DOMESTIC JUDICIAL REVIEW OF TRADE REMEDIES

Experiences of the Most Active WTO Members

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Canada: high deference, stark reality

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I Introduction

This chapter will discuss the review of trade remedy determinations in Canada. First, we will provide an overview of Canada's trade remedy regime and the types of determinations made pursuant to Canada's trade remedy laws. Second, we will provide an overview of Canada's system of administrative law, which governs the review of administrative decisions including those made in trade remedies proceedings. We will then provide a detailed discussion and commentary on key Canadian court, Canada–US Free Trade Agreement (CUFTA) and North American Free Trade Agreement (NAFTA) bi-national panel decisions involving trade remedy determinations made by the Canadian International Trade Tribunal (CITT) and the Canada Border Services Agency (CBSA). Based on this discussion and commentary, we will offer some concluding remarks on the implications of Canada's legal system, from both a domestic and comparative legal perspective.

II Canada's trade remedy law regime

Similar to the trade remedy regimes of many industrialized countries, Canada has a complex web of domestic trade remedy laws embodied in multiple statutes. The principal domestic trade remedy regimes in Canada are anti-dumping/countervail, set out in the Special Import Measures Act (SIMA), global safeguards, contained in the Canadian International Trade Tribunal Act (CITT Act) and China-specific safeguard remedies for market disruption and trade diversion under the CITT Act. Given that the large majority (i.e. well over 95 per cent) of Canadian trade remedy cases of the past two decades have involved anti-dumping and countervail, the focus of this chapter is on the review of Canadian anti-dumping and countervailing duty determinations, although the

principles discussed are applicable to the review of safeguards determinations as well. Under Canada's anti-dumping and countervailing duty laws, investigative jurisdiction is bifurcated, with the CBSA responsible for investigating and making determinations regarding dumping and subsidization and the CITT responsible for making determinations regarding injury/threat of injury. The investigative process in Canada runs approximately 210 days from beginning to end, with the key determinations by investigative authorities being: initiation of investigation by the CBSA (Day 0),[1] preliminary determination of injury/threat of injury by the CITT (Day 60),[2] preliminary determination of dumping and/or subsidization by the CBSA (Day 90),[3] final determination of dumping/subsidization by the CBSA (Day 180)[4] and final determination of injury by the CITT (Day 210).[5]

The CBSA and the CITT are also responsible for conducting expiry reviews (i.e. sunset reviews) to determine whether to extend an injury finding past the five-year automatic expiry limit. In this process, the CITT can initiate an expiry review at the request of the Minister of Finance, the CBSA, any government, or at the request of any other person who satisfies the CITT that a review is warranted.[6] If the CITT initiates a review, the CBSA conducts an investigation within 120 days to determine if the dumping or subsidizing of the goods is likely to continue or resume if the finding expires.[7] If the CBSA makes an affirmative finding, the CITT then determines whether the expiry of the order or finding is likely to result in injury or retardation.[8] The CITT may either rescind the order or finding, or continue it with or without amendment.[9] Additionally, the CITT may carry out an inquiry to determine if the imposition of anti-dumping or countervailing duties following an investigation is in the public interest.[10] The CITT will conduct a public interest inquiry upon application by a party to the investigation, or any other group or person affected by the investigation, and if it is of the opinion that there are reasonable grounds to act on the request.[11] If the CITT determines that it is in the public interest to reduce or eliminate

[1] SIMA, RSC 1985, c. S-15, s. 31. [2] SIMA, RSC 1985, c. S-15, s. 37.1.
[3] SIMA, RSC 1985, c. S-15, s. 38. [4] SIMA, RSC 1985, c. S-15, s. 41.
[5] SIMA, RSC 1985, c. S-15, ss. 42, 43(1). [6] SIMA, RSC 1985, c. S-15, s. 76.03(2), (3).
[7] SIMA, RSC 1985, c. S-15, s. 76.03(7). [8] SIMA, RSC 1985, c. S-15, s. 76.03(10).
[9] SIMA, RSC 1985, c. S-15, s. 76.03(12). [10] SIMA, RSC 1985, c. S-15, s. 45(1).
[11] Canadian International Trade Tribunal, *Guideline on Public Interest Inquiries* (Ottawa: Canadian International Trade Tribunal, 2000), at p. 1, online: www.citt-tcce.gc.ca/doc/english/Publicat/PubInt_e.pdf.

duties, it will issue a report to the Minister of Finance, who will ultimately make the decision.[12]

The CITT may also conduct interim reviews of findings or orders while they are still in effect.[13] The CITT itself, the Minister of Finance, the president of the CBSA, or any person of any government can initiate the review if there are reasonable grounds to act on the request.[14] The CITT may rescind, amend or continue the finding or order because of the interim review.[15] The CBSA also conducts re-investigations to update normal values, export prices or amounts of subsidy under a finding or order. Interestingly, there are no statutory provisions in Canada that govern such re-investigations. SIMA also provides for assessments and re-determinations of anti-dumping duty liability for given entries.[16] Finally, SIMA empowers the CITT to make rulings as to who is the importer of goods subject to anti-dumping findings, which can be important given that liability for anti-dumping duties falls on the importer for SIMA purposes.[17]

Findings or orders made in any of these proceedings are subject to various appeal and review mechanisms, discussed in the balance of this chapter.

III Administrative law in Canada

1 Introduction

As statutorily created and governed administrative bodies, the CITT and the CBSA are both subject to Canada's administrative law regime. Administrative law deals with the legal constraints placed upon administrative decision-makers[18] who exercise statutory power.[19] The purpose of administrative law is to ensure that agencies remain within the bounds of the rule of law.[20]

[12] SIMA, RSC 1985, c. S-15, s. 45(4), (5). [13] SIMA, RSC 1985, c. S-15, s. 76.01(1).
[14] SIMA, RSC 1985, c. S-15, s. 76.01(1), (3). [15] SIMA, RSC 1985, c. S-15, s. 76.01(5).
[16] SIMA, RSC 1985, c. S-15, ss. 55–9.
[17] SIMA, RSC 1985, c. S-15, s. 89. Note that in Canada the importer for SIMA purposes is not necessarily the importer for customs purposes.
[18] For the purposes of this chapter and for ease of reference, the chapter will use the terms "agency" or "agencies" to refer to all administrative bodies or administrative decision-makers, unless quoting directly from a source which uses other terminology.
[19] *Canadian Encyclopedic Digest*, 3rd edn, vol. I (Toronto: Carswell, 1973), "Title 3: Administrative Law", § 1.
[20] Colleen M. Flood, "An Introduction to (the Effervescence of) Administrative Law", in Colleen M. Flood and Lorne Sossin (eds), *Administrative Law in Context* (Toronto: Emond Montgomery Publications Limited, 2008), at p. 10.

The sources of administrative law, as they pertain to CITT and CBSA decisions, include SIMA, the Federal Courts Act[21] (FCA) and the common law.[22] As a general legal matter, these sources provide that where an agency has acted outside its authority, that decision is invalid.[23] More specifically, an agency acts outside its authority when it makes a decision which violates procedural fairness (whether the agency used the proper procedures in reaching a decision) or substantive validity (whether the agency made an error in the decision of sufficient magnitude that the court is willing to remedy it).[24] The most important questions in seeking review of an agency's decision are the proper review mechanisms to invoke, the grounds of review and the standard of review (i.e. the level of deference given to the agency's decision).

2 *Mechanisms for review*

The above-discussed determinations made by administering authorities under Canada's anti-dumping and countervailing duty laws fall into three categories for purposes of review under Canada's administrative law regime. First, SIMA provides a statutory right of appeal for a very small number of determinations made under it, namely re-determinations of actual anti-dumping liability made by the CBSA.[25] A second category of determinations, namely, certain final determinations, orders and/or findings of dumping, injury/threat of injury, likelihood of dumping and likelihood of injury in investigations, expiry reviews and interim reviews, are subject to a **statutory right of judicial review** at Canada's Federal Court of Appeal or a bi-national panel (if the goods at issue are eligible). Third, certain determinations which are neither "final", nor qualify as "orders or findings", are in theory reviewable pursuant to the Federal Court's supervisory jurisdiction over all federal boards, commissions or tribunals, which has been codified in Canada's Federal Courts Act.[26] Interestingly, for this third

[21] FCA, RSC 1985, F-7.
[22] See generally, Cristie L. Ford, "Dogs and Tails: Remedies in Administrative Law", in Flood and Sossin (eds), *Administrative Law in Context*, at p. 64.
[23] *Canadian Encyclopedic Digest*, "Title 3: Administrative Law", § 2.
[24] Flood, "An Introduction to (the Effervescence of) Administrative Law" in Flood and Sossin (eds), *Administrative Law in Context*, at p. 11.
[25] SIMA, RSC 1985, c. S-15, s. 60. Note that the appeal lies to Canada's Federal Court of Appeal and that, prior to such an appeal being made, the party in question must follow the procedure of requesting re-determinations and appeal to both the CBSA and the CITT, as set out in ss. 55 to 59 of SIMA.
[26] FCA, RSC 1985, F-7, ss. 18(1), 18.1, 28(1).

category of determinations, jurisdiction for judicial review would appear to be split between the Federal Court for CBSA determinations and the Federal Court of Appeal for CITT determinations.[27] Notably, while the jurisdiction for review and the standards governing review of the second and third categories of decisions are different (see discussion in the next section), the permitted grounds of applications for judicial review of these categories of decisions are identical. Specifically, applications for judicial review may be made on the ground that the CBSA or the CITT, as the case may be:

- acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- acted, or failed to act, by reason of fraud or perjured evidence; or
- acted in any other way that was contrary to law.[28]

3 *Standard of appeal or review*

Although an exhaustive history of the standard of review for administrative decisions in Canada is beyond the scope of this chapter, an understanding of the basic history and evolution of standard of review analysis is necessary to understand how Canadian courts currently treat CBSA and CITT decisions. At its core, the standard of review analysis is the means through which a court determines how much deference to give to an agency's decision.

3.1 Privative clauses and questions of jurisdiction

An issue at the core of early Canadian judicial decisions discussing standards of review pertained to the use of privative clauses to "thwart

[27] See FCA, RSC 1985, F-7, s. 28(1). See also *Whirlpool Corporation* v. *Camco Inc. et al.* [2000] 2 SCR 107; 2000 SC 67.

[28] SIMA, RSC 1985, c. S-15, s. 96.1(2). FCA, RSC 1985, F-7, s. 18.1(4). See also Annex 1911 of the NAFTA, which defines the standard of review for purposes of review of qualifying final determinations of Canadian investigative authorities as "the grounds set out in subsection 18.1(4) of the *Federal Court Act*, as amended".

attempts by the judiciary to trespass on the administrative domain".[29] The legislature established these statutory provisions – which deemed the agency's decision final and not subject to review – to remove agency decisions from the purview of the courts.[30] Courts, uncomfortable with the consequence that an "inferior tribunal" would essentially be the sole judge of the validity of its own acts, developed the concept of jurisdictional error to circumvent the privative clause protection.[31] The definition of jurisdictional error included any interpretation of a statute made by an agency, and the court would substitute its own opinion of the correct interpretation of the statue for the agency.[32] Essentially, the agency would have to get the "right" or "correct" answer on the jurisdictional question before it was entitled to protection from the privative clause, since privative clauses only protected decisions within the agency's jurisdiction.

3.2 The patently unreasonable decision

The Supreme Court of Canada issued one of the most influential decisions in Canadian administrative law in 1979 in *C.U.P.E.* v. *N.B. Liquor Corporation*,[33] in which, among other things, it criticized the arbitrariness of the above approach. Dickson J., writing for the Court, noted that it is difficult to determine what is "jurisdictional" and easy to label a question as jurisdictional, subjecting the agency to broader review.[34] Moreover, Dickson J. recognized that agencies were often specialized, administering highly technical statutory schemes and that courts should recognize their lack of relative expertise in reviewing decisions of such specialized agencies.[35]

In light of these criticisms, Dickson J. set out a second tier of analysis to be conducted in addition to assessment of jurisdictional errors: evaluation of specialized agencies' decision against a standard of "patent unreasonableness". In short, where the specialized agency acts within its jurisdiction, courts may interfere with that decision where the agency did "something which takes the exercise of its powers outside the protection of the privative or preclusive clause".[36] Examples of such an error would be acting in bad faith, basing the decision on extraneous matters, failing

[29] Guy Régimbald, *Canadian Administrative Law* (Markham: LexisNexis, 2008), at p. 393.
[30] David Philip Jones and Anne S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 2009), at p. 14.
[31] *Canada (Attorney General)* v. *P.S.A.C* [1993] 1 SCR 941, at para. 23. [32] Ibid.
[33] *C.U.P.E.* v. *N.B. Liquor Corporation* [1979] 2 SCR 227. [34] Ibid., at 233.
[35] Ibid., at 235. [36] Ibid., at 237.

to consider relevant factors or making an interpretation that the relevant legislation cannot rationally support.[37]

This analysis also gave rise to the notion that there is more than one "right" decision. The Court recognized that there are often many different interpretations to a statutory provision or factual situation, such that "[t]here is no one interpretation which can be said to be 'right'".[38] So long as the agency comes to an interpretation that is not patently unreasonable, then its privative clause should protect that decision from review.

The result of *C.U.P.E.* v. *N.B. Liquor Corporation* is that courts review questions of jurisdiction on a standard of "correctness" while they evaluate questions within jurisdiction against the standard of "patent unreasonableness".

3.3 The pragmatic and functional analysis

The Supreme Court further refined the analysis of the standard of review in *U.E.S., Local 298* v. *Bibeault*.[39] Writing for the Court, Beetz J. noted, "[t]he formalistic analysis [. . .] is giving way to a pragmatic and functional analysis, hitherto associated with the concept of the patently unreasonable error".[40] The central question is whether the legislature intended the question asked to be within the jurisdiction conferred on the agency.[41] A court must look at this question and factors such as the wording of the statute conferring jurisdiction, the purpose of the statute, the reason for the agency's existence, the agency's area of expertise and the nature of the problem confronting the agency, in order to determine whether the standard of correctness or patent unreasonableness applies to the decision.[42] Thus, the pragmatic and functional analysis became the governing framework to determine the standard of review to apply, and the Court relegated jurisdictional error to a lesser role.

3.4 Deference and statutory appeals: the "spectrum" of standards

However, courts had difficulty in applying this approach to agencies not protected by privative clauses or to those subject to statutory appeal. In such cases, there was no legislative direction to defer to the agency's

[37] Ibid. [38] Ibid. [39] *U.E.S., Local 298* v. *Bibeault* [1988] 2 SCR 1048.
[40] Ibid., at para. 122. [41] Ibid., at para. 119. [42] Ibid., at para. 122.

decision. In *Pezim* v. *British Columbia*, the Supreme Court created the concept of a "spectrum of standards" to address this issue.[43] The Court was clear that despite the absence of a privative clause, "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise".[44] Accordingly, Iacobucci J. held that:

> the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise.[45]

To determine which standard on the spectrum applies, the Court noted that courts should examine factors such as the agency's specialized duties and policy development role, as well as the nature of the problem under consideration.

Canada v. *Southam Inc.* clarified the spectrum's breadth.[46] In that case, Iacobucci J. held that when dealing with agencies that are subject to statutory appeals, there are three standards of review: the deferential standard of patent unreasonableness, the non-deferential standard of correctness and a middle standard of reasonableness *simpliciter*.[47] The difference between patent unreasonableness and reasonableness *simpliciter* lies "in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable."[48] Thus, courts now had a pragmatic and functional framework to assess the applicable standard of review.

3.5 Harmonization: the pragmatic and functional analysis

The next development was to harmonize the pragmatic and functional analysis in the statutory appeals context with the pragmatic and functional analysis in the context of statutes that provided no statutory right

[43] *Pezim v. British Columbia* [1994] 2 SCR 557. [44] Ibid., at 591. [45] Ibid., at 590.
[46] *Canada (Director of Investigation and Research)* v. *Southam Inc.* [1997] 1 SCR 748.
[47] Interestingly, Iacobucci J. retroactively claims that the standard of review chosen in *Pezim* was that of reasonableness *simpliciter*. See ibid., at para. 58.
[48] Ibid., at para. 57.

of appeal or review, but rather, included a privative clause. This occurred in *Pushpanathan* v. *Canada*.[49]

First, Bastarache J., writing for the majority, clarified the position of jurisdictional errors in the context of the pragmatic and functional approach. He held that a jurisdictional error is "simply an error on an issue with respect to which, according to the outcome of the pragmatic and functional analysis, the tribunal must make a correct interpretation and to which no deference will be shown".[50] Thus, jurisdiction remains a very small element in the analysis. Second, he categorized the factors to be taken into account when determining the standard of review, subsuming the presence of a privative clause as merely one factor for consideration. Drawing from *Southam*, Bastarache J. identified the following categories of factors to determine what standard to apply:

- the absence or presence of a privative clause;
- the expertise of the agency;
- the purpose of the Act as a whole and the provision in particular; and,
- the nature of the problem.[51]

A court is to consider each individual factor and balance them to determine the appropriate standard of review. It is to do so in every case, at every instance.

3.6 Revision: the standard of review analysis

The Supreme Court reformed all of this jurisprudence in *Dunsmuir* v. *New Brunswick* in response to judicial and academic criticism that the pragmatic and functional approach lacked predictability, workability and coherency.[52] The Court expressly noted that the analytical problems which arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review.[53]

To address these issues, the Court first collapsed reasonableness *simpliciter* and patent unreasonableness into one deferential standard of reasonableness.[54] This leaves only two standards of review: reasonableness and correctness. Reasonableness is the deferential standard,

[49] *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982.
[50] Ibid., at para. 28. [51] Ibid., at paras. 30–3, 36–7.
[52] Jones and de Villars, *Principles of Administrative Law*, at pp. 520–2.
[53] *Dunsmuir* v. *New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190, at para. 44. [54] Ibid.

concerned mostly "with the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law".[55] Correctness, on the other hand, means that "the reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question".[56] The two standards simplify the analytical process.

Bastarache J. also established a two-step approach to the now termed "standard of review analysis", overriding the previous "pragmatic and functional approach".[57] First, the court will ascertain whether jurisprudence has already established a standard to apply to a particular category of question. In that respect, questions of fact, discretion, policy or mixed fact and law "will usually" be reviewed on the reasonableness standard.[58] On the other hand, the court reviews questions of law relating to the constitution or true jurisdiction and questions relating to procedural fairness on the standard of correctness.[59]

If jurisprudence has not already settled which standard to choose, the court must proceed to an analysis of the standard of review factors to determine the proper standard. These are the *Pushpanathan* factors: "(1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal."[60] Moreover, Bastarache J. notes that in applying these factors, reasonableness "will usually result" where an agency is interpreting its own statute or a statute close to its function, or where the agency has developed a particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context.[61] Correctness will likely apply to other legal issues.[62]

In sum, the evolution of the standard of review analysis began with little deference, characterized by the jurisdictional error analysis, and then shifted to a variable and case-specific pragmatic and functional analysis with spectrums of deference at its core. Standards of review in Canada have reached their current evolution in *Dunsmuir*, with jurisprudence and the category of question driving whether to defer with a standard of reasonableness or not to defer with a standard of correctness. The above evolution has also naturally governed judicial review of CBSA and CITT decisions.

[55] Ibid., at para. 47. [56] Ibid., at para. 50. [57] Ibid., at para. 62. [58] Ibid., at para. 53.
[59] Ibid., at paras. 58–60. [60] Ibid., at para. 64. [61] Ibid., at para. 54. [62] Ibid., at para. 51.

IV Judicial review of CITT decisions

1 Procedure

With the exception of CITT appeal decisions of anti-dumping and/or countervailing duty liability under section 59 of SIMA, which are subject to a formal statutory appeal process discussed in section V below, decisions and determinations made by the CITT are subject to judicial review. Under SIMA, a person directly affected by the determination, decision order or finding may make an application for judicial review by filing a notice of application in the Federal Court of Appeal (or Federal Court, in the limited circumstances discussed above).[63] This application must be made by a person who is directly affected by the decision within 30 days of the decision in question, and such applications are heard in a summary way in accordance with the rules made in respect of applications for judicial review pursuant to the FCA.[64] For decisions concerning goods from NAFTA countries, this is extended to 40 days because of the prohibition on seeking review until 30 days after a decision (the NAFTA option for review is discussed in more detail below).[65] The Federal Court of Appeal may dismiss the application, set aside the final determination, order or finding, or refer the matter back to the CITT for reconsideration in accordance with its directions.[66]

2 Standard

2.1 Evolution of the standard

To understand the current approach to the standard of review applied to CITT decisions, it is important to trace the evolution of their treatment before the Federal Court of Appeal and, in particular, to examine how they fit within that era of administrative law generally. In addition, it is important to note that, in practice, after the harmonization of standard of review approaches in *Pushpanathan*, courts no longer distinguish between cases under the statutory appeal and those under the judicial review procedure for the purposes of determining the standards of review.

First, in the pre-*Pushpanathan* era of review, the Court accorded a high degree of deference to the CITT. At the time, a strong privative

[63] SIMA, RSC 1985, c. S-15, s. 96.1(3). [64] SIMA, RSC 1985, c. S-15, s. 96.1(3), (5).
[65] SIMA, RSC 1985, c. S-15, s. 77.012(1). [66] SIMA, RSC 1985, c. S-15, s. 96.1(6).

clause protected the CITT's jurisdiction. As such, the Court followed the *Bibeault* analysis, and where the issue was not one going to the jurisdiction of the CITT, it would apply a standard of patent unreasonableness. Otherwise, it would apply a standard of correctness. As the Court noted in *LNK Manufacturing Agencies Inc.* v. *Canadian International Trade Tribunal*:

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals . . . This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.[67]

The Court, therefore, accorded a high degree of deference to CITT decisions and was less searching in its review.

In 1994, the legislature amended SIMA, removing its privative clause and replacing it with a right of judicial review for various CITT decisions. This led the Court to switch from the *Bibeault* framework to the *Pezim* framework to determine the appropriate standard of review. Although one would expect that the removal of the privative clause would lead to less deference to CITT decisions and a more probing review, this was not the case. In fact, the Court continued to apply the standard of patent unreasonableness to the CITT's decisions notwithstanding the removal of the privative clause. For example, in *Canadian Pasta Manufacturers' Association*, the Court noted that:

> It should be noted that Gonthier J.'s reasoning [in *National Corn Growers* v. *Canadian Import Tribunal*] turned in part on the then current wording of section 76 of the Special Import Measures Act (SIMA). That section was amended with effect 1 January 1994, and no longer contains a privative or fi..ality clause. However, the other factors which point towards a need for judicial deference, most particularly the scheme of the statute, the subject matter of the inquiry and the specialized and expert nature of the Tribunal, are still in place.[68]

[67] *LNK Manufacturing Agencies Inc.* v. *Canadian International Trade Tribunal* [1990] FCJ No. 843, at para. 1 (QL) (FCA), citing *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740* v. *W.W. Lester Ltd.* [1990] 3 SCR 644, at 669.

[68] *Canadian Pasta Manufacturers' Association* v. *Aurora Importing & Distributing Ltd.*, 1997 CanLII 4726 (FCA) np.

Thus, despite the privative clauses' removal, the Court continued to apply a high standard of deference by using the *Pezim* factors.

With such a high level of deference accorded to the CITT, but with the legislative signal of no privative clause, the Court had a difficult time determining which standard to apply after *Southam* established the three standards of review. In fact, the Court created a fourth standard to deal with the CITT, which:

> falls between reasonableness simpliciter and patent unreasonableness which is reserved for those cases where a decision has been rendered by an expert tribunal on an issue within its field or expertise and has arrived at a higher Court by way of application for judicial review. This fourth standard of review requires more deference to a tribunal's findings than that given to expert tribunals containing a statutory right of appeal but slightly less deference than that given to tribunals protected by a true privative clause.[69]

Adding a fourth standard shows that the Court was willing to accord the highest level of deference possible, despite the fact that the legislature, by removing the privative clause, could have been sending a signal of legislative intent that the Court should show less deference to the CITT.

The move to the pragmatic and functional approach in *Pushpanathan* did not change this position. The Court, now with clear guidance that there were only three standards of review, consistently applied the standard of patent unreasonableness to the CITT's decisions.[70] Also during this period, the Court began using section 18.1(4)(d) of the FCA as the standard to apply to review the CITT's findings of fact, combining section 18.1(4)(d) with that of the pragmatic and functional approach.[71] This provision states that the Court may grant relief if the agency based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.[72] Rather than creating a more searching review given the larger range of discretionary considerations under the pragmatic and functional approach, even more deference was accorded to the CITT. In *Stelco Inc.* v. *British Steel Canada Inc.*, the Court held that

[69] *British Columbia Vegetable Marketing Commission* v. *Washington Potato and Onion Association*, 1997 CanLII 5694, at para. 3 (FCA).

[70] See, e.g., *GRK Fasteners* v. *Leland Industries Inc.*, 2006 FCA 118, at para. 20; *Dofasco Inc.* v. *Macsteel International (Canada) Ltd.*, 2002 FCA 419, at para. 6.

[71] *Stelco Inc.* v. *British Steel Canada Inc.* [2000] 3 FC 282, at paras. 14–15 (FCA).

[72] FCA, RSC 1985, F-7, s. 18.1(4)(d).

section 18.1(4)(d), when interpreted in light of the *Pushpanathan* factors, leads to a conclusion that:

> the Court should be very reluctant to set aside a decision by virtue of the inferences drawn by the Tribunal from the material before it or to insist that the Tribunal's reasons canvass all the material on which the applicant and the interveners relied, when that which the Tribunal regarded as particularly important, and on which it evidently based its decision, was sufficient to provide a rational basis for it.[73]

Thus, even during the *Pushpanathan* era of standards of review, when one would expect a more detailed and searching standard, given the malleability of the *Pushpanathan* factors, the CITT remained relatively impervious to review on a standard lower than patent unreasonableness.

With *Dunsmuir*, the Court has become more transparent regarding the standards of review. Relying on precedent, the Court has conclusively held that it will review all questions, except for questions of jurisdiction, on a standard of reasonableness. As the Court stated most recently in *Owen & Company Limited* v. *Globe Spring & Cushion Co. Ltd.*:

> [t]he tribunal is highly specialized and is entitled to significant deference. Only questions related to its jurisdiction are reviewed on a standard of correctness. All other questions attract a standard of reasonableness.[74]

Therefore, the Court remains and has remained throughout the entire tenure of the CITT, reluctant to interfere with the CITT's decisions, despite the changes in administrative law and in the SIMA statute itself.

2.2 Implications

(a) Correctness on questions of jurisdiction only As the Court only reviews jurisdictional questions on a standard of correctness, this itself gives rise to queries over what constitutes jurisdictional questions and whether anything before the CITT is jurisdictional. Notably, the CITT has been reviewed on questions of jurisdiction only in extremely rare circumstances. In the 1993 case of *Australian Meat & Live-stock Corp.* v. *Canada*,[75] the Court considered whether the CITT erred in law and exceeded its jurisdiction by conducting a safeguard inquiry where it

[73] *Stelco Inc.* v. *British Steel Canada Inc.*, at para. 21 (FCA).

[74] *Owen & Company Limited* v. *Globe Spring & Cushion Co. Ltd.*, 2010 FCA 288, at para. 4. See also *MAXX Bath Inc.* v. *Almag Aluminum Inc.*, 2010 FCA 62, at para. 31.

[75] *Australian Meat & Live-stock Corp.* v. *Canada (Canadian International Trade Tribunal)* (1993), 106 DLR (4th) 733 (FCA).

excluded from its consideration whether imports of boneless beef from the major source, United States, together with all other sources of imports, were such as to cause or threaten to cause serious injury to Canadian producers of like or directly competitive goods.[76] The Court found that there was no error in jurisdiction, as the CITT acted within the Order in Council setting out the mandate for its safeguard inquiry.[77]

Based on recent jurisprudence, it is clear that the reviewing Court would consider very little to be jurisdictional. For example, the question of whether the CITT chose the right products to be "subject goods" was not a question of jurisdiction, but a question of law within the CITT's expertise. The Court noted in *Maxx Bath Inc. v. Almag Aluminum Inc.* that:

> The applicant (and others) argued that certain goods fell outside the ambit of the preliminary determination and asked the Tribunal to draw the line, a task which is unquestionably within the Tribunal's jurisdiction ... Properly understood, the issue raised by the applicant does not go to jurisdiction but to the exercise of that jurisdiction. As with the other issues which the applicant has raised, the Tribunal will have committed a reviewable error only if its interpretation and application of the Agency's definition of the subject goods can be shown to be unreasonable.[78]

Typically, "line-drawing" by its very nature is a jurisdictional question, as it establishes what is and is not in an agency's scope. If "line drawing" falls within CITT jurisdiction, then not much would fall without, and very little would be determined on a standard of correctness.

(b) Errors that would not affect the outcome One implication of the standard of reasonableness is that courts have found that unless the CITT commits an error that would change the outcome of the decision, the Court will not overturn the decision and remit it to the CITT for redetermination. *Stelco Inc.* v. *British Steel Canada Inc.* best expresses this principle. In that case, the Court held that "even if the Tribunal committed a reviewable error on some of its findings of fact, its decision to rescind will still be upheld if there were other facts on which it could reasonably base its ultimate conclusion".[79] This approach to the CITT is found throughout the Court's jurisprudence.[80]

[76] Ibid., at para. 14 (FCA). [77] Ibid., at paras. 18 and 20 (FCA).
[78] *MAXX Bath Inc.* v. *Almag Aluminum Inc.*, at para. 33.
[79] *Stelco Inc.* v. *British Steel Canada Inc.*, at para. 22.
[80] See *Stelco Inc.* v. *Canada (Canadian International Trade Tribunal)* [1995] FCJ No. 832, at para. 4 (QL) (FCA); *British Columbia Vegetable Marketing Commission* v.

The result is that reviewing courts and bi-national panels (which, as discussed below, are required to apply Canadian law in their review of CBSA and CITT decisions) have arguably resorted to *post-facto* justifications for CITT decisions in spite of findings of error. For example, in *Certain Malt Beverages*, the bi-national panel, reviewing the CITT's negative likelihood of injury determination in an expiry (sunset) review on the basis that there was no longer a "regional market", found as follows:

> We agree that the figures from *Solid Urea* and *Reinforcing Bars* were misinterpreted or erroneously applied by the Tribunal. However, the Panel is uncertain what effect this misinterpretation had on the Tribunal's conclusion that:
>
> > In no case, where flows into and out of a market were of the magnitude of the flows in the present case, given the consistent pattern of significant movement of packaged beer both into and out of British Columbia, the Tribunal is of the view that there is no longer a regional industry in packaged beer in British Columbia.
>
> It is not clear to the panel whether the Tribunal based its conclusion regarding inflows on the evidence before it and found that it did not meet the "not to any substantial degree" test, or whether the Tribunal simply measured the level of inflows against the numbers used in the *Solid Urea* and *Reinforcing Bars* cases which it misinterpreted. The Panel is of the opinion that the Tribunal has not fulfilled its statutory obligation under section 45(1) of SIMA to provide "...a statement of facts and reasons that caused it to be of [an] opinion..." The Panel believes that pivotal issues, such as inflow and outflow determinations in the context of a regional industry determination, must be handled with enough depth for this Panel to understand the steps the Tribunal made in arriving at its findings.[81]

Notwithstanding the above acknowledgement that it did not understand the CITT's reasoning, the panel went on to determine that the errors in question were "immaterial to the result", because the CITT's negative regional market finding could be based exclusively on its determination that outflows were too significant for a regional market to exist.[82] Thus, not only on the reasonableness standard is the CITT not required to

Washington Potato and Onion Association, at para. 9 (FCA); *Infasco Division of Ifastgroupe and Company LP* v. *Canada (Canadian International Trade Tribunal)*, 2006 FCA 130, at paras. 13–14; *Owen & Company Limited* v. *Globe Spring & Cushion Co. Ltd.*, at para. 9.

[81] *Certain Malt Beverages from the United States of America (Injury)*, CDA-95-1904-01, p. 23.

[82] Ibid., at p. 24.

make the "correct decision", but it may also make an erroneous one, so long as that error would not have changed the eventual outcome, in the opinion of the reviewing court.

(c) Chances of success There have been very few successful reviews of CITT decisions. In fact, since the formation of the CITT, of 28 judicial reviews, courts quashed and remanded only five cases in whole or in part.[83] All of those cases dealt with the review of a decision taken in the context of an investigation. Of those, only two cases involved a remand of a final decision, and both were because the CITT made patently unreasonable findings of fact leading to erroneous determinations of injury.[84] Two of the cases dealt with whether the CITT erred in denying a product exclusion, and the Court only quashed and remanded the CITT's decision on that narrow issue.[85] The final case was actually before the Federal Court on a procedural issue regarding the disclosure of confidential information.[86] In all of the cases, the Court either failed to identify the standard of review being applied, or applied the standard of patent unreasonableness or reasonableness.

The low remand rate is likely a direct result of the extremely deferential standard of review applied to CITT decisions. This view is bolstered by the fact that the Court only reviews questions of jurisdiction on a standard of correctness. Moreover, the principle, as discussed above, that the Court only quashes and remands CITT decisions on reviewable errors, such that errors that would not affect the outcome of the decision are not grounds for a remand, also supports this trend. The high level of deference and low success rate provide a bleak picture for those who wish to challenge a decision of the CITT at the Federal Court of Appeal. From the perspective of counsel, it is extremely difficult to advise a client to seek review of CITT decisions, even in the face of blatant and material errors. From a policy perspective, given the high economic stakes of trade remedy cases, it can legitimately be asked whether the courts have shed too much of their supervisory role and

[83] *LNK Manufacturing Agencies Inc. v. Canadian International Trade Tribunal; Canada (Director, Investigation and Research Competition Act)* v. *Canadian International Trade Tribunal* (1991), 48 FTR 50 (FC); *Canadian Pasta Manufacturers' Association* v. *Aurora Importing & Distributing Ltd.*; *GRK Fasteners* v. *Leland Industries Inc.*, 2006 FCA 118; *MAXX Bath Inc.* v. *Almag Aluminum Inc.*

[84] *LNK Manufacturing Agencies Inc.* v. *Canadian International Trade Tribunal*; *Canadian Pasta Manufacturers' Association* v. *Aurora Importing & Distributing Ltd.*

[85] *GRK Fasteners* v. *Leland Industries Inc.*; *MAXX Bath Inc.* v. *Almag Aluminum Inc.*

[86] *Canada (Director, Investigation and Research Competition Act)* v. *Canadian International Trade Tribunal.*

whether assumptions which underlie the rationale for deference (e.g. relative expertise of the administrative decision-maker) should be examined on a case-by-case basis.

Even in cases where remands have occurred, since the CITT has existed in its present form (1989), we are aware of only one case where it changed its ultimate finding because of a remand by the Federal Court of Appeal or a NAFTA panel in the context of either an investigation or an expiry review. In *Machine Tufted Carpeting* (1991), the CITT changed its finding from an affirmative finding of injury to a negative finding of injury and threat of injury.[87] This further supports the view that successful outcomes from appeals either to the Federal Court of Appeal or to NAFTA panels have very little effect on the ultimate outcome of a CITT trade remedy case.

V Judicial review of CBSA decisions

1 Procedure

The timelines and procedures for review of CBSA decisions, other than for re-determinations, are the same as those of the CITT (as outlined above). For re-determinations of anti-dumping and/or countervailing duty liability, a person aggrieved by a decision may appeal to the CITT by filing a notice of appeal within 90 days of the re-determination.[88] The CITT is permitted to make any order or finding as may be required.[89] The person who appealed, the CBSA, or any individual who entered an appearance in the CITT appeal, may appeal the CITT's decision within 90 days to the Federal Court of Appeal. The Federal Court of Appeal may make such order and finding as required.[90]

The importance of using the proper procedure for seeking re-determinations and appeals of duty liability has been highlighted in the recent case of *Toyota Tsusho America Inc.* v. *Canada*. In that case, the applicant immediately sought judicial review of a CBSA re-determination at the Federal Court rather than first filing an appeal of re-determination at the CITT. The Court concluded that:

> In my view, the scheme of re-determinations and appeals provided by the SIMA is complete and, in enacting it, Parliament has clearly expressed its

[87] *Machine Tufted Carpeting*, NQ-91-006 Remand (2) (CITT).
[88] SIMA, RSC 1985, c. S-15, s. 61(1). [89] SIMA, RSC 1985, c. S-15, s. 61(3).
[90] SIMA, RSC 1985, c. S-15, s. 62.

> intention to oust the jurisdiction of this Court to review decisions taken under the authority of that statute ... The only way to have such a determination "quashed" or "set aside" is to follow the procedures set out in the SIMA itself.[91]

The Court considered the SIMA procedures to be adequate alternative relief and exercised its jurisdiction to decline to hear the judicial review application, since the applicant had not exhausted all adequate remedies. Thus, it is important to set the proper route to ensure the Court hears the application. However, while the **procedure** for challenging anti-dumping/countervailing duty re-determinations is different and involves filing appeals at the CITT and then the Federal Court,[92] for reasons discussed above, there is little substantive difference between the standards of review applied to Federal Court appeals of CITT decisions on appeal and Federal Court judicial reviews of other CITT and CBSA decisions and determinations.[93]

An issue of interest with respect to the review of both CBSA and CITT decisions is whether duties can be re-imposed retroactively if a matter involving a negative determination is remanded back to the CBSA or the CITT. SIMA appears to provide for retroactive application of duties in the case of a referral back from a NAFTA panel. Section 9.4 states that the importer is liable for duties as if the CITT's order had never been rescinded by the NAFTA panel. On the other hand, there are no provisions which govern retroactive application of duties on referral back by the Federal Court of Appeal. This discrepancy has yet to be tested in the case law.

2 Standard

2.1 Evolution of the standard

There have been considerably fewer reviews of CBSA decisions than of CITT decisions: in total, there have been eight decisions subject to review. Nevertheless, it would appear that the standard of review applicable to CBSA decisions, whether pursuant to statutory appeal or judicial review, would follow the framework outlined in *Dunsmuir*. With respect to findings

[91] *Toyota Tsusho America Inc.* v. *Canada (Canada Border Services Agency)*, 2010 FC 78, at para. 20, aff'd 2010 FCA 262. See also *GRK Fasteners* v. *Canada (Attorney General)*, 2011 FC 198.

[92] The processes for appeals and applications for judicial review are likewise governed by separate rules under the Federal Court Rules.

[93] See, e.g., *Commissioner for the Canada Customs and Revenue Agency* v. *M & M Footwear*, A-339-03, 28 April 2004 (Fed. CA).

of fact, the Court has applied section 18.1(4)(d) of the FCA such that the "Court cannot intervene unless it is shown that the CBSA based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it."[94] In our view, in any case filed today, the Court would likely choose the deferential standard and apply reasonableness. The Court would review errors of mixed fact and law on a standard of reasonableness, as indicated in *Dunsmuir*. In this respect, the Court has found that errors such as the calculation of dumping margins remain legal, and that factual determinations deserve "more, and considerable, deference".[95] Lastly, the Court has applied the standard of correctness when faced with questions of procedural fairness.[96] It remains to be seen how the Court will review questions of law decided by the CBSA, as there have been no cases analysing the standard to apply to such an error, and the Court will have to conduct a full standard of review analysis to determine the applicable standard.

2.2 Implications of the standard

Because of the relatively few cases involving the CBSA, it remains difficult to discern any significant trends in the case law. Of the eight decisions, the Court quashed and remanded only one because the CBSA made an error of law by not allowing counsel access to confidential information.[97] As this was a preliminary, procedural decision, the Federal Court and not the Federal Court of Appeal heard it. In respect of the other cases, applicants have been unsuccessful in reviewing factual findings,[98] procedural fairness violations[99] and errors of law.[100] It is therefore possible to draw the conclusion that an applicant's likelihood of success, regardless of the standard applied, remains very low.

In addition, in the context of procedural rights and procedural fairness, the Court accords a high degree of deference to the CBSA's choice of procedures. The Court has done so because of the tight timelines

[94] *Tianjin Pipe (Group) Corporation* v. *Tenarisalgomatubes Inc.*, 2009 FCA 164, at para. 3.
[95] *Uniboard Surfaces Inc.* v. *Kronotex Fussboden GmbH and Co. KG*, 2006 FCA 398, at para. 60.
[96] *Uniboard Surfaces Inc.* v. *Kronotex Fussboden GmbH and Co. KG.*
[97] *Canadian Steel Producers Assn.* v. *Canada (Commissioner of Customs and Revenue)*, 2003 FC 1311.
[98] *Tianjin Pipe (Group) Corporation* v. *Tenarisalgomatubes Inc.*
[99] *Uniboard Surfaces Inc.* v. *Kronotex Fussboden GmbH and Co. KG*; *Shaw Industries Inc.* v. *Deputy Minister of National Revenue (Customs & Excise)* (1992), 51 FTR 304.
[100] *Shaw Industries Inc.* v. *Deputy Minister of National Revenue (Customs & Excise)* (1992), 53 FTR 15.

facing the CBSA in dumping investigations. In *Uniboard Surfaces*, the Court held that:

> One has to accept that notwithstanding the diligence of the Agency and of all the parties, incidents are likely to occur which, in this particular context, will be seen as being inescapably inherent to the process. Investigations of that magnitude (360,000 pages, six countries, three continents, five or six different languages) can simply not be completed within the maximum allotted time (225 days) unless the duty of procedural fairness is set at a low threshold. There can be no legitimate expectation of a higher threshold. Perfection or near-perfection is simply not in sight.[101]

A challenge regarding procedural fairness, therefore, would likely be met with little success.

VI Bi-national panel reviews

1 Introduction

Where goods of a NAFTA or CUFTA country are the subject of a CBSA or a CITT decision, a person may access a review procedure involving bi-national panels as an alternative to the statutory appeal or judicial review procedures.[102] Canada and the United States signed the CUFTA in 1988 and it came into force in 1989.[103] The CUFTA was effective until the NAFTA came into force between Canada, the United States and Mexico in 1994.[104] The provisions in the NAFTA, however, generally left the panel review regime under the CUFTA untouched, with some small but significant exceptions. As such, the following section will describe the experiences of the panel review regimes under both the CUFTA and NAFTA together, but the discussion of procedure will focus on the NAFTA only.

2 Procedure

SIMA, NAFTA Article 1904 and the *Rules of Procedure for Article 1904 Binational Panel Reviews* govern panel reviews. A Minister of

[101] *Uniboard Surfaces Inc.* v. *Kronotex Fussboden GmbH and Co. KG*, at para. 45.
[102] SIMA, RSC 1985, c. S-15, s. 77.011(1), (2), (4).
[103] Foreign Affairs and International Trade Canada, "Canada-United States Free Trade Agreement", online: Foreign Affairs and International Trade Canada www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fast-facts-US.aspx?lang=en&view=d.
[104] Ibid.

International Trade, or any person who would be entitled to apply under the FCA or section 96.1 of SIMA may, within 30 days of a "definitive decision", request a review of that decision if the goods are from a CUFTA or NAFTA country (i.e. United States or Mexico).[105] A definitive decision is essentially any of the decisions subject to a statutory right of judicial review under section 96.1 of SIMA.[106] An applicant commences the process by filing a request for panel review to the NAFTA Secretariat.[107] Filing a request for a panel review removes any right to judicial review at the Federal Court.[108]

The grounds for a panel review are limited to:

- the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority; and
- procedural and substantive defences raised in the panel review.[109]

Thus, the grounds are essentially the same as those under the FCA and SIMA. Regarding remedies, the panel may either confirm the decision or refer the matter back for reconsideration.[110]

Although panel decisions are final and not subject to any judicial review, the panel, on its own initiative or that of an applicant, may request a review of a remanded determination.[111] Further, the minister or the government of a country to whom the order relates may request an extraordinary challenge proceeding against a panel decision.[112] The grounds for such a proceeding relate to the conduct of the panel from a procedural standpoint.[113]

3 Standard

3.1 Evolution of the standard

Pursuant to NAFTA Article 1904(3), a panel must apply the standard of review set out in Annex 1911 and the general legal principles that a court

[105] SIMA, RSC 1985, c. S-15, ss. 77.011(1), 77.011(2), 77.11.
[106] SIMA, RSC 1985, c. S-15, s. 77.01(1).
[107] *Rules of Procedure for Article 1904 Binational Panel Reviews*, r. 6.
[108] SIMA, RSC 1985, c. S-15, s. 77.011(7).
[109] *Rules of Procedure for Article 1904 Binational Panel Reviews*, r. 7.
[110] SIMA, RSC 1985, c. S-15, s. 77.015(3).
[111] SIMA, RSC 1985, c. S-15, ss. 77.02, 77.015(4).
[112] SIMA, RSC 1985, c. S-15, s. 77.017(1).
[113] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1990, Can. T.S. 1994 No. 2, Article 1904(13).

of the importing party otherwise would apply to a review of a determination.[114] Annex 1911 states that the standard of review, in the case of Canada, is the "grounds set out in subsection 18.1(4) of the *Federal Courts Act*".[115] In applying standards of review, therefore, panels apply the same common law principles and statutes as the Federal Court of Appeal would in review decisions, and the same case law relied on by the Federal Court of Appeal.[116] Thus, the evolution and experience described above applies equally to panel reviews.

3.2 Implications

Ten of the 26 CUFTA and NAFTA panel reviews have resulted in remands either in whole or in part, all of which were in the context of an investigation.[117] Seven of the panels were regarding determinations by the CBSA, while three involved determinations by the CITT. Of the 10 remands, most were extremely limited in scope and did not affect the overall outcome of the case. Therefore, overall it would appear that CUFTA and NAFTA panels have generated a slightly higher remand rate than the Federal Court of Appeal.

VII Conclusions

As the above discussion should make clear, Canada's framework of review of trade remedy determinations is complex in terms of both procedure and the evolving body of law governing the standard of review. Yet for all of this complexity, the stark reality for parties seeking redress against CBSA and/or CITT determinations is that the level of deference applied by reviewing courts in Canada is extremely high. From a policy perspective, one could legitimately ask whether Canadian courts

[114] Ibid., Article 1904(3). [115] Ibid., Annex 1911.

[116] See, e.g., *Certain Iodinated Contrast Media used for Radiographic Imaging, originating in or exported from the USA (including the Commonwealth of Puerto Rico)*, CDA-USA-2000-1904-01 (Ch. 19 Panel).

[117] *Certain Cold-Rolled Steel Sheet* (1994), CDA-USA-1993-1904-08 (Ch. 19 Panel); *Certain Beer* (1992), CDA-USA-1991-1904-01 (Ch. 19 Panel); *Certain Carpets* (1993), CDA-USA-1992-1904-02 (Ch. 19 Panel); *Certain Beer* (1992), CDA-USA-1991-1904-02 (Ch. 19 Panel); *Gypsum Board* (1993), CDA-USA-1993-1904-01 (Ch. 19 Panel); *Certain Corrosion-Resistant Steel* (1995), CDA-USA-1994-1904-03 (Ch. 19 Panel); *Refined Sugar* (1996), CDA-USA-1995-1904-04 (Ch. 19 Panel); *Certain Iodinated Contrast Media* (2003), CDA-USA-2000-1904-01 (Ch. 19 Panel); *Synthetic Baler Twine* (1995), CDA-USA-1994-1904-02 (Ch. 19 Panel); *Certain Hot-Rolled Carbon Steel Plate* (1999), CDA-MEX-1997-1904-02 (Ch. 19 Panel).

have shed too much of their supervisory role, given what is at stake in trade remedy disputes, and whether Canada's trading partners such as the United States got what they thought they were getting when they agreed to bi-national panel review of anti-dumping and countervailing duty determinations for goods of the other party under the CUFTA and the NAFTA. From a practical perspective, it will be interesting to see whether greater future use is made of mechanisms such as state-to-state dispute resolution under the WTO Agreements, in which less deference appears to be applied in the assessment of conformity of CBSA and CITT determinations and other measures of Canadian authorities with the obligations in those agreements.