Fordham International Law Journal

Volume 19, *Issue* 4 1995 *Article* 7

Straight Talk About a Complex Issue: The U.S. Standard of Judicial Review of Antidumping and Countervailing Duty Determinations: An Important Challenge for NAFTA Panels

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Abstract

One of the most important and controversial legal issues arising in connection with binational dispute settlement panels under the North American Free Trade Agreement ("NAFTA") and its predecessor, the United States-Canada Free Trade Agreement ("CFTA"), has been the standard of judicial review that panels must apply to U.S. antidumping ("AD") and countervailing duty ("CVD") cases. This standard generated particular controversy in three cases involving substantial amounts of trade from Canada into the United States – lumber, swine, and frozen pork. The United States contended that panels reviewing U.S. agencies' decisions in those cases incorrectly applied the standard of review by failing to grant the requisite deference to the agency. When the United States challenged the panels' decisions before Extraordinary Challenge Committees ("ECCs"), the ECCs let them stand. As a result, when negotiating the NAFTA, the United States succeeded in strengthening the attention paid to the standard of review that ECCs must grant when reviewing panel decisions. The United States' experience with binational panels has thus enhanced awareness of the concept of standard of review. While an explanation of the standard could fill volumes and cover hundreds of cases, the Authors of this Essay will attempt to present a practical, common sense analysis that may aid practitioners, panelists, law students, business people, and scholars to appreciate better the application of this principle.

STRAIGHT TALK ABOUT A COMPLEX ISSUE: THE U.S. STANDARD OF JUDICIAL REVIEW OF ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS: AN IMPORTANT CHALLENGE FOR NAFTA PANELS*

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INTRODUCTION

One of the most important and controversial legal issues arising in connection with binational dispute settlement panels under the North American Free Trade Agreement[1] ("NAFTA") and its predecessor, the United States-Canada Free Trade Agreement[2] ("CFTA"), has been the standard of judicial review that panels must apply to U.S. antidumping ("AD") and countervailing duty ("CVD") cases. This standard generated particular controversy in three cases involving substantial amounts of trade from Canada into the United States — lumber, swine, and frozen pork. The United States contended that panels reviewing U.S. agencies' decisions in those cases incorrectly applied the standard of review by failing to grant the requisite deference to the agency. When the United States challenged the panels' decisions before Extraordinary Challenge Committees ("ECCs"), the ECCs let them stand.[3] As a result, when negotiating the NAFTA,

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* The views expressed in this Essay are the personal opinions of the Authors and do not represent the position of the U.S. Department of Commerce or of any other agency of the U.S. Government. This Essay is adapted from a speech prepared for a symposium held in November 1995, at the Legal Center for Inter-American Trade and Commerce, Monterrey Institute of Technology and Advanced Studies. The original speech will be included in a collection of symposium materials to be published by the Center.

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1. Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

2. United States-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988).

3. *See* ECC 91-1904-01 (Pork Injury); ECC 93-1904-01 (Live Swine CVD); ECC 94-1904-01 (Lumber CVD). Under the United States-Canada Free trade Agreement ("CFTA") and the North American Free Trade Agreement ("NAFTA"), the Extraordi-

the United States succeeded in strengthening the attention paid to the standard of review that ECCs must grant when reviewing panel decisions.[4]

The United States' experience with binational panels has thus enhanced awareness of the concept of standard of review. While an explanation of the standard could fill volumes and cover hundreds of cases, the Authors of this Essay will attempt to present a practical, common sense analysis that may aid practitioners, panelists, law students, business people, and scholars to appreciate better the application of this principle.

I. *BACKGROUND*

Under Article 1904 of the NAFTA, final AD/CVD determinations covering goods of another NAFTA Party — Canada or Mexico — are subject to review by binational panels selected by the two governments involved, in lieu of review in the national courts of the importing country.[5] Decisions of the panels, composed of independent experts appointed on a one-time basis to decide a particular complaint, are binding international obligations of the Parties. This makes the binational panel system a unique transfer of judicial power to a private, non-judicial, *ad hoc* entity. Panelists cannot be government employees or otherwise affiliated with involved governments[6] and a majority of the panelists on a given panel, including the chair, must be lawyers in good standing. Panelists are also required to have a general familiarity with international trade law.[7]

This emphasis on legal knowledge, even for the non-lawyer panelists, is well-placed, because the NAFTA requires that panels

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nary Challenge Committees' ("ECC") appellate review is limited. NAFTA, *supra* note 1, art. 1904(13), 32 I.L.M. at 683.

4. NAFTA, *supra* note 1, art. 1904(13)(a)(iii), 32 I.L.M. at 683. It is interesting to note that, while the Canadian and Mexican standards of review are at least as complex as the United States', they have not yet occasioned such controversy. There have been no ECCs concerning decisions of Canadian or Mexican trade agencies.

5. *See* 19 U.S.C. §§ 1516a(g)(2)-(4) (1994). Private parties have the right to forego binational panel review in favor of continuing to pursue legal redress in the domestic courts. *Id.* Virtually all determinations involving goods of a NAFTA party, however, have been reviewed by binational panels established under Chapter 19 of the NAFTA, or its predecessor. U.S. GENERAL ACCOUNTING OFFICE, UNITED STATES-CANADA FREE TRADE AGREEMENT: FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS, GAO/GGD-95-175BR (June 1995).

6. Judges are not considered affiliated with governments for this purpose.

7. NAFTA, *supra* note 1, annex 1901.2, ¶ 1-2, 32 I.L.M. at 687.

determine whether the investigating authority has properly applied its own AD/CVD law. The body bases its determination on the record created during the administrative process, and uses the standard of review and general legal principles that would apply in that country's courts. In other words, the panel is to substitute for the courts of the importing country in reviewing AD/CVD determinations and to apply the same rules that a court would apply.[8]

II. *WHAT ARE UNFAIR TRADELAWS?*

The unfair trade laws — in particular, the AD/CVD laws — are the subject of Chapter 19 NAFTA review.[9] Dumping is often called price discrimination between national markets: the sale of merchandise to an export market for a price that is less than the exporter charges for such merchandise in its home or third-country markets or less than it costs to produce the merchandise.[10] Dumping is condemned by most of the international community because it sends false signals to the market. In the short term dumping may reduce prices to consumers in the importing country. In the long run, however, it causes resources to be misallocated by acting as a disincentive to investment in the country where the dumping is occurring and as an incentive to investment in the market of the dumping company. Dumping may lead to the collapse of the industry where the dumping is occurring and the domination of the market by foreign companies, which may then engage in monopolistic or oligopolistic pricing behavior.[11]

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8. NAFTA, *supra* note 1, art. 1904(3), 32 I.L.M. at 683. Specifically, Article 1904(3) of Chapter 19 of the NAFTA requires a binational panel reviewing an antidumping ("AD") or countervailing duty ("CVD") determination of the competent investigating authority 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." *Id.*

9. NAFTA, *supra* note 1, ch. 19, 32 I.L.M. at 680.

10. *See, e.g.*, JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL RELATIONS 653-63 (2d ed. 1986) (excerpting from various authors' views of economics of dumping).

11. Not all economists agree with this analysis. *See, e.g.*, JACKSON & DAVEY, *supra* note 10, at 658-61 (excerpting John J. Barcelo, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. YB. INT'L. LEGAL STUDIES 53, 61-64 (1979) (maintaining true predatory pricing is rare because it is costly and benefits are doubtful)). A strictly free market analysis of dumping, however, overlooks the political pressures created by dislocations of companies and workers. *See id.* at 657 (excerpting Bart S. Fisher, *The Antidumping Law of the*

Government subsidies are also considered unfair if they are conditioned on export or provided to specific industries, rather than being spread broadly across the economy. These targeted government benefits, although they are often important to the accomplishment of a country's social and economic goals, distort a country's comparative advantage. The subsidies put exporters in the position of competing against foreign governments instead of other producers. Once again, the Government's action sends the same false market signals as in the case of dumping.

If this price discrimination or government subsidization injures a domestic industry, the importing country is permitted to take action under its national laws by the Antidumping and Subsidies Agreements, which are part of the General Agreement on Tariffs and Trade ("GATT").[12] GATT is the umbrella agreement which contains guidelines for international trading. Since the entry into force of the results of the Uruguay Round of multilateral negotiations,[13] GATT operates under the umbrella of the World Trade Organization.

In the United States, the Commerce Department ("Commerce") determines whether dumping or subsidization exists, and the U.S. International Trade Commission ("ITC") determines whether injury results.[14] If both findings are affirmative, Commerce issues an order requiring that the Customs Service collect offsetting duties at the border, in the amount of the dumping or subsidy, on imports of this merchandise. This order

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United States: A Legal and Economic Analysis, 5 LAW & POLICY INT'L. BUS. 85-93); *id.* at 726 (excerpting Gary C. Hufbauer & Joanna Shelton Erb, *The Rationale for Disciplining Subsidies*, INSTITUTE FOR INTERNATIONAL ECONOMICS (1984) (stating concentrated interests of producers command greater political support than diffuse interests of consumers)). Also overlooked is the fact that the dumping and subsidy laws require proof of injury before producers may benefit from protection. 19 U.S.C. §§ 1671(a), 1673 (1994). Thus, consumers may freely benefit from the low prices of dumped or subsidized (*i.e.*, unfairly traded) goods, provided no injury is occurring to the producers in the consuming country.

12. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 STAT. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

13. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, art. 2, 33 I.L.M. 1. By signing the Final Act, the state representatives agreed to submit the Uruguay Round Agreements for consideration by their respective competent authorities with a view to seeking approval of the Uruguay Round Agreements in accordance with their national procedures. *Id.*

14. *See* 19 U.S.C. §§ 1671, 1673 *et seq.* (1994).

aims to remove the false market signal and the resulting economic inefficiencies caused by the dumping or subsidization. It attempts to restore market forces as the determinants of pricing decisions, and of investment decisions based on those prices.

III. *THE U.S. STANDARD OF JUDICIAL REVIEW OF AD/CVD DETERMINATIONS*

It is often said that the standard of review for a U.S. AD/CVD determination is whether the decision is reasonable. This is a useful shorthand description of the standard, which the courts themselves have often cited.[15] The statute, however, sets forth a more precise standard, which in turn has been analyzed exhaustively in decades of judicial decision-making.[16] This statutory standard is whether the agency's determination is supported by substantial evidence on the record or is otherwise in accordance with law.[17] The phrase "substantial evidence on the record," applies to findings of fact, and the phrase, "in accordance with law," applies to issues of law.

Before elaborating upon the U.S. standard of review, some preliminary matters should be clarified. The appellate, or reviewing, bodies applying the standard are the U.S. Court of International Trade ("CIT"), the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"),[18] and Chapter 19 NAFTA

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15. *See, e.g.*, SSIH Equipment S.A. v. U.S. International Trade Commission, 718 F.2d 365, 383 (Fed. Cir. 1983) (additional comments of J. Nies); National R.R. Passenger Corp. v. Boston & Maine Corp., — U.S.—, 112 S.Ct. 1394, 1401-02 (1992).

16. 19 U.S.C. § 1516a(b)(1)(B) (1994). More precisely, the statute requires the reviewing body to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." *Id.* This standard has been widely used in U.S. administrative law for review of many agencies' decisions. *See SSIH*, 718 F. 2d at 381-82. A different standard does apply to certain AD/CVD determinations. *See* NAFTA, *supra* note 1, annex 1911, 32 I.L.M. at 691-93; 19 U.S.C. § 1516a(b)(1)(A) (1994).

17. 19 U.S.C. § 1516a(b)(1)(B) (1994).

18. The Federal Circuit, although it reviews the decision of the Court of International Trade ("CIT"), applies anew the standard of review to Commerce's or the International Trade Commission's ("ITC") decision. Atlantic Sugar v. United States, 744 F. 2d 1556, 1559 n.10 (Fed. Cir. 1984), *cited in* NEC Home Electronics, Ltd. v. United States, 54 F.3d 736, 742 (Fed. Cir. 1995); *see* Suramerica de Aleaciones Laminadas v. United States, 44 F.3d 978, 982 n.1 (Fed. Cir 1994); *see also* PPG Industries, Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992). The two-tier system of appellate review, by which three Federal Circuit judges review the decision of one CIT judge, with both courts applying the same standard of review to the trade agency's decision, is unusual if not unique in administrative law. NAFTA's system is not parallel: five panelists

panels.[19] The U.S. agencies subject to the standard are Commerce and the ITC. The agencies do not apply the standard. This raises a matter which is a common source of confusion: the distinction between standard of review and standard of proof.

The standard of review is the standard that the reviewing or appellate court or panel ("reviewing body" or "body") — not the deciding agency — applies to the case. It is usually specified by statute and most commonly is one of four standards: *de novo*, clearly erroneous, supported by substantial evidence, or arbitrary and capricious. A Chief Judge of the Federal Circuit has explained that these standards, with regard to findings of fact, are equivalent to questions of increasingly narrow focus: is it right, is it wrong, is it unreasonable, or is it irrational?[20]

Not to be confused with the appellate court's standard of review, however, is the trial court's or agency's standard of proof. These are judge-made and usually are one of three standards: preponderance or weight of the evidence, clear and convincing proof, or beyond a reasonable doubt.[21] Since these are the standards which a fact-finder or trial court applies, we need discuss them no more.

A further point to clarify about our standard of review as it applies to AD/CVD cases is that it is confined to the record. The reviewing body has no authority to receive evidence on its own; it is strictly limited to reviewing "information presented to or obtained by [the agency] . . . during the course of the administrative proceeding."[22] An inquiry beyond the record constitutes an impermissible substitution of the court's or panel's judgment for that of the agency.[23] One may liken this to a person sitting down to a meal prepared in a restaurant: you cannot go in the kitchen

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review the trade agency's decision and usually have the final say. Only in "extraordinary" cases will a panel's decision be appealed to an ECC, which in turn does not possess the full power of review of the Federal Circuit. NAFTA, *supra* note 1, art. 1904(13), 32 I.L.M. at 683. *Cf. supra* note 3 and accompanying text (discussing ECC's limited appellate review in Pork, Live Swine, and Lumber cases).

19. NAFTA, *supra*, note 1, annex 1901.2, 32 I.L.M. at 687 (stating procedure for establishing Chapter 19 Binational Panels).

20. *SSIH*, 718 F.2d at 381.

21. *Id.* at 380.

22. 19 U.S.C. § 1516a(b)(2)(A)(i) (1994).

23. *See, e.g.*, Star-Kist Foods, Inc. v. United States, 600 F. Supp. 212, 215 (Ct. Int'l Trade 1984).

to cook the meal yourself. You are limited to expressing your opinion on what the chef has served.

A practical aspect of this rule is that attorneys must advise clients to get it right the first time. All the evidence needed to advocate a case must be put before the agency and on the record during the administrative proceeding itself. It will be too late to try and correct factual omissions by proffering evidence to the reviewing body. Judicial or panel review of an AD/CVD determination is a far different process than arbitration. Many arbitrations provide for fact-finding, including the gathering of documents and the testimony of witnesses. Chapter 19 NAFTA panels are neither arbitral nor trial bodies; they function as courts of appeal and rely on the record below.

With these preliminary points aside, we will try to highlight the most-cited of decades of cases concerning the U.S. standard of review. If these concepts were easy, we would not have so many hundreds of judicial pronouncements, including Supreme Court pronouncements. Judges who gain experience in applying these concepts year after year presumably do gain an understanding of them, but even then, experienced judges often differ in their application of the standard.

The first and probably the most-cited definition of substantial evidence came from our Supreme Court nearly sixty years ago: "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[24] But what exactly a "scintilla" was, more or less than a little gleam in a heap of otherwise undistinguished evidence, still remained a question. Due to this ambiguity the Supreme Court, in 1951, went to great lengths to clarify and amplify the standard.[25] For one thing, courts were getting lazy and deciding that, if they read one part of the record and found some evidence that supported the agency, they did not need to read any more and could affirm.[26] The Supreme Court let it be known that appellate courts must do their homework and canvas the whole record to determine whether the evidence was substantial.

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24. Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938).

25. Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951).

26. *Universal Camera*, 340 U.S. at 481, 490.

The Court warned, however, that the reviewing body does not review issues of fact *de novo*.[27] This point is critical. The reviewing body applying the substantial evidence standard, must defer to the agency if what the agency has done has sufficient support. This is true, even if the agency's ruling is not what the reviewing body would have done in the first instance. As the Supreme Court clarified yet again, substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[28]

While these may be fine words from the United States Supreme Court, how they apply to a real case is the primary concern. Unfortunately, the fact patterns and evidence in these cases and various other Commerce and ITC cases[29] are too complicated to discuss briefly. An example illustrates the point much more clearly.

Suppose that Commerce found, as a matter of fact, that on September 21, 1995, the sky was black. A losing party appeals that issue to the CIT or a NAFTA panel and contends that the determination is not supported by substantial evidence on the record, which establishes, in fact, that the sky was blue that day. The reviewing body would be required to canvas the entire record, which might consist of photographs of the sky over a 24-hour period, weather reports, testimony from witnesses who observed the sky, and other evidence.[30] The reviewing body might be tempted to conclude that, in fact, the sky was blue that day, or red-orange, or blue-and-white, or gray. Nevertheless, if evidence on the record reasonably supports Commerce's finding, the

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27. *Id.* at 488. "[A] court may [not] displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Id.*

28. Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

29. *See, e.g.*, American Alloys, Inc. v. United States, 30 F.3d 1469 (Fed. Cir. 1994), ICC Industries, Inc. v. United States, 812 F.2d 694 (Fed. Cir. 1987), Matsushita Elec. Indus. Co., Ltd. v. United States, 750 F.2d 927 (Fed. Cir. 1984).

30. Real administrative records in AD/CVD cases often fill boxes or consist of dozens of microfiche. Thus, as a practical matter, the court or panel will often rely on counsel to point out what portions of the record are relevant. The competitive forces unleashed by our system of advocacy usually result in the record being thoroughly searched and critically examined by attorneys on opposing sides. The court or panel, however, may review the record further if it has reason to be dissatisfied with the material brought to its attention.

standard dictates that the reviewing body affirm the agency regardless of any inclination that a different finding could or should have been made.

The reviewing body may have before it an issue of law, such as a question of statutory interpretation, instead of a factual issue. In this instance, the reviewing body must apply a two-step analysis. First, if the statute is clear and unambiguous on its face, the Supreme Court has said "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[31] For example, suppose that the antidumping statute states that the agency may calculate antidumping duties only when the sky is blue.[32] Suppose further that the administrative record establishes that the agency calculated antidumping duties on an overcast day. For the reviewing body, there can be no ambiguity here: the agency has failed to act in accordance with law.

Frequently, however, the statute is ambiguous or unclear. In these cases, the U.S. Supreme Court has held that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law."[33] In other words, " 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' "[34] As has been so often summarized, the standard is whether the agency's interpretation of the statute is reasonable.[35]

To continue with the hypothetical, suppose that the statute still states the agency may calculate antidumping duties only when the sky is blue. Suppose, however, that the administrative record reveals that the day was partly cloudy when the agency calculated antidumping duties. The agency argues before the reviewing body that Congress must have intended for the agency to be able to calculate antidumping duties on partly cloudy days, because there are relatively few days when the sky is entirely, per-

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31. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

32. For the sake of authenticity, the text of the statute states,"The agency may calculate antidumping duties only when the sky is blue."

33. *National R.R. Passenger*, 503 U.S. at 417-18 (citing *Chevron*, 467 U.S. at 843).

34. *Id.*

35. *Id.* at 417.

fectly blue, while there are many days when the agency must go about its business of calculating dumping margins. Opposing counsel says that the statute is clear on its face and means what it says.

The reviewing body must decide if the agency's interpretation is reasonable. If the reviewing body strictly construes the statute and believes that the statute is unambiguous, the body will find that blue is blue, and reverse the agency. If, however, the body finds that the statute is not so clear — that Congress could not have intended for blue to mean perfectly, eternally, cloudlessly blue — then the body will consider the agency's arguments. The body will look at the legislative history, if any, of the statute, and any other cases on point. The body will also want to be sure it is clear about the facts to which the agency is applying the statute. That is, the body should be clear whether the day was only a little bit cloudy, or very cloudy. Based on this information, the body will weigh the arguments on both sides of the issue, testing the strengths and weaknesses of each. The body may even conclude that, had it been the agency decisionmaker, it would have interpreted the statute differently. Nevertheless, if the reviewing body finds that the agency's construction is reasonable and permissible, the body must defer to the agency's expertise and affirm the agency's interpretation.

The tax pass-through issue[36] is a good example of a trade case where U.S. courts applied the reasonableness standard in reviewing an issue of law because it shows the CIT and the Federal Circuit applying the same standard with different results. Under the U.S. antidumping statute, prior to the Uruguay Round revisions, Commerce compared the home market price of the product to the U.S. price to determine if there existed a dumping margin.[37] In order to compare comparable prices, we stripped extra charges to get back to an ex-factory price in each instance. When the home market country, in this case Korea, charged a value added or sales tax on merchandise that was sold

36. Elizabeth C. Seastrum & Priya Aalagiri, *Recent Developments in Antidumping and Countervailing Duty Cases: November 1992 - October 1994*, 20 BROOK. J. INT'L L.J. 503, 505-06 (1995) (citing Daewoo Electronics v. International Union of Electronic, Electrical, Technical Salaried and Machine Workers, AFL-CIO, 6 F.3d 1511, 1513 (Fed. Cir. 1993), *cert. denied*, 114 S.Ct. 2672 (1994)). In the context of antidumping, "pass through" is defined as consumer tax incidence in the exporting country. *Id.*

37. 19 U.S.C. § 1677a(d)(1)(C) (1994).

in the home market, but not on merchandise sold abroad, the United States equalized the two prices by adding the value added tax on the U.S. price. Our statute, however, allowed us to do so "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."[38] Ambiguity existed in the meaning of the words "added to or included in the price." Millions of dollars of antidumping duty liability hung on this question.

Commerce interpreted the statute to allow looking at the invoices of the merchandise. If the invoices showed that the entire amount of the sales tax had been charged and Commerce verified that the taxes were in fact added to or included in the price of the merchandise sold in Korea, then Commerce would include the tax in the price of the merchandise sold to the United States. The CIT disagreed. The CIT maintained that Commerce's interpretation of the words was too imprecise to be reasonable. Instead, the CIT stated that Commerce must determine as precisely as economic science allows — such as by hiring an econometrician to conduct an econometric study — the extent to which the tax was included in the Korean price and "passed through" to consumers in the home market.

The Federal Circuit disagreed, reversing the CIT and affirming Commerce. The court held that Commerce need not conduct an econometric analysis of tax incidence in foreign markets when deciding whether to add the full amount of the foreign tax to the U.S. price.[39] In so holding, the court strongly reaffirmed the deference that must be shown to Commerce's implementation of the antidumping law, stating that, "these tenets [of deference to agency action] extend to their limits when [Commerce] interprets the antidumping law."[40] The court went on to state that "this Court has recognized the ITA as the 'master' of antidumping law, worthy of considerable deference."[41]

The "tax pass-through" issue involved nearly ten years of liti-

38. *Id.* Section 224 of the Uruguay Round Agreements Act has removed this tax dilemma from U.S. antidumping law by providing that we simply subtract the tax from the home market price altogether. Uruguay Round Agreements Act § 224, 19 U.S.C. § 3532 (1994).

39. *Daewoo Electronics Co.*, 6 F.3d at 1519-21.

40. *Id.* at 1516.

41. *Id.* (citations omitted).

gation, millions of dollars, and much heated debate. Intelligent, experienced judges reached different results when applying the same standard of review. All of this suggests that the application of our standard, whether to an issue of fact or an issue of law, is not an objective event. If this is true for judges who have applied the reasonableness standard hundreds of times, it is especially true for *ad hoc* panelists who are applying it for the first time.

To summarize, we can definitively say that our standard of review does not allow a reviewing body to decide the case *de novo*.[42] Instead, some deference to, or tolerance for, the agency's work must be allowed. The reviewing body is not the chef who makes the meal. It is not allowed into the kitchen to cook the way it likes. The body is more akin to a food critic writing for a gourmet magazine: it samples and surveys the meal as served. For example, if one of the dishes served is identified as "cooked potatoes," there might be fifty different recipes which would satisfy this specification, including: french fries, hash browns, baked potatoes, twice-baked potatoes, or cold potato salad. If the meal has been decently prepared and reasonably set forth, then the body recommends it favorably, even though the body might have added a little more salt here or a little less garlic there. Of course, if the meal is rancid or unpalatable, the reviewing body will send it back to the chef and say, "cook it again."[43]

The impact of this standard upon practicing attorneys who are advising their clients about litigation under the U.S. AD/CVD laws requires that they get the facts right and the record clear at the agency level. If a party loses there, it will not have a fresh start in the appellate court or before the reviewing panel. Instead, that party will have an uphill battle; the standard of review will not be a friend under these circumstances. On the

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42. An exception exists for issues of statutory construction where the statute on its face clearly contradicts the agency's interpretation, as we suggested in our example above concerning the overcast sky.

43. This is called a remand and happens all the time in AD/CVD cases, where one case may involve many highly technical issues. Sometimes the agency itself requests the remand, either because there has been a change in law or the agency has discovered an error. Generally speaking, the fact that remands are not uncommon in this highly technical area suggests that, much as we government attorneys, as well as those private attorneys representing parties who side with the government on an issue, emphasize the deference which courts and panels must accord the agency, these reviewing entities are not using the standard as a rubber stamp.

other hand, if a party wins an issue before the agency and the opposition seeks review, the standard will work in the initially successful party's favor, because the opposition will have to fight against the deference the reviewing body must grant to the agency.

CONCLUSION

The U.S. standard of review may be summarized as one of reasonableness, a concept that is simple in the abstract but difficult to apply in practice. Judges with many years of experience reviewing agency decisions may differ in application of the standard to any given case. It is not then surprising that *ad hoc* NAFTA panelists may find the concept of the standard elusive. It may, therefore, help the reviewing body to recall that, it does not play the role of the chef, but rather that of the gourmet critic. The reviewer must resist the temptation to go back in the kitchen and prepare the meal as he or she would have liked. Rather, the question is whether what has been prepared is decent and palatable, in a word, reasonable.