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

In the Matter of:

Certain Hot-Rolled Carbon Steel Plate, Originating in or Exported from Mexico — CDA-97-1904-02

DECISION OF THE PANEL ON STANDARD OF REVIEW AND REMAND ORDER

ON REVIEW OF THE CANADIAN INTERNATIONAL
TRADE TRIBUNAL FINDING

May 19, 1999

Before: Lic. Hernán García-Corral (Chairman)
Mr. William E. Code
Lic. Alejandro Ogarrio Ramírez
Lic. Loretta Ortiz Ahlf
Professor Leon E. Trakman

DECISION OF THE PANEL ON STANDARD OF REVIEW AND REMAND ORDER

This Decision is divided into two parts. The first part deals with the nature of standards of review governing errors of jurisdiction, law and fact and their applicability in this case. This first part is divided into two subparts - the majority opinion and the concurring opinion. The second part issues a remand order to the Canadian International Trade Tribunal (the "CITT") to interpret section 43(1.01) of the *Special Import Measures Act*[1] ("SIMA") and to apply that interpretation to the case. On compliance of the CITT with this remand order, the Panel will render its final decision.

PART I: OPINIONS

i) MAJORITY OPINION OF PANELISTS LEON TRAKMAN, WILLIAM CODE AND ALEJANDRO OGARRIO RAMIREZ

STANDARDS OF REVIEW

General

The law governing the applicable Standard of Review is provided under the North American Free Trade Agreement ("NAFTA") Articles 1904(3), 1911, Annex 1911, SIMA subsection 77.011 and the Federal Court Act[2] s. 18.1(4).

Section 77.015(1) of the SIMA provides:

> A panel shall conduct a review of a definitive decision in accordance with Chapter Nineteen of the North American Free Trade Agreement and the rules.

NAFTA Article 1904 provides:

> 2. An involved Party may request that a panel review, based on the administrative record, a final dumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

[1] R.S.C. 1985, c.S-15.
[2] R.S.C. 1985, c.F-7.

> 3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

Annex 1911 of the *NAFTA* provides:

> standard of review means the following standards, as may be amended from time to time by the relevant Party:
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> (a) in the case of Canada, the grounds set out in subsection 18.1(4) of the *Federal Court Act,* as amended with respect to all final determinations;

Section 18.1(4) of the *Federal Court Act* provides that the Panel may grant relief if it is satisfied that the CITT:

> (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise jurisdiction.
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> (b) failed to observe a principle of natural justice, procedural fairness or other procedures that it was required by law to observe;
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> (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
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> (d) based its decision or order on an erroneous finding of fact it made in a perverse or capricious manner without regard for the material before it;
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> (e) acted or failed to act, by reason of fraud or perjured evidence; or
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> (f) acted in any other way that was contrary to the law.[3]

In reviewing the determination of an investigative authority, a NAFTA Panel must apply the "general legal principles" that a court of the importing Party otherwise would apply to a review of the determination of a competent investigating authority. These "general legal principles" in the domestic law of Canada include the legal principles that guide Canadian courts in their review of administrative decisions. Applied to this case, the Panel is bound to apply those "principles" in reviewing the determination of the CITT in a comparable manner to the Federal Court of Canada's

[3] *Federal Court Act*, R.S.C. 1985, c.F-7 as amended s.18 1(4).

review of the determination of an investigating authority within its general jurisdiction.

Section 28(1)(e) of the *Federal Court Act*, provides that the Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of the CITT. The power of this Panel, therefore, to review the determination of the CITT is different in kind from the power of a court to hear an appeal.

A court of appeal has broad jurisdiction to overturn the finding of a lower tribunal. A tribunal with the power of judicial review, such as that invested in this Panel, has the power only to review the determination of the lower tribunal and to refer actual or suspected errors back to that lower tribunal for reconsideration. In all other respects, the determination of the lower tribunal must be accorded curial deference. The Supreme Court of Canada has noted:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on review. In principle, a court is entitled, on appeal, to disagree with the reasoning of a lower tribunal.
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> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within its scope of the statutory appeal, curial deference should be given to the opinion of a lower tribunal on issues which fall squarely within its area of expertise.[4]

Applied to the current case, in exercising its power of review the Panel cannot substitute its opinion for that of the CITT on grounds that the reasoning of the CITT is defective, or even wrong. Nor can it insist that its determination of law or fact is right and that the Panel's reasoning is "better" than that of the CITT. As was stated in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.:*

> ..the court will defer even if the interpretation given by the [labour] tribunal to the collective agreement is not the "right" interpretation in the court's view nor even the "best" of two possible interpretations, so long as it is an interpretation rationally attributable to the words of the agreement.[5]

In exercising its power of review, this Panel is entitled to determine only whether the CITT has committed a "reviewable error," consisting of an error of jurisdiction, error of law, or error of fact. The Panel cannot remedy that perceived error itself. Nor can it substitute *its* preferred remedy for that of the CITT. In accordance with article 1904, it is empowered to refer the matter back to the CITT for its consideration.

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[4] *Bell Canada v. Canada (C.R.T.C.),* [1989] 1 S.C.R. 1722 at p.1744-45.

[5] [1993] 2 S.C.R. 316 (NFLD). See, CITT Brief at 16.

Defining and Applying Standards of Review

In determining whether to remand a matter to the CITT for its consideration, the Panel must determine whether the CITT has erred and further, whether that error constitutes a "reviewable error" of jurisdiction, law or fact.

An error of jurisdiction arises where the CITT has acted without jurisdiction, in excess of its jurisdiction, or contrary to the principles of natural justice, as are outlined in Section 18.1(4) (a) and (b) of the *Federal Court Act* above.

In determining whether a matter under review is jurisdictional, this Panel must establish whether the legislature intended the matter in issue to be within the jurisdiction conferred on the CITT.[6] The Panel arrives at this legislative intention by examining, *inter alia*, the wording of the enactment conferring jurisdiction on the CITT, the reasons for the CITT's existence**,** its area of expertise and the nature of the problem before it and the Panel.[7]

Should the Panel determine that the CITT acted in accordance with its jurisdiction, it must thereafter decide whether the CITT has committed any errors or law or fact within that jurisdiction that are "reviewable."

An error of law arises if the Panel finds that the CITT erred in interpreting or applying the law in regard to a matter within its jurisdiction. An error of fact arises if the Panel finds that the CITT has committed an error in construing the facts in the exercise of its jurisdiction.

In determining whether the CITT has committed an error of jurisdiction, law or fact, the Panel must identify the applicable standard of review by which to evaluate the nature of the error and the extent to which it is "reviewable." Ultimately, it must distinguish "reviewable errors" which it may remand to the CITT from non-reviewable errors.

The standards of review according to which the Panel determines whether an error of the CITT is reviewable ranges along a spectrum. That spectrum ranges from a standard of "correctness," to a standard of "reasonableness," to a standard of "patent unreasonableness."[8]

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[6]See eg., *U.E.S. Local 298 v. Bibeault* [1988] S.C.R. 1048 [hereinafter *Bibeault*].

[7]See further, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 [hereinafter *Pezim*] at 590-5.

[8]*Pezim, supra* note 7; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 [hereinafter *Canadian Broadcasting Corp*.] at p. 178.

In regard to errors of jurisdiction, the standard ordinarily applicable is "correctness." The CITT must be "correct" in the exercise of its jurisdiction.

The applicable standard of review in regard to errors of law and fact varies from a standard of "reasonableness" to a standard of "patent unreasonableness." In cases where there is a right of appeal and the absence of a privative clause, the standard of review ordinarily is one of "reasonableness" in respect of errors of law and fact. The court of appeal must determine whether the expert tribunal acted "reasonably."[9] In cases where there is a right of review from an expert tribunal, but not a right of appeal, and where there is a privative clause, the standard of review is one of "patent unreasonableness." The reviewing body must determine whether the expert tribunal has committed an error that is "patently unreasonable."

In cases in which there is a right of review, the absence of a privative clause, and when the tribunal subject to review is expert and is acting in accordance with its statutory authority, the Federal Court of Canada ordinarily applies a standard of "patent unreasonableness".

The applicability of the standard of "patent unreasonability" was recently reiterated by the Federal Court of Appeal in reviewing determinations of law and fact within the jurisdiction of the CITT. In *Canada (Attorney General) v. Symtron Systems Inc.,*[10] Linden J. reviewed the decision of the CITT in regard to government procurement projects under Chapter 10 of the North American Free Trade Agreement. He concluded in light of prior decisions of both the Supreme Court of Canada and the Federal Court of Appeal:

> Pursuant to the decisions of the Supreme Court of Canada [See Note 11 below][11] and this Court [See Note 12 below][12] the standards of review to be employed are as follows: (1) when making a determination within its jurisdiction, decisions of the CITT may only be overturned if they are patently unreasonable; (2) when making a decision regarding its own jurisdiction, the CITT must be correct.[13]

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[9]On the application of a standard of ?reasonableness? where there is a right of appeal and the absence of a privative clause, *see Pezim, supra* note 7; and *Director of Investigation and Research v. Southam Inc., et al.,* [1997] 1 S.C.R.748; [1997] D.LR. (4th) 1 [hereinafter *Southam].*

[10][1999] F.C.J. No. 178. Court File Nos. A-787-97, A-700-97, para. 45 [hereinafter *Symtron*].

[11]*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 [herinafter *Mossop*]: *Pezim, supra* note 7; *Southam, supra* note 9.

[12] *See, e.g.*, *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn*. [1977] F.C.J. No. 1543 (Fed. C.A.) (Q.L.) [hereinafter *Onion*]. *See also Deputy Minister of National Revenue for Customs and Excise v. Hydro-Quebec* (1994), 172 N.R. 247 (Fed. C.A.) at para. 16.

[13]*Onion, supra* note 12 at para. 45.

The Panel is bound by such determinations of the Court of Appeal in the case at hand.

The Panel will apply these standards of review to this case.

The "reasonableness" standard of review does not apply in this case. The standard of reasonableness applies when a statute both lacks a privative clause and contains a right of appeal. That standard applies when a decision is unreasonable on the basis of the facts on which it was made. As was stated in *Southam,* an unreasonable decision is one made in the face of a contradiction in a premise or an invalid inference.[14] There is no right of appeal in respect of section 42 of the SIMA. The CITT is an expert tribunal whose decisions are entitled to great deference. Staffed by adjudicators with specialized knowledge, it has statutory authority to interpret and apply the SIMA and to decide international trade cases falling within its jurisdiction. The decisions of the CITT, in the exercise of these functions, are entitled to great deference.

As the Supreme Court of Canada held in *Pezim,* notwithstanding the absence of a privative clause, a lower tribunal's expertise in exercising statutory authority is a compelling reason to accord it judicial deference.

> Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise. This point was reaffirmed in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,* [1993] 2 S.C.R. 316 where Sopinka J., writing for the majority, stated the following at p. 335:
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> > ...expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the Tribunal's enabling statute provided explicitly for appellate review, as was the case in *Bell Canada*, supra it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.[15]

Similarly, in *National Corn Growers Association v. Canada (Import Tribunal),* the Supreme Court accorded great deference to an expert tribunal experienced in the intricacies of international trade and that dealt with a large volume of trade law cases.[16]

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[14] *Southam, supra* note 9.

[15] *Pezim, supra* note 7 at 591-592.

[16] [1990] 2 S.C.R. 1324 [hereinafter *Corn Growers*] at 1348, *per* Wilson J.

Deference is also accorded to specialized tribunals in the manner in which they weigh evidence in exercising their statutory authority.

> It is a function of a specialized, expert tribunal such as this one to weigh and balance those factors and to decide the importance to be given to each. In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. Realistically, this is a question of fact.. [17]

Applied to this case, the CITT has considerable expertise in interpreting statutes within its jurisdiction, in accordance with the authority accorded it by section 42 of the SIMA. It is expert, too, in examining evidence and according relative weight to different facts in issue.

Given that the CITT is an expert tribunal with wide statutory authority and experience in interpreting and applying the SIMA, its decisions are entitled to great deference, even in the absence of a privative clause. As the Supreme Court of Canada held in *Mossop*:

> ... even absent a privative clause, the courts will give a considerable measure of deference [to highly specialized bodies] on questions of law falling within the expertise of these bodies because of the role and functions accorded to them by their constituent Act..[18]

This deference is owed, as stated by the Supreme Court of Canada, because the expertise of a tribunal is the "most important of the factors a court must consider in settling on a standard of review."[19]

To similar effect, the courts in *Bell Canada,*[20] *Bradco*[21] *and Pezim*[22] have all accorded great deference to decisions of lower tribunals regarding issues of material injury and causation falling squarely within their expertise.

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[17] CITT brief at 22 quoting *Sacilor Acieries v. Anti-dumping Tribunal* (1986), 9 C.E.R. 210 (F.C.A.)

[18] *Mossop, supra* note 11 at 584 (per La Forest J.)

[19] *See, Southam, supra* note 9 *at para.* 50; *Pushpanathan v. Canada (M.C.I.),* [1998] 1 S.C.R. 982 [hereinafter *Pushpanathan*]at para. 32.

[20] *Bell supra* note 4 at 1744.

[21] *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.,* [1993] 2 S.C.R. 316 [herinafter *Bradco*] at 335.

[22] *Pezim, supra* note 7 at 404.

> Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within its scope of the statutory appeal, curial deference should be given to the opinion of a lower tribunal on issues which fall squarely within its area of expertise.[23]

Given the deference to be accorded to the CITT in the exercise of its jurisdiction on questions of law and fact, this Panel is required not to remand unless it considers that the CITT may have committed a "patently unreasonable" error.[24] As was stated in *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles,* "the patently unreasonable error test is the pivot on which judicial deference rests."[25]

The patently unreasonable standard is variously defined. The Supreme Court of Canada in *Southam* held that, in order to find the decision of a lower tribunal "patently unreasonable," that decision must have no "basis in law".

> A patently unreasonable conclusion is one that had no basis in the evidence, or was contrary to the overwhelming weight of the evidence.[26]

A patently unreasonable error arises when the lower tribunal acted clearly and openly "irrationally," and when its decision is incapable of having any rational explanation. Absent such irrationality, the lower tribunal "has the right to be wrong." As was stated in *CUPE Local 963 v. N.B. Liquor Corp***:**

> The tribunal has the right to be wrong. Under this standard a court cannot set aside a tribunal's decision merely because it disagrees with it but can do so only where the decision "cannot be sustained on any reasonable interpretation of the facts or of the law or where it is "clearly irrational.[27]

A decision that is patently unreasonable constitutes "a fraud on the law or a deliberate refusal to comply with it."[28]

As a result, the Supreme Court of Canada has stated, in cases like *Canada (A.G.) v. PSAC*, that the "patent unreasonableness" test is a "very strict test" and that errors of law and fact are reviewable only when they are "clearly irrational":

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[23] *Bell supra* note 4 at 1744.

[24] *Symtron, supra* note 10 at para 45.

[25] [1993] 2 S.C.R.756 at 77 (*per* J?Heureux-Dube).

[26] *Southam, supra* note 9. See also *Canada (A.G.) v. PSAC* [1993] 1. S.C.R. 941, 963-64.

[27] [1979] 2 S.C.R. 227 [hereinafter *CUPE*] at 237.

[28] See, *CUPE, supra* note 27 at 237.

> It is not enough that the decision of the Board is wrong in the eyes of the court; it must, in order to be patently unreasonable, be found by the court to be clearly irrational.[29]

The Supreme Court has held further that, if there is *any* evidence in support of the lower tribunal's determination, the reviewing court must treat that determination as "rational."

> ...a finding or decision of a tribunal is *not* patently unreasonable if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same conclusion.[30]

The Complainant argues that a "patently unreasonable" test is inapplicable because the SIMA now specifically excludes a privative clause. It is true that, in implementing the North American Free Trade Agreement, on January 1, 1994, Parliament repealed and re-enacted SIMA section 76(1) and did not include a privative clause.[31] However, the removal of the privative clause under the SIMA has not displaced the "patently unreasonable" standard as the applicable standard of review in respect of errors of law and fact.[32] In a series of cases since January 1, 1994, the Federal Court of Appeal has held that the patently unreasonable standard continues to apply to such errors. In *Stelco v. Canadian International Trade Tribunal et al.,* it stated:

> We cannot see any practical difference between the standard in subsection 18.1(4) of the *Federal Court Act* and the standard of patent unreasonableness.[33]

To a similar effect, the Federal Court of Appeal held in *Canadian Pasta Manufacturer's Association v. Aurora Importing & Distributing Ltd., et al.*

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[29][1993] 1 S.C.R. 941, 963-64[964]. As was stated in *CAIMAW v. Paccar of Canada Ltd.* [*1989*] *2 S.C.R. 983* [hereinafter *CAIMAW*] at 1003 (B.C.): "a tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently" unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the courts upon review."

[30]See, *Bradco, supra* note 21 at 687-88 (discussing a labour arbitration). To a similar effect, *see Lester (W.W.) (1978) Ltd. v. United Association of Journeymen etc. of the Plumbing and Pipefitting Industry, Local 740* [1990] 2 S.C.R. 644 (Nfld.) [hereinafter *Lester*].

[31] Section 76 now provides: ?[S]ubject to subsection 61(3) and Part I.1 or II, an application for judicial review of an order or finding of the Tribunal under this Act may be made to the Federal Court of Appeal on any of the grounds set out in subsection 18.1(4) of the *Federal Court Act*." This new version of SIMA section 76(1) eliminates the pre-existing provision that the Tribunal's decisions were "final and conclusive.? In effect, by removing the privative clause, section 76(1) now states that all decisions are reviewable under s. 18.1(4) of the FCA.

[32]*Southam, supra* note 9 at p. 772.

[33](May 23, 1995) A-360-93 (F.C.A., unreported) [hereinafter *Stelco*].

> ..we are dealing with a specialized tribunal whose decisions are entitled to a high degree of deference and should only be overturned if they manifest that character of patent unreasonableness which is the modern standard for judicial review in such cases.[34]

The Federal Court also applied the standard of patent unreasonability in the more recent case of *Canada (Canadian Wheat Board) v. Unicone Industriali Pastai Italiani.*[35]

As was discussed earlier in this decision, the Federal Court of Appeal recently applied the standard of patent unreasonability specifically to the review of a determination of the CITT, in *Canada (Attorney General) v. Symtron Systems Inc*.[36] That case, released on February 5, 1999, is determinative in this case. There Linden J. cited as authority for the patent unreasonability test decisions of the Court of Appeal and the decisions of *Mossop, Pezim and Southam* rendered by the Supreme Court of Canada.[37]

To similar effect, in the recent *Premier Choix* decision, the Federal Court adopted a patent unreasonability standard even though the applicable legislation did not contain a privative clause. As was stated there:

> In light of the new teachings of the Supreme Court of Canada, like Letourneau J.A., therefore, I am of the view that the most appropriate standard of review in this case should continue to be patent unreasonableness. I am persuaded that the absence of a statutory right of appeal, the wide discretion given to the Board, and the highly technical nature of the Board's subject matter warrant the utmost deference, even though there is no privative clause...[38]

Other NAFTA panels, too, have applied the standard of patent unreasonability since the removal of the privative clause from the SIMA in January 1, 1994. In *Hot-rolled Carbon Steel Sheet,* that NAFTA Panel held:

> On questions of law within the Tribunal's expertise, the Panel would remand only if the Tribunal's findings were patently unreasonable. On issues of fact, the Panel would not reweigh the evidence, but would remand the Tribunal's finding if there were no rational connection between the evidence and the

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[34](1997) 208 N.R. 329; FCA file no. A-473-96 [hereinafter *Pasta*] at 3.

[35][1998] F.C.J. No. 173, February 9, 1998 [hereinafter *Unicone*] at paras 4 and 7.

[36] *Symtron, supra* note 10 at para. 45.

[37]See, *Symtron, supra* note 10.

[38]*Reseaux Premier Choix Inc. v. Canadian Cable Television Association* [1997] F.C.J. No.1723 [hereinafter *Choix*] at para. 17.

> Tribunal's finding.[39]

The Complainant argues that *Onion*[40] gives rise to a fourth standard of review on questions of law and fact which is more than "reasonableness" but less than "patent unreasonableness." That court *does* discuss a "fourth standard" of review which provides for more deference to be given to a lower tribunal's finding than to expert tribunals with a statutory right of appeal, but slightly less deference than to tribunals' decisions protected by a true privative clause. But the court in *Onion* still insists that "great deference is to be shown to the Tribunal's decisions particularly when dealing with questions that go to the heart of its expertise." It also concludes that the CITT's error was "patently unreasonable" on the facts. As a result, its comments about a "fourth standard" are at most *dicta* and are not binding upon this Panel. It is well established in the Law of Canada that *obiter dicta* are not binding authority unless they express a legal proposition that is a necessary step to the judgment pronounced by the Court in the case in which the *dicta* is found.[41]

In concluding on standards of review, the Panel holds that, under Canadian Law, the CITT is subject to a "correctness" standard of review in respect of errors of jurisdiction and a "patent unreasonableness" standard in respect of both errors of law and fact.

ii) CONCURRING OPINION OF PANELISTS HERNAN GARCIA-CORRAL AND LORETTA ORTIZ AHLF

STANDARDS OF REVIEW

This Panel is constituted under **NAFTA** Article 1904 to review a determination of the CITT in accordance with Canadian anti-dumping duty law. This Panel is directed to apply relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of ... [Canada] ...would rely on such materials.[42]

Binational Panels are further directed by the **NAFTA** to apply:

> ... the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.[43]

Annex 1911 defines the standard of review, in the case of Canada, as the grounds

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[39](1994), CDA-93-1907-07 at 15.

[40] *Onion, supra* note 12.

[41]*Reference Re Canada Temperance Act,* [1939] 4 D.L.R. 14 (Ont. C.A.) affd. (P.C.)

[42] NAFTA, Art. 1904 (2)

[43] NAFTA, Art. 1904 (3)

set out in subsection 18.1(4) of the **Federal Court Act**, as amended. Moreover, as Canada is the importing Party, the general legal principles of Canadian law are to be applied in this review.[44]

Section 18.4 of the **Federal Court Act** lists the grounds for which a tribunal may be reviewed. These grounds are that the tribunal:

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

These grounds for review are read in light of the standard of review developed by the Supreme Court of Canada. The Supreme Court of Canada has stated that "the central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal".[45]

In order to assist the courts in deciphering legislative intent and determining the appropriate standard of review, the Supreme Court of Canada has developed a spectrum of standards of review. This spectrum was initially developed in *Pezim* and has been refined in *Southam* and *Pushpanthan*.

The spectrum ranges from patently unreasonable, on the one extreme, where deference is at its highest to correctness at the other extreme where deference is at its lowest. [46] This standard was further refined to include a third standard of reasonableness in cases where the appropriate standard falls between the two extremes.[47] Where exactly on the spectrum the appropriate standard of review falls in the circumstances is determined by a functional and pragmatic analysis.

Issues of Jurisdiction

[44] NAFTA Article 1911 defines "general legal principles" to include "principles such as standing, due process rules of statutory construction, mootness and exhaustion of administrative remedies".
[45] *Pezim, supra* note 7at 589
[46] *Pezim, supra* note 7 *at* 580-90.
[47] *Pezim, supra* note 7 and *Southam, supra* note 9.

The **Federal Court Act** provides that a court may review a tribunal decision where it:

> 18.4(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction.

In determining the standard of review, this Panel must distinguish between questions establishing the parameters of a tribunal's jurisdiction and questions within a tribunal´s jurisdiction.[48] Questions demarcating the jurisdiction of a tribunal are those questions which yield answers which define the powers of the tribunal to embark on proceedings, issue orders, etc.[49] These questions are identified by a pragmatic or functional analysis which examines:

> … not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.[50]

At the heart of this analysis is an effort to glean whether the legislature intended that the question at issue be decided by the tribunal acting within its jurisdiction or the courts.[51]

It is settled law that with respect to questions dealing with a tribunal's jurisdiction, correctness is required and the concept of deference is severely constrained. That is, a tribunal must be correct with respect to any question which defines its jurisdiction.[52]

This Panel must determine whether the tribunal correctly determined any question affecting its jurisdiction. If the tribunal incorrectly dealt with this question, this Panel must remand. If the relevant question does not affect the tribunal's jurisdiction, then a different standard is applicable.

Issues of Law

The **Federal Court Act** provides that a court may review a tribunal where it:

> 18.4 (c) erred in law making a decision or an order, whether or not the error appears on the face of the record.

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[48] *Bibeault, supra* note 6 at 1088.
[49] *Syndicat des employés de production du Québec et de Láladie v. Canadian Labour Relations Board, [1984] 2 S.C.R. 412.* [hereinafter *Syndicat]*
[50] *Bibeault* , *supra* note 6 at 1088.
[51] *Canadian Broadcasting Corporation* v *Canada* (*Labour Relations Board*), [1995] 1 S.C.R. 157 at 179.
[52] See, *CAIMAW, supra* note 29. See also, *Syndicat, supra* note 49 *and Bibeault, supra* note 6.

Issues of law relate to the interpretation or the application of law by tribunals acting within their jurisdiction. In response to privative clauses[53] shielding tribunals from review, the standard of review that was traditionally applied to errors of law was "patent unreasonability". This test is very deferential and calls for a strict approach to judicial review.[54]

In *Southam*, the Supreme Court of Canada explained the difference between unreasonable and patent unreasonable as:

> The difference between "unreasonable" and "patently unreasonable" 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.[55]

The court in *Southam* went on to elaborate:

> This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem... But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.[56]

In the absence of privative clauses, recent Supreme Court of Canada decisions have moderated this standard by asking the courts to employ a functional and pragmatic test to decipher legislative intent and to determine the appropriate standard of review to fit the agency and the circumstances. The analysis inherent in this test focuses upon all the relevant factors, none of which alone are dispositive. These factors include the presence or lack of a privative clause, the presence or lack of a statutory right of appeal, the expertise or specialization of a tribunal in the circumstances, the purpose of the Act as a whole and the provision in particular and the nature of the problem -a question of law or fact. [57]

In determining the appropriate standard of review, the Supreme Court of Canada

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[53] The Supreme Court of Canada has defined a full privative clause as a provision in legislation " that declares that decisions of tribunals are final and conclusive from which no appeal lies and all forms of judicial review are excluded". See, *Pushpanathan*, *supra* note 19 at 996 .

[54] See, *Bradco, supra* note 21 at 340.

[55] *Southam, supra* note 9 at 777.

[56] *Southam, supra note 9* at 777

[57] See*, Pushpanathan, supra* note 19.

has emphasized the importance of balancing the presence or lack of a privative clause with the other factors, especially the relative expertise of the tribunal.[58] The court in *Pezim* held that what is "crucial is whether or not the agency's decisions are protected by a private clause".[59] However, that court went on to say that even where there is no privative clause and where there is a statutory right of appeal, 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.[60] This reasoning was adopted in *Pushpanathan* which held that:

> … the presence of a full privative clause is compelling evidence that the court ought to show deference to the Tribunals decision, unless other factors strongly indicate the contrary as regards the particular determination in question.[61]

Pezim did not determine the precise extent of deference to be applied in each case. Rather, the court stated that the degree of deference "ranges from the standard of reasonableness to that of correctness".[62] The court went on to elaborate:

> At the reasonable end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no right of statutory appeal.[63]

The *Pezim* case involved a tribunal decision from which there was a statutory right of appeal and which was not protected by a privative clause. In those circumstances, the Court held that the applicable standard of review fell between the two extremes of correctness and patent unreasonableness which entitled the Tribunal to "considerable deference".

The present case is similar to the one in *Pezim*. The CITT is a specialized tribunal deciding matters within their area of expertise[64] and is not protected by a privative clause. However, unlike the Tribunal in *Pezim*, the CITT is subject to judicial review rather than a statutory right of appeal.[65] These circumstances simultaneously call for a more exacting standard and deference. On the one hand, factors which call for a more exacting standard include the wording of s. 18.4 (c) which permits review of errors of law, whether or not they appear on the face of the record, the fact that the

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[58] *Southam, supra* note 9.
[59] *Pezim, supra* note 7 at 590.
[60] *Pezim, supra* note 7 at 590
[61] *Pushpanathan* , *supra* note 19 at 996.
[62] *Pezim, supra* note 7 at 590.
[63] *Pezim, supra* note 7 *at* 590.
[64] The expertise of the CITT was discussed in *Corn Growers, supra* note 16.
[65] The jurisdiction of a court on appeal is much broader than the jurisdiction of a court in review. See,
Bell, supra note 4 at 1774-5.

CITT is subject to judicial review, and the fact that the CITT no longer enjoys the benefit of any type of privative clause.[66] On the other hand, the factors which counsel deference include the fact that the CITT is a specialized Tribunal making determinations within its area of expertise and the lack of a statutory right of appeal. Under similar circumstances the Supreme Court of Canada, has said:

> ...(when) there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum.[67]

Under the circumstances of this review, the CITT is not entitled to the highest deference on the spectrum. The appropriate standard of review falls between the extremes of correctness and patent unreasonability which entitles the CITT to considerable deference. While this standard does not extend to the point of patent unreasonbleness, it does fall near to that end of the spectrum. This is a high degree of deference commensurate with the CITT's expertise and the circumstances of this review.

This Panel should remand only if it finds that the CITT's decision cannot be sustained on any reasonable interpretation of the law. This standard is also consistent with that adopted by the recent Binational Panels in *Baler Twine*[68] and *Concrete Panels*.[69]

Issues of Fact

The **Federal Court Act** provides that a tribunal's determination can be reviewed for errors of fact when the tribunal:

> s.18.4 (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or with out regard for the material before it.

Issues of fact arise from determinations of fact made by a tribunal acting within its jurisdiction. The wording in s. 18.4(d) is much stricter than that found in s.18.4(c) which counsels a more deferential approach to issues of fact than to issues of law. However, the line that divides issues of fact from issues of law may not be clear at

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[66] The SIMA was revised in 1994 to amend s. 76(1) in so far as to remove the "final and conclusive" wording from the clause. See North American Free Trade Agreement Implementation Act., S.C. 1993, C. 44, p. 17(1).

[67] *Southam, supra* note 9 at *775.*

[68] *Synthetic Baler Twine With a Knot Strength of 200 Lbs. or Less Originating in or Exported from the United States of America,* CDA-94-1904-02 (April 10, 1995).

[69] *Certain Concrete Panels, Reinforced With Fiberglass Mesh, Originating in or Exported from the United States of America and Produced by or on Behalf of Custom Building Products, Its successors and Assigns, for Use or Consumption in the Province of British Columbia or Alberta*, CDA-97-1904-01 (August 26, 1998).

first instance, and indeed issues of fact may at times be mixed with issues of law. The courts have developed an appropriate litmus test to assist in this task. The court in *Pushpathan* adopted the reasoning in *Southam* which held :

> … it is not always easy to say precisely where the line should be drawn, though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in future.[70]

The courts have recognized a tribunal's superior position in determining questions of fact and have given tribunals greater deference as complicated questions of fact and law draw closer to issues of fact. Several recent Federal Court of Appeal decisions have dealt with the appropriate standard of review to be applied to CITT dumping determinations in the context of issues of fact and issues of substantial fact mixed with law. Depending on the circumstances of the particular case, the courts have described this standard as patently unreasonable[71], akin to patently unreasonable[72], or as a "fourth standard" which is slightly less deferential than patently unreasonable[73].
These decisions are refinements to the spectrum analysis articulated by the Supreme Court of Canada in *Pezim* and *Southam*. In the circumstances particular to each case, the courts articulated the appropriate standard of review by balancing the factors calling for a more exacting standard with those calling for more deference.

In the particular circumstances of this review, this Panel must balance competing factors. On the one hand, it must consider the factors calling for deference which include the strict language of s.18.4(d), the fact that the CITT is a specialized tribunal making findings of fact within its area of expertise with the benefit of analyzing the evidence first hand and the fact that the CITT is not subject to a statutory right of appeal. On the other hand, it must consider factors calling for a more exacting standard which include the absence of any type of privative clause and the fact that the CITT is subject to judicial review.

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[70] See, *Southam, supra* note 9 at 768 and *Pushpanathan, supra* note 19 at 990.
[71] *Pasta, supra* note 34.
[72] One Federal Court of Appeal decision notes that" there does not appear to be any practical difference between the standard set out in s.18.1(4)(d) and that of patent unreasonability". See, *Stelco, supra* note 33.

[73] *Onion, supra* note 12, created a fourth standard which falls between reasonable simpliciter and patently unreasonable that calls for 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.

Given that the present review has "indications that go both ways", the appropriate standard of review in these circumstances falls between the extremes of correctness and patent unreasonability which entitles the CITT to considerable deference. While this deference does not reach the level of patent unreasonableness, it does fall very near to that end on the spectrum. In the context of reviewing issues of fact or substantial issues of fact mixed with law under these circumstances, the considerable deference which is accorded to the CITT is even greater than in the context of issues of law.

The standard of review normally applied to issues of fact or substantial issues of fact mixed with law is that there must be a rational connection between the facts and the tribunal's findings. This statutory standard however is not whether there is any evidence at all, but whether there is evidence which, reasonably reviewed, is capable of supporting the tribunal's finding. Such evidence need not be substantial nor need the Panel arrive at the same determination as the Tribunal in light of it.[74]

This Panel should remand only if it finds that the CITT's determination cannot be sustained on any reasonable interpretation of the facts.

PART II: REMAND ORDER

SEPARATE ORDER OR FINDING UNDER SECTION 43(1.01) OF THE SIMA

The SIMA provides, under section 43 (1.01) that, where an inquiry referred to in section 42 involves goods of more than one NAFTA country, or one or more NAFTA countries and goods of one or more other countries, "the Tribunal shall make a separate order or finding under subsection (1) with respect to the goods of each NAFTA country.

Both the CITT and the Complainant acknowledge that the CITT made no separate order or finding in respect of Mexico. The Complainant argues, however, that a failure to issue a separate order in respect of Mexico constitutes an error of jurisdiction and an error of law. The Complainant argues further, that in issuing a separate order, the CITT is required to provide separate reasons as well. The CITT, Stelco and IPSCO argue that the stipulation for a separate order in section 43 (1.01) is a technical requirement only and that, if the Panel deems it appropriate, it should only remand with instructions that the CITT issue a separate order, without requiring separate reasons.

Given that the interpretation of the SIMA is within the jurisdiction of the CITT and that the CITT is charged with the duty to interpret and apply the SIMA, including section

[74] *Lester, supra* note 30 at 668-9

42, in a reasonable manner the Panel remands this matter to the CITT for its consideration. In particular, the Panel instructs the CITT to determine whether, under section 43 (1.01) of the SIMA, a separate order is required in respect of Mexico and further, whether separate reasons are also requisite.

The CITT is given until June 21, 1999 to respond to this remand.

On receipt of the CITT's determination, the Panel will decide all issues arising out of these proceedings.

SIGNED IN THE ORIGINAL BY

Hernán García-Corral- Chairman
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Issued May 19, 1999.