

**ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:

Secretariat File No.: CDA-USA-98-1904-02

Certain Cold-Reduced Flat Rolled
Sheet Products of Carbon Steel
(including high-strength low-alloy steel)
Originating in or Exported from the
United States of America (Injury)

Wilhelmina K. Tyler, J.D., Chair
Frank R. Foran, Q.C.
Lisa B. Koteen
Paul C. LaBarge
Professor James Frank Smith

DECISION OF THE PANEL

(JULY 19, 2000)

APPEARANCES:

Riyaz Dattu and John W. Boscariol, appearing for the Complainant, Stelco Inc.
Paul Lalonde, Christopher Kent, Yasir Naqvi, Gordon LaFortune, appearing for the Respondents
U.S. Steel, LTV Steel Company, Inc., Bethlehem Steel Corp., National Steel Corporation, Inland
Steel Industries, Inc., AK Steel Corporation and Karmax Heavy Stamping, Krupp Fabco Inc.,
Maksteel, The Narmco Group and Titan Tool & Die Ltd.
Bruce C. Treichel, appearing for the Complainant, Dofasco Inc.
Ronald C. Cheng, appearing for the Complainants Ispat Sidbec Inc. and Algoma Steel Inc.
Gerry H. Stobo and Philippe Cellard, appearing for the Investigating Authority (Canadian
International Trade Tribunal)

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INTRODUCTION

This Panel was convened pursuant to Article 1904 of the North American Free Trade Agreement (“NAFTA”). This Panel Review, CDA-USA-98-1904-02, was constituted in response to a Request for Panel Review filed with the Canadian Secretariat pursuant to Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Reviews of the NAFTA Rules of Procedure.

This Panel Review relates to an Order by the Canadian International Trade Tribunal (“CITT”), dated July 28, 1998, rescinding its earlier finding of injury. The Complainants allege that the CITT committed several errors of jurisdiction, law and fact with respect to the Final Determination (“Determination”) of the CITT issued on July 28, 1998.

The products that are the subject matter of this review are described as cold-reduced flat-rolled sheet products of carbon steel (including high strength low-alloy), in coils or cut lengths (not painted, clad, plated or coated), in widths up to and including 80 in. (2,032 mm) and in thickness from 0.014 in. to 0.142 in (0.35 mm to 3.61 mm) inclusive, (the “subject goods”) and as more particularly described in the Statement of Reasons.¹

The Parties to this Panel Review include: as Complainants, Stelco Inc. (“Stelco”), Dofasco Inc., Ispat Sidbec Inc. and Algoma Steel Inc.; as Respondents, U.S. Steel, LTV Steel Company Inc.(“LTV”), Bethlehem Steel Corp.(“Bethlehem”), National Steel Corporation (“National Steel”), Inland Steel Industries Inc.(“Inland”), AK Steel Corporation (“AK Steel”)(collectively the “U.S. Mills”), Karmax Heavy Stamping, Krupp Fabco Inc., Maksteel, The Narmco Group and Titan Tool & Die Ltd. (collectively the “Stampers”); as well as the CITT. The Public Hearing in this matter was held in Ottawa, Ontario, on Monday, January 31, and Tuesday, February 1, 2000.

BACKGROUND

On July 29, 1993, the CITT, in conducting Inquiry No. NQ-92-009, found that subject to certain exceptions and exclusions, dumping in Canada of the subject goods from, *inter alia*, the United States, had caused, was causing and was likely to continue to cause material injury to the production of like goods in Canada (the “1993 Finding”).

¹ Statement of Reasons, Review No. RR-97-007, July 28, 1998, Administrative Record, (“A.R.”) Volume 21(“Statement of Reasons”), p. 3-4.

Pursuant to subsection 76(2) of *SIMA*², the CITT conducted Review No. RR-97-007 of its findings of material injury made under Inquiry No. NQ-92-009. Public and *in camera* hearings were held in Ottawa, Ontario from May 20 - 27, 1998. In its review, the CITT concluded that there is no likelihood of resumed dumping of the subject goods from, *inter alia*, the United States. In light of this conclusion, the CITT found it unnecessary to consider the issue of the likelihood of injury. Pursuant to subsection 76(4) of *SIMA*, the CITT issued an Order on July 28, 1998, rescinding its findings made under Inquiry No. NQ-92-009.

The CITT's Statement of Reasons are framed as a response to the Complainants' argument that 1) increased U.S. capacity and 2) the impact of low-priced imports in the U.S. will cause U.S. producers to dump subject goods on the Canadian market. The heart of the CITT's response to this argument and therefore its entire decision, is that favorable U.S. market conditions for subject goods leave U.S. producers no economic incentive to dump goods in Canada. Therefore, there is no likelihood of resumed dumping of the subject goods from the U.S. into Canada. More particularly, U.S. producers have no incentive to dump the subject goods in Canada because supply and demand is in balance in the U.S. market, demand is outpacing capacity and prices for subject goods are high. Further, along with discounting the effects of low-priced imports into the U.S., the CITT addresses the diminishing value of the Canadian dollar, the volume of U.S. exports to Canada, U.S. steel exports to Mexico and U.S. producers' policies regarding dumping.

On September 30, 1998, the Complainants filed their complaint seeking the review of the decision of the CITT in Review No. RR-9-007. The Complainant Stelco's Brief, with which the other Complainants concur, submits that the issues before this Panel include:

- 1) The appropriate standard of review to be applied to the CITT's decision to rescind the 1993 Finding;
- 2) Whether the CITT erred in its findings relating to supply and demand in the U.S. market;
- 3) Whether the CITT erred in its findings of fact regarding U.S. products and current and future levels of capacity utilization for the production of subject goods;
- 4) Whether the CITT erred in its finding of a steady upward trend of cold-rolled steel sheet pricing in the U.S.;
- 5) Whether the CITT erred in failing to analyze the proportion of exports of subject goods from the U.S. to Canada; and
- 6) Whether the CITT erred in its interpretation of the phrase "likelihood of resumed dumping" and whether the CITT erred in failing to ask the proper questions relating thereto.

² *Special Import Measures Act*, R.S.C. 1985, c. S-15 as amended by S.C. 1994, c. 47 ("*SIMA*").

These issues were further refined in the Complainant Stelco's Reply Brief and at the oral hearing. This Panel will address the relevant issues as framed by the Complainant Stelco in the Complainants' Brief, albeit not necessarily in the same order, as a guide for discussion.

OPINION

1) STANDARD OF REVIEW

This Panel is constituted under NAFTA Article 1904 to review a determination of the CITT in accordance with Canadian anti-dumping laws and regulations. This Panel is directed to apply relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of ...[Canada] ... would rely on such materials.³

This Panel is further directed by NAFTA to apply:

... the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.⁴

Annex 1911 defines the standard of review, in the case of Canada, as the grounds set out in subsection 18.1(4) of the *Federal Court Act*, R.S.C. 1985, c. F-7 (as amended). Moreover, as Canada is the importing Party, the general legal principles of Canadian law are to be applied in this review.⁵

Section 18.1(4) of the *Federal Court Act* lists the grounds for review of a decision of an administrative tribunal. These grounds are that the tribunal:

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

³ NAFTA, Art. 1904(2).

⁴ NAFTA, Art. 1904(3).

⁵ NAFTA Article 1911 defines "general legal principles" to include "principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies".

These grounds for review are read in light of the standard of review developed by the Supreme Court of Canada, which states that “the central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction to administrative tribunals”.⁶ More specifically, the reviewing court must ask whether the question is one that was intended by the legislators to be left to the exclusive decision of the board.⁷

In order to assist the reviewing courts in deciphering legislative intent and determining the appropriate standard of review, the Supreme Court has developed a spectrum of standards of review. This spectrum was developed in *Pezim*⁸ and has been refined in *Southam*⁹ and *Baker*¹⁰. The spectrum ranges from patent unreasonableness, on the one extreme, where deference is at its highest to correctness at the other extreme where deference is at its lowest.¹¹ This standard was further refined to include a third standard of reasonableness in cases where the appropriate standard falls between the two extremes.¹² The appropriate standard of review within the spectrum in the circumstances under review is determined by a functional and pragmatic analysis.

i) Issues of Jurisdiction

The *Federal Court Act* provides that a court may review a tribunal where it:

18.1 (4)(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction.

In determining the standard of review, this Panel must distinguish between questions establishing the parameters of a tribunal’s jurisdiction and questions within a tribunal’s jurisdiction.¹³ As noted in *Concrete Panels*, the purpose of jurisdictional review is to ensure that administrative agencies conform to the mandate assigned to them by the legislators.¹⁴ Questions demarcating the jurisdiction of a tribunal are those questions yielding answers which define the powers of the tribunal to embark on proceedings, issue orders, etc.¹⁵ These questions are identified by a functional and pragmatic analysis which examines:

⁶ *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (“*Pezim*”).

⁷ *Pushpanathan v. Canada (Ministry of Citizen and Immigration)*, [1998] 1 S.C.R. 982 (“*Pushpanathan*”) citing *Pasiechynk v. Saskatchewan (Workers’ Compensation Board)*, [1997] 2 S.C.R. 890.

⁸ *Pezim*, *supra* note 6.

⁹ *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (“*Southam*”).

¹⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 [Q.L.].

¹¹ *Pezim*, *supra* note 6 at 580-590.

¹² *Pezim*, *supra* note 6 and *Southam*, *supra* note 9.

¹³ *Union des employés de service, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, (“*Bibeault*”) at 1088.

¹⁴ *Certain Concrete Panels, Reinforced with Fiberglass Mesh, Originating in or Exported from the United States of America and Produced by or on Behalf of Custom Building Products, Its Successors and Assigns, for Use or Consumption in the Province of Alberta*, CDA-97-1904-01 (August 26, 1998), (“*Concrete Panels*”) p. 3.

¹⁵ *Syndicat de employés de production du Québec et de L’Aladie v. Canadian Labour Relations Board*, [1984] 2 S.C.R. 412 (“*Syndicat*”).

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

At the heart of this analysis is an effort to glean whether the legislature intended that the question at issue be decided by the tribunal acting within its jurisdiction or the courts.¹⁷ Questions involving issues of interpretation central to the purpose for the creation of the tribunal and requiring the exercise of the specialized expertise of the tribunal are likely to be within the tribunal's jurisdiction. Questions concerning general legislation or otherwise requiring the supervision or expertise of the courts may be found to be jurisdictional.¹⁸

It is settled law that with respect to questions dealing with a tribunal's jurisdiction, correctness is required and the concept of deference is severely constrained. That is, a tribunal must be correct with respect to any question that defines its jurisdiction.¹⁹

This Panel must determine whether the CITT correctly determined any question affecting its jurisdiction. If the tribunal incorrectly dealt with this question, this Panel must remand. If the relevant question does not affect the CITT's jurisdiction, then a different standard is applicable as the question becomes one of law, fact or mixed law and fact.

ii) Issues of Law

The *Federal Court Act* provides that a court may review a tribunal where it:

18.1 (4)(c) erred in law making a decision or an order, whether or not the error appears on the face of the record.

Issues of law relate to interpretations of law made by tribunals acting within their jurisdiction. In response to privative clauses²⁰ shielding tribunals from review, the standard of review that was traditionally applied to errors of law was "patent unreasonableness". This test is very deferential and calls for a strict approach to judicial review.²¹

¹⁶ *Bibeault*, *supra* note 13 at p. 1088.

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

¹⁸ *Certain Concrete Panels*, *supra* note 14 at pages 3-4.

¹⁹ See, *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983. See also, *Syndicat* *supra* note 14 and *Bibeault* *supra* note 12.

²⁰ The Supreme Court of Canada has defined a full privative clause as a provision in legislation that declares that decisions of tribunals are final and conclusive from which no appeal lies and all forms of judicial review are excluded. See, *Pushpanathan*, *supra* note 7 at page 996.

²¹ *United Brotherhood of Carpenters and Joiners of America. Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 ("*Bradco*") at page 340.

In *Southam*, the Supreme Court of Canada explained the difference between unreasonable and patently unreasonable as:

The difference between “unreasonable” and “patently unreasonable” lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the Tribunal’s reasons, then the Tribunal’s decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.²²

The court in *Southam* went on to elaborate as follows:

This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem... but once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.²³

Recent Supreme Court of Canada decisions have moderated this standard by asking the courts to employ a functional and pragmatic test to decipher legislative intent and to determine the appropriate standard of review to fit the agency and the circumstances. The analysis inherent in this test focuses upon a number of relevant factors, none of which alone are dispositive. These factors include:

- 1) the presence or lack of a privative clause and the wording of that clause;
- 2) the presence or lack of a statutory right of appeal;
- 3) the expertise or specialization of a tribunal in the circumstances;
- 4) the purpose of the Act as a whole and the provision in particular; and
- 5) the nature of the problem in question, especially whether it relates to a determination of law or fact and whether the decision is individual or polycentric in nature.²⁴

In determining the appropriate standard of review, the Supreme Court of Canada has emphasized the importance of balancing the presence or lack of a privative clause with the other factors, especially the relative expertise of the tribunal. The court in *Pezim* held that what is “crucial is whether or not the agency’s decisions are protected by a privative clause”.²⁵ However, that court went on to say that even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions

²² *Southam*, *supra* note 9 at page 777.

²³ *Southam*, *supra* note 9 at page 777.

²⁴ See, *Pushpanathan* *supra* note 7 and *Baker* *supra* note 10.

²⁵ *Pezim*, *supra* note 6 at page 590.

of specialized tribunals on matters which fall squarely within the tribunal's expertise.²⁶ This reasoning was adopted in *Pushpanathan* which held that:

the presence of a full privative clause is compelling evidence that the court ought to show deference to the Tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question.²⁷

Pezim did not determine the precise extent of deference to be applied in each case. Rather, the court stated that:

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness.²⁸

The Court went on to elaborate:

At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no right of statutory appeal.²⁹

The *Pezim* case involved a tribunal decision from which there was a statutory right of appeal and which was not protected by a privative clause. In those circumstances, the Court held that the applicable standard of review fell between the two extremes of correctness and patent unreasonableness, which entitled the Tribunal to "considerable deference".

Similarly, in *Baker*, the decision maker was not protected by a privative clause and there was the explicit contemplation of judicial review by the Federal Court of Canada. In those circumstances, the Court held that there should be considerable deference, but that the standard should not be as deferential as patent unreasonableness.³⁰

The present case is similar to both *Pezim* and *Baker*. The CITT is a specialized tribunal deciding matters within its area of expertise³¹ and is not protected by a privative clause. However, unlike the tribunal in *Pezim*, but like the decision maker in *Baker*, the CITT is subject to judicial review rather than a statutory right of appeal.³²

²⁶ *Pezim*, *supra* note 6 at page 590.

²⁷ *Pushpanathan*, *supra* note 7 at page 996.

²⁸ *Pezim*, *supra* note 6 at page 590.

²⁹ *Pezim*, *supra* note 6 at page 590.

³⁰ *Baker*, *supra* note 10 at page 21.

³¹ *National Corn Growers Association v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 ("Grain Corn").

³² The jurisdiction of a court on appeal is much broader than the jurisdiction of a court in review. See *Bell Canada v. Canada (C.R.T.C.)*, [1989] 1 S.C.R. 1722 at pages 1774-5.

Factors which call for a more exacting standard include the wording of s. 18.1(4)(c) which permits review of errors of law, whether or not they appear on the face of the record, the fact that the CITT is subject to judicial review and the fact that the CITT no longer enjoys the benefit of any type of privative clause.³³ On the other hand, the factors which counsel deference include the fact that the CITT is a specialized tribunal making determinations within its area of expertise, the polycentric nature of the decision and the lack of a statutory right of appeal.

Under the circumstances of this review, the CITT is not entitled to the highest deference on the spectrum. Under similar circumstances the Supreme Court of Canada, has said:

... (when) there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum.³⁴

The appropriate standard of review falls between the extremes of correctness and patent unreasonableness, which entitles the CITT to considerable deference. While this standard does not extend to the point of patent unreasonableness, it does fall closer to that end of the spectrum. This is a high degree of deference commensurate with the CITT's expertise and the circumstances of this review.

This Panel should remand only if it finds that the CITT's decision cannot be sustained on any reasonable interpretation of the law.³⁵ This is also consistent with the standard adopted by the recent Binational Panels in *Baler Twine*³⁶ and *Concrete Panels*³⁷ and is also consistent with the analysis provided in *Baby Food*.³⁸

iii) Issues of Fact

The *Federal Court Act* provides that a tribunal's determination can be reviewed for errors of fact when the tribunal:

18.1(4)(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

³³ *SIMA* was revised in 1994 to amend s 76(1) insofar as to remove the "final and conclusive" wording from the clause. See *North American Free Trade Agreement Implementation Act*, S.C. 1993, C. 44, p. 17(1).

³⁴ *Southam*, *supra* note 9 at page 775.

³⁵ *Grain Corn*, *supra* note 31 and *Bradco*, *supra* note 21.

³⁶ *Synthetic Baler Twine With a Knot Strength of 200 Lbs. Or Less Originating in or Exported from the United States of America*, CDA-94-1904-02 (April 10, 1995).

³⁷ *Concrete Panels*, *supra* note 14.

³⁸ *Certain Prepared Baby Food Originating in or Exported from the United States of America (Injury)* CDA-USA-98-1904-01. While the Panel declined to make a specific ruling as to what the appropriate standard of review is for alleged errors of law within jurisdiction, it did call into question various of the Federal Court decisions which call for a patently unreasonable standard to be applied to questions of law.

Issues of fact arise from factual determinations made by a tribunal acting within its jurisdiction. While the line that divides issues of fact from issues of law may not be clear at first instance, and indeed issues of fact may at times be mixed with issues of law, the courts have developed an appropriate litmus test to assist in this task. The court in *Pushpanathan* adopted the reasoning in *Southam*, which held:

...it is not always easy to say precisely where the line should be drawn, though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.³⁹

Several recent Federal Court of Appeal decisions have dealt with the appropriate standard of review to be applied to the CITT in the context of issues of fact and issues of substantial fact mixed with law. Depending on the circumstances of the particular case, the courts have described this standard as patently unreasonable,⁴⁰ akin to patently unreasonable,⁴¹ or slightly less deferential than patently unreasonable.⁴² Regardless of the particular labels, the standard of review with respect to issues of fact and issues of substantial fact mixed with law remains a deferential one.

In fact, a recent Federal Court of Appeal decision⁴³, reviewing a decision of the CITT pursuant to a subsection 76(4) determination under *SIMA*, held that when trying to ascertain the standard of review to be applied, it did not seem “to advance matters appreciably to try to determine whether this equates to a ‘patently unreasonable’ or an ‘unreasonable simpliciter’ standard”. The Court warned that there is a danger that an inquiry of that kind may serve to divert the Court’s attention from a careful consideration of the words in which Parliament has formulated the standard of review for the factual finding on which federal administrative tribunals base their decisions.⁴⁴

In that particular case, while the Court declined to articulate the precise standard of review, it was deferential. The Court held that three factors were particularly relevant in establishing a reluctance to intervene in the CITT’s decision. These factors included, firstly, that the CITT’s

³⁹ *Southam*, *supra* note 9 at page 768 and *Pushpanathan*, *supra* note 7 at page 990.

⁴⁰ *Canadian Pasta Manufacturers’ Association v. Aurora Importing & Distributing Ltd.*, [1997] F.C.J. 493.

⁴¹ One Federal Court of Appeal decision notes that “there does not appear to be any practical difference between the standard set out in s. 18.1(4)(d) and that of patent unreasonability” (*Stelco v. CITT*, May 23, 1995, No.:A360-93 [F.C.A.]) (“*Stelco I*”).

⁴² *The British Columbia Vegetable Marketing Commission v. Washington Potato and Onion Association*, November 6, 1997, No. A-435-97, created a fourth standard which falls between reasonable simpliciter and patently unreasonable that calls for more deference to a tribunal’s findings than that given to expert tribunals whose decisions are subject to a statutory right of appeal but slightly less deference than that given to tribunals protected by a true privative clause.

⁴³ *Stelco Inc. and British Steel Canada Inc. et al.*, Federal Court of Appeal, January 25, 2000, Docket: A-365-98 (“*Stelco II*”).

⁴⁴ *Ibid.* at pages 6 and 7.

decision was made in the exercise of the subjective discretion conferred by subsection 76(4) of *SIMA* that permits the Tribunal to make an order “as the circumstances require”. Secondly, the facts in dispute were manifestly within the expertise of the CITT and the Court ran the risk of “second guessing” the conclusions reached by the specialized tribunal. Thirdly, the important part played in the fact finding process of the CITT by staff research and the extensive written submissions made in response to it. Hence the Court held that it should be very reluctant to set aside a decision by virtue of the inferences drawn by the CITT from material before it or to insist that the CITT reasons canvass all the material when that which the CITT regarded particularly important and on which it evidently based its decision was sufficient to provide a rational basis for it. Given the above, the Court expressed the applicable standard of review as follows:

Accordingly, in order to establish that the tribunal committed a reviewable error the applicant and the intervenors must demonstrate on the balance of probabilities that the Tribunal’s finding that dumping was likely to resume if the original finding were rescinded was not rationally supported by any material before it. Thus, even if the Tribunal committed a reviewable error on some of its findings of fact, its decision to rescind will still be upheld if there were other facts on which it could reasonably base its ultimate conclusion.⁴⁵

This Panel adopts the reasoning of the Court in *Stelco II* and holds that even if the CITT committed a reviewable error on some of its findings of fact, its decision will still be upheld if there were other facts on which it could reasonably base its ultimate conclusion. A tribunal that is subject to a duty to give reasons, as is the CITT by virtue of subsection 76(4) must of course provide adequate reasons. But, this does not mean that it must deal with every issue raised before it. Rather, it must explain its conclusion on those issues that are of central importance to its decision.⁴⁶

In the particular circumstances of this review, this Panel must balance competing factors. On the one hand, it must consider the factors calling for deference, which include the strict language of s. 18.1(4)(d), the fact that the CITT is a specialized tribunal making findings of fact in its area of expertise with the benefit of analyzing the evidence first hand and the fact that the CITT is making a decision which is polycentric in nature and is not subject to a statutory right of appeal. On the other hand, it must consider factors calling for a more exacting standard, which include the absence of any type of privative clause and the fact that the CITT is subject to judicial review.

Given the circumstances of this Panel Review and informed by the jurisprudence developed by the Federal Court of Appeal, the appropriate standard of review to be employed falls on the patent unreasonableness side of the spectrum. In the context of reviewing issues of fact or substantial issues of fact mixed with law under these circumstances, the deference that is

⁴⁵ *Ibid.* at pages 6-10.

⁴⁶ *Ibid.* at pages 6-10.

accorded to the CITT is greater than in the context of issues of law.⁴⁷

The standard of review normally applied to questions of fact or substantial issues of fact mixed with law is that there must be a rational connection between the facts and the tribunal's findings. This statutory standard, however, is not whether there is any evidence at all, but whether there is evidence which, viewed reasonably, is capable of supporting the tribunal's finding.⁴⁸ Such evidence need not be substantial nor need the Panel arrive at the same determination as the tribunal in light of it.⁴⁹

Moreover, notwithstanding the high degree of deference accorded to the CITT with respect to questions of fact, both the Courts and other panels have insisted that the CITT base its decision on evidence found in the record and not mere speculation or conjecture.⁵⁰ While the CITT need not deal with every issue raised, it must provide adequate reasons for its decision based on the issues which were central to its inquiry.⁵¹

This Panel adopts this standard of review for the conduct of its review of findings of fact in this case and accordingly, this Panel will remand only if it finds that the CITT's decision cannot be sustained on any reasonable interpretation of the facts.⁵²

2) SUPPLY AND DEMAND CONDITIONS IN THE UNITED STATES MARKET

The Complainants assert that the CITT made an:

[e]rroneous finding of fact that supply and demand conditions for the subject goods were generally in balance in the United States, and in making such finding, the failure to consider evidence that the precipitous drop in U.S. transaction prices for subject goods of 13 percent was the result of flat demand conditions for subject goods as of 1996, rapidly increasing imports due to global oversupply conditions for subject goods, and declining U.S. producers' shipments at a time of huge incremental capacity additions by the U.S. producers.⁵³

Preliminarily, this Panel notes that two allegations are discussed elsewhere in this decision: (1) that U.S. transaction prices had plunged 13 per cent; and (2) that increases in capacity by U.S.

⁴⁷ See *Copper Pipe Fittings Panel*, CDA-USA-98-1904-02, ("Copper Pipe") where the Panel held that on issues that are not truly jurisdictional, the standard to be applied to rulings of the CITT is patent unreasonableness.

⁴⁸ *Lester (W.W.)(1978) Ltd. V. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 ("*Lester*") at page 669.

⁴⁹ *Ibid.* at pages 668-669.

⁵⁰ *Lester*, *supra* note 48.

⁵¹ *Stelco II*, *supra* note 43.

⁵² *Grain Corn*, *supra* note 31 at pages 1369-1370.

⁵³ *Brief of the Complainant Stelco Inc.*, p. 89 (hereinafter cited as "*Stelco's Brief*").

producers would have an additional adverse impact on prices. Because these two issues are discussed below, this Panel does not consider them here. This Panel addresses in turn the allegations that: there was no evidence that supply and demand for the subject goods were generally in balance; demand conditions for the subject goods as of 1996 were flat; imports into the U.S. market were rapidly increasing due to global oversupply; and U.S. producers' shipments were declining.

i) Whether Supply and Demand Conditions Were Generally in Balance in the U.S. Market for the Subject Goods.

The Complainants maintain that the CITT erred in resting its finding regarding supply and demand for subject goods in the U.S. market on the testimony of a single witness, a representative of U.S. producer Inland, who testified that "supply and demand conditions are generally in balance in the U.S. market"⁵⁴. The Complainants assert that the evidence provided by the witness from Inland "was very much limited to Inland's experience, and at that to Inland's sales in the 'high-quality high-end segment' of the subject goods market limited to at most 200,000 net tons"⁵⁵. The Complainants examine the Inland witness' testimony in considerable detail in an effort to show that the witness' statement is limited to the experience of his firm, such that it is not reliable evidence for the proposition that supply and demand were in balance in the U.S. market as a whole.

In response, the U.S. Mills submitted that "there was evidence in the record as to general balance between supply and demand in the U.S. market for the subject goods"⁵⁶ and that "[n]otwithstanding Stelco's attempts to qualify, circumscribe and limit the scope of the testimony of Mr. Hudson [the witness for Inland], it is clear that his observations about supply and demand were to the effect that they were roughly in balance"⁵⁷. The U.S. Mills assert that "[c]learly, Mr. Hudson was expressing his understanding of the 'total market' and of the 'high end of the market' and of conditions 'in general', rather than just the particular circumstances of Inland (as Stelco would have it)"⁵⁸.

The CITT takes the position that "there is evidence on the record that the announced price increase was limited to the products on the higher end of the market"⁵⁹. With respect to this issue, the CITT submitted "that the testimony of the witness for Inland was supportive of the CITT's conclusion that supply and demand conditions were generally in balance in the U.S. market"⁶⁰.

⁵⁴ *Id.*

⁵⁵ *Stelco's Brief*, at page 93.

⁵⁶ *U.S. Mills' Brief*, at page 82.

⁵⁷ *Id.* at page 82.

⁵⁸ *U.S. Mills Brief*, at page 87.

⁵⁹ *Tribunal's Brief*, at page 56.

⁶⁰ *Brief of the Canadian International Trade Tribunal*, at page 54 (hereinafter, *Tribunal's Brief*).

This Panel finds that review of the testimony indicates that the witness was in fact responding to a question about the conditions facing the cold-rolled carbon steel sheet market generally.⁶¹ In his further remarks he does describe his own firm's situation but he also alludes to the overall U.S. market in describing "a pretty favourable environment"⁶². On cross-examination, Stelco's counsel did elicit an admission from the witness that there was excess supply "at the low end"⁶³ and that prices generally seem to be dropping,⁶⁴ yet the witness repeatedly resisted Counsel for Stelco's efforts to have him attribute the price reductions to excess supply.⁶⁵

Nor did the CITT rely upon the comments of one witness alone.⁶⁶ The CITT referred to witnesses' testimony that their companies had no extra product to export to Canada.⁶⁷ The CITT made several statements which, taken together, comprise its finding with respect to supply and demand. The Complainants focused almost exclusively on the statement that "supply and demand conditions are generally in balance in the U.S. market..."⁶⁸. However, in discussing capacity utilization and the effect of the planned additions to capacity, the CITT observed, "[t]he planned additions to capacity are a response to increased demand by users" and "there is abundant evidence on the record that demonstrates that capacity in the United States and Canada has been unable to keep pace with the rising demand for cold-rolled steel sheet..."⁶⁹. References to the relationship between supply and demand in the industry are found throughout the CITT's Statement of Reasons.

The central issue, however, is whether there is evidence, reasonably considered, to support the CITT's determination with respect to supply and demand conditions. There is sufficient evidence, particularly as discussed further below, that this Panel cannot disturb the CITT's determination that supply and demand conditions were generally in balance.

ii) Whether Demand Conditions for the Subject Goods Were Flat

The Complainants assert that the "[t]ribunal had before it substantial, independent and authoritative evidence that U.S. demand for subject goods had flattened or declined since 1996 and that, during the recent months of 1998, U.S. demand for the subject goods had furthered softened"⁷⁰.

⁶¹ A.R. Vol. 15B. p. 1121.

⁶² *Id.*, p. 1129.

⁶³ *Id.*, pp. 1128-29.

⁶⁴ *Id.*, pp. 1132, 1136.

⁶⁵ *Id.*, pp. 1129-32, 1134, 1136-37.

⁶⁶ *See, e.g.*, A.R. Vol. 5.5 (Public), p. 203; A.R. Vol. 5.3F (Public), p. 6; A.R. Vol. 5.3G (Public), P. 7.

⁶⁷ *Statement of Reasons, supra* .at page .23, fn. 65 and 70.

⁶⁸ *Statement of Reasons*, at page 24.

⁶⁹ *Statement of Reasons*, at page 22.

⁷⁰ *Stelco Brief*, at page 100.

In response, the U.S. Mills stated:

The fact that there existed some evidence supporting the domestic industry's argument is immaterial. The question before this Panel is whether the CITT made a finding without any evidentiary support and if so whether there was any other evidence capable of supporting the CITT's conclusion. The U.S. Mills submit that there was abundance of evidence supporting the CITT's findings with respect to demand and that, in any event, there was voluminous other evidence supporting the CITT's general conclusion as to the likelihood of resumed dumping⁷¹.

To support their allegation, the Complainants rely upon U.S. Department of Commerce statistics showing that apparent 1998 consumption climbed 10 percent between 1995 and 1996 but then rose only slightly the following year. Comparing the first two months of 1997 with the same time period in 1998, the demand curve is nearly flat.⁷² Again, the CITT identifies evidence in the record to support its finding.⁷³ As the Statement of Reasons declares, "[t]he Tribunal heard considerable evidence that the outlook is for continued high demand in the U.S. market, as the major cold-rolled steel consuming industries are experiencing sustained high demand in their respective markets. High demand for cold-rolled steel sheet by the U.S. automotive sector, in particular, was cited by all the witnesses for the U.S. Mills"⁷⁴. Although the CITT did not provide any citations to the record, representatives of the five other U.S. Mills that participated in the proceeding, AK Steel, US Steel, Bethlehem, National Steel and LTV, did testify to high demand in the U.S. market.⁷⁵

Also instructive are the responses the U.S. Mills filed in response to the CITT's Foreign Manufacturer's Review Questionnaire. The questionnaire included the question, "Please describe the trends in the state of the market for cold-rolled steel sheet in your country from 1993 to the present in relation to demand, prices and capacity utilization". Because of the broad scope of the question, the respondents' answers varied widely. Their assessments were mixed. AK Steel wrote, "[e]ach year since 1993, we have been able to increase productivity of our #3 cold-rolled mill", adding "[t]he current trend remains positive..."⁷⁶. National Steel indicated that demand was flat but that additions to capacity were offset by increased demand.⁷⁷ Inland stated that "cold-rolled capacity has risen steadily to meet demand" but that mini-mills were exerting price pressure at the low-end [of product quality] and consumption might be on the decline.⁷⁸

⁷¹ *U.S. Mills Brief*, at page 90.

⁷² *Stelco's Brief*, at page 100.

⁷³ *Tribunal's Brief*, at page 57.

⁷⁴ *Statement of Reasons*, *supra*, at pages 22-23.

⁷⁵ Vol. 15B, page 1009 (AK Steel), 1026-28 (USX), 1063 and 1079-80 (Bethlehem), 1097 (National Steel) and 2203 and 1009-10 (LTV).

⁷⁶ A.R. Vol. 5.5 (Public), at page 203.

⁷⁷ A.R. Vol. 5.3F (Public), at page 6.

⁷⁸ A.R. Vol. 5.3G (Public), at page 7.

Bethlehem opined that the market for cold-rolled sheet steel in the United States was strong.⁷⁹ LTV took the position that demand was up and prices were up but in the future prices could go up or down depending on supply and demand.⁸⁰ While there is no consensus, the majority of the mills expressed at least cautious optimism.

This Panel finds that other evidence supporting the proposition that demand was strong includes documentation in the trade press. For example, the Price Waterhouse World Steel Dynamics Price Track #57 (Feb. 9, 1998), observes, “[o]ne of the strongest positives is the robust steel demand in both the U.S. and Europe where the economies are doing well...”⁸¹. Although demand did not appear to be increasing above the 1996 levels, the industry officials who appeared in or prepared questionnaire responses for the proceeding apparently considered the demand to be quite high in an absolute sense. Therefore, this Panel will not interfere with the CITT’s finding that demand was high.

iii) Whether the U.S. Market Experienced Rapidly Increasing Imports Due to Global Oversupply

The Complainants contend that the CITT “ignored substantial and independent evidence before it of worldwide overcapacity for the production of flat-rolled steel sheet, including the subject goods, the result of which had been a continuing influx of low-priced subject goods imports into the United States, especially from Asia and Eastern Europe”⁸². In response, the U.S. Mills stated that “the Tribunal has a duty to address the principle [sic] issues raised and provide reasons based on the evidence presented before it. This duty does not entail explicit reference to every price [sic] of evidence addressed and every argument presented at the hearing”⁸³.

This Panel notes that, while the CITT did acknowledge that import penetration increased between 1996 and 1997, the CITT made no specific finding with respect to excess supply worldwide. As the Federal Court of Appeal recently stated in *Stelco II*, the CITT is not obligated to address every issue on which it heard evidence and “[t]he burden is on the applicant to demonstrate that any factor on which the CITT did not make a reasoned finding was, on the facts of the case, of such manifest importance that the CITT was bound in law to deal with it expressly in its reasons for decision”⁸⁴. Complainants have not demonstrated the manifest importance of the alleged worldwide oversupply *per se*. Furthermore, this Panel references this question in the discussion of the effect of increased capacity, *infra*.

⁷⁹ A.R. Vol. 5.3E (Public), at page 7.

⁸⁰ A.R. Vol. 5.3B (Public), at page 5.

⁸¹ A.R. Vol. 13K Sollac. Aciers d’Usinor Ex. R-3, p.7.

⁸² *Stelco’s Brief*, at page 102.

⁸³ *U.S. Mills’ Brief*, at page 92.

⁸⁴ *Stelco II*, *supra* at note 43.

The CITT disposed of the Complainants' allegations that imports were supplanting U.S. shipments in two sentences:

The evidence demonstrates that, between 1996 and 1997, total imports into the United States increased from 2.3 million to 3.2 million tons, rising from 14.6 to 20 percent of the U.S. market. This rise in imports coincided with a period of growing demand for cold-rolled steel sheet in the United States which, as indicated previously, outpaced the growth in capacity.⁸⁵

Essentially, the CITT considered the rise in imports to be a response to demand that the U.S. Mills could not meet and that it did not pose a serious threat to the U.S. Mills. As indicated, there is evidence on the record that is sufficient for this Panel to conclude that it should not interfere with the CITT' finding with respect to the effect of rising imports.

iv) Whether the U.S. Producers' Shipments Were Declining

The Complainants argue, "[d]uring 1997, while imports into the United States rose dramatically, and prices for the subject goods were declining, the domestic shipments of the subject goods by the U.S. producers fell by 8%"⁸⁶. In reply, the U.S. Mills cite the U.S. Department of Commerce data for the proposition that between 1996 and 1997 "both imports into the U.S. and overall apparent consumption (demand) increased, just as the CITT said in its Reasons"⁸⁷. The CITT, in turn, submits "that the period to which the CITT referred was not the 1996-1997, as suggested by the Complainants, but rather is the period that the finding has been in place". The CITT goes on to argue that there is evidence on the record to support its conclusion with respect to the U.S. firms' shipments, citing to a document in the administrative record as an example of the supporting evidence.⁸⁸

The U.S. Department of Commerce document on which the Complainants rely shows that U.S. shipments rose ten percent between 1995 and 1996 and dropped less than six percent from 1996 to 1997. In the first two months of 1998, shipments were up five percent compared to the same time in 1997. While the data referred to by the U.S. Mills actually tends to support Complainants' allegations that shipments were declining, the CITT is correct that consideration of the entire time frame does indicate that, overall, shipments were not trending down.

Taken altogether, the evidence appears to provide support for both the CITT and the Complainants. Much of the information, particularly the forecasts in the trade publications, is opinion rather than hard data and even the data is subject to subjective interpretation. As this Panel explains in the discussion of the standard of review, interpretation and analysis should be

⁸⁵ *Id.* at page 24 (footnote omitted).

⁸⁶ *Stelco's Brief*, at page 110.

⁸⁷ *U.S. Mills' Brief*, at page 97.

⁸⁸ *Tribunal's Brief*, at page 58.

left to the CITT, which has been granted the authority under *SIMA* and which has the expertise to engage in that exercise. The CITT's finding with regard to supply and demand must stand.

3) THE POTENTIAL EFFECT OF INCREASED PRODUCTION CAPACITY

The Complainants challenge the CITT's finding with respect to the effect that planned additions to production capacity for subject goods to be sold for the merchant market could have on the U.S. market for such goods. The Complainants quote the first paragraph of the CITT's "Analysis":

There are over a dozen producers of the subject goods in the United States. Six integrated mills participated in this review. In 1997, these mills accounted for approximately 80 percent of the total US cold-rolled steel sheet production capacity. The U.S. integrated mills' cold-rolling facilities were operating at approximately 87 percent of capacity in 1997. The Tribunal notes that, based on planned additions to capacity in the United States to be completed by mid-1999, the six integrated mills will account for somewhat less than 80 percent of total U.S. cold-rolled steel sheet production capacity, depending upon the capacity reductions which may occur during the intervening period and on which U.S. producers make these reductions.⁸⁹

The Complainants contend that this very first paragraph of the CITT's analysis with respect to the United States contains a number of significant factual errors and unsubstantiated assumptions. These factual errors and unsubstantiated assumptions "permeate" and "infect" much of the subsequent four pages of analysis with respect to the United States,⁹⁰ such that 'the entire decision of the CITT can be regarded as fundamentally flawed, and properly subject to remand'⁹¹.

The Complainants allege four essential errors contained in the paragraph quoted above:

1. That the CITT erroneously used the overly broad term "cold-rolled steel sheet" in lieu of the more precisely defined subject goods;
2. That the CITT stated that there were over a dozen producers of the subject goods in the United States where there were in fact twenty-one;
3. That the CITT's statement that the U.S. Mills accounted for 80 percent of total U.S. production capacity was unsupported by evidence and that the CITT should have focused on the impact of additions to capacity planned by the non-participating producers; and

⁸⁹ *Statement of Reasons*, *supra* note 1 at page 22 (footnote omitted).

⁹⁰ *Stelco's Brief*, paragraph. 64, citing *Certain Pasta Manufacturers' Association v. Aurora Importing and Distributing Ltd., et al.* (1997), 208 N.R. 329, p. 338 (Fed. C.A.), para 119, pp. 65-66.

⁹¹ *Id.*, at pages 65-66.

4. That the CITT erred in discounting the impact of the portion of the new production capacity that had already been introduced into the U.S. market.

In response, the U.S. Mills argue that there is evidence on the record to support the CITT's finding with respect to capacity utilization and that the Complainants improperly invite this Panel to reweigh the evidence and substitute its judgment for that of the CITT.⁹²

i) Alleged Failure to Distinguish the Subject Goods

The Complainants argue that the CITT failed to distinguish "cold-rolled steel sheet" from the "subject goods," alleging the former term is over-inclusive because it refers to goods destined for further processing in addition to the annealed goods that are destined for the merchant market. Counsel for the CITT responds that the term "cold-rolled steel sheet" was used to mean the goods subject to review, which are described fully in the Statement of Reasons.⁹³ In their Reply Brief, however, the Complainants deny that they had alleged that the Tribunal had improperly used the expression "cold-rolled steel sheet" instead of "subject goods"⁹⁴. Rather, the Complainants were "attempting to deduce from the record the source of the 80 percent figure"⁹⁵.

Although it appears to this Panel that the term "cold-rolled steel sheet" is nothing more than a kind of shorthand for the subject goods, used throughout the industry⁹⁶, because the Complainants either did not make or have withdrawn the allegation, this Panel need not address it.

ii) Twenty-One Producers of the Subject Goods

The Complainants next take issue with the first sentence in the CITT's United States analysis, "there are over a dozen producers of the subject goods in the United States"⁹⁷. The Complainants maintain that, because there were twenty-one producers of the subject goods in the U.S. at the time of the review, the CITT erred by understating the number, indicating that there were "over a dozen" instead of "close to two dozen"⁹⁸. In response, the U.S. Mills argue that the evidence supports the number of producers of subject goods in the United States.⁹⁹ In their Reply Brief, the Complainants emphasize that the point is that the CITT "grossly understated, and thereby

⁹² *U.S. Mills' Brief*, at page 61.

⁹³ *Tribunal's Brief*, paragraph 105, at page 50.

⁹⁴ Reply Brief of Complainant Stelco ("*Stelco's Reply Brief*") at page 55 paragraph 110.

⁹⁵ *Ibid.*

⁹⁶ *U.S. Mills' Brief*, paragraph 177, at page 67. In addition, the Tribunal's questionnaire directed to the U.S. Mills, framed questions in terms of "cold-rolled steel sheet," not "subject goods." A.R. Vol. 5.3 (Public), pp. 18 and 24. Stelco itself uses the term "cold-rolled steel sheet." *e.g.* Brief of the Complainant Stelco, *supra*, para 190, p. 109.

⁹⁷ Statement of Reasons, *supra* note 1 at page 22.

⁹⁸ *Stelco's Brief*, at page 70.

⁹⁹ *U.S. Mills' Brief*, at page 63.

necessarily over-emphasized the role of the U.S. Mills in the U.S. market”¹⁰⁰.

This Panel finds that the CITT did not err, in part because it is technically correct to say that twenty-one is “over a dozen” and it is less than two dozen. Moreover, the CITT explicitly referred to the U.S. Mills and the fifteen non-participating U.S. producers, so that there is no ground for any inference that the CITT sought to conceal the ratio of the U.S. Mills to all U.S. producers.¹⁰¹

iii) The U.S. Mills as Representative of U.S. Production Capacity; the Impact of New Subject Goods Capacity

The Complainants challenge the CITT’s notion that the U.S. Mills are representative of the entire U.S. industry. The Complainants argue that, “there is no evidence in the record that the six participating U.S. producers’ cold-rolled steel sheet production capacity represented approximately 80 percent of total U.S. cold-rolled steel sheet production capacity”¹⁰². According to the Complainants, the CITT erred in referencing all cold-rolled steel sheet *production* when it should have considered *capacity* for subject goods production and the consequential impact of adding 3.8 million net tons of new capacity by the non-participating U.S. producers.¹⁰³ The Complainants question the source of the 80 percent figure and argue that the number both refers to production rather than capacity to produce the subject goods¹⁰⁴, and also includes further processed cold-rolled steel sheet (*i.e.*, not limited to the goods destined for the merchant market).¹⁰⁵ The Complainants add that there is no way to determine either the capacity utilization of the non-participating U.S. producers¹⁰⁶ or the level of unused capacity of any U.S. producers.¹⁰⁷

The U.S. Mills respond with an analysis intended to show that they are more representative than the Complainants acknowledge. They note that not all of the fifteen non-participating mills export to Canada and that one of the fifteen is a wholly-owned subsidiary of Inland, one of the U.S. Mills.¹⁰⁸ Relying on “Cold Mill Capacities” data that the Complainants submitted to the CITT during the review¹⁰⁹ and other statistics compiled by the CITT’s staff and submitted by the U.S. Mills, the U.S. Mills show that they do represent a high percentage of capacity of those

¹⁰⁰ *Stelco’s Reply Brief*, at page 63.

¹⁰¹ *Statement of Reasons*, *supra* note 1 at page 9.

¹⁰² *Stelco’s Brief*, at page 70.

¹⁰³ *Ibid.*, at pages 70 and 71. Of the 4.1 million tons of new and planned capacity (an increase of 25 percent of the U.S. market between 1997 and mid-1999), only 300,000 net tons of capacity was added by one of the U.S. Mills, while the remaining 3.8 million net tons of plant capacity were to be added by producers that did not participate in the review.

¹⁰⁴ *Ibid.* at pages 71-72.

¹⁰⁵ *Ibid.* at page 73.

¹⁰⁶ *Ibid.* at page 72.

¹⁰⁷ *Ibid.* at page 73.

¹⁰⁸ *U.S. Mills’ Brief*, at pages 63-65

¹⁰⁹ A.R. Vol. 11.1, Appendix A-2, Exh. 7.

producers that export to Canada.¹¹⁰ The U.S. Mills also criticize the Complainants allegation that the CITT should have focused on subject goods capacity rather than production, remarking that the evidence of production is relevant and that, by trying to shift the focus, the Complainants are asking this Panel impermissibly to reweigh the evidence.¹¹¹ To refute the implication that there was plenty of unused capacity, the U.S. Mills quote extensively from their own hearing witnesses who testified that their mills were very busy and had no excess capacity.¹¹²

Quoting extensively from the Statement of Reasons, the CITT maintains that it carefully considered the question of additions to capacity, including capacity added by non-participating producers.¹¹³

The Complainants, in reply, argue that neither the U.S. Mills nor the CITT has provided or cited to evidence on the record to support the position that the U.S. Mills do represent 80 percent of U.S. production capacity¹¹⁴. Yet the Complainants contend that all U.S. producers combined (including non-participating mills) hold 80 percent of the U.S. market, the rest having been captured by foreign exporters. The core of the Complainants' allegation is that, without the participation of the fifteen U.S. producers that planned to introduce most of the additions to capacity, the CITT could not properly analyze the effect of the increased capacity on the U.S. market.

The Complainants further criticized the CITT for failing to conduct a "qualitative review" of the planned increases to capacity.¹¹⁵ The U.S. Mills reply that there is no statutory requirement that the CITT conduct a "qualitative review" of the additions to capacity "by examining the timing of the new additions, whether the additions were being made by "new entrants", and the fact that 3.8 million net tons were being added by producers not represented at the hearing¹¹⁶.

This Panel scrutinized the CITT's discussion of additions to capacity:

Counsel for the domestic producers argued that most of the new cold-rolling capacity would be added by mills that did not participate in the review. The Tribunal notes that the mills that participated in the hearing account for about 80 percent of the current capacity in the United States. The evidence indicates that some of the forecasted additional capacity is already in place and has been absorbed by the U.S. market. There is no information on the record to lead the Tribunal to conclude that any of the additional production capacity introduced by

¹¹⁰ *U.S. Mills' Brief*, at pages 66 and 67.

¹¹¹ *Ibid.* at page 67.

¹¹² *Ibid.* at pages 70-73.

¹¹³ *Tribunal's Brief*, at pages 51-53.

¹¹⁴ *Stelco's Reply Brief*, at page 56 and page 60.

¹¹⁵ *Stelco's Brief*, at page 74.

¹¹⁶ *U.S. Mills' Brief*, at page 76.

producers, other than those that attended the hearing, will have an impact different from that demonstrated during the Tribunal proceedings.¹¹⁷

Although the CITT did not have written submissions or oral testimony provided directly by the fifteen non-participating producers, and although much of the information pertains to cold-rolled steel sheet generally, it did have information with respect to total U.S. production, how much capacity was coming on line, and most importantly, the effect of the increased capacity on the U.S. market.¹¹⁸

As to the question of whether or not the U.S. Mills represent about 80 percent of current capacity and a somewhat lower percent of all capacity once the additions were in place, there does appear to be support in the record for that estimate, as well, but the more significant question is whether the CITT had sufficient information to gauge the effect of increased capacity on the market and the behavior of the U.S. producers that export to Canada. As stated, it appears that the record does contain sufficient information on which the CITT could make a finding.¹¹⁹ Furthermore, there is no evidence that the market conditions observed by the U.S. Mills were different from those experienced by the non-participating producers.

Finally, concerning whether the CITT should have conducted a “qualitative review”, although the CITT could certainly have conducted its analysis more thoughtfully and thoroughly, there is no standard compelling greater rigor. Therefore, this Panel agrees with the U.S. Mills on this point.

iv) The Impact of the Portion of New Capacity that had been “Absorbed” into the U.S. Market

The essence of the Complainants’ issue is that new capacity would have a “staggering”¹²⁰ impact on supply and the CITT did not analyze its impact. Complainants state that the CITT seems to suggest that the effect of the added capacity would be “neutral or positive”, because at least some of it had been “absorbed”¹²¹. The Complainants maintain that the CITT provided no support for that statement. It is the Complainants’ position that there was stiff competition in the U.S. market and that additional capacity would ultimately drive down prices.¹²²

¹¹⁷ *Statement of Reasons*, *supra* note 1 at pages 23 and 24.

¹¹⁸ *See, e.g.*, A.R. Vol. 17, A.R. Vol. 11.1 Exhibit A-7, A.R. Vol. 2. at pages. 24.1-24.53, 106.

¹¹⁹ The CITT’s statement that there was “no information on the record to lead the Tribunal to conclude that any of the additional production capacity introduced by producers, other than those that attended the hearing, will have an impact different from that demonstrated during the Tribunal proceedings” means, as far as we can tell, that submissions from other producers would not have shown any impact from increased capacity different from the impact shown by the evidence on the record. It would not make sense for the CITT to say, as Complainants assert, that the impact of the new capacity added by the other producers would be neutral or positive, as compared to the impact of the new capacity to be added by the U.S. Mills.

¹²⁰ *Stelco’s Brief*, at pages 73 and 74.

¹²¹ *Ibid.* at page 77.

¹²² *Ibid.* at page 80.

The U.S. Mills counter that the CITT did examine and reach conclusions regarding the impact of the new additions to capacity, albeit conclusions that did not satisfy the Complainants. The U.S. Mills describe the CITT's discussion, particularly noting that the CITT did not say that the impact of the additional capacity would be neutral; rather, the CITT stated that there was no evidence on the record (*i.e.*, that the Complainants had not produced any such evidence) demonstrating that the impact of the additional capacity newly introduced by non-participating U.S. producers would differ from that which the CITT had observed during its hearings (*i.e.*, that the new capacity was not problematic). The U.S. Mills conclude that the CITT considered and rejected the Complainants' arguments.¹²³

The CITT's Brief quotes extensively from the Statement of Reasons to show that the CITT indeed considered the issue of the additions to capacity.¹²⁴

In their Reply Brief, the Complainants reiterate that over 90 percent of the additional capacity for subject goods was being introduced by companies other than the U.S. Mills and that the CITT should have concluded that this additional capacity, accounting for 25 percent of U.S. demand, along with increased imports into the United States, would create pressure on U.S. prices and heighten the propensity of U.S. producers and exporters to dump the subject goods.¹²⁵

The CITT did consider the impact of the increased capacity. The CITT was fully aware of the Complainants' concerns: "[t]hese additions to capacity and the presence of low-priced imports into the United States from Asia and elsewhere are central to the Canadian mills' argument that there is a likelihood of resumed dumping from the United States"¹²⁶. The CITT concluded, however, that "[t]he planned additions to capacity are a response to increased demand by users of cold-rolled steel products in general and a shift in product mix toward producing more higher value-added products to meet the changing requirements of the market"¹²⁷, and that "there is abundant evidence on the record that demonstrates that capacity in the United States has been unable to keep pace with the rising demand for cold-rolled steel sheet"¹²⁸. Therefore, the CITT found the Complainants' concerns to be unwarranted.

The CITT's conclusions that additional capacity was a response to demand is based on extensive testimony from representatives of the U.S. Mills. Not only did they testify that they could not meet demand, at least one witness expressed the view that in general the environment was favourable for the U.S. market.¹²⁹ On cross-examination, the Complainants' counsel did not impeach that testimony.

¹²³ *U.S. Mills' Brief*, at pages 79-81.

¹²⁴ *Tribunal's Brief*, at pages 51-53.

¹²⁵ *Stelco's Reply Brief*, at pages 71-72.

¹²⁶ *Statement of Reasons*, *supra* note 1 at page 22.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ A.R. Vol. 15B, at pages 1031, 1087-88, 1117, and 1140.

On the other hand, there is a significant amount of evidence that qualifies the rosy picture that the U.S. Mills presented at the hearing. Included in the record are the 10-K reports that the U.S. companies must file with the United States Securities and Exchange Commission. The filers must certify to their accuracy. The 1997 10-K's for National Steel, USX (United States Steel), Rouge, AK, Inland, LTV and Wheeling-Pittsburgh, as well as the 1996 10-K for Bethlehem, are strikingly consistent in describing the market as highly competitive, pointing particularly to the pressures they anticipated from the mini-mills, which were increasing capacity, and the impact of low-priced imports. Several of them cited worldwide over-capacity as a cause for concern. Nevertheless, much of the anxiety apparent in the 10-K forms is future-oriented and marked by anticipation of the next downturn. Typical of a cyclical industry like steel, many of the firms declared that they felt threatened despite strong demand and high prices for the industry as a whole.¹³⁰ Of course, the 10-K's refer to the entire steel market, while the oral testimony was specifically limited to the market for the cold-rolled goods the U.S. producers export to Canada for the merchant market. This evidence, therefore, is not determinative as to the negative effect of the additional capacity.

The Complainants presented evidence in the form of trade analysts' predictions in industry publications that the additional capacity could fuel the global oversupply of cold-rolled steel sheet, all tending toward a gloomy outlook for the U.S. producers.¹³¹ When confronted with pessimistic prognostications during the CITT's hearing, one U.S. Mills' witness sought to qualify and limit the significance of the forecasts.¹³²

None of the evidence is absolute, nor could it be considering that the CITT was attempting a certain amount of crystal ball-gazing to determine the likelihood of resumed dumping. Although the weight of the evidence suggests that the increased production capacity had or was likely to have an adverse impact on subject goods prices, the correct standard is whether there is any evidence, viewed reasonably, that supports the CITT's finding. This Panel finds that there was evidence before the CITT that reasonably supports its finding that the planned increases in capacity were in response to high demand, such that they would not exacerbate global oversupply and exert downward pressure on prices. Therefore, this Panel cannot remand on this issue.

4) UPWARD PRICE TRENDS

The Complainants argue that the CITT made an:

[e]rroneous finding of fact that 'there has been a steady upward trend in 1997 and into early 1998 of subject goods pricing in the United States in the face of unequivocal

¹³⁰ A.R. Vol. 11.1, Exhibit 13. One could speculate that the integrated producers might face a more hostile environment than the mini-mills and those that are not primary producers, because the inefficient, unionized, high-cost integrated mills would likely feel pressure from low-cost imports and the more efficient, non-union, lower-cost mini-mills and smaller firms.

¹³¹ Cites in *Stelco's Brief*, at page 80, at pages 81-82, and pages 82-83.

¹³² A.R. Vol. 15B, at page 1134.

evidence to the contrary including evidence of a precipitous drop in the mid-west U.S. transaction prices for subject goods which had fallen 13 percent in less than 1 ½ years.¹³³

It is argued this erroneous finding of fact was in part the basis for the CITT's conclusion "that there is no economic incentive for U.S. producers to export the subject goods at reduced prices"¹³⁴. In support of their contention that there was no increasing price trend in 1997 and in early 1998, the Complainants cite evidence of U.S. pricing trends to show that, in fact, prices dropped throughout 1997 and the first quarter of 1998.¹³⁵ The Complainants contend the U.S. Mills did not file any evidence in response to the evidence on pricing trends cited by them. They note that British Steel Canada Inc. filed evidence which stated that "[t]he U.S. market is soft and prices have weakened in the last few weeks" and "[a]lthough the major mills are proposing a US\$15 per ton price increase, from April onwards, it is unlikely that customers will accept it"¹³⁶. The Complainants also point to confidential evidence obtained by them through interrogatories of the U.S. Mills and on cross examination of witnesses for the U.S. Mills.

The Complainants argue that the CITT made an erroneous finding of fact by concluding that "there has...been a steady upward trend in 1997 and into 1998" for subject good prices and that this erroneous finding of fact was fundamental to the CITT's conclusion that:

The evidence demonstrates that the prevailing conditions in the U.S. market for cold-rolled steel sheet are highly favourable...the evidence and testimony citing the high demand and prices coupled with near full capacity utilization levels and recent price increases, support the conclusion that there is no economic incentive for U.S. producers to export the subject goods at reduced prices.¹³⁷

They argue that the CITT could not have come to these conclusions without having ignored the evidence that "indicated a precipitous drop in prices starting at the end of 1996 continuing into 1997 and then into early 1998". Further they state that the CITT's conclusions concerning demand and capacity utilization levels are erroneous and that they were "no doubt influenced by its factually incorrect finding of high and increasing prices".¹³⁸

The U.S. Mills argue that the CITT's finding as to price trends was fully supported by evidence on the record. They emphasize that the CITT's conclusion as to price trends was in relation only to the Complainants' allegations that cold-rolled steel sheet prices "were lagging behind" the price for all of the other flat-rolled products and that price increases attempted by the U.S. Mills are not being accepted by customers.¹³⁹ The U.S. Mills also point to evidence from the Pre-

¹³³*Stelco's Brief*, at page 50.

¹³⁴*Stelco's Brief*, at page 50.

¹³⁵*Stelco's Brief* at pages 51-57.

¹³⁶*Stelco's Brief*, at page 58.

¹³⁷*Statement of Reasons*, *supra* note 1 at page 25.

¹³⁸*Stelco's Brief*, at pages 61 and 62.

¹³⁹*U.S. Mills' Brief*, at page 54.

hearing Staff Report that indicates that prices for subject goods did increase through 1997.¹⁴⁰ In response to the contention that the only evidence on U.S. pricing trends was filed by British Steel Canada Inc., they cite various U.S. Mills' responses to a Foreign Manufacturers' Review Questionnaire. The U.S. Mills contend that this evidence, along with the evidence of Mr. Hudson of Inland supports the finding of the CITT.¹⁴¹ Based on this, the U.S. Mills argue that there is evidence supporting the CITT's finding and that this Panel should not engage in re-weighing the evidence. In any event, it is argued that even if there is no evidence supporting the CITT's findings of price trends in the U.S., the general finding that there is no likelihood of resumed dumping was itself supported by other evidence and therefore should not be remanded.¹⁴²

In response, the Complainants argue that the U.S. Mills failed to point to "any *independent* evidence of general price trends for subject goods in the U.S. market to support the CITT's conclusion that "there has been a steady upward trend in 1997 and into early 1998" of subject goods pricing in the United States" [*italics emphasis added only*].¹⁴³ They state the only "independent" evidence cited by the U.S. Mills is evidence from the CITT's Pre-hearing Staff Report that relates to Canadian and not U.S. prices.¹⁴⁴

The Complainants argue that the independent evidence, *i.e.* the evidence not presented by the U.S. producers, does not in any way support the CITT's conclusion that the price of subject goods increased during 1997 and into 1998. The Complainants argue that the evidence of Inland relied on by the U.S. Mills is not representative of all the producers of subject goods in the United States. Even if it is, this evidence does not support the CITT's conclusion about price trends.

In relation to the evidence from the Foreign Manufacturers' Review Questionnaire, the Complainants dispute that the evidence cited by the U.S. Mills in relation to average transaction prices and list prices is capable of supporting the conclusion that "there has been a steady upward trend in 1997 and into early 1998".

A determination of this issue requires a close review of the Statement of Reasons of the CITT. It states:

In determining whether there is a likelihood of resumed dumping, the Tribunal considered factors relating to market conditions in Canada, the named countries and other markets for the subject goods. Such factors included: (1) the volume of imports of the subject goods from each named country into Canada and their

¹⁴⁰U.S. Mills' Brief, at page 55.

¹⁴¹U.S. Mills' Brief, at pages 57 to 60.

¹⁴²U.S. Mills' Brief, at pages 57 to 61.

¹⁴³Stelco's Reply Brief, at page 78.

¹⁴⁴Stelco's Reply Brief, at pages 78 and 79. The Panel notes this evidence in fact relates to Canadian and not U.S. pricing contrary to what was represented by counsel for the U.S. Mills.

exports to other countries; (2) developments in the demand and supply of the subject goods from each named country and other markets; (3) the capacity to produce cold-rolled steel sheet by domestic mills and a selection of foreign mills from the named countries; (4) the economic situation in the domestic markets of the named exporting countries; and (5) the existence of anti-dumping actions concerning the subject goods in other countries.¹⁴⁵

This Panel notes that though the CITT did mention that it specifically considered the economic situation of the domestic market of the named exporting countries in its determination of a likelihood of resumed dumping, it did not say that price trends in those markets were a key consideration or even a consideration when examining that market.

In fact, the only mention by the CITT of price trends in its Statement of Reasons is as follows:

It was argued by the domestic producers that average prices for cold-rolled steel sheet are lagging behind the prices for all of the other flat-rolled steel products and that price increases attempted by the US mills are not being accepted in the market, indicating a softening of demand. The Tribunal finds that the evidence does not support this conclusion. First, although cold-rolled steel sheet prices have been increasing at a slower rate than those for other flat-rolled products, there has still been a steady upward trend in 1997 and into early 1998. The Tribunal notes that, while not all U.S. mills have attempted price increases, the evidence indicates that there has been at least partial acceptance of those that were initiated. The Tribunal also notes that the evidence demonstrates that, since the finding, U.S. mills have invested in upgrades that have reduced their costs and/or improved quality.¹⁴⁶

This Panel notes that the CITT's consideration of price trends is in the context of dealing with the argument of the Complainants that lagging prices for cold-rolled steel and unaccepted price increases by some of the U.S. Mills indicated a softening of demand. In finding that the evidence did not support the Complainants' assertion of a softening of demand, the CITT cited other factors in addition to price trends.

The CITT summarizes its decision as follows:

The evidence demonstrates that the prevailing conditions in the US market for cold-rolled steel sheet are highly favourable. In the Tribunal's view, the evidence and testimony citing the high demand and prices, coupled with near full capacity utilization levels and recent price increases, support the conclusion that there is no economic incentive for US producers to export the subject goods at reduced prices.¹⁴⁷

¹⁴⁵*Statement of Reasons, supra* note 1 at page 14.

¹⁴⁶*Statement of Reasons, supra* note 1 at page 24.

¹⁴⁷*Statement of Reasons, supra* note 1 at page 25.

This Panel does not believe that the statement regarding a “steady upward trend in 1997 and into early 1998” was a key consideration in the CITT’s ultimate determination of there being no likelihood of resumed dumping. The single statement relating to price trends was in response to a claimed “softening of demand”.

In any event, this Panel has reviewed the evidence cited by the parties and is of the view that there is some evidence to support the finding of the CITT in relation to price trends.¹⁴⁸

However, rather than focusing on price trends *per se*, the CITT considered that there was “high demand and prices” for subject goods in the U.S. market. We have previously dealt with the issue of demand. Presuming the CITT’s reference was to “high...prices”, there was evidence before it that would allow it to make this finding as part of its determination that there was no likelihood of resumed dumping.¹⁴⁹

In summary, the Panel is of the view that the CITT’s determination as to price trends was not material to its determination that there was no likelihood of resumed dumping. Instead, the CITT purported to rely on “high...prices” in its determination and it had evidence before it to do so. In any event, the Panel is of the view that there was sufficient evidence before the CITT to support its finding as to price trends, such that the finding is not reviewable.

The Complainants in their Brief and Reply Brief put emphasis on what they refer to as “independent evidence” contained in industry reports prepared by PaineWebber and Merrill Lynch, CRU Monitors and the Pre-Hearing Staff Report, which it claims do not support the finding of an upward price trend. The Complainants discount evidence provided by the U.S. Mills in the form of questionnaire responses and oral testimony. At paragraph 170 of their Reply Brief they state that the CITT should have been guided by “the obligations contained in Articles 6 and 11 [of the WTO Anti-Dumping Agreement], that oral evidence may only be taken into account in so far as it is reproduced in writing and made available to all parties to the proceedings”. A similar complaint is made at paragraphs 38 through 41 of their Brief. The Complainants appear to want this Panel to discount the weight of evidence given by the U.S. producers and particularly the oral evidence provided.

This Panel does not agree with this position. First, it should be noted that CITT has the statutory authority to determine what evidence it will accept and what weight to give to it. This Panel notes that, unlike what the Complainants call “independent evidence”, the impugned evidence was provided by witnesses whose testimony was subject to testing by cross-examination. It is

¹⁴⁸A.R., Vol. 5.3B at page 53; A.R., Vol. 10 at 6; A.R., Vol. 10 at page 96; A.R. Vol. 10D, Exhibit RR-97-007-RI-10A, Tab 4 at page 12; A.R., Vol. 10 at page 58 and A.R., Vol. 5.3B at page 53; A.R., Vol. 5.3C at page 111; A.R., Vol. 16A Transcript Vol. 5 at page 483.

¹⁴⁹A.R., Vol. 10 at pages 6, 38, 58, 96; A.R. Vol. 10D, Exhibit RR-97-007-RI-10A, Tab 4 at page 12; A.R. Vol. 15B, Transcript Vol. 4 at pages 767, 770-71; A.R., Vol 15B, Transcript Vol. 5 at page 1128; A.R., Vol. 15B, Transcript Vol 5 at page 483.

also of note that the testimony objected to by the Complainants was elicited under cross-examination and was not evidence-in-chief. The CITT is entitled to accept oral evidence given by sworn witnesses.

Second, the CITT applies the obligations under the WTO Anti-Dumping Agreement to the extent they are incorporated in *SIMA* and its regulations. Though Articles 6 and 11.4 are not specifically incorporated in *SIMA*, to the extent the CITT should be guided by them, the Panel is of the view that the CITT was in compliance with those obligations. All oral evidence before the CITT was recorded in transcripts and subsequently provided to the parties.

5) PROPORTION OF EXPORTS TO CANADA

i) The CITT Failed to Properly Assess Propensity to Dump

The Complainants submit that:

In concluding that there existed no likelihood of resumed dumping on the part of the U.S. producers of the subject goods and in particular no propensity to dump on the part of the participating U.S. producers, the Tribunal accepted the statements made by the participating U.S. producer witnesses that they had and enforced company policies not to dump the subject goods.¹⁵⁰

The CITT concluded on the basis of the testimony of the witnesses for the U.S. Mills that exports to Canada are subject to limitations on availability and strict pricing policies. The witness for National Steel testified that its sales program is customer-driven rather than country-driven and that National Steel had no cold-rolled steel sheet available for sale to Canada beyond that which was included in its annual sales plan. The witness for U.S. Steel indicated that U.S. Steel has a strict pricing policy that precludes it from undercutting Canadian mill prices or selling at prices that are not profitable. According to the witness for Bethlehem, the company's export pricing policy requires that all exports, including the subject goods, generate a profit and not be priced below its U.S. transaction price. The witness for LTV testified LTV's pricing policy is to cease selling to customers where prices fall below its domestic selling prices. Finally, the witness for Inland testified that its current production capacity falls short of the demand for its cold-rolled steel sheet and that it has no plans to increase capacity at the present time.¹⁵¹

The CITT determined that on the basis of the high levels of demand for the subject goods produced by the U.S. Mills combined with their strict pricing policies there was no incentive on the part of the U.S. Mills to export the subject goods to Canada at price levels below their

¹⁵⁰ *Stelco's Brief*, at page 37.

¹⁵¹ *Statement of Reasons*, *supra* note 1 at page 23.

domestic transaction prices. Considering the evidence before it, the CITT concluded that there was no propensity to dump on the part of the U.S. Mills.

The Complainants allege that the CITT made an error by concluding there was no propensity to dump on the part of the U.S. Mills simply on the basis of witnesses verbal testimony which was unsupported by documentary evidence.¹⁵² The Complainants contends that in erroneously basing its conclusion on the verbal statements of witnesses for the U.S. Mills, the CITT failed to consider evidence to the contrary contained in Revenue Canada's Enforcement Data indicating that the assessment of *SIMA* anti-dumping duties against exports of the subject goods more than doubled between 1993 and 1996, and increased another 300% between 1996 and 1997.¹⁵³ The Revenue Canada Enforcement Data also indicated that in 1997 exports of the subject goods from the U.S. to Canada accounted for a certain portion of *SIMA* duties assessed against exports of subject goods from subject countries. Exports of subject goods by the U.S. Mills were assessed *SIMA* anti-dumping duties.¹⁵⁴ The Complainants contend that given this information, the CITT erroneously concluded that the U.S. Mills would not dump.

In response, the U.S. Mills submit that regardless of whether witnesses oral statements were supported by documentary evidence, the CITT has the discretion to accept and give weight to verbal statements made by sworn witnesses.¹⁵⁵ However, the U.S. Mills also argue that the Complainants' argument regarding the lack of documentary evidence to support witnesses testimony with respect to the strict pricing policies of the U.S. Mills is without merit. The documentary evidence reflected on the record that supports the testimony of witnesses for the U.S. Mills consists of written *in-camera* evidence statements of witnesses for the U.S. Mills.¹⁵⁶

The Complainants further allege that the CITT failed to account for evidence of pricing policies of the U.S. Mills that sold subject goods into the Canadian market at below normal values. The U.S. Mills responded to these allegations by arguing that there is no direct evidence to support allegations of aggressive pricing policies, that such allegations that Inland, LTV, AK Steel and Bethlehem were selling subject goods below normal values are unfounded and that there is ample evidence on the record to refute such allegations. The evidence on the record that purports to repudiate the allegations set forth in the internal correspondence of the domestic producers consists of *in-camera* witness statements and oral testimony of witnesses for the U.S. Mills stating that U.S. Mills maintain strict pricing policies and do not sell the subject goods at prices below normal values in the spot market or otherwise.

It is alleged that the approach taken by the CITT showed that it was concerned only with the statements made by the U.S. Mills' witnesses that they had and enforced company policies not to

¹⁵² *Stelco's Brief*, at page 37.

¹⁵³ *Stelco's Brief*, at page 37.

¹⁵⁴ *Stelco's Brief*, at page 38.

¹⁵⁵ *U.S. Mills' Brief*, at page 39.

¹⁵⁶ *U.S. Mills' Brief*, at pages 39 - 42.

dump the subject goods. It is further alleged that the CITT erroneously based its conclusions on the verbal statements of witnesses for the U.S. producers unsupported by documentary evidence and failed to consider evidence to the contrary contained in the Revenue Canada Enforcement Data and the evidence of aggressive pricing practices presented by the domestic producers. With respect to this alleged error, it is not the role of this Panel to reweigh such evidence. It is apparent that the CITT had before it relevant information relating to the propensity to dump on the part of the U.S. Mills including documentary evidence to support the witnesses testimony. Pursuant to its mandate, the CITT is required to assess such evidence and to not make its determination in a capricious or perverse manner. This Panel will not remand if the evidence viewed reasonably is capable of supporting the finding of fact.

As this Panel had noted previously, the CITT has the statutory authority to determine what evidence it will accept and what weight it will afford it. The CITT has the discretion to accept verbal statements made by sworn witnesses, particularly in the absence of direct contradictory evidence or a direct challenge to the veracity of the witnesses' evidence on cross-examination. Additionally, there was documentary evidence on the record that supported the testimony of such witnesses. While a more fulsome evidentiary case may be desirable, this Panel will not reweigh the evidence and accordingly the Panel does not order a remand on this issue. The CITT's inquiry involves determining the presence or absence of evidence to support a contention, and where conflicting evidence exists, to weigh that evidence in reaching its conclusion. This is not a situation in which the matter must be referred back to the CITT for expert reweighing of the evidence, nor is it a situation where the CITT's finding is perverse due to an absolute lack of evidence on the record to support its conclusion. As there was material before the CITT that viewed reasonably supports its finding with respect to the propensity to dump, this Panel declines to remand on this issue.

ii) Jurisdictional Error or Error of Law in Failure to Consider A Significant Number of Other Exporters.

The Complainants submit that:

The CITT made an error of jurisdiction (and in the alternative, an error of law) by failing to address the legal question of the likelihood of resumed dumping of the subject goods by the U.S. industry as a whole as it is required to do by SIMA, and specifically in failing to consider the actual and potential volume of subject goods exports by non-participating U.S. producers and exporters. In this regard, it is significant to note that the six participating U.S. producers accounted for less than half of the subject goods exported to Canada from the U.S. in 1997.¹⁵⁷

¹⁵⁷ *Stelco's Brief*, at page 39.

The CITT found that the U.S. Mills accounted for approximately 80 percent of the current production capacity of the subject goods in the U.S.¹⁵⁸ Furthermore, the CITT accepted the fact that for the period from 1997 to mid-1999, the additional cold-rolling capacity that would be available for merchant sales was estimated to be 4.1 million tons.¹⁵⁹ This additional capacity represented over 25 percent of U.S. demand for subject goods and over 30 percent of U.S. producer shipments of subject goods. The CITT explained that there was no information on the record to lead it to conclude that any of the additional capacity introduced by the U.S. producers of the subject goods, other than those that attended the hearing, will have an impact different from that demonstrated during the CITT proceedings.¹⁶⁰ On the basis of this determination and other evidence presented by the U.S. Mills, the CITT concluded that the evidence and testimony citing high demand and prices, coupled with near full capacity utilization levels and recent price increases, support the conclusion that there was no economic incentive for U.S. producers to export the subject goods at reduced prices¹⁶¹.

The Complainants allege that the CITT committed a jurisdictional error or an error of law in only considering the stated behavior and asserted export policies of the U.S. Mills and failing to consider their actual behavior, or the behavior and practices of the fifteen non-participating U.S. producers of subject goods and a number of other exporters of subject goods into the Canadian market¹⁶².

Firstly, the Complainants submit that there are now a significant number of exporters of the subject goods and the failure to consider the activities of these exporters in light of the additional capacity they were bringing into the U.S. market constitutes an error of jurisdiction or law. The Complainants argue that the CITT did not in its decision refer at all to the existence of these numerous exporters of subject goods from the U.S., and did not address (1) the issue of the very minimal level of participation of the U.S. producers and exporters in its review proceedings; (2) the types of exporters who had chosen not to participate in its review proceedings; and (3) the volume of the exports accounted for by exporters who chose not to participate¹⁶³.

Secondly, the Complainants submit that the CITT failed to consider the volume of exports by non-participating producers and exporters, in so far as only a portion of the exports to Canada had been made by the U.S. Mills. The evidence before the CITT indicates that less than half of imports of subject goods in 1996 and in 1997 were from the U.S. Mills¹⁶⁴. Moreover, the relatively low proportion of subject goods imports represented by the U.S. Mills is also consistent with evidence before the CITT concerning certain individual producer's estimates as to their share of subject goods exported to Canada. The U.S. Mills who provided a response to

¹⁵⁸ *Statement of Reasons*, supra note 1 at page 22.

¹⁵⁹ *Statement of Reasons*, supra note 1 at page 22.

¹⁶⁰ *Statement of Reasons*, supra note 1 at page 24.

¹⁶¹ *Statement of Reasons*, supra note 1 at page 25.

¹⁶² *Stelco's Brief*, at page 36.

¹⁶³ *Stelco's Brief*, at page 42.

¹⁶⁴ *Stelco's Reply Brief*, at page 68.

the request for this information contained in the Foreign Manufacturer's Review Questionnaire, namely, Inland, LTV and U.S. Steel, estimated that their exports of subject goods to Canada were relatively low.¹⁶⁵

Thirdly, the Complainants submit that of the 4.1 million net tons of additional capacity for the merchant market, only 300,000 net tons were being added by the participating U.S. producers of the subject goods. The balance of the additional capacity, 3.8 million net tons or 93 percent of all on-coming capacity was being added by producers who did not participate in the CITT's review proceedings.¹⁶⁶ Accordingly, the CITT made an error in concluding that none of the additional capacity introduced by U.S. producers, other than those that attended the hearing, will have an impact different from that demonstrated during the CITT proceedings¹⁶⁷. In so finding, the Complainants submit that the CITT erroneously accepted the U.S. Mills as being representative of all 21 (or 23) U.S. producers of the subject goods despite the fact that a significant percentage of new on-coming capacity for the U.S. merchant market was being brought on by U.S. producers who failed to participate in the CITT's review proceedings.

Based on the foregoing, the Complainants allege that having ignored the large number of non-participating U.S. producers and exporters who accounted for over half of the subject goods exports to Canada and a significant percentage of additional capacity coming-on in the U.S. merchant market, the CITT committed a reviewable error by failing to consider the non-participating U.S. producers and by accepting the evidence of the U.S. Mills as representative of all exporters of subject goods from the U.S. to Canada.

The U.S. Mills responded to the Complainants' allegations that the CITT committed an error of law or jurisdiction in failing to consider non-participating U.S. producers and exporters by pointing out that the CITT did consider the overall situation of the U.S. market as a whole and as such committed no error. The U.S. Mills further submitted that even if the CITT had committed the alleged error and failed to consider non-participating producers, this would not constitute a reviewable error under *SIMA* as there is no legal requirement for the CITT to address the specific level of participation of the U.S. producers, the types of exporters who did not participate and the amount of exports accounted for by these exporters.¹⁶⁸

The U.S. Mills argue that the CITT did not fail to consider the U.S. industry as a whole as the CITT specifically noted in its Statement of Reasons that counsel for Dofasco underlined the important role of the 15 non-participating U.S. producers, the U.S. service centres and the U.S. based steel traders. The CITT also explicitly recognized there are over a dozen producers of the subject goods in the U.S., which implies that the CITT took into account that in its estimation

¹⁶⁵ *Stelco's Reply Brief*, at page 68.

¹⁶⁶ *Stelco's Reply Brief*, at pages 72.

¹⁶⁷ *Statement of Reasons*, *supra* note 1 at page 24.

¹⁶⁸ *U.S. Mills' Brief*, at page 49.

approximately 20% of U.S. production comes from producers not represented at the hearing.¹⁶⁹ The U.S. Mills further submit that the CITT acted reasonably in analyzing the evidence submitted by the U.S. Mills and was entitled to infer that market conditions for non-participating U.S. producers and other exporters were similar, in the absence of any evidence to the contrary.¹⁷⁰

A difficult issue is raised by the Complainants' assertion that the CITT committed a reviewable error in failing to consider the actual and potential volume of subject goods exports by non-participating U.S. producers and exporters as well as their actual behavior and that of a significant number of other exporters.¹⁷¹ Furthermore, the Complainants' assert that the CITT's statement regarding the production capacity of the U.S. Mills and failure to discuss the dumping behavior of the non-participating producers and exporters was an error of such magnitude that it infects their ultimate finding. The question of failing to discuss a factor on which the CITT heard evidence was addressed in *Stelco II*, where the Federal Court of Appeal stated:

Accordingly, it cannot be inferred from the fact that the reasons do not discuss a factor on which the Tribunal heard evidence that it must therefore have failed to consider it. A tribunal that is subject to a duty to give reasons, as is the CITT by virtue of subsection 76(4), must of course, provide adequate reasons, but this does not mean that it must deal with every issue raised before it. Rather, it must explain its conclusion on those issues that are of central importance to the decision.¹⁷²

It may not be inferred that the CITT failed to consider the volume of exports from producers who did not participate in the hearing or the dumping behavior of such producers or non-participating exporters of subject goods solely on the basis that the CITT did not evaluate such evidence in its reasons. The critical issue is whether the CITT gave adequate reasons to explain its conclusion on those issues that are of central importance to the decision.

This Panel finds that even if the CITT erred, there is sufficient evidence, reasonably viewed, to support the CITT's ultimate finding of no likelihood of resumed dumping. Under the standard of review that this Panel must follow, the question is whether there is evidence which, reasonably viewed, is capable of supporting the CITT's finding.¹⁷³ Such evidence need not be substantial nor need the Panel arrive at the same determination as the CITT in light of it.¹⁷⁴ In the words of the Federal Court of Appeal, the Panel "should be very reluctant to set aside a decision by virtue of the inferences drawn by the CITT from the material before it or to insist that the CITT canvass all

¹⁶⁹ *U.S. Mills' Brief*, at page 37.

¹⁷⁰ *U.S. Mills' Brief*, at page 48.

¹⁷¹ *Stelco's Brief*, at page 37.

¹⁷² *Stelco II*, supra note 43 at pages 7 and 8.

¹⁷³ *Lester*, supra note 47 at page 669.

¹⁷⁴ *Lester*, supra note 47 at pages 668-669.

the material on which the parties relied, when that which the CITT regarded as important, and on which it evidently based its decision, was sufficient to provide a rational basis for it”¹⁷⁵.

Even assuming that the CITT erred in viewing the U.S. Mills as representative of the U.S. export market and thereby failed to consider a significant number of other U.S. exporters to Canada, this Panel declines to remand on this issue. The evidence of favourable supply and demand conditions for subject goods in the U.S. market as a whole coupled with near full capacity utilization levels and recent price increases, viewed reasonably, support the conclusion that there was no economic incentive for U.S. producers to export the subject goods at reduced prices. Furthermore, the CITT heard direct evidence on these critical issues, and did not simply rely on inferences about the U.S. market that were based in any finding about the representativeness of the U.S. Mills.

Therefore, the CITT's ultimate finding that the U.S. Mills had no incentive to dump in the Canadian market and that there was no likelihood of resumption of dumping escapes review notwithstanding any failure to consider evidence respecting the behavior of non-participating producers or exporters. As the Federal Court of Appeal concluded in *Stelco II*, "even if the tribunal committed a reviewable error on some of the findings of fact, its decision to rescind will still be upheld if there were other facts on which it could reasonably base its ultimate conclusion."¹⁷⁶

iii) Competition With Non-Subject Country Imports

The Complainants submit that:

The CITT made an error of fact and law when it concluded, solely on the basis that subject countries had sold into the Canadian market at a substantive premium above the domestic industry's prices, that subject country imports would not be made at non-subject country import price levels. In particular, the CITT failed to consider that only a small percentage of subject country imports were of commercial quality cold-rolled steel sheet in 1997. During the same period, a substantial percentage of non-subject country imports, only a small percentage of apparent Canadian consumption and domestic production consisted of commercial quality cold-rolled steel sheet. Accordingly, the CITT's comparison of average subject country import prices with average domestic industry's prices was improper in light of these vastly different product mixes.¹⁷⁷

The CITT rejected the Complainants' argument that U.S. producers and exporters of subject goods would have to sell at dumped prices in order to re-enter the Canadian market. The CITT

¹⁷⁵ *Stelco II*, *supra* note 43 at pages 7 and 8.

¹⁷⁶ *Stelco II*, *supra* note 43 at pages 7 and 8.

¹⁷⁷ *Stelco's Brief*, at page 48.

found that because the subject countries now sell into the Canadian market at a substantial premium above domestic prices, any increase in subject country imports into Canada would not have to be made at dumped prices in order to meet low non-subject country prices.¹⁷⁸

The Complainants allege that the CITT made an error of fact and law when it concluded that subject country imports would not be made at non-subject country prices on the basis that they had previously sold into the Canadian market at a premium because average prices do not account for differences in product mix. The differences in average prices are due to other factors, thus there can be difficulties in drawing conclusions.¹⁷⁹ Further, the Complainants point to the fact that although average U.S. import selling prices exceeded average domestic industry's selling prices for subject goods by 32% in 1992, the CITT in the 1993 Finding concluded that subject goods were being exported from the U.S. to Canada at dumped prices.

The U.S. Mills responded to the Complainants allegation that the CITT improperly referred to average prices by first pointing out that imports from non-subject countries into Canada are not determinative of the question as to whether subject countries are likely to resume dumping.¹⁸⁰ The U.S. Mills further submit that even if the use of such average prices was inappropriate, such use does not constitute a reviewable error. It is an undisputed fact that average prices were higher for U.S. subject goods imported into Canada than average domestic prices, thus no primary error of fact was made.¹⁸¹

The CITT did not commit an error of law or fact by concluding that any increase in subject country imports into Canada would not have to be made at dumped prices because the subject countries sell into the Canadian market at a substantial premium above domestic prices. A logical nexus exists between the evidence cited by the CITT and its finding. Moreover, the difference in product mix evidences the fact that subject country imports compete in a different market segment than non-subject country imports referred to by the Complainants. Thus, it would be erroneous to conclude on the basis of this evidence that subject country imports would have to be made at dumped prices in order to compete with low-priced non-subject country imports.

The CITT's authority to conduct such an analysis and to make a determination based on its analysis is central to the authority granted to it under *SIMA*. The CITT exercised its discretion and applied its expertise to the facts obtained in its investigation. The question of whether the existence of low-priced non-subject country imports would cause subject country imports to be made at dumped prices is a matter clearly within the jurisdiction and specialized expertise of the CITT. For these reasons the Panel finds that the CITT's interpretation was one reasonably open to it based on the facts on the record and thus no reviewable error was committed.

¹⁷⁸ *Statement of Reasons*, *supra* note 1 at page 17.

¹⁷⁹ *Stelco's Brief*, at page 47.

¹⁸⁰ *U.S. Mills' Brief*, at page 50.

¹⁸¹ *U.S. Mills' Brief*, at page 51.

6) INTERPRETATION OF “LIKELIHOOD OF RESUMED DUMPING”

The Complainants’ submit that the CITT committed an error of law in its interpretation of the phrase “likelihood of resumed dumping”, and a jurisdictional error in failing to ask the proper questions in its determination of likelihood of resumed dumping. The Complainants asserted that the conditions that gave rise to the 1993 Finding had not changed materially and the CITT’s assessment of likelihood of resumed dumping should have been made on a country-by-country basis.¹⁸²

In its Brief, the CITT claimed that the errors alleged by the Complainants in this regard are subject to the standard of review of patent unreasonableness, since the questions considered by the CITT related to matters within its jurisdiction and expertise. The CITT argued that the phrase “likely to resume dumping”, which is a phrase created by the CITT, is plain on its face, that the relevant regulation is devoid of guidance and in any event, the CITT considered all the relevant factors in coming to its decision. The CITT claimed that it must conform to the circumstances of the case which permit it to dispense with past practice in appropriate circumstances and that it has discretion as to whether it conducts an assessment of likelihood of resumed dumping on a cumulative basis.¹⁸³

In their Briefs, both the U.S. Mills and the Stampers argue that no reviewable error was made by the CITT in its interpretation of likelihood of resumed dumping. They argue that *SIMA* imbues the CITT with considerable discretion in undertaking a s. 76 review. They further argued that the CITT must conform its decision to the circumstances of the present case that gives them the flexibility to interpret and apply “likelihood of resumed dumping” and “material change”. In the alternative, they submit that even if the CITT was obligated to follow past practices, it satisfied this obligation by employing an analysis that was fully consistent with past practices. They further submit that the CITT has the discretion to analyze the relevant factors on either a country by country, cumulative, or producer by producer basis, depending on the circumstances. They conclude by asserting that the country-by-country analysis undertaken by the CITT was not only permissible, but was in fact the correct one under the circumstances.¹⁸⁴

In their Reply Brief and during oral argument, the Complainants modified their position with respect to this issue.¹⁸⁵ They argued that the parties were, in fact, in agreement that the CITT stated in the Statement of Reasons that it would undertake a country-by-country analysis. They argued that the disagreement is whether the CITT actually reviewed the U.S. industry and the U.S. market conditions as a whole and whether it “focused more heavily” and indeed “too

¹⁸² *Stelco’s Brief*, at pages 27-35.

¹⁸³ *Tribunal’s Brief*, at pages 35 – 41.

¹⁸⁴ *U.S. Mills’ Brief*, at pages 27-32 and Brief of Complainants Stampers at pages 18-22.

¹⁸⁵ Counsel for the Stelco stated he would intend to rely on his Reply Brief, Transcript of Public Hearing, Volume I, January 31, 2000, (“*Transcript*”) page 120.

heavily” on the evidence of the U.S. Mills, thereby disregarding relevant probative material and evidence before it regarding the entire U.S. market.

The Complainants submit in their Reply Brief that the issues before the Panel are:

- (i) whether the CITT made incorrect finding of facts with respect to the U.S. Mills leading it to rely “more heavily” on this evidence “such that the decision is reviewable as jurisdictional error or an error of law”; and
- (ii) even if the findings of fact were correct, did the CITT commit a jurisdictional error or an error of law in relying more heavily on the evidence of the participants to the exclusion of others, particularly in light of the conclusions reached in its 1993 Finding.¹⁸⁶

The Complainants appear to have either abandoned or refined their original arguments focusing on error of law pertaining to the interpretation of the phrase “likelihood of resumed dumping” and jurisdictional error in failing to ask the proper questions. The issues as reframed by the Complainants pertain to findings of fact with respect to the U.S. Mills and the weight of the evidence given to such findings. This Panel agrees with the CITT and the U.S. Mills that the CITT has ample discretion when dealing with sunset reviews in its interpretation of likelihood of resumed dumping and the questions asked and answered by the CITT pertaining thereto do not reach the level of reviewable error.

As with respect to the alleged errors as refined, counsel for the Complainant Stelco conceded at the oral hearing that the likelihood of dumping and resumption of dumping are price issues.¹⁸⁷ The issues pertaining to pricing are elsewhere discussed in this opinion and need not be reconsidered in this context.

The Complainants submit that the Canada Customs and Revenue Agency and not the CITT is the most qualified to determine the likelihood of resumed dumping and that this is a factor that goes to the level of deference.¹⁸⁸ The Complainants submit that the CITT has less expertise with respect to the likelihood of dumping analysis than it does with respect to likelihood of injury analysis.¹⁸⁹ As discussed in the standard of review section above, the CITT is entitled to ample deference in this review, even if another agency might be more expert in some aspects. Accordingly, the level of deference afforded the CITT in these circumstances is more than necessary to uphold its determination. This Panel will not reweigh the evidence.

¹⁸⁶ *Stelco’s Reply Brief*, at pages 45-54.

¹⁸⁷ *Transcript*, at page 83.

¹⁸⁸ *Transcript*, at page 95.

¹⁸⁹ *Transcript*, at pages 96 and 111.

7) CONCLUSION

The heart of the CITT's decision is that favorable U.S. market conditions for the subject goods in the U.S. provide U.S. producers with no economic incentive to dump the subject goods in Canada. More particularly, U.S. producers have no incentive to dump the subject goods in Canada because supply and demand condition for the subject goods are in balance in the U.S. market, demand is outpacing production capacity and prices for the subject goods are high. Further, discounting the effects of low-priced imports into the U.S., the CITT addresses the diminishing value of the Canadian dollar, the volume of U.S. exports to Canada, U.S. steel exports to Mexico and U.S. producers' policies regarding dumping. The CITT therefore determined that there is no likelihood of resumed dumping from the U.S. and found it unnecessary to reconsider the issue of likelihood of injury and issued an order rescinding its earlier findings.

The CITT's findings with respect to the condition of the U.S. market provide the foundation for this conclusion. Given that the key to the CITT's finding regarding the U.S. market conditions is its supply and demand and capacity findings, all of the factual errors alleged by Complainants are rendered harmless if the findings about supply and demand and capacity conditions remain intact. In view of the applicable standard of review, this Panel upholds the determination of the CITT. While the reasoning of the CITT in some areas could have been more fulsome, this Panel finds that the allegations of error do not reach the level of reviewable error required by the applicable standard of review.

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

Signed in the original by:

Ms. Wilhelmina K. Tyler, J.D. (Chairperson)
Ms. Wilhelmina K. Tyler, J.D. (Chairperson)

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

Ms. Lisa B. Koteen
Ms. Lisa B. Koteen

Mr. Paul C. LaBarge
Mr. Paul C. LaBarge

Professor James Frank Smith
Professor James Frank Smith

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