained on any reasonable interpretation of the facts or of the law.⁶⁵

It is submitted that the question of whether the issues before this Panel concerning the proper interpretation and application of section 42(3)(a) of SIMA by the Tribunal are jurisdictional and subject to the "correctness" test applied by the Majority, or are ordinary ones of law and fact subject to the "patently unreasonable" test, already has been decided conclusively by the Supreme Court of Canada in the National Corn Growers case. The plain answer of the Court -- notwithstanding the lengthy opinions as to the proper application of that standard -- was that section 42(3)(a) of SIMA is not a "jurisdictional" statute and therefore the "patently unreasonable" test is the proper standard of review.

With due respect to the Majority, I am unable to find a meaningful distinction between interpreting one or another word or phrase in section 42(3)(a). Nor does the distinction between mandatory and discretionary language appear relevant to whether interpretation or application of a statutory provision is or is not jurisdictional for purposes of review.

Moreover, the Panel should be mindful of the Canadian Supreme Court's injunctions that those appellate courts reviewing an administrative tribunal protected by a privative clause, such

⁶⁴ Bell Canada v. Canada (C.R.T.C.), [1989] 1 S.C.R. 1722, at 1746.

⁶⁵ National Corn Growers, *supra*, at 1326.

as the CITT, "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so,"⁶⁶ and that "administrative tribunals like the [CITT] must be given the benefit of any doubt."⁶⁷

The prior binational panel which has reviewed a Tribunal decision relating to section 42(3)(a) of SIMA has followed the teaching of National Corn Growers, and found the section's interpretation by the Tribunal subject to the "patently unreasonable" test.⁶⁸ While this Panel is not bound to follow that decision, it should be a persuasive -- even a compelling -- indication of this Panel's role and duty on the instant review.

Language from another Canadian Supreme Court case is instructive to an understanding and application of the "patently unreasonable" test:

A tribunal may, on the one hand, have jurisdiction in the narrow sense of authority to enter upon an inquiry but, in the course of that inquiry, do something which takes the exercise of its powers outside the protection of the privative or preclusive clause. Examples of this type of error would include ... basing the decision on extraneous matters, failing to take relevant factors into account ... or misinterpreting provisions of the Act

so as to embark on an inquiry or answer a

⁶⁶ Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227, at 233 (Emphasis added).

⁶⁷ Syndicat des employés de production du Québec et de l'Acadie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412, at 441.

⁶⁸ Certain Dumped Integral Horsepower Induction Motors from the United States [1991], 4 TCT 7065, at 7074.

question not remitted to it.⁶⁹

Applying this learning to the two central issues on this review, "concentration" and "causality," I conclude that, as to the former the Tribunal's determination was not "patently unreasonable," but that as to the latter it did not pass this test.

B. Concentration of Imports

Measured by a "correctness" standard, it is in my view a close question whether the Tribunal's finding of a "concentration of imports" within the meaning of subparagraph 1(ii) of Article 4 of the Code was sustainable. Indeed, from the Majority opinion, it seems apparent that panel members had misgivings. The Tribunal's finding at best was borderline under both of the traditional tests its predecessor, the CIT, had enunciated in Recreational Vehicle Entrance Doors and Solid Urea to determine whether there was a "concentration of imports." Thus, the 29% B.C. share of total Canadian imports under the traditional "distribution" or "penetration" test was markedly lower than in any prior case. Application of the traditional "density" test gave an 8.1% figure for 1990 which dropped to 6.6% in the first quarter of 1991, again well below levels previously thought necessary to constitute an import concentration for purposes of the regional industry exception.

The Tribunal itself was concerned enough to request Revenue Canada for estimates of dumped imports into the rest of Canada because, as noted, the Deputy Minister's dumping investigation had been limited to imports into B.C. On the basis of these estimates, the Tribunal

⁶⁹ Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382, at 389, quoted with approval by Beetz, J. in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 at 1084-85. See also, National Corn Growers, *supra*, at 1338.

arrived at a 41% estimate of B.C.'s share of dumped imports into Canada, admittedly on the basis of less than the best information.⁷⁰

However, the Tribunal's emphasis was on a new test it devised for this case, a variant of the distribution test, which compared B.C.'s share of the dumped imports to B.C.'s share of the Canadian national beer market. The resultant 2.9 ratio, the Tribunal concluded, showed a relative concentration of imports in the B.C. market. The test, the Tribunal indicated, was to deal with the situation of small, possibly multiple, regional markets, for which the two traditional tests could prove inappropriate. In the Tribunal's words:

it [was] logical in this case to assess concentration in terms of British Columbia's share of the subject imports into Canada compared to its share of total packaged beer consumption in Canada.⁷¹

To sustain the Tribunal's "concentration of imports" determination under the "patently unreasonable" test, the Panel need only find that it rests on a reasonable interpretation of the law, not necessarily the only such interpretation, or even the interpretation which the Panel might consider best. This is the teaching of National Corn Growers. The only inquiry is whether the Tribunal had a rational basis for its decision.

Viewed in this way, it is apparent that the Tribunal's "concentration" decision must be affirmed. It is not unreasonable to create a test for small regional markets. The express language of Article 4, subparagraph 1(ii) -- "the territory of a Party may ... be divided into two or more competitive markets" -- indicates that this was a circumstance envisioned by the drafters of the

⁷⁰ Decision, p. 15. Understandably, counsel for the B.C. Brewers expressed the view that it probably would have been preferable for the Tribunal not to go through this exercise. Hearing transcript, p. 283.

⁷¹ Decision, p. 15.

provision. In such small regional markets, it could be expected that import penetration might not exceed 50% of the national market or, as here, even exceed one-third. Nevertheless, if import penetration is proportionally large, a concentration could exist.

As pointed out by counsel for the Tribunal in its submission to this Panel, the relative distribution or penetration test adopted in this case was one that was contemplated by the United States Congress when it enacted the Trade Agreements Act of 1979 which implemented the Code's regional industry exception under U.S. law.⁷² The U.S. International Trade Commission has followed such a test in decisions under the provision of U.S. law comparable to section 42(3)(a) of SIMA.⁷³ While such precedent is not controlling here, it clearly is persuasive on the question of whether the Tribunal's use of the relative distribution or penetration test in this case was reasonable under SIMA.

In sum, it is clear that the Tribunal was not patently unreasonable in concluding that there was a concentration of imports in the B.C. market.

⁷² Brief of the Canadian International Trade Tribunal, pp. 29-30.

⁷³ Certain Steel Wire Nails from Korea (1980) 2 Int'l Trade Rep. Dec. 5181 (U.S.I.T.C.0); Gray Portland Cement and Cement Clinker from Japan, USITC Pub. No. 2376, April, 1991.

There was some discussion at the hearings as to whether there should be a consideration of U.S. precedent by this Panel. It is my view that a cross-fertilization leading to consistent results under the FTA on both sides of the border is an appropriate part of the binational panel process. See Hearing Transcript, p. 289.

C. Causality

On the other hand, the Tribunal's determination that "the dumped imports are causing injury to the producers of all or almost all of the production within [the B.C.] market" just as clearly fails the "patently unreasonable" test.

As was said by the Court in the Nipawin case,⁷⁴ a tribunal takes itself out of the protection of a privative clause by "basing its decision on extraneous matters" or "misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it." The CITT patently did so in dealing with the issue of causality, i.e., whether the dumped imports were causing material injury to the B.C. Brewers.

It is axiomatic that "dumping is a price oriented phenomenon. Underselling is the sine qua non of injury by reason of dumping."⁷⁵ The Tribunal has confused its function in determining causality by relying on the "presence of dumped imports" rather than limiting its causality inquiry to the price effects of such dumped imports. Thus, the Tribunal finds that "the costs associated with the switch from bottles to cans were caused by the presence of dumped imports." Relying, inter alia, on this finding, it concludes that the dumped imports caused "material injury to all three producers [Molson, Labatt and PWB]."⁷⁶ Clearly it has based its decision upon an "extraneous matter." Moreover, it has embarked on an inquiry not remitted to it. In sum, it has made a "patently

⁷⁴ Supra, p. 45, n.69

⁷⁵ Certain Dumped Integral Horsepower Induction Motors from the United States, supra, at 7087.

⁷⁶ Decision, p. 20.

unreasonable" decision on causality.

The effect of this error is magnified in the case of the present inquiry into material injury to a regional industry, because subparagraph 1(ii) sets a much higher standard of injury than where the issue is material injury to a national industry. Here, the injury caused by the dumped imports must be to "the producers of all or almost all of the production within [the B.C.] market." The Tribunal recognized this in finding that "all three producers," i.e., Molson, Labatt and PWB, had been materially injured by the dumped imports.

Thus, the Tribunal's reliance on the costs of the switch from bottles to cans as well as price suppression as elements of material injury caused by dumped imports takes on added significance. It appears from the Tribunal's preoccupation with the cost factor associated with the change from bottles to cans that one or more of these producers suffered material injury only when this factor was added to price suppression. If one of these producers, particularly Molson or Labatt, were not materially injured by dumped imports, the Tribunal's conclusion that all or almost all of the B.C. production was materially injured would be very much in doubt.⁷⁷

In all events, the Tribunal must eliminate from its consideration this cost factor, caused as it was not by dumping but by consumer preference for cans⁷⁸, in weighing whether "all or almost all of the [B.C.] production" in fact was materially injured by dumped imports. It must embark on its statutory causality inquiry by asking the correct question and not include the legally extraneous costs of switching from bottles to cans in making its statutorily mandated determination.

⁷⁷ The Tribunal noted that the switch from bottles to cans affected Molson and Labatt differently. Decision, p. 18.

⁷⁸ The Tribunal itself found that there was such a consumer preference for cans. Decision, p. 19.

Signed in the original by:

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JEAN-GABRIEL CASTEL, Q.C.

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