CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, October 10, 1990

Review No.: RR-89-013

IN THE MATTER OF a review, under section 76 of the *Special Import Measures Act*, of the finding of material injury of the Anti-dumping Tribunal dated April 15, 1983, and of the finding of material injury of the Canadian Import Tribunal dated October 11, 1985, respecting:

CERTAIN DUMPED INTEGRAL HORSEPOWER INDUCTION MOTORS, ONE HORSEPOWER (1 HP) TO TWO HUNDRED HORSEPOWER (200 HP) INCLUSIVE, WITH EXCEPTIONS, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA;

AND

DUMPED POLYPHASE INDUCTION MOTORS, ONE HORSEPOWER (1 HP) TO TWO HUNDRED HORSEPOWER (200 HP) INCLUSIVE, ORIGINATING IN OR EXPORTED FROM BRAZIL, JAPAN, MEXICO, POLAND, TAIWAN AND THE UNITED KINGDOM; AND SUBSIDIZED SUBJECT GOODS, ORIGINATING IN OR EXPORTED FROM BRAZIL

O R D E R

The Canadian International Trade Tribunal, under the provisions of section 76 of the *Special Import Measures Act*, has conducted a review of:

- the finding of material injury of the Anti-dumping Tribunal dated April 15, 1983, concerning the dumping in Canada of integral horsepower induction motors,* one horsepower (1 hp) to two hundred horsepower (200 hp) inclusive, excluding vertical-shaft pump motors generally referred to as vertical P-base or vertical P-flange motors, originating in or exported from the United States of America, but excluding:

  1) single phase motors;
  2) submersible pump motors for use in oil and water wells;
  3) arbor saw motors; and
  4) integral induction motors for use as replacement parts in:

     i) absorption cold generator pumps manufactured by The Trane Company,
     ii) Centravac Chillers manufactured by The Trane Company, and
     iii) semi-hermetic compressors and hermetic compressors manufactured by The Trane company; and

  *(For greater certainty, the expression "integral horsepower induction motors" is to be construed as referring to induction motors constructed in three-digit frames.)

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- the finding of material injury of the Canadian Import Tribunal dated October 11, 1985, concerning the dumping in Canada of polyphase induction motors, 1 hp to 200 hp inclusive, originating in or exported from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom and the subsidizing of the same goods originating in or exported from Brazil.

Pursuant to subsection 76(4) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby:

- continues the finding dated April 15, 1983, in respect of the goods originating in or exported from the United States of America with an amendment to exclude the subject goods that are imported into Canada from the United States by Trane Canada for installation into equipment manufactured by Trane Canada for export from Canada to the United States, in accordance with the Inward Processing provisions of the *Customs Tariff* (Member Bertrand dissenting from the exclusion); and

- continues the finding dated October 11, 1985, in respect of the dumping of the subject goods originating in or exported from Brazil, Japan, Poland, Taiwan and the United Kingdom and in respect of the subsidizing of the subject goods by Brazil, and rescinds the said finding with respect to the subject goods originating in or exported from Mexico.

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

Michèle Blouin
Michèle Blouin
Member

Robert J. Martin
Robert J. Martin
Secretary

CANADIAN INTERNATIONAL TRADE TRIBUNAL
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CERTAIN DUMPED INTEGRAL HORSEPOWER INDUCTION MOTORS, ONE HORSEPOWER (1 HP) TO TWO HUNDRED HORSEPOWER (200 HP) INCLUSIVE, WITH EXCEPTIONS, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA;

AND

DUMPED POLYPHASE INDUCTION MOTORS, ONE HORSEPOWER (1 HP) TO TWO HUNDRED HORSEPOWER (200 HP) INCLUSIVE, ORIGINATING IN OR EXPORTED FROM BRAZIL, JAPAN, MEXICO, POLAND, TAIWAN AND THE UNITED KINGDOM; AND SUBSIDIZED SUBJECT GOODS, ORIGINATING IN OR EXPORTED FROM BRAZIL

Special Import Measures Act - Whether to continue, with or without amendment, or rescind the findings of the Anti-dumping Tribunal and the Canadian Import Tribunal relating to the above-mentioned goods - Timeliness of Tribunal review pursuant to subsection 76(5) - Supplier-specific orders pursuant to subsection 43(1) - Assembly from imported parts - Price sensitivity - Investment for production facilities.

DECISION: The Canadian International Trade Tribunal continues the above-mentioned findings with an amendment to exclude certain goods imported from the United States by Trane Canada and rescinds the finding with respect to goods originating in or exported from Mexico. Dumping on the part of suppliers of goods originating in or exported from each of the countries subject to these findings, with the exception of Mexico, is likely to continue or resume, and subsidizing of the same goods originating in or exported from Brazil is likely to continue. This is evidenced by the behavior demonstrated by the major exporters and by the level of price competition in the domestic market (Member Bertrand dissenting from the exclusion).

The Tribunal finds that, without the imposition of anti-dumping or countervailing duties, dumping and/or importation of subsidized goods would likely cause material injury to the domestic industry. The material injury to the domestic industry would be in the form of lower prices, reduced market share, marginal or negative returns and a reduced ability to invest in the capital necessary to remain competitive.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	June 4 to 18, 1990
Date of Order and Reasons:	October 10, 1990
Tribunal Members:	Arthur B. Trudeau, Presiding Member Robert J. Bertrand, Q.C., Member Michèle Blouin, Member
Director of Research:	M. Brazeau
Research Managers:	D. Chatterson/D. Kemp
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Participants:		Simon V. Potter, Jean G. Bertrand and Denis Gascon
	for	The Electrical and Electronic Manufacturers Association of Canada, Westinghouse Motor Company Canada Ltd. and Moteurs Leroy-Somer Canada Limitée/Leroy-Somer Canada Limitée
		Richard G. Dearden and Milos Barutciski
	for	General Electric Canada Inc.
		(Integrated Manufacturers)
		Darrel H. Pearson
	for	Brook Crompton (Canada) Inc., Brook Crompton International Ltd., MagneTek Canada Ltd. and Century Electric Inc.
		B. Erik Furstrand, P. Eng.
	for	Madison Industrial Equipment Ltd. and Teco Electric & Machinery Co. Ltd.
		(Non-Integrated Manufacturers)
		C.J. Michael Flavell and Geoffrey C. Kubrick
	for	Toshiba Corporation and Toshiba International Corporation
		Peter Clark, Peter Burn, Mary Ellen Murdock and Keith Flavell
	for	V.J. Pamensky Canada Inc. and Ministry of Economy, Finance and Planning, Government of the Federative Republic of Brazil
		Peter Clark and Peter Burn
	for	WEG Exportastora S.A. and WEG Motores Ltda.
		William R. Herridge, Q.C.
	for	John Wilson Electric (Fordwich) Ltd., Duke Electric (1977) Limited, XYZ Dynamo Ltd. and TME Delta Inc.

	Terrence A. Sweeney and Luqing Quian
for	Baldor Electric Company, Dryden Agencies Ltd. and Canada Electro Drives (1982) Ltd.
	A. de Lotbinière Panet, Q.C., Richard A. Wagner and Edith Bramwell
for	Trane Canada, Division of WABCO Standard Trane Inc. and The Trane Company of La Cross
	Richard S. Gottlieb and Peter E. Kirby
for	ABB Motores S.A. de C.V.
	(Importers/Exporters)
	Alex Fleming, P.Eng.
for	B.C. Hydro
	(Other)

Witnesses:

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Vice-President General Manager,
Leeson Electric (Canada) Ltd.

Tom Johnson
Vice-President
Marketing and Medium Motor Operations
Westinghouse Motor Company Canada Ltd.

Jeff B. Irish
Program Manager - Component Motors
Industrial Drive
Motor Business
GE Canada

James D. McAnsh
Manager - International Trade Services
Corporate Law
GE Canada

Alidor Lueders
Diretor de controle
WEG S.A.

Adimar Schievelbein
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Charles P. LeMone
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TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
MICHÈLE BLOUIN, Member

STATEMENT OF REASONS

SUMMARY

The Canadian International Trade Tribunal (the Tribunal) has completed a review, under section 76 of the *Special Import Measures Act* (SIMA), of the findings of material injury made by the Anti-dumping Tribunal (ADT) on April 15, 1983, and the Canadian Import Tribunal (CIT) on October 11, 1985, concerning certain induction motors imported from the United States, Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom.

In conducting a review of a finding of material injury caused by dumping and/or importation of subsidized goods, the Tribunal looks for evidence concerning such factors as the recent behavior of exporters and market conditions in the countries of origin, Canada and elsewhere that make imports of dumped and/or subsidized goods likely or unlikely to resume in the foreseeable future. The Tribunal also considers evidence pertaining to such factors as changes in import shares, market conditions and the health of the industry to determine whether a resumption of dumping and/or importation of subsidized goods is likely to cause material injury to producers in Canada.

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In the matter of the review of the 1985 finding against Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom, the evidence shows that, while overall imports have declined, the amount of countervailing duties assessed and collected on imports from Brazil, the overall margins of dumping and the percentage of goods dumped have all increased to substantial levels over the past two years. Imports from Brazil have increased considerably and the Government of Brazil has not ceased subsidizing. Since the finding in 1985, a substantial volume of imports from Taiwan, Poland and the United Kingdom have been supplanted by motors produced in Canada by new non-integrated producers that import parts from the same overseas factories that formerly exported the completed motors and that, in some cases, continue to export completed motors to Canada. Given the evidence concerning this new production and the global trend to world-scale production facilities, the Tribunal questions the viability of this non-integrated production were the finding to be rescinded. Imports from Mexico dropped to a negligible level after the finding and have not been a factor in the market since that time.

The Tribunal acknowledges the evidence presented concerning the dumping of induction motors in Australia by Brazil, the United Kingdom, Taiwan and Poland. In addition, the Tribunal considers the evidence respecting the behavior exhibited in the so-called large motor case to be relevant to this case because it was heard only last year, and the bulk of the goods (200- to 800-hp motors) involve the same producers, production processes, marketing channels and customers.

The Tribunal heard considerable evidence pertaining to the softening of the domestic market and price sensitivity. Given the market situation, the likelihood of increased pricing pressures and the demonstrated behavior of the subject countries, the Tribunal concludes that dumping by the subject countries is likely to resume, with the exception of Mexico, in the event of a rescission of the finding.

Regarding a resumption of dumping and/or the continued importation of subsidized goods being likely to cause material injury to the domestic industry, the Tribunal notes that, while the performance of the industry has improved during the buoyant market of the past few years, the industry remains unprofitable overall. Although the share of the market held by domestic producers has increased since the finding in 1985, almost all of the increase is accounted for by the non-integrated producers that have become established since the 1985 finding and that sell motors produced largely from parts imported from countries subject to the finding. The integrated producers, Westinghouse Motor Company Canada Ltd. (Westinghouse), Leroy-Somer Canada Limitée (Leroy-Somer) and General Electric Canada Inc. (GE Canada), have been able to maintain their share of the market over the past several years, although several other integrated producers have exited the industry during the past five years.

The industry is in the process of rationalizing and restructuring and is faced with vigorous competition in its home market. Pricing pressures on all suppliers are expected to increase over the near term. Due to its protracted loss situation and its large investment outlays, GE Canada is particularly susceptible to a market downturn and/or lower prices that would result from a resumption of dumping. The Tribunal concludes that a resumption of dumping and/or the continued importation of subsidized goods is likely to cause material injury to the domestic industry in the form of lower prices, reduced market share, marginal or negative returns and a reduced ability to invest the capital necessary to remain competitive.

In the matter of the review of the 1983 finding against the United States, the evidence shows that imports from the United States have increased significantly since 1986 and now exceed the combined imports from the six countries subject to the 1985 finding. The average margin of dumping and the percentage of goods dumped are significant and increasing. The US industry is in the midst of a substantial reorganization and rationalization. While some plants have closed and some firms have exited the industry, other major US producers have excess capacity or were planning to increase their capacity. The Tribunal heard evidence that Toshiba International Corporation (Toshiba) has made considerable inroads into the end-user market segment through a strategy of aggressive pricing. The Tribunal is also aware of the margins of dumping and the percentages of goods found to have been dumped from the United States during the large motor inquiry last year. In view of the above and in light of the evidence concerning the price sensitivity of a market that is softening, the Tribunal is of the view that, without the imposition of anti-dumping duties, producers in the United States are likely to continue or resume dumping.

The Tribunal considers that the observations made in respect of the impact that resumed dumping and subsidizing by the countries subject to the 1985 finding is likely to have on domestic production are also pertinent to the impact of resumed dumping by US producers. In fact, the likelihood of material injury is considered to be even greater due to the growth in imports from the United States, the share of the market held by these imports, the more established distribution and marketing of US goods in Canada and the aggressive pricing behavior by Toshiba that has resulted in a successful penetration of the end-user market segment.

The Tribunal, therefore, continues the finding of October 11, 1985, in respect of Brazil, Japan, Poland, Taiwan and the United Kingdom and rescinds the said finding with respect to Mexico. The Tribunal also continues the finding of April 15, 1983, with an amendment to exclude the subject goods that are imported into Canada from the United States by Trane Canada for installation into equipment manufactured by Trane Canada for export from Canada to the United States, in accordance with the Inward Processing provisions of the *Customs Tariff*.

BACKGROUND

This review, conducted under section 76 of SIMA, encompasses the findings of material injury made by the ADT on April 15, 1983, and the CIT on October 11, 1985, concerning certain induction motors described as follows.

Inquiry No. ADT-8R-78 (April 15, 1983)

Integral horsepower induction motors, one horsepower (1 hp) to two hundred horsepower (200 hp) inclusive, excluding vertical-shaft pump motors generally referred to as vertical P-base or vertical P-flange motors, originating in or exported from the United States of America.[1]

Inquiry No. CIT-6-85 (October 11, 1985)

Polyphase induction motors, 1 hp to 200 hp inclusive, originating in or exported from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom.

The Tribunal issued a notice of review on November 28, 1989. This notice was sent to all known interested parties and was published in Part I of the December 9, 1989, edition of the Canada Gazette. In March 1990, detailed questionnaires were sent to all known Canadian producers of the subject goods and to over 60 importers. From replies to these questionnaires and from information obtained from other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports. Prior to the hearing, Tribunal staff members visited several producers and importers located in Quebec, Ontario and British Columbia, while Members of the Tribunal visited the premises of two producers in Ontario.

The record of this review consists of all relevant documents and materials, including the original findings, the notice of review, correspondence with interested parties, replies to questionnaires, the pre-hearing staff reports, and submissions and argument filed by interested parties. All public exhibits were made available to interested parties, while protected exhibits were made available only to independent counsel who had filed an undertaking of non-disclosure. Public and *in camera* sessions were held in Ottawa from June 4 to June 18, 1990.

Westinghouse and Leroy-Somer, integrated domestic manufacturers of the subject goods, were represented by the Electrical and Electronic Manufacturers Association of Canada (EEMAC) and by counsel at the hearing. Evidence was submitted and argument made in support of continuing both findings.

GE Canada, another integrated domestic manufacturer, was represented by counsel at the hearing. Evidence was submitted and argument made in support of continuing both findings for a period of three years or, alternatively, continuing both findings except against Baldor Electric Company (Baldor) and any importers that qualify for inward processing remission orders or, alternatively, continuing the 1985 finding and amending the US finding to cover only exports by Toshiba.

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1. This finding resulted from a rehearing ordered by the Federal Court of Appeal in *DeVilbiss (Canada) Ltd. v. the Anti-dumping Tribunal*, [1983] 1 F.C. 706. The court had upheld an application for review under section 28 of the *Federal Court Act* respecting a finding of material injury, made in 1979 by the ADT, that arose from the dumping of the same class of goods from the United States.

Leeson Electric (Canada) Ltd. (Leeson), a domestic producer and importer, submitted a brief in support of continuing both findings and was called as a witness by EEMAC.

Brook Crompton (Canada) Inc. (Brook Crompton), a domestic producer and importer, and its parent company in the United Kingdom, Brook Crompton International Ltd., were represented by counsel at the hearing and submitted evidence and made argument in support of rescinding the finding in Inquiry No. CIT-6-85 or, alternatively, excluding the subject motors from the United Kingdom or excluding certain classes of induction motors (vertical hollow shaft, two-digit frame size and wound rotor).

Madison Industrial Equipment Ltd. (Madison), a domestic producer and former importer, was represented by the president of the firm. Madison submitted evidence and made argument in favor of rescinding the finding in Inquiry No. CIT-6-85 or, alternatively, excluding imports from Taiwan or excluding imports by Madison from Teco Electric & Machinery Co. Ltd. (Teco), Taiwan.

An exporter from the United States, Toshiba, and four of its Canadian distributors, John Wilson Electric (Fordwich) Ltd. (John Wilson), Duke Electric (1977) Limited (Duke Electric), XYZ Dynamo Ltd. and TME Delta Inc. were all represented by counsel at the hearing. They submitted evidence and made argument in support of rescinding the finding in Inquiry No. ADT-8R-78 against the United States.

Another exporter from the United States, Baldor, and two of its Canadian representatives, Dryden Agencies Ltd. (Dryden) and Canada Electro Drives (1982) Ltd., were represented by counsel at the hearing. Evidence and argument were submitted in support of rescinding the finding in Inquiry No. ADT-8R-78.

An importer, MagneTek Canada Ltd. (MagneTek) and its supplier in the United States, Century Electric Inc. (Century), were represented by counsel at the hearing. They submitted evidence in support of rescinding the finding in Inquiry No. ADT-8R-78 or, alternatively, excluding motors exported by Century and imported by MagneTek or, alternatively, rescinding both findings.

An importer from the United States, Trane Canada (Trane), was represented by counsel at the hearing. Counsel submitted evidence and made argument in support of rescinding both findings. In the event of a continuation of the findings, it was submitted that the current exclusions concerning certain classes of motors imported by Trane be continued and that the subject goods, imported by Trane under an inward processing remission order and subsequently exported, be excluded from application of the findings.

Another importer, V.J. Pamensky Canada Inc. (Pamensky) and its supplier in Brazil, WEG Motores Ltda (WEG), were represented by counsel at the hearing. They submitted evidence and made argument in support of rescinding the 1985 finding against the six countries in Inquiry No. CIT-6-85.

A manufacturer in Mexico, ABB Motores S.A. de C.V. (ABB Motores), was represented by counsel at the hearing. Counsel submitted evidence and made argument in support of the Tribunal declaring that the finding does not apply to goods produced and exported by ABB Motores or, alternatively, that goods produced and exported by ABB Motores are excluded from the finding.

The ambassador of Mexico made a written submission requesting that exports from Mexico be excluded from the finding.

LEGAL ISSUES

Jurisdiction of the Tribunal

At the outset of the hearing, counsel for Toshiba Corporation and Toshiba presented a motion requesting that the Tribunal declare itself out of time and without jurisdiction to conduct this review as it pertains to the ADT finding of April 15, 1983, respecting the United States, in Inquiry No. ADT-8R-78. By virtue of subsection 108(8), a transitional provision in SIMA,[2] findings already in effect when SIMA became law in 1984 were deemed to have been made on the date the new legislation came into force, i.e., December 1, 1984. Counsel argued that the French version of subsection 76(5) of SIMA requires that the Tribunal complete its review and make an order or finding within five years of the previous finding, i.e., November 30, 1989.

The question is whether, as counsel contended, the French version of subsection 76(5) means that a review must be completed within five years of the original finding or order. The English version of subsection 76(5) states that an order or finding expires within five years, "Where the Tribunal has not initiated a review ..., " whereas the French version states, "*À défaut de réexamen...* ". Counsel argued that the French version was more consistent with the spirit of SIMA, which was seen as setting a maximum limit of five years for any order or finding.

Counsel also argued that subsection 76(4): "*À la fin du réexamen visé au paragraphe (2), le Tribunal rend une ordonnance...* " and "On completion of a review pursuant to subsection (2) ... the Tribunal shall make an order ... " means that the order (*ordonnance*) is part of the review and, thus, must be issued within the five-year period.

Finally, counsel argued that accepting the English version of subsection 76(5) could result in an absurd situation where the Tribunal had only to initiate a review within five years of the original order and then might leave the matter unresolved for an indefinite and, possibly, lengthy period.

In a ruling from the bench, the Tribunal refused to grant counsel's motion and asserted its jurisdiction, stating:

> *... this panel concludes that it has jurisdiction to conduct this review and to issue a valid order as it pertains to the finding respecting the United States. This review was initiated before the five-year expiry date.*
>
> *In reaching this conclusion, this panel adopts as its reasons those set out by the Tribunal in the Statement of Reasons of the Order dated May 1, 1990 in Review RR-89-006 Carbon and Alloy Steel Plate.*

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2. R.S.C., 1985, c. S-15.

The reasons set out in that review and adopted by this panel are as follows:

> *Firstly, all provisions of section 76 must be read together, in both languages, to derive their general meaning and intention. Subsection 76(2) states that a review may be conducted "at any time" following the original order or finding and it provides no deadline for the review to be initiated or completed with reference to the five years referred to in subsection 76(5). A review is not conducted in a trice. It takes weeks or months to complete, starting with staff work before the Notice of Review and continuing through staff research, public hearings and the issuing of a finding with reasons by the Tribunal. Parliament could not logically have required in subsection 76(5) that the review be completed before the expiration of five years from the original order when it has already empowered the Tribunal to initiate a review "at any time" during that period.*
>
> *Secondly, the Tribunal considers that the plain meaning in both languages of subsection 76(4) is that the Tribunal must make an order immediately following the completion of a review. The order sets out the conclusions reached in the review.*
>
> *Thirdly, the Tribunal considers that the overall purpose of SIMA is to ensure that Canadian production of like goods is protected from material injury caused by dumping and subsidizing, subject to review to ensure that such special protection is still justified. Such a review may be initiated at any time after the making of an order or finding, but not later than five years. Subsection 76(5) is only meant to ensure that the order or finding be deemed to have expired if the Tribunal has not initiated a review within five years of having made such an order or finding.*
>
> *Parliament did not provide for the specific duration of an order or finding made by the Tribunal under section 43. This is because it is not possible to predict how long dumping or subsidizing, and the injury from it, will continue. If parliament's overriding purpose was to ensure that an injury finding last no more than five years, it would have said so in SIMA. Instead, parliament placed the five-year provision in the context of the section 76 review procedures. The spirit of SIMA and the thrust of section 76 as a whole is neatly expressed in the English version of subsection 76(5). The French phrase "À défaut de réexamen... " that is, "unless there is a review ... ," reflects the fact that a review is a process and not a brief moment in time.*
>
> *Finally, a party which considered that the Tribunal, having initiated a review, was taking too long to conduct it and issue its decision, could seek appropriate remedies elsewhere.*

Application of Finding

At the hearing, counsel for ABB Motores, a manufacturer of the subject goods in Mexico requested that the Tribunal declare that the CIT decision under review, Inquiry No. CIT-6-85, does not apply to ABB Motores. ABB Motores was not an exporter of the subject goods either at the time of the dumping investigation by the Deputy Minister of National Revenue, Customs and Excise (the Deputy Minister) or during the CIT's inquiry held in 1985. Indeed, ABB Motores did not exist under that corporate name until 1986

when it was formed by the merger of two companies. One of the founding companies was from Mexico and had been producing the subject goods since 1964. However, that company was not an exporter of the subject goods at the time of either the dumping investigation or the material injury inquiry.

Counsel based the request on these circumstances, stating that ABB Motores was neither a party to the dumping investigation preceding the CIT's material injury inquiry nor a party before that tribunal during its material injury inquiry. In counsel's view, the CIT could make a finding of material injury only to producer-exporters that had been investigated and found to have dumped goods in Canada. Counsel for ABB Motores contends that this conclusion flows from the scope of the Tribunal's powers as set forth in subsection 43(1) of SIMA.

After having examined the jurisprudence and the scheme and intention of SIMA, the Tribunal concludes that it cannot accede to counsel's request. First, the Supreme Court of Canada decision in *Hitachi et al. v. the Anti-dumping Tribunal et al.*[3] makes it quite clear that the scope of a material injury finding is not delineated to encompass only those producer-exporters found to have dumped goods in Canada at the time of the dumping investigation or material injury inquiry.

In the *Hitachi* case, which involved the dumping of color television sets in Canada from Japan, other Asian countries and the United States, the ADT had evidence that only three of twelve Japanese exporters were underselling the domestic product. Further, of these three, only one of them had sales of any consequence. Despite the fact that only a few Japanese exporters were dumping goods comparable to the domestic product, the ADT stated as follows:

> *... The willingness of <u>some</u> Japanese exporters to undersell the domestic product is of concern, and is likely to increase in volume if dumping were permitted to continue.*[4] (Emphasis added)

Accordingly, the ADT concluded that the dumping of the goods in issue, which were exported from <u>Japan</u>, was likely to cause material injury to the production in Canada of like goods. That is, the ADT did not limit the scope of the finding of material injury only to those exporters found to have dumped color televisions in Canada at the time of the dumping investigation or material injury inquiry. Rather, the finding was country-wide in its application.

The ADT's finding was made in accordance with subsection 16(3) of the *Anti-dumping Act*,[5] the relevant portion of which reads as follows:

> *... The Tribunal ... shall declare to what goods or description of goods including, where applicable, <u>from what supplier and from what country of export</u>, the order or finding applies.* (Emphasis added)

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3. [1979] 1 S.C.R. 93.
4. Inquiry No. ADT-4-75, at p. 16.
5. R.S.C., 1970, c. A-15.

The empowering provisions of subsection 43(1) of SIMA at the time that the CIT made the finding challenged in this review by ABB Motores read as follows:

> *... The Tribunal ... shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.*

Hitachi eventually appealed the decision of the ADT to the Supreme Court of Canada on the following question of law:

> *... when the Anti-dumping Tribunal made a finding of material injury or likely material injury [pursuant to subsection 16(3)] in respect of exports of television sets from Japan, was it required to relate its finding to each exporter, or could it make such a finding in respect of all goods from Japan, irrespective of whether in the case of some exporters there was no evidence of injury or likely injury.* (Emphasis added)

The Supreme Court dismissed the appeal stating that the ADT was empowered by subsection 16(3) to make the finding that was challenged in the appeal proceedings.

In view of the substantial similarity between subsection 16(3) of the *Anti-dumping Act* and subsection 43(1) of SIMA, the Tribunal reads the *Hitachi* decision as meaning that a finding rendered under subsection 43(1) is not required to be exporter-specific or applicable only to those exporters found to have dumped goods in Canada at the time that the dumping investigation or material injury inquiry was conducted. Indeed, the finding may be made country-wide in application. In the Tribunal's view, this finding accords with the scheme of SIMA and the intention of Parliament in enacting the legislation.

According to that scheme, when any goods are imported into Canada subsequent to a finding, a customs officer may determine, for the purposes of assessing anti-dumping duty, several things: (1) whether the imported goods are goods of the same description as goods to which the finding applies; (2) the export price of the imported goods that are of the same description as goods to which the finding applies; or (3) the normal value of the exported goods.

Counsel argued that the CIT finding only applies to exporters found to have dumped goods at the time of the dumping investigation or material injury inquiry. Since the above-noted determinations relate to goods that are of the same description as goods to which the finding of the CIT applies, it follows from counsel's reasoning that these determinations would be applicable only to goods supplied by exporters named in the CIT finding.

The Tribunal cannot accept this reasoning because an exporter, not identified in a finding, could dump goods with impunity, even though the exporter was supplying the same dumped product from the same country that was the subject of the material injury finding. It is well expounded that the prime purpose of SIMA is to protect Canadian manufacturers and producers from unfair import competition arising from dumping

and/or importation of subsidized goods causing material injury.[6] Clearly, this parliamentary intention could be easily circumvented if the scope of a dumping inquiry was limited only to those exporters found to have dumped goods in Canada at the time of the dumping investigation or material injury inquiry.

SUMMARY OF THE FINDINGS

Finding Against the United States (Inquiry No. ADT-8R-78)

On January 9, 1979, the ADT found that the dumping of certain integral horsepower induction motors, one horsepower to two hundred horsepower inclusive, originating in or exported from the United States, had caused, was causing and was likely to cause material injury to the domestic production of like goods.

In its consideration of material injury, the ADT noted that the Canadian industry comprised producers of widely varying size, orientation and product range. Overall, the industry was able to produce virtually the entire range of the subject goods to an acceptable standard of quality, although it was criticized for its slow response to specialized market segments, as well as its distribution and service practices.

Imports from the United States were found to be a major and rapidly growing factor in the Canadian market. Over three quarters of the imports investigated by the Deputy Minister were found to have been dumped with a substantial margin of dumping. This prevented the Canadian industry from sharing in the substantial growth in the Canadian market during the late 1970s, as it was unable to raise prices sufficiently to offset increased costs. As a consequence, the domestic industry lost market share and suffered declines in employment, capacity utilization and profitability.

The ADT noted that the price was a significant factor, if not always the determining one, in purchasing decisions. As such, the ADT concluded that dumped prices were the major reason for the market success of the motors from the United States and, accordingly, that such dumping was responsible for the injury incurred by the Canadian industry. Several classes of induction motors, not produced in Canada, were excluded from the finding.

During the hearing, the meaning of the phrase "integral horsepower" was a contentious issue. The industry relates "integral" to motors having a three-digit frame code, while "fractional" relates to two-digit frame codes. However, fractional motors with two-digit frames may range up to five horsepower, while integral motors with three-digit frames may be rated at less than one horsepower. Although the ADT did not explicitly define the meaning of "integral horsepower" during the hearing, it did indicate, in its statement of reasons, that the goods in issue were induction motors of one to two hundred horsepower and constructed in three-digit frames.

Certain importers made application, under section 28 of the *Federal Court Act*, for review of the ADT's decision to the Federal Court of Appeal, arguing that, because the goods at issue were defined subsequent to the hearing, they were deprived of the

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6. *Electrohome Limited et al. v. the Deputy Minister of National Revenue for Customs and Excise*, [1986] 2 F.C. 344; Inquiry No. CIT-9-87 (Solid Urea).

opportunity to submit evidence and make argument specifically directed to the class of goods that the ADT found to be the subject of the inquiry. The Federal Court of Appeal, in its decision dated July 20, 1982, agreed that the failure to afford this opportunity to all parties constituted a denial of natural justice and directed the ADT to rehear the matter.

The rehearing was held on January 24, 1983, and evidence was adduced with respect to the particular class of goods found to be the subject of the inquiry, namely, induction motors constructed in three-digit frames having horsepower ratings from one to two hundred inclusive. The ADT determined that motors with three-digit frames constituted close to 70 percent of the total market for one to two hundred horsepower integral induction motors. The ADT came to the same conclusion that it had reached in the original inquiry and issued a finding on April 15, 1983, with the same exclusions as in the original finding. The latter finding and the 1985 finding are the subject of this review.

Finding Against Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom (Inquiry No. CIT-6-85)

On October 11, 1985, the CIT found that the dumping in Canada of polyphase induction motors, 1 hp to 200 hp inclusive, originating in or exported from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom and the subsidizing of the same goods from Brazil had caused, were causing and were likely to cause material injury to the production in Canada of like goods. On November 26, 1985, the CIT issued a finding of no material injury respecting imports of the same class of motors originating in Romania.[7]

In its consideration of material injury, the CIT noted that the Canadian industry was profitable in 1981, but with the arrival of the 1982-83 recession, it experienced sharply reduced sales and net losses. Market demand increased in 1984 and 1985, but the industry continued to lose market share and to report net losses.

In assessing the cause of this injury, the CIT noted that it could not be attributed to poor quality, delivery or service. Indeed, the consensus was that the quality of the domestically produced motors was considered equal to, or better than, that offered by foreign competitors. Furthermore, the injury was not attributable to changes in foreign exchange rates, to intra-industry competition or to the industry's restructuring in the face of expected continued competition from world-scale plants in other countries. The CIT concluded that, although these factors were adversely affecting the domestic industry to some degree, material injury in the form of loss of market share and price suppression, which led to operating losses, was caused by the cumulative effect of dumped and subsidized imports.

7. In its reasons for a finding of no material injury, the CIT noted that Romanian motors had no brand-name recognition, no record of proven performance and no established channels of distribution in Canada.

THE PRODUCT

The products described in the findings under review are:

- integral horsepower induction motors, one horsepower (1 hp) to two hundred horsepower (200 hp) inclusive, excluding vertical-shaft pump motors generally referred to as vertical P-base or vertical P-flange motors, single phase motors, submersible pump motors for use in oil and water wells, arbor saw motors and integral induction motors for use as replacement parts in certain products manufactured by The Trane Company, originating in or exported from the United States of America, in Inquiry No. ADT-8R-78, and

- polyphase induction motors, 1 hp to 200 hp inclusive, originating in or exported from Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom in Inquiry No. CIT-6-85.

In both cases, the subject motors are polyphase alternating current motors as distinct from single phase and direct current motors. These motors are generally used to provide mechanical torque to move solids, liquids and gases and are typically used in fans, blowers, pumps, compressors, conveyors and machine tools.

Within the 1- to 200-hp range, the subject motors are normally sold in three enclosure types: open drip-proof (ODP), totally enclosed fan cooled (TEFC) and totally enclosed explosion proof (TEXP). These enclosures can be made of cast iron, cast aluminum or rolled steel. For the most part, rolled steel is used for ODP enclosures, cast iron, cast aluminum and rolled steel are used for TEFC enclosures, and cast iron is used for TEXP enclosures.

Polyphase induction motors have two main components: the stator, or stationary component, and the rotor, or rotating component. When an electric current is applied to the stator and rotor, opposing magnetic fields that produce torque are created. This torque then turns the rotor and motor shaft. In an induction motor, the field produced in the rotor windings is induced by creating a voltage across the gap surrounding the rotor.

A relatively new phenomenon in the marketplace is the emergence of a demand for high-efficiency induction motors that use less electricity than a standard-efficiency motor to produce the same horsepower, thereby reducing the energy cost of operating the motor and reducing its pay-back period. The pulp and paper, mining and chemical industries account for an estimated 60 to 70 percent of the high-efficiency motors sold in Canada. B.C. Hydro and Ontario Hydro offer rebates to purchasers of high-efficiency motors to encourage their use. High-efficiency motors are available in all motor sizes in the 1- to 200-hp range and in each of the three enclosure types.

THE INDUSTRY

In Inquiry No. ADT-8R-78, EEMAC was the complainant, representing six of its member companies: Brown Boveri Canada Limited, Canadian General Electric Company Limited (now GE Canada), Etatech Industries Inc. (Etatech), Leroy-Somer, Lincoln Electric Company of Canada Limited (Lincoln) and Westinghouse.

In Inquiry No. CIT-6-85, EEMAC was again the complainant, representing four of its member companies: GE Canada, Westinghouse, Leroy-Somer and Lincoln. Two other companies, Etatech and Franklin Electric of Canada Ltd. (Franklin), responded to the manufacturer's questionnaire, but were not represented by EEMAC.

In this review, evidence and argument were presented by EEMAC on behalf of two of its member companies, Westinghouse and Leroy-Somer. Another EEMAC member, GE Canada, elected to present evidence and argument on its own. These three firms have accounted for the bulk of Canadian production and sales throughout the 1985-90 period of review.

Westinghouse is a subsidiary of Westinghouse Motor Company (US), a joint venture between Westinghouse Electric Corporation (US) and Teco (Taiwan). Westinghouse manufactures the subject goods in an integrated manufacturing facility in Hamilton, Ontario, in conjunction with larger motors and some specialty products. It is fully responsible for the design and manufacture of the subject goods. Westinghouse's main motor product is a TEFC cast iron motor that it produces in all sizes in the 1- to 200-hp range. Westinghouse distributes its products through a separate but related company, Wesco Sales and Service Co. (Wesco) that services all levels of the market, including original equipment manufacturers (OEMs), end users and sub-distributors.

Leroy-Somer is owned by Leroy-Somer SA of France. In December 1989, Emerson Electric Co. (US) tendered an offer to purchase all shares of Leroy-Somer SA and became the majority shareholder. About 60 percent of the firm's production is aluminum frame TEFC motors. A large proportion of the firm's output is exported to the United States.

GE Canada is owned by General Electric Company (US). It produces a full range of the subject motors at its production facility located in Peterborough, Ontario. It sells the subject goods domestically and for export through its own sales force.

The structure of the domestic industry has changed considerably since 1985, with several firms ceasing production and some new firms entering the market. The smaller producers, Franklin, Etatech and Lincoln, all ceased domestic production of the subject motors. Although Lincoln stopped production, it is maintaining its sales of motors in Canada through importations from its US counterpart.

Since 1987, a new type of producer has appeared in the domestic market. These companies had previously competed in the market as importers but, since the finding in 1985, began importing motor parts and assembling the parts into motors in Canada. These parts are typically imported from the same sources that had exported completed motors prior to the finding. These so-called non-integrated manufacturers, and the countries from which they import, are as follows: Brook Crompton (formerly Hawker Siddeley) - United Kingdom; Leeson Electric (Leeson) - Taiwan, United States, China; U.S. Electrical Motors, a division of Emerson Electric Canada Ltd. (Emerson) - United States; Madison Industrial Equipment (Madison) - Taiwan; Milton Electric - Taiwan; and Dalimpex - Poland.

Although the integrated manufacturers (Westinghouse, Leroy-Somer and GE Canada) continue to dominate the production of alternating current induction motors in Canada, the non-integrated manufacturers have shown significant growth in their production of these goods. As a group, the integrated manufacturers sell the complete

spectrum of motors under review, with Leroy-Somer dominating the production of motors under 26 hp, while GE Canada and Westinghouse show relative strength in the production of motors over 100 hp. These firms sell to OEMs, to and through distributors, and to end users. The non-integrated manufacturers also report production in all size ranges, but their relative strength lies in the 6- to 100-hp range. Generally, these firms sell to OEMs and distributors throughout Canada.

Capital Investment

Since 1985, the industry has invested nearly $12 million of capital equipment. Throughout the period of review, Westinghouse, Leroy-Somer and GE Canada accounted for most of the investment activity, but in recent years, newcomers such as Brook Crompton, Leeson and Emerson have also made capital investments in the production of the subject motors. Except for a minor drop in 1986, overall capital expenditures have increased annually, with the greatest single-year increase estimated for 1990. GE Canada, with significant expenditures relating to new equipment and an upgrade of its test facility, is projected to account for a considerable portion of the reported industry outlay on capital in 1990.

POSITIONS OF THE PARTIES

Integrated Producers

Two of the three major manufacturers of the subject goods in Canada, Westinghouse and Leroy-Somer, were represented by EEMAC. Despite protection from most dumped and subsidized imports, EEMAC claimed that the industry continues to face strong competition in the marketplace and has undertaken sizeable financial investments and undergone substantial reorganization to continue to improve its efficiency and to meet this competition. The findings have recently provided the market with some much needed stability. Although several manufacturers have exited the industry over the past several years, the traditional manufacturers have been able to maintain their market share while new producers have gained share. Not all manufacturers have returned to profitability.

Counsel argued that, despite the two findings, it was only after a re-investigation by Revenue Canada in 1987 that the industry began to receive adequate protection from dumped and subsidized motors. In addition, counsel argued that dumping has continued to occur and subsidizing by Brazil will continue.

The industry noted that Japan, in the past, was found to be dumping induction motors in Canada, the United States and Australia and, more recently, was found to be dumping large motors in Canada. Despite the finding, Japan continues to dump motors in Canada. Mexico was identified as a source of parts and the home of nine producers and potential exporters of induction motors. Poland was said to have been able to maintain volume without paying anti-dumping duty. Counsel noted that European Economic Community (EEC) motor producers, including Brook Crompton (UK), successfully complained about the dumping of motors from Eastern European countries, including Poland. Brazil has had very high subsidy levels and although it was submitted that the subsidies have been or will be eliminated, no proof of this was made. Counsel argued that the subsidies received have not been fully countervailed.

Counsel noted that imports of motors from the United Kingdom and Taiwan have both been largely replaced by motors assembled in Canada from imported parts. It was suggested that the manufacturers in these two countries have world-scale plants that would likely resume exporting completed motors at dumped prices in the event of a rescission.

Counsel noted that US exports account for as much as the six countries subject to the 1985 finding combined and that dumping continues. Toshiba, for example, exports motors at values no higher than the normal values provided by Revenue Canada, an indication of the price sensitivity of the market.

The industry mentioned that several parties provided substantial evidence that the market cycle has crested and that demand is declining. This decline increases the likelihood of dumping and the vulnerability of the domestic industry. Counsel also noted the evidence respecting expansions or planned expansions of capacity on the part of US exporters.

Counsel asserted that there are numerous suppliers to the Canadian market that supply similar goods and compete primarily on price. Several importers expressed concerns regarding their current inability to respond to lower prices. The price sensitivity of the market is such that a small change in price can result in substantial changes in market share, with other producers thereby forced to follow the low price leaders in the market. Counsel argued that the industry's profit levels are thin and that any renewed dumping would quickly lead to lower prices, reduced profitability, reduced investment and significant material injury to the domestic industry.

GE Canada argued that the United States and the other six subject countries have a propensity to dump. Counsel submitted that anti-dumping and countervailing duties assessed and collected, margins of dumping and amounts of subsidy and the proportion of dumped or subsidized imports, especially in the case of Brazil, have all increased significantly over the two-year period leading up to the review hearing. It was argued that the behavior exhibited over the past two years, while the findings were in place, indicates what the behavior would be if the findings were rescinded.

Counsel also submitted that importers continually seek low-cost sources of supply and that if the findings were rescinded, importers would quickly switch back to dumping countries such as Taiwan, the United Kingdom and Mexico. The newer production facilities in Canada, set up to circumvent the findings, would be replaced by the world-scale facilities in Taiwan and the United Kingdom. Imports from Mexico and Poland would quickly revert to the levels prior to the finding.

GE Canada noted evidence of a market downturn that was suggested as another indicator of propensity to dump. Counsel recounted evidence submitted by numerous parties that indicated that a substantial downward price pressure exists that would lead prices downward if the findings were rescinded. It was also noted that manufacturers in the United States and the United Kingdom have excess capacity.

Propensity to export dumped or subsidized goods on the part of specific exporters was also addressed. Toshiba has been willing to price below the market and was thereby able to win five of eight large end-user contracts over the past two years. It was noted that Revenue Canada recently decided to assess anti-dumping duties on these contracts.

Additionally, in the large motor case, Toshiba in Houston and Toshiba Corporation in Japan, as well as Teco in Taiwan, were found to have high margins of dumping and a high percentage of dumped imports. Counsel argued that the large motor case is relevant as it occurred last year, and the bulk of the goods (200 to 800 hp) involve the same firms, production processes, marketing channels and customers. Counsel also argued that subsidy programs in Brazil have been suspended, not eliminated, and that both WEG from Brazil and Teco from Taiwan have used low prices to take direct aim at the user market.

The issue of whether or not renewed dumping is likely to cause material injury was also addressed. The penetration of the user market by Toshiba, WEG and Teco has seriously affected GE Canada's financial results in the form of lost orders, lower prices and seriously eroded margins. It was argued that the firm's difficulties would be exacerbated if resumed dumping caused Canadian market prices to drop rapidly to US levels, instead of the more gradual decline expected if the findings were continued. It was noted that GE Canada has made major investments to enable it to become a member of the global GE team as opposed to a branch plant. It was submitted that the second phase of the investment plan, which would enable the firm to obtain cost reductions over the next three years and make the transition from a high-cost, low-volume producer to a global player, has not yet been approved. It was argued that rescission would lead to renewed dumping, lower prices, financial haemorrhaging and an inability to obtain necessary investment that would result in GE Canada's exit from the industry.

Non-Integrated Producers

Brook Crompton argued that there is no propensity to dump on the part of UK exporters. Counsel submitted that dumping margins were incorrectly determined at the time of the preliminary and final determinations and that Brook Crompton (UK) has effectively not dumped since the finding in 1985. Brook Crompton's production in Canada was described as a substantial and continuing operation that was initiated in response to unfavorable exchange rates and not as a means of avoiding the finding. It was also noted that Brook Crompton (UK) has a high rate of capacity utilization and that its exports complement production in Canada.

Counsel for the firm also argued that renewed dumping by its parent company, the sole UK producer of the subject goods, could not cause material injury to the industry, in light of the volume of exports and the absence of any demonstrated propensity to dump. Counsel also claimed that Brook Crompton does not consider itself vulnerable to renewed dumping from any source.

Madison submitted that it has ceased importing the subject goods, commenced production in Canada and plans on continuing this production. As a producer, it considers that it can compete with all sources of supply and does not seek dumping protection. Madison also noted that imports from other producers in Taiwan have declined substantially.

Leeson produces a wide range of motors in the 20- to 200-hp range in Canada, although it continues to import motors in the 1- to 15-hp range from its US parent company and from Taiwan. Leeson submitted that it would prefer the continuation of the finding against the United States if that ensured that the unfair price competition

from offshore producers, other than Brook Crompton in the United Kingdom, would not return into the marketplace.

Importers and Exporters

Counsel for Toshiba International Corporation argued that the firm's behavior demonstrates an absence of any propensity to dump. Counsel submitted that Toshiba attempts to sell at the normal values set by Revenue Canada and that anti-dumping duties are negligible, equating to about one percent of total sales. Only when the normal values are revised, after the goods are imported, do Toshiba's prices deviate from the normal values. Toshiba claimed that it has no intention of seeing its prices or profits decline and insisted that Toshiba would not dump if the finding were rescinded. Counsel argued that Toshiba has a high level of capacity utilization and US producers overall do not have much excess capacity. In addition, it was submitted that the dumping found by Revenue Canada in the large motor investigation is irrelevant to this review.

Counsel submitted that Toshiba has been successful in the market because of non-price elements such as inventory, delivery, quality and efficiency. Counsel said GE Canada was concerned with competitive Toshiba products rather than dumped Toshiba products. Counsel suggested that GE Canada has more to fear from Westinghouse than from Toshiba and that Leroy-Somer is not often in direct competition with Toshiba, as it does not make aluminum motors. Counsel submitted that the Canadian industry is capable, after the exits of several producers over the past few years, of competing in the North American market and is earning oligopolistic profits in Canada.

Counsel submitted that, while the findings served a worthwhile purpose in the early to mid-1980s, competitive circumstances have changed and the United States no longer poses a significant threat to the Canadian industry. Counsel suggested that the Tribunal reward Toshiba for obeying the law respecting dumping either by granting it an exemption or by rescinding the finding.

Counsel for four Toshiba distributors, John Wilson, Duke Electric, XYZ Dynamo Ltd. and TME Delta Inc., submitted that the industry's case is weak on two important grounds. First, the industry, except for GE Canada, is healthy, has been increasing its market share and profits, and is not vulnerable to renewed dumping. The poor performance of GE Canada is due to internal cost problems and competition from other domestic producers. Furthermore, because Leroy-Somer produces aluminum motors that are not produced by the two larger US exporters, it cannot be injured by such imports. Second, there is no indication that there will be renewed dumping from the United States. For these reasons, and in view of the 11 years of protection that the industry has received, the Tribunal was requested to rescind the US finding.

Counsel for the Brazilian exporter, WEG, and its Canadian importer, Pamensky, claimed that almost all the subsidies previously available to the exporter have been withdrawn and are no longer available. It was also claimed that the margins of dumping on Brazilian exports are caused by exchange rates failing to keep up with inflation. WEG was described as a low-cost producer whose exports to Canada have been supervised by Revenue Canada. It was argued that, while the Canadian industry is globalizing, it has been slow to restructure and wants managed trade in the Canadian market. Counsel

argued that the industry's transition will continue with or without the findings. In light of the above and since the findings have outlived their usefulness, the 1985 finding applicable to Brazil should be rescinded.

Counsel for Baldor and its Canadian representative, Dryden, noted that Baldor has complied with the finding with only a negligible amount of anti-dumping duty assessed over the past several years. Counsel argued that Baldor has no propensity to dump and would not compete if prices dropped too low. It was noted that no complaints against Baldor's pricing were raised during the hearing and that GE Canada consented to an exclusion for Baldor. Counsel further noted that Baldor does not compete in the end-user market and, therefore, is not in competition with Westinghouse or GE Canada in this market.

Counsel argued that the Canadian industry is not vulnerable to renewed dumping, but rather is confronted with problems unrelated to the dumping of the subject goods, namely, an inability to compete against undumped goods from the named countries and subject goods from unnamed countries, difficulties in competing with the new producers in Canada, uncompetitive high-efficiency motors, and competition among the members of the Canadian industry.

As noted earlier in these reasons, counsel for ABB Motores of Mexico submitted legal argument to the effect that the finding under review does not apply to motors produced by ABB Motores. Counsel also submitted that, if the Tribunal decides that the finding does have application, there is no evidence of any propensity to dump by ABB Motores, and the firm should be excluded from any continued finding. It was noted that ABB Motores has never dumped the subject goods in Canada and that another firm in the ABB group was not found to have dumped large motors from Finland.

Counsel argued that the evidence of propensity put forward by the industry concerning high tariffs in Mexico, and the existence of nine other producers in Mexico capable of exporting the subject goods, is illogical and is mere speculation rather than evidence. Counsel argued that the Tribunal requires real evidence of a propensity to dump, not mere speculation.

Counsel for Trane noted that anti-dumping findings are not meant to be permanent and requested that the findings be rescinded. If not, it was submitted that the current exclusions covering certain classes of motors imported by Trane be continued. Additionally, it was submitted that motors imported by Trane under an inward processing remission order, and subsequently exported, should also be excluded from the finding. Counsel for EEMAC and for GE Canada agreed to these exclusions.

CONSIDERATION OF THE EVIDENCE

The apparent domestic market for the subject goods, as measured in units, grew by about 6 percent during the five-year period ending in 1989. Producers in Canada increased their share of this market by 9 points, reaching 46 percent in 1989. This growth, however, is properly attributable to the new producers that entered the industry after the 1985 finding. The traditional integrated producers, GE Canada, Westinghouse and Leroy-Somer, gained only 1 point of market share over the period and ended with a combined share of 30 percent.

The market share held by imports declined by 9 points over this period to 54 percent in 1989. Imports from Japan, Mexico, Poland, Taiwan and the United Kingdom underwent a significant retrenchment after the 1985 finding with their combined market share declining from 35 to 7 percent. Imports from the largest exporter in Japan, Toshiba Corporation, were supplanted by imports from the firm's US subsidiary, while Mexico's exports to Canada ceased. A substantial volume of imports from Poland, Taiwan and the United Kingdom were replaced with motors produced in Canada by firms that formerly imported completed motors from these countries.

Countering this downward trend in import penetration, imports from the United States gained 9 points of market share over the five-year period, reaching a 23-percent share in 1989. Imports from Brazil also grew, gaining 4 points to reach a 14-percent share. Imports from countries not subject to these findings grew substantially, from less than a 1-percent share prior to the 1985 finding to 9 percent in 1989.

The relative importance of different import sources has changed significantly since the 1985 finding. While the share of total imports accounted for by motors from the United States declined through the early 1980s to a low of 23 percent in 1985, imports grew rapidly after the finding was made against the six countries in 1985 to account for 43 percent of total imports by 1989. Imports from Brazil almost doubled in relative importance over the years 1985-89, reaching 23 percent of total imports in 1989. Imports from the remaining five countries subject to the 1985 finding declined from 59 percent of total imports in 1985 to 13 percent in 1989. During the same period, imports from non-subject countries more than tripled and accounted for 21 percent of total imports in 1989.

While the market expanded over the five-year period 1985-89, it underwent a 2-percent contraction in 1989. Similarly, while prices have increased about 5 percent per year, price increases appeared to have softened in 1989. Most witnesses indicated that they foresee a slowdown in the market in 1990, especially in the forestry, pulp and paper, and mining end-user markets, and many expect a concomitant softening in prices.

Considerable evidence brought forward during the hearing characterized the Canadian market for the subject goods as price-sensitive. OEMs appear to purchase the lowest cost motor that meets their minimum standards. On the other hand, end users assess suppliers on the basis of technical requirements, servicing capabilities, delivery and price. While price was only one of several factors assessed in the awarding of some of the end-user contracts discussed at the hearing, price appeared to be the deciding factor in the awarding of many of the contracts. Suppliers respond to price pressures in different ways, but no one appears to be immune to pricing pressure in the marketplace. Participants generally agreed that domestic prices were higher than US prices, but would decline over time to reach US levels as Canadian tariffs declined under the Canada-United States Free Trade Agreement (the FTA).

Overall production in Canada increased by almost 25 percent over the five years, with new producers accounting for over half of the increase. Despite steadily increasing net sales values since 1984, unit sales in 1989 by integrated producers are at about the same level as in 1985. Losses continued to be incurred by the industry until 1988 when marginal profits were reported. While some firms also reported profits in 1989, the overall industry returned to a loss position in 1989. During the period 1986-89, the industry embarked on various rationalization programs, many of which will extend into

1990 and beyond. Capital expenditures have increased in each year since 1986, with 1989 expenditures exceeding 6 percent of 1989 sales.

REASONS FOR DECISION

In a review of a finding of material injury to domestic industry caused by dumping or subsidizing, the Tribunal must consider two fundamental questions. Firstly, if the finding is rescinded, is dumping or subsidizing likely to continue or resume? Secondly, if dumping or subsidizing continues or resumes, is it likely to cause material injury to the domestic industry?

In answering the first question, the Tribunal looks for evidence concerning such factors as the recent behavior of exporters and market conditions in the countries of origin, in Canada and elsewhere that make dumping likely or unlikely to resume in the foreseeable future. In addition, the Tribunal looks for evidence respecting the subsidizing practices of the governments of countries subject to the finding. In answering the second question, the Tribunal considers evidence pertaining to many factors, including changes in import shares, market conditions, the health of the industry and any other changes in circumstances that might render the industry likely to be materially injured.

Continued/Resumed Dumping - Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom, and Subsidizing - Brazil (Inquiry No. CIT-6-85)

Total imports of the subject goods from these countries have declined over the past five years. However, the amount of countervailing duty assessed and collected on imports from Brazil and overall margins of dumping and the percentage of imports found to have been dumped from the named countries have all increased to substantial levels over the past two years. The individual behavior of the six countries involved in this finding, however, has been mixed.

Of these countries, Brazil is the only one that has been able to increase its volume and value of exports since the 1985 finding. This growth in imports is overshadowed by the even more dramatic increase in the amount of countervailing and anti-dumping duties collected on these imports. These duties account for the majority of duties collected under SIMA on imports of the subject motors. WEG, the major Brazilian producer, obviously views Canada as an important market in its overall export strategy.

The Tribunal heard evidence that the Government of Brazil has made some movement towards suspending subsidies available to exporters in Brazil. However, the Tribunal is not convinced, from the evidence, that the subsidies have been eliminated and that exporters in Brazil are, and will continue to be, ineligible for countervailable subsidies. In the event that these subsidies are eliminated at some future time, the Deputy Minister would, consequently, cease collecting countervailing duties, and the Tribunal would, then, be in a position to consider rescinding the finding on the basis that the subsidizing had ceased.

With respect to the dumping of the subject goods from Brazil, the percentage of goods dumped and the margins of dumping on these goods have increased markedly over the past few years.

Evidence heard at the hearing indicates that motors from Brazil are aggressively marketed in Canada, largely on the basis of price. Several witnesses testified to the low pricing of these motors. Evidence was adduced that a Canadian producer lost two contract bids in the end-user market segment to Brazilian motors at prices that were well below market levels.

The Tribunal also notes that Brazil was found to have been dumping certain induction motors in Australia in 1982. Additionally, WEG was found to have been exporting dumped and subsidized induction motors over 200 hp to Canada in 1988 with 62 percent of imported goods being dumped with an average margin of dumping of 25 percent and the amount of subsidy found to be 25 percent. The Tribunal is of the opinion that the behavior exhibited in the so-called large motor case (Inquiry No. CIT-5-88) has some relevance to this case, as the large motor case was heard only last year, and the bulk of the goods (200- to 800-hp motors) involves the same producers, production processes, marketing channels and customers as this case. In fact, evidence adduced at the hearing revealed that, at least in some instances, motors under 200 hp and over 200 hp are covered by a single purchase order. In light of the above, the Tribunal is of the view that the dumping of motors from Brazil will continue.

Imports from three subject countries, the United Kingdom, Taiwan and Poland, have all declined substantially since the finding and have been replaced, in part, with motors assembled in Canada by firms that formerly imported the subject goods. Imports from these three countries declined from 50 percent of apparent imports in 1985 to 12 percent in 1989.

Despite declines in the volume exported, the margin of dumping on goods imported from the United Kingdom remains significant. Although Brook Crompton, whose parent company is now the sole UK exporter, began producing motors in Canada in late 1987 to supplant imports of the subject goods from the United Kingdom, its overall sales in Canada have declined. The motors produced in Canada are made largely from parts imported from the same factories in the United Kingdom that still continue to export completed motors to Canada.

Brook Crompton UK purchased the UK operation of GEC Electromotors last year and now operates five world-scale plants having substantial capacity. Additional capacity expansions are planned. The firm has been operating in Canada under different names for a number of years and has a well-established and reputable sales organization.

The Tribunal notes that certain induction motors from the United Kingdom were found to have been dumped in Australia in 1979 and 1982. Additionally, a company related to Brook Crompton in the United Kingdom was found to have been dumping 100 percent of its exports of large motors in Canada in 1988 at an average margin of dumping of 13 percent.

Imports from Taiwan have declined substantially, although the percentage of goods dumped and the margins of dumping have remained persistently high. Teco, one of the manufacturers in Taiwan, operates a world-scale plant and is apparently constructing another in Indonesia. Tatung, another producer in Taiwan, also operates a large plant. Imports from both of these firms have been largely replaced by motors produced in Canada, mostly from imported parts, by former importers of the completed motors. These importers have established reputations and distribution networks in

Canada. Madison, the non-integrated producer utilizing parts imported from Teco, was identified during the hearing as an aggressive pricer. Recently, Madison successfully penetrated the end-user market by outbidding a domestic integrated producer.

The Tribunal notes that Taiwan was subject to the above-noted Australian anti-dumping finding in 1982. In addition, Taiwanese exports of induction motors over 200 hp were found to have been dumped in Canada in 1988, with 81 percent of imports found to have been dumped at an average margin of dumping of 18 percent.

Imports from Poland, while down from their 1985 high, have stabilized over the past three years. Both the percentage of goods dumped and the margin of dumping declined during this period with no anti-dumping duties being assessed in 1989. The sole Canadian importer of motors from Poland, Dalimpex, also began producing motors from imported parts a few years ago. The importer chose not to appear before the Tribunal and did not provide any argument or evidence to permit the Tribunal to conclude anything other than that the new production in Canada was prompted by, and is maintained in Canada due to, the existence of the 1985 finding.

The Tribunal notes that Poland was also subject to the aforementioned Australian anti-dumping finding in 1979. In addition, Poland, along with several other Eastern European countries, was found, in 1987, to have been dumping standardized multiphase electric motors in the EEC.

Considerable evidence concerning the operations and intentions of the new non-integrated producers was heard by the Tribunal. Despite having supplanted a substantial volume of imports from the United Kingdom, Taiwan and Poland since the 1985 finding, these new producers did not support continuation of the finding. This raises the question as to whether these firms are committed to production in Canada or if they, perhaps, prefer to be able to import completed motors without dumping supervision.

The evidence indicates that a substantial number of parts and components for these motors are sourced from the same factories from which completed motors were exported prior to 1985. In addition, this new post-finding production is concentrated on subject goods, while non-subject, and in some cases subject, induction motors continue to be imported from the same factories that produce the parts for the subject motors. The planned and expended investment in these new facilities is, on average, a small fraction of that invested by the integrated producers. In light of this evidence and evidence concerning the importance of world-scale facilities in the motor industry of the 1990s, there is some doubt in the Tribunal's mind that the new non-integrated production facilities in Canada would retain their allure in the event the finding were rescinded.

Imports from Japan have also declined since the finding, although the margin of dumping remains significant and the percentage of dumped goods remains very high. A portion of the decline in imports is due to the transfer of production from Toshiba Corporation, a major producer in Japan, to a US subsidiary. The Tribunal is aware that Toshiba Corporation was also found to have been dumping large motors in Canada, in 1988, from Japan, the United States and Brazil. The percentage of its exports that were found to have been dumped ranged from 100 percent (Japan) to 58 percent (United States) to 36 percent (Brazil), with the margins of dumping found to be 38 percent (Japan), 16 percent (United States) and 43 percent (Brazil).

Imports from Mexico, after peaking in 1984, dropped to a negligible level after the finding. Although the industry expressed some concern about a potential resumption of dumping by producers in Mexico, evidence adduced at the hearing did not support this concern. Furthermore, there does not seem to be any organization actively marketing the goods in Canada.

In addition to the country-specific behavior noted above, the Tribunal is also cognizant of the softening trend in the overall market environment in Canada in which the above-mentioned behavior was, is and will be demonstrated. Given the price sensitivity of the market and the large number of suppliers, it is likely that one or more suppliers will lead prices down in an attempt to maintain or gain market share when the market is declining. This will result in additional suppliers responding out of necessity. In considering whether this pricing pressure would provoke a continuation or resumption of dumping, the Tribunal is mindful that subsidized and dumped imports have continued to enter Canada and, in fact, have increased over the past four years, a time period during which the domestic market has been generally expanding.

In light of the available evidence, the Tribunal concludes that if the finding were rescinded, dumping by Brazil, Japan, Taiwan, the United Kingdom, and Poland is likely to continue or resume. Subsidizing by the Government of Brazil continues, although some programs have been suspended. With regard to Mexico, the Tribunal concludes that the evidence has not established that exporters in Mexico are likely to resume dumping if the finding is rescinded against Mexico.

Continued/Resumed Dumping - United States (Inquiry No. ADT-8R-78)

During the hearing, an issue arose that concerned the propriety of calling an official of Revenue Canada to provide reply evidence. Counsel for EEMAC, Leroy-Somer and Westinghouse wanted to call an official of Revenue Canada to present evidence that it had investigated five contracts in which Toshiba was involved. The contracts were for certain subject goods imported from the United States into Canada during the period 1988-89.

The purpose of these investigations was to evaluate whether to re-determine the normal values of the subject goods exported to Canada in fulfilment of the respective contracts. Counsel sought to introduce the evidence in response to Toshiba's testimony that it had no propensity to dump the subject goods.

Counsel for Toshiba objected to the propriety of the Tribunal's categorization of the evidence as being in reply. However, the Tribunal ruled that it was prepared to hear the witness and have him cross-examined. Counsel for Toshiba moved for an adjournment to recall a witness to challenge the official's testimony. The Tribunal did not grant the adjournment because it noted that the reply evidence only indicated that the Deputy Minister had undertaken investigations regarding the importations.

While the investigations have been completed, assessments of anti-dumping duty have not been issued against the various purchasers of Toshiba's products related to the investigated contracts. Thus, at the time of the hearing, assessments of anti-dumping duty against these purchasers did not in fact exist. Because of this, the Tribunal chose not to consider the official's evidence regarding these five contracts in determining

whether to rescind or continue the finding respecting goods originating in or exported from the United States.

Imports from the United States have increased significantly since 1986 and exceed imports from the other six subject countries combined. The overall margin of dumping and percentage of dumped goods increased substantially after the 1985 finding and then declined in 1988, only to increase again in 1989. Over the past few years, the two larger US exporters, Toshiba and Baldor, have had a relatively low percentage of dumped exports and moderate margins of dumping, but have indicated that they either already have excess capacity or plan to increase their capacity. The Tribunal is aware that the volume and value of imports from each of these exporters now exceed the total volume and value imported from each of the six other countries, except for Brazil.

Counsel for Baldor submitted evidence that the firm is a responsible pricer that does not have a propensity to dump. Counsel referenced testimony by GE Canada to the effect that it did not oppose excluding Baldor from the application of the finding. Westinghouse and Leroy-Somer do not share this view. The Tribunal notes that Baldor does not compete directly with GE Canada in the end-user market segment, but does compete with Westinghouse and Leroy-Somer in the other market segments. In addition, the Tribunal is conscious of the magnitude of Baldor's exports and of the fact that its margin of dumping and the percentage of its exports that are dumped are not negligible. Consequently, the Tribunal finds no reason to exclude exports by Baldor from the application of this finding.

Substantial evidence was adduced at the hearing concerning Toshiba's marketing efforts, particularly in the end-user sector. Toshiba has become a major force in this segment of the market over the past several years through its demonstrated objective of gaining market share through aggressive pricing. Toshiba has essentially by-passed its distributors in bidding on large end-user contracts and appears to attempt to offer the lowest price possible without dumping. The anti-dumping duties assessed against Toshiba's imports appear to result from Toshiba pricing too close to the normal value price line.

Evidence provided during the hearing indicates that the US motor industry has been undergoing a remarkable reorganization and rationalization. Several plants have been closed, firms have exited the industry, while others have been targets of leveraged buyouts (LBOs). In an industry undergoing this type of rationalization/reorganization, some firms will strive to obtain a level of sales sufficient to produce the cash flow necessary to finance operations and service their debt. This necessity increases the likelihood of pricing to gain volume and market share by any means necessary, including dumping. The Tribunal is conscious of the fact that a significant percentage of imports of large motors from the United States was found to have been dumped in 1988 with significant margins of dumping.

In assessing whether dumping is likely to resume, the Tribunal has considered, in addition to the above, the same factors as noted in respect of the 1985 finding, i.e., the softening market, the price sensitivity of the market and the prospect of suppliers offering lower prices to which other suppliers will be forced to respond. The Tribunal is of the view that exporters in the United States are subject to at least the same level of pricing pressures outlined above in respect of the countries subject to the 1985 finding. As such,

and in light of the available evidence, the Tribunal concludes that, if the finding were rescinded, dumping by the United States would likely resume.

Material Injury - Brazil, Japan, Mexico, Poland, Taiwan and the United Kingdom (Inquiry No. CIT-6-85)

In 1985, the CIT determined that imports of dumped and subsidized goods were causing material injury to the domestic industry in the form of lost sales, loss of market share, price suppression and operating losses. Since that time, the evidence shows that, while the industry is in better overall health than at any time since 1982, it is not overly strong. The traditional integrated producers have maintained their market share, although several producers have exited the industry over the intervening years. The industry has also been able to improve its profitability. Losses have been reduced substantially with some producers earning a profit in the last few years. Output has increased moderately, while exports have shown significant improvement, although they did not show a profit in 1989.

The performance of the industry, as a whole, is not evenly distributed among its members. During the buoyant market period of the last two years, Westinghouse and Leroy-Somer have returned to modest profitability and have had mixed success in regaining market share. GE Canada has had poorer performance during this period with declining output, decreased market share and substantial losses. Much of this poor performance can be attributed to the recent penetration of the end-user market by motors imported from the United States, Brazil and Taiwan.

The Canadian industry is reorganizing and rationalizing. It has made large capital expenditures in preparing for continued competitive challenges. GE Canada is still in the midst of this process and has been incurring, what it hopes are, short-term pains for long-term gains. A major investment program resulting from a North American mandate and the transfer of equipment from a plant closed in the United States are nearing completion. GE Canada is currently seeking approval for an additional three-year investment program required for it to become a low-cost, higher volume producer. In light of GE Canada's large outlays on investment and its protracted loss situation, the firm is especially susceptible to a market downturn and/or lower prices that would arise from a resumption of dumping. These events would exacerbate the firm's reduction in output and decline in market share and would further erode its margins. In addition, the Tribunal is mindful of the difficulty that GE Canada would have in obtaining approval from its parent company for its investment program in the face of continued losses resulting from a resumption of dumping.

The induction motor industry is in the midst of considerable change worldwide. Evidence provided at the hearing revealed that producers have been taken over by other producers, plants have been closed and global capacity is being expanded through both plant expansions and the overseas construction of new world-scale factories. The trend appears to be toward fewer and larger producers having continental or global product mandates. In addition, the FTA will serve to eliminate tariffs between Canada and the United States by 1998, and prices in Canada are expected to decline to the lower US levels.

Evidence provided during the hearing attested to the vigorous competition in the domestic market. New producers have supplanted imports from some countries and

have gained a significant share of the market. Imports from non-subject countries are increasing. Certain imports have made considerable inroads into the end-user market over the past several years, competing primarily on price. Continued dumping on the part of some countries and subsidizing by Brazil have fostered energetic price competition.

Given the enlarged pricing pressures of a weaker market, the Tribunal expects domestic producers to face strong pricing pressures in the near future and that dumping by the exporters in the named countries is likely to continue or resume. The Tribunal concludes that a resumption of dumping is likely to cause material injury to the industry in the form of lower prices, smaller market shares, marginal or negative margins and a reduced ability to invest the necessary capital to remain competitive.

Material Injury - United States (Inquiry No. ADT-8R-78)

The rationale described above, in respect of material injury to the domestic industry arising from resumed dumping on the part of the countries subject to the 1985 finding, is also applicable to an analysis of material injury likely to be caused to the industry arising from resumed dumping on the part of the United States. In fact, material injury is more likely to be caused due to the market share held by imports from the United States, the more established distribution and marketing of US goods in Canada and the aggressive end-user market pricing demonstrated by Toshiba. In addition, despite the contention of Toshiba and Baldor that they cannot cause material injury to Leroy-Somer because they do not produce and export aluminum motors, the Tribunal notes that the evidence indicates that aluminum and cast iron motors compete directly in most applications.

In light of the above, the Tribunal concludes that resumed dumping from the United States is likely to cause material injury to the domestic industry in the form of lower prices, reduced market shares, marginal or negative margins and a reduced ability to invest the necessary capital to remain competitive.

Request for Exclusion

Counsel for Trane requested that the subject goods imported from the United States, for installation into equipment manufactured by the firm for export from Canada to the United States, in accordance with the Inward Processing provisions of the *Customs Tariff*,[8] be excluded from the application of the finding. Evidence submitted by Trane indicates that, while the firm purchases Canadian-made motors for equipment sold in Canada, it also imports some subject motors from the United States. Trane is able to claim a drawback of the customs and anti-dumping duties paid on most of these imported motors, as they are incorporated into equipment that is subsequently exported to the United States.

Trane presented evidence respecting its reasons for sourcing motors in the United States. It stated that it incorporates US motors into equipment that is exported to the United States because of US market requirements. These requirements were described in more detail in Trane's confidential submission. In summary, Trane contends that these

8. R.S.C., 1985, c. 41 (3rd Supp.).

imports could not cause material injury to the domestic production of like goods due to the modest quantities involved and because these imports are eligible for a drawback. Both Trane's public and confidential submissions were unchallenged during the hearing.

Neither EEMAC nor GE Canada objected to the granting of any such exclusion, and, in fact, GE Canada would not object to excluding imports by any importers under the Inward Processing provisions. EEMAC and Trane were of the view that only those firms that requested such an exclusion should be eligible for the exclusion.

The Tribunal is, therefore, of the view that induction motors imported from the United States by Trane for installation into equipement manufactured by Trane for export from Canada to the United States, in accordance with the Inward Processing provisions of the *Customs Tariff*, are not causing material injury to the domestic industry, as the evidence indicates that such motors are not sourced from domestic suppliers because of US market requirements. Consequently, those motors will be excluded from the application of the finding against the United States.

CONCLUSION

In view of the foregoing, the Tribunal has concluded that dumping on the part of exporters in Brazil, Japan, Poland, Taiwan and the United Kingdom is likely to continue, that subsidizing on the part of Brazil has not ceased and that renewed imports of dumped and/or subsidized goods would cause material injury to the domestic industry. The finding in Inquiry No. CIT-6-85 is, therefore, continued with respect to Brazil, Japan, Poland, Taiwan and the United Kingdom, and the said finding is rescinded in respect of the subject goods originating in or exported from Mexico.

The Tribunal has also concluded, in view of the above, that dumping by exporters in the United States is likely to continue and that renewed dumping would cause material injury to the domestic industry. The finding in Inquiry No. ADT-8R-78 is, therefore, continued, with an amendment to exclude the subject goods that are imported into Canada from the United States by Trane for installation into equipment manufactured by Trane for export from Canada to the United States, in accordance with the Inward Processing provisions of the *Customs Tariff* (Member Bertrand dissenting from the exclusion).

Arthur B. Trudeau
Arthur B. Trudeau
Presiding Member

Michèle Blouin
Michèle Blouin
Member

REASONS FOR PARTIAL DISSENT BY MEMBER BERTRAND

I agree with my colleagues on all aspects of the finding and reasons thereof except with respect to the exclusion granted to Trane. Based on my understanding of the facts of this case, I am unable to conclude that such an exclusion is warranted, for the following reasons.

Oral evidence, confidential testimony and argument presented on behalf of Trane indicate that there are three "pillars" upon which that request for exclusion is based. First, the domestic industry, as represented by EEMAC and GE Canada, is not opposed to Trane being granted an exclusion for those imported subject motors subsequently exported under the Inward Processing provisions of the *Customs Tariff*. Second, the subject goods imported by Trane, and subsequently exported, are entitled to duty drawback pursuant to the *Goods Imported and Exported Drawback Regulations*.[9] The claimed administrative and cash-flow burdens borne by Trane in complying with the drawback regulations, and the claim by Trane that the receipt of a duty drawback is evidence that there is no material injury to the domestic industry by Trane's imports, furnish a second reason, according to the company, for granting the exclusion. Third, Trane claims that the US market requires that the equipment sold by the company incorporate US-made motors for reasons or purposes discussed *in camera*.

While the acquiescence of domestic producers to the granting of an exclusion to Trane is a factor to be considered, it is not because all the parties to a hearing agree to the exclusion that, on that basis alone, the Tribunal should endorse that agreement. In addition, the Tribunal must be convinced, by evidence presented, that Trane's importation of the dumped motors is not likely to cause material injury.

In my view, the existence and effect of the duty drawback regulations, the burden involved in complying with those regulations and the claim relating to market requirements, when assessed in the light of the totality of the evidence, do not justify the conclusion that the importation by Trane of dumped subject goods, incorporated into equipment subsequently exported, is not likely to cause material injury.

First, there is Trane's concerns about the claimed administrative and cash-flow burdens borne by the company in complying with the drawback regulations. While I sympathize with Trane in this regard, I am unable to see the relevance of those burdens and inconvenience to the Tribunal's consideration of whether the dumped imports by Trane of the subject motors are likely to cause material injury.

Second, with regard to the duty drawback regulations per se, previous Tribunal jurisprudence has consistently held that such regulations are not germane in examining the relationship between dumped product and material injury. Thus, in the ADT's Inquiry No. ADT-5-81, the Tribunal held that duty drawback provisions have nothing to do with dumping and, as such, do not enter into the question of causality between dumping and injury being incurred by the Canadian industry at any given moment. Similar views were expressed in Inquiry No. ADT-3-83.

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9. SOR/86-795.

Trane maintains that, to the extent that it could enjoy the benefits of the Inward Processing provisions with respect to regular customs duties on US motors to be subsequently exported, it should be spared the extra burden of a refund claim with respect to anti-dumping duties through the granting of an exclusion. Support for that position may be found in the graphite electrode exclusion granted in the CIT's Review No. CIT R-5-87. In my view, the present situation is distinguishable on fundamental grounds. In the graphite electrode review, the ownership of the electrodes remained with the US exporter and the electrodes were brought into the country only to be finished, the producer in Canada performing only a tolling function. Given the unique position of the exporter, there was no possibility that the importation of graphite, electrodes in those circumstances would displace Canadian production and cause injury to producers in Canada of finished electrodes. Rather, production costs were reduced and margins and cash flow were improved. Furthermore, the paper burden and inconvenience experienced by Trane is no different from that of any producer in Canada exporting equipment incorporating the subject goods to the United States. The granting of an exclusion to Trane on such grounds would create a precedent that, if followed, would effectively broaden the scope of the Inward Processing provisions to include anti-dumping duties when Parliament and the Governor in Council have declined to do so.

The third "pillar" upon which Trane bases its exclusion request involves the claim that US market requirements dictate the use of US-sourced motors in equipment exported for sale in that market. Unlike my colleagues, I am not convinced that the evidence presented, viewed in the context of the totality of the evidence in this inquiry, justifies an exclusion.

In considering evidence whether importations of dumped goods are not likely to cause material injury and, thus, that an exclusion is warranted, the Tribunal examines, amongst other things, whether the domestic industry in issue is producing or could produce the subject goods (or substitutes) for which the exclusion is requested. If the domestic industry does not or is unable to produce such goods, it cannot claim injury from importations of the dumped goods sought to be excluded.

Taken in these terms, the substance of Trane's argument regarding market consideration is that the domestic industry is not producing or could not produce or supply motors that are like or substitutable for the motors for which Trane seeks an exclusion. As such, the Canadian industry cannot claim injury from the importation of the dumped motors incorporated into equipment subsequently exported. Trane, in effect, argues that US market requirements create an impermeable barrier to Canadian-sourced motors. Yet, the evidence presented at the hearing indicates otherwise.

Motors sourced in the United States for incorporation into Trane's exported equipment are no different from Canadian-produced motors in terms of uniqueness of design, standard or specification. When Trane manufactures, for sale in Canada, equipment identical to that exported by the company to the United States, it sources Canadian motors. In short, there is no evidence to indicate that the necessity to source motors in the United States is grounded in the subject motors per se. Rather, the difficulty is ascribed to US market requirements, as explained *in camera*. Yet, evidence was presented to the Tribunal indicating that domestic producers export a substantial volume of a broad range of subject goods to the United States. Further, there is no evidence that these exported goods are considered unacceptable in that market or have

not satisfied the same market requirements described by Trane. In other words, if the US market requirements, as perceived by Trane, constitute a barrier between imported and locally produced motors, it is a porous barrier, indeed, that domestic producers have not encountered in their activities or dealings in that market.

Thus, even though the domestic industry has acquiesced to an exclusion, I am not convinced, for the foregoing reasons, that Trane should be granted an exclusion on the grounds of absence of likelihood of material injury nor that it would be proper for the Tribunal to bring into consideration the existence of the Inward Processing provisions and to establish a precedent that would lead to an expansion of the effect of such provisions beyond what was intended in the legislation and the regulations.

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member