

Why We Were Right and They Were Wrong

subjected the Tribunal to more scrutiny than domestic courts have when applying the deferential standard of review. John Coleman - chair of the CITT stated that, "panels have scrutinized cases more carefully and have demanded more information and quantifiable proof than was previously required by the Federal Court of Canada."⁴⁴

Panels have applied a more rigorous, exacting standard of review to Revenue Canada determinations. Unlike Canadian review courts, panels have either partially or completely remanded all of the cases involving Revenue Canada for re-consideration. On the face of the evidence, critics could use the more "intrusive" standard of review to argue that panels have not adhered to Canadian administrative law and practice. Nevertheless, panels have upheld the Canadian standard of review in spite of their activeness. In *Gypsum Board, Beer, and Tufted Carpets*, the panels applied the "reasonableness" standard and reviewed whether the Canadian agency committed an error of law. Taken together, the determinations were thoroughly considered, persuasively reasonable, and rejected Revenue Canada's interpretation of the SIMA as "unreasonable."⁴⁵ The *Gypsum Board* panel fully remanded Revenue Canada's formulation of the "period of investigation" (POI). The American complainants raised the POI issue as an alleged error of law, and argued that the "correctness" standard was applicable. The panel disagreed, and held that the agency could exercise discretion in the matter because the SIMA did not explicitly stipulate how the POI was to be formulated in a dumping investigation. The panel maintained that the most appropriate standard of review was the "reasonableness" standard in light of the discretion that the agency enjoyed within its core areas of expertise. The panel looked to the facts of the case and found that while setting the POI was within Revenue Canada's area of expertise, it used unreasonable evidence to support an affirmative dumping investigation.⁴⁶ Therefore, the *Gypsum Board* panel employed the Canadian standard of review properly by affirming the discretion and deference that the agency was due. Nevertheless, the panel did not allow the agency to use unreasonable evidence to substantiate an affirmative determination, and thereby subjected the antidumping order to a rigorous, but appropriate, process of judicial review.

⁴⁴ William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 142.

⁴⁵ *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia*, CDA-91-1904-01; *Binational Panel Review in the matter of Certain Machine Tufted Carpeting Originating in or exported from the United States of America*, CDA-92-1904-01; *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States*, CDA-93-1904-01.

⁴⁶ *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States*, CDA-93-1904-01, 4-8.