

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

In the Matter of:

CERTAIN SOLDER JOINT PRESSURE PIPE FITTINGS
AND SOLDER JOINT DRAINAGE, WASTE AND VENT
PIPE FITTINGS, MADE OF CAST COPPER ALLOY,
WROUGHT COPPER ALLOY OR WROUGHT COPPER,
ORIGINATING IN OR EXPORTED FROM THE
UNITED STATES OF AMERICA AND PRODUCED BY
OR ON BEHALF OF ELKHART PRODUCTS
CORPORATION, ELKHART, INDIANA, NIBCO INC.,
ELKHART, INDIANA, AND MUELLER INDUSTRIES, INC.,
WICHITA, KANSAS, THEIR SUCCESSORS AND ASSIGNS

CDA-USA-98-1904-03

DECISION OF THE PANEL

ON REVIEW OF THE CANADIAN INTERNATIONAL
TRADE TRIBUNAL ORDER OF OCTOBER 16, 1998

April 3, 2000

Before: D. Michael Kaye, Esq. (Chair)
Prof. Jeffery C. Atik
Jane C. Luxton, Esq.
E. Neil McKelvey, O.C., Q.C.
Prof. David J. Mullan

Hearing: February 8, 2000, Ottawa, Ontario, Canada

APPEARANCES:

The Complainants

Mr. Darrel H. Pearson and Mr. Jeffery D. Jenkins on behalf of Cello Products Inc. and Bow
Metallics Inc.

In Opposition to the Complainants:

Mr. Lawrence L. Herman on behalf of Mueller Industries, Inc. and Streamline Copper & Brass
Ltd.

Mr. Riyaz Dattu on behalf of Nibco Inc.

On Behalf of the Canadian International Trade Tribunal:

Mr. Gerry H. Stobo and Ms. Tamra A. Alexander on behalf of the Canadian International Trade
Tribunal

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I. INTRODUCTION

This Panel was convened pursuant to Article 1904 of the *North American Free Trade Agreement* (“NAFTA”) in response to a Complaint filed with the Canadian Secretariat on December 21, 1998 by Canadian domestic manufacturers Cello Products Inc. (“Cello”) and Bow Metallics Inc. (“Bow”) (the “Complainants”). The Complaint related to an order of the Canadian International Trade Tribunal (the “CITT”) made on October 16, 1998 in Review No. RR-97-008 rescinding its finding of October 18, 1993 in Inquiry No. NQ-93-001 concerning certain solder joint pressure pipe fittings and solder joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, originating in or exported from the United States of America and produced by or on behalf of Elkhart Products Corporation, Elkhart, Indiana, Nibco Inc., Elkhart, Indiana, and Mueller Industries, Inc., Wichita, Kansas, their successors and assigns.

In Inquiry No. NQ-93-001, the CITT had found that dumping in Canada of the subject goods, with some exceptions, had caused, was causing and was likely to cause material injury to the production in Canada of like goods. In its 1998 review of that finding in Review No. RR-97-008 made under subsection 76(2) of the *Special Import Measures Act* (“SIMA”), the CITT found that there was a likelihood of resumed dumping, but that such dumping was not likely to cause material injury to the Canadian industry, and rescinded the finding in Inquiry No. NQ-93-001 by its order of October 16, 1998 made pursuant to subsection 76(4) of SIMA.

In accordance with a prescribed timetable, briefs were filed on behalf of the Complainants, Cello and Bow, and on behalf of Mueller Industries Inc. (“Mueller”) and Streamline Copper & Brass Ltd. (“Streamline”) and on behalf of the CITT. The Complainants filed a reply brief. Counsel for Nibco Inc. (“Nibco”) did not file a brief.

Counsel for the Complainants submitted on appeal that in Review No. RR-97-008, the CITT had committed errors of jurisdiction, failed to follow principles of natural justice and erred in law and fact. They requested that the finding of no likelihood of material injury to the domestic industry be set aside and replaced with a finding of likelihood of material injury, or alternatively, that the matter be remanded to the CITT with directions that it make a finding of likelihood of material injury. They also submitted that Streamline should be excluded from the domestic industry in the CITT’s analysis. Counsel for Mueller, Streamline and the CITT countered that the Panel should uphold the CITT’s decision.

Counsel for the Complainants had argued before the CITT that Streamline, a Canadian manufacturer and affiliate of Mueller, should not be included as part of the Canadian domestic industry. The CITT rejected this submission and, in its order, found that Streamline was part of and should not be excluded from the domestic industry. Counsel for the Complainants submit that the CITT was in error in so doing. Counsel for Mueller, Streamline and the CITT support the CITT’s decision.

The CITT’s Statement of Reasons, in finding that future dumping would not likely cause material injury to the Canadian industry, considered many factors, including market and

competitive conditions, prices and price trends. (See Section IV below). However, it did not quantify the degree to which U.S. producers would be expected to dump subject goods if the existing order were lifted. The Complainants submit that failure to do so constituted reversible error.

Pursuant to the practice of the CITT and guidelines issued by it during Review No. RR-97-008, the parties submitted to other parties a number of requests for information. The CITT, in its notice to the parties of the practice it intended to follow with respect to such requests, reserved the right to disallow requests not considered appropriate. By a letter to the parties dated June 26, 1998, the CITT disallowed some requests for information by Cello to Mueller, Streamline and Nibco. Counsel for the Complainants submitted on application for review that the CITT was in error in disallowing their requests for information. Counsel for Mueller, Streamline and the CITT supported the CITT's decision. Counsel for Nibco made no separate submission but expressed agreement with the submissions of counsel for the CITT.

This Binational Panel was convened to review the CITT's decision. A hearing was held on February 8, 2000 in Ottawa, Ontario, Canada, in the presence of all members of the Panel and counsel for all parties.

The Complainants' brief, after submissions on the standard of review to be applied in reviewing a decision of the CITT pursuant to Article 1904 of the NAFTA, raised two substantive issues and one procedural issue, as follows:

- Issue No. 1** Did the CITT err in finding that Streamline was part of, and should not be excluded from, the domestic industry for purposes of the review inquiry?
- Issue No. 2.** Did the CITT err by failing to establish a quantum of materiality in conducting its causation analysis?
- Issue No. 3:** Did the CITT err in the request for information process by misapprehending the nature of its statutory authority, by pre-judging the relevance of information requested by Cello and Bow, and by restricting the threshold of admissibility to a new clearly of relevance standard?

Complainants submit that the answer to the questions in all three issues should be in the affirmative. Mueller, Streamline and the CITT submit that the answers should be in the negative.

All of these issues were thoroughly addressed at the hearing by counsel for Complainants, Mueller and Streamline and the CITT.

II. STANDARD OF REVIEW

A. Position of Counsel

1. Substantive grounds of review

In both their written and oral submissions, counsel for the Complainants put in issue the standard of review to be applied by this Panel in reviewing the decision of the CITT. They conceded on the two substantive grounds of challenge that the standard of review was one of patent unreasonableness, this currently being the most deferential basis for scrutiny of tribunal and agency decision-making under Canadian judicial review law. However, they also urged that that standard of review required the Panel to probe beneath the reasons provided by the CITT for its decision. It necessitated an assessment of the allegations made in light of an in-depth examination of the contents of the administrative record.

While agreeing with the position of counsel for the complainants on the standard of review to be applied to the substantive issues, counsel for both the respondent companies and the CITT argued that the specific substantive allegations did not require the Panel to probe the administrative record in depth. Rather, both these issues could and should be reviewed simply on the basis of the written reasons provided by the CITT. Counsel for the respondent companies also claimed that, even if the standard was not that of patent unreasonableness, he was nonetheless prepared to argue that the decisions of the CITT on the two substantive issues were neither unreasonable nor even incorrect, these being the other two principal standards of scrutiny under Canadian judicial review law.

2. Procedural grounds of review

In contrast to their position on the substantive grounds of review, counsel for the Complainants contended that the Panel should adjudicate on a correctness basis their assertions of a breach of the rules of natural justice or procedural fairness arising out of the CITT's conduct of the Request for Information ("RFI") or pre-hearing discovery process. This was opposed by counsel for both the respondent companies and the CITT. They argued that, in assessing any complaints over the way in which the CITT had conducted the RFI process, the Panel was obliged to accord the CITT some considerable measure of deference.

B. The Relevant Law

1. General

a. The legislative regime

Article 1904(3) of Chapter 19 of the *North American Free Trade Agreement*, incorporated into Canadian law by the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c.44, provides:

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

Annex 1911 to Chapter 19 of NAFTA goes on to provide that

standard of review means the following standards, as may be amended from time to time by the relevant Party:

- (a) in the case of Canada, the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended, with respect to all final determinations.

Section 18.1(4) of the *Federal Court Act*, R.S.C. 1985 (as amended by S.C. 1990, c.8) specifies that tribunals and agencies coming within the ambit of that Act are subject to review on the following grounds:

- (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 by law to observe;
- (c) erred in law in making a decision or order, whether or not that error of law appeared 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 to the evidence 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.

b. Standard of review

Notwithstanding that the provisions of section 18.1(4) when read literally might suggest that the appropriate standard of review under each of those provisions is a standard of correctness, the Supreme Court of Canada and the Federal Court have almost invariably read the terms of this provision (and its predecessor) as subject to the general Canadian common law principles of judicial review. To the extent that Article 1904(3) of NAFTA requires this Panel to apply the “general legal principles” which a Canadian court would deploy in reviewing a decision of the CITT, we too are required to give effect to those common law principles.

Under those common law principles of judicial review, there is a varying level of intensity in the degree of judicial scrutiny of the determinations of all forms of statutory and

prerogative decision-makers. The appropriate standard for intervention depends on a “pragmatic and functional” approach to the nature of the tribunal and its statutory mandate, and ranges from “correctness” review at one end of the spectrum, through unreasonableness review, to patent unreasonableness review at the other end.

A typical example of this line of precedent is provided by the judgment of the Supreme Court of Canada in *National Corn Growers Association v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, cited and relied upon by the Complainants. In *National Corn Growers*, the Court was concerned with a judicial review application brought under the *Federal Court Act* against a decision of the predecessor of the CITT, the Canadian Import Tribunal made (as here) under the *Special Import Measures Act*, S.C. 1984, c.25. The Supreme Court accepted that, in conducting judicial review of the decisions of an expert tribunal such as the Canadian Import Tribunal determining questions within its jurisdiction and protected by a form of privative clause, it should intervene only in situations where the tribunal had made a patently unreasonable determination on a matter of either law or fact. Only in the domain of rare but truly jurisdiction-limiting provisions would the standard of judicial review be that of correctness. In the course of so doing, the Court (at pp.1369-70) acknowledged explicitly that it was placing a gloss on the “quite broad” grounds of judicial review then provided for in the relevant provision of the *Federal Court Act*.

As already noted, the Complainants do not contest that the two substantive issues in contention in these proceedings are matters within the jurisdiction of the CITT and, therefore, in relation to those issues, the only questions that really need to be asked are, first, whether the standard of judicial review to be applied by the Panel is now in any way different from that accepted by the Supreme Court of Canada in *National Corn Growers*, and, secondly, if there has been no change, what precisely patent unreasonableness review of those two matters involves.

2. Determination of substantive questions

a. The appropriate standard

At the time that *National Corn Growers* was decided, section 76(1) of the SIMA contained a privative clause to the effect that “every order of the Tribunal is final and conclusive.” In rendering the majority judgment in that case, Gonthier J. made specific reference (at p.1370) to the terms of that section in justification of a deferential standard of judicial review:

In this particular case, s.76 of SIMA provides that the CITT’s decision, with certain limited exceptions, is final and conclusive. Given this provision, this Court, therefore, will only interfere with the CITT’s ruling if it acted outside the scope of its mandate by reason of its conclusions being patently unreasonable.

However, that provision was amended effective as of January 1, 1994 and the privative wording removed, so that section 76(1) now reads:

76. (1) Subject to subsection 61(3) and Part I.1 or II, an application for judicial review of

an order or finding of the CITT under this Act may be made to the Federal Court of Appeal on any of the grounds set out in subsection 18.1(4) of the *Federal Court Act*.

Given the context of that change, amendments to the SIMA in the wake of Canada's entry into the NAFTA, questions were inevitably raised as to whether this change had as its objective more intensive judicial and Panel scrutiny of the merits of determinations made in trade disputes by the CITT. While this question has yet to come before the Supreme Court of Canada, the Federal Court of Appeal has for the most part rejected this argument and continued to apply a patent unreasonableness test to the review of determinations of the CITT of matters within its jurisdiction.

In *Canadian Pasta Manufacturers' Association v. Aurora Importing & Distributing Ltd.* (1997), 208 N.R. 329 (F.C.A.), the Court noted (at p.332) that

...the other factors which point towards a need for judicial deference, most particularly the scheme of the statute, the subject matter of the inquiry and the specialized and expert nature of the Tribunal, are still in place.

More recently, in *Canada (Attorney General) v. Symtron Systems Inc.*, [1999] 2 F.C. 514, Linden J.A. accepted that the standard of judicial review of matters within the jurisdiction of the CITT was that of patent unreasonableness. In so doing, he reiterated that the standard of correctness was restricted to situations where the CITT was "making a decision regarding its own jurisdiction."

Subsequently, a majority of the Panel in *Certain Hot-Rolled Carbon Steel Plate Originating in or Exported from Mexico (Decision of Panel on Standard of Review and Demand Order)* (May 19, 1999), CDA-97-1904-02 (NAFTA Ch. 19 Panel) accepted that *Symtron Systems* stated the Canadian law accurately. In doing so, the majority panelists emphasized that, while there is no longer a privative clause, under SIMA such matters still originate by way of an application for judicial review rather than statutory appeal. This was seen as highly significant in the application of a patent unreasonableness rather than an unreasonableness standard.

This judicial response to the removal of the privative clause from section 76(1) of the Act also has the support of the Supreme Court of Canada to the extent that that Court has now accepted that the presence or absence of a privative clause is but one factor among others which under a "pragmatic and functional" approach goes towards determining the appropriate standard of review: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748.

All of this serves to indicate that on issues that are not truly jurisdictional, the standard to be applied to rulings of the CITT remains that of "patent unreasonableness." Indeed, all of this seems to have been accepted by the parties to these proceedings and, in particular, by the concession of the Complainants. We therefore conclude that in terms of the directive contained in Article 1904(3) of Chapter 19 of the NAFTA, we should apply the patent unreasonableness standard of review in assessing the two substantive issues raised by the complaining companies

b. Applying patent unreasonableness

In both their written and oral submissions, counsel for Complainants urged upon the Panel the following statement by Gonthier J. from *National Corn Growers, supra*, at p. 1370:

In some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis.

This raises the question of the extent to which in this instance it was part of the obligation of this Panel to probe beneath the reasons of the CITT and, in particular, examine the allegations of patent unreasonableness made by the complaining companies in light of the administrative record compiled by the CITT.

After careful reflection, it is our view that the particular grounds of review that the Complainants were urging upon us were not ones that required an in-depth analysis of the record. In general, we were guided in reaching this conclusion by the following statement by Evans J.A. in *Stelco Inc. v. British Steel Canada Inc.*, January 25, 2000, A-365-98 (F.C.A.) [unreported] (at para. 18):

[T]he facts in dispute in this case are manifestly within the expertise of the CITT, and unless the Court exercises a very high degree of restraint and resists the domestic producers' invitation to subject the findings to close scrutiny through the record, it runs the risk of second guessing the conclusions reached by the specialized Tribunal.

More particularly, however, at no point did the Complainants seek to rely upon arguments that the CITT's findings of primary fact or inferences from those primary facts lacked support in the administrative record. Rather, their complaints were ones that involved primarily allegations of gaps and inconsistencies within the reasons of the CITT, as well as errors of law and principle in the crafting of those reasons, including the drawing of inferences that were not justified by the facts as found. As a consequence, we have confined our review of the CITT's decision to an evaluation within the patent unreasonableness standard of the reasons provided by the CITT. We have not gone beyond those reasons to the administrative record itself.

Once again, however, in relation to aspects of that review of the reasons provided by the CITT, we have been aided by the judgment of the Federal Court of Appeal in *Stelco Inc. v. British Steel Canada Inc.*, *supra* (at paras. 25-26):

Given the discretionary nature of the Tribunal's decision-making power under subsection 76(4), it is impossible in the abstract to say that any one of the factors typically considered by the Tribunal in these cases is so intrinsically important that it must always be dealt with in the Tribunal's reasons, whenever it is put in issue by the parties. It is for the Tribunal to determine the significance of any given factor in light of its conclusions on other factors.

The burden is on the applicant to demonstrate that any factor on which the Tribunal did not make a reasoned finding was, on the facts of the case, of such manifest importance that the Tribunal was bound in law to deal with it expressly in its reasons for decision. . .

c. Breach of the rules of natural justice and procedural unfairness in the conduct of the RFI process

As submitted by counsel for the Complainants, the general position of the Canadian courts has been that the searching standard of correctness is the appropriate one to be applied to allegations of the rules of natural justice or procedural unfairness. Tr. at 13. However, in certain contexts, the courts have conceded considerable autonomy to tribunals and agencies in the making of procedural rulings or determinations. Very recently, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, L'Heureux-Dubé J., speaking for the Court, described (at para. 27) the circumstances under which such a deferential approach should be taken to the procedural rules and rulings of an agency or tribunal:

[T]he analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedures made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: *Brown and Evans [Judicial Review of Administrative Action in Canada (loose-leaf)]*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA. v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, *per* Gonthier J.

In this instance, the particular procedural concern of the Complainants is alleged deficiencies in the rules that the CITT has developed and imposed in this case relating to pre-hearing discovery of material in the possession of the parties opposed in interest. On this particular issue of pre-hearing discovery, the judgment of MacGuigan J.A. for the Federal Court of Appeal in *CIBA-Geigy Ltd. v. Canada (Patented Medicine Prices Review Board)* (1994), 170 N.R. 360 (F.C.A.), while not directly on point, nonetheless, is very instructive. This case involved an attempt in the context of a price-gouging proceeding before the Board to secure discovery of documents in the possession of the Board itself. Speaking for the Court, MacGuigan J.A. (at para. 5) quoted at length from the judgment of McKeown J. at first instance: [1994] 3 F.C. 425 at pp. 445-46. The following extracts are the most salient for present purposes:

The Board has made a decision refusing disclosure of the documents requested and I should give such a decision curial deference unless fairness or natural justice requires otherwise. Disclosure cannot be decided in the abstract. The Board is supposed to proceed efficiently and to protect the interest of the public. This requires, *inter alia*, that a hearing shall not be unduly prolonged. Certainly, the subject of the excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its

regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand.....Law and policy require that some leeway be given an administrative tribunal with economic regulatory functions....It is not intended that proceedings before these tribunals be as adversarial as proceedings before a court. To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint. Fairness is always a matter of balancing diverse interests.

While we are concerned here with an attempt to secure discovery of material in the possession of parties rather than material in the possession of the tribunal or agency, the considerations referred to by McKeown J. (and specifically endorsed by the Federal Court of Appeal) clearly have relevance. Section 17 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c.47 (4th Supp.) designates the CITT as a court of record with all the powers of a superior court with respect to the “production and inspection of documents.” Section 35 of that Act then goes on to specify that

[h]earings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit.

Both these provisions speak to the existence of considerable discretion and latitude on the part of the Board in the crafting of procedures to reflect the imperatives of the particular regulated domains over which the CITT has substantive jurisdiction or authority. Indeed, this would seem to be particularly so in the case of pre-hearing procedures such as discovery of material in the possession of parties.

As held by the Federal Court of Appeal in *CIBA-Geigy, supra*, tribunals involved in economic regulation may not be engaged in the kind of administrative process that is sufficiently akin to criminal proceedings to attract the application of the principles enunciated by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, under which, in a criminal case, the Crown has a legal duty to make total disclosure to the defense. However, even in the event that the common law of procedural fairness dictates that the parties are entitled to a form of discovery (as in *Ontario (Ontario Human Rights Commission) v. Ontario (Board of Inquiry into Northwestern General Hospital)* [1993], 115 D.L.R. (4th) 279 (Ont. Div. Ct.)), the precise details of that process are matters over which the tribunal or agency is entitled to a measure of deference or respect from the Panel. This is particularly so here where the Act in section 35 places a value on informality and expedition in the processes of the CITT and where the CITT has responded to that legislative imperative by working diligently towards a discovery process which will meet those ends while at the same time providing a basis for the orderly exchange of information prior to the hearing.

While the *Canadian International Trade Tribunal Rules*, SOR/DOR/91-499 (as amended), promulgated under section 39(1) of the *Canadian International Trade Tribunal Act*, make no explicit provision for true discovery, from November 1996 onwards, the CITT has utilized a request for information (RFI) process in order “to facilitate the inquiry by enhancing the timely exchange of information among participants prior to the hearing” (Memo to Counsel

and Parties of Record, June 3, 1998). This process was incorporated in guidelines, guidelines which the CITT has kept under review and modified to make the process more efficient and effective. In this instance, the parties were informed that the most recent modification of the guidelines would be applied.

All these factors are strongly suggestive of a particular aspect of the inquiry or hearing process over which the Panel should accord considerable deference to the CITT. In its determination of what should be both the general parameters and the actual details of the RFI procedures, the CITT's choices are entitled to "important weight."

In fact, L'Heureux-Dubé J. in *Baker, supra*, does not explicitly locate her specification of the need for deference to procedural choices within the framework of the spectrum of standards of review identified by the Supreme Court as applying to substantive determinations. Rather, it is simply proffered as one of a number of factors that a reviewing court must take into account in determining whether or not a tribunal or agency has met the requirements of procedural fairness or natural justice required by the common law. Nonetheless, to the extent that the procedural choices in issue here are ones that the legislature has implicitly placed within the discretionary authority of the CITT, there is sound reason for assimilating the CITT's choice of discovery process within the general realm of discretionary powers. To this extent, the balance of L'Heureux-Dubé J.'s judgment in *Baker* assumes direct relevance. There, she goes on to make it clear that review of the exercise of discretionary powers should now be treated as being subject to the "pragmatic and functional" analysis that dictates which of the three standards of review is appropriate.

Indeed, the critical factors in that "pragmatic and functional" analysis are ones that we have already identified in bringing this exercise of procedural discretion within the general parameters of the kinds of procedural decisions or choices to which L'Heureux-Dubé J. referred explicitly in *Baker*. At the very least, these factors indicate that the Panel should not intervene with the CITT's choice of and application of its discovery procedures unless its choices or actions in the particular case were unreasonable.

However, to the extent that the discovery guidelines are still obviously in the course of ongoing modification and evolution and to the extent that they have not yet been incorporated in the formal Rules of the CITT, action that requires consultation with the Minister and approval of the Governor in Council, we have determined that the appropriate standard for intervention or review of either the procedures or their application in a particular instance is not that of patent unreasonableness.

III. FAILURE TO EXCLUDE STREAMLINE FROM THE DOMESTIC INDUSTRY

A. The CITT's Discretion In Determining The Domestic Industry

The Complainants challenge the CITT's decision to include Streamline, a subsidiary of Mueller, within the domestic industry for purposes of its Section 76(2) review. The Complainants argue that the CITT's failure to exclude Streamline constitutes an abuse of the

discretion provided by Section 2(1) of SIMA (defining domestic industry).

SIMA grants substantial discretion to the CITT to include or exclude a domestic producer that is related to an exporter or importer of dumped goods from the domestic industry. Section 2(1) defines “domestic industry” as:

[T]he domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped . . . goods, “domestic industry” *may* be interpreted as meaning the rest of those domestic producers. [emphasis added]

In order to exclude a producer from the domestic industry, the CITT first must find that a particular Canadian producer is *related* to an exporter or importer of dumped goods.

Section 2(1.2) provides:

For the purposes of the definition “domestic industry” in [Section 2(1)], a domestic producer is related to an exporter or importer of dumped . . . goods where

- (a) the producer either directly or indirectly controls, or is controlled by, the exporter or importer,
- (b) the producer and the exporter or importer, as the case may be, are directly or indirectly controlled by a third person, or
- (c) the producer and the exporter or the importer, as the case may be, directly or indirectly control a third person,

and there are grounds to believe that the producer behaves differently towards the exporter or importer than does a non-related producer.

Taken together, sections 2(1) and 2(1.2) operate to grant the CITT considerable discretion to include or exclude a domestic producer based on its relationship with an exporter or importer of dumped goods. Only the final clause of section 2(1.2), which imposes a requirement that there be “grounds to believe that a related producer behaves differently” in order for a domestic producer to be deemed to be related for purposes of the “domestic industry” definition, limits this discretion.

The CITT did conclude that Streamline was related to Mueller, applying section 2(1.2). Statement of Reasons (“SOR”) at 16. The CITT, in exercising its discretion, could have applied Section 2.1 to exclude Streamline from the domestic industry. The Complainants argue that the CITT’s failure to exclude Streamline amounts to an abuse of its discretion.

B. Abuse Of Discretion

In arguing abuse of discretion, the Complainants assert that the CITT failed to properly consider (a) the goals of SIMA and (b) the control of Streamline by Mueller in making its determination. Further, the Complainants contend that the CITT failed to consider (c) the effect of Streamline's opposition to continuing the finding and the alleged resultant use of SIMA as a "sword against other Canadian producers." These failures, argue the Complainants, constitute legal error. In effect, the Complainants are asserting that consideration of these various arguments is mandatory.

SIMA does not, however, mandate the consideration of any particular factor. Rather, as discussed above, the CITT enjoys a broad grant of discretion under the statute. This discretion operates, when coupled with the deferential patent unreasonableness standard of review appropriate to these proceedings, to make it extremely difficult to displace the CITT's decision not to exclude Streamline. Moreover, a reading of the Statement of Reasons satisfies us that the CITT more than adequately considered the factors cited by the Complainants.

1. Goals of SIMA

The Complainants first urge consideration of the goals of SIMA as a necessary element in the proper exercise of discretion and then assert that the dominant goal of SIMA is the protection of Canadian producers. The chief goal of SIMA, according to the Complainants, is the protection of domestic producers from unfairly traded imports. Complainants' Brief at 28. While SIMA does appropriately protect Canadian producers from unfairly traded imports, it also operates to advance the interest of Canadian consumers of dumped goods by limiting antidumping orders to cases where there is injury to a domestic industry. SIMA also incorporates into domestic law the elaborate bargains made by Canada in a variety of international trade agreements and thus protects the interests of exporters and importers of foreign goods as well.

Even if the protection of domestic producers is the primary goal of SIMA, it does not follow that Streamline, a Canadian producer, is not within the statute's protection. The Complainants' argument would convert the determination to exclude a related producer from the domestic industry from a matter of discretion into a mandated result. This is inconsistent with the nature of the statutory design.

2. Control by Mueller

The CITT acknowledges that Mueller controls Streamline. The Complainants assert that the finding of such control should have compelled the CITT to exclude Streamline from the domestic industry. Here again the Complainants' argument seems to deny the existence of discretion.

Section 2(1.2) does compel the CITT to consider the control exercised between an exporter or importer and a related producer but by its own terms it does not mandate exclusion.

Indeed, were the CITT to conclude in a particular case that no grounds existed “to believe that the producer behaves differently towards the exporter or importer than does a non-related producer,” it could not find that the producer and the exporter or importer were related for purposes of section 2(1). In this instance the CITT would have no clear authority to exclude that particular producer from the domestic industry. To the extent that SIMA has any mandatory provisions with respect to domestic industry, it seems to mandate, in a particular circumstance, that the CITT *include* a producer.

The Complainants seem to confound the control that triggers the “related” test of section 2(1.2) of SIMA with operational control. Operational control may be independently exercised by a related firm and, where present, may be appropriately considered by the CITT in exercising its discretion not to exclude that firm from the domestic industry. The CITT finds that “Streamline manages its day-to-day operations in a manner which is independent of Mueller . . .” SOR at 16. The CITT also finds that “[Streamline’s] sales in Canada over the period of review were predominantly from domestic production.” SOR at 16. The CITT further notes that it is satisfied that this strategy for serving the Canadian market from Streamline’s domestic production will not change in the near or medium term. These factors support Streamline’s inclusion in the domestic industry notwithstanding its relationship to Mueller.

The CITT thus determines (1) that Mueller controls Streamline so as to satisfy section 2(1.2)(a) of SIMA and (2) that Streamline exercises sufficient independent “day-to-day” operational control to justify its inclusion in the domestic industry. These two findings are not inconsistent.

It is clear that the CITT did consider the existence and the effect of the control of Streamline by Mueller in exercising its discretion to include Streamline within the domestic industry. The Statement of Reasons contains a discussion of the analysis the CITT undertook in evaluating the effects of the control by Mueller of Streamline. The Complainants cannot maintain that the element of control was not appraised by the CITT.

3. Effect of Streamline’s opposition

The Complainants assert that the CITT was obliged to exclude Streamline from the domestic industry as Streamline, in contrast with the Complainants, supported rescission of the finding. It is hard to see the relevance of the litigation posture of any particular producer, related or non-related, to its inclusion or exclusion in the domestic industry evaluated by the CITT in its section 76(2) review. The Complainants have not been prevented from arguing their support for continuation of the finding through the inclusion of Streamline within the domestic industry. Had the CITT excluded Streamline from the domestic industry, Streamline’s views on rescission of the finding would have been asserted with equal effect through its parent Mueller. There is simply no relationship between the determination to include Streamline in the domestic industry and the ability of any party to advocate its respective position in this case.

C. Adequacy of the Statement of Reasons

The SOR sets out in considerable detail the analysis performed by the CITT in exercising its discretion not to exclude Streamline from the domestic industry. While the standard of review may not compel us to examine the reasonableness of the CITT's Statement beyond determining the absence of facial error, we note the SOR's completeness and coherence in accounting for the CITT's domestic industry determination. Complainants have not identified any inconsistency between the consideration described in the Statement of Reasons and the underlying record.

D. No Abuse of Discretion

SIMA grants broad discretion to the CITT to include or exclude a related producer from the domestic industry examined in a section 76(2) determination. SIMA does not mandate particular factors that the CITT must consider in making its determination. As such, the CITT enjoys discretion both as to identifying the relevant considerations and in its overall determination. We have not identified any abuse of this discretion under the patent unreasonableness standard of review. The broad discretion vested in the CITT, coupled with the deference appropriate to this standard of review, lead this Panel to find no error in the CITT's decision not to exclude Streamline from the domestic industry.

IV. CAUSATION

Complainants argue that the CITT's causation analysis failed to meet the requirements of SIMA section 76(4), which states that "on completion of a review . . . of an order or finding, the Tribunal shall make an order rescinding the order or finding or continuing it with or without amendment, as the circumstances require, *and give reasons for the decision*" (emphasis added). According to Complainants, the CITT's SOR failed to "give reasons" for its decision that dumping (which the CITT found likely to occur) would not cause material injury to the domestic industry. Specifically, Complainants argue that the CITT's failure to quantify the degree to which U.S. producers will dump subject goods in the future necessitates a finding by this Panel that the CITT's SOR was inadequate. However, as discussed below, neither the statute nor the regulations require the CITT to calculate dumping margins in order to conduct its causation analysis. Indeed, in this case, the CITT cited to specific reasons in its SOR for determining that dumping by the U.S. producers would be unlikely to cause material injury to the domestic industry. Therefore, given the deference afforded to the CITT in matters related to causation, this Panel upholds the CITT's determination.

A. CITT's Causation Analysis

Pursuant to sections 76(2) and 76(4) of SIMA, the CITT may review and rescind an order previously issued by the CITT as long as it gives reasons for its decision. Most notably, the statute does not provide the CITT with any guidance concerning how to conduct a section 76(2) review. As a result, the CITT's practice has been to conduct these reviews by first determining whether there is a likelihood of resumed dumping, and if so, whether such dumping will be likely

to cause material injury to the domestic industry. Only two requirements are placed upon the CITT: (1) the final determination must not be patently unreasonable; and (2) the CITT must “provide adequate reasons” to explain its final determination. *See, Stelco Inc. v. Attorney General of Canada*, Docket No. A-365-98, Federal Court of Appeal at 9 (unreported).

In its October 16 SOR, the CITT found that the likelihood of resumed dumping would not cause material injury to the domestic industry. SOR at 17-22. In making this determination, the CITT focused on a range of factors, including the change in market conditions since the original injury determination, the likely volume and price of dumped imports and the recent and likely future performance of the domestic industry. Specifically, the CITT made the following findings:

- Since 1995, domestic market conditions have stabilized and the health of the domestic industry has improved substantially;
- U.S. imports have declined dramatically with a concomitant rise in market share held by Canadian producers;
- Between 1995 and 1997, domestic market volumes increased 24 percent while sales from domestic production increased by 30 percent;
- Sales from domestic production have been consistently made at prices significantly lower than sales made from U.S. imports;
- U.S. imports have been generally sold at undumped prices;
- U.S. imports are typically higher-priced, lower-volume items that tend to fill out domestic producers’ product lines rather than compete directly with domestic production;
- Trends suggest that as domestic producers expand their product range they rely less on imports to fill out their product lines;
- Any dumping by the three named exporters is likely to be limited to a small volume of products, will be intermittent, and will not be likely to significantly disrupt the Canadian market; and,
- Other factors, such as intense price competition among domestic producers, rather than any dumping by U.S. producers, are likely to be the major contributing factors affecting the industry’s performance in the near future.

According to the CITT, Streamline and Mueller, these findings are not patently unreasonable and the SOR satisfies section 76(4) by providing an adequate explanation linking these findings to its conclusion that any dumping by the U.S. industry will not cause material injury to the domestic industry.

B. Quantification of Dumping

Complainants do not dispute that evidence on the record supports the CITT's findings. *See* Tr. at 94. Rather, they argue that the CITT's SOR is inadequate (and therefore its reasoning is patently unreasonable) because it fails to include a quantification of the likely dumping margin that would exist absent an order. However, Complainants fail to identify any existing legal authority to support the assertion that the CITT must quantify dumping in order to conduct its causation analysis. Complainants cite to *Moldex Ltd. v. Beneke Industries Ltd.* (1984), 7 C.E.R. 323 (F.C.A.) to support the conclusion that the CITT must quantify dumping. *See* Tr. at 77. However, that case has no bearing on the issue at bar. In *Moldex*, complainants argued that injury is "material" if it in any way affects the operation of the domestic producers. *See Moldex* at 324. The court disagreed, stating that such a definition of "materiality" has no merit. *Id.* That conclusion provides no support for the belief that the CITT *must* quantify dumping when conducting a causation analysis.

On the contrary, other courts and panels have held that "there is no single administrative standard against which to judge the tribunal's analysis of causality." *Certain Concrete Panels* at 12. *See also Sacilor Acieries, et al. v. Anti-Dumping Tribunal, et al.* (1985), 9 C.E.R. 210 (F.C.A.) at 214. It is clear that the CITT has the discretion to conduct a causation analysis in any manner, as long as that analysis is not patently unreasonable and it is adequately explained in the SOR. In this case, the CITT's analysis is supported by the record (as Complainants concede) and the CITT "explain[ed] its conclusion on those issues that are of central importance" to its decision, as indicated above. *See Stelco* at 10 (holding that section 76(4) requires the CITT to provide adequate reasons for its decisions and does not have to address every issue raised before it). Therefore, this Panel rejects Complainants' assertion that satisfaction of section 76(4) requires the CITT to quantify dumping margins.

C. Contradictory Statements

Complainants also contend that the CITT failed to satisfy section 76(4) because of some allegedly contradictory comments in the SOR. Specifically, on page 15 of the SOR, the CITT states that "certain items *would inevitably be dumped*," while on page 21 the CITT states that "such dumping, *if it does occur*, will be intermittent and not at volumes and prices which would disrupt the domestic market." (emphasis added) Complainants assert that these statements are inherently contradictory and therefore this Panel should remand the CITT's determination in order to seek further clarification.

However, this Panel does not agree with Complainants' assertions. First, put into context, these statements are reasonably consistent. The first statement refers to the inevitability that some fittings (whether wrought or cast) will inevitably be dumped in Canada. The second statement refers to the possibility that cast fittings alone may be dumped in Canada. These two statements are not necessarily inconsistent, given that only wrought (and not cast) fittings may *inevitably* be dumped. Second, even if these statements were inconsistent, this is not the kind of patent error that justified a remand in *Canadian Pasta Manufacturers' Assn. v. Aurora Importing*

& Distributing Ltd, (1997) 208 N.R. 329 (F.C.A.), relied upon by Complainants in this case. Therefore, this Panel rejects Complainants' assertion that the determination should be remanded.

V. THE RFI PROCESS

A. Background

Complainants have raised three challenges to the CITT's actions in the Request for Information (RFI) process. As discussed in Section II.B.2.c, above, the CITT's administration of the discovery process is within its discretionary powers and the appropriate standard of review for these issues is unreasonableness. Before turning to the specific arguments raised by Complainants, however, it is useful to set forth the relevant facts and events that frame these issues.

- On March 20, 1998, the CITT issued its Notice of Review. A schedule was provided of the major steps and dates in the review process.
- On June 3, the CITT sent by facsimile transmission a memorandum to all counsel and parties of record alerting them to the procedures that would apply to the RFI process in this proceeding. The memorandum noted that, as in two recent cases, a revised procedure would be used, incorporating a single question and response period, rather than two as had been previous practice, and that any questions that could not reasonably have been asked during the single RFI process could be raised at the public hearing, which was scheduled for August 18, 1998.
- On June 4, the CITT sent by facsimile transmission revised guidelines for RFIs. Key dates in the process were set forth. The third paragraph of the notice conveyed the following points:
 - “[I]n some recent inquiries and reviews the number of requests for information directed to other parties has been needlessly cumbersome and, in many instances, the information requested has been of little or no relevance to the issues being considered by the Tribunal.”
 - “As a result, the Tribunal has disallowed, in whole or in part, certain requests for information,” citing as examples requests relating to:
 - an unduly long period of time,
 - non-subject goods,
 - facts or activities within the direct knowledge of that party,
 - information available from public sources,
 - large volumes of supporting information for data provided in response to Tribunal questionnaires, and

- documentation relating to business plans not yet approved by senior management of a firm.

The notice went on to explain that the CITT expected parties to limit the extent to which RFIs were excessive or irrelevant and that “where the relevance or usefulness of the information requested may not be readily apparent, it would be helpful if parties requesting information included the rationale for requesting it and the relevance of the information requested.” The notice added that “this will assist the Tribunal when it considers, either on its own initiative or in response to an objection, the appropriateness of requests for information in deciding whether to require a party to respond.”

- On June 9, the CITT dismissed a motion to disqualify a non-lawyer from acting as counsel of record for one of the parties to the review, noting that:

As an administrative agency, the Tribunal conducts less formal proceedings than do courts. The Tribunal is of the view that, given the quasi-judicial nature of its proceedings and the resulting duty to act fairly, there is an implication that parties are entitled to be represented by counsel, [citation omitted] as is contemplated by the CITT Act, and to be represented by counsel of choice. The Tribunal regularly permits parties to be represented by persons other than lawyers, such as trade consultants, economists and accountants. The Tribunal is not persuaded by the submissions of counsel for Cello that a change in the Tribunal’s practice is warranted in this review. Moreover, to require that Professor Mathewson have certain experience as counsel or an advocate before the Tribunal or other courts in order to be allowed to appear as counsel for Amcast and Elkhart in this review, as suggested by counsel for Cello, would, in the Tribunal’s view, be reading a new requirement into the definition of “counsel” in subsection 45(4) of the *CITT Act*.

- On June 15, counsel for Complainants transmitted RFIs to Nibco and Streamline and Mueller. The requests, along with the subsequent objections, rulings, and status on appeal, are set forth in Table 1 of the Appendix. Several requests called for information relating to non-subject goods, one of the subjects specifically highlighted in the CITT’s June 4 notice as likely to be disallowed as cumbersome and of little or no relevance. Complainants’ requests did not provide any rationale or explanation of relevance for these requests or any other.
- On June 18, counsel for Nibco filed objections, as shown in Tables 1A and B of the Appendix.
- On June 19, counsel for Complainants requested a delay until June 25 to respond to Nibco’s objections.

- On June 22, counsel for Streamline and Mueller filed objections to Complainants’ RFIs, as shown in Table 1C of the Appendix.
- Also on June 22, counsel for Nibco objected to Complainants’ request for an opportunity and delay until June 25 to respond to objections and extension request, arguing the CITT’s June 4 memorandum encouraged the parties to explain the relevance and rationale for RFIs at the outset and that Complainants chose not to take this opportunity. Further, counsel for Nibco cited precedent in the *Cold Rolled Steel Sheet* (Review No. RR-97-007) case, in which the CITT refused to accept post-facto explanatory submissions.
- On June 22 and June 23 (two submissions), counsel for Complainants responded to Nibco’s June 22 letter, arguing that fairness and natural justice considerations supported the Complainants’ right to respond to objections, further stating that the relevance and usefulness of the RFIs was “readily apparent and self-explanatory,” acknowledging that one of Complainants’ counsel had “played a very limited role in the *Cold Rolled Steel Sheet*” review, but saying that Complainants’ counsel were not aware of the Tribunal’s position in that case, and objecting to the late filing of Streamline’s objections, as well as the cursory nature of Nibco’s objections. The second June 23 submission, a 19-page justification of Complainants’ RFIs, was rejected by the CITT as a response to objections and is not in the record.
- On June 25, counsel for Streamline filed a response to Complainants’ June 22 letter, arguing that the CITT’s directions of June 4 were clear, reminding the CITT that the reasons for these rules were common-sense limits and fairness to all parties, and that the issues of relevance and burden in the RFIs were “straightforward” and should be decided by the CITT.
- On June 26, the CITT issued its ruling on the RFIs. In relevant part, the CITT:
 - Considered the arguments and points raised in Complainants’ letters of June 19, 22, and 23 requesting an opportunity to reply to objections and challenging the objections as cursory.
 - Refused to consider any of the late-filed Streamline/Mueller objections except to the extent they were similar to those raised by Nibco’s timely-filed objections.
 - Returned the second June 23 letter from counsel for Bow, which was characterized as a response to objections.
 - Reminded the parties that RFIs “at this stage in the review must of necessity be limited to matters which are clearly of relevance to those at issue in this review. The Tribunal’s request for information process differs from a more wide-ranging and protracted interrogatory or discovery process counsel would typically experience in a civil action before the courts. The Tribunal has a

clear sense of which of the requests and responses it considers are necessary for a full and proper consideration of the issues in this review.”

- Pointed out that “if a party feels that, notwithstanding the Tribunal’s decisions, there is a compelling matter which needs to be considered, it may notify the concerned party in advance of the hearing of its intention to raise that matter in accordance with the procedures issued to the parties on June 4, 1998.”
- On July 3, the CITT returned Complainants’ letters of June 22, 23, and 25, which had sought to respond to objections filed by Nibco and Streamline/Mueller.
- On July 10, the CITT noted that it would distribute to the parties on July 15 the responses to the RFIs and reminded parties of their opportunity to serve notices of “matters which have arisen” following the filing of the parties’ cases and reply submissions.
- On July 13, counsel for Complainants sent notice to counsel for Nibco to be prepared to address and bring documentation to the hearing on a list of issues that appear to cover the same ground as the RFI that were not allowed. A comparison of RFI subjects to Notice of Matters Arising (NMA) requests appears in Table 2 of the Appendix.
- On July 14, counsel for Streamline objected to Complainants’ 15-item NMA request for documentation which Streamline described as “a supplementary RFI procedure” that specifically sought information on matters the CITT had ruled not relevant during the RFI process, and asked the CITT to strike the request, in order to avoid unnecessary burden and cost.
- On July 16, counsel for Nibco provided a table comparing Complainants’ RFIs and July 13 NMA information requests, objecting to the submission of NMAs for all items for which RFIs were previously denied by the CITT.
- Also on July 16, counsel for Complainants responded to Streamline’s objections, citing the CITT’s June 4 memorandum for the proposition that in providing for NMAs, “the Tribunal gave parties an opportunity to make requests for information following a review of the evidence filed by all parties.” Complainants’ letter also quoted the CITT’s June 26 notice and summarized the key passage as signifying “thus, the Tribunal not only envisioned that Notices of Matters Arising would deal with the parties’ cases and the manufacturer’s reply submission but would also deal with compelling matters which need to be considered and in respect of which the Tribunal chose not to require responses to requests for information.” In addition, counsel for Complainants provided a rationale for each of the disputed NMA information requests.

- On July 21, counsel for Complainants replied to objections filed by counsel for Nibco, reiterating points made in the July 16 letter to Streamline and providing an explanation of relevance and need for the items requested, including those previously denied in the RFI process.
- On July 31, the CITT issued a ruling, noting that in doing so it must balance (i) relevance, (ii) burden, (iii) the specificity of the information requested, and (iv) the sufficiency of the information already on the record. In light of the information already on the record, the CITT stated it had a “clear sense of which of the matters identified in the notices of matters arising are necessary for a full and proper review of this nature.” Of the matters that related to RFIs ruled not relevant in the CITT’s June 26 letter, the July 31 ruling granted the request for two of the three categories, including all of the previously denied inquiries into non-subject matter goods. The request for the sales agreement and any service agreements with Mr. Sargeant -- which counsel for Nibco had previously said did not exist -- was denied as not relevant.

B. The Nature of the CITT’s Statutory Authority

Complainants’ first claim of error with respect to the RFI process is based on statements drawn from the CITT’s June 26, 1998, ruling denying three of Complainants’ RFIs on relevance grounds and the June 9 ruling on whether a non-lawyer could represent a party in the review. Specifically, Complainants point to the following excerpt from the CITT’s June 26 letter:

Given the tight overall time frames for the conduct of this review under the *Special Import Measures Act*, the Tribunal wishes to remind parties that the process of directing requests for information to other parties at this stage of the review must of necessity be limited to matters which are clearly of relevance to those at issue in this review. The Tribunal’s request for information process differs from a more wide-ranging and protracted interrogatory or discovery process counsel would typically experience in a civil action before the courts. The Tribunal has a clear sense of which of the requests and responses it considers are necessary for a full and proper consideration of the issues in this review.

Complainants take issue with the CITT’s characterization of its process as “less than ‘wide-ranging’” and its emphasis on “tight time frames.” To these points Complainants add the CITT’s statements in the June 9 letter that “as an administrative agency, the CITT conducts less formal proceedings than do courts” and its reference to the “quasi-judicial nature of its proceedings.” Taking these quotations together, Complainants argue the CITT has misapprehended its jurisdiction and statutory authority “to fully consider and admit relevant evidence.” (Complainants’ Brief at 39, 41).

After spending substantial time both at the February 8 hearing and in reviewing the

record with respect to Complainants' arguments on this point, the Panel is not persuaded that the CITT unreasonably construed the scope of its authority. As previously noted, the CITT may exercise "all such powers, rights and privileges as are vested in a superior court of record." *CITT Act* § 17. Section 35 of the *CITT Act* directs the CITT to conduct its proceedings "as informally and expeditiously as the circumstances and considerations of fairness permit."

It is plain from section 35 that the CITT has been granted authority to wield its "powers, rights and privileges" in a manner that is somewhat more informal and expeditious than would be the case in proceedings before a court, so long as "the circumstances and considerations of fairness" remain paramount. As discussed in Section II.B.1.c. above, the Federal Court of Canada has acknowledged these differences in procedure in proceedings before tribunals and has emphasized both the importance of fairness and the fact that fairness requires balancing of the parties' sometimes divergent interests. *CIBA-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*, [1994] 3 F.C. 425 at para. 32.

The passages Complainants object to from the June 9 and 26 rulings, when read in their entirety, are not to the contrary. The observation that the CITT, "as an administrative agency, conducts less formal proceedings than do courts" is nothing more than a restatement of section 35 of the CITT Act. The full sentence in the June 9 ruling in which the CITT referred to its "quasi-judicial nature" makes clear that that foundation is the source of the CITT's "resulting duty to act fairly" and its decision to allow a party its counsel of choice, rather than suggesting the CITT has some lesser authority or license to give short shrift to the parties' rights. Similarly, the statements culled from the June 26 ruling characterizing the RFI process as "differ[ing] from a more wide-ranging and protracted interrogatory or discovery process [that] counsel would typically experience in a civil action before the courts" and recognizing the "tight time frames for the conduct of this review," are part of an overall discussion by the CITT of the need for a "full and proper consideration of the issues in this review." Accordingly, upon closer examination of the objected-to phrases, the Panel does not agree that the CITT misapprehended the nature of its authority.

Complainants, however, appear to be arguing something more. Citing the Federal Court of Appeal's decision in *Magnasonic Canada Limited v. Anti-dumping Tribunal*, [1972] F.C. 1239 (C.A.) at 1246-49, Complainants suggest that the CITT compromised its "duty to fully consider and admit relevant evidence" because of its over-emphasis of the "less than 'wide ranging'" scope of discovery and "'tight time frames'" of the review proceeding. Complainants' Brief at 41. They contend that the CITT improperly allowed these considerations to limit the scope of certain RFIs sought by Complainants. But Complainants acknowledge that the CITT has the right to limit discovery and admissibility of evidence to what it judges to be relevant (Complainants' Brief at 41; Tr. at 133), and it is incontrovertible that the statutory scheme imposes fairly stringent time limits on reviews.

Faced with the need to accommodate competing considerations of fairness to all the parties and statutory time constraints, the CITT's June 3 and 4 letters took, in the Panel's view, an appropriate and sensible approach. The letters (1) put the parties on notice that in this proceeding, as in other recent cases, a single RFI round would be permitted, (2) explained that

questions that could not reasonably have been asked during this single round could be addressed at the hearing, (3) alerted the parties to particular subjects that would likely be disallowed as irrelevant or needlessly burdensome, and (4) stated that “where the relevance or usefulness of the information requested may not be readily apparent, it would be helpful if parties requesting information included the rationale for requesting and the relevance of the information requested. This will assist the CITT when it considers, on its own initiative or in response to an objection, the appropriateness of requests for information in deciding whether to require a party to respond.” The June 4 letter provided an illustrative list of requests that had been disallowed, including “non-subject goods.” Complainants were thus on notice that their RFIs for non-subject goods were likely to be rejected and that there would be no provision for a round of responses to objections to RFIs. In spite of these clear warnings, they chose not to provide a rationale for the relevance of such RFIs in this case.

The question on review is whether the CITT acted unreasonably in denying Complainants’ RFI requests in these circumstances. In the Panel’s view, the CITT’s decision on this issue required it to weigh considerations of fairness to all the parties -- including Complainants’ desire for this information, their failure to justify the need for it after having been told it would likely be disallowed, and the burden on other parties who would have to respond if these RFIs were permitted. This process called upon the CITT to apply expertise, and as discussed previously, the CITT’s exercise of discretion will only be overturned if it was unreasonable. For several reasons, it was not.

First, Complainants were given the opportunity to provide a rationale for their RFIs and fair notice that the subject matter of those at issue here was controversial and had previously been disallowed. Their argument at the hearing, that the CITT’s June 4 letter used “an unfortunate choice of words” by saying “it would be helpful where usefulness may not be readily apparent” (Tr. at 98) and that this somehow placed Complainants in the impossible situation of having to decide whether it would be necessary to explain the relevance of their RFIs or not, strains credulity when Complainants had explicitly been told that requests concerning non-subject good were likely to be rejected.

Second, Complainants had other opportunities to seek the information they wanted. The June 26 letter straightforwardly advised the parties that if they disagreed with the CITT’s decisions and felt a matter needed to be addressed, they could raise it during the NMA process. Complainants availed themselves of this opportunity, filing NMA requests for information on July 13 that closely tracked the RFIs that had been denied June 26. Indeed, counsel for Streamline and Nibco strenuously objected in letters filed July 14 and 16, describing Complainants’ NMA requests as “another kick at the can” and providing a table of side-by-side comparisons to show that Complainants were using the NMA process as “an invitation to pose again (*albeit*, with different words) the same questions that were extensively considered by the Tribunal and ruled [irrelevant] by way of its letter of June 26, 1998.” Notwithstanding these complaints, Complainants were permitted to respond to objections and on July 16 cited the CITT’s June 4 and 26 letters as establishing that the CITT intended the NMA process to give “parties an opportunity to make requests for information following a review of the evidence filed by all parties” and “thus, the Tribunal not only envisioned that Notices of Matters Arising would

deal with the parties' cases and the manufacturer's reply submission but would also deal with compelling matters which need to be considered and in respect of which the Tribunal chose not to require responses to requests for information." Complainants also provided an explanation of why their previously denied requests were relevant. As Table 2 illustrates, two of the three previously rejected requests, including those relating to non-subject goods, were allowed.

Third, at oral argument, Complainants were asked if they were arguing whether the situation rose to the level described by Chief Justice Lamar in *Université du Québec à Trois Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491, in which he noted that "it may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice." Tr. at 126. Further, counsel was asked whether Complainants had made any representations during the August 18, 1998 hearing in the case that the June 26 ruling on the RFIs had jeopardized their ability to make their case. Tr. at 127. Counsel was unable to recall such a representation, *see id.*, nor did Complainants' briefs assert such an argument. Given that Complainants took full advantage of their opportunity to obtain the desired information during the NMA process, asserting forcefully their rights as established by the CITT's statements in the June 4 and 26 letters, they do not appear to have suffered any harm, even if the CITT's ruling had been incorrect, which in the Panel's view it was not.

Complainants cite *Magnasonic, supra*, and *Sarco Canada Limited v. Anti-Dumping Tribunal et al.*, [1979] 1 F.C. 247 (C.A.) at 258 paras d, e, f, 259 paras b, c, f, g, h, i, j, 260 paras a, b, c, for the proposition that the CITT's over-emphasis on the time pressures of the statute and less than wide-ranging discovery "nullif[ied] the right to a full and fair opportunity to be heard." Complainants' Brief at 41-42. However, Complainants were able to obtain the information they sought and have made no showing that their rights to be heard fully and fairly were infringed. The Panel does not find that the CITT breached the principles of natural justice or acted unreasonably in construing the scope of its authority.

C. The Claim That the CITT Pre-Judged Relevance

Complainants next contend that the CITT's reliance, in the June 26 ruling on relevance of RFIs, on its "self-described 'clear sense . . . of which requests it considers are necessary'" amounted to pre-judgment of relevance, resulting in a breach of natural justice. Complainants' Brief at 39. Complainants go so far as to say that "the Tribunal's 'clear sense' of that material's [i.e., certain RFIs] admissibility, absent any physical review of such information, is an improper fettering of discretion and is an irrelevant consideration." Complainants' Brief at 45. At the outset, it is important to note that Complainants overstate their case: the June 26 ruling concerned the scope of discovery and made no determination with regard to admissibility. In the same way, Complainants' reliance on *Larocque, supra*, at 487, is misplaced as *Larocque* also dealt with a refusal to hear admissible and relevant evidence, not the determination of the appropriateness of discovery requests, a distinction counsel for Complainants acknowledged at oral argument. Tr. at 134. To the extent *Larocque* applies here, it is instructive in its *obiter dictum* on the decisionmaker's authority to determine relevance:

I also think, though in my opinion it is not necessary to decide this point in the case at bar, that the necessary corollary of the grievance arbitrator's exclusive jurisdiction to define the issue is his exclusive jurisdiction then to conduct the proceedings accordingly, and that he may *inter alia* choose to admit only the evidence he considers relevant to the case as he has chosen to define it.

Id.

The issues in the June 26 ruling involved a judgment that Complainants had failed to demonstrate the need for RFIs on a subject they had been warned the CITT had previously found to lack relevance in cases of this kind. They made no effort to justify their requests by explaining their special relevance in this case. It thus appears the CITT was on firm ground in ruling the requests not relevant.

Complainants' assertion, in paragraph 121 of their Brief, that unless the CITT compelled production of the requested information and physically reviewed it, it could not properly determine relevance and improperly fettered its discretion is not sustainable. To the contrary, this view would deny the CITT its discretion, as it would have no choice but to compel production whenever a party requested any information and could only determine relevance after reviewing it, forcing parties to bear unjustified burden and cost.

Complainants have not established that the CITT pre-judged relevance, breached natural justice, or acted unreasonably in its statements in the June 26 ruling regarding which requests were necessary for a full and proper consideration of the issues in the review. Instead, it appears that the CITT applied its expertise, gained through experience in cases of this kind, as to what types of information requests were likely to adduce relevant evidence. Complainants were offered the opportunity to demonstrate otherwise, but declined. The CITT was well within its discretion to rule as it did, and the Panel does not find this action unreasonable.

D. The Assertion of a New Relevance Standard

Finally, Complainants say the CITT's June 26 ruling created a new, higher "clearly of relevance" standard for issuance of RFIs. The sentence Complainants object to reads as follows: "Given the tight overall time frames for the conduct of this review under the *Special Import Measures Act*, the Tribunal wishes to remind parties that the process of directing requests for information to other parties at this stage of the review must of necessity be limited to matters which are clearly of relevance to those at issue in this review."

It is unclear what significance the "clearly of relevance" phrase had in the proceedings below. As written, it was a "reminder" to the parties about limitations on RFIs that were necessary "at this stage of the review." There was no suggestion that this formulation would apply at later stages of the case or with regard to the evidence that would be admitted to the record. Indeed, we know that it did not, since Complainants sought the same information in the

NMA process and were permitted to compel its production. Moreover, the CITT's determination of what information would be required in the RFI process appears to have been based not on this part of the June 26 letter but on the CITT's judgment of what was "necessary for a full and proper consideration of the issues in this review." There is no indication that Complainants objected at the time to what they now view as the invocation of a new, higher standard of relevance or that they attributed the rejection of certain RFIs to reliance on such a factor. Thus, Complainants have made no showing that the CITT's quoted statement on the relevance standard in the June 26 ruling flouted principles of natural justice or constituted an unreasonable exercise of the CITT's expertise and discretion.

For all the foregoing reasons, the Panel does not view the CITT's actions with respect to the RFI process as unreasonable.

VI. CONCLUSION

For the reasons set forth above, this Panel hereby affirms the finding of the CITT in its order of October 16, 1998 in Review No. RR-97-008. The 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:

D. Michael Kaye, Chair D. Michael Kaye, Chair

Jeffery C. Atik Jeffery C. Atik

Jane C. Luxton Jane C. Luxton

E. Neil McKelvey, OC, QC E. Neil McKelvey, OC, QC

David J. Mullan David J. Mullan

Issued on the 3rd day of April, 2000.

APPENDIX

TABLE 1A

Cello Request to Nibco

Requested Information	Objection	Response	June 26 Ruling	Challenge on Appeal
1. Schedule of payments on sales of subject and non-subject goods, from Nibco to NCI from 1996 to the present.	June 18 objection to non-subject goods, relying on Tribunal's June 4 letter.	June 24 letter states relevance and usefulness are "readily apparent and self-explanatory." Asserts objections are cursory and inadequate.	Reply ordered for subject goods only.	Characterized as "outright refusal." No description of relevance in briefs.
2. Copy of Nibco Canada's 1995 financial statements.	None.	None.	Provide statement if available.	Characterized as "qualified refusal." No description of relevance in briefs.
3. Copy of agreement of sale of Nibco Canada and related agreements, plus any personal service agreements between Cliff Sargeant and NCI or Nibco.	Objected to as irrelevant; no personal service agreement exists.	Same response as item 1 on relevance and adequacy of objections.	Request not relevant for the review.	Characterized as "outright refusal." No description of relevance in briefs.
4. Explain Nibco's pricing policy for non-subject goods to U.S. customers for 1996 to the present.	Objected to as irrelevant and burdensome.	Same response as item 1.	Information on non-subject goods not required.	Characterized as "outright refusal." No description of relevance in briefs.
5. Copies of marketing plans bearing on the sale of subject goods for Canadian market in the future.	No objection.	Same response as item 1.	Provide if such plans exist.	Characterized as "qualified refusal." No description of relevance in briefs.
6. Copies of plans for additions to production capacity for subject goods for the next five years.	No objection.	Same response as item 1.	Provide if such plans exist.	Characterized as "qualified refusal." No description of relevance in briefs.
7. [Not contested]				
8. Details of export prices for all export markets for 1995 to the present of subject goods.	Objected to as burdensome and irrelevant.	Same response as item 1.	Provide export information and breakdown as requested in Questionnaire.	None.
9. Copies of plans exhibiting use of subject goods production capacity for U.S. and export markets in the future.	No objection.	Same response as item 1.	Provide if such plans exist.	Characterized as "qualified refusal." No description of relevance in briefs.

TABLE 1B

Bow's Request to Nibco

	Objection	Response	June 26 Ruling	Challenge on Appeal
1. Terms and conditions of sale regarding subject and non-subject goods made by Nibco to NCI from 1996 to the present	Same as objection to Cello #1 in Table 1A.	General objection to Nibco's objections; statement that relevance and usefulness are "readily apparent and self-explanatory."	Reply for subject goods only.	Assertion that Tribunal's ruling was "outright refusal."
2. Copy of the agreement of sale, plus related agreements regarding sale of Nibco Canada to Cliff Sargeant and/or NCI.	Same as objection to Cello #3 in Table 1A.	Same as above, plus statement that reference to the relationship between Nibco and NCI is noted in Exhibit B-1.	Ruled not relevant.	Assertion that Tribunal's ruling was "outright refusal."
3. Details of Nibco's pricing policy in respect of the sale of non-subject goods to U.S. customers from 1996 to the present.	Same as objection to Cello #4 in Table 1A.	Same as above.	Information on non-subject goods not required.	Assertion that Tribunal's ruling was "outright refusal."
4. Details of Nibco's pricing policy in respect to non-subject goods to NCI from 1996 to the present.	Same as objection to Cello #1 and #4 in Table 1A.	Same as above.	Information on pricing policy to be provided.	No objection.

TABLE 1C

Cello Request to Streamline and Mueller

	Objection	Response	June 26 Ruling	Challenge on Appeal
1. Copies of plans for additions to production capacity for Mueller for the next 5 years.	Information is covered in questionnaires and redundant.	Objections were filed late (June 22).	Provide information if such plans exist.	Assertion that ruling is qualified refusal.
2. Copies of marketing plans for subject goods for Canadian market in the future.	Information is covered in questionnaires.	Objections were filed late (June 22).	Provide information if such plans exist.	Assertion that ruling is qualified refusal.
3. Copies of memoranda documenting meetings between Mueller and/or Streamline and the Department of National Revenue	Requests are speculative and irrelevant.	Objections were filed late (June 22).	Request not relevant for this review.	“Outright refusal.”
4. Documentation showing plans for Streamline in European and Canadian markets if Finding is not rescinded.	No objection.	Objections were filed late (June 22).	Provide information if such plans exist.	Assertion that ruling is qualified refusal.
5. Details of export prices for all export markets for sales of the subject goods by Mueller.	Irrelevant, burdensome, “fishing expedition.”	Objections were filed late (June 22).	Adequate information has been provided in questionnaire responses.	“Outright refusal.”
6. Copies of any plans exhibiting the use of subject goods production capacity for U.S. and export markets in the future by Mueller.	Irrelevant, burdensome, “fishing expedition.”	Objections were filed late (June 22).	Provide information if such plans exist.	“Qualified refusal.”

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Comparison of Denied RFI Requests with Notice of Matters Arising

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RFI	June 26 Ruling	Matters Arising	Documentation Requested	July 31 Ruling
1. Schedule of payments for sales of subject and non-subject goods from Nibco to NCI for 1996 to the present. [Cello #1; Bow ##1 and 4]	Information on non-subject goods not relevant.	1. Differences in payment terms and schedules of payment for sales of subject and non-subject goods by Nibco to NCI.	Payment terms and conditions and internal memoranda discussing rationale.	Granted.
2. Copy of agreement of sale of Nibco Canada and related documents, plus copies of any personal service agreements between Cliff Sargeant and NCI and/or Nibco. [Cello #3; Bow #2]	Not relevant.	2. Explanation of how sale of Nibco Canada to NCI and/or Mr. Sargeant affects sales and prices by Nibco's distributor of subject goods.	Agreement of sale of Nibco Canada and any related financing arrangements.	Ruled not relevant.
3. Explain Nibco's pricing policy in respect of non-subject goods to U.S. Customers for 1996 to the present. [Cello #4; Bow #3]	Information on non-subject goods not relevant.	3. Differences, if any, between pricing policies applicable to non-subject goods sold by Nibco to NCI and to U.S. distributors, and any effect on prices of subject goods.	Pricing policies for 1995 to the present.	Granted.

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