

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

IN THE MATTER OF:
CERTAIN HOT-ROLLED CARBON
STEEL PLATE AND HIGH-STRENGTH
LOW-ALLOY PLATE, HEAT-TREATED
OR NOT, ORIGINATING IN OR
EXPORTED FROM THE U.S.A.

Secretariat File No.
CDA-93-1904-06

MEMORANDUM OPINION AND ORDER

December 20, 1994

Before: Lawrence J. Bogard, Chairman
John Hays Barton
Peter J. Gartland
Wilhelmina K. Tyler
Gilbert R. Winham

Appearances:

Ronald C. Cheng and Gregory O. Somers, Osler, Hoskin & Harcourt, argued for Complainant Algoma Steel, Inc. and Participant Ipsco, Inc.

Lawrence L. Herman, argued for Complainant Stelco, Inc.

Debra P. Steger, General Counsel, and Hugh J. Cheetham, argued for Respondent Canadian International Trade Tribunal. With them on the brief was Joël J. Robichaud.

C.J. Michael Flavell, Q.C. and Geoffrey C. Kubrick, Flavell Kubrick and Associates, argued for Participants Bethlehem Steel Export Corporation and U.S. Steel, A Division of USX Corporation. With them on the brief was Paul M. Lalonde.

Richard S. Gottlieb, Gottlieb & Pearson, argued for Participant Oregon Steel Mills, Inc.

Alain Préfontaine argued for the Attorney General of Canada.

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MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Chapter Nineteen of the Canada-United States Free Trade Agreement ("FTA") to review the final determination of the Canadian International Trade Tribunal ("CITT" or "Tribunal") in Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Whether Heat-Treated or Not, Exported From or Originating In Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom, the United States, and the former Yugoslav Republic of Macedonia, NQ-92-007, May 6, 1993 ("Steel Plate").^{1/} Although that determination pertained to subject goods originating in nine countries, our review is limited to those elements of the

^{1/} The goods subject to the determination are: hot-rolled carbon steel plate and high-strength low-alloy plate not further manufactured than hot-rolled, heat-treated or not, in cut lengths, in widths from 24 inches (610 mm) to 152 inches (3,860 mm) inclusive, and thicknesses from 0.187 inches (4.75 mm) to 4.0 inches (101.6 mm) inclusive, as follows:

- plate made to CSA specifications: G40.21, Grades 230G/33G, 260W/38W, 300W/44W, 350W/50W, 350A/50A, 350AT/50AT, 400W/60W, 260WT/38WT, 300WT/44WT, 350WT/50WT, and 400WT/60WT, or equivalent specifications in either CSA or other recognized designation systems or standards;
- plate made to ASTM specifications: A283M/A283, Grades A, B, C and D, A36M/A36, A572M/A572, grades 42, 50, 60 and 65, A588M/A588, A242M/A242, Types 1 and 2, A515 and A516M/A516, Grade 70, or equivalent specifications in either ASTM or other recognized designation systems or standards;

and excluding plate for use in the manufacture of pipe and tube (also known as "Skelp"), plate in coil form and universal mill plate.

determination that apply to United States-origin goods. With respect to U.S.-origin goods, a majority of the Tribunal found that subject goods exported from or originating in the United States had not caused, were not causing, and were not likely to cause material injury to the production in Canada of like goods, while one member of the Tribunal dissented.^{2/}

Algoma Steel Inc. ("Algoma"), the petitioner in the CITT's proceeding, has challenged this negative determination on the following grounds: (1) The CITT erred in failing to cumulate dumped imports from the United States with dumped imports from the other countries subject to the Tribunal's investigation, or alternatively, the CITT did cumulate but excluded U.S. goods from its determination on grounds that were not legally valid; (2) The CITT disregarded record evidence of price erosion and price suppression by dumped imports from the United States; (3) The CITT erroneously considered the deterrent effect of antidumping duties in evaluating future injury from U.S.-origin imports; (4) The CITT erred in finding that the demand for U.S.-origin imports was tied "much more closely to economic conditions than to any price considerations"; (5) The CITT erred in finding no evidence to suggest U.S. exporters of dumped plate are likely to behave in an injurious manner in the Canadian market; and (6) The CITT erred in its price comparisons between U.S.-origin and domestic industry goods. Ipsco, Inc. ("Ipsco"), another Canadian steel producer, supports Algoma in these challenges. A third Canadian producer, Stelco Inc. ("Stelco"), joins Algoma and further asserts that the Tribunal violated the precepts of "natural justice" when it allowed four individuals who were members of Canada's

^{2/} The CITT issued a unanimous affirmative determination with respect to subject goods originating in the remaining eight countries.

Binational Dispute Resolution Panel Roster to appear before it in the Steel Plate proceeding, and to participate in the Tribunal's investigation.

For the reasons set forth more fully below, the Panel 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 January 13, 1994 and reconvened on September 21, 1994, at which all participants were heard, the Panel unanimously affirms the CITT's negative injury determination in respect of subject goods originating in the United States.

II. PROCEDURAL HISTORY BEFORE THE PANEL

The CITT issued its final determination on May 6, 1993. Algoma and Stelco timely requested review on June 8, 1993, pursuant to Article 1904 of the Canada-United States Free Trade Agreement ("FTA"), and filed their Complaints on July 8, 1993. We have jurisdiction over this action pursuant to Article 1904(2) of the FTA and Section 77.15 of the Special Import Measures Act, Revised Statutes of Canada 1985, Chapter S-15, as amended ("SIMA")^{3/}

Responding to the Complaint were the CITT and, in support of the CITT's determination, Bethlehem Steel Export Corporation ("Bethlehem"); U.S. Steel, A Division of USX Corporation ("USS"); and Oregon Steel Mills ("Oregon").

All participants filed timely Notices of Appearance, except Oregon. Subsequently, Oregon filed a Motion for Leave to File a Notice of Appearance out of time, which the Panel

^{3/} 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 that time, including SIMA as it read in November 1989, prior to its having been amended in accordance with the North American Free Trade Agreement.

granted on the grounds that no prejudice would result to the other participants. The Attorney General of Canada filed a consent motion on November 24, 1993, requesting an extension of time in which to file an Appearance and a brief on the issue of whether the participation of Binational Panel Roster members in the Tribunal's investigation was a denial of natural justice. The Panel granted this consent motion.

On January 12, 1994, Algoma submitted copies of SIMA as amended in accordance with the North American Free Trade Agreement ("NAFTA"). At oral argument, Algoma argued that this amended version of SIMA, rather than the November 1989 version, set forth the standard of review to be applied by this Panel.

The Panel heard oral argument in Ottawa on January 13, 1994.

On January 18, 1994, the Panel issued an Order requesting those participants wishing to do so to submit post-hearing briefs on the following issues raised at the hearing: (1) whether the post-NAFTA version of SIMA set forth the standard of review in this proceeding; (2) whether the Panel has jurisdiction to address the merits of the "natural justice" issue raised by Stelco; (3) whether the Panel has jurisdiction to review the CITT's ruling that it lacked jurisdiction to grant Stelco's motion to exclude Binational Panel Roster members from appearing as counsel; and (4) whether the CITT in fact lacked jurisdiction to grant the relief sought by Stelco. All participants filed post-hearing briefs.

On March 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 June 30, 1994 following the appointment of a new Panelist. Algoma and Ipsco moved to reconvene oral argument in order to permit the new Panel member to hear argument and ask questions of

counsel. The Panel granted this Motion, and oral argument was reconvened in Ottawa on September 21, 1994.

III. THE CITT'S DETERMINATION

The CITT's determination with respect to U.S.-origin goods in Steel Plate was made in the context of its investigation of the effects of dumping of subject goods from nine countries. The Tribunal unanimously found the Canadian industry manufacturing carbon steel plate to be suffering injury that was "material" within the meaning of section 42 of SIMA, and that such injury was caused by imports from eight of the foreign sources. At the same time, by a vote of 2-1, a majority found that subject goods imported from the United States had not caused, were not causing, and were not likely to cause, material injury to production in Canada of like goods.

A. Analysis of Material Injury

The CITT's analysis "commenced with an examination of the effects that the aggregate imports from all of the named countries had on the industry's performance." Steel Plate, supra, at 17. This analysis described the CITT's "view that although total demand for carbon plate is insensitive to price, the demand for the product of any single producer is, to a large degree, highly price sensitive." Id. The CITT concluded on this basis that regular plate, which comprised the majority of plate at issue, was a commodity for which price usually was the principal determinative factor in a customer's buying decision. Id. The Tribunal noted, however, that quick delivery of plate made to varying specifications was often an important factor for fabricators and end-users, who buy smaller quantities of plate. Id.

The Tribunal's determination summarized its findings as to trends in certain indicators of the economic condition of the domestic industry, including the industry's overall production, domestic

sales volume, share of the domestic market, net income, employment levels, capacity, and capacity utilization. Id. at 14. The CITT noted that domestic production and market share each fell in the period from 1989 through 1991, but rebounded in 1992, while subject imports exhibited the opposite trend, increasing from 1989 to 1991 and falling in 1992. Id. In volume terms, domestic sales fell during the 1989-1991 time frame and rose in 1992. Id. at 15. In value terms, domestic sales fell steadily throughout the 1989-1992 period. Id.

With respect to market share, the Tribunal found that "[t]raditionally, the domestic mills have accounted for about 80 percent of the market" but during the period investigated by the CITT "the industry's share fell from 77 percent, in 1989, to 65 percent, in both 1990 and 1991, all to the benefit of imports from the subject countries, before returning to a level of just over 80 percent in 1992." Id. at 18, emphasis added.

Regarding price trends in the Canadian market, the CITT observed that average prices for sales of domestic regular plate fell roughly 28 percent between 1989 and 1992, while average selling prices of subject imports -- excluding imports from the United States -- fell about 21 percent during the same period. Id. at 15. Average selling prices of U.S.-origin goods, which the CITT noted were generally the highest of all imported plate prices, fell between 1989 and 1990 but rose in 1991, and remained above 1990 levels in 1992. Id. The CITT further noted that landed prices from all sources other than the United States fell by 22 percent during the period of investigation. Id. Landed prices for U.S.-origin goods, the CITT found, rose throughout the same period. Id.

The Tribunal then addressed the interaction between price and market share, observing that in 1991, subject imports from "offshore suppliers" continued to be landed at increasingly

lower prices and greater volumes. Id. at 18. Domestic market share returned to traditional levels (around 80 percent) in 1992; however, the Tribunal found, the domestic industry only regained that market share by undercutting dumped prices in the Canadian market. Id. The CITT's analysis "consider[ed] that the continuing decline in the unit price of plate imports from most of the subject countries exerted strong downward price pressures on the domestic mills, particularly on Algoma and Stelco." Id.

Based on this interaction between prices and market share, the Tribunal articulated the economic harm suffered by the domestic industry as a loss of profitability caused, in part, and maintained thereafter, by the low or dumped prices of the subject goods:

As demand deteriorated and prices fell, the industry's financial performance worsened, from a net profit of 17 percent on sales of \$234 million in 1989 to a net loss of 11 percent on sales of \$144 million in 1992. A portion of these losses must be attributed to weak demand in the market and the resulting competition for market share among the domestic mills. Production stoppages at Algoma and Stelco also affected the Canadian industry's market share in late 1990 and early 1991.^{4/} However, the persistence throughout 1991 of the severe drop in the domestic industry's market share, even after the effects of these stoppages had passed, is explained by the continued presence of low or dumped prices of subject imports from offshore. While the domestic industry recovered market share in 1992 by adopting aggressive pricing policies, this gain was only at the expense of ever greater financial losses.

Id. at 19.

^{4/} In 1990, Algoma and Stelco were involved in strikes "lasting more than three months which created uncertainty in the market for weeks or months before and after the strikes." During that year, subject imports, particularly from the United States, significantly increased their market share. Steel Plate, supra, at 17.

B. Analysis of U.S. Imports

After identifying the nature of the economic harm suffered by the Canadian industry, the CITT observed that as "[its] deliberations progressed, it became clear . . . that the circumstances relating to the imports from the United States were significantly different from those respecting imports from the other subject countries." Id. Therefore, the Tribunal determined that "for the purposes of this case, the evidence relating to these differences should be considered fully, and possible injury from the United States should, if necessary, be considered separately from injury from other sources."^{5/} Id. The CITT then conducted a specific analysis of U.S. imports. The distinguishing factors noted by the Tribunal were:

1. Contrasting Trends In Import Volumes and Prices

In 1991, the volume of U.S.-origin imports fell while import volumes from other countries rose. U.S. prices, which already were much higher than either domestic prices or those of most other imports, increased throughout the period, while prices of goods from other sources fell. Steel Plate, supra, at 19, 20.

2. Role of U.S. Imports in the Canadian Market

Between 1989 and 1990, the Tribunal noted, much of the U.S.-origin imports "filled a void in the Canadian marketplace created by the prolonged strikes at Algoma and Stelco, and the

^{5/} The CITT emphasized that it did not interpret SIMA Subsection 43(1) to require a separate examination of U.S. goods, citing Polyphase Induction Motors Originating in or Exported from Brazil, France, Japan, Sweden, Taiwan, the United Kingdom and the United States of America, Inquiry, No. CIT-5-88, April 28, 1989 (hereinafter "Polyphase Induction Motors"). Rather, the Tribunal stated, "if the evidence relating to any other named exporting country had set it apart distinctly from the others, the Tribunal would have also considered a separate examination and finding on injury with respect to that country." Steel Plate, supra, at 19.

market uncertainties which preceded and followed the strikes." Id. at 20. Throughout 1991 and 1992 (after the strikes were concluded), the price of U.S.-origin imports rose while market share declined steadily for five consecutive quarters. The Tribunal attributed the higher market share of U.S. goods in 1992 (4 percent) in comparison to 1989 (2.6 percent) to increased integration of the North American steel market, spurred by FTA tariff reductions, and to business relationships developed during the Algoma and Stelco strikes. Further, the increased U.S. market share was found to correspond in part to a loss in market share for supplier countries not subject to the Deputy Minister's dumping determination. Id.

3. U.S. Producers Occupied a Market "Niche"

Demand for U.S.-origin goods involved sales of small lots of plate having particular dimensions and specifications, while other foreign sources sold large lots of more common sizes and types of plate. There was testimony that Bethlehem and USS, two of the major U.S. suppliers, were "niche players" in the Canadian market. A significant proportion of U.S.-origin plate was purchased for reasons other than price, in particular, long-run market needs, specific physical and chemical characteristics, and prompt availability, so that U.S.-origin plate filled "stable and almost structural demands that the domestic mills do not service." Id. at 21. The Tribunal therefore concluded that demand for U.S. plate was tied much more closely to economic conditions than to price considerations. Id. at 20-21.

4. Future Injury

Average dumping margins for U.S.-origin goods were generally much lower than those for plate from other subject suppliers. The Tribunal observed that imposition of antidumping duties at a rate of 11.5 percent -- the calculated dumping margin for U.S. exporters other than the six mills investigated by the Deputy Minister -- would not deter purchasers of plate unavailable from Canadian sources from continuing to buy from U.S. suppliers. Id. at 21.

While there was excess capacity in U.S. mills, there was no evidence to suggest that U.S. exporters were likely to behave in an injurious manner in the Canadian market. U.S. plate prices were well above Canadian mill prices, and U.S. plate was generally bought for reasons other than price, so that the imposition of antidumping duties would have little effect on demand for U.S. plate. Also, there was "no persuasive evidence" regarding excess inventories of U.S. plate to suggest future injury; rather, evidence indicated that the U.S. plate market was firming due to economic recovery. Id.

C. Analysis of Other Imports

The CITT then turned to its "Analysis of Other Subject Imports," noting that "[I]mports from [subject] countries . . . other than the United States, as a group, displayed quite a different pattern of behavior." Id. at 21. For example, unlike imports from the United States, the volumes of plate imported from other subject countries increased while their selling prices decreased. Id. at 21, 22. Offshore market share continued to rise after the Algoma and Stelco strikes ended, at the expense of domestic and U.S. plate. Id. at 22. Moreover, evidence presented by two large service centers indicated prices for plate from non-U.S. subject suppliers were the benchmark for negotiations with domestic mills, and therefore were "the driving force behind the declining

prices" for Canadian plate. Id. The CITT further observed that sales of non-U.S.-origin plate were often made off-the-dock at irregular times and prices, which exerted constant and downward pressure on domestic prices. Id. The Tribunal referred to a study on international spot pricing of steel plate, which indicated that European prices had fallen to extreme lows due to over-capacity, lack of demand and price competition from Eastern Europe, and concluded that declining offshore prices forced the domestic producers to lower their prices to win back market share, resulting in material injury in the form of deteriorated financial performance in 1991 and 1992. Id.

D. Causality

After analyzing the effect of imports on the Canadian industry, the CITT discussed causality, finding that price erosion in 1991 and 1992 correlated directly to the dumping of subject goods from subject countries other than the United States. Id. at 23. The CITT reiterated that pricing was established based on offshore offers, and that the effect on domestic prices of offshore steel plate was exacerbated by the irregular flow of imports and dock sales by various offshore sources, further noting that all offshore suppliers (with two exceptions) were dumping virtually all of their sales, and had weighted average dumping margins of between 23 percent and 53 percent. Id. at 23, 24.

With respect to future injury, the CITT found that if duties were not imposed, the offshore suppliers would continue dumping, noting that all but two of the subject countries had previously been subject to antidumping duties. Id. at 24. The CITT therefore concluded that these countries had a propensity to dump the subject goods. Id. The Tribunal also found that dock sales by many of the offshore countries had a destabilizing effect on pricing in the market. Id. For these

reasons, the Tribunal found that dumping of subject goods by suppliers other than the United States was likely to cause future injury. Id. at 24, 25.

E. Exclusions

Having found material injury and likelihood of future injury with respect to non-United States suppliers, the CITT addressed requests to exclude certain products from the imposition of antidumping duties, and concluded that three product exclusions were appropriate.^{6/} Id. at 25, 26.

F. Participation By Roster Members

The CITT's opinion also described its ruling concerning a motion brought by Stelco to bar counsel who were members of the Chapter 19 Binational Panel Roster from appearing before the CITT. Noting that the issue raised by Stelco's motion was fundamental to the structure of Chapter 19, the CITT nonetheless denied Stelco's motion on the grounds that it lacked jurisdiction to grant the relief sought. Id. at 16.

IV. OPINION OF THE PANEL

A. Standard of Review

1. Submissions of The Tribunal

We must first address Algoma's challenge to the Tribunal's submissions concerning both the standard of review and the merits of its decision. Algoma asserts that the Tribunal's submissions were inappropriate and should not be considered by this Panel as they were not

^{6/} The product exclusion determinations did not pertain to U.S.-origin merchandise because the Tribunal made a negative determination with respect to the United States. Thus, these exclusions are not directly at issue here.

explanations of the Tribunal's decision, arising from the Tribunal's expertise. We do not accept this assertion.

Rule 40 of the Article 1904 Panel Rules clearly envisages that the Tribunal has the right to appear before this Panel. However, the nature of such appearance is subject to the law of Canada governing how an administrative decision-maker is to participate in judicial review.

Canadian law on this question is best described in CAIMAW v. Paccar of Canada, Ltd., [1989] 2 S.C.R. 983, (hereinafter "Paccar"), where the court stated that the tribunal in question had

standing before this Court to make submissions not only explaining the record . . . but also to show that it had jurisdiction to embark upon the inquiry and that it had not lost that jurisdiction through a patently unreasonable exercise of its powers.

Paccar, supra, at 1014.

An administrative body has the right to make submissions in respect of the administrative record, its interpretation of its powers within its jurisdiction, and matters within its specialized expertise. This right extends to submissions as to the appropriate standard of review. Id. at 1017. As the court observed,

[T]he Tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the Tribunal, which may render reasonable what would otherwise appear unreasonable to someone not vested in the intricacies of the specialized area.

Paccar, supra, at 1016, citing British Columbia Government Employees Union v. Industrial Relations Council (unreported, B.C.C.A., May 24, 1988.)

This Panel finds that the Tribunal may make submissions as to the appropriate standard of review and its interpretation of the law surrounding the standard of review.

2. The Version of SIMA That Governs This Review

Pursuant to the FTA, the Panel reviews the CITT's determination applying the standard set forth in SIMA as it read in November 1989 (hereinafter "old SIMA"). Section 76(1) of old SIMA included a so-called privative clause which stipulated that "every order or finding of the [CITT] under this Act is final and conclusive." The presence of this privative clause requires the Panel to review the CITT's determination using a standard of "patent unreasonability." SIMA was amended by the North American Free Trade Agreement Implementation Act, S.C. 1994, c. 44 (hereinafter "NAFTA Implementation Act"), effective January 1, 1994, resulting in a "new SIMA." This amendment, *inter alia*, repealed the privative clause in SIMA section 76(1) with respect to CITT determinations involving the United States or Mexico. Absent a privative clause, the Panel reviews the CITT's determination using a standard of "reasonableness."

Algoma, Ipsco and Stelco assert that new SIMA governs this Panel's deliberations. Algoma observed that Article 1904 of the FTA obliges a Panel to apply the general legal principles that a court of the importing party otherwise would apply to the review of an antidumping duty or countervailing duty determination, and asserted that under Canadian law, procedural matters that are the subject of statutory amendment or repeal are presumed, absent legislative intent to the contrary, to operate retroactively. Algoma then argued that the privative clause in Section 76(1) of the old SIMA was procedural and that Parliament did not demonstrate intent that this "procedural" privative clause was to be repealed only prospectively. Stelco argued that the new SIMA should govern, because the FTA, which obliges Panels to apply relevant domestic law, states that such law includes ". . . the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time. . . ." FTA, Art. 1904 (2).

The CITT responds that old SIMA governs our review, asserting that subsection 77.015(1) of new SIMA provides that ". . . a panel shall conduct a review in accordance with Chapter 19 of the North American Free Trade Agreement ("NAFTA"). . .," and that Article 1906 of the NAFTA provides that "Chapter 19 shall apply only prospectively to final determinations . . . made after the date of entry into force of [the] Agreement." The CITT asserted that this review is being conducted under the FTA rather than NAFTA, and therefore, the relevant grounds for review are those in old SIMA.

The Attorney General of Canada ("Attorney General") argued that the privative clause addresses the scope of the Panel's review, a question of jurisdiction and substance that could not be abrogated retroactively by the January 1, 1994 amendments to SIMA. The Attorney General further stated that the intent of the Parties to the NAFTA and the FTA was that Panels operating under Chapter 19 of the FTA were to apply the old SIMA's standard of review. Bethlehem and USS made similar arguments.

Based on the submissions of the participants, the Panel recognizes that there is room for doubt as to what the FTA and NAFTA require regarding the narrow question of statutory amendments to the SIMA. Turning to Canadian law, which this panel is empowered to apply, the NAFTA Implementation Act specifies that Section 43 of the Interpretation Act, R.S.C. 1985, c. I-21, is to apply when the former suspends provisions of an Act of Parliament. Section 43 of the Interpretation Act states in part:

Where an enactment is repealed in whole or in part, the repeal does not [...]
(c) affect any right, privilege, obligation or liability acquired, accrued,
accruing or incurred under the enactment so repealed [...]

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) [...]

The effect of Section 43 is to preserve substantive rights that, but for this provision, could be extinguished by the repeal of a statute.

The heart of the matter is whether the privative clause in Section 76(1) of old SIMA gives rise to a substantive legal right. We conclude that the privative clause gives rise to a substantive legal right because it defines the scope of permissible review. Where there is a privative clause, a Panel may find the Tribunal committed an error of law only if an alleged mistake is found to be patently unreasonable.^{7/} Where there is no privative clause, however, a Panel may find the Tribunal committed an error of law if the alleged mistake is found merely to be unreasonable.^{8/} Changing the standard of review thus affects the substantive rights of parties. This analysis is supported by Attorney General of Canada v. Langille, [1982] 2 F.C. 208, at 209 where the Court of Appeal found that the right of appeal was a "substantive right and is not affected by the repeal of the provision authorizing it and the substitution of a new and narrower right of appeal."^{9/} See also Certain Hot-Rolled Carbon Steel Sheet Products Originating In Or Exported From the

7/ Dayco (Canada) Ltd. v. CAW-Canada, [1993] 2 S.C.R. 230 (hereinafter "Dayco"), Paccar, supra, at 1003.

8/ Bell Canada v. Canada (CRTC), [1989] 1 S.C.R. 1722 at 1745-6; In the matter of Certain Machine Tufted Carpeting Originating in or Exported from the United States, 19 May 1993, CDA-92-1904-01, at 6, 7. (Ch. 19 Panel) (hereinafter "Machine Tufted Carpeting").

9/ In Langille, the Court applied Sections 35(c) and (e) of the Interpretation Act as they then were. Those sections correspond to Sections 43(c) and (e) of the Interpretation Act as raised in this matter.

United States, May 18, 1994, CDA-93-1904-07, (Ch. 19 Panel) (hereinafter "Hot Rolled Carbon Steel Sheet").

These proceedings are governed by the privative clause in Section 76(1) as it read when these proceedings were commenced. The Panel is operating under the standard of review set forth in old SIMA.

3. The Standard of Review

Pursuant to Article 1904(3) of the FTA, this Panel will 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.

Article 1911 of the FTA provides that a request for review to a Panel must be made on grounds set forth in section 28(1) of the Federal Court Act, R.S.C. 1985, c. F-7. Section 28(1) provides that the Tribunal's decision will be reviewed on the grounds that it:

- (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 that error appears on the face of the record; or
- (c) based its decision or order on an erroneous finding of fact that is made in a perverse or capricious manner or without regard for the material before it.

This standard is subject to section 76(1) of SIMA, which has been held to be a privative clause. See, e.g.: National Corn Growers Association v. Canadian Import Tribunal, et al., [1990] 2 S.C.R. 1324 at 1369 (hereinafter "National Corn Growers"); Machine Tufted Carpeting, *supra*, at 16-17.

The principles governing judicial review of an administrative tribunal in Canada were summarized in U.E.S. Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 (hereinafter "Bibeault"):

1. If the question of law 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.

Bibeault, supra, at 1086.

Establishing the degree of curial deference to be accorded to a tribunal's determination must begin with determining the tribunal's jurisdiction, *i.e.*, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" Id. at 1088. The limits of jurisdiction are determined by a pragmatic and functional test, examining:

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

Id.

This pragmatic and functional approach has been consistently employed, and somewhat reformulated, in subsequent cases before the Supreme Court of Canada. See e.g., Dayco, supra; and Domtar Inc. v. Quebec (Commission D'Appel en Matière de Lésions Professionnelles) [1993] 2 S.C.R. 756 (hereinafter "Domtar").

Canadian courts will engage in an analysis of the relative expertise of a tribunal. An analysis of the relevant provisions of SIMA and the Canadian International Trade Tribunal Act, R.S.C. 1989, c. 47, reveals legislative intent as to the degree of deference to be shown to the

Tribunal. The Binational Panel in Hot-Rolled Carbon Steel Sheet ably reviewed the CITT's enabling legislation finding that the legislative language leads to the conclusion that "[The Tribunal]...is a specialized administrative body whose findings within its area of expertise are entitled to deference under Canadian law." Hot Rolled Carbon Steel Sheet, supra, at 11. That Panel's reasoning is intrinsically persuasive and is supported by the Panel's determination that SIMA Section 76(1) contains a privative clause.

The participants agreed that the standard of review to be applied with respect to alleged errors of jurisdiction, including a denial of natural justice, is the "correctness" standard. This test is also the applicable standard for denial of natural justice, which goes to the jurisdiction of the Tribunal. Service Employees International Union, Local 333 v. Nipawin District Staff Nurses Assn., [1975] I.S.C.R. 382, at 389 (hereinafter "Nipawin"). Correctness is the applicable standard even in the presence of a privative clause, where the question is whether a tribunal made an error in interpreting a legislative provision limiting its powers, or whether a tribunal correctly decided that it had jurisdiction to consider the issue before it. Dayco, supra, at 249, 308; Bibeault, supra, at 1085-1086, citing Syndicat des Employés de production du Québec et de l'Acadie v. CLRB [1984] 2 S.C.R. 412 at 420 (hereinafter "Syndicat des Employés"). On jurisdictional questions,

...only a patently unreasonable error results in an excess of jurisdiction when the question at issue is within the tribunal's jurisdiction, whereas in the case of a legislative provision limiting the tribunal's jurisdiction, a simple error will result in a loss of jurisdiction.

Bibeault, supra, at 1088.

The participants agreed that the "patently unreasonable" standard applies to alleged errors of law. The Panel concurs. Where an agency decision protected by a privative clause is under review, and the

decision was made within the scope of the agency's jurisdiction, the standard of review to be applied by a reviewing court in respect of an alleged error of law is the "patently unreasonable" standard. Dayco, supra; National Corn Growers, supra.

The participants do not agree as to whether alleged errors of law and errors of fact are subject to the same standard of review. In our opinion, the grounds set forth in subsection 28(1)(c) ("erroneous finding of fact . . . made in a perverse or capricious manner or without regard to the material before it") can be viewed as the primary version of the test to determine whether a decision is patently unreasonable. This "test" is substantively the same as the patently unreasonable standard. Thus, it is unnecessary to differentiate between errors of law and errors of fact. This view is supported by Blanchard v. Control Data Canada Ltd., [1984] 2 S.C.R. 476:

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact or a combination of the two), which is unreasonable.

Blanchard, supra, at 494-495.

The participants differed as to how the applicable standard of review ought to be applied. This matter was addressed in National Corn Growers, which stated that "...courts, in the presence of a privative clause, will only interfere with the findings of a specialized tribunal where it is found that the decision of that tribunal cannot be sustained on any reasonable interpretation of the facts or of the law." National Corn Growers, supra, at 1369-1370.

In determining the reasonableness of a decision, a reviewing authority may have to perform an "in-depth analysis" through a detailed examination of the record. Id. at 1370.

In Paccar, the court articulated the importance of applying curial deference to decisions of a tribunal. Mere disagreement with the decision of the tribunal does not make that result patently unreasonable. The application of reasonableness has been addressed as follows:

When a court says that a decision under review is 'reasonable' or 'patently unreasonable' it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true.

Paccar, supra, at 1018.

The patently unreasonable test is clearly a strict standard. The patently unreasonable standard was first articulated in CUPE (Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.), [1979] 2 S.C.R. 227, at 237, and indicates that the Tribunal must be more than just wrong. The reviewing panel must ask:

...was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review.

CUPE, supra, at 237.

Examples of such patently unreasonable errors would include:

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 provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

Nipawin, supra, at 389.

More recently, the Court stated:

A patently unreasonable error is more easily defined by what it is not than by what it is. This court has said that a finding or decision of a tribunal is not patently unreasonable if there is any evidence capable of supporting the

decision even though the reviewing court may not have reached the same conclusion.

United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Limited [1993] 2 S.C.R. 316, at 340-341.

In summary, this Panel would remand the findings of the Tribunal on an error of jurisdiction, including natural justice, if it were incorrect. On questions of law or on issues of fact, a decision of the Tribunal acting within its jurisdiction and expertise may be found to be patently unreasonable where:

- a) the decision cannot be sustained on any reasonable interpretation of the facts or the law and is thus clearly irrational;
- b) the evidence viewed reasonably is incapable of supporting the Tribunal's finding of fact or a rational or logical relationship does not exist between the evidence and the decision of the Tribunal; or
- c) the Tribunal has acted in bad faith, based the decision on extraneous matters, failed to take the relevant factors into account or breached the provisions of natural justice.

Conversely, the Tribunal's decision may not be found to be patently unreasonable if it was acting within its jurisdiction and there is evidence capable of supporting the decision, even if this Panel would not have reached the same conclusion.

B. Participation of Roster Members Before The Tribunal

Stelco asserts that the appearance before the Tribunal of certain opposing counsel who were members of the Canadian Roster of potential members of Chapter 19 Binational Dispute Panels constitutes a denial of natural justice or a failure to observe principles of procedural fairness. As such, Stelco asserts, the decision of the Tribunal is a nullity and must be set aside in its entirety. We do not agree.

During the Tribunal's investigation Stelco moved to bar Roster Members from participating in the Tribunal's proceedings, arguing that Roster Members, as individuals who may at some point be in a position to review the Tribunal's decisions in other proceedings, could be favored by the Tribunal over non-Roster counsel to a degree that would raise a suspicion or apprehension of bias in the mind of a reasonable person who has informed himself or herself of the nature of the proceedings. The Tribunal denied Stelco's motion, stating that the issue was fundamental to the structure of Chapter 19 of the Canada-United States Free Trade Agreement, but that the Tribunal's governing legislation did not give it jurisdiction to grant the relief sought.

Stelco has not asked the Panel to rule on the Tribunal's finding that it lacked jurisdiction to grant the requested relief. Rather, Stelco asks the Panel to decide the merits of its claim, *i.e.*, whether the participation of Roster Members in the Tribunal's investigation constitutes a denial of natural justice within the meaning of section 28(1)(a) of the Federal Court Act.

The Tribunal argues that its denial of Stelco's motion at the administrative level was not a "definitive decision" within the meaning of subsection 77.1(1) of SIMA^{10/} and that Articles 1904.1 and 1911 of the FTA authorize this Panel to review only definitive decisions. The Tribunal's denial of Stelco's motion to bar Roster Members is not merely, as the Tribunal characterizes it, a "preliminary" or "interlocutory" ruling. Stelco's attempt to bar Roster Members attacked the core of the Tribunal's "definitive" decision by questioning the fundamental fairness of the underlying proceeding. If the participation of Roster Members in the Tribunal's investigation contravenes

^{10/} Such "definitive decisions" include orders or findings under subsections 43(1), 76(3.1), 76(4.1) or 91(3) of SIMA.

principles of natural justice, then the determination arising from that investigation is a nullity. The natural justice issue is inextricably interwoven with the Tribunal's final decision. The Panel has jurisdiction to review the Tribunal's final, "definitive" decision. We therefore have jurisdiction to review the natural justice elements of that decision.

Section 28(1)(a) of the Federal Court Act, pursuant to which this Panel reviews the Tribunal's determination, authorizes us to review the determination with respect to whether the Tribunal "failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction." Although we have the authority only to review "definitive decisions," errors reversible under section 28(1)(a) are reversible in the context of reviewing the "definitive decision" regardless of when they are made. *See, e.g., Syndicat des Employés*, supra, at 439:

Section 28(1)(a) does not distinguish between the 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. There is therefore no reason to make a distinction where § 28(1)(a) makes none, between on the one hand excess of jurisdiction *ratione materiae* committed at the beginning of the hearing, whether or not resulting from an error, and on the other, an error made during the hearing or in the conclusion of the hearing. . . .

Denial of natural justice is similarly a ground for review set forth in section 28(1)(a), and the same policy considerations pertain. If Stelco was denied natural justice, then the process that resulted in the "definitive decision" under review was tainted, regardless of the stage in the proceeding at which principles of natural justice were violated. A tainted administrative process can produce only a tainted definitive decision. It is the Panel's responsibility to determine whether such taint exists.

We turn next to the merits of Stelco's argument. Binational Panels sit in review of Tribunal decisions. Thus, Roster Members, as potential Panelists, could serve as reviewers of Tribunal decisions. This status, Stelco argues, gives such Roster Members an unfair advantage in appearances as advocates before the Tribunal. Why this may be so is less than clear. At root, the concern seems to be that Tribunal Members would seek to curry favor with Roster Members, i.e., their potential reviewers, by giving them (and by extension their clients) preferential treatment during Tribunal proceedings. At oral argument, the suggestion was also made that Roster Members might become aware of information during the course of reviewing a Tribunal decision that would not otherwise have been available and which would be advantageous in the representation of a participant in another proceeding. Stelco supports its position principally by reference to common law decisions concerning the propriety of former judges appearing before the courts of which they had once been members. It is important to note that Stelco has not alleged any actual bias or impropriety on the part of any individual in the context of the challenged review.^{11/} Hence, the issue before us is the mere apprehension of bias on the part of the Tribunal arising from the status of Roster Members as such.

The FTA and Canadian implementing legislation demonstrate that Parliament was aware of and sanctioned the situation about which Stelco complains. Paragraph 1 of Annex 1901.2 of the FTA provides that Roster Members "shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, sound judgment, and general familiarity with

^{11/} We note as well that there is no evidence in the record that suggests any actual bias or impropriety.

international trade law." Paragraph 2 of that Annex states that a majority of the Panelists on each Panel "shall be lawyers in good standing." Annex 1901.2 expressly states that a Panelist may engage in other business during the term of the Panel on which he or she sits. The Annex bars Panelists from appearing as counsel before other Panels. The FTA establishes a Code of Conduct for Panelists and a remedy in the event that a Panelist violates that Code. The Code provides, inter alia, that a Panelist may not represent any participant in the review proceeding for a period of one year after completion of the proceeding.

It is apparent that the FTA Parties and Parliament considered the circumstances that Stelco raises, and that they resolved to permit lawyers knowledgeable in international trade law to conduct their business as lawyers while serving as Panelists (and, necessarily as Roster Members), with the limitation that they refrain for one year from representing or advising any participant in the proceeding before their Panel with respect to antidumping or countervailing duty matters. The appearance of Roster Members before the Tribunal is thus a circumstance recognized and accepted by Canada and the United States in negotiating the FTA, and ratified by Parliament. A reasonable apprehension of bias cannot exist when it is the direct consequence of the statutory scheme at issue. Brosseau v. Alberta Securities Commission [1989] 1 S.C.R. 301, at 315 (hereinafter "Brosseau"). In this structure, the Panel concludes that the Canadian Parliament necessarily contemplated that Roster Members may represent clients before the Tribunal without creating a reasonable apprehension of bias.^{12/}

^{12/} We note also that Stelco did not allege that any Roster Members appearing before the Tribunal in Steel Plate were engaged in a conflict of interest requiring the Tribunal as a court of record to exercise its supervisory jurisdiction over officers of the court.

Stelco characterizes this "inherent" statutory authorization for Roster Members to appear before the Tribunal as irrelevant, arguing that nothing in the FTA or the implementing legislation says that only persons who have appeared before the Tribunal are qualified to serve as Roster Members, or that Roster Members are required to appear before the Tribunal. The question, however, is not whether the FTA and its implementing legislation requires experience as counsel before the Tribunal as a condition for Roster Membership, or whether Roster Members are forced to appear before the CITT. Rather, it is whether the FTA and its implementing legislation permit Roster Members to appear as counsel before the Tribunal. The Panel concludes that they do. Brosseau, supra, establishes that Parliament may deviate from common law principles of natural justice. The inherent statutory authorization for Roster Members to appear before the Tribunal thus is not only relevant, it is central to the question.^{13/}

We have concluded on the merits that the appearance of Roster Members before the Tribunal does not present a reasonable apprehension of bias and therefore does not contravene the principles of natural justice and note that Stelco requested review only as to this issue. It is

^{13/} In any event, the Panel notes that mere status as a Roster Member does not necessarily result in a particular individual sitting in review of a CITT determination. Each Canadian Roster Member is but one of twenty-five potential Panelists. Roster members may be called upon to review determinations by the Deputy Minister of National Revenue, Customs, Excise and Taxation, the U.S. Department of Commerce, or the U.S. International Trade Commission in addition to determinations of the CITT. Moreover, participation on any particular Panel is contingent upon the Roster Member's time availability, freedom from conflicts of interest, and acceptance by the Canadian and U.S. parties. There is no certainty that a particular Roster Member appearing before the Tribunal would in fact ever review a Tribunal decision. Any Tribunal Member seeking to curry favor of a Roster member appearing before him or her is thus anticipating a contingency so remote that any apprehension of bias attendant to it is mere speculation. Such speculation is insufficient to establish a reasonable apprehension of bias. Minister of Employment and Immigration v. Sethe, [1988] 2 F.C. 552 at 560.

therefore unnecessary for the Panel to decide whether the Tribunal erred in finding that it did not have jurisdiction to grant the relief requested by Stelco.

C. Cumulation

Complainants assert that the CITT committed a patently unreasonable error of law when it did not cumulate U.S.-origin goods with subject goods from other countries as, they allege, is required by Canadian law.^{14/} Alternatively, they argue that even if the CITT cumulated U.S. goods in finding material injury, the CITT nonetheless committed a patently unreasonable error of law in granting an exclusion for U.S. goods on grounds that are not legally valid. Cumulation in Canada is, according to Complainants, a mandatory practice pursuant to which the CITT is required to aggregate the effects of dumping from all sources and to assess the injurious impact of dumping collectively, without distinction as to source. Under this theory, the only predicate for cumulating the imports from any particular source is that the imports have been found to be dumped. Moreover, Complainants argue, the only permissible grounds for excluding imports from any source from the CITT's determination after cumulation are de minimis dumping margins, de minimis import volumes, or dumped imports that are a de minimis share of total imports from that source.

1. SIMA And GATT

There is no support in SIMA or the 1979 GATT Antidumping Code for the proposition that cumulation is required by Canadian law, and that subject goods may be excluded from the

^{14/} Cumulation refers to the analysis of the effect, "en masse", that all imports subject to the investigation may have on the competing domestic industry.

determination only on de minimis grounds. Section 42(1)(a) of SIMA, from which the CITT derives its fundamental statutory authority, says nothing about cumulation or exclusion:

The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination of dumping or subsidizing in respect of goods, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:

(a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of goods

(i) has caused, is causing or is likely to cause material injury or has caused or is causing retardation, or

(ii) would have caused material injury or retardation except for the fact that provisional duty was imposed in respect of goods.

The language of section 42(1)(a) confirms that while cumulation is not precluded by SIMA, neither is it required. The most that can be said is that section 42(1)(a) permits cumulation.

Neither a requirement to cumulate nor a limitation on the grounds for excluding subject goods from the CITT's determination can be read into section 43(1) of SIMA. Section 43(1) confers on the CITT the authority to define the scope of its determination, stating that "[t]he Tribunal . . . shall declare to what goods, including, where applicable, from what supplier and what country of export, the order or finding applies." Complainants suggest that the CITT's authority to identify, "where applicable," the countries and suppliers subject to its determination implies a requirement that the Tribunal must first cumulate all subject goods before excluding any suppliers from the determination because the act of excluding some sources implies a prior cumulation of all sources. No such requirement is implied in the language of the provision. Section 43(1) merely authorizes the Tribunal to identify the sources of merchandise subject to its determination. The identification

of goods subject to the determination under section 43 does not define the methodology by which the CITT conducts its investigation under section 42.

Similarly unavailing are suggestions that cumulation is implicitly recognized by or "in accordance with" the 1979 GATT Antidumping Code. The Code, which may be consulted to resolve ambiguities in SIMA, National Corn Growers, supra, at 1371, is silent on the subject of cumulation. Article 3(1) of the Code merely states that a determination of injury shall involve an examination of both "the volume of the dumped imports and their effect on prices . . . and the consequent impact of these imports [.]". Article 3(2) requires the investigating authority to consider whether there has been a significant increase "in dumped imports" or significant price undercutting by "the dumped imports." These provisions may be read to address either cumulated or country-specific dumped imports. As with SIMA, cumulation is not barred by the GATT Antidumping Code, but neither is it mandated.

2. Past Administrative Practice: Cumulation and Exclusion

Complainants' approach ultimately rests on the assertion that the CITT is bound by a long-standing and consistent practice of considering material injury from subject imports en masse and excluding particular suppliers of subject goods on de minimis grounds. For this argument to prevail, we must find that (1) consistent past administrative practices exist; and (2) administrative practice or precedent may bind an agency under Canadian law. We find neither. Cumulation and exclusion are products of administrative interpretation and the Tribunal, having created the concept and its application, has the discretion to vary the application of the concept to reflect the facts of each case.

The Complainants have cited a number of cases where Canadian agencies have cumulated. See, e.g.: Polyphase Induction Motors, supra; Bars, Plates and Forgings (CIT 1985); Certain Stainless Steel, Nickel and Nickel-Alloy Pipe and Tubing (ADT 1984). However, participants have also cited examples of "non-cumulation," i.e., analyses that address material injury from individual producers or countries in the first instance, even when goods from several sources are subject to investigation. See, e.g., Wide Flange Shapes (ADT 1983) (ADT identified as an "initial question" whether imports from Spain should be included "in the assessment of injury"); Citric Acid (ADT 1980) (ADT examined first one U.S. exporter, then another U.S. exporter, then remaining exporting countries, in its material injury analysis); Rail-Car Axles (CIT 1985) (CIT considered U.K. and U.S. producers consecutively in determining material injury from each); Methyl Ethyl Ketone (ADT 1980) (ADT considered U.S. and U.K. imports separately in assessing material injury from each); Alpine Ski Poles (ADT 1984) (ADT appeared to "non-cumulate" Germany and Norway due to lack of contribution or negligible contribution to injury). The analysis in these cases is distinctly fact-driven.

The clearest articulation of cumulation as the concept is applied in Canada is Polyphase Induction Motors, supra, where the CITT stated:

In cases involving more than one exporting country, or when a number of exporters operate from one country, the issue often arises as to whether the Tribunal, in its consideration of material injury, should consider the effect of the imports "en masse," in a cumulative manner, or segregate the impact that imports, from each separate source, [had on the domestic industry]. Cumulation is also at issue when complaints against both dumping and subsidizing reach the Tribunal; in such instances, it has been, and continues to be, the Tribunal's practice, in accordance with its interpretation of the statute, to consider such dumping and subsidization

determinations as requiring a single inquiry and to analyze the cumulative impact of both on domestic production.

In the present inquiry, a number of counsel argued that the Tribunal should not cumulate imports and that the question of whether imports from each named country were a cause of material injury should be determined separately.

The Tribunal rejects this contention. The Tribunal conducted an inquiry as to whether the dumping of subject motors originating in or exported from seven countries caused material injury to the production in Canada of like goods. This inquiry, first and foremost, focused on the dumping of a class of goods whatever their origin. It does not mean, however, that the Tribunal will always find, in the case of a positive finding, against all named countries. There could well be specific reasons why imports from specific sources might be excluded. However, it is only after the cumulative effect of the dumped goods from all subject countries has been analyzed that exclusions, if any, can be envisaged.

Polyphase Induction Motors, supra, at 11-12.

It is the Polyphase Induction Motors decision that Complainants assert binds the Tribunal to the methodology favored by Complainants. Polyphase Induction Motors articulated two "practices" regarding cumulation: first, that the CITT would cumulate the impact of dumping and subsidization of subject goods where both phenomena are involved;^{15/} and second, that the CITT would analyze the cumulative effect of dumped goods from all subject countries before considering whether there are grounds for excluding a particular country.

Critically, however, Polyphase Induction Motors does not state that the CITT is required to cumulate. More importantly, it does not state that "cumulation" must employ a specific

^{15/} All subject goods were dumped in Steel Plate. Issues pertaining to cumulating dumped and subsidized subject goods are therefore not before us.

methodology or be reflected in a particular way in the CITT's determination. While it is "only after the cumulative effect of the dumped goods from all subject countries has been analyzed" that exclusions from the determination may be envisaged, Polyphase Induction Motors leaves the Tribunal with significant freedom as to how that analysis may be conducted, and does not identify a stage of the analysis at which cumulation may give way to consideration of appropriate bases for exclusions.

Our judgment with respect to cumulating is strengthened by the absence of a consistent administrative practice of granting exclusions only where de minimis grounds exist. See, e.g.: Synthetic Baler Twine Originating in or Exported from Portugal, Italy, the United Kingdom, the Netherlands and the Federal Republic of Germany, ADT-8-81, February 23, 1988, at 10-12 (exclusion granted upon finding price was not motivating factor in customers' decision to buy); Chemically Pre-sensitized Aluminum Offset Printing Plates Originating in or Exported from Japan and the United Kingdom, CIT-4-87, October 27, 1987, at 12 (exclusion granted based on finding that factors such as customer satisfaction played more significant role than price in customers' purchasing decisions). Wide Flange Steel Shapes, relied upon by Complainants, does note that product exclusions had been based on de minimis conditions in the past, but it also states that the Tribunal has the discretion to grant exclusions whenever presented "with other overriding factors." Wide Flange Steel Shapes, supra, at 6. Polyphase Induction Motors does not establish any specific limitations on the CITT's discretion to exclude subject goods or goods from subject countries. In fact, the Tribunal found that the subject goods in Polyphase Induction Motors did not cause material injury, and did not even reach the issue of exclusions. Polyphase Induction Motors, supra, at 20.

3. No Administrative Stare Decisis

Even if the methodology urged by Complainants did represent a consistent administrative practice, the CITT would not be bound under Canadian law to follow that practice, subject to principles of natural justice discussed below. Canadian case law confirms that the decision of an administrative agency acting within the scope of its expertise will not be overturned unless it is patently unreasonable, even if it conflicts with prior practice. Administrative tribunals may not bind themselves by prior guidelines or fetter their discretion to deal appropriately with the specific facts before them. Where complicated administrative schemes are involved, Canadian courts should exercise curial deference to ensure the effective functioning of the administrative authorities. Maple Lodge Farms v. Government of Canada, [1982] 2 S.C.R. 2 at 6-7.

In Domtar, supra, the Supreme Court of Canada held that the Quebec Supreme Court had erred in finding that the interpretation by one agency of a section of the workers' compensation law, while not patently unreasonable, was nonetheless reviewable because it differed from an interpretation of the same provision by a different tribunal. The Court concluded that judicial review of a reasonable determination, on the grounds of jurisprudential conflict among agency decisions, would improperly extend judicial oversight of agencies and violate principles of curial deference. Noting that agencies are not bound by stare decisis, the Court stated that:

[T]he search for consistency is not an absolute one....[T]he consistency objective must be pursued in keeping with the decision-making autonomy and independence of members of the administrative body....[C]ertainty of the law and decision-making consistency are chiefly notable for their relativity. Like the rules of natural justice, these objectives cannot be absolute in nature regardless of the context. The value represented by the decision-making independence and autonomy of the members of administrative tribunals goes hand in hand here with the principle

that their decisions should be effective....If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles.

Domtar, supra, at 799-800.

Domtar held that where an administrative body renders a decision within its jurisdiction, that decision will not be reviewed unless it is patently unreasonable, regardless of whether it is inconsistent with another administrative determination on that issue.^{16/} Domtar, as well as Consolidated-Bathurst Packaging Ltd. v. IWA [1990] 1 S.C.R. 282 (hereinafter "Consolidated-Bathurst"), calls for an appropriate balance between achieving administrative consistency on the one hand and maintaining the decision-making autonomy and independence of members of administrative bodies on the other. See also Tremblay v. Quebec (Commission des Affaires Sociales), [1992] 1 S.C.R. 952 (hereinafter "Tremblay"). Domtar clearly identifies administrative consistency as a value to be balanced against the responsibility of the administrative body to decide each case independently and with regard to the specific facts. Consolidated-Bathurst confirms that while coherence or consistency in administrative decision-making is to be fostered, the independence of the decision maker is not to be sacrificed in doing so:

[T]he decision of one panel cannot bind another panel and the measures taken by the Board to foster coherence in its decision-

^{16/} Complainants have not asserted that the method of determining material injury is not within the CITT's jurisdiction.

making must not compromise any panel member's capacity to decide in accordance with his conscience and opinions.

Consolidated-Bathurst, supra, at 328.

There is no administrative stare decisis in Canadian law. Thus, even if Polyphase Induction Motors did describe a specific analytic methodology, the Tribunal could not be bound to that methodology in Steel Plate.

4. The Steel Plate Analysis

While noting that the Tribunal was not required by law to cumulate U.S.-origin goods with other subject goods in Steel Plate, the Panel concludes that the CITT majority did consider the impact of all subject imports "en masse" in determining whether the domestic industry was suffering material injury. The majority began its analysis of material injury with a section titled "Analysis of Market Indicators." Steel Plate, supra, at 17. There, the majority stated, "[t]he inquiry commenced with an examination of the effects that the aggregate imports from all of the named countries had on the industry's performance." Id. (emphasis added.) The subsequent discussion of the elements of the majority's analysis confirms that the majority conducted an aggregated analysis:

The Tribunal examined trends in domestic shipments and in volumes and values of all carbon plate imported . . . from both subject and non-subject countries . . . It also looked at trends in the buying and selling prices of this imported product as compared to the selling prices of domestically produced carbon plate. . . .

During the four years examined by the Tribunal, the industry's share [of the market] fell . . . to the benefit of imports from the subject countries. . . .

During [1990], imports from the subject countries, particularly the United States, significantly increased their share of the domestic market. . . .

While the industry regained all of the share that it had lost to the subject countries, it was only able to do so by undercutting the dumped prices in the market. . . .

During the four year period examined, the average selling price of regular carbon plate imported from all the named countries, including the United States, dropped by an average of 14 percent.

Id. at 18, 19 (emphases added).

This discussion of domestic industry trends in relation to all subject imports preceded the majority's discussion of the specific nature of the material injury suffered by the domestic industry. Material injury in Steel Plate took the form of deterioration of the industry's financial performance due to price erosion resulting from price cutting by the domestic industry in an effort to regain lost market share. The price erosion element of material injury signals the competitive dynamic by which material injury was caused -- price undercutting by imported goods.

The majority undertook any separate analysis of imports from the United States only after it analyzed the industry's condition as affected by aggregated subject imports:

As the Tribunal's deliberations progressed, it became clear to a majority of the Tribunal that the circumstances relating to the imports from the United States were significantly different from those respecting imports from other subject countries. These differences persuaded the Tribunal that, for the purposes of this case, the evidence relating to these differences should be considered fully, and possible injury from the United States should, if necessary, be considered separately from injury from other sources.

Id. at 19.

The majority's separate consideration of U.S. merchandise was not the starting point of the majority's analysis, contrary to Complainants' assertions. Moreover, the majority was clear that it would not undertake a separate consideration of U.S. merchandise except "if necessary" after

looking "fully" at differences in the circumstances of U.S.-origin merchandise. The majority then discussed at length the reasons why a separate analysis of imports from the United States was "necessary" before concluding that such imports were not a cause of material injury.

The Panel finds that the majority's description of its analysis may be interpreted reasonably as articulating an "en masse" analysis of injury by the majority before distinguishing U.S. imports on the basis of different circumstances. As such, the Steel Plate determination is not inconsistent with the broad principle enunciated in Polyphase Induction Motors, even though the language of the majority's determination is significantly less clear than the principle-like language used in Polyphase Induction Motors. In this respect, it is the language of the majority's determination that governs our analysis rather than the dissenting member's characterization of the majority's action. The dissenting member's assertion that he "would not have considered the evidence relating to the United States prior to making a determination about material injury . . . from dumped imports considered 'en masse,'" Steel Plate, supra, at 28, does not accurately characterize what the majority did, which was to assess the condition of the domestic industry in relation to aggregated subject imports and find material injury. It is true that the majority then found circumstances in this case that made it "necessary" to consider possible injury from the U.S.-origin merchandise separately from other imports -- and that these circumstances were not de minimis import volumes or dumping margins -- but it does not follow from this that the majority did not cumulate. Hence, the Panel cannot find that the CITT's decision was patently unreasonable.

5. Reasonable Opportunity To Respond

The Panel has considered whether the parties to the administrative proceeding had a legitimate expectation that the CITT would employ a particular methodology, and that they were unfairly denied an opportunity to respond to any prospective change in that methodology.

Counsel for Stelco noted, with reference to Polyphase Induction Motors and Steel Plate, that participants "prepare [their] cases [before the CITT] on the basis of what they have done in the past. It is unreasonable in a patent sense, as a matter of law, for the Tribunal to have told us what they will do, as a matter of law, in applying SIMA and in assessing causality, in a significant case and then departing from that principle without any explanation or any reason in another case." Transcript of January 13, 1994 hearing at 127-28. This argument was pursued at length by all Complainants at the reconvened oral argument in the context of the doctrine of legitimate expectations.

Principles of natural justice require that parties "be given a reasonable opportunity to respond" to new grounds for administrative decision making on which they have made no

representations. Consolidated-Bathurst, supra, at 338. ^{17/} Consolidated-Bathurst spells out the parameters of the required opportunity:

It is true that on factual matters the parties must be given a 'fair opportunity ...for correcting or contradicting any relevant statement prejudicial to their view.'...However, the rule with respect to legal or policy arguments not raising issues of fact is somewhat more lenient because the parties only have the right to state their case adequately and to answer contrary arguments.

Id.

We believe that the required opportunity was present here. First, the administrative record of the CITT's investigation indicates that the analytic methodology for cumulation and exclusion was very much at issue and debated before the CITT. Indeed, the approach adopted by the majority follows closely the approach proposed by USS and Bethlehem and strongly opposed by the Canadian producers. During oral argument before the Tribunal, counsel for USS and Bethlehem specifically argued against the need to cumulate initially, and urged an approach based on the possibility of "a lack of a causal connection between dumping for a particular country...and

^{17/} At oral argument on September 21, 1994, Counsel for Algoma sought to introduce a number of additional authorities on the doctrine of legitimate expectations. Without deciding whether these authorities are properly before this Panel, we note that they are readily distinguished. Reference re Canada Assistance Plan [1991] 2. S.C.R. 525, for example, deals with a completely different application of the legitimate expectations doctrine. It rejects an argument that the doctrine can create a substantive right for a Province to demand consent or consultation in the Federal legislative process. In H.T.V. Ltd. v. Price Commission, [1976] I.C.R. 170 (C.A.) the Price Commission changed important accounting rules without providing any opportunity for a hearing. In DeVilbiss (Canada) Lt. v. Anti-dumping Tribunal, [1993], 4 C.E.R. 245 (F.C.A.), the closest case to the situation before us, the Tribunal defined the category of goods at issue without notice to the parties and in a way that might have significantly affected their presentation of evidence. This is clearly different from a situation in which the analytic approach of the administrative body responds to the facts and argument before the body.

the injury," Record, Vol. 14 E. Tr. 1062-1064. (This is a non-confidential excerpt from the confidential transcript.) Counsel for USS and Bethlehem mentioned exclusions as a subject "which you [the Tribunal] asked for some help on," and then stated:

...I, frankly, don't care whether you exclude only Bethlehem and USS or whether you exclude the U.S.A. as a country, but I would say that I think the case supports the proposition that in certain circumstances, limited circumstances granted, that exclusions can be granted for either companies or countries and the case law that we have gathered covers both companies and countries.

Record Vol. 13(l), Tr. 1593.

The counter-argument was presented as well. Stelco's case brief urged the traditional approach to cumulation. Record Vol. 10A, Ex. C-6. Counsel for Algoma and Ipsco asserted that the CITT "has always been steadfast" in establishing whether the cumulative effect of all subject imports is material injury, "before considering whether, in extremely limited circumstances any particular product or particular named country should be excluded..." Vol. 13(l), Tr. 1439.

Second, to the extent that Steel Plate represents a change in the CITT's approach, we do not believe that the CITT's approach in this case required factual showings different from those required under the earlier approach. Under either approach, the Canadian industry knows that there may be exclusions. It therefore always has a strong incentive to provide as much evidence of injury as it can. Stelco argued that it would have presented a stronger summary of its specific price erosion evidence, a summary which it did present to this Panel at oral argument. Transcript of September 21, 1994 oral argument at 59. Yet, the underlying evidence was, in fact, in the CITT's record, and Stelco certainly had both notice of the importance of the issue and the opportunity to make a strong summary presentation of it during the CITT's extensive hearing.

The Panel does not believe that the complainants should have been surprised by the CITT's analytic approach; rather, it concludes, they debated this argument before the CITT, which demonstrates that they had a reasonable opportunity to be heard, and that they were treated fairly. The Panel therefore cannot find the CITT's approach to be an incorrect application of natural justice and related concepts of fairness.

D. Consideration of Evidence of Price Suppression And Price Erosion

Algora and Ipsco allege that the Tribunal erred in disregarding record evidence of price erosion and price suppression caused by dumped American subject goods, and attempt to buttress this allegation by asserting that there was no record evidence indicating that numerous small quantity American shipments were not injurious to the domestic industry in the same way as the fewer but larger shipments of imports from other sources. They then review a series of price comparisons between American-origin goods, other imports, and domestic industry goods in support of their contention that American-origin goods were causing injury to domestic production.

Stelco alleges that the Tribunal failed to consider the price suppression as well as the price depression effects of dumped American subject goods on Canadian production. Stelco contends that the analysis of price depression without a companion analysis of price suppression

contravenes the GATT Code.^{18/} This error, Stelco asserts, was exacerbated because the Tribunal used an incorrect basis for comparing American and Canadian producer prices.^{19/}

For reasons discussed herein, the Panel rejects the Complainants' allegations. The Panel cannot, nor will it re-weigh the evidence, as the Complainants would apparently have it do. Nor will the Panel engage in an analysis of the relative merits of the methodologies suggested by the Complainants vis-à-vis the ones utilized by the Tribunal. Rather, in keeping with the standard of review governing this proceeding, the Panel's review is confined to determining whether there exists record evidence to support the Tribunal's conclusions and whether the methodologies employed by the Tribunal are within its purview.

The Tribunal's approach is summarized at pages 4-11, *supra*. It found that circumstances relating to American goods were significantly different vis-à-vis other subject goods. *Id.* The Tribunal noted that the trends in the volumes and prices of American imports were markedly distinct from other imports. The Tribunal noted that the volume of American imports fell in 1991

^{18/} Stelco refined this argument in reply. Firstly, it alleged that the Tribunal failed to examine the extent to which American prices, either by collective or individual shipments, suppressed domestic prices. Secondly, it alleged that the Tribunal failed to make a finding as to whether or to what extent the dumping of imports at these prices were having a suppressive impact on domestic pricing and causing injury to Canadian production.

^{19/} Stelco asserts that the Tribunal looked at evidence which led to an incorrect basis for comparing American and Canadian producer prices. Specifically, Stelco asserts that the evidence relied upon by the Tribunal applied only to a small percentage of total American exports in 1992 and failed to take into account the large proportion of regular plate as a percentage of total U.S. subject goods. Furthermore, Stelco asserts that the Tribunal incorrectly used average American selling prices in Canada rather than average import prices for American plate and that this led to a skewed picture of trends in American imports and their price eroding and price suppressive impact on Canadian producer prices in the inquiry period.

and that their prices rose. Id. at 19, 20. This was in marked contrast to other imports where volumes rose while their prices declined. Id. The Tribunal found that American imports displayed such a pattern because these increased imports went to an increasingly integrated North American market and, in part, to filling the void in the market created by domestic production stoppages and, in part, due to a loss in market share of exporting countries not subject to the existing dumping order. Id. at 20.

Record evidence, while not uncontroverted, suggests that some American importers had become niche players in the Canadian market. That is, American imports were, in part, specific and client related. Other record evidence, again not uncontroverted, suggests that some American imports were the result of the domestic producers' unwillingness to produce same, inability to produce same, or perceived inability to timely produce same. Uncontroverted record evidence of the Deputy Minister's findings noted that the average dumping margins of American imports were, in part, significantly lower than other imports.

Thus, the Tribunal concluded that American imports were meeting special needs other than price and were necessary to fill structural demand that Canadian domestic production could not fill. Id. at 21. The Tribunal went on to observe that as American import prices were already above Canadian and other import prices, the addition of anti-dumping duties would not significantly alter their demand. Id.

As noted, the Tribunal found that price erosion compelled the domestic industries to further undercut prices in an attempt to recoup market share and that this, in turn, led to greater financial losses and both present and future material injury. Id. at 18.

However, the Tribunal noted that American imports did not display the same market characteristics as other imports. Id. at 19. Namely, the Tribunal found that the American market share was not due to price considerations. Id. at 21. American imports were, in part, priced higher than other imports and domestic production. As such, the Tribunal majority concluded that American imports did not compel market price erosion and were, therefore, not a cause of the domestic price suppression which inflicted exacerbated financial losses. Id.

The Tribunal therefore found that the American imports were not the cause of the material injury and threat of future injury. Id. Even the dissent concluded that the evidence revealed that a significant portion of the subject imports from the United States were "higher priced goods of a thickness greater than 3.125 inches." Id., at 29.

In sum, the methodologies utilized by the Tribunal are within their discretion and as such must be allowed to stand. The record evidence upon which the Tribunal relies is not uncontroverted, nonetheless, evidence to support the Tribunal's conclusions does exist. It is not the function of this Panel to re-weigh that evidence. This Panel concludes that the Tribunal's findings in this regard are supported by record evidence, not patently unreasonable, and must be upheld.

E. Product Exclusions For Plate Over 3.125" Thick And For PVQ Plate

Complainants also attack the CITT's product exclusions for plate over 3.125 inches thick,^{20/} and for Pressure Vessel Quality (PVQ) plate.^{21/} Because the Panel affirms the CITT's finding of no injury from U.S. imports, and because the Panel's jurisdiction in this case is limited to issues concerning U.S.-origin merchandise, the challenges to these product exclusions, as they apply to U.S.-origin merchandise, are moot. The Panel does not address them further.^{22/}

F. Future Injury From Imports Of U.S.-Origin Goods

In deciding that there was no injury with respect to U.S. goods, the Tribunal noted:

With respect to future injury, the Tribunal, while it recognizes the excess production capacity of U.S. mills, finds no evidence on the record to suggest that U.S. plate exporters are likely to behave in an injurious manner in the Canadian carbon plate market. The Tribunal observes that the average landed prices of plate imported from offshore suppliers is below the Canadian mill-gate price, and the addition of anti-dumping duties would make this plate uncompetitive. On the other hand, U.S. plate prices have been well above Canadian mill prices. U.S. plate is generally being purchased for reasons other than price. Because of this, the addition of anti-

^{20/} "[T]he Tribunal is of the view that plate over 3.125 in. thick is not readily available from domestic production and, therefore, should be excluded from the finding." Steel Plate, supra, at 25.

^{21/} "[T]he Tribunal is satisfied that much of the subject PVQ plate that is entering Canada satisfies a demand for a higher-value specialty product that the domestic industry does not produce." Id.

^{22/} The Panel notes, however, that its own review of the record evidence indicates substantial support for the CITT's conclusion that while Complainants may have the capacity to produce thick plate and PVQ plate, they generally did not do so and thus were not competing in the markets for these products. The Panel also notes that Complainants have asserted an apparent "principle" of product exclusions emerging from the administrative precedent; however, none of the Complainants provided any of the cases cited in support of this "principle." Even if the issue were not moot, therefore, the Panel would be ill-equipped to evaluate the Complainants' argument and would have to give the Tribunal the benefit of the doubt that its exclusions, which were otherwise supported by the facts, were warranted and were not precluded by the case law.

dumping duties to already low margins of dumping would have little effect on demand for these products. The Tribunal notes that, in addition to the evidence on pricing and import volume patterns, there is no persuasive evidence with respect to excess inventories that would lead the Tribunal to conclude that injurious dumping from the United States is likely in the near future. Furthermore, the Tribunal heard evidence that the U.S. plate market was beginning to firm, as the economic recovery proceeded in the United States.

Steel Plate, supra, at 21.

The Tribunal had already noted a variety of differences between U.S.-origin merchandise and other imports, including the price trend, the character of the goods supplied, and the relative average dumping margin. *Id.* at 19-21. The majority then went on to find that "dumped imports of the subject goods from the United States have not caused, are not causing, and are not likely to cause material injury to the production in Canada of like goods." *Id.* at 21.

Algoma and Ipsco argue that the Tribunal "erred in considering the deterrent effect of the imposition of anti-dumping duty in its evaluation of future injury." Confidential brief of the Complainant Algoma Steel Inc., and the Participant Ipsco Inc., pages 53-56, paragraphs 104-111.

In support of their argument, they note that SIMA section 45 includes an explicit procedure for the Tribunal to decide that imposition of anti-dumping duties would not be in the public interest. This procedure, which applies after a determination of material injury, requires a report to be made to the Minister of Finance and to be published in the Canada Gazette, and also requires the Tribunal to offer an opportunity for representations.

Counsel for the Tribunal responded that the "Tribunal's comments in this regard were simply observations bases [sic] on the Tribunal's conclusions about the evidence relating to the pricing of United States imports and the particular nature of the demand for these products."^{23/}

Algoma and Ipsco respond that, "[i]f . . . comments on the deterrent effect of duties were 'simply observations', and not a basis for decision, very few reasons remain on which the Tribunal's finding of no future injury from dumped U.S. exports can be based."

We affirm the Tribunal. The Tribunal's comment on the "deterrent effect of duties" was basically a way of integrating the points that prices for U.S.-origin goods were above Canadian mill prices and that U.S.-origin plate was being purchased for reasons other than price. These underlying substantive points -- along with others covering inventories and the U.S. market -- are what support the Tribunal's conclusion with respect to future imports.

Moreover, the actual charge to the Tribunal in SIMA section 42 is that it

[S]hall make inquiry with respect of such of the following matters as is appropriate in the circumstances:

(a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods

(i) has caused, is causing or is likely to cause material injury or has caused or is causing retardation, or

(ii) would have caused material injury or retardation except for the fact that provisional duty was imposed in respect of the goods.

^{23/} Brief of the Canadian International Trade Tribunal, at 25-26, paragraph 48.

It is clear that this authorizes -- indeed it directs -- an inquiry as to whether the dumped goods are likely to cause material injury. This is clearly a future-looking investigation, and the Tribunal must therefore investigate the plausible motivations of the firms that have dumped goods and the market conditions that will affect their future decisions. Considering that Parliament directed the Tribunal to consider the impact of provisional duties, it is hard to imagine that it intended for the Tribunal to ignore the impact of anti-dumping duties in making determinations as to the future. Thus, it is not unreasonable for the CITT to consider deterrent effects in analyzing whether dumping is "likely to cause material injury."

Such an interpretation of section 42 leaves abundant scope for section 45, which says nothing about whether the deterrent impact of duties should be considered in making an injury determination. Rather, section 45 provides an opportunity for the Tribunal to respond to broader concerns, as by rejecting an anti-dumping duty in circumstances in which imported goods cause material injury to the Canadian producers of like goods, but, in the judgment of the Tribunal, this injury is outweighed by a benefit to a consumer industry.

V. CONCLUSION AND ORDER

For the foregoing reasons, the determination of the Canadian International Trade Tribunal that the dumping of certain hot-rolled carbon steel plate and high-strength low-alloy plate, heat treated or not, originating in or exported from the United States of America had not caused, was not causing, and was not likely to cause material injury to the production in Canada is hereby **AFFIRMED**. The Panel directs the Canadian Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action pursuant to Rule 79A of the Article 1904 Panel Rules.

SIGNED IN THE ORIGINAL

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