

Backgrounder

EXTRAORDINARY CHALLENGE PROCEDURES UNDER THE CANADA-U.S. FREE TRADE AGREEMENT

Under Chapter 1904 of the Canada-U.S. Free Trade Agreement, either country can request an Extraordinary Challenge of a binational panel ruling on any of the following grounds:

- a member of the panel was guilty of gross misconduct, bias or a serious conflict of interest, or otherwise materially violated the rules of conduct;
- the panel seriously departed from a fundamental rule of procedure; or
- the panel manifestly exceeded its powers, authority or jurisdiction.

It also must be determined that any one of these grounds has materially affected the panel's decision and threatens the integrity of the binational panel review process.

An Extraordinary Challenge Committee must be established within 15 days of a request for such a committee. The Committee comprises three members, selected from a 10-person roster of judges or former judges of a federal court of the United States or a court of superior jurisdiction in Canada. Each country selects one panel member, and the third is chosen by both or by lot.

Written arguments from both countries must be filed with the Committee within 21 days of the request for a committee.

Article 1904.13 of the FTA states that the decision should be rendered by the Committee typically within 30 days of the request. The Committee can extend the time limits in the interests of fairness, as was the case in the previous Extraordinary Challenge launched in June 1993.

In rendering its decision, the Committee can affirm the decision of the binational panel, vacate the decision, or remand the decision back to the panel for further consideration accompanied by instructions from the Committee.

When the United States Trade Representative notified Canada of his intention to launch the challenge, he included a statement as to why the challenge was being launched.

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