

Why We Were Right and They Were Wrong

which exists in United States jurisprudence to formulate a relatively exacting and unyielding standard of review," and have thereby adhered to American jurisprudence and administrative practice. Consequently, American agencies have learned that they need to provide reasoned determinations where their conclusions flow logically from supporting evidence to withstand a binational panel review.⁴⁰

(2) *Binational panels and the Canadian standard of review*

Chapter 19 panels have reviewed Canadian administrative law and practice to determine the appropriate standards of review. However, inspite of their efforts to review Canadian jurisprudence, panels have not been able to agree on the degree of deference that should be accorded to the CITT and Revenue Canada. Consequently, panels have bestowed different degrees of deference on the two Canadian agencies in the process of judicial review. Generally speaking, the CITT's traditional privative clause has encouraged panels to be more deferential to it than to Revenue Canada in the review process.

Chapter 19 panels have been unanimous in finding that CITT decisions could only be reviewed according to the "patently unreasonable" standard until the privative clause was removed in 1994.⁴¹ For example, the *Hot-Rolled Steel Sheets* and *Cold-Rolled Steel Sheets* panels explained that deference was the central component of the Canadian standard of review. Deference was determined by legislative provisions, the wording of a statute that gave jurisdiction to an administrative agency, and common law regarding judicial review. More importantly, a high degree of deference was automatically granted to an agency that was protected by a privative clause. Because Section 76 (1) of the SIMA was a privative clause that insulated the CITT, the Tribunal's interpretation of the law deserved deference. Consequently, the only applicable standard of review was the "patently unreasonable" test to ensure that the CITT's interpretation

and *NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 68, 95-96, 105; Andreas F. Lowenfeld, "Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," *New York University Journal of International Law and Politics*, Vol. 24, No. 1 (Fall, 1991), 275.

⁴⁰ John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 574, 594.

⁴¹ Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 18-19; John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 553; 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), 119-120.