

It is only possible to challenge panel decisions under extraordinary circumstances, namely if a member is guilty of gross misconduct, bias or serious conflict of interest, or if the panel has seriously departed from a fundamental rule of procedure or manifestly exceeded its authority, and if one of these factors has materially affected the panel's decision and threatens the integrity of the binational review process. An Extraordinary Challenge Committee consisting of three judges will then be established and will render its decision, generally within 30 days (Article 1904, paragraph 3 and appendix).

- Finally, it was specified in substance that the provisions outlined above would remain in effect for a period of five to seven years, pending development by the two parties of a bilateral subsidies code to replace countervailing duties. If consensus could not be reached, one of the parties could terminate the Agreement on six-month notice (Article 1906). Article 1907 states in particular that "the Parties shall establish a Working Group that shall . . . seek to develop more effective rules and disciplines concerning the use of government subsidies [and] . . . a substitute system of rules for dealing with . . . government subsidization." It was stipulated as well that the two countries would make every effort to develop and implement this new regulatory system.¹⁶

As one might expect, subsidies and trade remedies were the most contentious issue during the negotiations. If a subsidies code could not be agreed upon, the problem of how to settle differences arose. This problem and, especially, the finality of the decisions made by a binational panel almost derailed the final round of negotiations on two occasions. These issues were only settled at the last minute and despite serious reservations on the part of the United States.

Even though this outcome was far from the objectives which the Canadian government had originally set for itself, namely a subsidies code to replace the system of countervailing duties, it was a considerable achievement to obtain a trade panel whose decisions were impartial, binding and final (except in extraordinary cases). For the first time, the United States agreed to accept a binational institution that would hand down final decisions on the legality of trade determinations. In the enthusiasm surrounding the end of the negotiations, the chief Canadian negotiator, Simon Reisman, spoke of a remarkable accomplishment.¹⁷ It is indeed true that this mechanism is without parallel anywhere else in the world. However, despite these accomplishments, it is evident that, in comparison with the initial objectives, this was

¹⁶ We will return to these provisions and to the Canada-U.S. working group, pp. 20-21, at the end of the third part.

¹⁷ Comments in *Assessing the Canada-U.S. Free Trade Agreement*, p. 44.