

***The Canadian-American Business Council
and the
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***“Investment and Trade Disputes in North America:
Institutional Failures and Government Apprehension”***

**DUTIES AND DUMPING: WHAT’S GOING WRONG WITH
CHAPTER 19?**

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I. INTRODUCTION

Chapter 19 of the North American Free Trade Agreement (“NAFTA”) reserves to Canada and Mexico a privileged place in trade relations with the United States that has been accorded to no other countries, and likely never will be accorded to any other countries in the future. The United States has refused to include a dispute resolution chapter for antidumping (“AD”) and countervailing duties (“CVD”) in any other free trade agreement. Since Mexico joined Canada in this privileged status, in 1995, the U.S. government has succeeded in a drive to eliminate most of the advantages of Chapter 19. During the six years of the Free Trade Agreement between Canada and the United States (“CUSFTA”), Chapter 19 delivered great dividends to Canada. Canada prevailed in almost every major dispute that was adjudicated, particularly *Fresh, Chilled and Frozen Pork; Live Swine; and Softwood Lumber*. The cases were decided much more promptly than would have been possible coursing through the Court of International Trade (“CIT”) and the Court of Appeals for the Federal Circuit (“CAFC”). Although expensive, they were not nearly as expensive as they might have been over the longer course in the U.S. courts.

The United States, very aware of the defeats it was suffering in Chapter 19’s binational process, tried to alter the dispute resolution mechanism formally in the creation of NAFTA. Canada successfully resisted. The United States succeeded, however, in indirectly altering Chapter 19 through subtle revisions to the language of Chapter 19, amplified by its implementing legislation, rules revisions, and Statement of Administrative Action for NAFTA’s implementation. The United States also has abused the Chapter 19 apparatus by starving the institution’s Secretariat; revising the roster politically; stalling appointments to panels; delaying adjudication; attacking the integrity

of panelists; and rewriting the law.

Today the value of Chapter 19 to Canada is not all that it had once been. Canadians must not only contend with a reduced likelihood of success in future binational panel reviews. They also must expect binational panel reviews to be as slow and as expensive as appeals to the U.S. courts, and no fairer, with U.S. panelists who are no longer necessarily expert in trade law, who are protected from appeal, and who are carefully selected to defend U.S. government agency prerogatives. It is now arguable that Canadian private interests ensnared by antidumping and subsidies disputes with the United States would be better off in U.S. courts than before binational panels.

In U.S. courts, Canadians have a right to appeal to the CAFC, which has enunciated a standard of review not uniformly respected by Chapter 19 panelists. That standard, most powerfully stated in *Gerald Metals v. United States*, limits the discretion of agencies and the deference due to them, preserves the standards the U.S. Supreme Court articulated in *Chevron*, and assures that the burden of proof resides with the agencies, not with responding parties. The court's *Gerald Metals* decision comports with international obligations set out in the WTO and inscribed in U.S. law by the Uruguay Round Agreements Act, whereas NAFTA binational panels have been prepared to depart from these requirements and standards.

Canada accepted Chapter 19 dispute settlement under the CUSFTA as a compromise, in lieu of being excluded from the U.S. trade remedy laws. At first, Chapter 19 delivered as promised: more aggressive review of antidumping and countervailing duty determinations by panels comprised of international trade experts;

faster, and therefore cheaper, reviews; and finality. The United States sought to neutralize the threat posed by Chapter 19 with a two-pronged strategy, shaping Chapter 19 jurisprudence in ways that facilitate the defense of AD and CVD determinations, while weakening Chapter 19 institutionally.

The United States Department of Commerce (“Commerce”) has effectuated the first prong of the U.S. strategy by arguing consistently before binational panels for a more deferential standard of review, and for relaxed legal tests and evidentiary standards.¹ Commerce sought to reduce its specificity test from four factors to one over a series of five binational panel reviews, for example, and very nearly succeeded. To inoculate itself against adverse panel decisions, the United States has succeeded in robbing panel decisions of their finality, permitting Commerce to relitigate settled issues in later investigations and panel reviews.² The United States also has

¹ This discussion focuses on Commerce, but the International Trade Commission also assailed Chapter 19, mostly with vigorous denunciations of panel decisions and a refusal to accept that any legal findings from panels could ever be applicable in later investigations. See, e.g., *Softwood Lumber from Canada*, Inv. No. 701-TA-312 (Second Remand), USITC Pub. 2753 (Mar. 1994), 1994 ITC LEXIS 728 at *3 (“The remand instructions issued by the panel in this investigation significantly impede our execution of our statutory obligations as Members of the United States International Trade Commission.”), *7 n.19 (“We must point out that the panel’s assertion about the superior probative value of purchaser’s questionnaires...is incredibly naïve.”), *14 (“the cases cited by the panel as support for its proposition that an affirmative determination cannot be based on the volume of imports alone, including even prior panel decisions, are inapposite to the issues presented in this investigation”); *Fresh, Chilled, or Frozen Pork from Canada*, Views on Second Remand, Inv. No. 701-TA-298 (Final), USITC Pub. 2362 (Feb. 1991) at 3-4 (“{W}e find many aspects of the Panel decision to lack ‘intrinsic persuasiveness’ and, thus, we will not change our practice or procedure to conform with those aspects of the Panel opinion discussed below.”). In sunset reviews, the Commission has been especially recalcitrant. See *Magnesium from Canada: Full Sunset Review of Antidumping Duty and Countervailing Duty Orders*, Views of the Commission on Remand, File No. USA-CDA-00-1904-09 (Oct. 15, 2002) at 2-3 (“The Panel has misunderstood our findings regarding substitutability, and therefore has misapplied *Gerald Metals*...the panel has required us to reconsider nonsubject imports in light of *Gerald Metals*. However, due to the factual differences between these reviews and *Gerald Metals*, the conclusions we set forth in the Original Sunset Views are the same.”).

² At one time, Canada joined Commerce in arguing against the finality of panel decisions before the NAFTA panel reviewing the fourth administrative review for *Live Swine*, in the hopes of re-litigating the Tripartite Program in future cases, which a prior panel had deemed countervailable. See Brief Of The

amended its trade laws to escape unfavorable panel decisions, in flagrant violation of NAFTA Article 1903.

Commerce has advanced significantly the U.S. strategy of weakening more aggressive Chapter 19 panel review by international trade experts. International trade experts are uniquely qualified for applying the standard of review thoughtfully and assertively. Their understanding of trade law helps them assess whether the statutory provisions at issue are unambiguous, leaving no latitude for inappropriate agency interpretation. Their familiarity with antidumping and countervailing duty investigations helps them apply the substantial evidence standard. Yet the United States is now placing on panels state judges with no trade experience (presumably advancing a more deferential standard of review that judges themselves would like to insulate them from appeal), while attacking the integrity of trade experts found to be ruling against the U.S. side, whatever their nationality.

The second prong of the U.S. strategy against Chapter 19 has been a campaign to weaken the functioning of the binational panels themselves, and thereby dilute the benefits of Chapter 19 to Canadian litigants. Canada agreed to Chapter 19 dispute settlement on the expectation that it would deliver Canadian parties more expeditious and less expensive relief from unlawful antidumping or countervailing duties than would review at the CIT. But U.S. dilatory tactics, and administrative shortcomings that complicate the attraction and retention of qualified panelists, have protracted Chapter 19 proceedings involving Canadian imports to the point, at 696 days on

Government Of Canada, *In The Matter Of: Live Swine From Canada*, USA-91-1904-03 (Nov. 15, 1991) at 10-11.

average, where they exceed the duration of cases settled before the CIT, which average 641 days. The average duration of panel reviews concerning Canadian imports increases to 768 days when active cases currently exceeding 315 days in duration -- the recommended length for panel reviews -- are taken into account. These worsening delays are exceedingly costly to Canadian litigants, who must continue to post AD and CVD deposits on their subject exports during the pendency of a binational panel review. The longer AD and CVD orders remain in place, the greater the financial burden on Canadian exporters, and the greater the incentive to settle disputes on unfavorable terms.

The United States has exercised peremptory challenges and the code of conduct to delay panel reviews, refusing to observe the 61-day deadline for selecting panelists, or the 45-day deadline for filling panel vacancies. These delays are exacerbated by the U.S. propensity for placing petitioners' counsel on its roster, and its refusal to select panelists from "off the roster" when necessary. The United States has also meddled in the affairs of the NAFTA Secretariat, starving the NAFTA Secretariat, U.S. Section, of funds and staff, and blocking for ten days the release of the panel remand decision on the ITC's *Softwood Lumber* affirmative threat remand determination (the "*Softwood Lumber* injury" remand decision).

Canada's efforts to find willing panelists have been hampered by U.S. attacks on the integrity of past Canadian panelists, which has had a chilling effect on the willingness of Canadian international trade experts to join the roster or serve on panels. U.S. international trade experts may be no more eager to serve on panels after the Coalition for Fair Lumber Imports' ("the Coalition") attack on the integrity of a U.S.

panelist for the *Softwood Lumber* injury panel review, which the United States used as a pretense for improperly delaying the release of the panel decision.³

Canada could counter the U.S. strategy of undermining Chapter 19 institutionally through consultations under NAFTA Chapter 20. Canada could demand that the United States reform its administration of binational panel reviews to end delays in panelist selection and replacement. The United States should better fund and staff its section of the Secretariat; reform its roster to eliminate bias and facilitate the selection of panelists; agree to adhere to the deadlines for constituting panels and filling panel vacancies; and agree to raise panelist pay, to make it commensurate with the pay offered to members of other international dispute settlement bodies.

Were the United States to receive a report card on its handling of binational panel disputes, it would receive straight Ds for Discretion (which the United States has sought to increase for Commerce and the ITC), Defiance (of panel decisions), Delay, and Derision (of past and current panelists, making it harder to recruit international trade experts for panels). The United States has succeeded in diminishing the advantages of binational panel reviews to Canadian litigants, by eliminating their finality and lengthening their duration. The enhanced fairness of binational panel review by international trade experts is now under threat. Canada must now either defend Chapter 19, or allow it to pass into irrelevance.

³ The NAFTA Secretariat, Canada Section, acknowledged possessing the decision, refused to release it, and referred inquiries to the Government of Canada. The Government of Canada has denied delaying release.

II. CANADA SECURED INVALUABLE, UNPRECEDENTED RIGHTS UNDER CHAPTER 19

Canada agreed to the Chapter 19 dispute settlement process under the CUSFTA in an eleventh hour compromise, after the United States refused to exempt Canadian imports from U.S. antidumping ("AD") and countervailing duty ("CVD") laws.⁴ The United States agreed to this novel arrangement to complete the CUSFTA negotiations, on the expectation that binational panels would apply U.S. law and reach the same results as would the CIT.⁵ Canada's expectation, however, was that Chapter 19 dispute settlement, conducted before panels of international trade experts, would result in more expeditious relief (without prolonged and often disappointing recourse to the CAFC) and, more importantly, a more searching and rigorous review of AD/CVD determinations than provided by the CIT.⁶ Canada's early victories under Chapter 19 delivered on the anticipated benefits of binational panel review, and confirmed Chapter 19's enormous value to Canadian litigants. But they also triggered a U.S. backlash.

A. Canada Accepted Chapter 19 As A Compromise

One of Canada's primary concerns in negotiating the CUSFTA was to prevent the arbitrary imposition of AD and CVD orders, so-called "contingent liability," from nullifying Canada's benefits under the Agreement. Between 1980 and 1988, Canada had been subject to 19 antidumping and 11 countervailing duty investigations,

⁴ See Patrick Macrory, "NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution," C.D. Howe Institute Commentary, No. 168 (Sep. 2002) at 3-4.

⁵ *Id.*

⁶ See Macrory, *supra.* at 4; see also Gary Clyde Hufbauer, Jeffrey J. Schott, and Yee Wong, "NAFTA Dispute Settlement Systems," Institute for International Economics (2003) at 2-3.

resulting in 13 orders.⁷ These investigations appeared tainted by political interference, as epitomized by Commerce's flip-flop on Canadian softwood lumber stumpage programs: Commerce held that they were not subsidies in a 1983 CVD investigation, but decided that they were in a 1986 investigation. Expensive and protracted U.S. court appeals offered little recourse. The CIT hobbled legal challenges against AD and CVD orders by according more and more deference to the politically-motivated factual and legal findings of Commerce and the ITC. Canada demanded to be excluded from the U.S. trade laws, and walked out of the CUSFTA negotiations two weeks before they were to conclude when the U.S. refused to accede.

Canada ultimately agreed to binational panel review as a compromise, pending the creation of a unified trade law regime within seven years. Chapter 19 appeared to address many of Canada's key concerns about the arbitrary application of U.S. trade law, as trumpeted by Canada's Department of External Affairs:

"Trade remedy procedures, such as anti-dumping and countervailing duty petitions, can pose a serious threat to predictability and security of access {to the U.S. market}...Chapter 19 includes provisions to prevent abuse of the current system, thus allowing Canadian exporters to compete in the U.S. market on a more secure, predictable and equitable footing...any relief granted will be subject to challenge and review by a binational panel which will determine whether existing laws were applied correctly and fairly. Canadian producers who have in the past complained that political pressures in the United States have disposed U.S. officials to side with complainants will now be able to appeal to a bilateral tribunal...Decisions will be rendered quickly based on strict time limits built into the procedure."⁸

⁷ Gilbert Gagne, "North American Free Trade, Canada, and U.S. Trade Remedies: An Assessment After Ten Years," *World Economy* (2000), 23(1) at 79.

⁸ Canada Dept. of External Affairs, *The Canada-U.S. Free Trade Agreement*, Copy 10-12-87 (Ottawa: External Affairs, 1988) at 267-69.

Thus, binational panel reviews were to be fairer, faster, and cheaper than court appeals.

1. Binational Panel Reviews Were To Be Fairer

Binational panel reviews were to be fairer than court appeals, because panels would be comprised of international trade law experts. The CIT had come to exhibit undue deference towards the factual and legal findings of Commerce and the ITC.

In the late 1990s, the CAFC itself recognized the problem in two landmark decisions, reining in excessive CIT deference towards agency factual and legal findings. In *Gerald Metals v. U.S.*, the CAFC reminded CIT judges that "the substantial evidence standard requires more than mere assertion of 'evidence which in and of itself justified {the determination}, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'"⁹ In *Timex I.V. v. U.S.*, the CAFC reminded the CIT judges that it is their responsibility, not an agency's, to ascertain whether a statutory provision is ambiguous,¹⁰ according no deference to an agency's inconsistent interpretation of an unambiguous statute.¹¹

International trade experts are uniquely suited to apply properly the standard of review clarified by the CAFC. Most are seasoned international trade lawyers, as a majority of each binational panel must consist of attorneys.¹² Their expertise in antidumping and countervailing duty investigations helps them better

⁹ 132 F.3d 716, 720 (Fed. Cir. 1997)(quoting from *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

¹⁰ 257 F.3d 879, 882 (Fed. Cir. 1998) (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997); *Chevron*, 467 U.S. at 859-863 and other authorities).

¹¹ *See id.* ("[I]f we hastily 'throw up our hands' and declare that Congress's intent is unclear, we abdicate our duty.")

¹² NAFTA, Annex 1901.2 at para. 2.

assess whether an agency has considered adequately all the evidence, or impermissibly focused on supportive evidence alone, in rendering its factual findings. Their knowledge of trade law helps them assess whether a particular statutory provision is unambiguous, in which case an agency's inconsistent interpretation would be owed no deference. CIT judges deal with a wide variety of cases besides appeals of antidumping and countervailing duty determinations. With a jurisdiction encompassing all lawsuits against the United States concerning international trade,¹³ the CIT might not apply the standard of review as consistently, aggressively or insightfully as a panel of international trade experts.

2. Binational Panel Reviews Were To Be Expeditious

Chapter 19 binational panel review was intended to be expeditious. Canadian exporters remained subject to crushing AD or CVD duties during the pendency of lengthy court appeals, which could average up to 1,210 days for CIT decisions appealed to the CAFC.¹⁴ NAFTA Article 1904.14 provides that "{t}he rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made."

The *Statement of Administrative Action to Accompany the United States-Canada Free Trade Implementation Act* recognizes that one of the primary goals of binational panel review is to obtain "expeditious decisions, while at the same time preserving the rights of interested parties to be heard."¹⁵ These principles were

¹³ See U.S. Court of International Trade website, <http://www.cit.uscourts.gov/informational/about.htm>, last visited Nov. 6, 2003.

¹⁴ GAO Report, *CUSFTA: Factors Contributing to Controversy in Appeals of Trade Remedy Cases to Binational Panels*, June 1995 (GAO/GGD-95-177BR) at 59 (Cases from 1990 through September 1994).

¹⁵ Reprinted in House Doc. 10-216, 100th Cong., 2d Sess., at 259.

unchanged under NAFTA.¹⁶ NAFTA Article 1904.8 provides that "{w}here the panel remands a final determination, the panel shall establish as brief a time period as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision." Rule 2 of the Article 1904 Rules of Procedure for NAFTA Article 1904 Binational Reviews ("NAFTA Panel Rules") provides that "{t}he purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904."¹⁷ NAFTA panels have recognized that the core principles behind Chapter 19 binational panel review are "expeditious decisions, finality, reduced costs and certainty."¹⁸

NAFTA binational panel reviews possess several other attributes that serve to accelerate relief from unlawful AD and CVD orders. Binational panel decisions are not subject to appeal,¹⁹ except to ECCs on very limited grounds, eliminating this source of delay. Binational panels also lack equitable powers, which federal courts may use to enjoin or compel party actions pursuant to party motions, eliminating another potential source of delay. And binational panels are instructed by NAFTA to minimize the duration of remands.²⁰

¹⁶ See *Statement of Administrative Action for the North American Free Trade Agreement Implementation Act*, Sep. 13, 1993 ("{T}he Statement of Administrative Action accompanying the CFTA Implementing Act, H.Doc. 100-216, 100th Cong. 2d Sess. 258-89 (1988), fully describes the panel system that will be established under the NAFTA.").

¹⁷ See also Rule 20(1)(d) of the NAFTA Panel Rules: "A Panel may extend any time period fixed in these rules if...in fixing the extension, the panel takes into account the intent of the rules to secure just, speedy and inexpensive reviews of final determinations.").

¹⁸ *In the Matter of Live Swine from Canada*, Decision of the Panel, USA-91-1904-03 (Oct. 30, 1992) ("Live Swine") at 22.

¹⁹ NAFTA Art. 1904.11.

²⁰ See NAFTA Art. 1904.8.

Shorter proceedings, no appeals, and fewer motions translate directly into lower legal fees for private litigants appealing antidumping and countervailing duty actions, and the faster elimination of costly AD and CVD orders or, at least, speedier dispute resolution.

3. Binational Panel Review Decisions Were To Be Final

The finality of binational panel decisions is enhanced by the fact that administrative decisions cannot be reviewed in any U.S. court once binational panel review is requested,²¹ and ECC review of panel decisions is circumscribed by strict criteria. An ECC's sole function was to ascertain whether a challenged panel decision satisfies the three-prong test provided under NAFTA Article 1904.13, as detailed in the prior section. ECC reviews are not ordinary appeals, as observed by the unanimous ECC in *Pork*:

"This three-prong requirement provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge 'is not intended to function as a routine appeal.' Indeed, the Committee's only function is to ascertain whether each of the three requirements set forth in Article 1904.13 has been established {that is compliance with any one of the Article 1904.13(a)(i-iii) criteria and both requirements of subparagraph (b).}"²²

As the unanimous ECC in *Live Swine* elaborated: "The ECC should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process. An ECC corrects 'aberrant Panel

²¹ NAFTA Art. 1904.11; see also 19 U.S.C. § 1516a(g)(2).

²² *Fresh, Chilled and Frozen Pork from Canada*, File No. ECC-91-1904-01USA (June 14, 1991) at 10 (quoting *Statement of Administrative Action, United States-Canada Free Trade Agreement* at 116, reprinted in H.R. Doc. No. 216, 10th Cong., 2d Sess., 163, 278 (1988)); see also *Live Swine ECC Decision* at 7-8 (quoting *Pork ECC Decision* at 10); *Softwood Lumber ECC Decision*, Hart Opinion at 14, Morgan Opinion at 9 (quoting *Pork ECC Decision* at 10).

decisions' and 'aberrant behavior by panelists.'"²³ Unlike CIT decisions that may not survive CAFC review, panel decisions are final, except in extraordinary instances.²⁴

B. Chapter 19 Binational Panel Review Initially Worked As Promised

The results of Chapter 19 binational panel review were promising initially. Chapter 19 appeared to deliver all of the anticipated benefits, as concluded by an academic study of the first two and a half years of Chapter 19 dispute settlement: "FTA panels deserve high marks for their successful performance to date. They have issued timely, well crafted, and impartial decisions. The panelist selection process has been amicable, and the Parties have given the panel decisions binding effect."²⁵

The study found that only three of fourteen disputes had not been resolved within the 315 day deadline contemplated by Chapter 19.²⁶

Canadian litigants exhibited greater confidence in their ability to overturn unlawful AD and CVD orders, appealing 50 percent of orders imposed when the CUSFTA was in effect, compared to only 20 percent of orders imposed over the four years prior to the CUSFTA.²⁷ This renewed faith in the appellate process appeared well founded. Between 1989 and 1993, Canadian parties prevailed more often before

²³ *Live Swine ECC Decision* at 8; see also *Softwood Lumber ECC Decision*, Hart Opinion at 14 (quoting *Live Swine ECC Decision* at 8), Morgan Opinion at 9-10.

²⁴ See *Grey Portland Cement and Clinker from Mexico*, Opinion and Order of the Extraordinary Challenge Committee, File No. ECC-2000-1904-01USA (Oct. 30, 2003) ("Cement ECC Opinion") at 2 ("Under the provisions of Chapter 19 of the NAFTA, an extraordinary challenge is not the equivalent of a legal appeal...the binational panel review system is the mechanism for appeal of specific claims and agency determinations...By contrast, the extraordinary challenge process, as the name suggests, is reserved for extraordinary situations where there are substantial allegations of legal error, such as gross misconduct, serious departures from fundamental rules of procedure, action that manifestly exceeds a panel's authority or similar acts that threatens {sic} the integrity of the panel review process.").

²⁵ Gary N. Horlick and F. Amanda DeBusk, "Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One-Half Years," (1992) 37 McGill L.J. 574, 593.

²⁶ *Id.* at 581, Appendix 2, Table 1.

²⁷ Macrory, *supra.*, at 4.

binational panels (two-thirds of such appeals were fully or partially successful), than parties before the CIT, whose appeals succeeded only one-third of the time.²⁸

Only Mexico, among U.S. trading partners, enjoys the preferential adjudication of antidumping and countervailing duty disputes through a mechanism like Chapter 19 that is provided to Canada.²⁹ Canada has every reason to safeguard, or even strengthen, Chapter 19 dispute settlement, against the systematic U.S. efforts to undermine it.

III. THE UNITED STATES HAS PURSUED SUCCESSFULLY A STRATEGY TO ERODE THE POSITIVE ATTRIBUTES OF CHAPTER 19 DISPUTE SETTLEMENT

The United States never wanted Chapter 19 dispute settlement. Canada insisted upon it, in lieu of an exemption from the U.S. trade laws, as a precondition for entering the CUSFTA. The United States has always feared that, with experts instead of judges, binational panel review would advantage Canadian complainants under the U.S. trade laws and create a separate body of jurisprudence, more complainant-friendly than the federal courts. Canada's success with initial binational panel reviews could only have fed these U.S. fears.

The United States responded with a two-pronged attack on the Chapter 19

²⁸ Gagne, *supra.*, at 85.

²⁹ One measure of Chapter 19's success at reining in AD and CVD actions has been the U.S. unwillingness to extend the concept to subsequent free trade agreements secured with Jordan, Singapore, and Chile. See House Ways and Means Committee Report, *Statement on How the U.S.-Singapore Free Trade Agreement Makes Progress In Achieving U.S. Purposes, Policies, Objectives, and Priorities*, available at <http://waysandmeans.house.gov/Media/pdf/singapore/hr2739Singachievesobjectives.pdf>, last visited Nov. 6, 2003 ("The FTA does not address antidumping or countervailing duty issues."); J.F. Hornbeck, *The U.S.-Chile Free Trade Agreement: Economic and Trade Policy Issues*, CRS Report Order Code RL31144 (Feb. 3, 2003) at CRS-11 (Chile eager to address U.S. antidumping laws in FTA), CRS-16 ("In an unanticipated outcome, no chapter on trade remedies was included {in the FTA}, hence there would be no expected change to the antidumping and countervailing duty options currently available to both countries.").

process, calculated to either bend it to U.S. advantage or destroy it. First, the United States sought to mold the jurisprudence developed through binational panel review to its advantage, transforming this perceived threat into an opportunity. In individual disputes, the United States, through Commerce and the U.S. International Trade Commission, has sought to relax the legal and evidentiary standards applicable to CVD investigations. Using these tactics, the U.S. succeeded in simplifying the specificity test from four factors to one, and eliminating the effects test – tests Commerce had consistently misapplied in past CVD investigations, leading to reversals on appeal. In the current *Softwood Lumber* CVD dispute, Commerce has sought to establish new practices embracing cross-border benchmarks for the first time, and the release of CVD and AD margins before their legal rationale has been developed. Where U.S. arguments have failed, the U.S. Congress has revised the U.S. trade laws to nullify adverse panel decisions.

Commerce has argued consistently for a more deferential standard of review before binational panels than is applicable in federal court. Above all, binational panel decisions were supposed to be fairer, as panels of international trade experts could be expected to apply the standard of review more rigorously and thoughtfully than generalist U.S. judges. But in the most recent cases, the integrity of panelists has been attacked when extraordinary deference has not been accorded the agencies, and other panels have begun to accord Commerce the high degree of deference it has long been after, but which not even a U.S. court has allowed.

The second prong of the U.S. strategy has been an effort to undermine Chapter 19 institutionally, by stripping the binational panel review process of the very

attributes that make it so valuable to Canadian exporters. Binational panels are supposed to be fast, and therefore cheap, but the United States has delayed panel proceedings to the point where they are slower, on average, than cases concluded before the CIT. The United States succeeded in revising the ECC process under NAFTA in an effort to make it more closely resemble ordinary appeals.

A. The United States Has Sought To Forge A Chapter 19 Jurisprudence More Conducive To The Imposition Of Trade Remedies

To effectuate the first prong of its strategy, the U.S. government assigned responsibility for defending AD/CVD determinations under Chapter 19 to the very agency responsible for issuing them, Commerce, rather than the Department of Justice, which always handled such appeals before the CIT and CAFC, and still does outside NAFTA.³⁰ Commerce would be in a better position to defend its own protectionist methodologies consistently, and demand a more deferential standard of review, unconstrained by the broader public policy considerations that motivate the Justice Department.³¹

³⁰ The ITC also uses its own lawyers to argue cases before binational panels. Most disputes have involved Commerce determinations, however, because the ITC conducts only original injury investigations, while Commerce conducts both original investigations and administrative reviews of existing orders at the request of interested parties. The ITC openly challenged the authority of the binational panel that reversed its affirmative material injury determination in *Fresh, Chilled, or Frozen Pork from Canada*, but has otherwise been less activist in shaping Chapter 19 jurisprudence. USITC Pub. 2362 at 3-4 ("Notwithstanding this determination, this Second Panel Decision violates fundamental principles of the United States-Canada Free-Trade Agreement (FTA) and contains egregious errors under U.S. law. Had this decision come from the {CIT}...we would have directed counsel to appeal to the {CAFC}...At a minimum, however, we find many aspects of the Panel decision to lack 'intrinsic persuasiveness' and, thus, we will not change our practice or procedure to conform with those aspects of the Panel opinion discussed below.").

³¹ Similarly, USTR has begun handing over WTO litigation to both Commerce and the ITC, acting as a master of ceremonies for the agency lawyers defending their own actions and the actions of their own agencies. By contrast, Canada still relies exclusively on lawyers in the Department of Foreign Affairs and International Trade, with occasional Canadian private lawyers as consultants, but never with lawyers who actually represented Canadian litigants before U.S. agencies.

Commerce's strategy of shaping Chapter 19 jurisprudence to better defend its AD and CVD determinations has consisted of two interrelated components. First, Commerce has sought to increase the deference binational panels owe its factual findings and legal interpretations by misrepresenting consistently the standard of review. Second, Commerce has endeavored to relax its evidentiary burden for imposing AD or CVD relief. For example, Commerce attempted to simplify its specificity test over the course of several disputes by arguing that it need only examine one of the four statutory specificity factors, rather than all four.

As a hedge against adverse panel decisions, the United States succeeded, with Canada's inadvertent assistance, in robbing panel decisions of their finality, making each panel review *sui generis*. In two important instances, the U.S. Congress has amended the U.S. trade laws to give Commerce its way, simplifying the specificity test and abolishing the effects test.³² Canada possesses the right to challenge such strategic modifications to U.S. trade law under NAFTA Article 1903, which proscribes revisions to U.S. law that circumvent binational panel decisions or violate U.S. international obligations.³³ Canada, however, has never invoked this provision of NAFTA.

1. The United States Has Succeeded In Relaxing The Standard Of Review Applicable By NAFTA Panels

The foundation of Chapter 19's benefits to Canadian parties is the requirement that binational panelists be expert in international trade law. The

³² See discussion *infra*. section III.A.3.

³³ Other trade law modifications that might be subject to Article 1903 action include the Continued Dumping and Subsidy Offset provision (the "Byrd Amendment").

replacement of CIT judges with panels of international trade experts, including two or three Canadian experts, promised a fairer, more aggressive review of the factual and legal findings undergirding AD and CVD determinations. Under the FTA, the United States attacked binational panels for allegedly misapplying the U.S. standard of review, requesting ECC reviews of three adverse panel decisions on grounds that the panels had shown insufficient deference towards Commerce and the ITC.

Meeting with no success, the United States subtly altered the basis of Chapter 19 review through the NAFTA negotiations, through minor revisions to Article 1904 itself (amplified by revisionist interpretations of Chapter 19 contained in the SAA), implementing legislation, and legislative reports. These changes were intended to increase panel deference, by encouraging the selection of judges over international trade experts, and facilitating the reversal of panel decisions by ECCs. Judge Wilkey's dissenting opinion in the ECC review in *Softwood Lumber*, in which the majority affirmed the binational panel decision ordering the revocation of the CVD order, crystallized the direction in which the United States was determined to pull binational panel review.

- a. The United States bridled under the more assertive review binational panels provided

The United States filed three Extraordinary Challenges under the CUSFTA, each alleging that the respective Panels had usurped the authority of administrative agencies by misapplying the standard of review. Article 1904.13 of the CUSFTA, and now NAFTA, provides that Parties may request an ECC to review a final Panel decision. Provided the article's three prongs were satisfied,³⁴ the ECC would

³⁴ "Where, within a reasonable time after the panel decision is issued, a Party alleges that: a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise

then be empowered to vacate the panel decision or remand the decision to the panel for action consistent with the ECC's instructions.

In the first Extraordinary Challenge, *In the Matter of: Fresh, Chilled, or Frozen Pork from Canada*, the Office of the U.S. Trade Representative ("USTR") alleged that the Panel had "manifestly exceeded its powers, authority or jurisdiction by effectively applying a *de novo* standard of evidentiary review instead of the correct standard, 'substantial evidence on the record'"³⁵ and "impermissibly reweighed the record evidence" on key issues.³⁶ In the second Extraordinary Challenge, *In the Matter of: Live Swine from Canada*, USTR alleged that the Panel had "impermissibly substituted its own interpretation {of U.S. law} for that of Commerce" on three issues, in violation of the appropriate standard of review.³⁷ Canada elected to defend these challenges on narrow interpretations of the Extraordinary Challenge process, arguing that the scope of ECC review, limited to misconduct, conflict of interest, and extraordinary dereliction, precluded the ECCs from considering the U.S. arguments. Both the *Pork* and *Swine* ECCs agreed that "if a panel fails to apply the appropriate standard of review, it manifestly exceeds 'its powers, authority or jurisdiction,'" satisfying the first prong of the three prong test.³⁸ The two ECCs also agreed that "{t}he

materially violated the rules of conduct, ii) the panel seriously departed from a fundamental rule of procedure, or iii) the panel manifestly exceeded its power, authority or jurisdiction set forth in this Article, and b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process, that Party may avail itself of the extraordinary challenge procedures set out in Annex 1904.13."

³⁵ Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, ECC-91-1904-01USA (Jun. 14, 1991) ("*Pork ECC Decision*") at 16.

³⁶ *Id.* at 18.

³⁷ Decision, ECC-93-1904-01USA (Apr. 8, 1993) ("*Live Swine ECC Decision*") at 4-5.

³⁸ *Pork ECC Decision* at 17; *Live Swine ECC Decision* at 11.

appropriate test is whether the Panel accurately articulated the scope of review and...whether it 'has been conscientiously applied.'"³⁹

The ECCs unanimously found, but with little elaboration, that the panels had properly articulated the standard of review and adhered to it in analyzing the issues in contention.⁴⁰ In *Pork*, the ECC found that the Panel had "discussed at length the correct standard of review" and went to "considerable effort to determine the presence or absence of 'substantial evidence'."⁴¹

The ECC in *Live Swine* held that the Panel had "correctly cited" the standard of review, "discussed and referred to the standard of review" throughout its analysis, and "recognized that it was required to give deference to Commerce's statutory interpretation," if sufficiently reasonable under the *Chevron* standard.⁴² The Committee went on to question the quality of the panel's decision in dicta, however: "Although we need not and will not reach a decision on the merits of {the Panel's} conclusions, the Committee felt that the panel may have erred."⁴³ Of course, the Panel had been presented only one side on the merits. This comment was a warning.

b. Judge Wilkey's dissent articulated the U.S. desire for a more deferential standard of review under Chapter 19

In response to these defeats, the United States sought to alter the very nature of Chapter 19 panel review through the implementation of NAFTA, converting the architecture of Extraordinary Challenge to the elements of ordinary appeal, and

³⁹ *Live Swine ECC Decision* at 12 (citing *Pork ECC Decision* at 17).

⁴⁰ *Pork ECC Decision* at 16-17; *Live Swine ECC Decision* at 14-15.

⁴¹ *Pork ECC Decision* at 16.

⁴² *Live Swine ECC Decision* at 14 (citing *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

⁴³ *Id.* at 15.

attempting to convert panels of experts into groups of judges with no particular expertise in trade matters. The intellectual vehicle for these changes was the *Softwood Lumber* ECC dissent of Judge Malcolm Wilkey.⁴⁴

The two Canadian members of the *Softwood Lumber* ECC upheld the panel's application of the standard of review.⁴⁵ Justice Gordon L.S. Hart observed that "the replacement of court adjudication by a five member panel of experts in international trade law may very well reduce the amount of deference to the Department in the future" and "{w}hen the parties to the FTA agreed to replace {the CIT} with this type of panel, they must have realized and intended that such a review...would be more intense."⁴⁶ Justice Hart's view comports with Canada's expectations in negotiating Chapter 19, as summarized in a General Accounting Office report, based upon interviews:

"Canadian officials emphasized their belief that panelists' expert opinions would improve oversight of U.S. agency actions, and that panels would not be as deferential as the U.S. courts were. Panels were seen as an improvement because Canadians believed that {the} CIT was 'passive' in its review of U.S. agency actions, and that politics, not the law, guided agency determinations."⁴⁷

⁴⁴ *In the Matter of: Certain Softwood Lumber Products from Canada*, Memorandum Opinion and Order, ECC-94-1904-01USA (Aug. 3, 1994) ("*Softwood Lumber ECC Decision*").

⁴⁵ See *id.*, Opinion of Mr. Justice Gordon L.S. Hart ("Hart Opinion") at 27, 40; *id.*, Opinion of the Honorable Herbert B. Morgan ("Morgan Opinion") at 16-19, 21.

⁴⁶ Hart Opinion at 27.

⁴⁷ *U.S.-Canada Free Trade Agreement, Factors Contributing to Controversy in Appeals of Trade Remedy Cases to Binational Panels*, Briefing Report to Congressional Requesters, GAO/GGD-95-175BR (June 1995) at 39 ("GAO Report").

Canada viewed Chapter 19 as an alternative to the creation of a unified trade law regime with the United States, and never would have agreed to binational panel review were it no more intensive than CIT review.⁴⁸

Judge Wilkey disagreed with his Canadian colleagues on the Panel majority's application of the standard of review:

"Basically, the Panel opinion attempts to redo, to reevaluate the evidence, to redetermine the technical issues before the administrative agency. The Panel places its own interpretation and makes its own evaluation of the weight of the evidence...I believe that this Binational Panel majority opinion may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read...the majority's position could be boiled down to an assertion that the agency did not know what it was talking about, but the majority knows. This illustrates the danger of placing review of agency action in the hands of a panel of 'experts' in a particular field, instead of having a review of administrative agency action by generalists who are willing to defer to the agency expertise."⁴⁹

Judge Wilkey's opinion was vitriolic, and he did not spare the distinguished Canadian judges on the ECC, asserting, for example, that Justice Hart's suggestion that Chapter 19 review "may very well" reduce deference towards Commerce "totally violates the fundamental agreed upon concept that the standard of appellate review in each country would remain the same."⁵⁰ Judge Wilkey concluded that "agency discretion and

⁴⁸ See Macrory, *supra*. at 3-4 ("One of Canada's major objectives in the FTA negotiations was to eliminate – or at least ameliorate – the AD and CVD laws with respect to trade between the two countries...Two weeks before the deadline, the Canadians walked out of the negotiations over this issue, which they regarded as a deal-breaker. In deference to Canadian concerns that judicial oversight of the United States' administration of its AD and CVD laws was inadequate, a special mechanism would be set up allowing the parties to AD and CVD cases to take appeals to a binational panel specially constituted for the purpose, instead of to the domestic courts.").

⁴⁹ *Softwood Lumber ECC Decision*, Dissenting Opinion of U.S. Circuit Judge (Ret.) Malcolm Wilkey ("Wilkey Dissent") at 38, 40-41.

⁵⁰ *Id.* at 68.

deference to their expertise, mandated by U.S. statutes and time-honored in practice, has been diminished exclusively by the votes of the Canadians on the Panel and on this ECC."⁵¹

- c. The United States sought to make binational panel review more deferential through NAFTA
-

Judge Wilkey's dissent forecast the post-NAFTA U.S. conception of Chapter 19 dispute settlement. The United States sought to strengthen panel deference towards agency determinations under NAFTA, in response to adverse panel and ECC decisions,⁵² through two key revisions of the binational panel review process. First, rosters were no longer to be limited to international trade experts, but also were to include judges with experience in deferring to expert government agencies. Second, ECCs were made to more closely resemble ordinary appeals, giving them additional time and impetus to reverse panels for any "failure to apply the appropriate standard of review." The U.S. SAA and Congressional reports emphasize that these changes were calculated to relax the standard of review applied by binational panels.

Judge Wilkey's distrust of the international trade experts sitting on Chapter 19 panels is reflected in the NAFTA requirement that rosters of potential panelists "include judges or former judges to the fullest extent practicable."⁵³ Congress intended that the inclusion of judges on binational panels would temper the inclination of

⁵¹ *Id.* at 69.

⁵² See Eric J. Pan, "Assessing the NAFTA Ch. 19 Binational Panel System: An Experiment in International Adjudication," 40 *Harv. Int'l L.J.* 379 (Spring 1999).

⁵³ NAFTA Article 19, Annex 1901.2 at para. 1.

panelists expert in international trade to apply the standard of review too aggressively,⁵⁴ nullifying one of Chapter 19's primary benefits to Canadian complainants. As explained by the U.S. SAA:

"There are several advantages to having judges and former judges serve as panelists. For example, the participation of panelists with judicial experience would help to ensure that, in accordance with the requirements of Article 1904, panels review determinations of the administering authorities precisely as would a court of the importing country by applying exclusively that country's...law and standard of review.

Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process...The decisions of a few binational panels convened under the FTA have underscored the importance of the NAFTA's emphasis on the proper application of the judicial standard of review. In specific, these decisions have raised the question of whether these panels have correctly applied the standard of review. Where, in the Administration's view, panel decisions have failed to apply the appropriate standard of review or they have otherwise manifestly exceeded their powers, authority or jurisdiction, there could be recourse to the extraordinary challenge procedure under Article 1904(13)." ⁵⁵

The Senate Joint Report on the NAFTA Implementation Act emphasized to future binational panels that inadequate deference towards agency discretion would not be tolerated:

⁵⁴ Judge Wilkey opined that the Canadian panelists had refused to display sufficient deference towards Commerce's expertise, thinking "they know better than the lowly paid 'experts' over in the Commerce Department, and they have felt inclined to say so." Wilkey Dissent at 51 (citing Senate Joint Report at 42-42). But these international trade experts, he contended, "are not experts in the field of judicial review of agency action; they do not necessarily have any familiarity whatsoever with the standards of judicial review under United States law." *Id.* at 20 (citing Committee on the Judiciary, House of Representatives Report 100-816, Part 4, Aug. 4, 1988 at 3).

⁵⁵ North American Free Trade Agreement Implementation Act: Statement of Administrative Action, 1 H.Doc. 159, 103d Cong., 1st Sess. 644-46 (1993) ("NAFTA SAA") at 646.

"Some binational panels have not afforded the appropriate deference to U.S. agency determinations required by the U.S. Supreme Court in the Chevron decision...Panels...are restricted to examining whether the agency's view is a permissible construction of the statute...It is the Committee's expectation that, in the future, binational panels will properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the International Trade Commission."⁵⁶

The inclusion of a state court judge with no international trade law experience on the *Softwood Lumber* CVD Panel resulted directly from this revision to Chapter 19.

Congress passed legislation in the NAFTA Implementation Act to ensure that it maintained an important role in the selection of panelists. Section 402 of the Act required the U.S. Trade Representative to submit preliminary lists, final lists and amendments to the roster of potential Chapter 19 panelists to the Senate Committee on Finance and the House Committee on Ways and Means for consultation and, implicitly, approval.⁵⁷

The United States sought to enforce greater binational panel deference by making ECC proceedings more like ordinary appeals to the CAFC, through three revisions to Chapter 19. First, Article 1904.13(a)(iii), governing ECCs, was revised to clarify that ECCs could find that a panel had "manifestly exceeded its power, authority or jurisdiction...by failing to apply the appropriate standard of review." Second, Article 1903.13 was revised to clarify that ECCs are to examine "the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904.13 has been established... ." ECCs

⁵⁶ Senate Joint Report at 42-42.

⁵⁷ See 19 U.S.C. § 3432(c)(3) and (4).

under NAFTA would receive copies of the relevant portions of the underlying administrative record subject to binational panel review,⁵⁸ unlike ECCs under the FTA. Third, the time available for ECC review was tripled from 30 to 90 days.⁵⁹ These changes were intended to focus the deliberations of future ECCs on the chief complaint of the United States, that binational panels fail to apply the proper standard of review by according insufficient deference to Commerce and the ITC. More rigorous ECC review would encourage binational panels to be more conservative in their application of the standard of review.

The SAA confirms the U.S. intention to transform ECC review into an ordinary appeal:

"{F}ailure by a binational panel to apply the appropriate standard of review would qualify as a ground for ECC review under Article 1904(a)(iii). In negotiating the NAFTA what was clearly implied in Article 1904.13(a)(iii) of the CFTA, namely that a binational panel that failed to apply the appropriate standard of review would per se be considered to have manifestly exceeded its powers, authority or jurisdiction. This amendment affirms the central importance to the functioning of the binational panel system of strict adherence by panels to the proper application of the judicial standard of review of the importing country.

{T}he changes to Annex 1904 clarify that an ECC's responsibilities do not end with simply ensuring that the panel articulated the correct standard of review. Rather, ECCs are to examine whether the panel analyzed the substantive law and underlying facts."⁶⁰

The House Report accompanying Annex 1904.13 accords with the SAA:

⁵⁸ See Rules of Procedure for Article 1904 Extraordinary Challenge Committees, Rule 7.

⁵⁹ NAFTA, Annex 1904.13(2).

⁶⁰ NAFTA SAA at 195-97.

"ECCs must examine the legal and factual analysis underlying the findings and conclusions of the panel's decision...Annex 1904.13...also triples the length of time available to the ECC to undertake its review...By expanding the period of review and requiring ECCs to look at the panel's underlying legal and factual analysis...ECCs are also to examine whether the panel correctly analyzed the substantive and underlying facts."

Congress sought to avoid repetition of the *Live Swine* ECC, which "felt that the panel may have erred" but refused to reverse on grounds that the very strict conditions for ECC review had not been met.⁶¹

Despite these U.S. efforts, the ECC opinion for *Grey Portland Cement and Clinker from Mexico* of October 30, 2003, the first under NAFTA, suggests that ECCs may continue to view their jurisdiction as more limited than that of a normal appellate court. In that opinion, the ECC reaffirmed that "an extraordinary challenge is not the equivalent of a legal appeal" but "is reserved for extraordinary situations where there are substantial allegations of legal error, such as gross misconduct, serious departures from fundamental rules of procedure, action that manifestly exceeds a panel's authority or similar acts that threatens {sic} the integrity of the panel review process."⁶²

The full impact of changes to the ECC process under NAFTA on Extraordinary Challenges is yet to be seen, but the impact of these changes on binational panels is apparent. Panelists, like judges, seek to avoid appeal and reversal. Panelists under the CUSFTA knew they could not be appealed and were subject almost exclusively to allegations of misconduct or conflict of interest. NAFTA panelists, however, are on notice that their decisions can be effectively appealed, and on further

⁶¹ *Live Swine ECC Opinion* at 15.

⁶² *Cement ECC Opinion* at 2.

notice that such appeals will arise from the United States when they are insufficiently deferential, exercise independence, or apply their trade expertise.

The only NAFTA ECC to date, *Cement*, did not apply the revised ECC standards the way the United States would have them applied. Nevertheless, the message from the United States to future panelists is clear: decisions by international trade experts that too aggressively question U.S. agency determinations will be challenged. The United States will not wait for extraordinary circumstances to launch Extraordinary Challenges.⁶³

Canada inadvertently endorsed and enhanced the U.S. transformation of Chapter 19 by adopting portions of the U.S. SAA verbatim, and thus the U.S. understanding of the procedural changes. The new Chrétien government in Ottawa, justifying the apparent reversal in its political position by supporting NAFTA, declared that there were no changes in the agreement from the CUSFTA; it asserted that the U.S. implementing legislation was merely "clarifying" certain technical aspects of the CUSFTA. Until that point, every ECC decision had confirmed the extremely narrow review available before an ECC. The United States, and in turn Canada's SAA, repudiated these decisions. The United States was permitted to "clarify" ECCs into a

⁶³ The United States has brought an Extraordinary Challenge against the panel decision in *Pure Magnesium from Canada*, File No. ECC-2003-1904-01USA, alleging *de novo* review and suggesting that the panel reweighed the evidence and made findings of its own instead of remanding to the agency to make findings based on instructions or questions raised by the panel. See U.S. Request for an Extraordinary Challenge Committee, *In the Matter of: Pure Magnesium from Canada*, File No. ECC-2003-1904-01USA (Sep. 24, 2003). A challenge committee was formed only in late May 2004. The binational panel was forced to make its remand instructions more explicit on the third remand, after Commerce refused to comply with the Panel's instructions in the first two remands, making the ECC appear to be a test of whether the mechanism can succeed as an ordinary appeal, and whether a standard of review can be enforced that provides both extreme deference and panel inability to bring about agency compliance.

judicial appeal process with a longer review period and a review of the underlying record, intimidating binational panelists if not changing fully the ECCs themselves.

2. The United States Has Succeeded In Relaxing The Legal Tests, And Reducing The Evidentiary Burden, For Imposing Trade Protection Through The Chapter 19 Process

Commerce has accompanied its campaign to secure greater binational panel deference with efforts to forge a salutary binational panel jurisprudence, undoing the main legal bases for its panel defeats by arguing in case after case for the simplification of legal tests and a reduction in the evidentiary burden for imposing countervailing duties. Indeed, Commerce argued before panels positions inconsistent with the advocacy of the Department of Justice before the CIT, seeking greater authority, discretion, and legal simplification.⁶⁴

This section presents three examples of Commerce's strategy of pushing the legal envelope before binational panels in an effort to facilitate the future imposition of trade relief. Perhaps the prime example of this strategy was Commerce's drive, over a period of years, to simplify its specificity test from four factors to one. In the *Softwood Lumber* CVD investigation, Commerce for the first time sought to measure benefit using cross-border benchmarks, and issued countervailing duty (and dumping) margins prior to the development of any legal justifications for them.

⁶⁴ Justice argued that Commerce had properly analyzed all factors under its specificity test in both PPG and Georgetown Steel. See *PPG Industries, Inc. v. United States*, Brief of the Defendant-Appellee United States (Oct. 17, 1991) at 35-36; see also Defendant's Memorandum in Opposition to Plaintiff's Motions for Judgment Upon the Agency Record at 19, *Georgetown Steel Corp. v. Saudi Iron and Steel Company* (No. 91-07-00496).

- a. Commerce succeeded in whittling the specificity test down from four factors to one
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Before Commerce finds that a foreign government program is countervailable as a "domestic subsidy," Commerce must first find that it confers some benefit, by law or in fact, upon a "specific enterprise or industry or group of enterprises or industries."⁶⁵ The methodology for making this determination is known as the "specificity test," under which Commerce considers whether a government program is *de jure* or *de facto* specific. Canada enjoyed binational panel victories in *Pork, Swine*, and *Softwood Lumber* because of the U.S. failure to apply this test properly. Commerce published in 1989, but did not formally promulgate, regulations identifying four factors relevant to its consideration of whether a program is *de facto* specific.⁶⁶ Controversy centered around whether Commerce's consideration of all four factors was obligatory or

⁶⁵ See 19 U.S.C. §§1671(a)(1) (countervailing duties may be imposed where Commerce finds the provision of a countervailable subsidy), 1677(5)(A)(a) (a subsidy must be specific to be countervailable).

⁶⁶ See *Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments*, 54 Fed. Reg. 23,366, 23,379 (1989). The proposed regulations state in relevant part:

(b)(1) Domestic programs.

Selective treatment, and a potential countervailable domestic subsidy, exists where the Secretary determines that benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry or group of enterprises or industries.

(2) In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:

- (i) The extent to which a government acts to limit the availability of a program;
- (ii) The number of enterprises, industries, or groups thereof that actually use a program;
- (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
- (iv) The extent to which a government exercises discretion in conferring benefits under a program.

Id.

discretionary. Canada's principal legal defense in countervailing duty actions was Commerce's obligation to analyze all four specificity factors, duly weighing factors militating against a finding of specificity, consistent with the standard of review in international trade requiring consideration of the record as a whole, including evidence that might detract from the views of the agency.⁶⁷

Commerce sought to liberate itself from the law and logic of the four-factor specificity test through the Chapter 19 process. Several U.S. court decisions had upheld Commerce's finding of *de facto* specificity based upon multiple factors in the proposed regulations.⁶⁸ The Department of Justice, in representing Commerce before the CIT and the CAFC, argued for the appropriateness of a multi-factor specificity analysis.⁶⁹ But representing itself before binational panels, Commerce asserted that it possessed the discretion to find specificity after analyzing as few as one of the four relevant factors. Through sheer force of will, and with eventual assistance from Congress, Commerce succeeded in establishing this new practice.

Commerce campaigned for a one-factor specificity test over a series of four cases. Binational panels rejected Commerce's arguments in *Fresh, Chilled, and Frozen Pork*,⁷⁰ accepted them in dicta in *Live Swine*,⁷¹ and finally embraced them in

⁶⁷ *Gerald Metals v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997).

⁶⁸ See *Georgetown Steel Corp. v. Saudi Iron and Steel Company*, 810 F. Supp. 318 (Ct. Int'l Trade 1992); see also *PPG Industries, Inc. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991).

⁶⁹ *Id.*

⁷⁰ See *In the Matter of Fresh, Chilled, and Frozen Pork*, USA-89-1904-06, Brief of the International Trade Administration, United States Department of Commerce (Mar. 6, 1990) at 49-50.

⁷¹ See *In the Matter of Live Swine from Canada*, USA-91-1904-04, Decision of the Panel (June 11, 1993) at 23.

Pure and Alloy Magnesium from Canada.⁷² Commerce wasted no time invoking the *Magnesium* panel decision to defend its single-factor specificity test in its remand determination for *Softwood Lumber*,⁷³ a testament to its overall Chapter 19 strategy.

Commerce's single-factor test was rejected by the *Softwood Lumber* panel on remand in a bitterly contested panel vote along national lines,⁷⁴ a rejection upheld by the ECC over Judge Wilkey's dissent.⁷⁵ Congress then revised the statute through passage of the Uruguay Round Agreements Act to sanction expressly Commerce's preferred single-factor analysis: "the subsidy is specific if one or more of the following {four} factors exist...".⁷⁶ The SAA emphasizes that while "{t}he administration intends that Commerce seek and consider information relevant to all of these factors...where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity...".⁷⁷ The four factor test was legislated into one.

⁷² See *In the Matter of Pure and Alloy Magnesium From Canada*, USA-92-1904-03 (December 14, 1993) at 34-35.

⁷³ Redetermination Pursuant to Binational Panel Remand, *In The Matter of Certain Softwood Lumber Products From Canada*, USA-92-1904-01 (Sept. 17, 1993) at 6.

⁷⁴ *In the Matter of Certain Softwood Lumber Products from Canada*, *supra*.

⁷⁵ *In the Matter of Certain Softwood Lumber Products from Canada*, *supra*, 1994 FTAPD LEXIS 11). The ECC majority in *Lumber* summarized Commerce's position as

[the] use [of] a sequential approach when considering the four matters they are directed to investigate by their proposed regulations (54 Fed. Reg. at 23,379 (to be codified at § 355.43(b)(2))). If they are satisfied that one of the factors is met Commerce need not consider the other factors. They will not, however, make a negative finding of non-specificity until all factors have been considered.

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⁷⁶ 19 U.S.C. § 1677 (5a)(D)(iii).

⁷⁷ *Statement of Administrative Action*, H.Doc. 103-316, Message from the President of the United States Transmitting the Uruguay Round Trade Agreement, 103d Cong., 2d Sess. (1994) at 931.

Canada could have challenged the United States under NAFTA Article 1903 for revising the U.S. antidumping laws to circumvent an adverse binational panel decision, as detailed below, but did not.

b. Commerce got away with crafting its cross-border benchmark from inaccurate U.S. auction data

Having secured a relaxed specificity test, Commerce sought to relax the requirements for measuring benefit in the current *Softwood Lumber* CVD investigation by embracing cross-border benchmarks. The Department had long rejected cross-border benchmarks out of the recognition that "thick border" effects, including "species combination, density, quality, size, age, accessibility, and terrain and climate," make cross-border comparisons of U.S. and Canadian stumpage prices impossible.⁷⁸ Commerce's newfound reliance on cross-border benchmarks was not only contrary to law, but also unsupported by substantial evidence – the second element of the applicable standard of review.

The key assumption behind Commerce's use of U.S. auction data to construct its cross-border benchmark, that these prices represent "adequate remuneration" for stumpage subject to "prevailing market conditions,"⁷⁹ was demonstrably incorrect. Commerce's failure to verify these pricing data as accurate, on grounds that only foreign data need be verified, was consistent with its long-term strategy of relaxing the evidentiary burden for imposing trade protection through the Chapter 19 process.

⁷⁸ See *Certain Softwood Lumber Products from Canada*, 48 Fed. Reg. 24159, 24168 (May 31, 1983).

⁷⁹ See IDM at 45; see also Commerce Nov. 15 Opp. Brief at D-44 (U.S. public timber sale prices were "an estimation of all market-based prices, including those from private lands.").

U.S. government reports placed on the administrative record further demonstrated that state and federal auctions were rife with inefficiencies that completely divorced the resulting prices from "prevailing market conditions."⁸⁰ For example, officials in Minnesota and Michigan establish timber reserve prices – minimum prices -- on the basis of the prior year's auction prices or government appraisals, without consulting current market pricing.⁸¹ Many bids placed at USFS auctions are for stumpage rights several years in the future, severing the link between bidding and current market conditions.⁸² The prices resulting from these auctions would reflect not current market prices, but prices the year before or prices based upon market conditions projected years into the future.

USFS auction data were particularly distorted, as the Coalition readily acknowledged in its briefs, and as Commerce itself acknowledged in its preliminary determination. The USFS does not place timber on the market in response to demand conditions, as would a private seller, but according to its "cruising" schedule and environmental considerations.⁸³ As the USFS has been forced to prioritize

⁸⁰ Submission by Baker & Hostetler LLP to the U.S. Department of Commerce, "Prices For Standing Timber On U.S. Public Lands Cannot Serve As Market Prices Or Benchmarks," Case No. C-122-839 (Dec. 31, 2001) ("Auction Pricing Submission").

⁸¹ See Letter from Baker & Hostetler LLP to the U.S. Department of Commerce (Dec. 28, 2001), at Attachs. 3 and 4 (Declarations of Laura C. Farhang).

⁸² See Final Negative Countervailing Duty Determinations: Certain Softwood Products From Canada, 48 Fed. Reg. 24159, 24168 (May 31, 1983).

⁸³ See Auction Pricing Submission at Exhs. 5 (John M. Berry, *The Owl's Golden Egg; Environmentalism Could Boost Lumber Profits and Prices*, The Washington Post, Aug. 4, 1991 (citing Mark S. Rogers, *What's Good for the Spotted Owl is Great for the Wood-Products Industry*)), 6 (Darius M. Adams, *Is the Level of National Forest Timber Harvest Sensitive to Price*, Land Economics, at 73 *et seq.* (Feb. 1991) (U.S. government decisions unrelated to timber market affect supply and price of timber), 7 (Gregory Amacher, *Government Preferences and Public Forest Harvesting: A Second Best Approach*, Am. J. of Agric. Econ. (Feb. 1, 1999) (government decisions regarding the quantities of timber to be sold depend on factors unrelated to natural market forces – e.g., conservation and raising revenue for school budgets)), 8 (*Lumber Price Decline*, Housing Econ. at 7-8 (June 8, 1998) ("government forest policies,

environmental protection over timber production, more and more federal lands have been taken out of circulation.⁸⁴ Although the Bush administration has attempted to relax environmental standards through revisions to the National Forest Management Act regulations,⁸⁵ the new rules are politically motivated, and unrelated to any change in market demand for timber.

The USFS also has failed to maximize competition by maximizing the number of bidders for each auction, determined largely by a region's terrain and mill concentration, or by conducting its auctions on the basis of sealed bids.⁸⁶ The USFS's slipshod auctions, and its lack of any financial accountability,⁸⁷ have yielded increasing financial losses since 1995, culminating in a \$126 million loss in 1998.⁸⁸ USFS auction

including those that regulate timber on public lands, and trade policies, such as the quota on Canadian lumber, have made {price} volatility more severe”), and 9 (Jay Sullivan and Gilles J. Keith, *Assessing Public Timber Harvest Impacts In A Mixed Public/Private Stumpage Market*, (University of Toronto Press 1996) (illustrating impact of public harvest levels on prices, and analyzing public harvest levels’ impact on private timber suppliers and local economies).

⁸⁴ See Baker Dec. 31 Letter at Exh. 2 (Land Ownership: Information on the Acreage, Management and Use of Federal and Other Lands, GAO/RCED-96-40 (Mar. 13, 1996)), Exh. 3 (Forest Service: Barriers to Generating Revenue or Reducing Costs, GAO/RCED-98-58 (Feb. 13, 1998)).

⁸⁵ The Defenders of Wildlife website provides an overview and critique of these policy changes. See "H.R. 1904, Bill To Fight Fires With Logging, Aggravates Bush Forest Policy Rollbacks," Defenders of Wildlife website (Oct. 30, 2003), <http://www.defenders.org/forests/forest/103003.html>, last visited April 16, 2004; see also "Bush Administrative Eases Logging Rules," CNN.com (Mar. 24, 2004), <http://www.cnn.com/2004/ALLPOLITICS/03/24/forest.plan.ap/>, last visited April 16, 2004 (Bush administration relaxes environmental standards for logging federal old growth forests in the Pacific Northwest, though only for tress slated for logging as of 1994).

⁸⁶ Baker Dec. 31 Letter, Exh. 24 at 2.

⁸⁷ *Id.* at Exh. 17 ("Major Management Challenges and Program Risks: Department of Agriculture," GAO Performance and Accountability Series (GAO-01-242, Jan. 1, 2001)).

⁸⁸ *Id.* at Exh. 15 (*Timber Sales Program Annual Report*, National Summary, USDA FS, Fiscal Year 1998 (July 1999)). Since 1998, USFS has not released cost/revenue data for its operations, admitting that accounting procedures prevent accuracy. The General Accounting Office continues to conclude that the auction system is divorced from market reality. See Letter from Linda M. Calbom, Director, Financial Management and Assurance, to the Honorable Cynthia McKinney, "Financial Management: Annual Costs of Forest Service's Timber Sales Program Are Not Determinable," GAO-01-1101R Forest Service Timber Costs (Sep. 21, 2001).

prices, therefore, could not possibly reflect "market conditions" in the United States, or represent "adequate remuneration" for timber, as the statute requires.

The statute requires that "adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided." It does not matter whether the distortions in the USFS's auctions increased or lowered timber prices. Commerce should not be able to use USFS auction prices to gauge adequacy of remuneration because they do not reflect "prevailing market conditions."

Yet, the Panel did not pass on the issue of whether the U.S. timber price data Commerce relied upon to construct its cross-border benchmark was unsupported by substantial evidence, and held only that the cross-border benchmark was contrary to law, as inadequately adjusted to account for cross-border differences. The panel made no finding that U.S. auction data were unusable, because not representative of "adequate remuneration" or "present market conditions."⁸⁹ This omission opened the door for the Coalition to urge Commerce to maintain its cross-border benchmark on remand by tinkering with the adjustments made to the auction data, to better simulate private transaction prices under market conditions in Canada.⁹⁰ It would appear to have enabled Commerce to rely on U.S. log prices in its remand determination, under the guise of Canadian import prices.

⁸⁹ The Panel's criticism of U.S. auction data was limited to two sentences: "In the preliminary Determination, the Department declined to use USFS auction prices because there appeared to be a lack of credible evidence that the data available yielded reliable market values. Yet, in the Final Determination, on the same evidence, USFS prices were used to create benchmarks." CVD Panel Decision at 33-34.

⁹⁰ See Letter from Dewey Ballantine LLP to the U.S. Department of Commerce, Case No. C-122-839 (Aug. 27, 2003).

Had the panel found Commerce's use of defective auction prices unsupported by substantial evidence, there would have been no possibility of a cross-border benchmark of any kind on remand, and less of a possibility of cross-border benchmarks in future investigations or administrative reviews. Commerce relinquished its cross-border benchmark on remand, in favor of a log benchmark allegedly constructed from prices inside Canada, but the most damaging data for Canadian interests still come from the United States.

- c. Commerce got away with releasing the dumping and countervailing duty margins before developing their legal justification
-

Commerce released the final countervailing duty margins in the current *Softwood Lumber* dispute at noon on March 22, 2002, but did not release the official *Federal Register Notice and Issues and Decision Memorandum* ("IDM") justifying the margins until nearly 6 p.m. on March 25, 2002. The joint Canadian complaint and initial brief to the panel charged that Commerce "violated statutory requirements and prejudged the final determination when it issued duty rates without any accompanying rationale" because "it was not until...four days after the decision was due...that any explanation to justify the rates was issued."⁹¹ Commerce's vehement response alleged "irresponsible" smear tactics against Commerce officials "beyond reproach,"⁹² who had used the days following the release of the margins "to resolve a few final details, edit and proofread" the Notice and IDM.⁹³ Prejudgment of the investigation would be

⁹¹ Canadian Aug. 2 Joint Br. at K-24-26.

⁹² Commerce Opposition Brief, File No. USA-CDA-2002-1904-03 (Nov. 15, 2002) at F-64.

⁹³ *Id.* at F-54-55.

grounds for revocation of the order,⁹⁴ and giving Commerce a pass on prejudgment would embolden the agency to push the procedural envelope in future cases.

Counsel for the Ontario industries pursued the claim. Baker & Hostetler LLP filed a FOIA request and a subsequent lawsuit in federal district court, requesting all documents generated by Commerce between the release of the final determination and the release of the IDM. Commerce admitted that it had produced over 14,000 pages of such documents, but invoked the "deliberative process" privilege to avoid producing many of them. The sheer volume of materials produced belied Commerce's claim that it was merely editing and proofreading the IDM. Commerce's invocation of the deliberative process privilege confirmed the obvious: the "deliberative process" exemption under FOIA applies only to "predecisional deliberations."⁹⁵ Commerce admitted that it was deliberating on the final determinations for at least three days after it published the duty margins and class or kind determinations. Thus, Commerce knew the results of the final determination even before having developed reasons or reasoning, law or justification, to support them. Unredacted portions of the released documents bore out Canada's charge that Commerce had prejudged key aspects of the investigation.

Commerce released most of the documents in response to Baker & Hostetler's FOIA request on March 12, 2003, after the normal briefing period had concluded. The panels still possessed the authority to accept supplemental briefing at

⁹⁴ See *In re Sang-Su Lee*, 277 F.3d 1338, 1345 (Fed. Cir. 2002) (quoting *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)) ("{C}ourts may not accept appellate counsel's post hoc rationalization for agency action.").

⁹⁵ See, e.g., *Senate of Commonwealth of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 585 (D.C.Cir. 1987).

that time on events occurring subsequent to briefing.⁹⁶ Counsel for the Ontario industries filed a motion for supplemental pleading accompanied by a supplemental brief arguing the prejudgment claim based upon the released documents.⁹⁷ They also submitted as subsequent authority a federal court order from the FOIA litigation confirming that Commerce had continued its deliberations after releasing the final margins.⁹⁸

The Panel rejected the motion for supplemental pleading and made no mention of the prejudgment issue in its decision. Commerce apparently has established that it may issue *post hoc* rationalizations of countervailing duty margins with impunity.

- d. The United States has succeeded in robbing panel decisions of their finality

Commerce has met with some success in its project of shaping Chapter 19 jurisprudence, but as a hedge against failure, Commerce has sought to limit the reach of adverse panel decisions. Commerce adopted the view, at the very beginning of the CUSFTA, that every Chapter 19 adjudication would be considered *sui generis* and binding only for the instant proceeding. Commerce would not be required, in any subsequent administrative review, to respect a panel decision, nor even Commerce's

⁹⁶ See Notice Of Motion For Supplemental Pleading and Proposed Order under Rule 61, and Supplemental Brief on behalf of The Ontario Forest Industries Association, The Ontario Lumber Manufacturers Association, And Tembec Inc., File No. USA-CDA-2002-1904-03 (May 16, 2003); Notice Of Motion For Supplemental Pleading and Proposed Order under Rule 61, and Supplemental Brief on behalf of The Ontario Forest Industries Association, The Ontario Lumber Manufacturers Association, And Tembec Inc., File No. USA-CDA-2002-1904-02 (May 16, 2003).

⁹⁷ *Id.*

⁹⁸ See Notice of Subsequent Authority Pursuant to Rule 68(1)(b)(i) on Behalf of the Ontario Forest Industry Association, the Ontario Lumber Manufacturers Association, and Tembec Inc., File No. USA-CDA-2002-1904-03 (May 16, 2003).

own remand determination, from any prior proceeding. Commerce went so far as to warn panels, in its remand determinations, that it would follow the panels' instructions but would reject any subsequent application of panel rulings.⁹⁹

Commerce sought, by this repudiation of panel authority to settle an issue, to limit panels to immediate matters and to otherwise emasculate Chapter 19. There would be limited value, for example, in establishing in an investigation or administrative review that a government program is not countervailable, if Commerce could assert countervailability and apply duties in a subsequent review, even on the same grounds as those previously rejected by a binational panel.

Canada tested Commerce in the *Live Swine* reviews.¹⁰⁰ The panel in *Fresh, Chilled and Frozen Pork* had found Québec's Farm Income Stabilization Insurance ("FISI") not countervailable. That decision was put before a panel reviewing the same program, for essentially the same time period (a nine-month overlap) under a countervailing duty order for *Live Swine*. The *Live Swine* panel adopted the same position as the *Pork* panel, finding the program not countervailable. But Commerce rejected the implication of this panel decision, and in the subsequent administrative review of the *Live Swine* order, resumed countervailing the program, and on the same grounds as before.

Nothing in Article 1904, under either the CUSFTA or NAFTA, suggests that panel decisions are not final with respect to particular government programs in

⁹⁹ See, e.g., *In the Matter of Fresh, Chilled, and Frozen Pork*, USA-89-1904-06, Department of Commerce Redetermination Pursuant to Remand (April 11, 1991). The ITC adopted the same approach.

¹⁰⁰ Québec was the principal litigant in this and many of the other early binational panel cases because Québec was the province most targeted by subsidy allegations at that time.

dispute. Article 1904.13 provides that "the decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel." Commerce contended that "particular matter" could mean only the instant panel, even though the language suggests that a binational panel holding that a particular government program is non-countervailable, the facts of which would not change from one review to the next, should preclude the re-litigation of the same program.

Commerce endeavored to rob panel decisions of their finality in order to retain the discretion to re-litigate issues that appeared to be settled under Chapter 19. On remand, Commerce refused to find FISl not countervailable, and instead merely eliminated FISl from the duty calculation for the period of review.¹⁰¹

Perceiving Commerce's intention to re-litigate FISl's countervailability in future administrative reviews and investigations, Québec returned to the panel, and urged the panel to instruct Commerce to find FISl expressly non-countervailable.¹⁰² Canada, however, did not support the Québec position. The panel then rejected Québec's request, and affirmed Commerce's remand determination, essentially on grounds that Commerce's deletion of FISl from its duty calculation could be interpreted as a finding of non-countervailability.¹⁰³

¹⁰¹ *In the Matter of Fresh, Chilled and Frozen Pork*, USA-89-1904-06, Department of Commerce Redetermination Pursuant to Remand (April 11, 1991).

¹⁰² See *In the Matter of Fresh, Chilled and Frozen Pork*, USA-89-1904-11, Notice of Motion Pursuant to Rule 75(2) Requesting Panel Review of Second Commerce Determination on Remand (filed April 26, 1991).

¹⁰³ *In the Matter of Fresh, Chilled and Frozen Pork*, USA-89-1904-11, Memorandum Opinion (June 3, 1991), at 2.

Québec, concerned with the issue of finality, sought to convince Ottawa to file an Extraordinary Challenge on grounds that the panel had illegally accepted as final a determination that did not satisfy statutory requirements. But Ottawa expressed concern that Québec's grievance would transform the ECC process into an ordinary appeal, and did not lodge an Extraordinary Challenge. Commerce then continued to litigate FISI's countervailability in successive administrative reviews of the *Live Swine* order, and established that in the CUSFTA, nothing was necessarily final.

Québec's challenge to the countervailability of FISI resumed in the *Live Swine* reviews, seeking to establish a Chapter 19 jurisprudence on finality. Québec's rationale was not so much economic – Québec principally exported pork, not swine -- but strategic: Canada would be in a better position to mitigate Commerce's protectionist excesses through Chapter 19 appeals were panel decisions final. Canada then directed its counsel to participate in the *Live Swine* reviews.

Unfortunately, the Canadian government of the day joined Commerce in opposing the finality of panel decisions, in an effort to protect the National Tripartite program against the *Pork* panel's holding that the program was countervailable. Canada's opposition doomed Québec's arguments for finality.¹⁰⁴ Québec argued that

¹⁰⁴ In its *Swine IV* case brief, Canada attempted to suggest that the *Pork* panel decision could not bind a subsequent panel. Brief Of The Government Of Canada, *In The Matter Of: Live Swine From Canada*, USA-91-1904-03 (Nov. 15, 1991) at 10-11 (asserting that Tripartite's countervailability as found by the *Pork* panel did not apply in *Swine*, which is "on a different administrative record, and involving a different commodity, period, and Commerce Department rationale than those under review here."). In the *Swine III* reply brief, Canada directly challenged the *Pork* panel decision and insinuated that to apply the *Pork* panel decision was to favor Québec's FISI over Canada's Tripartite Program:

While [the National Pork Producers Council] urges this Panel to swallow whole the second *Pork* decision with respect to Tripartite, it backpedals furiously with respect to the portion of the same decision on FISI.

the doctrines of collateral estoppel and administrative practice dictated that panel decisions be final and binding on all future disputes, bolstering its case with an opinion letter to both panels from Harvard Law School Professor Arthur Miller, one of the nation's foremost experts on civil procedure generally, and collateral estoppel in particular.

Canada countered that collateral estoppel was inapplicable to trade cases generally, or at least to panel decisions in particular. Canada also argued that Commerce had never really found FISI non-countervailable in its remand determination, though this situation had resulted from Canada's own decision not to request an ECC in *Pork* when Commerce's remand determination failed to conform to the panel's remand order. Canada's counsel testified at the *Swine IV* public hearing that every panel decision was temporary and limited to the facts of the review period, permitting mistakes made by one panel to be corrected by a subsequent panel.

Commerce relied on the lack of finality established in *Swine IV* for its victory in *Swine V*, in which the Panel upheld Commerce's single-factor specificity test in contradiction of the *Pork* panel decision. The Canadian Government's decision to oppose the finality of binational panel decisions might have served that government's short term interest in re-litigating the countervailability of the Tripartite Program. But the

Reply Brief of the Government of Canada, *In The Matter Of: Live Swine From Canada*, USA-91-1904-03 (Jan. 31, 1992) at 8. Canada's brief thereupon challenged the *Pork* panel decision's legal conclusions. *Id.* n. 7.

Finally, Canada's brief implicitly adopted Commerce's and NPPC's legal position that a panel decision is binding only insofar as it is "intrinsically persuasive," asserting that, "The NPPC might find that second decision persuasive; we do not." *Id.* Canada's brief concluded by attacking the finality of the *Pork* panel decision: "this panel [must] base its decision in this case on this record, not on the record in another -- even a related -- proceeding." *Id.* at 9 (emphasis on original). This was the same argument mounted by the NPPC and Commerce against the application of collateral estoppel to favor FISI.

program was legislated out of existence the following year, and panel decisions have never regained the finality they once promised.¹⁰⁵

3. The United States Has Modified U.S. Law To Escape Adverse Binational Panel Decisions In Violation Of NAFTA Article 1903

What Commerce has been unable to accomplish before binational panels, such as a single-factor specificity test, the U.S. Congress has accomplished by revising the U.S. trade laws to overturn adverse panel decisions. Article 1903 of CUSFTA, now NAFTA, was negotiated to prevent changes in U.S. law from undermining Canada's rights under the Agreement, including the right to binational panel review. The Article specifically provides that:

- 1) A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such an amendment be referred to a binational panel for a declaratory opinion as to whether
 - (a) the amendment does not conform to Article 1902(2)(d)(i) or (ii); or
 - (b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to article 1902(2)(d)(i) or (ii).

NAFTA Article 1902(2)(d) provides that all revisions to a party's antidumping and countervailing duty laws must conform to the party's obligations under the WTO Agreement, and to NAFTA's goal of the "fair and predictable conditions for the progressive liberalization of trade." Under Article 1903, a binational panel may recommend modifications to the amending statute to remedy any non-conformity with NAFTA or the WTO Agreement. Should corrective action not be taken by the amending

¹⁰⁵ FISII was still found, for a third time, not countervailable, even in a one-factor test. Commerce proceeded to countervail it, despite three CUSFTA panel rulings and three conforming remand determinations, in subsequent administrative reviews.

Party to conform its law to the binational panel's recommendations, the affected Party is allowed to take "comparable legislative action or equivalent executive action."

Canada's absolute victory in the *Lumber III* binational panel review, in which the panel instructed Commerce to issue a negative determination, did not prevent Congress from amending the countervailing duty laws to facilitate the domestic industry's next case.¹⁰⁶ Congress used the Uruguay Round Agreements Act as a pretext for amending the U.S. trade laws in response to Canada's victory in *Lumber III*, and essentially overturn two key panel holdings in that dispute. The panel rejected Commerce's contention that it could find a program specific after analyzing only one of the four relevant specificity factors; Congress amended the statute to sanction Commerce's abbreviated, one-factor approach to this determinative issue. And the panel held that Commerce had failed to analyze the effects of the alleged subsidy before establishing the subsidy's existence; Congress eliminated this requirement as well.¹⁰⁷ Congress enacted these statutory revisions expressly to facilitate a future affirmative countervailing duty determination against Canadian softwood lumber imports.¹⁰⁸ The SAA announced the connection.¹⁰⁹

¹⁰⁶ See Macrory, *supra.*, at 23.

¹⁰⁷ *Id.* at 12-13.

¹⁰⁸ Gagne, *supra.*, at 85.

¹⁰⁹ See Uruguay Round Agreements Act Statement of Administration in H.R. Doc. No. 103-316 (Sept. 27, 1994) at 926. ("In *Certain Softwood Lumber Products from Canada*, USA-92-1904-02, a three-member majority ruled that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation....Although this panel decision would not be binding in future cases, the Administration wants to make clear its view that the new definition of subsidy does not require that Commerce consider or analyze the effect....")

Canada criticized the United States for broadening the application of trade remedies through the Uruguay Round Agreements Act.¹¹⁰ But Canada did not request an Article 1903(1)(a) panel review of these protectionist revisions to U.S. law, an action to which Canada was entitled, on grounds that these statutory revisions functioned to overturn the *Lumber III* panel decision.

Canada also declined to implement Article 1903(1)(b) against U.S. efforts to revise the U.S. antidumping and countervailing duty laws in a manner contrary to its obligations under the WTO Agreement. The Continued Dumping and Subsidy Offset provision enacted on October 28, 2000, otherwise known as the "Byrd Amendment," is a prime example. Under the Byrd Amendment, dumping and countervailing duties are no longer paid into the U.S. Treasury, but instead are distributed annually to "affected domestic producers" – petitioners or domestic producers expressing support for a petition. The Byrd Amendment is highly unfavorable to Canadian exporters, both because it provides a financial incentive for the filing and domestic industry support of antidumping and countervailing duty petitions, and because it subsidizes U.S. competitors. U.S. companies received \$293 million under the law in 2003,¹¹¹ and the United States has insisted in *Softwood Lumber* negotiations that as much as \$1 billion in Canadian deposits should be given over to the competing U.S. industry in compliance with the Byrd Amendment.

¹¹⁰ See Gagne, *supra.*, at 87.

¹¹¹ See *Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000*, Congressional Budget Office (Mar. 2, 2004), <http://www.cbo.gov/showdoc.cfm?index=5130&sequence=0>, last visited April 16, 2004.

Canada joined many other countries in challenging the Byrd Amendment through WTO dispute settlement. The Appellate Body affirmed the Panel's findings that the Byrd Amendment violates multiple provisions of the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures.¹¹² Yet, Canada did not act outside the WTO with a request for Article 1903 panel review of the Byrd Amendment, even as the U.S. refuses to comply with the WTO Appellate Body ruling.¹¹³ The Byrd Amendment remains on the books, applicable to Canada. The December 27, 2003 deadline for its repeal passed with no action.¹¹⁴

B. The United States Has Sought To Undermine Chapter 19 Institutionally, Stripping Binational Panel Reviews Of Their Expedition

The United States has sought to weaken Chapter 19 institutionally, the second prong of its strategy, by sabotaging the work of the panels themselves. The U.S. Section of the NAFTA Secretariat has been manipulated politically, starved of funds and drastically understaffed. The United States has disregarded the deadlines for constituting binational panels and filling vacancies. Securing panelists has been made more difficult by low panelist pay and a shortage of experts on the U.S. and Canadian rosters ready and willing to serve on binational panels. As a consequence, the duration of panel proceedings has increased by nearly 50 percent since 1995, and now exceeds the duration of cases settled at the CIT.

¹¹² *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body, WT/DS217/AB/R, WT/DS234/AB/R (16 Jan. 2003) at para. 318.

¹¹³ See "Co-Complainants Hold Talks On Response To U.S. Non-Compliance On Byrd Amendment," BNA International Trade Daily (Dec. 9, 2003) ("early 70 senators wrote to Bush asking that the law be preserved.").

¹¹⁴ *Id.*

1. The United States has succeeded in making panel reviews less expeditious and more costly
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The United States has succeeded in protracting NAFTA panel proceedings using a variety of means, undermining one of the most important benefits to Canadian complainants under Chapter 19. NAFTA Article 1904.13 provides that the United States is to adopt binational panel rules of procedure "designed to result in final decisions within 315 days of the date on which a request for a panel is made." In 1995, the GAO reported the duration of binational panel proceedings averaged 502 days.¹¹⁵ NAFTA Panels reviewing Canadian agency decisions affecting U.S. exports still average only 507 days, the shortest average completion time for Chapter 19 cases.¹¹⁶ The average duration of a NAFTA panel proceeding initiated by Canadian complainants against U.S. antidumping or countervailing duty determinations had lengthened to 696 days,¹¹⁷ more than twice the 315-day span NAFTA negotiators envisioned for these cases, and 37 percent longer than binational panel reviews of Canadian AD and CVD actions.¹¹⁸ The duration of these reviews now exceeds the duration of cases settled by the CIT, which took on average, over the 1994-2003 period, 641 days to complete.¹¹⁹ One of the fundamental benefits of binational panel review over CIT review has been lost.

¹¹⁵ GAO Report at 56.

¹¹⁶ See "Duration Of Panel Reviews In Canada (In Days)," attached as Exhibit 1.

¹¹⁷ See "Duration Of Binational Panels Reviewing U.S. Determinations And Delays In Panel Selection (In Days)," attached as Exhibit 2.

¹¹⁸ *Id.*

¹¹⁹ See Exhibit 3. Average time for completion of CIT cases includes remands but excludes CIT decisions that were appealed to the CAFC. The duration of cases decided before the CIT without appeal to the CAFC are more comparable to the duration of cases decided before binational panels, as binational panel decisions cannot be appealed except under extraordinary circumstances.

The average length of time for completed NAFTA panels reviewing U.S. agency decisions will only increase as currently active panel reviews are completed, given their state of disarray. Of 30 binational panel reviews active today, 26 are reviewing U.S. agency decisions. Of these, 13 are so-called "dateless panels," with no set decision due dates, indicating that the panels have not yet been assembled or have been suspended.¹²⁰ Some of these panel reviews were requested as far back as 1994.¹²¹ Eight of eleven active panel reviews brought by Canadian complainants have already exceeded 315 days, the panel review duration recommended by NAFTA Article 1904.13. Inclusion of the duration of these active panels as of January 16, 2004, with the duration of completed panel reviews, brings the average duration of panel reviews requested by Canadians to 768 days.¹²² The duration of panel reviews continues to lengthen.

The United States has become adept at exploiting the inefficient panelist selection and replacement procedures provided under Chapter 19. Delays have also resulted from the overly stringent conflict-of-interest standards imposed on panelists after 1997, (apparently in response to the vilifying experience of the *Softwood Lumber* ECC), which have forced the untimely departure of several panelists from active panels. And NAFTA panels have faced open defiance from U.S. agencies refusing to comply

¹²⁰ See generally, NAFTA Secretariat web page at http://www.nafta-sec-alena.org/DefaultSite/dispute/index_e.aspx?articleid=11#n_ch19u (last visited October 27, 2003).

¹²¹ *Id.* Although most dateless panels affect Mexican goods, the scope of the problem suggests that the panel selection process is malfunctioning badly. The United States has deployed the same delay tactics against both Mexican and Canadian complainants; at least one dateless panel concerns Canadian merchandise.

¹²² See Exhibit 1.

with their remand instructions and orders, necessitating additional remands and longer panel proceedings.¹²³

a. The panel selection process is susceptible to abuse

Although the NAFTA Chapter 19 procedure provides specific deadlines for the selection of panelists, these deadlines all too often are disregarded. Missed deadlines have become the rule, rather than the exception, in the panelist selection process, with no effective penalty to enforce compliance. When a party misses the 45 day deadline for appointing its two panelists, NAFTA Annex 1901.2 provides that panelists are to be drawn from the Party's roster by lot, but in practice, panelists are selected by consensus.¹²⁴ The fifth panelist is to be agreed upon by both parties within 55 days, or selected by lot by the 61st day. NAFTA panel reviews cannot be expeditious unless panels are constituted within 61 days of a panel request, as provided under Annex 1901.2.

The United States has taken full advantage of the unenforceability of panelist selection deadlines by disregarding them.

¹²³ Macrory, *supra.*, at 22.

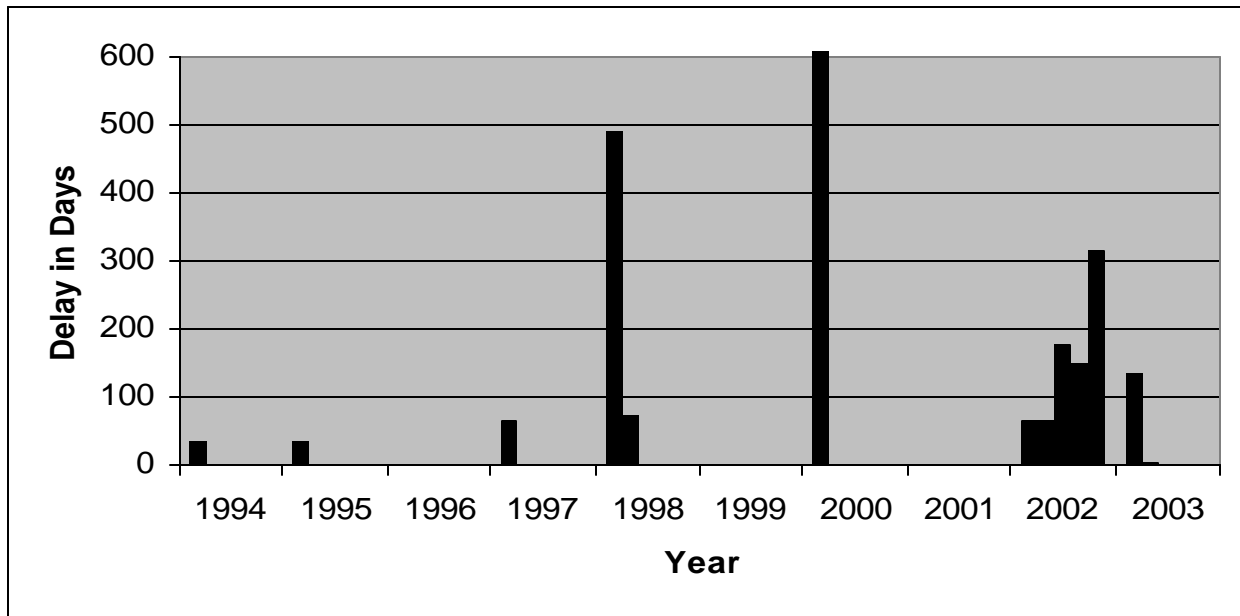
¹²⁴ The NAFTA Annex procedure for the selection of panelists has two parts. Under Rule 2 of the Annex:

“Within 30 days of a request for a panel, each involved Party shall appoint two panelists, in consultation with the other involved Party. . . Each involved Party shall have the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party. Peremptory challenges and the selection of alternative panelists shall occur within 45 days of the request for the panel. If an involved Party fails to appoint its members to a panel within 30 days or if a panelist is struck and no alternative panelist is selected within 45 days, such panelist shall be selected by lot on the 31st or 46th day, as the case may be, from that Party's candidates on the roster.

The fifth and final panelist is selected following the procedure in Rule 3:

Within 55 days of the request for a panel, the involved Parties shall agree on the selection of a fifth panelist. If the involved Parties are unable to agree, they shall decide by lot which of them shall select, by the 61st day, the fifth panelist from the roster, excluding candidates eliminated by peremptory challenges.

Panel Selection Delays In Days, Over The 55 Days Provided Under Annex 1901.2, For All Panel Reviews Concerning Canadian Merchandise (1994-2003)¹²⁵



Only one NAFTA panel review for which data were available suffered no delays: *Hard Red Spring Wheat from Canada*, File No. USA-CDA-2003-1904-06.

These growing delays result in part from the U.S. refusal to select panelists from "off the roster" when no individuals on the roster are available, due to the requirement that all prospective panelists included on the roster be approved by protectionist Congressional committees, as detailed below.¹²⁶ When no individuals on the U.S. roster are available for service on a requested binational panel, the proceeding is effectively suspended indefinitely, until one becomes available.

¹²⁵ See Exhibit 1. Data were unavailable for three NAFTA panel reviews requested in 2000. The one NAFTA panel review requested in 2000 for which data are available, *Certain Carbon Steel Products from Canada*, File No. 2000-USA00-11, had no panel for 1,012 days after the first panel request, which is literally off the chart.

¹²⁶ See *Invitation for Applications for Inclusion on the Chapter 19 Roster*, 64 Fed. Reg. 61171, 61171-72 (Nov. 9, 1999) (citing 19 U.S.C. § 3432).

b. Panel proceedings have been delayed through political manipulation

Delays in panel proceedings also have resulted from the politically-motivated manipulation of the NAFTA Secretariat, functionally part of the judicial branch, by the executive branch. Separation of powers is a fundamental tenet of constitutional government in the United States and, to a lesser degree, Canada. Yet, the NAFTA Secretariat is beholden to the executive branches for resources unlike any court of law. The United States has exploited this major systemic flaw in the Chapter 19 system.

An excellent example of political interference with the judicial integrity of Chapter 19 can be found in April 2004. The U.S. government apparently instructed the NAFTA Secretariat to withhold the *Softwood Lumber injury* panel's second decision from public view while dealing with an impropriety allegation against a panelist. Nothing in the NAFTA Rules permitted such an embargo by a Party, and it would be difficult to imagine that the anticipated visit of the Canadian Prime Minister to Washington was unrelated to this political action. The panel decision issued on April 19, 2004 rejected the ITC's affirmative threat remand determination,¹²⁷ and would have made Canadian softwood lumber producers disinclined to accept settlement at the moment when both federal governments were declaring publicly their expectation that settlement was at hand.

Another example of executive branch pressure can be found in Commerce's deliberate underfunding of the NAFTA Secretariat, U.S. Section. The U.S.

¹²⁷ See *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Remand Decision of the Panel, File No. USA-CDA-2002-1904-07 (Apr. 19, 2004) ("ITC NAFTA Panel Remand Decision").

Section's shrinking budget results from its situation within Commerce's International Trade Administration ("ITA"), the very agency that issues AD and CVD determinations, and defends them before binational panels. Financially strangling the Secretariat advances the ITA's interests by reducing the quality of panelists, protracting binational panel reviews, and increasing the likelihood that Canadian litigants will accept disadvantageous settlements or avoid Chapter 19 altogether.

Within ITA, the U.S. Section is located in the office of Market Access and Compliance ("MAC"), whose mandate includes the enforcement power to insure that foreign industries comply with ITA's dictates. MAC's mission to enforce the ITA's determinations is fundamentally incompatible with the U.S. Section's responsibility for the smooth administration of binational disputes against ITA. As there is no line item budget for the U.S. Section, MAC has used its discretion over the U.S. Section's budget to starve the office of funds, consistent with its charge to advance ITA's interests.¹²⁸

The U.S. Section has suffered for lack of funds, making do with only three employees, one fewer than under the CUSFTA, despite three times the caseload, and a budget of around US\$1 million in most years. By comparison, the NAFTA Secretariat, Canadian Section, has eight employees and a US\$3 million budget, even though its caseload is approximately one-tenth the caseload of the U.S. Section. The U.S. Section has gained a reputation for being slow to pay panelist salaries, often taking up to a year;

¹²⁸ It is well known that Peter Hale, the Principal Deputy Assistant Secretary for Administration within MAC in charge of the U.S. Section's budget, is a personal friend of Joseph Spetrini, Deputy Assistant Secretary of ITA. Mr. Spetrini is known as a leading protectionist at Commerce, and an implacable foe of Chapter 19. See Paul Blustein, "When the U.S. Thinks Goods Are 'Dumped,' He Steps Up," *Washington Post* (July 13, 2003) at F1 ("{Spetrini} has considerable latitude in interpreting the rules and deftly skews the outcome toward high margins, according to a number of former employees who relate similar accounts of how he operates. A term several used to describe Spetrini's approach is "margin shopping," or looking at different ways to calculate an importer's costs or prices and choosing the one that helps fatten the prospective margin to a desirably high level.").

a financial sacrifice that discourages high quality international trade experts from serving on binational panels, with the occasional exception of retirees and trade lawyers with a fortuitous lull in their workload. A gravitation toward academics has not helped much, typically depriving panels of experienced international trade law practitioners.

The U.S. Section has neglected to pay its portion of binational panel costs in Canada and Mexico since 2002, although the Mexican and Canadian Sections have diligently paid their portion of binational panel costs in the United States, perhaps on the expectation that the U.S. Section would use the funds to repay them. Control of Chapter 19's financial needs through MAC, and the exertion of political control over the NAFTA Secretariat has put Chapter 19 itself in peril.

- c. The United States has abused the preemptory challenge system in the selection of replacement panelists, delaying the NAFTA panel on *Magnesium From Canada* for months

U.S. actions to delay the initial selection of panelists have extended into the processes for replacing panelists in active panels. Here, as in the initial process to select a panelist, the lack of penalties for non-action; unclear drafting of NAFTA; and neglect of the affected Parties to reactivate suspended panels; have all contributed to abuse of the panelist replacement procedure.

Such delays have affected Canadian interests directly, and seriously. The binational panel reviewing the ITC's sunset determination for *Magnesium from Canada*, poised to rule in Canada's favor, was suspended interminably pending the selection of two replacement panelists. The ITC's determination that duties should be maintained depended on factual findings that two related NAFTA Panels, reviewing the separate AD and CVD sunset determinations issued by Commerce, ruled unsupported by substantial evidence and contrary to law. Thus, the NAFTA Panel reviewing the ITC

determination, once reconstituted, could only reverse the ITC's determination, resulting in the revocation of both orders. Yet, the U.S. blocked two Canadian nominations using peremptory challenges. After a six and a half month delay,¹²⁹ the panel was finally reconstituted, but was not due to issue a decision until June 3, 2004, prolonging the orders a total of four years from their sunset date. The panel was suspended yet again when the panel's chairman recused himself on May 17 for reasons unknown, but most likely in response to the recent U.S. attacks on the integrity of one of the *Softwood Lumber IV* panelists because of practice before the ITC.

NAFTA Annex 1901.2 to Chapter 19, paragraph 9, establishes that "{i}f a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist in accordance with the procedures of {the NAFTA} Annex."¹³⁰ The Annex does not expressly provide procedures for the selection of replacement panelists, or for the exercise of peremptory challenges during such a process. In the *Magnesium* panel, the U.S. unilaterally applied peremptory challenges to block replacement panelists. Canada would have been within its rights to object.

NAFTA Annex 1901.2, paragraph 9, can be read to extend the provisions governing panelist selection generally, in paragraph 2, to the selection of replacement panelists. But paragraph 2 provides that each party may exercise four peremptory challenges only within strict time limits: "{p}eremptory challenges and the selection of alternative panelists shall occur within 45 days" or else "such panelist shall be selected

¹²⁹ The panel was suspended on May 23, 2003 and resumed work on December 15, 2003, according to the NAFTA Secretariat, U.S. Section.

¹³⁰ Rule 81 of the NAFTA Article 1904 Panel Rules includes almost identical language.

by lot." The U.S. peremptory challenges against Canada's replacement panelists prevented the *Magnesium* panel from reconvening for over half a year. Canada could have demanded that replacement panelists be drawn by lot after 45 days, as provided under the most liberal construction of NAFTA Annex 1902.1, and could have insisted that its nominees be accepted. Canada should insist on compliance with this deadline in the selection of a replacement for the panel's chairman.

- d. The conflict of interest standards demanded by the United States have affected the ability to assemble adequate panelist rosters and has delayed the selection processes

Delays in panel formation have resulted from toughened "conflict of interest" rules introduced by the NAFTA Chapter 19 working group in 1997, as well as the heightened sensitivity of potential panelists to the possibility that even unimportant conflicts may become subject to public attack. Such concerns are the consequences of U.S. attacks on two Canadian panelists in the 1994 *Softwood Lumber* binational panel review, echoed in Judge Wilkey's dissenting ECC opinion, condemning them for not divulging information which later was considered by the majority of the ECC members not to be serious. The attacks, detailed in section b.2. below, inevitably impacted the way potential panelists perceive the process, and prompted an overzealous application of the conflict of interest standards.¹³¹

Unusually strict conflict of interest standards have forced panelists to withdraw from active cases, and has complicated the panelist selection process. Under

¹³¹ For example, Judge Wilkey sought to disqualify from *Softwood Lumber* panels any lawyer whose firm had ever represented a Canadian forest products company. See Wilkey Dissent at 84-87 (asserting that Panelists Hunter and Dearden materially violated the Code of Conduct by failing to disclose their law firms' relationships with Canadian lumber and forest products companies, among other things). Such a standard could eliminate almost every prominent lawyer in Canada.

the CUSFTA, eleven panelists had withdrawn from Chapter 19 procedures after panel proceedings had been initiated,¹³² affecting one-third of all panels.¹³³ The strengthening of conflict of interest standards in the NAFTA, and again by the 1997 Working Group, could have only worsened these delays. In 1997, the GAO found that delays averaging 53 days had resulted from "the logistics of finding qualified potential panelists, in particular panelists who meet the NAFTA code of conduct that requires that panelists meet certain criteria, including lack of a conflict of interest."¹³⁴ One commentator has attributed increasingly pronounced delays in Chapter 19 proceedings to "the toughened conflict-of-interest rules that were introduced with the NAFTA, as well as the greater sensitivity to the possibilities for such conflict after the *Lumber III* decision."¹³⁵

2. Delays In Panelist Selection And Replacement Are Exacerbated By Factors That Make International Trade Experts Understandably Reluctant To Serve On NAFTA Panels

Other sources of delay result from deficiencies intrinsic to Chapter 19, tolerated or exacerbated by the United States, that make the attraction and retention of binational panelists more difficult. The qualifications and responsibilities of NAFTA panelists are provided under Annex 1901.2 to NAFTA Chapter 19:

"{T}he Parties shall establish...a roster of individuals to serve as panelists in disputes under this Chapter. The roster shall include judges or former judges to the fullest extent

¹³² Mercury, *supra.*, at 547.

¹³³ GAO Report at 89.

¹³⁴ North American Free Trade Agreement: Impacts and Implementation, Statement of JayEtta Z. Hecker, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division, GAO/T-NSIAD-97-256 (Sep. 1., 1997) at 17.

¹³⁵ Macrory at 20-21 ("The conflict issue has resulted in the need for more time to assemble panels, and in some cases it has forced panelists to withdraw during a case.").

practicable...Each party shall select at least 25 candidates...Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law."

Article 1909 provides that a "code of conduct" for panelists be established, and Part IV of this code provides that panelists must be "independent and impartial" and avoid any relationship "that is likely to affect the member's impartiality or that might reasonably create an appearance of impropriety."

The difficulty the United States and Canada have encountered in seating new NAFTA panels, and in filling vacancies that arise on sitting NAFTA panels, results from several factors that make panel membership unappealing to many individuals meeting the above criteria. Panelist pay is low. Past and current panelists have had their integrity publicly impugned by the United States. Many "experts" on the U.S. roster are too biased to ever be approved for participation on a NAFTA panel, and clutter the roster as the result of politically-motivated Congressional interference. Delays in assembling panels, and filling panel vacancies, are inevitable under the circumstances.

a. Panelists are underpaid

The vast majority of experts on the U.S. and Canadian rosters are international trade lawyers out of necessity, as a majority of sitting panels must consist of "lawyers in good standing" under Annex 1901.2. International trade lawyers "of high standing and repute" typically will be partners at private firms, with competitive billable rates of at least US\$400/hour. Yet, the remuneration offered to NAFTA panelists is a fraction of that offered by other, comparable dispute settlement bodies. The International Centre for Settlement of Investment Disputes ("ICSID") provides conciliators, arbitrators, and *ad hoc* Committee members involved in mediating

investment disputes a fee of US\$2,000 per day, in addition to the reimbursement of direct expenses.¹³⁶ Until 2002, NAFTA panelists were paid C\$400 per eight hour day, only US\$296.00 per day at current exchange rates,¹³⁷ or considerably less than a typical single billable hour. Moreover, panelists are paid only for the time that they work (consistent with the concept of billable hours), and must report their time to the responsible Secretariat.¹³⁸ International trade partners might be eager to appear on the roster, as a welcome addition to their curriculum vitae, but are understandably less eager to actually serve on a panel, given the financial sacrifice.

Panelist pay was doubled in 2002, to C\$800 (US\$592.59) per day, out of recognition of the problem. For the typical trade partner, daily equivalent billing therefore now represents a sacrifice of approximately 84 percent. Certainly their partners could not be enthusiastic to see firm billings and revenue reduced 84 percent. As observed in a report issued by the NAFTA Secretariat, Canadian Section: "The new rate, to be fully implemented in the 2002-203 fiscal year, although adequate to attract qualified panelists, is still low compared to what international trade experts can earn in the private sector, or even from comparable dispute settlement bodies."¹³⁹ Consequently, the pool of willing international trade lawyers for the roster is reduced,

¹³⁶ ICSID Schedule of Fees (Jan. 1, 2003) at ¶12, <http://www.worldbank.org/icsid/>, last visited January 14, 2004.

¹³⁷ The exchange rate was C\$1 to US\$0.74 as of April 16, 2004, according to the *New York Times* on-line Marketwatch. See <http://marketwatch.nytimes.com/custom/nyt-com/html-currencies.asp?fchart0=&fchart1=&fchart3=GBP&currfrom=126275&howmany=1&currto=126274&x=69&y=9>, last visited April 16, 2004.

¹³⁸ Telephone conversation with Patty Vidangos, NAFTA Secretariat, U.S. Section, Sep. 22, 2003.

¹³⁹ *2002-2003 Estimates: Report on Plans and Priorities*, <http://www.tbs-sct.gc.ca/EST-PRE/20022003/NAFTA-ALENA/NAFTA02rpp-PRe.asp?printable=True>, last visited Sep. 21, 2003.

the incentive to serve on a NAFTA panel weakened, and the process of assembling a panel, or filling a panel vacancy, protracted.

b. Panelists are abused

The Code of Conduct, Part IV, stipulates that panelist "candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law." As pillars of the international trade establishment, panelists would presumably value their public reputations highly, and take any accusations of impropriety or bias very seriously. The most recent U.S. attacks on the integrity of a panelist in *Lumber IV*, essentially because he is an active practitioner, and the U.S. crusade to impeach the integrity of two Canadian panelists in the 1994 *Softwood Lumber* binational panel review ("*Softwood Lumber III*"), Chairman Richard G. Dearden and Panelist Lawson A. W. Hunter, exert an inevitable, possibly deliberate chilling effect on the willingness of international trade experts, especially from the respondents' side of the bar, to join the roster or serve on panels.¹⁴⁰ The attacks have all been reserved for panelists, Canadian or American, voting against U.S. agencies.

The ramifications of apparently cynical gambits to overturn panels voting against U.S. agencies could transform the essential concept of the panel structure, as the most recent victim of such attacks has argued publicly:

¹⁴⁰ Even as the United States alleges conflicts of interest where none exist, Canada has declined to demand the recusal of Grant Aldonas, Commerce Under Secretary for International Trade in charge of the softwood lumber dispute, despite a glaring conflict of interest. Undersecretary Aldonas had been counsel to the British Columbia Lumber Trade Council ("BCLTC") at Miller & Chevalier before joining Commerce, and would therefore have direct knowledge of BC's vulnerabilities in the *Softwood Lumber* investigations and subsequent administrative review.

In the event the views of the United States were adopted... a chilling effect would be placed over the Binational Panel process that would make it highly unlikely, if not impossible that an attorney or economist with even a mere potential to be involved in an antidumping or countervailing duty case would be willing or able to serve on a NAFTA Panel."¹⁴¹

The U.S. strategy strikes at the very heart of Canada's bargain for NAFTA Panels made up of international trade experts.

The recent attacks on the panelist in *Lumber IV* build upon the U.S. crusade in *Softwood Lumber III* against Chairman Dearden and Panelist Hunter, both Canadians. The Coalition launched the attack in a January 24, 1994 letter to USTR, asserting that "{i}t would be simply outrageous - and utterly unacceptable - if the U.S. industry, having proven its case, loses before the Canadian members of a panel . . . on which two of the panelists present serious problems of appearance of bias."¹⁴² As John Ragosta, counsel to the Coalition, charged publicly, "It is outrageous that Canada nominated panelists from firms that represent the government of Canada and the Canadian lumber industry and now insists on keeping those panelists."¹⁴³ The United States unsuccessfully sought agreement from Canada to replace these two panelists long after the panel on which they served had rendered decisions adverse to the United States, and to vacate the panel decision.¹⁴⁴ The Coalition's allegations of impropriety were a thinly veiled effort to salvage the countervailing duty order that the panel had reversed.

¹⁴¹ Letter from panelist to Caratina L. Alston, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Injury Determination*, File No. USA-CDA-2002-1904-07 (Apr. 28, 2004) at 2.

¹⁴² Peter Morton, "Beer, Lumber Under New U.S. Threat," *The Financial Post* (Jan. 29, 1994) at 3.

¹⁴³ Laura Eggerston, "Lumber," *The Canadian Press* (Feb. 23, 1994).

¹⁴⁴ See Morgan Opinion at 22.

The United States then brought the Coalition's conflict of interest allegations before the ECC. Panelist Hunter was accused of working for the Canadian government even as he ruled on the dispute, "an intolerable relationship, fraught with conflict, regardless of the specific subject matter of the work."¹⁴⁵ Both panelists were accused of failing to disclose alleged relationships between their law firms, the Canadian and/or provincial governments, and Canadian lumber producers.¹⁴⁶ The United States asserted that "{t}hese companies stood to gain directly from" Panelist Hunter's decision to revoke the CVD order, and that Panelist Hunter "stood to gain financially" from the representations, creating "an appearance of impropriety...of overwhelming proportions."¹⁴⁷ The United States accused Chairman Dearden of calling "into question his impartiality as decision-maker" and of personally profiting from the undisclosed relationships.¹⁴⁸

The ECC majority found no merit to the U.S. charges.¹⁴⁹ Panelist Hunter had briefly advised the Canadian Department of Transport on competition law, a matter wholly unrelated to the *Softwood Lumber* dispute.¹⁵⁰ The client relationships both panelists allegedly failed to disclose were "matters which had no connection at all with

¹⁴⁵ Brief of the United States, *In the Matter of: Certain Softwood Lumber Products from Canada*, File No. ECC-94-1904-01USA (May 3, 1994) at 42.

¹⁴⁶ *Id.* at 38-39, 45-46.

¹⁴⁷ *Id.* at 43-44.

¹⁴⁸ *Id.* at 46-47 ("Indeed, while {Chairman Dearden} served on the Panel his firm earned C\$200,000 from legal work for the Canadian Government. As a member of the firm Chairman Dearden may have stood to share in the profits from those earnings.").

¹⁴⁹ Hart Opinion at 44; see also *id.* at 46-51; Morgan Opinion at 21-33.

¹⁵⁰ See Hart Opinion at 44.

the work of the panel and usually related to very technical expertise of their firm in the copyright, patent, taxation and other specialized fields."¹⁵¹

Judge Wilkey dissented from the majority opinion of his Canadian colleagues, excoriating both Panelist Hunter and Chairman Dearden for materially violating the code of conduct. He found that "Lawson Hunter's undisclosed interests and relationships were not insignificant, nor were they irrelevant to the issues to be decided by the Panel in this case."¹⁵² He agreed that "{a}s a partner in his two firms, Hunter stood to gain financially from the representation of the lumber companies and the Canadian government."¹⁵³ He found that Chairman Dearden's failure to disclose his firm's government and industry representations gave "rise to the appearance of partiality in his judgments as a member of the Panel."¹⁵⁴ He accused both panelists of "an unfortunate inattention, a disinterest in the obligations of disclosure initially and the continuing obligations of the Panel work."¹⁵⁵

The U.S. accusations of gross panelist impropriety in *Softwood Lumber III*, and Judge Wilkey's dissent, placed future panelists and ECC members on notice that any decision contrary to the wishes of the United States could be met with character assassination. The recent U.S. attacks on a panelist in *Lumber IV* renew this warning, and the attacks will continue in the inevitable U.S. Extraordinary Challenge to the *Softwood Lumber injury* panel decision. The U.S. position that international trade

¹⁵¹ *Id.*

¹⁵² Wilkey Dissent at 85.

¹⁵³ *Id.* at 86.

¹⁵⁴ *Id.* at 87.

¹⁵⁵ *Id.* at 92-93.

lawyers are unfit to serve as NAFTA panelists would nullify one of Chapter 19's primary benefits to Canadian litigants: panel review by international trade experts liable to apply the standard of review more aggressively and thoughtfully than generalist federal judges.

- c. The U.S. roster is clogged with members chosen on the basis of politics rather than impartiality
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Part IV of the panelist code of conduct provides that panelists must be "independent and impartial" and avoid any relationship "that is likely to affect the member's impartiality or that might reasonably create an appearance of impropriety." The nature of international trade law, and the prevalence of international trade lawyers on the roster, has made this requirement difficult to satisfy. The legal and technical arguments required to advance the interests of domestic industries petitioning for protection and defending foreign producers are fundamentally incompatible. Consequently, the international trade bar generally is polarized between practices that represent domestic interests and practices that represent respondent interests. This reality has complicated the panelist selection process,¹⁵⁶ as each side in a dispute appoints two panelists, and may exercise four peremptory challenges, rejecting panelists chosen by the other side.¹⁵⁷

The U.S. approach to vetting candidates for its roster exposes the selection process to political manipulation by protectionist constituencies. Periodically,

¹⁵⁶ See *CUSFTA: Factors Contributing to Controversy*, *supra*. at 87 (conflicts of interest could hamper panelist recruitment efforts, especially given small Canadian trade bar); see also Gustavo Vega Canovas, "Symposium: NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects; Disciplining Antidumping in North America: Is NAFTA Chapter 19 Serving Its Purpose?" 14 *Ariz.J.Int'l & Comp. Law* 479, 489 (Spring 1997).

¹⁵⁷ Annex 1901.2 at para. 2 (Under Annex 1901.2, para. 3, parties to the dispute must agree on a fifth panelist, or select one by lot).

USTR invites applications from individuals seeking inclusion on the roster, and prepares a preliminary list of candidates.¹⁵⁸ USTR selects individuals from this list for the roster after consultation with the Senate Committee on Finance and the House Committee on Ways and Means.¹⁵⁹ The powerful Senate Finance Committee's ranking Democrat, Senator Max Baucus, aggressively presses the agenda of the Coalition, and a second committee member is a leading spokesman for domestic steel, Senator Jay Rockefeller.¹⁶⁰ Such Congressional Committee oversight could only inject political considerations into a selection process that should revolve entirely around the code of conduct, and the exigencies of assembling acceptable panelists.

The U.S. roster of "independent and impartial" experts includes John Magnus and John Ragosta of Dewey Ballantine LLP, who have represented the U.S. steel and softwood lumber industries, respectively, for two decades, and Bruce Malashevich, President of Economic Consulting Services Inc., who has championed the U.S. magnesium industry's numerous bids for trade relief against Canadian, Russian, and Ukrainian producers. Although the petitioners' bar is small, its representation on the U.S. NAFTA roster is dominant: with only twenty-five candidates for panels, politically-chosen rosters undo the Chapter 19 purpose of selecting impartial experts to adjudicate.

¹⁵⁸ See *Invitation for Applications for Inclusion on the Chapter 19 Roster*, 64 Fed. Reg. 61171, 61171-72 (Nov. 9, 1999) (citing 19 U.S.C. § 3432).

¹⁵⁹ *Id.*

¹⁶⁰ See Sen. Max Baucus homepage, <http://baucus.senate.gov/>, last visited Oct. 1, 2003 ("It's also vital that we prevent U.S. markets from being overrun with unfairly traded goods, such as Canadian softwood lumber."); Sen. John D. Rockefeller homepage, <http://rockefeller.senate.gov/>, last visited Oct. 1, 2003 ("Senator Rockefeller saw his four-year push for 201 action come to a fruitful end when President Bush imposed 30 percent tariffs on flat-rolled and tin-plated steel products...Senator Rockefeller and his Senate colleagues sent a letter to the Administration asking it not to negotiate away the country's antidumping laws.).

Canada's past management of its own panelist rosters has been less than exemplary. Canada's inability to appoint replacement panelists for the binational panel review of the ITC's sunset determination on *Magnesium from Canada* delayed the proceeding for nearly seven months. Canada's Extraordinary Challenge Committee roster contains only three names,¹⁶¹ instead of the required five.¹⁶² Canada has unwittingly reinforced the United States' delay tactics.

3. Canada's Conduct Of The Panelist Selection Process Disadvantages Canadian Parties

Canada could compensate somewhat for U.S. efforts to hamper panelist selection and replacement by consulting with counsel to Canadian interested parties on panelist selection. Canada has maintained the position that the government alone should participate in the panelist selection process. Meanwhile, the United States invites input on prospective panelists from its own interested parties, which spend large sums of money performing due diligence to secure the most favorable candidates.¹⁶³ Canada's approach to panelist selection should be no less open, consistent with its approach to vetting panelists for WTO panels.¹⁶⁴

Canada's experience with panelist selection underscores the importance of seeking input on prospective panelists from interested Canadian parties. Canada's closed panelist selection process for the final *Pork* binational panel review under the

¹⁶¹ Réjane L. Colas, Gordon L.S. Hart, and Patricia M. Proudfoot.

¹⁶² See NAFTA Annex 1904.13.

¹⁶³ See Riccardi, *supra.*, at 732 n.36 (2002) ("In practice, at least on the U.S. side, there is some room for interested party input {in panelist selection}, and considerable private sector resources are used to vet proposed panelists."). The author speaks from personal experience as a senior associate at Dewey Ballantine, LLP, counsel to the Coalition for Fair Lumber Imports.

¹⁶⁴ Canada consults openly with counsel on WTO nominees.

CUSFTA undermined the Canadian parties' challenge to the "pass through" provision of U.S. trade law, under which Commerce found that government support for hog producers had automatically "passed through" to benefit pork packers.¹⁶⁵ Canada selected Margaret Prentis to serve on the panel, notwithstanding her support for a similar pass-through provision as a member of the Canadian tribunal on beef from the European Community – a position duly brought to the panel's attention by the U.S. pork producers. Canadian parties might not have lost the pass through issue¹⁶⁶ had they been given the opportunity to object to Ms. Prentis's selection for the panel.

For a brief period, Canadian parties benefited when DFAIT invited their participation in the selection of the panelists for *Lumber III*, a panel that subsequently reversed Commerce's affirmative countervailing duty determination. In *Lumber III*, the Canadian parties were able to comment on the background of potential panelists, were informed as to panelist recusals and the reasons for recusal, and were consulted regarding replacements.

Canada later reverted to its original approach to panelist selection and declined to consult with counsel to all Canadian interested parties in selecting panelists for the latest softwood lumber binational panel reviews. U.S. counsel to the Canadian parties were given no opportunity to object to the United States' selection of a California judge with no international trade expertise on the CVD NAFTA Panel, who presumably was chosen, consistent with the enunciated purpose in the SAA, to play a pivotal role in defining a highly deferential standard of review.

¹⁶⁵ See *In the Matter of: Fresh, Chilled, and Frozen Pork*, Memorandum Opinion and Order, File No. USA-89-1904-06 (Sep. 28, 1990) at xiii (Section 771(b) of the Trade Act of 1930, as amended).

¹⁶⁶ See *id.* at xxii-xxviii.

Canada's opaque panelist selection process under Chapter 19 contrasts inexplicably with its practice of consulting Canadian interested parties over the selection of panelists for WTO dispute settlement. Counsel to Canadian parties have minimal insights into potential WTO panelists, who can be drawn from any WTO Member and need not be international trade lawyers. U.S. counsel to Canadian parties are uniquely situated to comment on prospective NAFTA panelists selected by the United States, however, who frequently are fellow international trade lawyers in Washington, D.C. Canada should leverage this expertise, and advantage Canadian complainants, by opening the panelist selection process to Canadian party scrutiny in current and future binational panel reviews.

IV. CANADA MUST BECOME WILLING TO CHALLENGE PANEL DECISIONS THAT THREATEN THE INTEGRITY OF CHAPTER 19

A. Canada Could Reassert The Fundamental Principles Of Chapter 19 Dispute Settlement Through A Successful ECC Review_____

Canada has never requested an ECC, and by its approach to defending against them has signaled a general unwillingness to challenge Chapter 19 panels. There are at least four powerful reasons for Canada to rethink this approach.

First and foremost, Canada must examine carefully the merits of panel decisions, particularly as to standard of review. As the United States has pushed panelists to think and act more deferentially, panels have begun to depart from the law as established in *Gerald Metals* and other decisions of the CAFC. Where there is a serious departure from the standard of review because of excessive deference, Canada must be prepared to challenge. Excessively deferential panels will establish important and dangerous precedents.

Second, a Canadian challenge would transmit important signals about Canadian trade policy. Through an Extraordinary Challenge, regardless of the outcome, Canada would communicate its serious commitment to its own economic interests, and reassert its position as an equal partner with the United States within NAFTA.

An Extraordinary Challenge would communicate to current and future Chapter 19 panelists that Canada has a stake in the outcome of Chapter 19 proceedings that is no less important than that of the United States. Panelists would understand that Canada will actively insure that antidumping and countervailing duty investigations of Canadian imports are conducted in a fair, lawful, professional and thoroughly reasoned manner by U.S. agencies. Canadian panelists in particular would be assured of Canada's support when holding U.S. agencies to a rigorous application of the standard of review under U.S. law. Panels acting improperly against Canadian interests could not presume that they are immune to challenge.

Third, an Extraordinary Challenge on the merits, without allegations of conflicting interests and *ad hominem* attacks on individual panelists, would distinguish Canada's treatment of the process from the approach taken by the United States, while emphasizing serious policy interests. The personalization of the *Lumber III* ECC was inexcusable, unnecessary, and would have to have been considered reckless but for the apparent U.S. desire to kill off Chapter 19 entirely. The most recent personal attack only confirms a regrettable opportunism.

Deference has meant, of late, a willingness to let agencies resist remands and stall the process. A Canadian Extraordinary Challenge could reaffirm Canada's

commitment to the paramount goal under Chapter 19 of expeditious panel review in a case where a panel has over-indulged the agency so that expeditious review has been nullified. NAFTA Article 1904.13 directs panels to establish "as brief a time period as is reasonable" for remand proceedings, and it would be appropriate to challenge a panel disobeying this obligation. Even were the challenge unsuccessful, future panels would be on notice that Canada will not tolerate interminable panel reviews.

B. Canada Should Not Be Deterred By The Threat Of A Constitutional Challenge To Chapter 19

Canada should not hesitate to challenge out of concern that private parties in the United States may then retaliate by challenging the constitutionality of NAFTA Chapter 19. Such a challenge should not be perceived as a credible threat to Canadian interests. Several challenges to NAFTA's constitutionality have been brought, and all have failed. The Coalition challenged the constitutionality of Chapter 19 after *Lumber III*,¹⁶⁷ but dropped its suit when Canada acquiesced to consult on an eventual managed trade agreement with the United States.¹⁶⁸ Other challenges to Chapter 19 failed on procedural grounds, for lack of standing.¹⁶⁹ A court has never reached the merits of a constitutional challenge to Chapter 19, and likely never will.

Chapter 19 would likely withstand constitutional challenge on the merits.

The gravamen of past complaints has been that Chapter 19 violates Articles II and III of the Constitution, Article II because panelists are not appointed by the President with the

¹⁶⁷ See *Coalition for Fair Lumber Imports v. United States*, Court No. 94-1627 (filed D.C.Cir. Sep. 14, 1994, and withdrawn by voluntary motion to dismiss on Jan. 5, 1995).

¹⁶⁸ See Jennifer Danner Riccardi, "The Failure of Chapter 19 in Design and Practice: An Opportunity for Reform," 28 Ohio N.U.L.Rev. 727, 734 (2002). Ms. Riccardi litigates at Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports.

¹⁶⁹ See *Am. Coalition for Competitive Trade v. Clinton*, 128 F.3d 761 (1997); *Nat'l Council for Indus. Def., Inc. v. United States*, 827 F.Supp. 794 (D.D.C. 1993).

advice and consent of the Senate; and Article III because U.S. litigants are denied the right to settle disputes in a U.S. court.¹⁷⁰ But the U.S. Supreme Court has long permitted Congress to bestow judicial powers upon administrative tribunals whose members are not selected in accordance with the requirements of Articles II and III.¹⁷¹ Both the ITC and Commerce act as non-Article III administrative tribunals charged with administering the U.S. trade laws.

The U.S. Supreme Court has articulated a three-prong balancing test for analyzing the constitutionality of congressional delegations of judicial power to non-Article III bodies, most recently in *Commodity Futures Trading Commission v. Schor*.¹⁷² Courts are to balance three concerns when confronting such an issue: 1) To what extent does the body usurp the "essential attributes of judicial power" from Article III courts, and a litigant's right to an impartial judiciary in particular?; 2) To what extent does the body's jurisdiction intrude upon Article III matters?; and 3) Was the body created pursuant to a legitimate legislative concern?¹⁷³

None of the concerns implicit in the *Schor* balancing test is implicated by binational panels.¹⁷⁴ First, binational panels do not impermissibly intrude upon the province of the judiciary, because they lack the "ordinary powers" of federal courts. NAFTA panels do not possess the equitable powers of Article III courts, such as the power to issue injunctions compelling parties to act or refrain from acting, though

¹⁷⁰ See Riccardi, *supra*.

¹⁷¹ See Erwin Chemerinsky, *Federal Jurisdiction* § 4.1 (1989).

¹⁷² 478 U.S. 833 (1986).

¹⁷³ *Id.* at 851 (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587, 589-593(1985); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84-86 (1982)).

¹⁷⁴ See, generally, Ethan Boyer, *Article III, The Foreign Relations Power, and the Binational Panel System of NAFTA*, 13 *Int'l Tax & Bus. Law.* 101 (1996).

NAFTA panel decisions possess the same legal force as federal court decisions.¹⁷⁵

Binational panels are fair to litigants, because panelists are insulated from Presidential and Congressional interference by both the fact that at least two and up to three panelists are appointed by Canada, and by the authority of ECCs to check any gross unfairness.¹⁷⁶

Second, binational panel jurisdiction, limited to antidumping and countervailing duty final determination and results, is far more circumscribed than CIT jurisdiction, encompassing all matters related to international trade. Binational panels adjudicate public rights, antidumping and countervailing duty matters that could be conclusively determined by the executive or legislative branches, rather than private rights normally left to Article III courts,¹⁷⁷ and panels have no equitable powers.

Finally, Congress and the President created binational panels in order to secure the CUSFTA, and later the NAFTA, in a legitimate exercise of their dominion over the foreign affairs of the United States.¹⁷⁸ Canada would not have joined either Agreement without Chapter 19. The Supreme Court traditionally has deferred to the Executive branch in the realm of foreign affairs, especially where presidential action enjoys Congressional support. In *Dames & Moore v. United States*, the Court approved of the President's removal of all legal claims against Iran from Article III courts to a special international tribunal, holding that it was an appropriate exercise of presidential

¹⁷⁵ See 19 U.S.C. § 1516a(g)(7)(A).

¹⁷⁶ In addition, federal courts retain exclusive jurisdiction over constitutional questions, and panelists are proscribed from being affiliated with, or influenced by, any government. See *id.* at 125.

¹⁷⁷ See *id.* at 132-133.

¹⁷⁸ See *id.* at 135,136.

power over foreign affairs, bolstered by tacit Congressional approval.¹⁷⁹ Binational panels are no less immune to constitutional challenge because they are created through NAFTA, an Executive Agreement with express Congressional approval by majority vote.

Any challenge to the constitutionality of NAFTA Chapter 19 also must be viewed in light of the benefits that Chapter 19 offers. Canada's rationale for maintaining Chapter 19 would evaporate if binational panel review were to become less advantageous than CIT review. Thus, any concerns Canada may have about a U.S. challenge to the constitutionality of Chapter 19 are outweighed by the danger that Chapter 19 would disintegrate were the trend described here permitted to continue.

V. CANADA SHOULD ADDRESS THE ADMINISTRATIVE DYSFUNCTION AFFLICTING THE CHAPTER 19 PROCESS THROUGH CHAPTER 20 CONSULTATIONS WITH THE UNITED STATES

Canada should address the growing administrative failures on both sides of the border hobbling the Chapter 19 dispute settlement process by requesting consultations with the United States under NAFTA Article 20. Before going this route, however, Canada must first renew its commitment to the efficient administration of binational panel reviews. Canada should buttress its roster to insure an adequate supply of willing and conflict-free panelists and ECC members, and begin to insist upon the 61-day deadline for constituting panels, and the 45-day deadline for filling panel vacancies, to end these sources of panel delay. Canada then would be in a strong position to demand that the United States end its obstructionist administration of Chapter 19.

NAFTA Chapter 20, Article 2004, provides:

¹⁷⁹ 453 U.S. 654, 686 (1981).

{T}he dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

Canada could request consultations on grounds that the U.S. administration of Chapter 19 dispute settlement has delayed dispute settlement proceedings in violation of Articles 1904.8 and 1904.14 and Annex 1901.2, which provide for expeditious panel review.¹⁸⁰ Although Article 2004 provides that Chapter 20 dispute settlement is not available for "matters covered in Chapter Nineteen," Canada's complaint would not concern antidumping or countervailing duty "matters," but rather the U.S. implementation of its obligations under Chapter 19.

Canada's goal through Chapter 20 dispute settlement would be to compel the United States to eliminate the administrative impediments to expeditious Chapter 19 panel review, and to cease its dilatory tactics. The United States must agree to abide by the time limits on panelist selection provided under Annex 1901.2(2) – 45 days for the two panelists selected by each country and 60 days for agreement on a fifth panelist -- or accept panelists selected by lot on the 61st day, "off the roster" if need be. Panelist vacancies must be filled within the same 45 day timeframe under Annex 1901.2(9). The United States must agree to maintain a roster containing international trade experts

¹⁸⁰ NAFTA Article 1904.8 provides that "{w}here the panel remands a final determination, the panel shall establish as brief a time period as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision." NAFTA Article 1904.14 provides that "{t}he rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made." Annex 1901.2(2) provides that the U.S. and Canada must settle upon two panelists apiece within 45 days of the first panel request, while Annex 1901.2(3) provides that each choose two panelists within 45 days of the first panel request, including all peremptory challenges, while the fifth panelist must be agreed upon within 60 days.

ready and willing to serve as panelists, and free of pro-petitioner bias that Canada and Mexico legitimately would find objectionable. Finally, the United States must agree to increase the funding of the NAFTA Secretariat, U.S. Section, and remove the office from Commerce's domain, in order to improve the Secretariat's functioning through additional independent staff. Canada should also propose that panelist pay be increased to a level sufficient to attract and retain qualified international trade experts.

Canada initially would seek consultations under Article 2006 in the spirit of cooperation embodied in Article 2003, which provides that Parties "shall make every attempt to arrive at a mutually satisfactory resolution of any matter that might affect {NAFTA's} operation." Canada's strengthening of its own administration of binational panel reviews would evidence its good faith in pursuing consultations with the United States.

Should consultations fail, Canada would have recourse to mediation under Article 2007, followed by arbitration under Article 2008. Under Article 2007, Canada would present its grievances to the Free Trade Commission established under Article 2001, consisting of cabinet-level representatives of the United States, Canada, and Mexico, which would present recommendations for a negotiated settlement of the dispute. Failing a settlement, Canada could request an arbitral panel to hear the dispute, which would rule on whether the administrative failures identified by Canada represent violations of U.S. obligations under Chapter 19, and recommend corrective action. Were the United States to ignore the panel's recommendations, Canada would be authorized to retaliate against the United States under Article 2019, suspending benefits equal to the benefits denied Canada by the U.S. violations.

Canada would likely succeed in improving the Chapter 19 process through Chapter 20 consultations. The NAFTA Secretariat, U.S. Section, is well aware of its funding and operational shortcomings, and might support Canada's efforts to have them addressed through a negotiated solution. Arbitration under Chapter 20, if necessary, would likely result in a favorable outcome for Canada. Mexico has used Chapter 20 arbitration successfully to resolve disputes concerning U.S. safeguard measures imposed on Mexican broom corn brooms,¹⁸¹ and the U.S. failure to permit Mexican trucking companies to operate in the United States.¹⁸² Given the unmistakable lengthening of Chapter 19 proceedings over time, an arbitral panel under Chapter 20 is likely to agree with Canada that the United States must alter its approach to Chapter 19 dispute settlement to eliminate all unnecessary delays.

The potential public embarrassment of a Canadian request for consultations on the administration of NAFTA likely would be enough to trigger reform. NAFTA remains the gold standard of U.S. trade agreements; it would be damaging to U.S. policy interests, globally, for Canada to voice publicly dissatisfaction with U.S. management of the Agreement's institutions.

¹⁸¹ See *In the Matter of: The U.S. Safeguard Action Taken On Broom Corn Brooms from Mexico*, Final Panel Report, File No. USA-97-2008-01 (Jan. 30, 1998) (the Panel found that the safeguard measures violated NAFTA and should be brought into compliance); *Proclamation 7154 – To Terminate Temporary Duties On Imports of Broom Corn Brooms*, 63 Fed. Reg. 67759 (Dec. 8, 1998) (safeguard measures revoked).

¹⁸² See *In the Matter of Cross Border Trucking Services*, Final Report of the Panel, File No. USA-MEX-98-2008-01 (Feb. 6, 2001) (U.S. prohibition on Mexican trucks in violation of NAFTA, though U.S. may impose stricter safety requirements on Mexican trucks within reason); *Application by Certain Mexican Motor Carriers To Operate Beyond U.S. Municipalities and Commercial Zones on the U.S.-Mexico Border*, Department of Transportation, 66 Fed. Reg. 22371 (May 3, 2001) (request for comments on proposed regulations permitting Mexican trucking companies to apply for permits to operate in the United States).

VI. CONCLUSION

The United States has sought to shape Chapter 19 jurisprudence to its advantage, amend its trade laws to circumvent panel decisions, and undermine Chapter 19 institutionally through the elimination of panel decision finality; ideologically chosen panelists; dilatory tactics in constituting panels and filling panel vacancies; attacks on the integrity of panelists; and the financial strangulation of the NAFTA Secretariat, U.S. Section. The U.S. strategy of undermining Chapter 19 institutionally could be addressed partly through Chapter 20 consultations to clarify U.S. obligations under Chapter 19. But Canada must also examine the avenue of Extraordinary Challenge to reestablish its policy commitments.

EXHIBIT 1: DURATION OF NAFTA PANEL REVIEWS IN CANADA (IN DAYS)**

PANELS REVIEWING CANADIAN DECISIONS

yr filed	1994	1994	1994	1994	1995	1995	1995	1995	1996	1997	1997	1998	1998	1998
case #	CDA94-01	CDA94-02	CDA94-03	CDA94-04	CDA95-01	CDA95-02	CDA95-03	CDA95-04	CDA96-01	CDA97-01	CDA97-02	CDA98-01	CDA98-02	CDA98-03
filed by	CAN	US	US	US	CAN	US	US	US	US	US	MEX	CAN	US	CAN
# of days	n/a	428	446	325	316*	n/a	n/a	438	n/a	402	747	495	682	527
Product	Apples	Synth.Bal.	Stl. Sheet	Stl. Sheet	Malt.Bev.	Apples	Carpet.	Sugar	Bact.Cult.	Concrete p.	Stl. Plate	Baby Food	Flt.Rld.Stl	Pipe Fitt.
Remands	n/a	1	1	0	0	n/a	n/a	1	n/a	0	1	0	0	0
Status	Term.	Compl.	Compl.	Compl.	Compl.	Term.	Term.	Compl.	Term.	Compl.	Compl.	Compl.	Compl.	Compl.

* closest panel to meeting the **315** day deadline.

yr filed	1999	2000	2000	2000	Avg. length compl. case	507
case #	CDA99-01	CDA00-02	CDA00-03	CDA00-04	Completed Cases	15
filed by	MEX	CAN-US	US	US	Active/ECC/Susp. Cases	0
# of days	n/a	525	553	519	Terminated Cases	3
Product	Car.Stl.Plt.	R.Imaging	TM Refrig.	Refrig.	Total # of cases	18
Remands	n/a	0	0	2	Avg. # of remands compl. cases	0.5
Status	Term.	Compl.	Compl.	Compl.	US compl. cases avg. length	480
					MEX compl. cases avg.length	747

** Some numbers are estimates. See notes at end of document.

EXHIBIT 2: DURATION OF BINATIONAL PANELS REVIEWING U.S. DETERMINATIONS AND DELAYS IN PANEL SELECTION (IN DAYS)**

yr filed	1994	1994	1995	1995	1995	1995	1995	1995	1996	1997	1997	1997	1997	
case #	USA94-01	USA94-02	USA95-01	USA95-02	USA95-03	USA95-04	USA95-05	USA96-01	USA97-01	USA97-02	USA97-03	USA97-07	USA97-07	
filed by	CAN	MEX	MEX	MEX	CAN	MEX	MEX	US	MEX	MEX	CAN	MEX	MEX	
Panel selection delay	35	11	45	69	35	84	30	0	260	258	64	144	144	
Panel duration	539	(unavail.)	505	451	316	489	487	n/a	570	570	849	671	671	
Product	Live Swine	Lthr.App.	Cookware	Cement	Pict. Tubes	OCTG	Flowers	Cookware	Cement	Cement	Stl.Flat.Pr.	Cookware	Cookware	
Remands	1	1	1	0	1	1	0	n/a	1	1	2	1	1	
Status	Compl.	Compl.	Compl.	Compl.	Compl.	Compl.	Compl.	Term.	Compl.	Compl.	Compl.	Compl.	Compl.	
yr filed	1998	1998	1998	1998	1999	2000	2000	2000	2000	2000	2000	2000	2000	
case #	USA98-01	USA98-02	USA98-03	USA98-05	USA99-03	USA00-03	USA00-05	USA00-06	USA00-07	USA00-09	USA00-10	USA00-11	USA00-11	
filed by	CAN	MEX	CAN	US	MEX	MEX	MEX	CAN	CAN	CAN	MEX	CAN	CAN	
Panel selection delay	489	857	72	589	1633	1274	1187	(unavail.)	(unavail.)	(unavail.)	1049	1012	1012	
Panel duration	1227	2133	364	1880	1765	1406	1319	1291	883	1263	1181	1162	1162	
Product	Stl.Flat.Pr.	Cement	Brass sht.	W.Stl.Pipe	Cement	Cement	Cement	Magnes.	Magnes.	Magnes.	Cement	Car.Stl.Prod.	Car.Stl.Prod.	
Remands	1	0	1	2	4	0	0	3	2	1	0	0	0	
Status	Compl.	Active*	Compl.	Active*	Active*	Active*	Active*	ECC*	Compl.	Active*	Active*	Active*	Active*	
yr filed	2001	2001	2001	2001	2002	2002	2002	2002	2002	2002	2002	2002	2003	
case #	USA2001-03	USA01-04	USA01-05	USA01-06	USA02-01	USA02-02	USA02-03	USA02-05	USA02-07	USA02-08	USA02-09	USA02-09	USA03-01	
filed by	MEX	MEX	MEX	MEX	MEX	CAN	CAN	MEX	CAN	CAN	CAN	CAN	MEX	
Panel selection delay	33	913	899	789	627	64	64	544	175	148	313	252	252	
Panel duration	1045	1045	1031	921	759	634	634	676	634	515	445	384	384	
Product	OCTG	Cement	OCTG	OCTG	Cement	Lumber(AD)	Lumber(CVD)	Cement	Lumber(Inj.)	Stl.W.Rod	Stl.W.Rod	Cement	Cement	
Remands	0	0	0	0	0	1	1	0	1	0	0	0	0	
Status	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	Active*	
yr filed	2003	2003	2003	2003									Avg. length compl. case	613
case #	USA03-02	USA03-03	USA03-05	USA03-06									Completed Cases	13
filed by	CAN	MEX	CAN	CAN									Avg. delay to panel selection	383
Panel selection delay	136	5	3	0									Avg. length of Canadian cases including active	
Panel duration	268	137	135	83									cases lasting more than 315 days	768
Product	Magnes.	Cement	Wheat	Wheat									Avg. length of completed Canadian cases	696
Remands	0	0	0	0									Active/ECC/Susp. Cases	25
Status	Active*	Active*	Active*	Active*									Terminated Cases	20
											Total # of cases	58		
											Avg. # of remands compl. cases	1.0		

** US cases terminated by the parties are not listed above.

These are: USA97-04 - 06, 08; USA98-04; USA99-01, 02, 04 - 07;

USA00-01, 02; USA00-04, 08; USA01-01, 02, 04, 06 and 10.

* For "Active" cases which include "panel duration" the number is counted to February 16, 2004.

Exhibit 3: Duration of Cases Concluded at the Court of International Trade

<u>Ct. number</u>	<u>Judge</u>	<u>F.R. date</u>	<u>Dec. date</u>	<u># of days</u>	<u>Consol.*</u>	Search #
94-01-00046	Carman	12/14/1993	3/28/1997	1170		139
94-06-00334	DiCarlo	3/30/1994	10/18/1996	903		150
94-06-00364	Pogue	5/23/1994	4/18/1996	666	c	163
94-07-00424	Restani	5/6/1994	8/18/1995	439		173
94-12-00771	Tsoucalas	11/10/1994	9/12/1996	642		151
94-12-00779	Tsoucalas	5/31/1994	8/5/1996	785		157
95-01-00068	Restani	11/7/1994	4/15/1996	495		164
95-01-00125	Tsoucalas	12/28/1994	11/19/1996	662		147
95-03-00236	Tsoucalas	2/2/1995	2/4/1997	703		143
95-03-00275	Wallach	12/28/1994	2/4/1997	739		142
95-06-00782	Pogue	5/17/1995	8/21/1996	432		154
95-08-01034	Pogue	5/26/1995	8/20/1997	787		128
95-09-01125	Wallach	6/19/1995	8/29/1997	539	c	126
95-09-01144	Pogue	6/28/1995	7/14/1997	717	c	131
95-09-01160	Wallach	8/14/1995	7/22/1996	313		158
96-02-00397	Carman	2/6/1996	12/10/1997	643		117
96-06-01573	Pogue	3/29/1996	5/6/1998	738		111
96-08-01921	Pogue	8/19/1996	8/25/1997	341		127
96-08-01970	Restani	7/24/1996	3/26/1998	580	c	112
96-08-01997	Restani	6/14/1996	12/2/1997	506	c	118
96-09-02209	Pogue	8/19/1996	6/29/1998	649	c	113
96-09-02222	Pogue	8/19/1996	9/17/1997	364		125
96-09-02281	Restani	8/30/1996	12/22/1997	449		115
96-10-02292	Pogue	9/4/1996	4/26/2000	1300		85
96-10-02298	Pogue	7/23/1996	3/16/1999	936	c	95
97-03-00415	Carman	2/6/1997	7/2/1998	481		107
97-05-00874	Wallach	2/28/1997	2/19/1999	691	c	97
97-05-00876	Wallach	4/16/1997	6/17/1998	397		110
97-06-01015	Restani	4/15/1997	8/15/2000	1188		76
97-07-01099	DiCarlo	6/13/1997	11/7/1997	117		122
97-08-01335	Restani	7/16/1997	6/2/1999	656		92
97-08-01344	Restani	7/14/1997	8/25/2000	1108		75
97-10-01913	Pogue	9/29/1997	10/28/1998	364		102
97-11-01967	Pogue	10/16/1997	12/15/1998	395	c	100
97-11-02021	Pogue	8/28/1997	1/27/1999	487		98
97-12-02066	Barzilay	11/19/1997	10/12/2000	1028		83
98-03-00487	Restani	2/13/1998	2/10/2000	697		86
98-09-02759	Goldberg	7/28/1998	1/9/2002	1231		45
98-09-02848	Restani	8/14/1998	7/31/2000	687		79
99-03-00168	Wallach	12/31/1998	6/19/2000	506		82
99-05-00262	Restani	4/9/1999	7/6/2000	424		81
99-06-00361	Wallach	5/12/1999	8/28/2000	444		74
99-06-00362	Wallach	4/3/1999	6/7/2000	401		84
99-06-00363	Wallach	5/12/1999	10/2/2000	479		72
99-06-00364	Wallach	3/3/1999	2/1/2002	1036		43
99-06-00369	Wallach	3/31/1999	12/28/2000	608	c	65
99-07-00457	Wallach	6/8/1999	7/3/2001	726		54
99-08-00466	Restani	5/6/1999	10/26/2000	563		71

Avg. duration of CIT cases filed in

<u>yr</u>	<u>days</u>
1994	768
1995	599
1996	651
1997	628
1998	872
1999	546
2000	759
2001	592
2002	619

Avg. duration of CIT cases by Judge

	<u>Avg. Days</u>	<u># of cases</u>
Aquilino	561	1
Barzilay	538	5
Carman	731	4
DiCarlo	510	2
Eaton	872	3
Goldberg	1231	1
Pogue	601	18
Restani	633	18
Ridgway	955	1
Tsoucalas	774	6
Wallach	573	16

Methodology

From the Lexis "U.S. Court of International Trade" decisions database we identified all cases including the words "dumping" or "subsidy(ies)" and "Department of Commerce" or "International Trade Commission" from 1994 (the date NAFTA took effect) through 2003.

Because CIT decisions do not normally identify the filing date, we used the date of the Federal Register of the Final Determination being reviewed, and added 30 days to estimate a filing date.

We reviewed the summary of the decision for each case individually and excluded injunction cases and interlocutory appeals.

A small number of consolidated cases may include more than one initiation date. The earliest date was chosen.

We considered only completed cases. Decisions ordering a remand were excluded. However, final decisions addressing remand redeterminations were included.