

ARTICLE 1904
BINATIONAL PANEL REVIEW PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

Certain Iodinated Contrast Media
Used for Radiographic Imaging,
Originating in or Exported from the
United States of America (Including
the Commonwealth of Puerto Rico)

Secretariat File No.: CDA-USA-2000-1904-02

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

January 8, 2003

Before: Mr. Brian E. McGill (Chair)
 Professor David J. Mullan
 Mr. Mark R. Sandstrom
 Professor Leon E. Trakman
 Ms. Shawna K. Vogel

Hearing: September 10, 2002, Ottawa, Ontario, Canada

Appearances:

On behalf of Bracco Diagnostics Canada, Inc. and
Bracco Diagnostics, Inc.

Mr. Dean A. Peroff

On behalf of Nycomed Amersham Canada Ltd. and
Nycomed Inc.

Mr. Lawrence L. Herman

On behalf of Tyco Healthcare Canada Inc.

Mr. C.J. Michael Flavell, Q.C.
Mr. Geoffrey C. Kubrick

On behalf of the Canadian International Trade Tribunal

Mr. John Dodsworth
Ms. Michèle Hurteau

Introduction

This is the Panel decision of the binational panel review in the matter of Certain Iodinated Contrast Media Used for Radiographic Imaging, Originating in or Exported from the United States of America (Including the Commonwealth of Puerto Rico) (Secretariat File No. CDA-USA-2000-1904-02) conducted pursuant to Article 1904 of the *North American Free Trade Agreement* (NAFTA) and Part I.1 of the *Special Import Measures Act* (SIMA).¹ The Request for Panel Review of the finding made by the Canadian International Trade Tribunal (Tribunal), on May 1, 2000, in Inquiry No. NQ-99-003, was filed with the NAFTA Secretariat, Canadian Section, by counsel for Nycomed Amersham Canada Ltd. and Nycomed Inc. on June 9, 2000 in accordance with Part II of the *Rules of Procedure for Article 1904 Binational Panel Reviews*. An additional Request for Panel Review was also filed by counsel for Bracco Diagnostics Canada, Inc. and Bracco Diagnostics, Inc.

The products that are the subject of this panel review are described as iodinated contrast media used for radiographic imaging, in solutions of osmolality less than 900 mOsm/kg H₂O, originating in or exported from the United States of America (including the Commonwealth of Puerto Rico).²

¹ R.S.C. 1985, c. S-15, as amended, (hereinafter “SIMA”).

² Statement of Reasons, *Certain Iodinated Contrast Media Originating In or Exported From the United States of America (Including the Commonwealth of Puerto Rico)*, Tribunal Inquiry No.: NQ-99-003, [2000] (hereinafter “Statement of Reasons”), at 3.

The parties to this panel review include Bracco Diagnostics Canada, Inc. and Bracco Diagnostics, Inc., Nycomed Amersham Canada Ltd. and Nycomed Inc. as complainants and Tyco Healthcare Canada Inc. and the Tribunal as respondents.

Standard of Review

Position of the Parties

Counsel for the complainants first argue that the Panel should apply a standard of correctness to the Tribunal's determination of what constituted the "domestic industry" for the purposes of its inquiry into whether the dumping had caused "material injury". They contend that the Tribunal's determination of the scope of the term "domestic industry" is a jurisdictional question on which the Tribunal is required to be correct. Alternatively, they submit that this issue is one of pure statutory interpretation involving the use of concepts intrinsic to commercial law or principles of statutory interpretation. This too, in their submission, should lead to correctness review. More generally, it is also their position that the Tribunal was, as part of its material injury inquiry, obliged to take account of domestic production for export of the relevant goods as well as domestic production of those goods for domestic consumption, that it did not do so at critical parts of its decision, and that this should lead to review. In terms of the standard of review, it is contended that, here too, the Tribunal had to be correct in its determination of whether export sales were legally relevant and in its determination of whether to take these sales into account at various points in its decision-making processes.

Both respondents resist these contentions. In particular, they argue that the determination of whether the “domestic industry” includes exported goods and the extent to which the level of exports is relevant to the overall injury inquiry lies at the heart of the Tribunal’s jurisdiction. They characterize this as a highly fact sensitive decision, not one dependent on a pure question of statutory interpretation and not one involving the use of concepts intrinsic to commercial or any other form of general or common law. If the Panel accepts this analysis, the respondents argue that the standard of review should be that of patent unreasonableness or, failing that (according to Tyco), nonetheless, a “high standard of deference”.

General Principles

This Panel has set out the general principles of Canadian judicial review law in its decision in CDA-USA-2000-1904-01, the companion proceedings involving a challenge to the Canadian Customs and Revenue Agency’s dumping determination. We reaffirm those general principles in this case.

Application to the Tribunal

The Supreme Court of Canada has recently considered the standard of review issue as it pertains to the Tribunal in *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*³ This case involved a decision of the Tribunal taken not under the *SIMA* but

³ [2001] 2 S.C.R.100.

under the *Customs Act*. More particularly, the Tribunal was required to interpret the terms “sale [of goods] for export to Canada” (with emphasis on the meaning of “sale of goods”) and “a condition of the sale of goods”. After an assessment of the expertise of the Tribunal, the Court held that, because these were questions of pure statutory interpretation involving a concept “intrinsic to commercial law”,⁴ there was no reason for deference and the standard was that of correctness. However, in so doing, the Court made it clear that it was not laying down a general rule for all questions of law to be resolved by the Tribunal under customs legislation, let alone its *SIMA* jurisdiction. The contrast drawn was to “technical words that are well beyond [the appeal court’s] customary mandate” where deference was required.⁵

More generally, Major J., delivering the judgment of the Supreme Court of Canada, endorsed an earlier Supreme Court of Canada assessment of the Tribunal’s claims to expertise:

In this connection, Wilson J. observed in *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at 1336, that “[c]areful management” of sectors like “international economic relations” “often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise”. Section 3(1) of the *Canadian International Trade Tribunal Act* requires a chair, a vice-chair and not more than six other permanent members to be appointed by the Governor in Council. Permanent members are appointed to hold office for a term not exceeding five years (s. 3(3)). Being permanent appointments, members of the [Tribunal] acquire experience in the questions they consider over the course of their appointments. Depending on the nature of the question at issue, members of the [Tribunal] acquire experience and expertise that courts do not. This is also consistent with Wilson J.’s characterization of the predecessor to the [Tribunal] as being “staffed by experts familiar with the intricacies of international trade relations who are in the business of dealing

⁴ *Id.*, at para. 33.

⁵ *Id.*, at para. 32.

with a large volume of trade related cases" (*National Corn Growers Assn.*, *supra*, at 1348).⁶

The *National Corn Growers Assn.* case arose out of a judicial review application to the Federal Court of Appeal from a determination made by the Tribunal under *SIMA*. In that context, the Supreme Court applied a standard of patent unreasonableness to review of both the relevant determinations of law and of fact. It is also relevant that *National Corn Growers Assn.* involved an application for judicial review as opposed to a statutory appeal, the route by which *Mattel* reached the courts. This is important because the case law makes it clear that less deference is generally afforded to determinations of law in the context of a statutory right of appeal than in the instance of a judicial review application.⁷

However, it is also significant that, since *National Corn Growers Assn.*, the privative clause restricting the scope of judicial review of the Tribunal determinations under *SIMA* has been removed. Notwithstanding this and *Mattel*, NAFTA panels⁸ and the Federal Court of Appeal⁹ have continued to apply a "patent unreasonableness" standard to the Tribunal determinations of issues of fact, law and mixed law and fact or, in the case of law or mixed law and fact, "a considerable degree of deference".¹⁰

⁶ *Id.*, at para. 30.

⁷ See *e.g.* *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, at para. 31.

⁸ See *e.g.* *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings Originating In or Exported from the United States of America*, (2000), CDA-USA-98-1904-03.

⁹ See *e.g.* *Canadian Pasta Manufacturers' Assn. v. Aurora Importing & Distributing Ltd.*, [1997] F.C.J. No. 115 (C.A.) (Q.L.), at para. 6.

¹⁰ See *e.g.* *Certain Refrigerators, Dishwashers and Dryers Originating In or Exported from the United States of America and Produced by, or on Behalf of, White Consolidated Industries, Inc., and Whirlpool Corporation, their Respective Affiliates, Successors and Assigns*, (2002), CDA-USA-2000-1904-04, (hereinafter "*Appliances Panel Determination*") at p. 17.

The Specific Issues

As outlined above, the complainants contend that the Tribunal erred in defining the “domestic industry” for purposes of assessing injury. They argue that the Tribunal limited its definition of “domestic industry” in paragraph 2(1) of *SIMA* to those goods manufactured for sale in the domestic market and unlawfully failed to consider the industry’s export performance. They further contend that the Tribunal, thereafter, failed to take export performance into account in determining material injury under section 42 of *SIMA* and *Special Import Measures Regulations* (SIM Regulations) subsections 37.1(1) and (3). They claim support for this position in the dissenting reasons of Member Close in the Tribunal decision.

This Panel agrees with the submissions of counsel for Bracco and Nycomed that the question of whether export sales are a component of the definition of “domestic industry” or, otherwise, a potentially relevant factor in the assessment of material injury does raise a question of legal principle which, in terms of the Supreme Court’s judgment in *Housen v. Nikolaisen*, is “readily extricable”¹¹ from the law/fact application part of this determination. On the other hand, characterizing this aspect of the Tribunal’s determination as involving an issue of legal principle does not, in terms of either *Mattel* or *Housen*, lead inexorably to a correctness standard of review. The Tribunal is still entitled to deference unless the question is a jurisdictional one or one that involves a pure question of statutory interpretation which

¹¹ 2002 SCC 33, at para. 36.

hinges on the application of principles of general law on which the reviewing court or tribunal would be as, if not more, expert than the tribunal under review.¹²

It is our judgment that this is a question that lies at the very core of what the Tribunal has been established to do - to interpret and give meaning to terms in the governing legislation which cannot be meaningfully isolated from the context of the highly specialized regime which that statute establishes. This is, essentially, a trade law issue that requires close working familiarity with the “intricacies” (to quote Wilson J. from *National Corn Growers Assn.*) of *SIMA*.¹³ To rule on whether the term “domestic industry” in paragraph 2(1) of *SIMA* dictates the inclusion of goods manufactured domestically for both domestic consumption **and** export and also mandates that export performance be taken into account at various stages of the material injury inquiry requires an understanding of both the structure and underlying purposes of the anti-dumping legislation and the place of this particular determination within that structure and those purposes. This task did not engage any issues of general law.¹⁴ Under the mandated “pragmatic and functional” analysis,¹⁵ the relevant questions were not jurisdictional issues or matters involving the interpretation of “jurisdiction

¹² This is clear from *Mattel* itself where Major J., delivering the judgment of the Court, affirms that it is necessary to consider the nature of the legal question that the Tribunal has to decide and determine whether it is one of general law or one that comes within the Tribunal’s expertise; [2001] 2 S.C.R. 100, at paras. 32-33.

¹³ As cited by Major J. in *Mattel*, *supra*, note 3.

¹⁴ In support of the proposition that this was the kind of question which, under *Mattel*, should be subject to correctness review, counsel for the complainants attempt to characterize the question as one involving the application of “general principles” of statutory interpretation on which the courts and this Panel are as, if not more expert than the Tribunal. However, to accept that argument would be, in effect, to accept the proposition that all exercises of pure statutory interpretation by this and other tribunals are subject to correctness review. This is contrary to the whole underpinnings of Canadian judicial review law and would make *Mattel* not simply a rarity (*Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, [2002] 1 F.C. 292 (C.A.), at para. 20) but the almost invariable rule.

¹⁵ As first formulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at 1088 and reaffirmed in cases such as *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 and *Mattel*, *supra*, note 3.

conferring”¹⁶ provisions. Neither is it a pure question of statutory interpretation that engages an issue of general law or law outside the Tribunal’s expected area of expertise. It is, therefore, this Panel’s conclusion that we should afford at least “a considerable degree of deference” to the Tribunal’s determination of the precise question of the relevance of goods manufactured for export in establishing the “domestic industry” and, more generally, the extent of that factor’s relevance as a component of the “material injury” inquiry. Indeed, once the Tribunal’s task becomes, as it rapidly did in this case, the exercise of its statutory discretion or judgment under section 42 of *SIMA* and SIM Regulations section 37.1 as to the factors that are relevant to this particular inquiry, the Tribunal deserves even more deference. At that point, the Tribunal has moved from a question of legal principle as to the abstract “legal” relevance of export performance and is now applying its judgment of the extent to which, if at all, export performance is relevant in this particular case: a matter of discretionary judgment or law/fact application.

In light of the conclusions that we reach below, it is not necessary to rule on whether that deference should extend as far as requiring a demonstration of patent unreasonableness. Even under the more intrusive unreasonableness standard, the Tribunal’s treatment of the issues of legal principle withstands scrutiny. The same is true of the Tribunal’s application of those principles to the facts of this case.

¹⁶ *Bibeault, ibid.*

I. Definition of the Domestic Industry

Complainants argue that the Tribunal erred in interpreting “domestic industry” as being limited to domestic production for domestic consumption.¹⁷ They allege that domestic industry for the purposes of investigation and the material injury analysis must include total domestic production – *i.e.* production for export sales as well as domestic sales. In response, Tyco states that the Tribunal did not limit its definition of domestic industry to domestic production for domestic consumption, but in fact properly defined it as required under the relevant provision of *SIMA*.¹⁸ The Tribunal also maintains that it correctly defined the domestic industry and did not limit the scope of the “like goods” produced by the single Canadian producer to products produced for domestic consumption. In the reasons for its decision, the Tribunal specifically states that exports of the like goods are an important component of the total domestic production of the like goods.¹⁹

Domestic industry is defined under paragraph 2(1) of *SIMA* as follows:

‘domestic industry’ means ... the domestic producers as a whole of the like goods or those domestic producers whose collective production of like goods constitutes a major proportion of the total domestic production of the like goods...

¹⁷ Joint Brief of the Complainants, Bracco Diagnostics, Inc., Bracco Diagnostics Canada, Inc., Nycomed Amersham Canada Ltd., Nycomed Inc. and Nycomed Imaging AS (hereinafter “Complainants Joint Brief”) at 13.

¹⁸ Response Brief of Tyco Healthcare Canada Inc. (Formerly Mallinckrodt Canada Inc.) (hereinafter “Tyco’s Response Brief”) at 2.

¹⁹ Brief of the Canadian International Trade Tribunal (hereinafter “Tribunal’s Response Brief”) at 28.

From this statutory definition, it is clear that domestic industry relates to domestic producers whose collective production of like goods constitutes a major proportion of the total domestic production, without any limitation as to whether such production is consumed domestically or exported. In applying the statutory definition under paragraph 2(1), the Tribunal concluded that Tyco was the sole domestic producer of the subject contrast media and, consequently, the domestic industry consisted of Tyco.

The Panel finds that the Tribunal did not restrict its definition of the domestic industry, represented by Tyco, the sole domestic producer, to Tyco's production for domestic consumption. In determining that Tyco represents the domestic industry, it considered all of Tyco's production, that destined for export as well as that consumed domestically. Accordingly, the Panel affirms that the Tribunal's interpretation of domestic industry was fully consistent with Canadian law. As a consequence, no issue arises as to what would have been the consequences of the Tribunal failing to include the production destined for export as part of the "domestic industry."

II. The Tribunal's Evaluation of Export Performance in the Context of the Material Injury Analysis

Complainants allege that, in measuring the impact of subject imports on the domestic industry, the Tribunal committed an error, as it failed to consider Tyco's export performance as a relevant factor under section 42 of *SIMA* and SIM Regulations subsection 37.1(1) in determining material injury and focused only on domestic sales and profits. Complainants

argue that: “For purposes of a material injury inquiry, ‘domestic industry’ must include domestic producers in all their activities – export sales no less than domestic sales.”²⁰ By confining itself to domestic production for domestic consumption, Complainants allege that the Tribunal’s material injury determination was inconsistent with *SIMA* and the SIM Regulations.

In response, Tyco submits that “The factors in paragraph 37.1(1)(c) of the SIM Regulations, when read in the proper context, in fact support the opposing view that the Tribunal is entitled to focus its enquiry on domestic production for the domestic market. According to the paragraph, the ‘relevant’ economic factors found must relate the ‘resulting impact of the dumped or subsidized goods on the state of the domestic industry’. The impact of dumping, it is suggested, can only be felt directly on products sold domestically.”²¹

The Tribunal argues that “there is nothing improper in considering specific segments of the domestic industry in its injury analysis.”²² The Tribunal notes that the Complainants, themselves, made reference to U.S. trade legislation, which requires that, in certain circumstances, the International Trade Commission “shall focus primarily on the merchant market for the domestic like product.”²³

²⁰ Complainants Joint Brief at 13; *id.* at 25 (“Rather than considering *all* factors that have a bearing on the state of the industry, *any* sales – both export and import – and the impact of those sales, in determining whether there was material injury, it confined itself to ‘injury to domestic production for domestic consumption’.”).

²¹ Tyco’s Response Brief at 30.

²² Tribunal’s Response Brief at 35.

²³ *Id.*

The SIM Regulations require that, in assessing injury, the Tribunal consider:

“(i) any actual or potential decline in output, sales, market share, profits, productivity, return on investments or the utilization of industrial capacity, and

(ii) any actual or potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital”²⁴

In delineating the factors to be examined in determining the impact of the dumped goods on the state of the domestic industry, paragraph 37.1(1)(c) does not specify whether domestic market performance or export market performance of the domestic industry, or both, should be examined. In other words, unlike other provisions of the SIM Regulations, paragraph 37.1(1)(c) does not mandate that the impact of dumped goods on export performance be examined by the Tribunal in making its determination of injury. In fact, with respect to such factors as sales or (domestic) market share, it is difficult to see how dumped imports could have any impact upon sales to third countries.

Furthermore, as pointed out by Tyco, the remedies available under the Canadian antidumping statute are designed to neutralize the negative impact of dumping on producers in Canada who are being injured by imports of dumped products. Relief is available only with respect to imported products sold in the domestic market. Conversely, the statute provides no relief for injury to exports of Canadian producers in third-country markets.

²⁴ SIM Regulations- paragraph 37.1(1)(c).

The Panel notes that the Tribunal has, on several previous occasions, found that, in weighing the impact of dumping upon the factors set out in SIM Regulations paragraph 37.1(1)(c), the determination of injury may be made with respect to the impact within the domestic market. In 1988, the Tribunal issued its determination in a dumping case involving imports of automobiles from Korea.²⁵ In *Cars*, the Tribunal determined that exports were unrelated to the issues of dumping into Canada and of injury to domestic production.

Moreover, and notwithstanding repeated statements that the car industry is a North American industry which encompasses exports and imports on the basis of rationalized production, GM Canada and Ford Canada centered their case on, and counsel argued that the complaints were concerned with injury to domestic production for domestic consumption.²⁶

In an antidumping investigation involving cold-rolled steel sheet, the Tribunal held that :

In determining if dumping caused material injury, however, the Tribunal focused principally on those indicators related to sales in the domestic market. They include trends and levels of imports and market shares, prices and financial performance. (emphasis added)²⁷

Similarly, in a recent antidumping investigation involving refrigerators, dishwashers and other appliances²⁸, the Tribunal weighed the impact of dumped imports on various factors set out in SIM Regulations paragraph 37.1(1)(c) with respect to the domestic market:

²⁵ *Cars Produced by or on Behalf of Hyundai Motor Company, Seoul, Republic of Korea, or by Companies With Which it is Associated*, Tribunal Inquiry No.: CIT-13-87, [1988] C.I.T. No. 15 (hereinafter referred to as “*Cars*”).

²⁶ *Ibid* at 15-16.

²⁷ *Cold-Rolled Steel Sheet*, Tribunal Inquiry No.: NQ-92-009, at 19.

²⁸ *Certain Refrigerators, Dishwashers and Dryers Originating in or Exported from the United States of America and Produced by, or on Behalf of, White Consolidated Industries, Inc. and Whirlpool Corporation, their Respective Affiliates, Successors and Assigns*, Tribunal Inquiry No.: NQ-2000-001 (hereinafter referred to as “*Appliances*”).

Central to the case made by Camco is that the dumped imports forced it to either meet the low-priced imports or to lose sales. In this regard, the Tribunal has addressed the issue of price erosion and price sensitivity of appliances in the Canadian market... . The Tribunal finds that Camco has experienced a significant loss of market share as a direct result of the increased sales of imports at dumped prices... the Tribunal looked at the revenues that Camco earned on sales of certain refrigerators, dishwashers and dryers in the Canadian Market... .²⁹

In a very recent decision, a NAFTA Panel upheld the Tribunal's determination in the *Appliances* case to the extent that the Tribunal focused on the impact of dumped imports within the domestic market. While acknowledging that the Tribunal in the underlying case had considered the entire industry, "including the industry's production for export and export performance", the "finding of injury was predicated on the impact of imports in specific sectors of the domestic market."³⁰

Accordingly, the Panel finds that there is nothing in the language of the statute and regulations that precludes the Tribunal from considering the impact of dumping on the factors set out in SIM Regulations paragraph 37.1(1)(c) with respect to conditions in the domestic market. The Panel finds that, to the extent that the Tribunal narrowed its examination of the impact of dumped imports on the factors set out in SIM Regulations paragraph 37.1(1)(c) to the domestic market, it did so in conformity with a not unreasonable interpretation of Canadian law.

²⁹ *Ibid* at 27-32.

³⁰ *Appliances Panel Determination* at 19-20.

III. Strong Export Performance as An Offset to Poor Performance in the Domestic Market

Complainants argue, in effect, that export performance must not only be taken into consideration, but that, if such performance is positive, the Tribunal must consider whether it ‘offsets’ the negative impact of dumped imports upon the state of the domestic industry.³¹

Tyco responds that Complainants had “failed to demonstrate that the provisions of *SIMA* and the SIM Regulations require that the Tribunal consider positive export performance in its injury analysis as an offset or counterbalance to its finding that material injury had been caused by the dumped imports in the domestic market. Instead, a reasonable interpretation of *SIMA* and its regulations establishes that there is no such obligation.”³²

The Tribunal also determined that it was not required to take positive export performance into consideration as an offset to injury caused within the domestic market by dumped imports.

Far from being a source of injury in this case, the domestic industry’s export performance has benefited its overall performance and has helped to offset the injurious effects of dumping in the domestic market. In the Tribunal’s views the effects of the domestic industry’s export performance, albeit favorable, does not negate the material injury caused directly by the dumping of the subject goods through price erosion and lost sales in the domestic market.³³

³¹ See Complainants Joint Brief at p. 16-17.

³² Tyco’s Response Brief at 25.

³³ *Certain Iodinated Contrast Media Originating In or Exported From the United States of America (Including the Commonwealth of Puerto Rico)*, Tribunal Inquiry No.: NQ-99-003, [2000] (hereinafter “*Contrast Media*”), at 20.

As indicated in the previous section, no mandate is found in *SIMA* or the SIM Regulations requiring that the Tribunal consider any particular market segment in weighing the impact of dumped goods on the state of the domestic industry with respect to the economic factors set out in this provision. It follows that there is no language in the statute or the regulations that requires the weighing of performance in various market sectors in assessing the impact of dumped imports.

The Panel notes that this issue has been reviewed and determined in a consistent manner in previous Tribunal determinations. For example, in a case involving hot-rolled steel sheet, the Tribunal determined:

The Tribunal does not consider that, when assessing injury to the domestic industry, good performance in one part of the domestic production should be used as a reason for failing to take into account injury caused to another part. In other words, the Tribunal does not support the notion that the determination of injury is an algebraic sum where the pluses and minuses of profits and losses in different parts should be used to cancel each other out. It is entirely possible for an industry to do well in one part and, yet, still be injured in another to the detriment of the industry as a whole. For example, if the domestic industry did not perform well in the domestic merchant market, while still, at the same time, generating positive returns from further internal processing and export sales, this would not negate in any way the fact that the domestic industry had, on the whole, been materially injured. The Tribunal's task is to determine whether the injury resulting from dumped and/or subsidized imports is material to the domestic industry as a whole and not whether injury in one part of the production has been matched by unrelated gains in other parts unaffected by dumped and/or subsidized imports or whether the injury has been spread equally across the parts of the domestic production.³⁴

³⁴ *The Dumping of Certain Flat Hot-Rolled Carbon and Alloy Steel Sheet and Strip Originating in or Exported from Brazil, Bulgaria, The People's Republic of China, Chinese Taipei, India, The Republic of Korea, the Former Yugoslav Republic of Macedonia, New Zealand, Saudi Arabia, South Africa, Ukraine and the Federal Republic of Yugoslavia, and the Subsidizing of Certain Flat Hot Rolled Carbon and Alloy Steel Sheet and Strip Originating in or Exported From India*, Tribunal Inquiry No.: NQ-2001-001, at 13.

This issue has been considered by the Tribunal most recently in the *Appliances* case:

With regard to Camco's export performance for dishwashers and dryers, all the evidence points to the conclusion that Camco is profitable and reasonably healthy with respect to its export sales of dishwashers and dryers. The Tribunal recognized that Camco's export business has aided its overall operation by helping to pay for plant and product improvements. In addition, the export sales have contributed greatly to higher productivity. In normal circumstances this should have made Camco a formidable competitor. However, the circumstances were not normal, as the presence of dumped product resulted in Camco having to struggle in its home market. The majority of the Tribunal, in this case, believes that the financial success in the export market should not be used to offset Camco's injury in the domestic market and that injury cannot be judged on Camco's worldwide operations.³⁵

The decision of the Tribunal was recently upheld by a NAFTA Panel in the *Appliances Panel Determination*:

The Tribunal majority determined that the positive export performance of the domestic industry did not extirpate the injury to the domestic industry. We find no error in this determination. Nothing in *SIMA*, its implementing regulations or reported precedent suggests that the "material injury" sufficient to sustain an antidumping order must reflect injury suffered by every market sector in which domestic like product is sold, including export market sectors. Furthermore, the Tribunal majority indicated that "in this case" the domestic industry's export success should not be weighed against the injury found in sectors of the domestic market. This determination is case-specific and involves a weighing of evidence, which is the prerogative of the Tribunal, and to which this Panel will defer.³⁶

The Panel finds that the Tribunal's refusal to offset injury to the domestic industry within the domestic market by the industry's positive export performance in making its injury determination pursuant to SIM Regulations paragraph 37.1(1)(c) is not unreasonable.

³⁵ *Appliances* at 31.

³⁶ *Appliances Panel Determination* at 20.

IV. Export Performance in the Context of SIM Regulations Subsection 37.1(3)

The complainants assert that SIM Regulations subsection 37.1(3) requires the Tribunal to consider ‘export performance’ as a relevant factor as part of its material injury analysis:

Section 37.1(3) includes the following additional prescribed factors for the purposes [of] determining whether the dumping has caused or is threatening to cause material injury (emphasis added):

- (a) whether a causal relationship exists between the dumping of the goods and the injury ... or threat of injury, on the basis of the factors listed in [section 37.1(1) and (2)]; and
- (b) whether any factors other than the dumping or subsidizing of the goods have caused injury or retardation or are threatening to cause injury, on the basis of
 - ...
 - (vi) the export performance and productivity of the domestic industry in respect of like goods, and
 - (vii) any other factors that are relevant in the circumstances.³⁷

Tyco asserts that paragraph 37.1(3)(b) “...contains a list of factors which the Tribunal may examine to ensure that injury suffered by the domestic industry caused by any factors not related to the dumping of subject goods is not attributed to the dumping. In other words, the effect of subsection 37.1(3)(b) is to ensure that the Tribunal isolates the negative effects of the domestic industry’s export performance to ensure that they are not considered by the Tribunal in its causation analysis.”³⁸

³⁷ Complainants Joint Brief at 8.

³⁸ Tyco’s Response Brief at 31-32.

The Tribunal concurs with Tyco's interpretation of SIM Regulations subsection 37.1(3): "The Tribunal majority also considered subsection 37.1(3) of the *SIM Regulations* which prescribes other factors, including export performance, which the Tribunal may consider to ensure that the injury caused by those other factors is not attributed to the dumped goods. The Tribunal majority properly noted that it should examine whether exports of the like goods have caused injury and recognized that it must not attribute this injury to dumped imports."³⁹

In the *Appliances* case, the Tribunal had taken a similar position with respect to the purpose of SIM Regulations subsection 37.1(3), and its determination was upheld by the NAFTA Panel reviewing the decision:

The purpose of subsection 37.1(3) is to ensure that the Tribunal turns its mind to other factors besides dumping that may cause injury to the domestic industry. If it is found that one of the factors enumerated in subsection 37.1(3) has caused some injury, then the Tribunal must ensure that this injury is not attributed to dumping. This step is necessary to ensure that it was in fact the dumping that caused the injury to the domestic industry and not the non-dumping factors that are the explanation for the decline in market share, or price, etc. Thus, what the Tribunal was obliged to do was to consider export performance, among other things, to ensure that these factors were not the cause of the injury suffered by the domestic industry.

The complainants are correct to argue that subsection 37.1(3) obliges the Tribunal to consider export performance in determining if there has been injury to the domestic industry. However, it is incorrect to argue, as the complainants have done, that the Tribunal must consider export performance in assessing injury from dumping, either to add to injury from dumping if export performance is poor, or to subtract from injury from dumping if export performance is good. *SIMA* only requires the consideration of export performance for the purposes of determining if the injury to the domestic industry was caused by factors other than the dumping. This is the only positive duty to consider export performance that exists in the relevant

³⁹ Tribunal's Response Brief at 33.

sections of *SIMA* and its regulations. Clearly, SIM Regulations 37.1(3) cannot be interpreted in a way that would create a positive obligation to include export performance in the determination of whether or not there is injury from dumping. In fact, export performance must be considered in order to separate potential injury caused by poor export performance, from injury caused by dumping.⁴⁰

The Panel finds that SIM Regulations subsection 37.1(3) does not require the Tribunal, in determining injury under SIM Regulations subsection 37.1(1) to weigh export performance as a factor to be taken into consideration in determining the impact of dumped goods on the state of the domestic industry. Accordingly, the determination of the Tribunal with respect to SIM Regulations subsection 37.1(3) in the context of this *Contrast Media* case is not unreasonable.

⁴⁰ *Appliances Panel Determination* at 22.

Conclusion

In light of the conclusions of this Panel made in respect of each of the issues set out above, the Panel hereby dismisses the complaints and orders that the decision of the Tribunal in this matter be and is hereby affirmed. The Panel directs the Canadian Secretary of the NAFTA Secretariat to issue a Notice of Final Panel Action pursuant to Rule 77 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*.

Signed in the Original by:

Brian E. McGill (Chair)
Brian E. McGill (Chair)

David J. Mullan
David J. Mullan

Mark R. Sandstrom
Mark R. Sandstrom

Leon E. Trakman
Leon E. Trakman

Shawna K. Vogel
Shawna K. Vogel

Issued on the 8th day of January 2003.