NAFTA CHAPTER 19 AND THE LAW OF JUDICIAL REVIEW IN CANADA

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Summary: I. Administrative Agencies and Judicial Structure; A. Administrative Agencies; 1. Revenue Canada-Dumping, Subsidization; 2. Canadian International Trade Tribunal-Injury; B. Judicial System; 1. Federal Court of Appeal; 2. Supreme Court of Canada; 3. Stare Decisis; II. NAFTA, Dualism and Canadian Domestic Law; A. Description of Chapter 19 Panels; B. Effect of Panel Decisions; C. Dualism and Statutory Interpretation; III. Canadian Law and the Standard of Review; A. Legislative Background; B. Statutory Standard of Review; 1. Original Act; 2. Amendments to the Act; C. Content of the Standard of Review; I. Jurisdiction; 2. Questions of Law; 3. Questions of Fact; 4. Procedure; D. Remedies; IV. Conclusion.

This article discusses the Canadian law of judicial review and describes some aspects of the operation of dispute settlement panels reviewing Canadian decisions under Chapter 19 of the North American Free Trade Agreement. The panel system is a hybrid, involving both international and domestic elements as well as governmental and private parties. Pursuant to Chapter 19, decisions imposing anti-dumping and countervailing duties can be reviewed by binational panels composed of five members appointed by the governments of the importing and exporting countries. Panels apply the domestic law of the importing

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country, including the principles of judicial review and the general legal principles that a domestic court would adopt. Panel reviews can be initiated by any involved NAFTA government. A government must call for a panel review if it is requested to do so by a private party who would be entitled to start proceedings for judicial review under the applicable domestic legal system.

Part I below explains in some detail the agencies and procedures involved in the imposition of anti-dumping and countervailing duties to goods imported into Canada. Readers who do not wish this amount of detail could skip directly to Part II on the place of Chapter 19 panels in Canadian legal theory, which adopts British dualism concerning the relationship between international law and domestic law. Part III contains a summary of the Canadian law of judicial review, including the various review standards that apply to issues of jurisdiction, law, fact and procedure. Citations are provided to decisions of both domestic courts and Chapter 19 panels on review of Canadian determinations.

I. ADMINISTRATIVE AGENCIES AND JUDICIAL STRUCTURE

A. Administrative Agencies

1. Revenue Canada-Dumping, Subsidization

In Canada, the imposition of anti-dumping duty and countervailing duty is governed by the Special Import Measures Act [2] («SIMA»), a federal statute. Under that legislation, the Department of National

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[2] *Special Import Measures Act,* Revised Statutes of Canada 1985, c.S-15, amd. R.S. 1985, c.23 lst Supp.); R.S. 1985, c.l (2d Supp.); R.S. 1985, c.47 (4th. Supp.); S.C. 1988, c.65; S.C. 1990, c.8; S.C. 1993, c.44; S.C. 1994, c.13; S.C. 1994, c.47; S.C. 1997, c.14. This summary does not take into account amendments that might result from the following two legislative proposals under discussion at the time of writing: Bill C-35, 1998, An Act to amend the Special Import Measures Act and the Canadian International Trade Tribunal Act, 1st reading March 19, 1998 Bill C-43. An Act to establish the Canada Customs and Revenue Agency, 1st reading June 4, 1998. Among other changes, Bill C-35 would give the Canadian International Trade Tribunal responsibility for preliminary determinations of injury. Bill C-43 would transfer the functions of the Deputy Minister to a newly-created position, the Commissioner of Customs and Revenue.

Revenue is responsible for investigations of dumping and subsidization. Determinations of injury are made by the Canadian International Trade Tribunal, an independent quasi-judicial body that reports to Parliament through the Minister of Finance [3].

The Deputy Minister of National Revenue may start an investigation of dumping or subsidization in response to a complaint from domestic producers or on the Deputy Minister's own initiative [4]. The investigation cannot proceed in either case without a reasonable indication that the domestic industry has suffered or is threatened with harm (SIMA, s.31). If the Deputy Minister decides not to go ahead with an investigation because of the absence of this reasonable indication, then the complainants or the Deputy Minister can refer the question to the Canadian International Trade Tribunal (SIMA, s.33, s.34) [5].

Once begun, an investigation can be terminated if the Deputy Minister concludes that the reasonable indication of harm is absent or that the evidence fails to disclose dumping or subsidization beyond insignificant amounts or negligible volumes (SIMA, s.35(1)) [6]. If an investigation is not terminated, the Deputy Minister will make a preliminary determination of dumping or subsidization describing the goods and estimating the margin of dumping or amount of subsidy for each exporter under investigation (SIMA, s.38(1)). The final determination will then be made within ninety days if

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3 *Canadian International Trade Tribunal Act*, R.S.C. 1985, c.47 (4th Supp.), as amd.

4 Investigations may also be initiated in response to a notice from the Canadian International Trade Tribunal concerning the adding of goods during the course of an inquiry (SIMA, s.46) or in response to an order by the federal Cabinet in cases where the WTO Subsidies Committee has authorized the imposition of countervailing duties (SIMA, s.7).

5 If the Tribunal finds the required reasonable indication, the Deputy Minister must proceed with the investigation (SIMA, s.31 (8), s.34(2)).

6 The issue of the reasonable indication may also be referred to the Tribunal (s.35(2)). «Insignificant» means a margin of dumping that is less than 2% of the export price or an amount of subsidy that is less than 1% of the export price. A «negligible» volume of dumped goods is less than 3% of the total volume released into Canada from all countries, but if three or more countries account for 7% of the total volume then their volumes are not negligible even if each country accounted for less than 3% (SIMA, s.2(1)).

the Deputy Minister continues to find dumping or subsidization of goods from the country or countries of export beyond insignificant amounts or negligible volumes. A final determination describes the goods and sets out the margin of dumping or amount of subsidy for each exporter (SIMA, s.41(1)). The Deputy Minister gives notice of preliminary determinations and final determinations with stated reasons to the Secretary of the Canadian International Trade Tribunal (SIMA, s.38(3)(b), s.41(3)(b)).

2. Canadian International Trade Tribunal-Injury

On receipt of a preliminary determination, the Canadian International Trade Tribunal begins its inquiry into whether the dumping or subsidization of goods has caused or is threatening to cause injury to a domestic industry or has caused retardation of the establishment of such an industry (SIMA, s.42(1)(a)(i)). From the time of the preliminary determination, imports could be subject to provisional duty if the Deputy Minister of National Revenue considered this necessary to prevent injury, retardation or threat of injury (SIMA, s.8(1)). If provisional duties have been imposed, the Tribunal's inquiry will examine whether the dumping or subsidization would have caused injury or retardation in the absence of such duties (SIMA, s.42(1)(a)(ii)).

The Tribunal will make its order or finding within one hundred and twenty days after receipt of the Deputy Minister's preliminary determination (SIMA, s.43(1)). If the inquiry concerns goods of NAFTA origin, the Tribunal will make a separate order or finding for each NAFTA country (SIMA, s.43(1.01)).

If the Tribunal makes a finding of injury, retardation or threat of injury, imported goods will be subject to anti-dumping duty equal to the margin of dumping or countervailing duty equal to the amount of subsidy (SIMA, s.3). If the Tribunal concludes that imposition of anti-dumping or countervailing duties, or imposition of the full amount of these duties, would be contrary to the public

interest, the Tribunal will report this opinion to the Minister of Finance (SIMA, s.45).

Once the Deputy Minister of National Revenue has made a preliminary determination concerning goods, the Deputy Minister may accept undertakings from an exporter or an exporting country to eliminate the dumping, the subsidization or the harm (SIMA, s.49(1),(2),(4)). In such a case, the collection of any provisional duties ceases and proceedings are suspended (SIMA, s.50), unless the exporter or exporting country exercises the option to continue with the investigation and the Tribunal's inquiry (SIMA, s.49(3)). To accept an undertaking, the Deputy Minister most believe that it would not cause the price to rise by more than the estimated margin of dumping or amount of subsidy (SIMA, s.49(2)(a)).

Undertakings are normally for five years, renewable for further periods of up to five years (SIMA, s.53). The Deputy Minister may terminate an undertaking and resume the investigation at any time in response to new information or changed circumstances or if the undertaking has been violated (SIMA, s.52(1)). Once an undertaking has been in effect for 30 days, it will be terminated if the importer, exporter, exporting government or complainant so requests, and the Deputy Minister will resume the investigation (SIMA, s.51). Should the Deputy Minister or Tribunal find an absence of dumping, subsidization or injury, any undertakings and other proceedings are terminated (SIMA, s.52(1.1),(1.2),(1.3)).

B. Judicial System

1. Federal Court of Appeal

Tribunal orders and findings may be reviewed before the Federal Court of Appeal (SIMA, s.76(1)). The Deputy Minister's final determinations of dumping and subsidization are also reviewable before the same court, as are the Deputy Minister's decisions concerning the renewal of undertakings and the termination of investigations (SIMA, s.96.1(1)(a),(b),(c)).

Anti-dumping and countervailing duties may apply to goods imported at any time after the Deputy Minister's preliminary determination [7]. When goods are imported after a Tribunal finding of injury, a customs officer will decide whether they meet the description in the order imposing duties and will determine values for the margin of dumping or amount of subsidy (SIMA, s.56(1)). From these decisions, there are two levels of appeal within the Department, for re-determinations first by a designated officer and then by the Deputy Minister (SIMA, s.57, s.58, s.59) [8]. A decision of the Deputy Minister may then be appealed to the Canadian International Trade Tribunal (SIMA, s.61). The Tribunal's decision may be appealed on a question of law to the Federal Court of Appeal (SIMA, s.62).

The Tribunal may reconsider its orders and findings (SIMA, s.76(2),(2.1)) [9]. If there is no continuation, orders and findings expire in five years (SIMA, s.76(5)).

2. Supreme Court of Canada

Judgments of the Federal Court of Appeal may be appealed to the Supreme Court of Canada, with leave from the latter court. The Supreme Court may grant leave to appeal if it decides that the case raises a question of public importance, a question involving important issues of law or mixed law and fact or a question that, for any other

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[7] If the Tribunal finds only a threat of injury but not past injury, there are no duties on goods released prior to the finding (SIMA, s.3, s.4, s.55). In the case of a massive importation causing injury, duties may be made retroactive to the start of the investigation, up to 90 days prior to the preliminary determination (SIMA, s.55(2)(b), s.5(b), s.6(b)). See further Robert K. Paterson & Martine M.N. Band, *International Trade and Investment Law in Canada*. 2d ed. (Scarborough, Ontario: Carswell, 1994 (rev. 1998)) at 8.42.

[8] New evidence may be presented on a re-determination: *Howmark v. Deputy Minister of National Revenue, Customs and Excise* (1993), 13 T.T.R. 321 (C.I.T.T.) ; *Direct Import DICO Corporation v. Deputy Minister of National Revenue, Customs and Excise* (1992), 8 T.T.R. 20 (C.I.T.T.). The Deputy Minister and designated officers may also make re-determinations in certain circumstances on their own initiative (SIMA, s.57, s.59).

[9] Tribunal decisions on reconsideration maybe reviewed before the Federal Court of Appeal (SIMA, s.96.l(l)(d),(e),(f)). In addition, in response to a recommendation or ruling of the Dispute Settlement Body of the World Trade Organization, the Minister of Finance may request a reconsideration by the Tribunal or by the Deputy Minister of National Revenue (SIMA, s.76.1).

reason, is of such a nature or significance as to warrant decision by the Supreme Court [10].

3. Stare Decisis

On anti-dumping and countervailing duty questions, Canadian courts will apply the common law doctrine of stare decisis. The doctrine requires that lower courts follow rules of law as determined by higher courts. The Federal Court is therefore bound to apply roles of law decided by the Supreme Court. Decisions of the Supreme Court and the Federal Court are binding on the Canadian International Trade Tribunal and the Deputy Minister of National Revenue.

Common law courts are not necessarily bound by their own previous decisions. If a previous decision cannot be distinguished on its facts, the English House of Lords stated in 1966 that it might depart from one of its own precedents, in order to avoid causing injustice or unduly restricting the development of the law [11]. Although appeals to the Privy Council from the Supreme Court of Canada were abolished in 1949, Canadian common law courts, like courts in other parts of the Commonwealth, are influenced by the House of Lords. The Supreme Court of Canada and probably also the Federal Court of Appeal would have similar power to over-role their own previous decisions on a legal point, if they chose to do so in particular circumstances [12].

For inquiries on questions of injury, the Canadian International Trade Tribunal is not acting as a court. When the Tribunal acts in a more judicial capacity on appeals of re-determinations by the Deputy Minister for goods imported after an injury finding, the Tribunal's

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[10] *Supreme Court Act*, R.S.C. 1985, c.S-26, as amd., s.40(1).

[11] *Practice Statement (Judicial Precedent),* [1966] 3 All E.R. 77, [1966] 1 W.L.R. 1234 (H.L.).

[12] *Minister of Indian Affairs and Northern Development v. Rainville,* [1982] 2 S.C.R. 518 at 527-28. See: G.L. Gall, *The Canadian Legal System*, 3d ed. (Toronto, Calgary, Vancouver: Carswell, 1990) at 281-91; S.M. Waddams, *Introduction to the Study of Law*, 4th ed. (Scarborough, Ontario: Carswell, 1992) at 77-86; Gordon Bale, «Casting Off the Mooring Ropes of Binding Precedent» (1980) 58 Can. Bar Rev. 255.

decisions probably do not have the effect of setting precedents under the stare decisis system, as the Tribunal has only the jurisdiction assigned to it by statute. While the Tribunal's decision is conclusive as to that particular dispute unless further appealed, it would not establish legal precedent binding on the Deputy Minister in the future [13]. As a practical matter, however, the Tribunal is guided by its own previous decisions, which are cited in argument by counsel in both appeals and inquiries.

II. NAFTA, DUALISM AND CANADIAN DOMESTIC LAW

A. Description of Chapter 19 Panels

Article 1904 of NAFTA provides for binational panel review of anti-dumping and countervailing duty determinations [14]. Panels have five members —two appointed by each involved NAFTA country and a fifth appointed by agreement (NAFTA, Annex 1901.2). On its own initiative, each state may request formation of a panel. A state is required to call for a panel if asked to do so by a private party entitled to start judicial review proceedings under domestic law (NAFTA, Art. 1904(5)). Panels decide by majority vote, with concurring and dissenting panelists identified. The panel decision is binding for that particular dispute as a matter of international law between the two countries (NAFTA, Art.1904(9)). After a panel

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[13] The Tribunal's role on appeals of redeterminations under SIMA is comparable to its role on customs tariff appeals. See: *Javex Co. v. Oppenheimer*, [1961] S.C.R. 170; *Olympia Floor and Wall Tile Co. v. Deputy Minister of National Revenue, Customs and Excise* (1983), 49 N.R. 66, 5 C.E.R. 562 (F.C.A.); *Deputy Minister of National Revenue, Customs and Excise v. Unicare Medical Products Inc.* (1990), 2 T.T.R. 38 (C.I.T.T.); *Boneless Manufacturing Beef Originating in or Exported from the European Economic Community* (1991), 6 T.T.R. 253 (C.I.T.T.).

[14] For background, see Harry B. Endsley, «Dispute Settlement under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution» 18 Hastings Int'l & Comp. L. Rev. 659 (1995); Jon R. Johnson, *The North American Free Trade Agreement: a Comprehensive Guide* (Aurora, Ontario: Canada Law Book, 1994); A.L.C. de Mestral. «The Resolution of Disputes between Japan and Canada and the United States: A Modest Proposal» in Michael K. Young and Yuji Iwasawa (eds.), *Trilateral Perspectives on International Legal Issues: Relevance of Domestic Law and Policy* (Irvington. N.Y.: Transnational, 1996) 235.

decision has been issued, an involved state may take the matter to an Extraordinary Challenge Committee to deal with allegations of panel misconduct, conflict of interest, breach of fundamental rules of procedure or excess of jurisdiction (NAFTA, Art.1904(13)). An Extraordinary Challenge Committee is composed of three judges or former judges selected by the involved states. The Committee's decision is binding for that particular matter as between the two countries (NAFTA, Annex 1904.13).

In Canadian legislation, Part I.1 of the Special Import Measures Act provides for panel review of anti-dumping and countervailing duty decisions in accordance with Chapter 19 of NAFTA. Panel review is available from a «definitive decision». This phrase covers Tribunal orders or findings concerning injury, including reviews of previous Tribunal orders [15]. The phrase also covers final determinations by the Deputy Minister, decisions by the Deputy Minister concerning renewal of undertakings and termination of investigations, and re-determinations by the Deputy Minister in the Departmental appeal process for goods imported after a Tribunal finding of injury.

Any person entitled to apply for a review of a definitive decision before the Federal Court of Appeal or for an appeal of a definitive decision to the Canadian International Trade Tribunal after the Departmental re-determinations (SIMA, s.61) can file a request for review before a NAFTA chapter 19 panel (SIMA, s.77.011(2)) [16].

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[15] SIMA, s.77.01(1), definition of «definitive decision», subparagraphs (c),(g),(h),(i),(i.1). Subparagraph (j) of this definition also includes Tribunal rulings on identification of the importer.

[16] Note that the panels are directed to apply the judicial review standard to all cases, including the Deputy Minister's re-determination for goods imported after an injury finding. In domestic law, those re-determinations at the end of the Departmental process would be subject to an appeal to the Tribunal. In this instance, the procedure and the grounds for questioning a decision may vary somewhat as between domestic law and the panel process, although judicial review of re-determinations is also available in domestic law (*Toshiba International Corp. v. Canada (Deputy Minister of National Revenue, Customs and Excise*, [1994] F.C.J. No. 998 (T.D.)). Once a matter has gone through the Departmental process and the Tribunal has dealt with an appeal of the Deputy Minister's re-determination, it could not be sent to a Chapter 19 panel at that point, because the Tribunal's decision in such a case is not a «definitive decision» under SIMA s.77.01(1).

Such a filing is deemed to be a request for panel review under Article 1904.4 of NAFTA by the Minister for International Trade (SIMA, s.77.011(3)) [17]. Once a request for a panel is made, then no application for review or appeal may be brought under SIMA sections 96.1 or 61, or under the Federal Court Act (SIMA, s.77.011 (7)).

The NAFTA panel will either confirm the decision or refer the matter back to the appropriate authority for reconsideration (SIMA, s.77.015(3)). If the matter is referred back, the authority must take action not inconsistent with the decision of the panel (SIMA, s.77.016(1)). Panel decisions and any Extraordinary Challenge Committee decisions are final and binding and not subject to further domestic appeal or review on any ground (SIMA, s.77.02).

B. Effect of Panel Decisions

In domestic law, while the panel decision is binding for that particular matter, it is unlikely to have precedential effect as stare decisis. Panels apply domestic Canadian law and use the same standard of review as would be applied by the Federal Court of Appeal and Supreme Court of Canada on judicial review. Canada follows the dualist British tradition of regarding international treaty law as a separate legal order distinct from domestic law. Decisions of panels established under NAFTA, therefore, would not be decisions by judicial bodies within the same legal hierarchy as the CITT and the Deputy Minister. While panel decisions could provide helpful discussions of particular points, they would not operate as precedent binding for future disputes.

A possible line of argument can be advanced to say that Chapter 19 panels have a certain existence as domestic institutions in addition

[17] The Minister or the government of a NAFTA country may also, of course, request panel review independently (see SIMA, s.77.011(1)). In addition, the Minister may request panel review of determinations in other NAFTA countries. Any person entitled to commence proceedings for judicial review under the law of the other NAFTA country may file a request with the Canadian Secretary of the NAFTA Secretariat and this request is deemed to be a request by the Minister for panel review under Article 1904.4 (SIMA, s.96.2 1).

to their international status. NAFTA panels are quite thoroughly described in Part I.1 of SIMA. Section 77.013(1) states that a panel «shall be appointed» in accordance with the relevant provisions of NAFTA. The panel «shall conduct a review», «shall determine whether the grounds on which the review was requested have been established» and «shall make an order confirming the decision or referring the matter back» (SIMA, s.77.015(1),(3)). The panel is to have «such powers, rights and privileges as are conferred on it by the regulations» (SIMA, s.77.015(2)) [18]. It can be argued that the panels have thus been implemented as institutions in domestic law in addition to their international status [19].

Even if Chapter 19 panels do have a shadow existence in domestic law, this would not necessarily imply that panel decisions attract the common law principle of stare decisis. Domestic administrative tribunals can be given statutory jurisdiction to make judicial decisions in particular cases without creating precedent binding in future matters [20]. Even if Chapter 19 panels were recognized as having some status in the domestic order, it is unlikely that their decisions would establish precedent binding as stare decisis in Canadian law.

The link between Chapter 19 panels and domestic law raises certain issues of constitutionality, since panel decisions are binding for the particular matter under review even if they do not have wider effect. The analysis centres on the statutory provisions blocking access to domestic courts once a panel review is underway (SIMA s.77.011(7)) and blocking

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[18] For the corresponding sections to the same effect concerning the appointment, powers and operation of Extraordinary Challenge Committees, see SIMA, s.77.018, s.77.019. See further: *Rules of Procedure for Article 1904 Binational Panel Reviews*, January 1, 1994, C.Gaz. 1994. I.23; *Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20 of the North American Free Trade Agreement*, January 22, 1994, C.Gaz. 1994.I.539; *Rules of Procedure for Article 1904 Extraordinary Challenge Committees*, January 29, 1994, C.Gaz. 1994.I.718.

[19] The description of Chapter 19 panels and Extraordinary Challenge Committees in the legislation is much more complete that the description of the dispute settlement mechanisms of the World Trade Organization in the implementing legislation for the results of the Uruguay Round. See: *World Trade Organization Agreement Implementation Act*, S.C. 1994, c.47, s.11, s.13; SIMA, s.76.1.

[20] See *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

court access to question a panel or Committee decision once it has been received (SIMA s.77.02). It is clear that it is not be possible to oust all court review of the constitutionality of a federal statute or of entities created under a statute. Concerning Chapter 19 of NAFTA, the specific constitutional question raised would be whether ultimate supervision over the work of the Deputy Minister and the Tribunal under SIMA can be conducted by the panels and Extraordinary Challenge Committee rather than the Federal Court of Appeal and Supreme Court of Canada. In other words, is there a constitutionally guaranteed right of access to the ordinary courts to see that the executive and its administrative agencies stay within the jurisdictions assigned to them by statute?

Under the Canadian constitution, the provincial Superior Courts are the courts with general jurisdiction, including power to review governmental action [21]. Judges for those courts are federally-appointed (Constitution Act, 1867, s.96) [22]. The federal government is also given power to create additional courts (Constitution Act, 1867, s.101). Canadian cases have held that s.96 restricts the provinces. Provinces cannot assign Superior Court judicial powers to provincial agencies unless those powers are necessarily incidental to other valid functions within provincial competence [23]. As well, it has been held that provinces are unable to create administrative tribunals entirely shielded from jurisdictional review by s.96 judges [24]. The federal government cannot re-write the constitution through a complete transfer of the s.96 criminal law power to a provincial tribunal with provincially-appointed judges [25], but it is unclear what other limits s.96 imposes on the federal

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[21] In the common law system, review powers were developed both in the Court of King's or Queen's Bench, a court of Law (certiorari, mandamus, prohibition, habeas corpus and quo warranto) and in the Chancery, a court of Equity (injunction, declaration). Provincial Superior Courts apply both Law and Equity.

[22] *Constitution Act*, 1867, R.S.C. 1985, App. II, no. 5.

[23] *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Reference re Young Offenders Act* (PE. I.), [1991] 1 S.C.R. 252; *Sobeys Stores Ltd. v. Yeomans*, [1989] 1 S.C.R. 238; *Re Residential Tenancies Act 1979*, [1981] 1 S.C.R. 714; *Attorney General of Quebec v. Farrah*, [1978] 2 S.C.R. 638.

[24] *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220.

[25] *McEvoy v. Attorney General of New Brunswick*, [1983] 1 S.C.R. 704.

level [26]. The federal government can create new tribunals and can give them powers previously held by the Superior Courts [27], subject to the qualification that final review for constitutionality must remain with s.96 courts [28]. The question is whether there is a constitutional limit based in the rule of law requiring that s.96 judges must have ultimate supervision of the actions of the Deputy Minister and the Tribunal under SIMA to see that statutory jurisdiction is respected.

The rule of law and judicial independence are fundamental principles in the Canadian constitution [29]. At this point, it is not clear whether the two are so inextricably linked as to prevent the complete transfer of jurisdictional review functions to Chapter 19 panelists and Extraordinary Challenge Committee members whose appointments lack the permanence and security of independent judges. Since the panels apply the same law that would be applied by domestic courts, the concern would not be over the substance of the task assigned to panels, but rather over panel composition.

A related question is whether s.96 requires that all Chapter 19 panelists and Committee members be appointed by the federal government in some way, including a notional confirmation for persons selected by the other NAFTA governments. This question might be resolved through an interpretation of or, if necessary, amendment to SIMA s.77.013(1), which provides that the panel shall be appointed in accordance with the procedure in Chapter 19 of NAFTA. The issue concerning judicial independence and jurisdictional review is more complicated. As discussed below, judicial review of administrative action in Canada examines questions of jurisdiction, law, fact and procedure. It would be inconvenient to decide that while final review on law, facts and procedure can be assigned to non-s.96 judges, there is a residue of

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[26] *Canadian Imperial Bank of Commerce v. Rifou*, [1986] 3 F.C. 486 (F.C.A.).

[27] *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394; Pringle v. Fraser, [1972] S.C.R. 821.

[28] *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147.

[29] *Reference re Secession of Quebec*, [1998] S.C.J. No. 61 (S.C.C., August 20, 1998); *Re Provincial Court Judges*, [1997] 3 S.C.R. 3; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (per Lamer C.J.).

review on questions of jurisdiction that must remain within the purview of s.96 courts [30]. Some of the reasoning concerning the provincial tribunal examined in the Crevier case [31] could lead to such a conclusion, however, if it is found applicable to the federal government. Clarification will have to await further developments [32].

C. Dualism and Statutory Interpretation

This section discusses the influence of international sources on domestic law in Canada. As Chapter 19 panels apply the general legal principles that a domestic court would follow, the discussion outlines the approach that panels are to adopt in their interpretation of Canadian law. The discussion also provides further background on the relationship between panel decisions and the domestic system.

The British tradition of dualism, followed in Canada, distinguishes treaties from other sources of public international law such as

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[30] Distinctions would be particularly difficult to establish, since a general concern for jurisdiction is at the base of all of judicial review. Procedural issues may be considered jurisdictional, as well as serious errors of law or fact.

[31] *Crevier, supra*. See *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at 920 (L'Heureux-Dubé J. dissenting).

[32] See generally: Lucie Cauchon, «L'accord de libre-échange Canada-Etats-Unis prévoit-il un contrôle judiciaire binational?» (1991), 32 Cahiers de Droit 729 (arguing that the Chapter 19 system is constitutional); Stéphane Rochette, «Les institutions binationales prévues dans le chapitre 19 del'*Accord de libre-échange entre le Canada et les Etats-Unis* au regard de l'article 96 de la *Loi constitutionnelle de 1867*» (1992), 33 Cahiers de Droit 1151 (arguing that the Chapter 19 system is not constitutional); J.M. Evans et al., *Administrative Law: Cases, Text and Materials,* 4th ed. (Toronto: Emond Montgomery, 1995) at 977-84. See further *Quintette Coal Ltd v. Nippon Steel Corp*., [1988] B.C.J. No. 1354 (B.C.S.C.) on international commercial arbitration. Any constitutional challenge would probably be argued in the domestic courts. In the unlikely event that a party decided to raise a challenge before a Chapter 19 panel, the panel would have jurisdiction to deal with the issue as a matter of general Canadian case law, since it has authority over questions of law *(Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Cooper v. Canada (Human Rights Commission), supra)*. On such a constitutional question, it is doubtful that SIMA s.77.02 would actually shield any panel decision from further review in domestic courts. Of course, if a Chapter 19 panel were faced with a constitutional challenge, the panel would have to decide whether it had jurisdiction to hear the matter under NAFTA.

international custom, general principles of law and jus cogens [33]. A ratified treaty binds Canada internationally, but its provisions do not apply to change domestic law unless the treaty is implemented into the domestic system. Even once implemented, the treaty provisions do not have independent effect; it is the domestic statute that has force of law.

Treaty provisions may be used for assistance in interpretation of the implementing statute, due to a presumption that Parliament does not intend to put Canada in breach of its international obligations. In this process, the meaning of the treaty will be determined in accordance with rules of interpretation contained in the Vienna Convention on the Law of Treaties [34].

Since the decision of the Supreme Court of Canada in National Corn Growers in 1990, it is no longer necessary to demonstrate an ambiguity in the domestic statute before an international source can be consulted. According to the judgment of Mr. Justice Gonthier in National Corn Growers:

In interpreting legislation which has been enacted with a view towards implementing international obligations, [...] it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.

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[33] See *Statute of the International Court of Justice,* Article 38(1)(a),(b),(c). Concerning non-treaty sources of international obligation, the British tradition is monist, viewing them as automatically part of the common law. The analysis in this section leaves aside a possible argument that some aspects of anti-dumping and countervailing duty law are now so widely accepted around the world as to have become part of international custom.

[34] *Vienna Convention on the Law of Treaties,* 23 May 1969, Can. T.S. 1980 No. 37 (in force 27 January 1980). See: *Pushpanathan v. Canada (Minister of Citizenship and Immigration),* [1998] S.C.J. No. 46; *Thomson v. Thomson,* [1994] 3 S.C.R. 551 *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689; *Canada v. Seaboard Lumber Saks Co*., [1995] 3 F.C. 113 (CA).

[...] [M]ore specifically, it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation. The Court of Appeal's suggestion that recourse to an international treaty is only available where the provision of the domestic legislation is ambiguous on its face is to be rejected [35].

This decision reverses earlier thinking that had required finding an ambiguity in statutory language first before the treaty could be consulted, in line with the British tradition of cautious use of extrinsic sources such as Parliamentary debates in statutory interpretation. Parliament is still supreme, of course, and can legislate in contravention of a treaty if it chooses to do so. If the statute is unambiguous, then its meaning governs, whether that meaning conforms to or contradicts an international obligation [36].

One question still open is the possible use of a treaty to fill a silence in domestic legislation —in effect, a question of what is implicit in

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[35] *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at 1371. The judgment of Mr. Justice Gonthier represents the opinion of four judges. A judgment by Madam Justice Wilson, concurred in by two other judges, agrees in the result of the decision but for different reasons. The case had to do with judicial review of an injury finding by the Canadian Import Tribunal, a predecessor of the Canadian International Trade Tribunal. The Tribunal had found causation in a countervailing duty matter based in part on potential imports. The Tribunal decision was upheld on review by both the Federal Court of Appeal and the Supreme Court of Canada. A GATT Panel acting under the Tokyo Round Subsidies Code, however, found that the Tribunal's determination was in contravention of Canada's obligations under the Code: Panel on Canadian Countervailing Duties on Grain Corn from the United States, GATT, *Basic Instruments and Selected Documents* 29S/411 (1991-92). By the time of the GATT Panel decision, the countervailing duties had been in place for five years and were about to expire. The Canadian International Trade Tribunal heard representations and decided not to review the matter. The duties therefore expired. See C.I.T.T. Bulletin, Vol.3, No.7, at 10 January/ February/ March 1992). As the duties were imposed prior to 1989 when the Free Trade Agreement took effect between Canada and the United States, U.S. exporters did not have the option of taking the original injury finding to a Chapter 19 panel.

[36] *Canada (Deputy Minister of National Revenue, Customs and Excise) v. General Electric Canada Inc.* (1994), 170 N.R 341 (F.C.A.); *Australian Meat & Live-Stock Corp. v. Canada (Canadian International Trade Tribunal)* (1993), 161 N.R. 147 (F.C.A.). For further discussion, see Ivan R. Feltham, «The Relationship between Domestic Law and International Law» in Ivan R. Feltham ed., *International Trade Dispute Settlement: Implications for Canadian Administrative Law,* (Ottawa: Centre for Trade Policy and Law, 1996) 165 at 171-83.

the statute. It might be argued that only treaty provisions explicitly implemented could draw on the treaty as an interpretative source. A strong argument can be made, however, for fairly extensive use of the treaty under a purposive approach reflecting the presumed intent of legislators in favour of implementation [37], so long as there is some basis in the domestic statute. The Supreme Court of Canada has recently said that, when interpreting legislation that implements an international treaty, the court «must adopt» an interpretation consistent with the treaty obligations [38].

The federal statute implementing NAFTA provides especially strong support for the use of that Agreement. Section 10 of the North American Free Trade Agreement Implementation Act explicitly approves NAFTA and section 4 confirms that the purpose of the statute is to implement the Agreement [39]. Section 3 states that the implementing legislation «shall be interpreted» in a manner consistent with NAFTA, and further provides that the same approach is to be used for interpretation of any other federal legislation that fulfils a NAFTA obligation [40]. Section 3 was cited for support by the Federal Court of Appeal in the Eli Lilly case in which the court used the terms of NAFTA Article 1709(11 to interpret a regulation under the Patent Act [41].

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[37] *Canada v. Seaboard Lumber Sales Co*., [1995] 3 F.C. 113 (C.A.).

[38] *Pushpanathan, supra*, para. 51. The presumption in favour of consistency with international obligations will not be applied, however, so as to produce unconstitutional results such as a federal interference in provincial jurisdiction: *Baker v. Canada (Minister of Citizenship and Immigration),* [1997] 2 F.C. 127 (C.A.) (appeal pending to the Supreme Court of Canada at time of writing). The federal immigration legislation at issue in the Baker case was not implementing legislation for the treaty in question, the *Convention on the Rights of the Child*. 28 May 1990, Can. T.S. 1992 No.3 (in force for Canada 12 January 1992). See further Irit Weiser, «Implementation of International Human Rights Law in a Federal State» Proceedings of the 27th Annual Conference of the Canadian Council on International Law, October 1998.

[39] *North American Free Trade Agreement Implementation Act*, S.C. 1993, c.44. Comparable provisions are contained in the WTO implementing legislation: *World Trade Organization Agreement Implementation Act*, S.C. 1994, c.47, s.8, s.3.

[40] The statute implementing the WTO Agreement does not have a comparable provision. Use of GATT sources in statutory interpretation, therefore, depends only on the case law discussed above.

[41] *Eli Lilly and Co. v. Nu-Pharm Inc*., [1997] I F.C. 3 (C.A.).

Even a very strong argument in favour of consistency between domestic law and international commitments has limits. A treaty that has been implemented into domestic law remains only an interpretive aid, not an independent source of obligation in Canadian law. The statute implementing NAFTA provides that no private causes of action are to proceed without the consent of the Attorney General of Canada. In the English version, s.6 is as follows:

6. (1) No person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of Part I or any order or regulation made under Part I.

(2) Subject to Section B of Chapter Eleven of the Agreement, no person has any cause of action and no proceedings of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.

Part I of the statute contains section 10 which explicitly approves NAFTA. The two paragraphs, therefore, refer to both the implementing legislation and the treaty itself [42]. It should be noted that the words in English «no person has any cause of action» should not be read independently, but should be read as modified by the phrase «without the consent of the Attorney General of Canada». This interpretation would bring the English language section somewhat into line with the French version of the same provisions, which is as follows:

6. (1) Le droit de poursuite, relativement aux droits et obligations uniquement fondés sur la partie I ou ses règlements ou décrets d'application, ne peut être exercé qu'avec le consentement du procureur général du Canada.

[42] The comparable provisions for the WTO legislation are *World Trade Organization Agreement Implementation Act, supra*, s.5, s.6. Section B of Chapter 11 of NAFTA, which does not have a counterpart in the WTO, allows private parties to initiate international commercial arbitration against NAFTA governments concerning investment disputes.

(2) Sauf cas prévus à la section B du chapitre 11 de 1'Accord, le droit de poursuite, relativement aux droits et obligations uniquement fondés sur l'Accord, ne peut être exercé qu'avec le consentement du procureur général du Canada [43].

The meaning common to the two versions, thus, does not deny the existence of a cause of action but says only that it cannot be exercised without the consent of the Attorney General [44]. This would be a logical interpretation, in any case; if the Attorney General were to consent, there must be something that could then go forward. As the two language versions are equally authoritative [45], there may be an argument that the right exists even if the remedy cannot be exercised independently. The issue could arise if the NAFTA —related claim were advanced as a defence, either in a private— party lawsuit or perhaps in response to a government enforcement proceeding of same sort. Federal Crown immunity is expressly waived in the implementing legislation [46].

Section 6 was mentioned in the Sanipan case before the Quebec Superior Court in 1995 [47]. The applicant, les Enterprises de rebuts Sanipan, ran a landfill site in Quebec. It sought a declaration that a provincial regulation prohibiting landfills from accepting solid waste from outside Quebec was invalid. In rejecting the application, the court cited section 6 to reinforce a finding that NAFTA did not have direct application in Canadian law. The court held that while the implementing legislation

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[43] Literally: «6.(l) The cause of action relating to rights and obligations uniquely founded on Part I or its regulations or orders can only be exercised with the consent of the Attorney-General of Canada. (2) Except for cases provided for in Section B of Chapter 11 of the Agreement, the cause of action relating to rights and obligations uniquely founded on the Agreement can only be exercised with the consent of the Attorney-General of Canada». (Author's translation).

[44] The choice of the common meaning is an accepted method of interpreting bilingual legislation, although it is not the only method available. For comments on bilingual interpretation, see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Quebec: Yvon Blais, 1991) at 272-79; Rémi Michael Beaupré, *Interpreting Bilingual Legislation* (Toronto: Carswell, 1986).

[45] *Official Languages Act*, S.C. 1988, c.38, s.13.

[46] *North American Free Trade Agreement Implementation Act, supra*, s.5. Federal Crown immunity is also waived in the WTO legislation: *World Trade Organization Agreement Implementation Act*, *supra*, s.4.

[47] *Entreprises de rebuts Sanipan c. Quebec (Procureur Général)*, [1995] A.Q. no. 105.

for NAFTA approves the treaty in section 10, it does not give the treaty provisions force of law domestically. The statute was to be distinguished from implementing legislation for certain other treaties in which the treaty is specifically given domestic effect [48]. The court was not convinced that NAFTA would have assisted the applicant even if available, but section 6 provided an additional reason, since there was no consent from the federal Attorney-General.

It is quite correct that section 10 does not go as far as provisions in certain other statutes that implement treaties. The section is very brief and states only that NAFTA «is hereby approved». In contrast, the Manitoba legislation at issue in the Thomson case, for example, states that the treaty in question «is in force in Manitoba and the provisions thereof are law in Manitoba» [49]. It could be argued that section 10 only gives Parliamentary approval for the ratification of NAFTA as an international obligation. Under the British tradition, treaty ratification is a prerogative act of the Crown (*i.e.* federal executive), without need of legislative consent. In Canada, there has been a practice of submitting major treaties such as NAFTA for Parliamentary approval [50]. Such approval does not necessarily imply implementation of treaty provisions as domestic law, although section 10 could certainly be clearer if no domestic effect were intended [51]. There remains the theoretical possibility of same effect for NAFTA beyond its use as an interpretive aid. If the Attorney-General

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[48] To the same effect, see *Antonsen v. Canada (Attorney General)*, [1995] 2 F.C. 272 (T.D.). See further *Antonsen v. Canada (Minister of Fisheries and Oceans)*, [1995] F.C.J. No. 804 (T.D.).

[49] *Child Custody Enforcement Act,* R.S.M. 1987, c.C360, s.17(2). The treaty, the *Convention on the Civil Aspects of International Child Abduction,* 25 October 1980, Can. T.S. 1983 No.35 (in force for Canada 1 December 1982), was annexed as a schedule to the legislation. See *Thomson v. Thomson*, [1994] 3 S.C.R. 551.

[50] See generally A.E. Gotlieb, *Canadian Treaty-Making* (Toronto: Butterworths, 1968) at 15-19. For comments on recent practice, see Daniel Turp, «Le rôle du Parlement dans la conclusion et la mise en oeuvre des traités internationaux», Proceedings of the 27th Annual Conference of the Canadian Council on International Law, October 1998.

[51] Legislative authority for implementation of a treaty into Canadian domestic law is divided between the federal and provincial levels of government, depending on the subject matter involved: *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326 (P.C.). For comments on the federal power over trade and commerce, see H. Scott Fairley, «Jurisdiction over International Trade in Canada: The Constitutional Framework» in Maureen Irish & Emily F. Carasco (eds.), *The Legal Framework for Canada-United States Trade* (Toronto, Calgary, Vancouver: Carswell, 1987) 131.

were to consent, section 6 implies that there must be some way in which NAFTA would then become the basis for a cause of action that could proceed. It is not completely clear what would happen on the Sanipan facts, or perhaps in a federal matter, if the issue arose in an enforcement action and NAFTA were argued as a defence.

The question of possible private rights is particularly tied to Article 2020 of NAFTA:

Article 2020: Referrals of Matters from Judicial or Administrative Proceedings.

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission to the court or administrative body in accordance with the rules of that forum.

3. If the Commission is unable to agree, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum [52].

Article 2020 seems to contain a presumption that the NAFTA treaty could have independent effect before a domestic court or administrative

[52] Article 2020 is based on Article 1808 of the Canada-United States Free Trade Agreement, which provided for an agreed interpretation to come from the Parties (i.e. the two national governments), rather than the Commission. A NAFTA government intending to submit its views to a foreign court or administrative body under Article 2020(3) may want to consider whether it would thereby risk becoming an unwilling defendant. Article 2021 stipulates that no government is to create a domestic right of action against another government for breach of a NAFTA obligation; the effect of this provision in domestic law would need to be assessed.

body. It would be consistent with Canadian dualism to say that an issue of interpretation of NAFTA might arise if NAFTA were being used to clarify the meaning of a domestic statute. It is more difficult to see how an issue of the application of NAFTA could arise under Article 2020(1), however, without stretching traditional notions of dualism. That particular wording might have been drafted with other NAFTA legal systems in mind.

The comparable provision for the European Union is Article 177 of the Treaty of Rome:

Article 177. The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community [...];

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice [53].

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[53] *Treaty Establishing the European Economic Community,* 25 March 1957, as amended by *Treaty on European Union,* 7 February 1992, 31 I.L.M. 247 (1992). This will become Article 234 when the Treaty of Amsterdam comes into effect. See *Consolidated Version of the Treaty on European Union* and *Consolidated Version of the Treaty Establishing the European Community, done at Maastricht, Rome and Amsterdam*. 7 February 1992, 25 March 1957, 2 October 1997, 37 I.L.M. 56 (1998).

In a landmark case in 1963, the European Court of Justice was faced with a reference from a Dutch tax court concerning a provision of the Treaty that prohibited increases in tariff duties. A Dutch importer, Van Gend en Loos, complained that chemicals it imported from Germany had been re-classified in the new tariff schedule and subjected to an 8% duty. As the duty had been only 3% previously, Van Gend maintained that the increase in duty was illegal. The Court of Justice agreed and ruled that the Treaty had direct effect to give Van Gend a defence against its government's demand for the increased tariff [54]. The doctrine of direct effect has grown since then to become a major part of European Community law [55].

The reference procedure in NAFTA Article 2020 is obviously not the same as the procedure in the European Community. If, however, a Canadian court were faced with a litigant in the situation of Van Gend en Loos who could point to a provision of NAFTA that had not quite made its way explicitly into national law, section 6 of the North American Free Trade Agreement Implementation Act might leave some room for the use of NAFTA as a defence. The treaty would not trump conflicting national law as it did for Van Gend, but it could be used to assist with interpretation of any ambiguities. Since it was so clear that the government intended to implement NAFTA, there may be a very strong presumption in favour of the application of NAFTA to fill any silences.

The predecessor of NAFTA Article 2020, Article 1808 of the Canada-United States Free Trade Agreement, was argued in one reported case, where the link to domestic procedure was problematic.

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[54] Case 26/62, *Van Gend en Loos v. Nederlandse Tariefcommissie*, [1963] E.C.R. 1.

[55] See Alexander J. Easson. «Article 177 of the EEC Treaty and the Concept of "Direct Effect"» in Irish and Carasco (eds.), *supra,* 59.

In the Nestle Enterprises case, the defendant in a trademark action requested the Trial Division of the Federal Court to use Article 1808 to solicit the views of the Canadian government on the treatment of grey-marketed goods under the Free Trade Agreement [56]. The request was part of the defendant's reply to the plaintiff's motion for an interim injunction. As the injunction was denied for other reasons, the court did not have to decide whether the defendant had a defence based on the treaty. The court did, however, state that if it were to decide on the defendant's request, the defendant would have to show how Article 1808 had become part of Canadian domestic law, as such a solicitation of governmental views would be an unusual step for a Canadian court to take. If a Canadian court in the future decides to use this reference procedure (now NAFTA Article 2020), it could be faced with the interpretive question of the filling of silences on issues of both procedure and substance. An administrative agency might be able to use the Article more easily, as administrative procedure can be more flexible than that of courts. It is not clear whether a Chapter 19 panel would qualify as a «court or administrative body» able to make an Article 2020 request should it wish to do so.

If a court or administrative agency were to take into account the answer from such a reference procedure or the result of an international dispute settlement mechanism such as a WTO panel [57], it would be going beyond the use of the treaty itself as an interpretive aid. These are subsequent sources, not just the materials before Parliament when the legislation was adopted. That is not to say that those sources would be rejected, of course. Instead of being treated as evidence of direct

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[56] *Nestle Enterprises Ltd. v. Edan Food Sales Inc.*, [1992] 1 F.C. 182 (T.D.).

[57] The WTO lacks a direct counterpart to the reference procedure in NAFTA Article 2020. Concerning anti-dumping and countervailing duties, SIMA s.76.1 allows the Minister of Finance to request reviews by the Deputy Minister or the Tribunal in response to recommendations and rulings from the WTO dispute settlement process. Presumably the Deputy Minister and the Tribunal are to consider the views of Canada's International obligations expressed in the WTO process, but the effect of those views on domestic law is not specified in the legislation. See: *World Trade Organization Agreement Implementation Act, supra*, s.13; *Boneless Manufacturing Beef Originating in or Exported from the European Economic Community* (1991), 6 T.T.R. 253 (C.I.T.T.). See further Denis Lemieux, «The Power of Administrative Agencies to Review Their Decisions», in Feltham ed., *supra*, 141.

legislative intent, they may be seen as tools to further the general purpose of maintaining consistency between Canadian practice and international obligations. By analogy, they could be similar to court decisions from other Commonwealth and common law jurisdictions, which are often cited by Canadian courts as persuasive, but non-binding, authority.

Chapter 19 panels are hybrid institutions involving both domestic and international legal orders, as well as private parties and governmental actors. They are not entirely like other international dispute settlement mechanisms since they interpret and apply Canadian domestic law. In domestic law, panel decisions are in a special category because SIMA makes them binding for the dispute in question [58]. For future disputes, they are unlikely to have precedential effect as stare decisis, but, as with other international dispute settlement mechanisms, panel decisions could be potentially persuasive authority, depending on the quality of the reasoning in particular decisions. To date, it has not been common practice to cite Chapter 19 panel decisions in domestic proceedings [59], but panel decisions are often mentioned in the reasoning of subsequent Chapter 19 panels.

III. CANADIAN LAW AND THE STANDARD OF REVIEW

A. Legislative Background

The main Canadian legislation concerning anti-dumping and countervailing duties, the Special Import Measures Act, was

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[58] SIMA, s.77.016(1). See: SIMA s.76(2.2); NAFTA Art. 1904(9). The closest comparison is to international commercial arbitration panels, which can apply domestic Canadian law if the parties so choose. The decisions of such arbitral panels are recognized and enforced in Canadian provincial, territorial and federal law. See: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Can. T.S. 1986 No. 43 (in force for Canada 10 August 1986); J.G. Castel, et al., *The Canadian Law and Practice of International Trade, with Particular Emphasis on Export and Import of Goods and Services,* 2d ed. (Toronto: Emond Montgomery, 1997) at 721-752.

[59] A Chapter 19 panel decision was mentioned in argument in *Sunezco International Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1994] F.C.J. No. 637 (F.C.A.).

adopted in 1984 to implement Canada's rights and obligations under the Anti-dumping Code and the Subsidies Code from the Tokyo Round of GATT negotiations. Canada was party to both those Codes, as well as to the earlier Anti-dumping Code from the Kennedy Round [60].

The Special Import Measures Act was amended to take account of the agreements on antidumping duties and subsidies concluded during the Uruguay Round of GATT negotiations [61]. Under Article 1902.2 of NAFTA, members of NAFTA reserve the right to amend their anti-dumping and countervailing duty laws, provided that the amendments will apply to goods from another NAFTA Party only if the amending statute so specifies. Section 189 of the World Trade Organization Agreement Implementation Act, accordingly, specifies that those amendments apply to goods from a NAFTA country.

B. Statutory Standard of Review

1. Original Act

The system of binational panel review for anti-dumping and countervailing duties was first established in chapter 19 of the Canada-United States Free Trade Agreement [62], and has been continued in substantially the same form in chapter 19 of NAFTA.

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[60] See generally: Castel *et al., supra*; Paterson and Band, *supra*; W.C. Graham, «Canada-United States Trade and the General Agreement on Tariffs and Trade» in Irish and Carasco (eds.), *supra*, 19; Lawrence L. Herman, *Canadian Trade Remedy Law and Practice* (Toronto: Emond Montgomery, 1997); Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London and New York: Routledge, 1995).

[61] *World Trade Organization Agreement Implementation Act, supra,* s.144-s.189.

[62] *Free Trade Agreement between the Government of Canada and the Government of the United States of America,* 22 December 1987 and 2 January 1988, Can. T.S. 1989 No. 3 (in force 1 January 1989).

Under Article 1904.3 of NAFTA, panels are 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». Those general legal principles «include principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies» (NAFTA, Art. 1911). For Canada, the standard of review in Annex 1911 is expressed as «the grounds set out in subsection 18.1(4) of the Federal Court Act, as amended, with respect to all final determinations».

The Canadian law of judicial review has undergone changes in both its statutory structure and applicable judicial decisions since 1989 when the Canada-United States Free Trade Agreement entered into effect. That treaty referred to the grounds of review in s.28(1) of the Federal Court Act as it was at the time. Those provisions have now been replaced by the grounds contained in the current version of the same statute. As well, the evolution of legal principles through case law has effect under the common law doctrine of stare decisis. Chapter 19 panels established under the two treaties have thus had to consider these changes when dealing with reviews from Canadian determinations.

The grounds of review in the former s.28(1) of the Federal Court Act were as follows:

> 28(1) [...] the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order [...] on the ground that the board, commission or tribunal
>
> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) 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 [63].

2. Amendments to the Act

The revised standard of review, from s. 18.1(4) of the current Federal Court Act, is as follows:

18.1(4) The Trial Division may grant relief [...] if it is satisfied that the federal board, commission or other 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 by law to observe;

(c) erred in law in making a decision or an 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 it 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 [64].

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[63] *Federal Court Act,* R.S.C. 1985, c.F-7, s.28(1), since substantially altered on amendment.

[64] *Federal Court Act,* R.S.C. 1985, c.F-7, as amd. These grounds of review are applicable to the Federal Court of Appeal (Federal Court Act, s.28(2)). Section 18.1 was added by S.C. 1990, c.8, s.5, into effect on February 1, 1992 (P.C. 1991-2512, SI/92-6, January 1, 1992, C. Gaz. 1992. II.280).

The standard of review in the earlier Free Trade Agreement between Canada and the United States was defined as «the following standards, as may be amended from time to time by a Party [...]» (Art. 1911). The reference to domestic legislation appeared to be ambulatory, requiring that the standard change with any changes in the legislation. After the Federal Court Act standard was amended, however, Chapter 19 panels reviewing Canadian decisions continued to apply s.28(1) as it had been in 1989, rather than using the newer list from s.18.1(4) [65]. In public international law, principles of treaty interpretation can be found in custom, in general principles and in the Vienna Convention on the Law of Treaties [66]. The static or non-updating interpretation might be explained as a question of ordinary meaning under Article 31 of the Vienna Convention since the new s.28 was not just an amended version but a complete replacement of the earlier provision. With the changes to the Federal Court Act, the section setting out standards of review was no longer s.28, but rather the new provision in s.18.1(4). In domestic Canadian law, under the federal Interpretation Act, statutory references are normally deemed to be ambulatory, *i.e.* they refer to a particular provision as amended [67], but this likely would not cover a revision that substantially changed the meaning [68].

The contrary argument in favour of updating to the new provision would say that it was not just the particular section that was incorporated into the treaty by means of the reference, but rather the whole review standard. On this view, when the standard changed for actions brought under domestic law, then it should have changed for the Chapter 19

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[65] The first panel initiated after February 1, 1992 was *Final Determination of Dumping Made by Revenue Canada, Customs and Excise, Regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America («Machine Tufted Carpeting, dumping»)*. CDA-92-1904-01, May 19, 1993. The s.28(1) standard of review was used by all panels until the first panel initiated under NAFTA, *Synthetic Baler Twine with a Knot Strength of 200 lbs. or Less, Originating in or Exported from the United States of America («Synthetic Baler Twine»),* CDA-94-1904-02, April 10, 1995, which switched to s.18.1(4).

[66] *Vienna Convention on the Law of Treaties*, 23 May 1969, Can. T.S. 1980 No. 37 (in force 27 January 1980).

[67] *Interpretation Act*, R.S.C. 1985, c.1-21, s.40(2).

[68] See discussion in Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Quebec: Yvon Blais, 1991) at 71-75.

panels as well. In other words, it was not just «s.28(1) as amended» that was incorporated by reference but rather «the [...] standard [], as may be amended from time to time». On this argument, Chapter 19 panels should have used the amended standard in order to maintain consistency witch domestic judicial review. The same question may arise again under NAFTA if a government amends its domestic legislation. The NAFTA provision defining the standard of review refers to «the following standards, as may be amended from time to time by the relevant Party» (NAFTA, Annex 1911). A future panel may have to decide whether the reference is intended to be ambulatory or static.

Machine Tufted Carpeting (Dumping) was the first panel initiated after February 1, 1992 when the change became effective in Canadian domestic law. In its decision, the panel referred to two sections of SIMA to explain the continued use of the original standard [69]. Section 77.11 (4) on requests for review mentions s.28 of the Federal Court Act and had not been amended when that legislation was changed. As well, s.77.29(c) covers the situation explicitly:

77.29 No provision.

(a) of an Act to amend this Act,

(b) of any other Act of Parliament respecting the imposition of anti-dumping or countervailing duties, or

(c) amending a provision of an Act of Parliament providing for judicial review of a definitive decision or setting forth the grounds for

[69] *Machine Tufted Carpeting (Dumping)*, CDA-92-1904-01, May 19, 1993, at 2. Reasoning to the same effect is contained in two subsequent panels: *Final Determination of Dumping Made by the Deputy Minister of National Revenue, Customs and Excise, Regarding Gypsum Board Originating in or Exported from the United States of America, («Gypsum Board»)*, CDA-93-1904-01, November 17, 1993, at 5; *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America («Cold-Rolled Steel Sheet (Injury)»),* CDA-93-1904-09, July 13. 1994, at 5. The analysis had also been mentioned in an earlier panel, initiated prior to February 1, 1992: *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company Inc., Pabst Company, and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia («Beer (Dumping)»)*, CDA-91-1904-01, August 6, 1992, at 9.

> such a review that comes into force after the coming into force of this section shall be applied in respect of goods of the United States, unless it is expressly declared by an Act of Parliament that the provision applies in respect of goods of the United States [70].

This clarifies the matter in domestic Canadian law, but it can be argued that s.77.29(c) was not consistent with the Free Trade Agreement. As the panels did not find an inconsistency, they did not have to decide whether their authority came from the treaty or from domestic legislation.

In application, the differences between the list in the former s.28(1) and the list in the current s.18.1(4) may not actually be significant, in any case. The main questions of judicial review that panels have had to address have related to the evolution of case law, rather than to differences between the two lists.

C. Content of the Standard of Review

1. Jurisdiction

In British common law, principles of judicial review of government action are largely based on notions of jurisdiction, historically as seen in the writs used by superior courts in England to review the actions of local justices of the peace. The writ of certiorari compelled the local tribunal to send up the record of its proceedings so that the superior court could determine if the tribunal had acted lawfully. If the superior court found that the local body had acted beyond jurisdiction, the court would quash the decision as ultra vires and return the matter to the Tribunal for a lawful decision [71]. Lord Reid, in the Anisminic case in

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[70] The amendments to SIMA to implement NAFTA are to the same effect. Similarly, they refer to the current review standard (SIMA, s.77.011(5)) and reject a change in the review standard unless NAFTA countries are mentioned specifically (SIMA, s.77.037(c)).

[71] The same remedy would apply if the superior court found an error of law on the face of the record. For discussion, including an explanation of other royal prerogative writs, see David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 2d ed. (Scarborough, Ontario: Carswell, 1994) at 9-14.

1969, described certain instances in which a Tribunal's decision would be found to be a nullity:

[...] [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it has no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide the question wrongly as it is to decide it rightly [...]. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law [72].

Judicial review, thus, is not an ordinary appeal in which a superior court determines whether the decision of a lower court is correct. In a review, the superior court shows deference to decisions of the lower tribunal made within jurisdiction. The superior court exercises a supervisory role to make sure that the administrative tribunal or agency does not exceed the jurisdiction delegated to it by the legislators. On jurisdictional questions, the tribunal or agency must be correct. For decisions within jurisdiction, however, the tribunal has a greater margin.

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[72] *Anisminic Ltd v. Foreign Compensation Commission*, [1909] 2 A.C. 147 at 171.

The Anisminic case illustrates the preliminary or wrong question doctrine of jurisdiction. Anisminic Ltd. submitted a claim to the Foreign Compensation Commission, a statutory body, for compensation for property confiscated by Egypt during the Suez incident. Although Anisminic was the original British owner, the Commission denied the claim because of certain dealings between the company and its «successor in title», the Egyptian organization to whom the property had been transferred after confiscation. The House of Lords disagreed with the Commission's view of successorship and ruled that the error meant that the Commission was without jurisdiction. The Commission could not, by its misinterpretation, assume more power than had been delegated by the legislators. In Canadian case law, an example of the preliminary question doctrine is Bell v. Ontario Human Rights Commission, in which the Supreme Court of Canada quashed the decision of a human rights commission that had misinterpreted the phrase «self-contained dwelling unit» and had therefore acted without jurisdiction on a complaint of illegal racial discrimination in residential renting [73].

The preliminary or collateral question doctrine was criticized as unpredictable in application and as allowing courts too much power to interfere in matters that the legislators had chosen to assign to specialized agencies. In a landmark decision in C.U.P.E. v. New Brunswick Liquor, Mr. Justice Dickson urged courts to exercise restraint before treating issues of statutory interpretation as jurisdictional and subject to a high level of scrutiny [74]. In U.E.S. Local 298 v. Bibeault, the Supreme Court said that judges should consider instead whether the legislators intended a particular question to be within the jurisdiction

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[73] [1971] S.C.R. 756. See also *Metropolitan Life Insurance Co. v. International Union of Operating Engineers*, [1970] S.C.R. 425. Not all common law countries in the Commonwealth use jurisdiction as a separate ground of review in this manner: see Michael Taggart, «Outside Canadian Administrative Law» (1996) 46 U. Toronto L.J. 649. It is possible that Canadian case law described infra is moving toward treating «jurisdictional questions» as simply questions of law that are reviewed without deference on a correctness standard.

[74] *Canadian Union of Public Employees, Local 963 v. New Brunswick, Liquor Corporation*, [1979] 2 S.C.R. 227 at 233, 235-36. See *Cold-Rolled Steel Sheet (Injury)*, CDA-93-1904-09, July 13, 1994, at 8.

conferred. Analysis should not be formalistic, but rather «pragmatic and functional [...] [considering] [...] not only the wording [...] 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» [75].

An analysis of expertise and legislative intent has assisted the Court in subsequent cases in deciding when to show deference to an agency's decision and when to review on a correctness standard. On trade matters, in the National Corn Growers case, the Supreme Court held that the determination of injury from dumping was within the jurisdiction of the Canadian Import Tribunal, a predecessor of the Canadian International Trade Tribunal [76]. Jurisdictional questions could still arise, however, in reviews of C.I.T.T. findings. In Integral Horsepower Induction Motors, the first Chapter 19 panel decision, the panel used a correctness standard to affirm the C.I.T.T.'s timing for initiation of proceedings when anti-dumping duties were about to expire [77]. The panel in Beer (Injury) treated the determination of a regional market as jurisdictional and remanded, but a later panel in Malt Beverages disagreed, distinguishing the earlier decision on the basis of intervening case law [78].

Although jurisdictional problems are isolated in sub-paragraph (a) of s.18.1(4) of the Federal Court Act, it can be argued that a jurisdictional

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[75] *Union des employés de service, local 298 v. Bibeault,* [1988] 2 S.C.R. 1048 at 1088. More recently, in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, the Supreme Court listed four categories of factors to be taken into account: privative clauses, relative expertise, the purpose of the Act as a whole and the provision in particular, and the nature of the problem as a question of either law or fact (para. 29-38).

[76] *National Corn Growers Association v. Canada (Import Tribunal),* [1990] 2 S.C.R. 1324 at 1346.

[77] *Certain Dumped Integral Horsepower Induction Motors, One Horsepower (1 HP) to Two Hundred Horsepower (200 HP) Inclusive, with Exceptions, Originating in or Exported from the United States of America («Integral Horsepower Induction Motors»),* CDA-90-1904-01, September 11, 1991, at 20. See also *Certain Malt Beverages from the United States of America («Malt Beverages»)*, CDA-95-1904-01, November 15, 1995, at 10-13.

[78] *Certain Beer Originating in or Exported from the United States of America by or on Behalf of G. Heileman Brewing Company Inc. and Pabst Brewing Company and the Stroh Brewery Company, their Successors and Assigns, for Use or Consumption in the Province of British Columbia («Beer (Injury)»)*, CDA-91-1904-02, August 26, 1992, (note concurring opinion by Chairman Greenberg); *Malt Beverages*, CDA-95-1904-01, November 15, 1995, at 14-16.

analysis is at the root of the other grounds of review listed as well [79]. A court on judicial review is not sitting on a simple appeal, but rather is supervising the actions of administrative actors to see that they remain within the jurisdiction delegated by the legislators.

2. Questions of law

When the record was forwarded to the superior court pursuant to a writ of certiorari, the superior court would review for errors of law on the face of the record even if those errors did not go to jurisdiction. To block this sort of review, legislators adopted the practice of inserting privative clauses in legislation. Privative clauses could be of various sorts, some saying that the agency's decision was final and binding, some going further and specifically limiting the type of review available. In the Anti-dumping Act of 1968, the Anti-dumping Tribunal, a predecessor of the Canadian International Trade Tribunal, was protected by both a finality clause and a true privative clause. The legislation was as follows:

> 30.(1) Subject to section 31, every order or finding of the Tribunal is final and conclusive.
>
> (3) An order or finding of the Tribunal is not subject to review or to be restrained, removed or set aside by certiorari, prohibition, mandamus or injunction or any other process or proceeding [...] On the ground
> (a) that a question of law or fact was erroneously decided by the Tribunal: or

[79] Note that a refusal to exercise jurisdiction in the words of s.18.1(4)(a) might occur if an agency followed a policy it had previously decided instead of giving full consideration to the circumstances of the manner before it. If the agency has not been given jurisdiction to make rules, then such an approach could be an improper «fettering» of its discretion. See: Jones and de Villars, supra, at 168-73; *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not, Originating in or Exported from the United States of America («Carbon Steel Plate»),* CDA-93-1904-06, December 20, 1994, at 35.

(b) that the Tribunal had no jurisdiction to entertain the proceedings in which the order or finding was made or to make the order or finding [80].

The effect of a privative clause, including a finality clause, was to block judicial review for error of law on the face of the record. Since the administrative agency still had to operate within the bounds of the power delegated, however, courts held that the privative clause only protected decisions made within jurisdiction. If the agency acted without jurisdiction, on this reasoning, any decision made was a nullity and there was nothing for the privative clause to protect. Jurisdictional review as outlined above would therefore continue. Even a strong privative clause such as s.30(3) would not block all review [81].

Although the ground of error of law on the face of the record would not be available in the presence of a privative clause, courts developed the doctrine that some errors of law were so serious as to become jurisdictional and cause the agency to lose jurisdiction. In C.U.P.E. v. New Brunswick Liquor, while counseling deference to an agency's interpretation of legislation, the Supreme Court ruled that if the interpretation was «patently unreasonable», then courts should intervene despite the presence of a privative clause [82]. The decision would not be judged on a correctness standard, but rather on a standard that demonstrated judicial deference so long as the agency's interpretation could be rationally supported.

The privative clauses that had been part of the Anti-dumping Act were modified in 1984 when the Special Import Measures Act was adopted to implement the Tokyo Round Anti-dumping and Subsidies Codes. Under that legislation, the Canadian Import Tribunal, which replaced the Antidumping Tribunal, was protected only by the

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[80] *Anti-dumping Act,* R.S.C. 1970, c.A-15. Section 31 allowed the Tribunal to review its own orders and findings (legislation since repealed).

[81] See *Magnasonic Canada Limited v. Anti-dumping Tribunal,* [1972] F.C. 1239 (C.A.), in which the Anti-dumping Tribunal was overturned for failing to conduct a hearing in accordance with the statute.

[82] *C.U.P.E v. New Brunswick Liquor Corp., supra.*

following finality clause:

76. (1) Subject to this section and paragraph 91(1)(g), every order or finding of the Tribunal is final and conclusive [83].

The Supreme Court, in the National Corn Growers case, found that this was still a privative clause that called for the standard of patent unreasonableness for review of both errors of law and errors of fact [84]. Several Chapter 19 panels applied that standard to review injury findings [85].

More recently, the Supreme Court has adopted a «spectrum» approach to the standard of review for errors of law that considers legislative intent and the expertise of the agency, similar to the «pragmatic and functional» approach to jurisdiction in the Bibeault case discussed above. Instead of depending solely on the presence or absence of a privative clause, the standard of review is on a spectrum ranging from «correctness» to «patent unreasonableness». At the correctness end of the spectrum, the procedure is a full appeal, no special deference is owed and the court can substitute its opinion for that of the agency. At the other end of the spectrum, the agency has special expertise to which the court must defer, review is limited by a privative clause and the patent unreasonableness standard will be applied. In the Pezim decision, the Supreme Court deferred to agency expertise and applied a standard of considerable deference even though

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[83] *Special Import Measures Act, S.C.*, 1984, c.25.

[84] *National Corn Growers Assn. v. Canada (Canadian Import Tribunal), supra.*

[85] *An Inquiry Made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Imports Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America («Machine Tufted Carpeting (Injury)»),* CDA-92-1904-02, April 7, 1993 (see also dissenting opinion of Chairperson John D. Richard); *Carbon Steel Plate,* CDA-93-1904-06, December 20, 1994; *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States («Hot-Rolled Carbon Steel Sheet»,* CDA-93-1904-07, May 18, 1994; *Cold-Rolled Steel Sheet (Injury),* CDA-93-1904-09, July 13, 1994; *Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Allay or Wrought Copper, Originating in or Exported from the United States of America («Solder Pipe Fittings»)*, CDA-93- 1904-11, February 13, 1995.

the case involved an appeal with no privative clause [86].

When SIMA was revised in 1993 on the implementation of NAFTA, the finality clause was dropped [87]. The current provision is as follows:

76.(1) Subject 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.

Despite the absence of a privative clause, Chapter 19 panels established under NAFTA have applied a standard of considerable deference to decisions of the Canadian International Trade Tribunal on questions of law [88]. To the extent that the expertise of the agency is relevant in determining the standard of review, the level of expertise is compared to that of a domestic court, rather than to the expertise of panel members [89].

For reviews of determinations of dumping, there never has been a privative clause. The first Chapter 19 panel reviewing a determination from the Deputy Minister, Beer (Dumping), had to decide on the level of scrutiny to apply to questions of law that were

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[86] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. See also *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[87] As the change was considered substantive rather than just procedural, panels followed Canadian rules of statutory Construction and declined to apply the amended version to matters already in progress: *Carbon Steel Plate,* CDA-93-1904-06, December 20, 1994; *Hot-Rolled Carbon Steel Sheet,* CDA-93-1904-07, May 18, 1994; *Solder Pipe Fittings,* CDA-93-1904-11, February 13, 1995.

[88] *Synthetic Baler Twin*, CDA-94-1904-02, 10 April 1995; *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported from the United States of America («Corrosion Resistant Steel Sheet (Injury)»)*, CDA-94-1904-04, July 10, 1995; *Malt Beverages*, CDA-95-1904-01, November 15, 1995; *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 («Concrete Panels»),* CDA-97-1904-01, August 26, 1998. *The Concrete Panels* decision (at 6) stated that this standard for injury reviews was very close to «patent unreasonableness» and that there would be a remand only if the Tribunal's finding could not be sustained on any reasonable interpretation of the law.

[89] *Synthetic Baler Twine*, CDA-94-1904-02, April 10, 1995, at 11; *Concrete Panels*, CDA-97-1904-01, August 26, 1998, at 5.

not jurisdictional. Citing cases in favour of judicial deference to an administrative agency's expertise, the panel adopted a standard of «reasonableness» and stated that it would not interfere so long as the Deputy Minister's interpretation was reasonable [90]. Subsequent panels have also used the standard of reasonableness for reviews of dumping determinations [91].

3. Questions of fact

On questions of fact, superior courts defer to lower courts and tribunals, even on an appeal. The superior court will not have had the opportunity to hear witnesses and receive the evidence. The superior court's ability to re-assess findings of fact is therefore limited. Courts are similarly limited in re-assessment of fact-finding by administrative agencies, particularly given the specialized contexts in which agencies may operate.

Prior to federal and provincial statutory reforms in the 1970's, even a complete absence of evidence to support an agency's finding of fact would not have been a jurisdictional error in Canadian administrative law [92]. A lack of evidence would have been an error of law, but a privative clause could block judicial review. The 1970 Federal Court Act changed that system for federal agencies and introduced review of factual findings «made in a perverse or capricious manner or without regard for the material» before the agency (s.28(1)(c)). While there has

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[90] *Beer (Dumping),* CDA-91-1904-01, August 6, 1992, at 18-19.

[91] *Machine Tufted Carpeting (Dumping),* CDA-92-1904-01, May 19, 1993; *Gypsum Board,* CDA-93-1904-01, November 17, 1993; *Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America («Cold-Rolled Steel Sheet (Dumping)»),* CDA-93-1904-08, June 14, 1994; *Certain Corrosion Resistant Steel Sheet Products Originating in or Exported from the United States of America («Corrosion Resistant Steel Sheet (Dumping)»),* CDA-94-1904-03, June 23, 1995; *Final Determination of Dumping Regarding Certain Refined Sugar, Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered, Originating in or Exported from the United States of America («Refined Sugar»),* CDA-95-1904-04, October 9, 1996.

[92] *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128 (P.C.), a Privy Council decision on appeal from Alberta. See further: *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 114 D.L.R (3d) 162 (Ont. C.A.); J.M. Evans *et al.*, *Administrative Law: Cases. Text and Materials,* 4th ed. (Toronto: Emond Montgomery, 1995) at 659-63.

been some question about the exact level of deference and whether the statutory standard is equivalent to «patent unreasonableness» [93], it is clear that a privative clause will not prevent review. In National Corn Growers, the Supreme Court stated that, despite a privative clause, it would interfere with an injury finding of the Canadian Import Tribunal if the Tribunal's decision «cannot be sustained on any reasonable interpretation of the facts or of the law» [94].

In the Southam case, the Supreme Court dealt with a standard of reasonableness that was on the spectrum between correctness and the standard of patent unreasonableness. Mr. Justice Iacobucci explained this middle standard as follows:

I conclude that the third standard should be whether the decision [...] is unreasonable [...]. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard most look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference [95].

Whatever the exact level of deference, panels have reviewed the evidence to decide whether the statutory standard has been met.

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[93] *Stelco Inc. v. Canada (Canadian International Trade Tribunal)*, [1995] F.C.J. No. 831 (F.C.A). See further: *Cold-Rolled Steel Sheet (Dumping),* CDA-93-1904-08, June 14, 1994, at 13-16; *Carbon Steel Plate,* CDA-93-1904-06, December 20, 1994, at 20; *Refined Sugar,* CDA-95-1904-04, October 9, 1996, at 5-6.

[94] *National Corn Growers Assn. v. Canada (Canadian Import Tribunal), supra*, at 1369-70. In the *Lester*, case, the Supreme Court stated that despite a privative clause in the Newfoundland *Labour Relations Act*, it would intervene «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» *(Lester (WW.) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 at 699).

[95] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at 776-77.

Injury findings have been subject to remands by Chapter 19 panels for analysis of the rational basis for certain conclusions by the Tribunal or for identification of evidence capable of supporting conclusions [96]. Dumping determinations have also been remanded for identification and reconsideration of evidence and for explanations of reasoning [97].

4. Procedure

For some time in the Canadian law of judicial review, the distinction between administrative decisions and judicial decisions was crucial for procedural questions. If the matter involved a determination of rights of the claimant, the decision would be judicial and subject to the principles of natural justice, requiring a hearing before an unbiased decision-maker. If the question involved some other application of governmental discretion or policy to the claimant, the principles of natural justice would not apply and the claimant would not have procedural protection [98]. In order to compel an administrative agency to provide a hearing and give reasons for its decision, a claimant would have to demonstrate that a decision was judicial or quasi-judicial. After the Magnasonic decision, in which the Anti-dumping Tribunal was over-turned for failure to provide a party with an opportunity to reply to certain confidential information, it was accepted that the Tribunal's determinations of injury were in this category [99]. The Deputy Minister's determinations of dumping, however, were not viewed as affecting rights in the same way [100]. This probably explains why no direct re-

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[96] *Machine Tufted Carpeting (Injury),* CDA-92-1904-02, April 7, 1993; *Synthetic Baler Twine,* CDA-94-1904-02, April 10, 1995.

[97] *Beer (Dumping),* CDA-91-1904-01, August 6, 1992; *Machine-Tufted Carpeting (Dumping),* CDA-92-1904-01, May 19, 1993; *Gypsum Board,* CDA-93-1904-01, November 17, 1993; *Cold-Rolled Steel Sheet (Dumping),* CDA-93-1904-08, June 14, 1994; *Corrosion Resistant Steel Sheet (Dumping),* CDA-94-1904-03, June 23, 1995; *Refined Sugar,* CDA-95-1904-04, October 9, 1996.

[98] The classification of the decision-maker and the scope of the prerogative writs were also important. For discussion and historical background, see Jones and de Villars, *supra*, at 178-85.

[99] *Magnasonic Canada Limited v. Anti-dumping Tribunal*, [1972] F.C. 1239 (C.A.). The Court based its decision on a failure to follow statutory requirements and did not actually rule that there had been a breach of natural justice. See further: *In re Sabre International Ltd.*, [1974] 2 F.C. 704 at 706 (C.A.); *Sarco Canada Limited v. Anti-dumping Tribunal,* [1979] 1 F.C. 247 (C.A.); *DeVilbiss (Canada) Limited v. Anti-dumping Tribunal,* [1983] 1 F.C. 706 (C.A.); Philip Slayton, *The Anti-dumping Tribunal* (Ottawa: Law Reform Commission of Canada, 1980) at 16-19, 65-67.

view was provided from the Deputy Minister's determinations until the Free Trade Agreement was implemented in 1988 [101]. It was only once goods had been imported that the situation would have become sufficiently specific for a claimant to have procedural rights. At that point, the importer would be entitled to two Departmental re-determinations (SIMA, s.57, s.58, s.59) followed by appeals to the Canadian International Trade Tribunal and the Federal Court of Appeal (SIMA, s.61, s.62).

In Nicholson v. Haldimand-Norfolk, the Supreme Court abandoned the sharp distinction between judicial and administrative actions and decided that a duty of procedural fairness applied even in the case of administrative decisions [102]. The exact nature of the duty would vary with the circumstances but it could not be said that only judicial decisions required fair procedures [103]. This evolution of case law is now reflected in the wording of s.18.1(4) (b) of the Federal Court Act.

A breach of a procedural duty is jurisdictional and not protected by a privative clause. A breach will render the agency's decision void.

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[100] *In re Sabre International Ltd., supra; Mitsui & Co. of Canada Ltd. v. Minister of National Revenue* (1977), 2 B.L.R. 281 (F.C.T D.).

[101] When Chapter 19 panels first had to deal with reviews of determinations by the Deputy Minister concerning margins of dumping, they did not have direct precedents in previous domestic case law. See now SIMA s.96.1(1), for review of final determinations, first enacted in S.C. 1988, c.65.

[102] *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979]. 1 S.C.R. 311. See further *Martineau v. Matsqui Institution Disciplinary Board* (No. 2), [1980] 1 S.C.R. 602. The Supreme Court in Nicholson relied on *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.).

[103] Concerning the Deputy Minister's investigation, see: *Chisholm (Ronald A.) Ltd. v. Canada (Deputy Minister of National Revenue, Customs and Excise)* [1986], 5 F.T.R. 1 (T.D.); *Electrohome Ltd. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1986] 2 F.C. 344 (T.D.); *Hyundai Motor Co. v. Canada (Attorney General),* [1988] 1 F.C. 333 (T.D.); *Shaw Industries Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)* [1992], 51 F.T.R. 304 (T.D.); *Shaw Industries Inc. v. Canada (Deputy Minister of National Revenue, Customs and Excise)* [1992], 53 E.T.R. 15 (T.D.); *Toshiba International Corp. v. Canada (Deputy Minister of National Revenue, Customs and Excise)*, [1994] F.C.J. No. 998 (T.D.).

Procedural fairness questions have arisen in several Chapter 19 reviews. Panels have ruled that participation of Chapter 19 roster members in the hearing before the Tribunal did not give rise to a reasonable apprehension of bias [104]. One panel ruled that the Tribunal did not breach natural justice by doing a post-hearing analysis, as the analysis was supported by information on the record [105]. Another panel ruled that the Tribunal was not required to set out each step in its reasoning, so long as it provided a sufficient explanation to meet the duty to give reasons [106].

D. Remedies

Under NAFTA Art.1904.8, a panel may either uphold the agency determination or remand it for action not inconsistent with the panel's decision. The panel's decision is binding (Art. 1904.9) [107]. In Canadian domestic legislation, a reviewing court would have somewhat more specific power. Under SIMA s.96.1(6), when the Federal Court of Appeal reviews a determination by the Deputy Minister, the Court can refer the matter back for determination «in accordance with such directions as it considers appropriate». When the Federal Court of Appeal sits in review of a Tribunal order on injury, the Court can refer back with such directions as it considers appropriate and can also «order a federal board, commission or other tribunal to do any act or thing it has unlawfally failed or refused to do or has unreasonably delayed in doing» [108].

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[104] *Hot-Rolled Carbon Steel Sheet,* CDA-93-1904-07, May 18, 1994; *Carbon Steel Plate,* CDA-93-1904-06, December 20, 1994.

[105] *Corrosion Resistant Steel Sheet (Injury),* CDA-94-1904-04, July 10, 1995. See further two oral judgments of the Federal Court of Appeal: *Companhia Siderurgica Nacional v. Canada (Canadian International Trade Tribunal)*, [1996] F.C.J. No 54 (F.C.A.); *Aciers Francosteel Canada Inc. v. Dofasco Inc.,* [1996] F.C.J. No. 52 (F.C.A.). Dumping duties on steel generated other oral judgments, in addition to concurrent Chapter 19 panel activity: *Stelco Inc. v. Canada (Canadian International Trade Tribunal)*, [1995] F.C.J. No. 831 (F.C.A.); *Stelco Inc. v. Canada (Canadian International Trade Tribunal),* [1995] F.C.J. No. 832 (F.C.A.); *A.G. der Dillinger Hüttenwerke v. Canada (Canadian International Trade Tribunal),* [1995] F.C.J. No. 833 (F.C.A.); *Canadian Klockner v. Stelco Inc.,* [1995] F.C.J. No. 973 (F.C.A.).

[106] *Cold-Rolled Steel Sheet (Injury),* CDA-93-1904-09, July 13, 1994. See further *Gypsum Board,* CDA-93-1904-01, November 17, 1993.

[107] See SIMA, s.77.015, s.77.016.

The differences in wording are probably not too significant, although panels have been fairly specific in their remand instructions [109]. No panel has yet ordered that an investigation or inquiry start again from the beginning, but the Tribunal has been instructed to reopen the record to obtain further evidence if necessary [110].

Panels have had to supervise the process of the review and deal with interlocutory matters that came up prior to a panel hearing. Two panels have decided that the Canadian International Trade Tribunal can participate during the review, although an agency does not always have such standing in Canadian domestic law. The panels interpreted NAFTA Art. 1904(7) and the Panel Rules to give the Tribunal the right to appear and present argument [111]. Panels have also disqualified a potential participant from presenting oral argument due to failure to file a brief [112], ordered certain paragraphs stricken from the pleadings [113], and, on two occasions, ordered disclosure of documents for which the Deputy Minister was claiming privilege [114]. Enforcement of such interlocutory orders is not covered explicitly in NAFTA Art. 1904(9) or SIMA s.77.016(1), but presumably rests on the authority of the Panel Rules (NAFTA Art. 1904(14), SIMA s.77.015(2)).

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[108] *Federal Court Act,* s.18.1(3)(a),(b). When re-determinations by the Deputy Minister were struck down in *Toshiba International Corp. v. Canada (Deputy Minister of National Revenue, Customs and Excise),* [1994] F.C.J. No. 998 (T.D.), the Court ordered that dumping duties be returned with interest from the date of the re-determinations.

[109] *Beer (Dumping),* CDA-91-1904-01, August 6, 1992; *Beer (Injury),* CDA-91-1904-02, August 26, 1992; *Machine Tufted Carpeting (Dumping)*, CDA-92-1904-01, May 19, 1993; *Machine Tufted Carpeting (Injury),* CDA-92-1904-02, April 7, 1993; *Gypsum Board,* CDA-93-1904-01, November 17, 1993; *Cold-Rolled Steel Sheet (Dumping),* CDA-931904-08, June 14, 1994; *Corrosion Resistant Steel Sheet (Dumping),* CDA-94-1904-03, June 23, 1995; *Refined Sugar,* CDA-95-1904-04, October 9, 1996.

[110] *Synthetic Baler Twine,* CDA-94-1904-02, April 10, 1995.

[111] *Machine Tufted Carpeting (Injury),* CDA-92-1904-02, April 7, 1993; *Carbon Steel Plate,* CDA-93-1904-06, December 20, 1994. See Hudson N. Janisch, «Standing of the Decision-Maker in Proceedings for Judicial Review» in Feltham (ed.), *supra,* 11.

[112] *Concrete Panels*, CDA-97-1904-01, August 26, 1998.

[113] *Solder Pipe Fittings,* CDA-93-1904-11, February 13, 1995.

[114] *Beer (Dumping),* CDA-91-1904-01, August 6, 1992; *Gypsum Board,* CDA-93-1904-01, November 17, 1993.

IV. CONCLUSION

As in the past, it can be expected that future Chapter 19 panels will respond to evolution in Canadian case law on principles of judicial review, even if the statutory standard remains unchanged. Panel decisions are not usually cited as persuasive authority before domestic courts, but they are often mentioned in the decisions of subsequent Chapter 19 panels. There have even been instances of panels citing decisions from other Chapter 19 panels that reviewed duties imposed under a different domestic legal system. The first Canadian Chapter 19 panel referred to two U.S. Chapter 19 panel decisions in dealing with an application to strike part of the pleadings [115]. A U.S. Chapter 19 panel mentioned but did not follow a Canadian Chapter 19 panel concerning treatment of the same expense in a review of dumping duties that involved many of the same corporate parties [116].

All the Chapter 19 panels are firmly grounded in domestic law and, a few references aside, they are unlikely to develop common principles together. Differences among the three NAFTA legal systems and, in particular, differences between the common law and civil law [117], should not be under-estimated. The panel decisions may nevertheless promote knowledge of each other's domestic legal systems among trade lawyers in the NAFTA countries. They could also serve as accessible examples of three systems of domestic administrative law operating in the common area of anti-dumping and countervailing duties.

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[115] *Integral Horsepower Induction Motors,* CDA-90-1904-01, September 11, 1991, at 7, citing *New Steel Rail, Except Light Rail, from Canada*, USA-89-1904-07, June 8, 1990 and *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, USA-90-1904-01, May 24, 1991.

[116] *Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93-1904-03, October 31, 1994, at 66, referring to *Cold-Rolled Steel Sheet,* CDA-93-1904-08, June 14, 1994.

[117] J.C. Thomas and Sergio López Ayllón, «NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area» (1995) 33 Can. Y.B. Int'l L. 75.

In trade law, the issue of deference in international dispute settlement mechanisms is likely to be of increasing importance. Under the Agreement on Anti-dumping Duties from the Uruguay Round, dispute settlement panels are required to show deference to the decisions of national authorities, and negotiators during the Round considered proposals for similar deference in all WTO dispute settlement [118]. If these negotiations are pursued in the future, administrative law in various domestic legal systems will be of interest, either as a source of inspiration or possibly as evidence of general principles of administrative law that would apply under Article 38(1)(c) of the Statute of the International Court of Justice.

British lawyers have increasing contact with civil law approaches to judicial review through decisions of the European Court of Justice. In the Council of Civil Service Unions decision, Lord Diplock listed the current grounds of review in English law as illegality, irrationality and procedural impropriety [119]. In Canadian terminology, these grounds would more usually be called jurisdiction or correctness (illegality), reasonableness or patent unreasonableness (irrationality) and natural justice or procedural fairness (procedural impropriety). Lord Diplock also mentioned that, in the future, English law might adopt the ground of proportionality which applies in the administrative law of several other member countries in the European Union [120]. Proportionality is not a ground currently recognized in Canadian administrative law. In the European Court of Justice, it was applied notably in Case 302/96,

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[118] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,* Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization,* 15 April 1994 (in force 1 January 1995), Article 17.6. See Steven P. Croley and John H. Jackson, «WTO Dispute Procedures, Standard of Review, and Deference to National Governments», 90 Am. J. Int'l L. 193 (1996).

[119] *Council of Civil Service Unions v. Minister for Civil Service*, [1985] A.C. 374 (H.L.) at 410-11.

[120] See further Jeffrey Jowell and Anthony Lester Q.C. «Proportionality: Neither Novel Nor Dangerous» in J.L. Jowell and D. Oliver (eds.), *New Directions in Judicial Review* (London Stevens & Sons, 1988) 51.

[121] *Commission v. Kingdom of Denmark,* Case 302/86, [1988] E.C.R. 4607 at 4632. See also p.4630 («The commission submits that the Danish rules are contrary to the principle of proportionality in so far as the aim of the protection of the environment may be achieved by means less restrictive of intra-Community trade»).

in which a Danish restriction on the quantity of beer that could be imported in non-approved containers was struck down because it was «disproportionate to the objective pursued» [121]. As attention is directed to the issue of deference in WTO dispute settlement, all trade lawyers may find themselves learning more about the administrative law of various countries around the world.

The panel system of Chapter 19 of NAFTA is an unusual dispute settlement mechanism that applies an international procedure to domestic rules. It has, in a sense, «internationalized» domestic law [122]. The system is an intriguing hybrid that involves both levels of law and recognizes both governmental and private parties. Chapter 19 panel decisions will be of particular interest to trade lawyers seeking to understand principles of judicial review in the domestic legal systems of the three NAFTA countries.

◎ Índice General
⊙ Índice ARS 21

[122] Donald M. McRae, «Crafting Mechanisms for Settling International Trade Disputes WTO and NAFTA as Models», in Thomas J. Schoenbaum, Junji Nakagawa and Linda C. Reif (eds.), *Trilateral Perspectives on International Legal Issues; From Theory into Practice* (Ardsley, New York Transnational, 1998) 331.