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

IN THE MATTER OF:

CERTAIN SOLDER JOINT PRESSURE PIPE FITTINGS AND SOLDER JOINT DRAINAGE, WASTE AND VENT PIPE FITTINGS, MADE OF CAST COPPER ALLOY, WROUGHT COPPER ALLOY OR WROUGHT COPPER, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA

Secretariat File No.
CDA-93-1904-11

MEMORANDUM OPINION AND ORDER

February 13, 1995

Before: John H. Barton, Chairman
The Hon. Mr. Justice John D. Richard
Leonard E. Santos
Tom M. Schaumberg
Wilhelmina K. Tyler

Appearances:

Dean A. Peroff, Amsterdam and Peroff, argued for Complainants Elkhart Products Corporation, Elkhart Indiana, and Amcast Industrial Ltd.. With him was Cynthia Amsterdam and Robert R. Amsterdam.

Lawrence L. Herman, Barrister and Solicitor, argued for Participants Mueller Industries, Inc. and Streamline Copper & Brass Ltd.

Colin S. Baxter, argued for Participants Nibco Inc. and Nibco Canada Inc. With him and also on the brief was Brian C. Pel.

Darrel H. Pearson and Peter Kirby argued for Participant Cello Products Inc. With them was Peter Collins.

John Syme argued for Respondent Canadian International Trade Tribunal. With him was Shelley Rowe.

TABLE OF CONTENTS

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Chapter 19 of the Canada–United State Free Trade Agreement ("FTA"), to review the final determination of injury by the Canadian International Trade Tribunal ("CITT" or "Tribunal") in Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, Originating in or Exported from the United States of America, NQ-93-001, September 13, 1993. The CITT found that the subject good "has caused, is causing and is likely to cause material injury to the production in Canada of like goods" subject to the exclusions of a list of goods contained in Appendix A of that report and of certain subject goods identified on the basis of outside dimensions and destined for air conditioning and refrigeration applications.[1]

Although they had initially presented a much broader variety of arguments, Complainants Elkhart Products Company ("Elkhart") and Amcast Industrial Ltd. ("Amcast") chose to challenge the CITT's final determination along two lines. One was that the CITT made a patently unreasonable error in treating drainage, waste & vent ("DWV") fittings together with pressure fittings as like goods. Along the same line, they claimed that the CITT made patently unreasonable errors by failing to make a separate analysis for each of the pressure and DWV sectors, and by failing to take into account domestic production in this separate analysis. They

---

[1] Canadian International Trade Tribunal File No. BN–93–004, Dated October 18, 1993. Inquiry No. NQ–93–001.

presented substantial economic arguments in support of this line of argument. Their second line of argument was that the CITT made a patently unreasonable error in its determination of price erosion, suggesting that if the product markets had been adequately divided, there would have been found little price erosion for Cello and such erosion as there was would have derived from Canadian competition. Mueller Industries, Inc. ("Mueller") and Streamline Copper & Brass Ltd. ("Streamline") supported both lines of argument. Respondent Cello Products Inc. ("Cello") opposed both.

Mueller and Streamline made a separate argument that the CITT made a patently unreasonable error in its development of the exclusion list, arguing that the list did not reflect the principles which the Tribunal stated it was using. Nibco Inc. and Nibco Canada, Inc. (collectively "Nibco") supported the Mueller/Streamline position. Cello opposed it.

In this decision and opinion, the Panel considers the standard of review governing Binational Panel Review for issues in cases in which Canada is the importing country, and then considers the challenged aspects of the Final Determination in relation to the relevant legislation and legal principles of the Canadian judicial system. It concludes that the CITT acted within its legal mandate and, on the basis of the administrative record, the applicable law, the written submissions of the parties, and the oral argument held on November 14 and 15, 1994, at which all participants were heard, the Panel affirms the CITT's injury determination with respect to the subject goods originating in the United States.

II. PROCEDURAL HISTORY

On February 5, 1993, the Deputy Minister of National Revenue, Customs, Excise and Taxation initiated an investigation of the subject goods in response to a complaint filed by Cello. Revenue Canada, Customs and Excise filed the Preliminary Determination of Dumping on June 18, 1993. On June 23, 1993, Notice of Commencement of Inquiry was filed by the Canadian International Trade Tribunal. Following its investigation, the CITT issued its final determination of injury on September 13, 1993.

Elkhart and Amcast timely requested panel review on November 24, 1993, pursuant to Article 1904 of the FTA, and filed their Complaints on December 23, 1993. The panel was appointed. It has jurisdiction over this action pursuant to Article 1904(2) of the Canada–United States Free Trade Agreement and Section 77.15 of the Special Import Measures Act, Revised Statutes of Canada 1985, Chapter S–15, as amended ("SIMA").[2]

Responding to the Complaint were the CITT and, in support of the CITT's determination, Cello. In addition, timely notices of appearance were made by Nibco, Mueller, and Streamline.

On June 21, 1994, a member of the Panel withdrew, and the Panel's proceedings were suspended pursuant to Binational Panel Rule 78. This suspension was terminated on August 29, 1994, with the appointment of a new panel member. A Panel Hearing was held in Ottawa, Canada, on November 14 and 15, 1994 at which the CITT, Elkhart and Amcast, Nibco, Mueller,

---

[2] As discussed below, this Panel was constituted as an FTA Panel upon the Complainants' request for Panel review, and it is operating under the laws in effect at the time of the request, including SIMA as in effect in November 1989, prior to its having been amended in accordance with the North American Free Trade Agreement.

and Cello presented oral argument to the Panel.

Although the Panel issued a number of other preliminary orders,[3] one deserves particular discussion, because it removed a number of issues from the dispute. This was in response to Cello's motion of August 3, 1994, to strike numerous paragraphs and other sections of Elkhart and Amcast's Reply Brief. Elkhart and Amcast accepted many of the deletions requested by Cello and also deleted a number of sections from their initial Brief. The Panel had to deal with a number of the paragraphs at issue on a paragraph–by–paragraph basis; it granted Cello's request to strike with respect to certain paragraphs and denied it with respect to others.[4] The effect of removing certain paragraphs by consent, however, was to remove certain issues from dispute, e.g. Elkhart dropped arguments that the Tribunal should have excluded Cello as a producer and that the Tribunal should have excluded it (Elkhart) from the finding.

---

[3] These included:

> Order of October 14, 1994, denying Cello's motion to remove certain authorities from the Appendix prepared by Elkhart and Amcast.
>
> Order of October 14, 1994, granting Mueller and Streamline's motion to permit the public disclosure of certain parts of the confidential reply brief filed by Elkhart and Amcast.
>
> Order of October 14, 1994, denying Cello's motion to deny Nibco entitlement to present certain written and oral argument.
>
> Order of November 23, 1994, requesting submissions on the accounting/product exclusion issue.
>
> Order of December 19, 1994, offering an opportunity to respond to submissions made in response to the order of November 23.

[4] Panel Order of October 14, 1994.

III. THE CITT'S DETERMINATION

The CITT began its Statement of Reasons by describing the product: "solder joint pressure pipe fittings and solder joint drainage, waste and vent (DWV) pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, in diameters up to 6 in. and the metric equivalent, for use in heating, plumbing, air-conditioning, and refrigeration (ACR) applications." CITT Finding at 1.[5] In describing the product, it noted that "Wrought and cast fittings fall into two major subclassifications: pressure solder fittings and DWV solder fittings," CITT Finding at 2, and went on to describe the applications of each of these two subclassifications.

The CITT then reviewed the two production processes, that for cast fittings and that for wrought fittings. It described the three domestic producers, Cello, Streamline (which did not support Cello in its complaint), and Bow Metallics Ltd. ("Bow")(which also did not support Cello). It further described the marketing and distribution system. The products are essentially a commodity product: wholesalers mix fittings from different suppliers, and producers offer a full range of fittings by purchasing from other producers those they do not produce. CITT Finding at 5.

Before turning to the decision, the Statement of Reasons also reviewed the Deputy Minister's dumping determination and the economic indicators describing the domestic market's performance. Finally, it described the positions of the parties: In very brief summary, Cello had argued that it was suffering both material injury and material retardation. CITT Finding at 9. Streamline and Mueller argued that there should be substantial product exclusions from any

---

[5] There are over 1000 different types and configurations, but the majority of the market is made up of wrought elbows, wrought couplings, and wrought tees, all in the 1/2-in. to 3/4-in. sizes. CITT Finding at 3.

determination on the grounds that Cello made or would foreseeably and imminently make only a particular range of products. They also argued that in its exclusions, the Tribunal should distinguish between cast and wrought fittings. Nibco argued that its sales in Canada were unrelated to dumping and that the Tribunal should exclude Cello from the domestic industry on grounds that Cello imported significant quantities of the dumped goods. It also attacked a number of Cello's material injury and retardation arguments. Amcast and Elkhart argued that Cello had not invested enough, that the recession particularly hurt the sales of cast fittings (an area in which Cello had recently invested), and that fittings for ACR applications should be excluded from any finding.[6]

In its "Reasons for Decision," the Tribunal began its analysis with an interpretation of Article 4 of the GATT Anti-Dumping Code,[7] which defines "domestic industry." On the basis of this language and of previous cases, it concluded that Cello's imports of dumped goods did not imply that it should be excluded from the domestic industry. CITT Finding at 15.

The CITT then turned to the like goods issue. It quoted the text of Subsection 2(1) of SIMA which defines "like goods," and went on to note that:

> Although there are differences between cast and wrought fittings as identified by counsel for Streamline, the Tribunal heard evidence that many of the fittings required for DWV and pressure applications are available in either wrought or cast, and substitutable for, and in competition with, each other in many

---

[6] The Mechanical Contractors Association of Canada also appeared before the Tribunal with a concern that certain of its members would have to absorb the price increases associated with the imposition of provisional duties. CITT Finding at 13.

[7] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*, signed in Geneva on April 12, 1979. (This is the version in force before the implementation of the Uruguay Round).

applications.

CITT Finding at 15. It thus saw "no reason to distinguish between cast and wrought fittings" and found that the domestically produced fittings were all like goods.

In determining material injury, the CITT reviewed the numbers for domestic production, market volume, imports, and prices. It found, in particular, that 1992 was a "disastrous" year with falling prices and increasing imports. CITT Finding at 16-17. Its overall analysis provided the basis for its finding of material injury, "primarily in the form of loss of production and sales, price erosion and loss of profitability." CITT Finding at 17.

The CITT then turned to the causality issue, and noted that the market is a commodity market "driven almost entirely by price." CITT Finding at 17. It noted the testimony of a former Streamline official that, in getting business, "price was virtually everything." CITT Finding at 18. It reviewed a staff analysis that the price declines were led by firms that imported substantially. And it noted that Cello was, in fact, reinvesting and upgrading its equipment. This overall analysis led the Tribunal to the conclusion that there was a "clear nexus between the dumping and the material injury." CITT Finding at 19.

The Tribunal did not stop there, however. It went on to consider the issue of retardation of domestic production by Cello and considered it more appropriate to deal with this issue as one of future injury. It concluded that there was a likelihood of injury "to both the fittings produced at the time of the hearing and to those fittings which Cello intends to produce within the next 18 months." However, because Cello had made no further formal commitments toward establishing the required production facilities, it found no likelihood of injury with respect to fittings that Cello planned to produce beyond that time. CITT Finding at 19-20.

Finally, the CITT considered the exclusions. Based on its analysis of future injury and tables of goods produced or intended to be produced by Cello, the Tribunal produced an exclusion list of those products that would not be produced within 18 months. And, based on separate logic, it accepted a Nibco/Amcast argument that fittings for ACR applications should be excluded; Cello had not claimed harm in this part of the market. CITT Finding at 20-21.

IV. OPINION OF THE PANEL

A. Standard of Review

Pursuant to Articles 1904:3 and 1911, this Panel is required to apply the standard of judicial review "that a court of the importing Party would apply to a review of a determination of the competent investigating authority."[8] In Canada, it is the standard of review found in s. 28(1) of the Federal Court Act,[9] as limited by the so-called privative clause found in s. 76(1) of the Special Import Measures Act[10] ("SIMA"), which provides that subject to certain exceptions, "every order or finding of the Tribunal under this Act is final and conclusive", and as limited by Canadian common law regarding the standard of review of specialized tribunals.[11]

---

8 See generally *United States Trade Representative v. The Government of Canada; in the matter of Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA, Memorandum Opinions and Order, August 3, 1994.

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

10 R.S.C. 1985, c. S-15 (as amended prior to the implementing legislation for the North American Free Trade Act).

11 The predecessor to the CITT, the Canadian Import Tribunal, has been found to be a specialized tribunal demanding a high level of deference in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1336.

This standard of judicial review of a decision of a specialized tribunal has been the subject of numerous Supreme Court of Canada decisions and is relatively well established in Canadian law today. In the Court's judgment in *Canada (A.G.) v. P.S.A.C.*, [1993] 1 S.C.R. 941 at 952-963, Mr. Justice Cory, in considering a decision on an application for judicial review of a decision of the Public Service Staff Relations Board pursuant to section 28 of the Federal Court Act, as it then read, summarized the role of the courts when reviewing decisions of specialized tribunals:

> In summary, the courts have an important role to play in reviewing the decisions of specialized administrative tribunals. Indeed, judicial review has a constitutional foundation. See *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. In undertaking the review courts must ensure first that the board has acted within its jurisdiction by following the rules of procedural fairness, second, that it acted within the bounds of the jurisdiction conferred upon it by its empowering statute, and third, that the decision it reached when acting within its jurisdiction was not patently unreasonable. On this last issue, courts should accord substantial deference to administrative tribunals, particularly when composed of experts operating in a sensitive area. [emphasis added]

Id. at 961-62. The Supreme Court of Canada has stated that a decision will not be patently unreasonable where there is any evidence on the record to support the decision of the tribunal. Madame Justice McLachlin wrote, in *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 688, that:

> [T]he Court in reviewing labour decisions is not concerned with whether or not the decision is "correct" but rather is concerned with whether or not the decision is "patently unreasonable". If there is any evidence capable of supporting a finding of successorship, the Court will defer to the Board's finding even though it may not have reached the same conclusion.

On January 1, 1994, as part of the implementing legislation enacting the provisions of the North American Free Trade Agreement ("NAFTA") in Canada, s. 76(1) of SIMA was amended

so that the provision that the CITT's decision was "final and conclusive" was removed.[12] Counsel for Mueller and Streamline argued that the elimination of the CITT's privative clause by NAFTA has changed the standard of review, and therefore the CITT's decision should be accorded less deference. We reject this argument because this inquiry was initiated prior to January 1, 1994. Article 1906 of NAFTA states that:

> Chapter 19 shall apply prospectively to final determinations of a competent investigating authority made after the date of entry into force of [the] Agreement.

Section 43 of the Interpretation Act[13] also states that where amendments are made to legislation, substantive rights are preserved. In this case, the standard of review in existence prior to the implementation of NAFTA has been preserved for the purposes of this Panel review.[14]

B. The Like Goods and Associated Causality Questions

The Complainants argued that the Tribunal made a patently unreasonable error in failing to find pressure and drainage ("DWV") fittings to be separate like goods and, accordingly, to conduct a separate injury analysis as to each. They argued that these two categories of products were generally used for different purposes and that they were affected differently by trends in the market. They went on to include substantial

---

[12] S.C. 1994, c. 44, s.217(1).

[13] R.S.C. 1985, c. I-21 (as amended).

[14] Also see *In the Matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States,* CDA-93-1904-07, Decision and Reasons of the Panel, May 18, 1994, at 13; *Re Bell Canada and Palmer,* [1974] 42 D.L.R. (3d) 1 (F.C.A.); *Re McDoom and Minister of Manpower and Immigration,* [1977] 77 D.L.R. (3d) 559 (F.C.T.D.).

economic analysis, including tables, in their reply brief in an effort to show, in summary, that harm to Cello derived primarily from an economic decline in the DWV sector, while it was pressure products that were primarily being imported.

Section 2 (1) of the Special Import Measures Act defines "like goods" as follows:

> "like goods", in relation to any other goods, means:
> (a) goods that are identical in all respects to the other goods, or
> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

R.S.C. 1985, c. S–15.

In reaching a like goods determination the Tribunal can evaluate a number of factors including physical similarity, manufacturing process, marketing methods, price, substitutability, competition, end use, quality and performance characteristics. *Women's Leather Boots and Shoes*, [1990] 2 T.T.R. 251, 270–74; *Sarco Canada Ltd. v. Anti–dumping Tribunal and Sarco Co. Inc. and Escodyne Ltd.*, [1979] 1 F.C. 247, 251–53.

In such a determination the Tribunal "is required to consider all of the characteristics or qualities of the goods, and not restrict itself to a consideration of something less than the totality of those considerations." *Dryden House Sales Ltd., carrying on business under the firm name and style of Ambassador– Dryden House v. Anti–dumping Tribunal* [1980] 1 F.C. 639, 643 (emphasis in original). This means, for example, that the Tribunal cannot restrict "itself to 'market considerations' in defining 'like goods.'" *Sarco Canada Ltd*, 1 F.C. at 253.

This need for considering all factors is especially important in this case, in which

the definition of like goods is shaped, to some extent, by administrative feasibility. With products such as fittings, there are a large number of distinctions that could be drawn. The Tribunal noted six subgroups within the pressure class and five within the drainage class. And it would be impractical to require the Tribunal to define many hundreds of different specific product categories on the grounds, for example, that tees and elbows do not compete with each other. This is one of the reasons that we do not believe that *Noury Chemical Corporation and Minerals and Chemicals Ltd. and Pennwalt of Canada Ltd. v The Anti-dumping Tribunal*, [1982] 4 C.E.R. 53 is applicable. There, the Deputy Minister had made a preliminary finding of dumping for four separate classes of goods, and the Tribunal made a single inquiry, combining all four classes into one, despite the fact that the products were not substitutable for one another. The Court of Appeal held that this was an error of law. In the present case, however, there was only one class of goods in the preliminary dumping finding -- and it is a class that includes many non-substitutable sub-classes.

In the present matter, the Tribunal made a like goods determination for cast and wrought fittings and determined that they were not separate like goods. CITT Finding at 15. That determination has not been challenged. The Tribunal 's finding, however, did not specifically address the question whether pressure and DWV products should be treated as separate like goods. It is upon this issue that error has been claimed in this review.

This panel cannot interfere with a like goods finding "unless there was a complete absence of evidence to support it or a wrong principle was applied in making it." *Sarco Canada Ltd.*, 1 F.C. at 254. Because we find evidence in the record which supports a

finding that pressure and DWV fittings are like goods and because no wrong principle was applied by the Tribunal in reaching this conclusion, we find that the decision of the Tribunal on this issue was not patently unreasonable.

A comparison of the evidence found in the record with the factors the Tribunal traditionally considers in reaching a like goods determination reveals that certain of the factors are clearly present in this instance.

For example, it is not disputed that pressure and DWV fittings are physically similar. The prime similarity is the fact that both are made of copper. CITT Finding at 2. This similarity is important for several reasons. First, it distinguishes the fittings in question from other fittings which perform the same function but are made from other materials such as plastic. Id. at 3. Second, it impacts the key issue of price. Because copper is the primary raw material for both types of fittings, prices of both DWV and Pressure fittings are directly and equally dependent upon the price of copper. As the Tribunal noted in its finding:

> Prices of the subject copper fittings are based on published price lists. These price lists change from time to time, generally reflecting price changes of the subject goods, primarily caused by changes in the price of copper.

CITT Finding at 5. See also, CITT Record, Vol. 1 (Public) (Staff Prehearing Report) at 124–25; Id., Vol. 9 (Public) (Statement of Aurini) at 18, ¶ 52; Id., Vol. 13 (Protected) (Testimony of Thompson) at 286; Id., Vol. 14 (Protected) (Testimony of Strobridge) at 42; Id., Vol. 6.1 (Protected) (Westburne Supply, additional information) at 273. Further, the copper composition of the products in question renders them subject to the same

manufacturing methods, another factor the Tribunal is to consider. Specifically, both pressure and DWV fittings can each be made by the same two manufacturing methods, cast or wrought. CITT Finding at 3–4. CITT Record, Vol. 1 (Public) (Prehearing Staff Report) at 79–80.

The record also establishes that the marketing methods and pricing for the products are the same. Pressure and DWV fittings are sold by manufacturers to the same customers, from the same price lists and are discounted from those price lists by the same factor. Specifically, pressure and DWV fittings are marketed and sold as a commodity product through several large distributors that in turn sell mostly to the plumbing trade. CITT Finding at 5; CITT Record Vol. 1 (Public) (Prehearing Staff Report) at 80, 82. Producers, for the most, part offer these distributors a full range of pressure and DWV products. Id.

Published price lists for the subject products contain both pressure and DWV fittings. See e.g., CITT Record, Vol. 3A (Public) at 8–95; Id., Vol. 5B (Public) at 101–267. Distributors generally order a mix of pressure and DWV products from these price lists. CITT Finding at 5. The prices listed are rarely, if ever, the actual sales price; rather they are being discounted by the same factor for both pressure and DWV. CITT Finding at 5; CITT Record, Vol. 4 (Protected) at 80–83, Id. Vol. 4A (Protected) at 208–16; Id., Vol. 4B (Protected) at 94.

As to uses, pressure and DWV fittings have the same general uses, i.e., they are used in industrial, institutional, commercial or multi–unit residential construction applications as connecting devices with respect to the movement of fluids. CITT Finding at 2– 3. Admittedly, pressure and DWV fittings are not generally substitutable for the specific end–uses due to their differing construction and performance characteristics. CITT Finding at 2–3; CITT Record, Vol. 14 (Public) (Testimony of Aurini) at 75–76, 97. It is, however, possible to sell a pressure fitting into a DWV application, although this is not a common occurrence. CITT Record, Vol. 14 (Public) (Testimony of Aurini) at 97.

Because pressure and DWV fittings are not generally substitutable it follows that they do not directly compete on the end–use level. The significance of this factor, however, is diminished, at least somewhat, by the fact that pressure and DWV fittings are sold to the same wholesale customers in mixed lots which are discounted by the same factor.

In this case, the market factors -- lack of substitutability or direct competition among the subcategories of product -- tend to support a finding of separate like goods. It was argued to us that these market factors are the "principal criteria" to be examined and they are "usually the determinative criteria." Transcript of Public Hearing (November 15, 1994) at 345. Even though we may find this economically persuasive, we must recognize that the Tribunal cannot restrict "itself to 'market considerations' in defining 'like goods.'" *Sarco Canada Ltd*, 1 F.C. at 253, but must "consider all of the characteristics or qualities of the goods." *Dryden House*, 1 F.C. at 643 (emphasis in original).

Clearly, the relative importance which the Tribunal chooses to give one set of factors as opposed to another in a particular case is within its discretion and part of its function. The Tribunal will not have made a patently unreasonable error under these circumstances. *Japan Electrical Manufacturers' Association v. Anti–Dumping Tribunal*, [1982] 2 F.C. 816-818 (F.C.A.) ("the Court cannot re–weigh the evidence and substitute its findings for those of the Tribunal which made the decision sought to be set aside"); see also, *Rohm and Haas Canada Ltd. v. Anti–Dumping Tribunal*, [1978] 22 N.R. 175, 177. Accordingly, and contrary to the arguments made to the panel, the fact that the Tribunal in other cases has accorded particular weight to market factors is not "determinative" in this review.

As a practical matter, this means that even if we had been inclined to weigh the evidence differently, such considerations are inappropriate at this stage of the process. As noted previously, Madame Justice McLachlin of the Supreme Court of Canada has stated that "[i]f there is any evidence capable of supporting a finding . . . the Court will defer to

the Board's finding even though it may not have reached the same conclusion." Lester, 3 S.C.R. at 688.

It was also argued to us that the Tribunal erred in not making an explicit finding that pressure and DWV fittings were a single like good. Complainants' Reply Brief further argues that this point may have been decisive for a determination of injury. There are broad statements in the law that might suggest a duty to make an explicit finding. Thus, in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227, the Court cited as examples of patently unreasonable error "acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it." Id. at 237 (quoting, *Service Employees International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al.*, [1974] 41 D.L.R. (3d) 6 at 11-12). This is not, however, an absolute statement indicating the existence of a duty to deal explicitly with specific questions, and we believe that if such a duty ever exists, it must apply only in very exceptional circumstances. Indeed, the law is clear that the Tribunal is not required to make explicit findings on each possible issue. As Justice McGuigan of the Federal Court of Appeal has stated:

> Courts have consistently held that it is not an error of law for a Tribunal not to give reasons on every argument presented to it (*Canadian Arsenals Ltd. v. Canadian Labour Relations Board*, [1979] 2 F.C. 393 at pp. 399–400), nor even to fail to make an explicit written finding on each constituent element of its decision (*Service Employees International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al.* (1974) 41 D.L.R. (3d) 6 at p. 13, [1974] 1 W.W.R. 653 at

> p. 659). The only question that can arise in the absence of written reasons is whether the decision arrived at can rationally be supported.

Maclean Hunter Ltd. v. Deputy M.N.R. (Customs and Excise), [1988] 15 C.E.R. 340 at 343. Although we would, of course, have preferred explicit consideration of the issue, we note the wisdom of Justice McGuigan's position in the circumstances of this case. There are often many plausible ways to divide a market and an economic analysis will always show some divisions much more favorable to particular parties than others; it would be unfair to the Tribunal to expect it to anticipate every such possibility and deal with it explicitly.[15]

The Tribunal's focus on the cast versus wrought distinction for like goods purposes and failure explicitly to consider the pressure versus DWV distinction is also supportable in this case in light of the fact that the record revealed much more discussion of the cast versus wrought distinction than of the pressure versus DWV distinction. See e.g., CITT Record, Vol. 13, (Public) at 225–28, 263; Id., Vol. 13A (Public) at 530–33. Indeed, Elkhart/Amcast clearly stated in their questionnaire response that "A key aspect to Amcast's marketing technique is to promote the distinction between wrought and cast copper fittings . . ." CITT Record, Vol. 5B (Public) at 81. Moreover, Counsel for Amcast/Elkhart in its closing argument before the Tribunal stated that "[o]ne point I did

---

[15] In *In the Matter of Machine Tufted Carpeting Originating in or Exported from the United States of America*, CDA-92-1904-02, Opinion and Order of the Panel, April 7, 1993, a predecessor panel remanded a case to the Tribunal because certain evidence relied upon by the parties required "the development of expert analysis before one can say if it is capable of supporting the conclusion." Id. at 29. The Panel acknowledges that it may be necessary to remand to the Tribunal when a determination of whether the decision can be rationally supported requires analysis this Panel should not undertake. In this case, however, the evidence rationally supporting the decision was evident from the record and did not require expert analysis.

not want to spend a lot of time on and . . . I just wanted to mention" was "that there are really two sub–groupings of the goods here, in terms of pressure versus drainage. One could also approach it from cast versus wrought." CITT Record, Vol. 13A (Public) at 617 (emphasis supplied). The Tribunal did approach the issue from a cast versus wrought perspective. Under such circumstances, there is little to advance the proposition that the Tribunal's actions were patently unreasonable.

We give only limited weight, however, to the fact that the issue of pressure versus DWV was raised only as a passing secondary argument to the wrought and cast issue. The Tribunal is an expert agency that need not depend on litigants to bring fundamental issues to its attention. Nevertheless, it plainly renders it more difficult to find that the Tribunal acted unreasonably that the parties themselves did little to press the distinction between pressure and DWV before the Tribunal.

In conclusion, based upon the evidence in the record which supports a finding of one like good and the deference which must be accorded the Tribunal in how the evidence is weighed, we cannot say that there is "a complete absence of evidence to support" or that "a wrong principle was applied in making" the decision not to analyze pressure and DWV fittings to determine whether they were separate like goods. Neither can we say that, in this case and in light of the fact that the issue was not fully developed before the Tribunal for consideration, the Tribunal failed to articulate its decision adequately. Because we cannot reach such a conclusion, we cannot find the decision of the Tribunal to be patently unreasonable.

C. Domestic Canadian Competition and Price Erosion

Elkhart and Amcast argued further that causation and material injury should be analysized separately for each product class. Their contention was that even if there is no error of law on the question of "like goods", the Tribunal is required to analyze causation and material injury by product class in any event because the circumstances within each product class are different.

These complainants argued that a breakdown of product classes would show that Cello sustained material injury in the DWV class due to non-dumping factors, and that, if Cello sustained material injury in the pressure product class, the injury would have been caused by the domestic production of Streamline and Bow. The complainants thus argued that the Tribunal confused material injury that was specific to the DWV product class with injury to the market as a whole. They further contended that, in any event, there are serious deficiencies in the Tribunal's data which result in a complete lack of record evidence with respect to the material injury in the form of price erosion. In support of their position, these complainants pointed to the fact that the data in the Tribunal's Staff Report is separated into pressure and DWV categories.

In its analysis, the Tribunal found that the market for the subject goods is a commodity market driven primarily by price. The Tribunal then went on to conduct extensive price trends analysis. It found that structural changes in the domestic market in 1991 culminated in a scramble by various suppliers to maintain or capture additional market share. These developments resulted in a decline in domestic production of 41 %. Although market volume increased by 16 % in 1991, the value of the market remained

static due to intensified price competition and a decline in copper prices. The Tribunal thus found that while Cello experienced positive results in terms of volume sold and market share, its profitability fell.

The Tribunal also found that 1992 was a disastrous year for the Canadian industry. While the market volume was stable, the value fell by 17 %. Total domestic production declined by 15 %, and Cello's production and capacity utilization dropped by 25 %. Named imports continued to grow in 1992, rising by another 13 % to almost 75 % of the market, while prices dropped as a result of the fierce price competition. CITT Finding at 16.

Following the imposition of provisional duties in the latter stages of 1992, there was a dramatic turnaround in the first half of 1993. Production by Cello and Bow increased, notwithstanding a 24 % drop in overall demand which led to increased market share for Cello and consequent improvement in financial performance, employment and capacity utilization. CITT Finding at 17.

In light of the foregoing, the Tribunal found that the domestic industry suffered material injury, primarily in the form of production and sales loss, price erosion and loss of profitability. CITT Finding at 17. It went on to find a direct correlation between the dumping and the material injury to domestic production. CITT Finding at 17.

The record evidence is not uncontroverted with respect to pricing data and the influences of both dumping and non-dumping factors. Nevertheless, there does exist record evidence supportive of a correlation between the entry into the domestic market of low priced imports and the collapse of price levels, which translated into the loss of

domestic sales, market shares and profitability. This is clearly sufficient record evidence not to preclude the Tribunal from a finding that these circumstances were a cause of material injury to the domestic industry. It is not within the Panel's purview to reweigh this evidence. *Japan Electrical Mfg. Assoc.*, 2 F.C. at 818. Accordingly, this Panel determines that the Tribunal's findings with respect to injury and causality are not patently unreasonable and that they must stand.

D. Exclusion and Product Accounting

After its conclusion that there was injury, the Tribunal turned to the question of exclusions. It considered the lists of goods that Cello intends to produce over the next 18 months, those Cello intends to produce over the next 5 years, and those Cello does not intend to produce. It concluded that "the subject goods not produced, and which Cello does not intend to produce within the next 18 months, as set out in Appendix A to the finding," should be excluded. CITT Finding at 20. In addition, the Tribunal excluded certain goods intended for ACR applications on the grounds that Cello had made no claim of injury with respect to these goods and that it was unclear whether they were made by any domestic firm.

Mueller Industries challenged the Tribunal's list of Appendix A. It initially argued that there were approximately 1000 items in the class of subject goods and that the number of items that Cello intended to and would be able to produce is much less than the difference between 1000 and 264, the number of items listed in Appendix A.[16] (It made no objection to the fashion in which ACR goods were excluded.) It supported its contentions by arguing that there can be no injury unless there is current or imminently-planned Canadian production. In the absence of such production, it argues, an error is one of law under section 42 of SIMA.

The Tribunal responded that the granting of exemptions is a discretionary activity.[17] Cello responded that, in fact, it intended to produce a large number of items:

165 actively produced wrought items

34 not actively produced wrought depending on demand

119 wrought planned for the next 18 months

"hundreds" of cast fitting.[18]

Allowing for the "hundreds" of cast fittings, the Tribunal's calculation would, in Cello's view, prove reasonable. Mueller Industries countered that Cello would not, in fact, be able to produce all the listed products, so that the calculation was faulty.[19]

---

16 Mueller Participant's Brief at ¶¶ 61–77.

17 CITT Brief at ¶¶ 96–101.

18 Cello Non–Confidential Brief ¶ 306.

19 Mueller Industries, Reply Brief ¶¶ 34–37.

In reviewing this type of issue, we have no doubt that the Tribunal has substantial discretion in defining the strategy of developing an exclusion list. We are not convinced by Mueller's argument that it would necessarily be an error of law for the Tribunal to apply a duty on a product not produced or likely to be produced in Canada. Section 42 of SIMA directs the Tribunal to evaluate injury or retardation caused by import of the goods found by the Deputy Minister to be dumped. The injury or retardation evaluated is, under section 2, that of the producers of "like goods," which are defined to be "goods that are identical in all respects to the [dumped] goods," or, in the absence of such goods, "goods the uses and other characteristics of which closely resemble those of the other goods." The statute thus clearly envisions the possibility that a tariff will be imposed to protect Canadian producers of such similar goods. In this case, there are a variety of subcategories of products, often in some competition with one another, and the term "like goods" has already been interpreted to allow the Tribunal to lump all the categories into one for the purposes of evaluating damage. It would be unreasonable to require the Tribunal to make an item-by-item analysis of each subcategory at the exclusion phase. Moreover, we must recognize that it would be unfair to the manufacturer not to provide it with some opportunity to choose to proceed with production plans from among a reasonable category of products that could be produced within the defined 18 months.

However, it would almost certainly be patently unreasonable if the Tribunal were to define an exclusion list in one way and then produce a list that reflected an entirely different principle. Hence we examined the list. Because the numbers required thoughtful analysis at the confidential level, the Panel requested submissions on the numerical

accounting issue and received such submissions from Cello, Mueller and Nibco. These submissions included numerical counts of products in different categories that Cello intended to and could produce. They revealed that there was no fundamental mathematical misunderstanding regarding the product accounting. Rather, the issue went to the status of certain specific products.

The products in dispute were described by a Cello executive, Mr. Terry Aurini, who admitted that certain products were not ready to go into production and that the "dyes" [dies] were not ready.[20] The interpretation of this statement in drawing a line to choose among products which Cello has differing degrees of ability and commitment to produce is essentially a finding of fact. As such, its review is clearly not within our authority, and we do not find a reviewable error in the way the Tribunal developed its exclusion list.

V. CONCLUSION AND ORDER

For the foregoing reasons, the determination of the Canadian International Trade Tribunal that the dumping of certain solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, originating in or exported from the United States of America has caused, is causing and is likely to cause material injury to the production in Canada of like goods is hereby AFFIRMED. The Panel directs the Canadian Secretary of the NAFTA Secretariat

---

[20] Protected Transcript at 282–283.

to issue a Notice of Final Panel Action pursuant to Rule 79A of the Article 1904 Panel Rules.

SIGNED IN THE ORIGINAL

John H. Barton, Chairman
John H. Barton, Chairman

The Hon. Mr. Justice John D. Richard
The Hon. Mr. Justice John D. Richard

Tom M. Schaumberg, Esq.
Tom M. Schaumberg, Esq.

Wilhelmina K. Tyler
Wilhelmina K. Tyler

Issued February 13, 1995

VI. PARTIAL DISSENT OF PANELIST LEONARD E. SANTOS

I join the Panel's decision with respect to its description of the standard of review, as well as its conclusions that the Tribunal need not analyze causation separately in this case if it finds a single class of like goods and that the Tribunal's product exclusion analysis is not patently unreasonable. But I dissent from its treatment of the "like goods" issue.

The central issue before this Panel has been whether the Tribunal's "like goods" determination is patently unreasonable. Its finding that wrought and cast fittings are like goods is uncontested, but Elkhart and Amcast argue that it should have found drainage and pressure fittings to be separate classes of like goods. The majority concludes that the Tribunal's determination is not patently unreasonable because there was some evidence before the Tribunal which, the majority believes, supports the conclusion that drainage and pressure fittings are like goods. I conclude that the Tribunal's implicit determination of this issue is patently unreasonable in view of the fact that its own Statement of Reasons tends to contradict the proposition that pressure and drainage fittings are like goods or the assumption that the Tribunal relied upon the evidence cited by the majority. Finally, I believe this Panel may not, in its reviewing role, rely upon its own analysis of evidence, an analysis which should have been performed, in the first instance, by the Tribunal.

I begin with a review of what the Tribunal stated for the record. In its Statement of Reasons, the Tribunal considered whether fittings produced by the cast and wrought methods are like goods. It stated that it heard evidence that many of the fittings required for drainage and pressure applications are available in either wrought or cast, and that wrought and cast fittings are substitutable for and in competition with each other in many applications. Thus, the Tribunal concluded, cast and wrought fittings are like goods. CITT Statement of Reasons

at 15.

The Tribunal did find that wrought and cast fittings fall into two major subclassifications: pressure solder fittings and drainage solder fittings. CITT Statement of Reasons at 2. It described the different applications, different sizes, and different construction of pressure and drainage fittings. Without adverting to these differences, the Tribunal concluded that the Canadian-produced fittings are like the imported goods found to be dumped.

Analysis by this Tribunal of whether pressure and drainage fittings are like products was not precluded by the fact that the Deputy Minister determined that imported fittings were like Canadian-made fittings. The Tribunal has the authority to find that the class of dumped goods identified by the Deputy Minister should be divided into two or more classes of like goods. In *Women's Leather Boots and Shoes*, [1990] 2 T.T.R. 251, and in *Machine Tufted Carpeting Originating in or Exported from the United States of America*, NQ-91-006, it found that two or more classes of like goods existed within the class submitted by the Deputy Minister and proceeded to make separate causation analyses for each class of like goods. In this case, it considered the question of whether wrought and cast fittings, which the Deputy Minister submitted as a single class of goods, constituted two separate classes of like goods and concluded that they did not. Thus, the Tribunal is authorized to consider whether pressure and drainage fittings are like goods.

The Tribunal itself is uncertain whether or not it undertook an analysis and concluded that pressure and drainage fittings are like goods. The Tribunal's brief before this Panel asserted that the Tribunal decided against creating two separate classes of like goods based on a number of factors. Brief Filed on Behalf of CITT ¶ 65. During oral argument before this Panel, counsel for the Tribunal backed away from this assertion, explaining that the brief was

only citing evidence in the record on which the Tribunal could have relied to determine whether pressure and drainage fittings are like goods. Transcript of Public Hearing at 302-03, 305-06. The Tribunal's written decision does not address the question. The facts recited in the decision, the only facts that the Tribunal demonstrably considered, support a finding that they are not like goods. The Tribunal's causation analysis, on the other hand, treats them as like goods.

The like goods issue is central to the Tribunal's injury analysis. The Deputy Minister makes the preliminary determination of dumping, pursuant to § 38(1) of the Special Import Measures Act ("SIMA"), "specifying the goods to which the preliminary determination applies." Paragraph 42(1)(a)(i) of SIMA authorizes the Tribunal to inquire whether the dumping "has caused, is causing or is likely to cause material injury . . . ." "Material injury" means "material injury to the production in Canada of like goods." SIMA § 2(1).

> "[L]ike goods," in relation to any other goods, means
>
> (a) goods that are identical in all respects to the other goods, or
>
> (b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

SIMA § 2(1).

If two classes of unlike goods are combined, then the causal analysis is flawed because injury caused by the dumping of one class of goods may be erroneously ascribed to the unlike class of goods. The problem is illustrated by *Noury Chemical Corporation and Minerals and Chemicals Ltd. and Pennwalt of Canada Ltd. v. The Anti-dumping Tribunal*, [1982] 4 C.E.R. 53. There, the Deputy Minister had made a preliminary finding of dumping for four separate classes of goods. The Tribunal made a single inquiry as to material injury, combining all four classes into one, despite the fact that the products were not substitutable for one another. The Court of Appeal held that this was an error of law:

> The Tribunal is required by section 16 to inquire 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 to the production in Canada of <u>like</u> goods.

<u>Id.</u> at 56 (emphasis in original). In this case, unlike *Noury*, the Deputy Minister's preliminary finding applied to a single class of goods. However, this does not change *Noury*'s holding that

it is the Tribunal's obligation to find that the dumping harmed Canadian production of like goods.

In its Statement of Reasons, the Tribunal articulated no explicit finding that pressure and drainage fittings were like or unlike goods. As noted previously, the Tribunal has variously asserted that it did and did not decide this issue. It is clear that the Tribunal did not address the issue explicitly. Implicit, however, in the Tribunal's conclusion that the domestically-produced fittings are like goods to the subject goods is the assumption that pressure and drainage fittings are like products. The Tribunal analyzed causation for a single class of goods. Were pressure and drainage fittings not like products, the Tribunal would have been obliged under *Noury* to make separate causation analyses.

Because the Tribunal assumed, without discussion, that pressure and drainage fittings are like goods, it articulated no reasons that would support such a conclusion. By contrast, it did articulate its reasons for finding that wrought and cast fittings were like products -- they compete with and are substitutable for one another:

> Although there are differences between cast and wrought fittings as identified by counsel for Streamline, the Tribunal heard evidence that many of the fittings required for DWV [drainage] and pressure applications are available in either wrought or cast, and substitutable for, and in competition with, each other in many applications.

CITT Statement of Reasons at 15.

There is no comparable finding with respect to pressure and drainage fittings. The

Tribunal's description of the two subclassifications reveals that drainage fittings, which are not used in pressurized applications, are made of lighter construction than those used in pressure systems. CITT Statement of Reasons at 3. Elkhart and Amcast argued and Cello conceded that pressure and drainage fittings do not compete and are not substitutable for one another. Revised Non-Confidential Reply Brief of Complainants ¶¶ 64-65; Non-Confidential Brief of Participants Cello Products, Inc., ¶¶ 204-05. While market factors may not be decisive, they were most persuasive to the Tribunal in its decision that cast and wrought fittings are like goods. Yet the record is devoid of any indication that the Tribunal considered these factors in its analysis of pressure and drainage fittings.

Canada's Supreme Court held in *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation*, [1979] 2 S.C.R. 227 ("CUPE"), that patently unreasonable error includes "acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting the provisions of the Act so as to embark on an inquiry or answer a question not remitted to it." Id. at 237, quoting *Service Employees International Union, Local No. 333 v. Nipawin District Staff Nurses Association of Nipawin et al.*, [1974] 41 D.L.R. (3d) 6 ("*Nipawin*"), 11-12. The majority finds this authority inapplicable, reasoning that *CUPE* does not require the Tribunal to make an explicit finding to show that it has "taken relevant factors into account" and speculating, based upon a brief quote from *MacLean Hunter Ltd. v. Deputy M.N.R. (Customs and Excise)*, [1988] 15 C.E.R. 340, that if any such duty exists it must apply only in very exceptional circumstances.[1]

[1]*MacLean Hunter* sheds no light on any duty to be explicit; indeed, it assumes that an explicit finding has been made. The majority's editing of its quote from that case obscures the factual context of the court's holding. The two full paragraphs from which the majority's quote is drawn state:

The majority's discussion of whether an explicit finding must be made begs the question. The issue is whether there is a rational connection between the Tribunal's finding, explicit or implicit, and the evidence it considered as reported in its Statement of Reasons. In this case, the Tribunal's Statement of Reasons provides no indication that the Tribunal recognized and reconciled the contradictory evidence before it and so I can only conclude, following *CUPE*, that it failed to take into account relevant evidence.

Sarco Canada Ltd. v. Anti-dumping Tribunal and Sarco Co. Inc. and Escodyne Ltd., [1979] 1 F.C. 247, is instructive as to what is sufficient consideration by the Tribunal of the like goods issue. The *Sarco* court accepted the proposition that "if the record disclosed that the Tribunal had restricted itself to 'market considerations' in defining 'like goods,'" it would have erred in law. Id. at 253. But the *Sarco* court's examination of the record was conducted in a manner quite different from the majority's in this case. Citing the Transcript of the Public Hearing, the court noted that there was evidence before the Tribunal as to both physical similarity and dissimilarity between the dumped goods and the Canadian goods. Id. Then the court looked to the Tribunal's Statement of Reasons to confirm that it "did give at least some

---

> The respondent, however, drew the court's attention to the Board's final summary of its findings in the seven appeals, in which it states explicitly as follows:
>
> Appeal No. 2285. The Financial Post Corporation Service Booklets and Updates (Exhibit A-1): Not a directory nor a printed book, and therefore not exempt.
>
> Clearly, therefore, the Board did make a finding that the materials were not national manufacturing, industrial or trade directories, even if it did not provide reasons for that decision. Courts have consistently held that it is not an error of law for a tribunal not to give reasons on every argument presented to it, nor even to fail to make an explicit written finding on each constituent element of its decision. The only question that can arise in the absence of written reasons is whether the decision arrived at can rationally be supported.

MacLean Hunter, 15 C.E.R. at 342-43 (citations omitted). In *MacLean Hunter*, the court first determined that the Board had made an explicit finding before addressing the question of whether reasons for the finding were required. The majority applies *MacLean Hunter*'s holding on the necessity of providing reasons to a case where the Tribunal did not make an explicit finding and recited facts that tend to contradict its implicit finding.

consideration to the physical dissimilarities between the dumped goods and the goods of Canadian producers." Id. at 253-54.

Unable to find anything in the Tribunal's Statement of Reasons which explains the proposition that drainage and pressure fittings are like goods, the majority combs the record in search of some evidence, any evidence, which could support the Tribunal's implicit "like goods" determination. The majority finds such support in evidence that drainage and pressure fittings are similar in physical characteristics, marketing methods and pricing. Not only was that explanation not offered by the Tribunal, but that reasoning is at odds with the Tribunal's product description. The Tribunal noted that drainage fittings are not used in pressure systems and are made of lighter construction than pressure fittings. CITT Statement of Reasons at 3.

In every case in which an issue is contested, a perusal of the record of evidence before the Tribunal ought to reveal evidence on both sides of the contested issue. Thus, the majority's method of searching through the evidence presented to the Tribunal ought to result in its discovery of "some evidence" to support any conclusion and thus would affirm the Tribunal's decision in every case. As *Sarco* demonstrates, more is required than a showing of evidence that the Tribunal might have considered. The *Sarco* court required confirmation in the Tribunal's Statement of Reasons that it was cognizant of the evidence presented to it.

Furthermore, the patently unreasonable standard requires that there be some rational connection between the evidence and the conclusion. "Only when the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact . . . can the court interfere." *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, 688-89. The similarities

between drainage and pressure fittings cited by the majority are not probative that they are indeed "like goods." The fact that both pressure and drainage fittings are made of copper is particularly inapposite. Certainly, many products other than fittings, such as wires, are made of copper, and that fact does not make them like fittings. As the Tribunal noted in *Women's Leather Boots and Shoes*, 2 T.T.R. at 272, the fact that women's boots and shoes are both made of leather does not render them like goods. Indeed, what the Tribunal chose to recite in this case were the differences in the construction and uses of pressure and drainage fittings.

The majority discounts the evidence cited by the Tribunal and concludes, based on the evidence it retrieved from the record of argument before the Tribunal, that drainage and pressure fittings could be found to be like products. But this is precisely what the Tribunal, rather than this Panel, is called upon to do. It is the Tribunal that must reconcile contradictory evidence. It is the Tribunal that must decide to discount certain factors in the face of other evidence. That the majority feels obliged to engage in this kind of weighing of evidence is perhaps the clearest sign of its misappropriated role. The Panel in *Machine Tufted Carpeting Originating in or Exported from the United States of America*, CDA-92-1904-02, Opinion and Order of Panel, April 7, 1993, refused to analyze evidence in the record which might have supported the Tribunal's decision, emphasizing that the Tribunal, not the reviewing Panel, had the obligation to undertake that analysis in the first instance. Id. at 29-32.

The majority distinguishes *Machine Tufted Carpeting*, arguing that in this case the evidence rationally supporting the Tribunal's decision is "evident from the record and did not require expert analysis." I believe this distinction is disingenuous. *Machine Tufted Carpeting* stands for the proposition that a Tribunal's decision is patently unreasonable if the analysis of evidence in the record which could support the Tribunal's decision was not performed by the

Tribunal. The discussion of causation which the panel found patently unreasonable in *Machine Tufted Carpeting*, id. at 18-33, was far more extensive and insightful than the "like goods" discussion of the Tribunal in the present case.

By arguing that evidence in the record of the present case does not require expert analysis, the majority is both conceding that no such analysis can be found in the Tribunal's Statement of Reasons, and asserting that it, the majority, is not itself engaged in such an analysis. But the majority's discussion of the evidence it selected from the record which it finds supportive of the Tribunal's implicit "like products" conclusion is laced with apparent contradictions which, according to *Machine Tufted Carpeting*, should have been resolved by the Tribunal. The majority juxtaposes the fact that drainage and pressure fittings are not substitutable with the fact that they share common distribution and marketing methods. Exercising its expertise, the majority believes that the importance of the lack of substitutability is "diminished, at least somewhat" by the common marketing methods. Yet this is the kind of analysis which the Panel in *Machine Tufted Carpeting* required the Tribunal to provide ab initio.

The "expert" to which the Panel refers in *Machine Tufted Carpeting* is the Tribunal itself. Id. at 29. The Panel in that case could have assumed the role of expert, but to do so would have usurped the expertise of a specialized tribunal to which it owed curial deference. Thus, the majority ignores the fact that its willingness to sustain the Tribunal's "like goods" analysis is based on its own digesting, weighing, analyzing and comparing, that is analysis, of evidence which the Tribunal did not address, and whose contradictions the Tribunal never reconciled.

The majority derives solace for its position from the fact that the parties did little to

press the distinction between pressure and drainage fittings before the Tribunal. Unfortunately, the majority fails to delineate what level of advocacy by the parties would have made it more sympathetic to the proposition that the Tribunal's finding was patently unreasonable. In fact, the Tribunal's Pre-Hearing Staff Report identified Pressure Solder Fittings and DWV Solder Fittings as the "two major classifications" of solder fittings. CITT Record, Vol. 2 (Protected) (Tribunal's Exhibits) at 10-13. Both the Staff Report and the Confidential Statement of David Ewing describe the differences between pressure and drainage fittings at length. Id. Vol. 12 (Protected) (Manufacturer's Cases) at 3-4. The very title of the proceeding specifically distinguishes between drainage and pressure fittings. And counsel for Amcast and Elkhart did, belatedly, raise the issue at the hearing. Id. Vol. 13-A (Public) at 617-19.

Certainly, it would have been preferable for counsel to have highlighted this issue at an earlier juncture in the hearing, but the high level of deference due to the Tribunal, embodied in the privative clause protecting its decisions, is predicated upon its status as a highly specialized and expert body. See *The Superintendent of Brokers v. Pezim*, [1994] __ S.C.R. __, slip op. at 28-31. The Tribunal must analyze the threshold question of like goods and reach its conclusion, whether or not the arguments are fully developed by counsel. The level of deference accorded the Tribunal carries with it an obligation to consider the evidence and to address those issues necessary to its conclusion. It also carries with it a minimum requirement that the Tribunal's decision be understandable. Here, the logic of its decision is a mystery.

It is not too much to expect an expert Tribunal to consider all relevant characteristics and render decisions whose bases can be ascertained. This Panel should not have to speculate

about the rationale and basis for the Tribunal's decision, nor should it be obliged to reconcile conflicting evidence in order to sustain a Tribunal's decision. A Tribunal's finding requiring that level of intervention is patently unreasonable.

I would remand the Tribunal's like goods determination and direct the Tribunal on remand to determine whether pressure and drainage fittings are like goods and to demonstrate that its finding has a rational basis. If the Tribunal were to determine on remand that pressure and drainage fittings were not like goods, I would further direct it to perform separate causation analyses for each class of like goods.

SIGNED IN THE ORIGINAL

Lenoard E. Santos, Esq.
Leonard E. Santos, Esq.

Issued February 13, 1995