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WHY WE WERE RIGHT AND THEY WERE WRONG

An Evaluation of Chapter 19 of the FTA and NAFTA

by

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EXECUTIVE SUMMARY

One of Canada's principal objectives during the FTA and NAFTA negotiations was to secure a rule-based mechanism to resolve trade disputes with the United States. The massive wave of American protectionism had hurt Canadian exporters too many times during the 1980s. American producers and policy-makers rallied under the banner of "fair trade," and relied extensively on domestic trade remedy laws to shield themselves from foreign competition. Canadians looked to the free trade negotiations as a source of help. How could "we" fight against "them" in the administration of antidumping and countervailing duty laws?

The solution was found in Chapter 19 of the FTA and later Chapter 19 of the NAFTA. Chapter 19 allowed binational panels to review final AD/CVD determinations in lieu of domestic courts. Canadians have generally praised Chapter 19 as a faster, fairer system that has provided consistency and predictability for North American traders. Many Americans, on the other hand, have criticized Chapter 19 for disregarding American jurisprudence, domestic trade remedy laws, the U.S. Constitution, and for being subject to conflicts of interest.

A trend in favour of rule-based trade has emerged in Canadian foreign policy-making circles. Conventional wisdom holds that a smaller country requires rules and institutions to counter the economic and political power of a larger country in a free trade agreement. Placed into the context of Chapter 19, Canada needs the binational panel process to fight against the biased, unilateral American trade remedy regime. Promoting Chapter 19 can only be done if it is indeed a good system. The purpose of this paper is to allow Canadians to evaluate the merits of the system of binational panel review in Chapter 19 of the FTA and NAFTA. Seeing that Chapter 19's critics are most often American and proponents tend to be Canadian, the paper has been framed in an "us versus them" context. Were their critiques wrong, or were our hopes for Chapter 19 right? Has Chapter 19 worked to improve the ways that Canadian and American trade remedy laws have been administered? Is it worth having in place?

The paper will review the arguments for and against Chapter 19. It will then use decisions of Chapter 19 panels and domestic review courts to evaluate the legitimacy of the arguments. It will conclude that the Chapter 19 system of binational panel review is a good one for Canada. "We" were right about its strengths. "Their" fears and critiques have proven to be false. Chapter 19 panels have adhered to the Canadian and American standards of review and domestic trade remedy laws. A second body of trade law, constitutional infirmities, and conflicts of interest have not emerged from panel decisions. More importantly, the panels have offered timely, well-reasoned, consistent decisions that have placed more predictability and confidence into North American trade.

The paper will conclude with a number of modest policy implications for Canadian trade policy-

makers. The importance of Chapter 19 is paramount for Canadian exporters. Compliance with Chapter 19 panel decisions is essential for the health of Canada's economy. American protectionism is on the rise once again. Therefore, Canadians need to stress the value of Chapter 19 and dispel the myths that are being circulated by its critics. "We" were right and "they" must be told why they were wrong! Canadians can also strengthen Chapter 19 by instituting timelines for the remand process, and by creating training seminars and communication networks to educate panelists of the intracacies of the trade regimes in Canada, Mexico, and the United States. Public confidence in the Chapter 19 system should only help parties in all three countries to comply with panel decisions. Finally, Canadians can promote Chapter 19 by presenting a national voice behind it. The federal government must lead the way in ensuring that individuals and administrative agencies in Canada comply with Chapter 19 and promote it vigorously in the United States.

Introduction

The compatibility of protectionist trade remedy laws and liberalized, free trade proved to be one of the most controversial issues of the FTA negotiations. Canadian firms had been hurt many times when exporting goods into the United States during the 1970s and 1980s. Stringent antidumping and countervailing laws were continually applied to Canadian products to shelter American producers in their home market. Canadian negotiators hoped to gain an exemption for their domestic producers from American trade remedy laws. The negotiating team proposed that domestic AD/CVD laws be harmonized after the FTA came into effect. However, the Canadian proposal was rejected. The American team insisted that U.S. trade remedy laws remain firmly in place. Turning a blind eye to the vast number of subsidy programs in their own country, American negotiators pointed to federal and provincial subsidies as evidence that Canadian products had an unfair advantage over American goods in the free trade area and would need protection in an integrated market.

The Canadian and American teams reached an impasse over dumping and countervailing issues at the eleventh hour of the FTA negotiations. While the Canadians refused to sign an agreement unless it contained effective measures to counteract American trade remedy laws, American negotiators refused to weaken their domestic laws. The solution to the impasse was Chapter 19 of the FTA. Chapter 19 created a binational mechanism to replace domestic judicial review of antidumping, countervailing, and injury determinations. In lieu of domestic courts, Chapter 19 gave binational panels the authority to evaluate whether administrative agencies applied domestic trade remedy laws correctly.[1] Panel decisions could uphold or remand AD/CVD/injury determinations for being (in)consistent with domestic trade remedy laws. Binational panels decisions were to be binding on the disputing parties in order that costly trade disputes would be settled quickly, and political controversies ended quietly. Routine appeals were not to be pursued. Panel decisions could only be appealed to Extraordinary Challenge Committees (ECCs) on the very specific grounds of Article 1904 (13) of the FTA.

The Chapter 19 compromise pleased negotiators from both countries. The Canadian team

[1] Before Chapter 19 of the FTA came into effect, the Federal Court of Appeals had exclusive jurisdiction to review AD/CVD determinations made by the Deputy Minister of Revenue Canada and injury determinations made by the Canadian International Trade Tribunal (CITT). Decisions of the Federal Court of Appeals could be reviewed by the Supreme Court of Canada. In the United States, AD/CVD determinations of the Department of Commerce-International Trade Administration (DOC) and injury determinations of the International Trade Commission (ITC) could only be reviewed by the Court of International Trade (CIT). CIT decisions could be appealed to the Court of Appeals for the Federal Circuit (CAFC), and ultimately to the Supreme Court of the United States. After Chapter 19 of the FTA came into effect, AD/CVD/injury determinations could be reviewed by either binational panels or domestic courts.

appreciated the binational character of Chapter 19, and hoped that the strict timelines and decision-making procedures would inject fairness, consistency, and predictability into the resolution of dumping and countervail disputes. The Americans supported the Chapter 19 compromise because it left domestic trade remedy laws in place and under Congressional control.

The NAFTA extended Chapter 19 to Mexico in 1993. During the NAFTA talks, a key objective of the Canadian and Mexican teams was to build on the strengths of Chapter 19 of the FTA, and to secure an effective, rule-based dispute settlement mechanism in the trilateral agreement. Canada and Mexico worked together to reflect the importance of rules in North American trade to ensure that their producers were not placed at the mercy of the American trade remedy regime which favoured American interests above all others. Both countries had fallen victim to the rising tide of American protectionism too many times during the 1970s and 1980s. Inspite of some resistance from the Americans, the Canadian and Mexican efforts were successful. Essentially, the binational panel process of the NAFTA was the same as the one in Chapter 19 of the FTA.[2]

Chapter 19 of the FTA went into operation in January of 1989. Binational panels were convened to address 45 Canada-U.S. disputes between 1989 and 1993. Panels issued binding decisions in 32 of the disputes, and the remaining 13 were terminated by the parties. Three ECCs were convened to review panel decisions at the request of the American Government. Binational panels have been convened to address 11 Canada-U.S. disputes pursuant to Chapter 19 of the NAFTA since 1993.[3]

Opponents and proponents of Chapter 19 have solicited arguments to evaluate the merits of the binational panel process of judicial review. Critiques have generally come from the United States. Americans have alleged that:

- Binational panels do not employ the appropriate standards of review

- Panels have created a second body of trade law that is exclusive to FTA/NAFTA parties

- The binational panel process of Chapter 19 violates the U.S. Constitution

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[2] The only notable exceptions are: the safeguard mechanism of Article 1905, the abolition of the FTA's five-to-seven year working group on dumping and countervailing duties, the NAFTA's insistence that the majority of panelists be lawyers or judges, the grounds for establishing an ECC, and the time that an ECC may take to issue a decision.

[3] See Appendix A for a summary of Chapter 19 disputes between January, 1989 and July, 1996

- The binational panel process is prone to conflicts of interest

Proponents of the Chapter 19 system have been usually from Canada. They have praised the alternative system of judicial review because:

- The Chapter 19 system is faster and more efficient than the Canadian and American processes of judicial review

- The Chapter 19 system increases the degree of fairness, consistency, and predictability in the bilateral trade environment

- Panel decisions are consistent with one another and allow Canadian and American producers to be more confident when exporting their goods

The purpose of the paper is to evaluate the legitimacy of each argument to understand if "they" (the Americans) were wrong, or "we" (the Canadians) were right about Chapter 19. Put another way, the paper will examine if Chapter 19 has improved the ways that AD/CVD laws have been administered in Canada and the United States as it was intended to do. The paper will be divided into three parts. Part One will review the arguments in favour of and against the binational panel process of Chapter 19. Part Two will examine a number of disputes to gauge the validity of the arguments. Because the vast majority of Chapter 19 disputes have been between Canadian and American parties under both the FTA and NAFTA, Part Two will only consider Canada-U.S. disputes in general, a number of bilateral disputes in particular, and will compare some Chapter 19 disputes with AD/CVD cases that were heard by domestic review courts. Part Three will summarize the findings of Part Two and will offer a number of modest policy implications for the future of Chapter 19.

The three parts of the paper will be used to defend the thesis that the Chapter 19 experience has confirmed that American critiques have been unfounded. The binational panel review system has been much better than what North American exporters had to endure before 1989. Panels in the Chapter 19 system of judicial review have employed the Canadian and American standards of review properly, even though they have remanded AD/CVD/injury determinations more frequently than domestic courts have done. Moreover, a second body of trade law has not emerged because panel decisions have adhered to domestic trade laws and administrative practices. The panel process has also proven to be constitutionally sound, and has not been plagued by conflicts of interest. More importantly, the Chapter 19 experience has vindicated the arguments of (Canadian) proponents. The binational panel process has proven to be faster than domestic judicial review. Binational panels have helped to make the North American trading environment more predictable and fair by issuing high quality, consistent, and timely decisions. Traders from both sides of the border have been able to assume more confidence when exporting their goods as a result.

1. Arguments of Opponents and Proponents of Chapter 19

The arguments for and against Chapter 19 parallel the objectives that Canadians and Americans had during the FTA/NAFTA negotiations. Canadians wanted security, predictability, fairness, and openness, while Americans desired control over domestic trade laws and processes. In general, the arguments against Chapter 19 have come from American policy-makers who have seen the process as an intrusion on national sovereignty, as a threat to their independent decision-making ability, and as a challenge to domestic trade remedy laws. Furthermore, much of the criticism of Chapter 19 has come from the U.S. industries that are frequent users of trade remedy laws (e.g., steel, lumber, cement, textiles, semi-conductors) and likely participants in the Chapter 19 process. Much of the criticism has stemmed from unhappiness with the *Fresh, Chilled, and Frozen Pork*, *Softwood Lumber,* and *Live Swine* disputes. Not surprisingly, those cases provoked controversy because they involved the highest value of trade of any American cases that had gone before binational panels, and were the only cases in which the original CVD and injury determinations were substantially overturned.[4] Critics have alleged that the binational panels do not adhere to the American standard of review, are beginning to create a second body of trade law, are unconstitutional, and are prone to conflicts of interest.

Conversely, arguments in support of Chapter 19 have come from Canadian policy-makers and producers who see the binational panel process as a solution to the problems they incurred in the American trade regime and system of judicial review before 1989. They have lauded binational panels for issuing more thorough, consistent, fair decisions in a much faster timeframe than domestic review courts have done in the past. The well-reasoned, detailed, timely decisions have been supported because they have helped to inject predictability and certainty into the often stormy context of North American trade.

A. Arguments of Opponents of Chapter 19

(1) Binational panels do not apply the standards of review properly

Articles 1904 (3) of the FTA and NAFTA stipulate that binational panels must apply the standards of review and general legal principles that an American or Canadian court would use when reviewing an administrative agency's determination.

The American standard of review is contained in Section 516 A (b)(1)(A),(B) of the *Tariff Act* of 1930 as amended. It stipulates that "a court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not

[4] Guillermo Aguilar Alvarez et al, "NAFTA Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations," in William Robson, S. Dahlia Stein (eds), *Trading Punches: Trade Remedy Laws and Disputes Under NAFTA* (Washington: National Planning Association, 1995), 32-33.

in accordance with law." Section 705 of the *Administrative Procedure Act* of 1946 built on the standard of review by providing that, "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (C) unsupported by substantial evidence in a case involving adjudication on the record."

The American standard of review uses two tests to ascertain whether there was a rational basis in fact for the determination and whether the agency went beyond its lawful authority when issuing a determination. The first test, the "substantial evidence" test, was developed in *Matasushita Electric Industrial Co. Ltd. v United States* (1984). "Substantial evidence" was defined as, "more than a mere scintilla, and enough to reasonably support a conclusion." Review courts have used the test to ensure that a determination is reasonably supported by evidence on the record. They have also used the test cautiously. In so far as a determination is based on substantial evidence, courts have deferred to the administrative agency's expertise, statutory interpretation, and methodology. The second test is the "errors of law" test, and was developed by the CIT in *Chevron USA Inc. v Natural Resources Defence Council* (1984). *Chevron* held that a review court need not conclude that an agency's interpretation was the only reasonable one, but was simply based on a "permissible" construction of its empowering statute. Courts have used *Chevron* to give the Department of Commerce and ITC a great deal of latitude. If an agency's methods were not specifically authorized by a statute, courts have generally bowed to the agency's expertise by stating that "Congress never directly addressed the precise question at issue and the Court should not do it either as long as the legislative history was not disturbed."[5]

The Canadian standard of review is set out in subsection 18.1(4) of the *Federal Court Act* as amended. Revenue Canada or CITT determinations may be reviewed when it can be demonstrated that the agency: (1) acted without or beyond its jurisdiction or refused to exercise its jurisdiction; (2) failed to observe a principle of natural justice, procedural fairness or other procedure required by law; (3) erred in law in making a decision; (4) based the decision on an erroneous finding of fact that was made in a perverse or capricious manner, or without regard for the material before it; (5) acted, or failed to act by reason of fraud or perjured evidence; (5) acted in any other way that was contrary to law.

There are essentially two issues (or errors) that a Canadian court examines in the process of review: (1) jurisdictional issues (2) issues within an agency's jurisdiction. Once a court decides

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[5] John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *NorthWestern Journal of International Law and Business*, Vol. 15, No. 3 (Spring, 1995), 573-574; James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 63-66.

what type of issue/error was committed, it will decide which standard of review is applicable. Jurisdictional issues are ones which define a tribunal's powers. A tribunal must be correct on such an issue. Jurisdictional issues are reviewed by the "correctness" standard. Issues/errors within an agency's jurisdiction are reviewed according to the "patently unreasonable" test to determine if an administrative agency appropriately within its jurisdiction or extended it too far. Courts may overturn a determination if there was a reasonable indication that the agency went beyond its jurisdiction.

Canadian courts have accorded agency determinations a great deal of deference in the process of review. Courts have determined the required degree of deference and standard of review by assessing a number of factors such as the nature of issue that was put before the tribunal by Parliament, and the tribunal's empowering statute. In *U.E.S. Local 298 v Bibeault* (1988), the Supreme Court held that if it was determined that Parliament intended the question to be answered by the tribunal, the issue was considered to be "within jurisdiction" and the "patently unreasonable" standard was applied. If, however, Parliament intended the question to be answered by the courts, the issue was to be considered "jurisdictional" and the tribunal would have to be "correct" in its interpretation of the relevant legislative provisions.[6]

Canadian courts have shown a great amount of deference to the CITT with respect to errors/issues within jurisdiction. Deference to the CITT has been extremely high because it was protected by a privative clause until 1994. Section 76(1) of the *Special Import Measures Act* (SIMA) demanded that administrative findings of the CITT were "final and conclusive." The legacy of Section 76(1) ensured that the CITT could only be subjected to judicial review if its interpretation of its statutory authority was so "patently unreasonable that its construction could not be rationally supported by relevant legislation."[7]

The CITT's privative clause was repealed on January 1, 1994. The CITT may now be reviewed to determine if it committed an error of law. Canadian courts and panels have now begun to follow the Supreme Court in *Pezim v British Columbia* (1994). *Pezim* dictated that "considerable deference" should be shown to an agency in the absence of the privative clause when the court examines alleged errors of law. In addition, "considerable deference" was a slightly lower standard of deference than "patently unreasonable" and considered the expertise

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[6] *U.E.S. Local 298 v Bibeault* (1988) 2 S.C.R., 1087-1088; Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada." (Ottawa: Unpublished, 1995), 15.

[7] *S.E.I.U. Co. 333 v Nipawin District Staff Nurses' Association*, 1 S.C.R. (1975), 382; *CUPE v N.B. Liquor Corporation*, 2 S.C.R. (1979), 227.

of an agency for issues within its jurisdiction.[8]

It should be noted that Canadian courts have never reviewed a Revenue Canada determination. However, based on court decisions, panel decisions thus far, and administrative laws and practices, it could be expected that Revenue Canada would be subjected to both the "correctness test" and the "reasonableness test" because it has not been protected by a privative clause. Under the "reasonableness" test, Canadian courts could hold that Revenue Canada determinations would not be overturned unless they were unreasonable. If there was more than one reasonable interpretation of an aspect of the SIMA, the agency's determination could be upheld in so far as it was reasonably based on fact and law.

In summary, the American and Canadian standards of review are based on the principle of deference to the administrative agency. Final determinations are to be upheld unless a court can find that they were outside of the agency's jurisdiction, an agency was guilty of an error of law, or a determination was unsubstantiated by reasonable evidence.

Critics of the Chapter 19 process have argued that panels do not adhere to the appropriate standards of review because they do not show enough deference to administrative agencies. For example, retired Judge Malcolm Wilkey criticized binational panels for "lacking in tradition and experience in judicial review of administrative agency action" when testifying before the House Ways and Means SubCommittee on Trade. Wilkey accused binational panels of not being compatible with the American process of review. He argued that Canadian and Mexican panelists were unfit to review American agencies because they could not understand or appreciate the degree of deference that had developed in American jurisprudence.[9] Similarly, a coalition of 45 "protectionist" companies and associations sent a letter to Congress on May 15, 1996 to convey their dissatisfaction with the Chapter 19 process. The letter suggested that binational panels had routinely disregarded the American standard of review because panelists did not defer to the DOC and ITC. In the event that panels had properly adhered to the American standard of review in accordance with Article 1904 (3) of the FTA/NAFTA, "panels would be very deferential to DOC and ITC trade determinations. In particular, they would sustain the agency's findings unless they had not reasonable or factual basis or were grounded on a legal

[8] John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Business*, Vol. 15, No. 3 (Spring, 1995), 554-568.

[9] Testimony of Malcolm R. Wilkey before the SubCommittee on Trade of the Committee on Ways and Means of the House of Representatives (June 21, 1995), 2-4; Opinion of Judge Wilkey, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 56-57.

interpretation that was effectively precluded by the statute."[10]

(2) Binational panels will create a second body of trade law

Articles 1904 (2) of the FTA and NAFTA state that binational panels must assess whether a final determination was in accordance with the AD/CVD laws of the importing country. When doing so, panels are to account for domestic trade remedy laws themselves, legislative histories, regulations, administrative practices, and judicial precedents to the extent that a domestic court would do in the process of judicial review. Article 1904 (2) was placed into the Agreements to ensure that panels would not create alternative trade laws, but would simply review the ways that domestic laws were applied by relevant administrative agencies in each country. In other words, panels were not created to develop a separate "FTA/NAFTA" body of trade law. Instead, "the very essence of the Chapter 19 process is one of ensuring that the procedural improvements adopted by Chapter 19 for the review of [AD/CVD] cases [would] be faithfully implemented but not to make substantive changes to the domestic laws."[11]

Critics of the Chapter 19 process have feared that panels could generate an "FTA/NAFTA" specific body of trade law since the FTA came into operation. Critics have maintained that binational panels could create a second body of trade law in two ways. First, many AD/CVD proceedings involve exports from FTA/NAFTA countries and non FTA/NAFTA countries. Consequently, the determination could be appealed to a binational panel and to a domestic review court, because Canadian, American, and Mexican parties are the only ones which may avail themselves of the Chapter 19 process. Furthermore, critics have feared that binational panels could reach different conclusions than domestic review courts, and thereby generate a second body of "FTA/NAFTA" specific body of trade law. Moreover, they have worried that issues which are common to different exporters from one FTA/NAFTA country could generate a second body of law if one opted for panel review and the other did not.[12] For example, a coalition of 40 industry associations argued that the Chapter 19 system fostered "wasteful litigation" which could result in the effective repeal of American trade laws because different

[10] Letter from Lauren R. Howard et al to Senator Moynihan and Senator Packwood, May 15, 1996.

[11] Memorandum, Opinion, and Order of the Majority, *In the Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), 16-17.

[12] United States General Accounting Office, *U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels* (Washington: GAO, 1995), 80-81; Robert E. Burke, Brian F. Walsh, "NAFTA Binational Panel Review: Should it be continued, eliminated, or substantially changed," *Brook Journal of International Law*, Vol. 20, No. 3 (1995), 545-546.

appeal forums could differ in their interpretations of U.S. AD/CVD laws.[13] Similarly, a group of prominent Senators sent a letter to USTR Kantor in May of 1995 to voice their opposition to Chapter 19. They stressed that when a case was before both the CIT and a binational panel, "the panel will inevitably differ with [other panels] or with the CIT in interpreting U.S. law. The result will be legal chaos and/or neutralization of the laws, even if the two systems were feasible and procedurally sensible."[14]

Second, critics have alleged that a second body of trade law could be generated because of the lack of precedent in the panel process. Domestic review courts in Canada and the United States operate according to the doctrine of *stare decisis*. Panel decisions, in contrast, do not have direct legal effect beyond the immediate case at hand. At best, panel decisions may constitute an authoritative, persuasive argument that may be referred to by another panel when examining a similar issue. Although panel decisions are often cited in subsequent panel decisions, they are not authoritative or legally binding in the way that judicial court decisions are. Critics such as the Customs and International Trade Bar in the United States have insisted that the lack of precedent in the panel system could lead to a second body of contradictory trade law. In a brief to the House Subcommittee on Trade, members of the Bar stated, "binational panel review will create a dual, if not multiple system of review which produces two or more separate legal interpretations of the same trade laws, sometimes in the same case ... The [duality] or multiplicity of decisions is unwise as a policy matter because of the confusion and burdens it creates."[15]

(3) The binational panel system is unconstitutional

Since 1989, protectionist congressmen and interest groups in the United States have argued that Chapter 19 is not legitimate and/or compatible with American laws because it violates the U.S. Constitution. Critics have charged that Chapter 19 is unconstitutional because it allows panelists who are not appointed according to the appointments clause of Article II, Section 2 to exercise the power of judicial review that has been reserved for Article III courts. Furthermore, critics have argued that the Fifth Amendment's guarantee of due process has been endangered because Article III courts were replaced with binational panels who were unfamiliar with the American standard of review. If binational panels were to survive a due process challenge, the Chapter

[13] "Coalition Seeks to Block Expansion of NAFTA Dispute Process," *Inside US Trade*, Vol. 13, No. 18 (May 5, 1995), 23-24.

[14] Letter to USTR Mickey Kantor from Senator Dole et al, May 5, 1995.

[15] "Statement of the Customs and International Trade Bar Association in opposition to authorizing fast-track negotiation of international trade agreements which include binational panel review in antidumping and countervailing duty cases" to the House Ways and Means SubCommittee on Trade, May 24, 1995.

19 process had to assure litigants of an independent, impartial forum, and afford them with an adequate opportunity to present their case.[16]

As will be explained, administrative officials, constitutional scholars, and various representatives of the international trade bar have concluded that the Chapter 19 process does not offend Article II, Article III, or the due process clause of the Fifth Amendment. Indeed, the House Judiciary Committee which considered the constitutionality of Chapter 19 in 1989 closed the issue by approving the Chapter 19 process as sound, constitutional, and legitimate. Nevertheless, protectionist congressmen and interest groups have continued to use constitutional challenges as a smoke screen for their discontent with the Chapter 19 process. For Christenson and Gambrel, "hidden in the constitutional question is distrust over a perceived protectionist bias of the International Trade Court and the Court of Appeals for the Federal Circuit in their judicial review function."[17] In other words, some American groups have continued to use constitutional arguments to foil fears that their protectionist interests could be sacrificed because negotiators of the FTA and NAFTA wished to have impartial binational panels review AD/CVD orders outside of the allegedly protectionist review courts in the United States. For example, the Coalition for Fair Lumber Imports (CFLI) argued that the Chapter 19 process was an unconstitutional ceding of American sovereignty after two binational panels and an ECC upheld Canadian stumpage practices. In 1994, the CFLI filed a suit in the District of Columbia Circuit Court of Appeals alleging that Chapter 19 of the FTA denied them due process and equal protection before the law and violated Articles II and III of the U.S. Constitution. The suit stemmed from the Extraordinary Challenge Committee's decision.[18] The Coalition argued that the ECC's 3-2 decision resulted from a "gross misinterpretation of U.S. law" and implied that it was rooted in power politics. The suit was withdrawn by the Coalition on January 6, 1995 after the Canadian and American governments introduced a new consultative mechanism for softwood lumber in December of 1994.

Similarly, a coalition of American companies which had traditionally sought protection from imports under American trade remedy laws sent letters to USTR Mickey Kantor on April 28,

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[16] Congress responded to those who feared that Chapter 19 was not compatible with the U.S. Constitution by permitting exclusive domestic judicial review of AD/CVD determinations that involved constitutional issues. The FTA and NAFTA's implementing legislation enables a participant to challenge a final AD/CVD order on constitutional grounds before a three judge panel of the Court of Appeals for the District of Columbia Circuit.

James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 109-110.

[17] Gordon Christenson, Kimberly Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 2 (Summer, 1989), 402.

[18] *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the Matter of Softwood Lumber Products from Canada*, ECC-94-1904-01 USA.

1995 and June 9, 1995 to suggest that Chapter 19 was an unfair, ineffective process that violated Articles II and III of the Constitution as well as the due process clause of the Fifth Amendment. The coalition suggested that binational panels had not properly applied the domestic laws of the United States nor complied with the proper standards of review in cases such as softwood lumber. The coalition therefore demanded that Chapter 19 be excluded from the FTA and NAFTA altogether. If such drastic action was not possible, the coalition insisted that Chapter 19 be substantially revised and withheld from new members of the NAFTA.[19]

Moreover, congressional officials have begun to bow to the most recent waves of political pressure and have raised the constitutional issue once again inspite of the fact that Congress settled the constitutional debate when it passed the FTA in 1989. Senator Craig (R-Idaho) mourned the "fate" of American softwood lumber producers because of the rulings of a number of binational panels during the 1991-1993 round of the softwood lumber dispute. He pointed to the constitutional infirmities of the Chapter 19 process to suggest that it be significantly improved. For Senator Craig, "because these rulings by non-elected, non-United States panelists are binding under the United States-Canada Free Trade Agreement, and now under the NAFTA, serious constitutional and procedural issues arise. Reform is needed to assure that future panels do not and cannot ignore U.S. law in order to protect unfair trade practices."[20]

In addition, nine prominent senators sent a letter to the USTR on August 9, 1995 suggesting that absent outright elimination of Chapter 19 and its replacement with the dispute settlement process of the WTO, substantial attention should be given to the Chapter's reform. The nine senators argued that the three original purposes of Chapter 19 (a temporary measure, to strictly enforce conflict of interest rules, to bind panelists by U.S. law and the deferential standard of review) had not been achieved. Furthermore, the softwood lumber dispute demonstrated that the Chapter 19 process was seriously inadequate and prone to problems such as conflicts of interest and misapplication of domestic standards of review. Recalling the constitutional issues centering on the appointments clause of Article II, the process of judicial review in Article III courts, and due process, the nine senators insisted that:

> Under Chapter 19, ad hoc panels of private individuals rule in place of judges on whether antidumping and countervailing duties have been imposed consistent with the domestic law of the importing country. This requires Chapter 19 panels to interpret and apply national law itself, rather than resolving disputes over the

[19] Letter from Lauren R. Howard et al to USTR Mickey Kantor, April 28, 1995; Letter from Lauren R. Howard et al to Ms. Carolyn Frank,Executive Secretary, Trade Policy Staff Committee, Office of the USTR, June 9, 1995.

[20] Senator Craig (R-Idaho), "Subsidized Canadian Lumber," LEGI-SLATE Report for the 104th Congress, *Congressional Record*, Tuesday August 8, 1995, 11812.

interpretation of international agreements as would normally occur in international dispute settlement mechanisms in the WTO. These panel decisions are automatically implemented without judicial or political review by accountable government officials.[21]

(4) The binational panel system is prone to conflicts of interest

Conflict of interest charges have stemmed from the codes of professional responsibility that are used in the Canadian and American judicial systems. The codes stipulate that "a lawyer shall not accept private employment in a manner upon the merits of which he has acted in a judicial capacity." Because many panelists are prominent trade lawyers, some have had to turn down panel appointments because of clients they have represented or areas of law they have argued. One American legal panelist had to decline from panel service four times because of potential conflicts of interests which could have impacted the issues before the panel.

Critics have alleged that slotting practicing international trade lawyers on the binational panel roster inevitably leads to conflicts of interest. Furthermore, they have charged that using a small community of legal professionals blurs the relationship between private practitioner and binational panelist. For Murphy, "despite the objective professionalism that is to be expected from panelists, it is impossible to completely separate personal experiences and views on how trade law should evolve." He has suggested that it is possible that a lawyer as a panelist in one case could argue for a similar position in a private capacity by reference to the preceding opinion in which he or she participated as a panelist. Critics have also argued that because the roster is limited to a small number of trade lawyers, clients would be likely to seek those lawyers on the service lists to gain a potential advantage.[22] Finally, critics have suggested that conflicts of interest could occur if a trade litigator presented a case to an administrative agency, and then became a member of a panel that reviewed that agency.

B. Arguments of Proponents of Chapter 19

(1) The Chapter 19 process will be faster than domestic judicial review

The domestic processes of judicial review in Canada and the United States are extremely long and expensive. The average length of the American review process is 3-5 years, while the average Canadian process is 2-4 years. The lengthy processes have proved harmful to exporters in the day-to-day operation of trade because it has added to the delays when AD/CVD

[21] Letter by Senator Max Baucus et al to USTR Mickey Kantor, August 9, 1995.

[22] Christopher Murphy, "Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold?" *The Transnational Lawyer*, Vol. 4 (1991), 599-601

determinations were reviewed for their appropriateness and legitimacy. The negotiators of Chapter 19 hoped to speed up the process of judicial review by instituting rigid timetables into the Agreement. Articles 1904 (14) of the FTA and NAFTA designated that panel review must be completed within 315 days of the date on which the request for a panel was made. Articles 1904 (14) set out strict timeframes for procedural aspects of the binational system as well.[23]

Proponents of the binational panel system have pointed to Articles 1904 (14) as excellent ways to accelerate the process of judicial review. They have lauded the FTA and NAFTA for containing such explicit timelines and lamented their absence in the domestic judicial systems.[24] For example, the CIT is supposed to file an administrative record within 40 days of the filing of a complaint. However, the CIT routinely obtains extensions that can last up to 7 months. Consequently, parties are often unable to advance their actions while they are awaiting the filing of the administrative record. In contrast, FTA/NAFTA rules of procedure stipulate that administrative agencies must file an index of the record within five days of the date for filing of a complaint with a binational panel. Within ten days after the index is filed, each complainant must designate those items listed in the index that are considered relevant to the panel review. Thereafter, the agency has fifteen days to file the designated documents with the panel, thus making the entire process of compiling the administrative record only 30 days long.[25]

Furthermore, proponents have suggested that the Chapter 19 process should be faster than the domestic systems because the Article 1904 rules avoid "multiple appeals," eliminate the need for motions to intervene, and do not permit applications for preliminary injunctions which can backlog or delay domestic courts.[26] Similarly, the Chapter 19 system should faster than domestic

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[23] The 315 day period of review must allow: (A) 30 days for the filing of the complaint; (B) 30 days for designation or certification of the administrative record and its filing with the panel; (C) 60 days for the complainant to file its brief; (D) 60 days for the respondent to file its brief; (E) 15 days for the filing of reply briefs; (F) 15 to 30 days for the panel to convene and hear oral argument; (G) 90 days for the panel to issue its written decision.

[24] James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 3-4; Homer E. Moyer Jr., "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort," *The International Lawyer*, Vol. 27, No. 3 (Fall, 1993).

[25] James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 15-16.

[26] The presence of "multiple appeals" slows the CIT's process of review. Litigants before the CIT commonly file multiple appeals to ensure that they have accounted for all of the associated issues (or cross-claims) that may be raised in the review of an AD/CVD determination. Multiple appeals are necessary in the CIT process because litigants do not know whether any other parties will appeal until 30 days after the final determination. In contrast, the binational panel system avoids multiple appeals by permitting any party to join a panel review following the first request for review and by permitting any party to file a complaint. This reduces the number of cases that are

systems because panel rules closely regulate the servicing of documents, the timing of briefs, and the timing of oral arguments. Panel rules require hand delivery, overnight courier, or facsimile. Consequently, the panel system should not be impeded by regular mail service or "business-day counts" as domestic courts are. Chapter 19 panel rules also eliminate the need for scheduling conferences to review briefs, motions, and the administrative record.[27]

Finally, proponents have affirmed the Chapter 19 system as a faster one because it does not permit routine appeals. Unlike the two domestic review systems, binational panel decisions may only be appealed under narrow circumstances. In the event that an appeal is warranted, and an ECC is convened, the Committee is required to issue a decision within 30 days under the FTA and 60 days under the NAFTA. Consequently, the entire review process under Chapter 19 (including appeals) is likely to be 1-2 years. In contrast, the entire process of review (including appeals) in Canada and the United States has tended to be from 2-5 years.

(2) The binational panel system will be more consistent and predictable than the domestic processes of judicial review

Generally speaking, critics of the U.S. system have argued that American review courts have not been consistent or predictable when reviewing AD/CVD determinations. They have pointed to the fact that the CIT is made up of 8 active and 5 senior judges who sit alone when reviewing a complaint. Consequently they have maintained that even though CIT judges meet regularly and read each other's opinions, it has been customary for CIT judges to decide similar questions differently.[28] Critics have also indicated that another consideration which adds to the inconsistency and unpredictability in the American judicial system is the fact that lower courts are permitted to reach different decisions. CIT judges are not bound by each other's decisions; they are only required to accept the decisions of a higher court such as the Court of Appeals for the Federal Circuit or the U.S. Supreme Court under the doctrine of *stare decisis*. For example, the CIT released two contradictory decisions regarding tax rebate issues in *Zenith Electronics*

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docketed, consolidates appeals, and eliminates the filing of protective multiple appeals. Interested parties do not need to request panel review solely to be prepared in the event that an opposing party makes such a request. All parties can wait and see whether any party requests a review. If so, all parties are then able to contest any issues that they wish to raise by filing complains under Rule 39 of the panel rules.

James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 6-8, 10, 13-14.

[27] James R. Cannon Jr., "Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade," Unpublished, 1990, 17-18.

[28] Andreas F. Lowenfeld, "Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," *New York University Journal of International Law and Politics*, Vol. 24, No. 1 (Fall, 1991), 276-277.

Corp. v United States (1986) and *Atcor Inc. v United States* (1987).[29] In *Zenith*, Judge Watson held that tax rebate issues required the DOC to conduct an elaborate econometric analysis to establish how much of a foreign tax was passed on to consumers in the foreign market and how much was actually absorbed by the manufacturer. In contrast, Judge Carmen ruled that the DOC was simply required to obtain evidence on whether the manufacturers included the tax in their home market sales in *Atcor*. Using *Zenith* and *Atcor* as examples, critics argued that different decisions on significant issues removed their confidence when exporting into the United States. They could never be sure how an administrative agency or review court would decided an issue in an AD/CVD investigation.

The American system of judicial review has also been criticized for being inconsistent and unpredictable because the CIT frequently deferred to the DOC and ITC even if their AD/CVD/injury determinations went beyond American laws or practice. In *Chevron USA Inc. v National Resource Defense Council* (1984), the CIT upheld an agency determination as within its discretion even though the determination directly violated a previously announced policy. Commentators explained *Chevron* as a case of an overworked judge. In all likelihood, the CIT judge was so overworked that he ruled "agency discretion" without fully reviewing the facts at hand.[30]

The American system of review has also been seen as inconsistent and unpredictable because courts have approached the standards of review differently. Because the standard of review is ambiguous concept, it is constantly evolving. American courts have created a spectrum when interpreting the standard of review. The spectrum has ranged from requiring a great deal of deference to allowing courts to be activist in the review process. It must be noted that this critique has been applied to the Canadian system of review as well. A conclusive statement on the standard of review has not emerged in Canadian jurisprudence because of the presence of the privative clause that shielded the CITT until 1994. [31]

Proponents of the binational panel system have argued that Chapter 19 should increase the consistency and predictability of the review process. A more consistent and predictable review process is valuable because it could increase the amount of confidence that exporters have in the

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[29] *Zenith Electronics Corp v United States* 633 F. Supp 1382 (CIT, 1986); *Atcor Inc. v United States* 658 F. Supp 295 (CIT, 1987).

[30] Andreas Lowenfeld, "Reflections on Dispute Settlement Under the FTA: Where Do We Go From Here?" The Hyman Soloway Lecture, (Ottawa: Centre for Trade Policy and Law, May 18, 1993), 7-8.

[31] John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 573-574, 596.

trade environment. They have suggested that the use of trade law experts, the fact that panels are convened to examine one case only and take the time to examine all of the relevant cases and laws at hand should help to produce more thorough, thoughtful, reasoned decisions. Once panels have issued such decisions, the consistency and predictability of the process could increase, because panels have the benefit of domestic jurisprudence and other panel decisions when reaching their own conclusions. In addition, proponents have cited the FTA/NAFTA Secretariats as valuable resources for binational panels. The Secretariats were established to give administrative assistance to the panels. Situated in the Ottawa, Washington, and Mexico City, the Secretariats must act as an institutional memory for panelists, calling attention to similar issues before other panels, briefs, and decisions of domestic courts. The Secretariats are also required to provide information to panelists regarding relevant chapters of the FTA/NAFTA, rules of procedures, briefs, and the codes of conduct.

(3) The binational panel system is a fairer process of judicial review

Both of the Canadian and American trade remedy regimes have been criticized for being unfair and subject to power politics. Exporters have complained that AD/CVD/injury determinations have been biased, and have protected the interests of national producers above all others. Because review courts have frequently deferred to administrative agencies, exporters have lamented that the process of judicial review solidified the unfairness in the trade regimes. Proponents of Chapter 19 have viewed the binational panels as mechanisms to inject fairness into the process of administering and appealing domestic trade remedy laws. Binational panels, composed of trade law experts from both sides of the border, have been upheld as solutions to the unilateral (and "unfair") domestic review processes.

2. Evidence To Assess The Arguments About Chapter 19

The following section will review a number of cases that have been decided by binational panels and domestic review courts to assess the validity of the arguments of opponents and proponents of Chapter 19. Were "they" wrong, or were "we" right?

(A) Binational panels and the appropriate standards of review

(1) Binational panels and the American standard of review

Critics in the United States have complained that binational panels have not applied the American standard of review properly when reviewing AD/CVD determinations. For example, the ITC appealed the *Fresh, Chilled, and Frozen Pork* panel decision because the agency did not feel that the panel gave it enough deference during the process of review. A member of the ITC's legal counsel office suggested that the panel's assessment of the injury determination was correct and justified. However, the ITC objected to the "intrusive" actions of the panel; had the panel

adhered to the proper standard of review, legal counsel to the ITC was certain that the panel could have reached the same conclusions about the injury determination and avoided the request for an Extraordinary Challenge Committee.[32]

Perhaps the most scathing attack on a binational panel's application of the American standard of review was offered by retired Judge Malcolm Wilkey in his dissenting opinion in the ECC's examination of the softwood lumber dispute. Wilkey had become a figurehead for protectionism in the American judicial system, and brought his own biases into the ECC hearing. Observers lamented that Wilkey came to the hearing with his mind set to protect U.S. producers, and did not make any effort to listen to the arguments of Canadian counsel.[33] Reflecting the views of nationalistic producer groups, Wilkey rejected the panel's use of the standard of review when it examined the DOC's CVD determination of Canadian softwood lumber. He stressed that the panel overstepped its jurisdiction by instructing Commerce to develop an alternative means of determining specificity. He maintained that when there was a "gap" or ambiguity in a statute, it was the agency and not the reviewing court that was authorized by Congress to fill it. In other words, deference to the administrative agency was the most important consideration that reviewing courts or binational panels had to account for.

In contrast to the other two members of the ECC, Wilkey insisted that the DOC's determination was reasonable, substantiated, and in conformity with U.S. laws and administrative practice. Not surprisingly, the DOC had found in favour of American softwood lumber producers and concluded that Canadian stumpage fees were "unfair" countervailable subsidies. Wilkey argued that "the panel proceeded to violate almost every one of the canons of review of an agency action." In particular, the panel attempted to redo and re-evaluate the evidence, redetermine the technical issues before the DOC, and insist on its own methods. Consequently, he suggested that the ECC must affirm the DOC's determination and reject the panel's decision for going beyond its authority.

Wilkey noted that the only members of the panel who truly understood and applied U.S. law correctly were the two dissenting members that issued a minority decision in the panel's remand opinion on December 17, 1993.[34] He criticized the majority of the panel for not complying with American law and practice. He reprimanded the majority for not employing the legislative history of the law dealing with specificity of subsidies. Wilkey held that, "while ignoring the

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[32] Confidential telephone interview with a member of ITC's legal counsel, July 9, 1996.

[33] Interview with Christianne Laizner, Legal Counsel (JLT), Department of Foreign Affairs and International Trade, September 23, 1996.

[34] Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada, Opinion of the Determination on Remand,* USA-92-1904-01.

legislative history may have been an English or Canadian practice, it was not an American one." American courts had always deferred to the legislative history of a statute. Failure to do so was "highly unjudicial by American, though maybe not by Canadian, standards."[35] Wilkey used this argument to insist that neither binational panels nor ECCs were appropriate or effective substitutes for domestic judicial review. He was dismayed by the seeming failure of the binational panels and other two members of the ECC to apply the American standard of review and administrative practices properly. In fact, Wilkey broadened his critiques to the other ECCs that had been used in the *Live Swine* and *Fresh, Chilled, and Frozen Pork* disputes. Wilkey accused Canadian ECC judges of always voting against American agencies, and thereby causing the Committees to divide across national lines.

Commentators on the Chapter 19 panel review process maintain that Wilkey's critiques were unfounded. For example, when accusing Canadian ECC judges of always siding with Canadian arguments, Wilkey overlooked the fact that the other two ECCs had been unanimous in their views and had been chaired by Americans. His accusations were unfounded and ignored that American judges had voted against the Department of Commerce and ITC as well when their AD/CVD/injury determinations were not in accordance with U.S. law. Similarly, to suggest that a panel implied an "incorrect" standard of review as Judge Wilkey did in the *Softwood Lumber* case implies that a correct standard of review exists. However, a clearly articulated approach to the standard of review (i.e., the errors of law or substantial evidence tests) has never been developed in American case law. The U.S. standard of review intrinsically involves subjective judgements and discretion on the part of reviewing courts and panels, and has frequently been the source of disagreement in the United States. Indeed, ECC member Justice Hart spoke of honest differences of opinion that emerge between CIT judges on a regular basis when they employ the standard of review and/or other points of law. He stated that the panel was within its authority and U.S. administrative law when it adopted an active approach to the standard of review. He also stated that other equally convincing arguments about the standard of review could have been justified as well. Panel members, like CIT judges, were able to reach conclusions even if other individuals and governmental officials disagreed with them. He stated, "there can be differences in view concerning [U.S. law] but there is nothing in the record which appears to me to be an attempt to avoid the standard of review required by law. Both sides make persuasive arguments as is expected by lawyers of their competence but in my opinion it cannot be said that the majority decision is clearly wrong."[36]

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[35] Opinion of Judge Wilkey, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the matter of Certain Softwood Lumber Products Canada* (ECC-94-1904-01 USA) August 3, 1994, 56-57.

[36] Opinion of Justice Hart, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding in the matter of Certain Softwood Lumber Products Canada* (ECC-94-1904-01 USA) August 3, 1994, 25.

Since 1989, panels have routinely applied the American standard of review correctly. They have pieced leading opinions together to apply the errors of law and substantial evidence tests appropriately. However, when doing so, panels have somewhat opened themselves to controversy because they have varied in terms of the degree of deference that should be shown to administrative agencies. Some panels have shown high degrees of deference in cases such as *Magnesium,* while others lesser degrees of deference in cases such as *Red Raspberries, Fresh, Chilled, and Frozen Pork*, *Live Swine*, and *Softwood Lumber.*[37]

Cases where panels have used lesser degrees of deference have sometimes become controversial. However, even the more active panels have not overstepped their jurisdiction or authority, and have employed the same degrees of deference as the CIT and Court of Appeals for the Federal Circuit have done in the past. In *Softwood Lumber*, for example, the panel actively reviewed the DOC's affirmative CVD determination by drawing from a CIT decision in *Daweoo Electronics Co. Ltd. et al v U.S.* (1993). The panel defended its activist standard of review by suggesting that the *Daweoo* Court did not abandon the practice of deferring to administrative agencies by requiring the DOC to rely on "substantial evidence"when making a determination. Relying on *Daweoo*, the binational panel stated:

> Although review under the substantial evidence standard is by definition limited, application of the standard does not result in the wholesale abdication of the Panel's authority to conduct a meaningful review of the agency's determination. Indeed, a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering the appeal process superfluous. The deference to be afforded an agency's findings and conclusions is not therefore unbounded.[38]

In summary, the CIT has produced a "spectrum" of decisions where judicial review has ranged from deferential to rigorous. Contrary to the arguments of critics of Chapter 19 in the United States, Chapter 19 panels have fallen well within that range.[39] Panels have "used the latitude

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[37] *Binational Panel Review in the matter of Pure and Alloy Magnesium from Canada*, USA-92-1904-03;*Binational Panel Review in the matter of Red Raspberries from Canada,* USA-89-1904-01*; Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-06; *Binational Panel Review in the matter of Live Swine from Canada,* USA-92-1904-04; *Binational Panel Review in the matter of Certain Softwood Lumber Products from Canada,* USA-1904-02.

[38] *Binational Panel Review in the matter of Certain Softwood Lumber Products from Canada - Decision of the Panel on Remand,* USA-92-1904-01, 16-17.

[39] John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 595-596; William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience*

which exists in United States jurisprudence to formulate a relatively exacting and unyielding standard of review," and have thereby adhered to American jurisprudence and administrative practice. Consequently, American agencies have learned that they need to provide reasoned determinations where their conclusions flow logically from supporting evidence to withstand a binational panel review.[40]

(2) Binational panels and the Canadian standard of review

Chapter 19 panels have reviewed Canadian administrative law and practice to determine the appropriate standards of review. However, inspite of their efforts to review Canadian jurisprudence, panels have not been able to agree on the degree of deference that should be accorded to the CITT and Revenue Canada. Consequently, panels have bestowed different degrees of deference on the two Canadian agencies in the process of judicial review. Generally speaking, the CITT's traditional privative clause has encouraged panels to be more deferential to it than to Revenue Canada in the review process.

Chapter 19 panels have been unanimous in finding that CITT decisions could only be reviewed according to the "patently unreasonable" standard until the privative clause was removed in 1994.[41] For example, the *Hot-Rolled Steel Sheets* and *Cold-Rolled Steel Sheets* panels explained that deference was the central component of the Canadian standard of review. Deference was determined by legislative provisions, the wording of a statute that gave jurisdiction to an administrative agency, and common law regarding judicial review. More importantly, a high degree of deference was automatically granted to an agency that was protected by a privative clause. Because Section 76 (1) of the SIMA was a privative clause that insulated the CITT, the Tribunal's interpretation of the law deserved deference. Consequently, the only applicable standard of review was the "patently unreasonable" test to ensure that the CITT's interpretation

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and NAFTA Prospects (Ottawa: Centre for Trade Policy and Law, 1996), 68, 95-96, 105; Andreas F. Lowenfeld, "Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," *New York University Journal of International Law and Politics*, Vol. 24, No. 1 (Fall, 1991), 275.

[40] John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 574, 594.

[41] Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 18-19; John M. Mercury, "Chapter 19 of the United States-Canada Free Trade Agreement 1989-95: A Check on Administered Protection?" *Northwestern Journal of International Law and Relations*, Vol. 15, No. 3 (Spring, 1995), 553; William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 119-120.

was rationally supported by evidence and the relevant legislation.[42]

Since the CITT's privative clause was removed, panels have also adhered to Canadian jurisprudence regarding the appropriate standard of review. The first three panels to review CITT determinations after the privative clause was removed adjusted the standard of review in the same way that Canadian courts had done. The *Baler Twine*, *Corrosion-Resistant Steel Sheets*, and *Certain Malt Beverages* panels articulated that the appropriate standard of review was to be the "considerable deference" standard in accordance with the Supreme Court's decision in *Pezim*. In *Baler Twine,* the panel reviewed the "patently unreasonable" test to ensure that the CITT's injury determination was reasonably supported by evidence. The panel explained that a privative clause compelled a review court to limit the standard of review and employ the "patently unreasonable" test with great deference. However, the repeal of a privative clause allowed a court to reconsider the use of the test. The *Baler Twine* panel decided that the more appropriate standard was "considerable deference" in light of *Pezim* and the repeal of the CITT's privative clause. *Pezim* held that if a privative clause did not exist, and a review body was made up of members who were experts like the agency, it could apply the "correctness" standard of review. The panel thereby affirmed its own expertise, and used the "correctness" standard for jurisdictional issues, and "considerable deference" for issues of fact within the CITT's area of expertise.[43] The *Corrosion-Resistant Steel Sheets* and *Certain Malt Beverages* panels discussed the nature of the "considerable deference" standard. The panels concluded that the level of deference was not to be determined solely by the presence or absence of a privative clause. Instead, the appropriate level of deference was to be determined by the extent of an agency's expertise within a specialized area of law. An agency's legislative mandate and expertise could be used to determine the appropriate level of deference. Based on administrative law and practice, and the fact that the CITT was a specialized administrative body with expertise and jurisdiction over trade remedy laws, both panels held that they were not to interfere with the CITT on questions of law or fact if it had a reasonable basis for its interpretation, and would thereby employ a high or "considerable" degree of deference.

It must be noted that in spite of the high degree of deference they have shown to the CITT, panels have remanded the agency more than domestic review courts have done. Four of the six cases where panels reviewed a CITT determination were either partially or completely remanded. Conversely, very few CITT cases have ever been appealed to the Federal Court of Appeal. Those that were appealed have been very rarely reversed. In addition, panels have

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[42] *Binational Panel Review in the matter of Certain Hot-Rolled Carbon Steel Sheet Products Originating in or exported from the United States,* CDA-93-1904-07, 5-8; *Binational Panel Review in the matter of Certain Cold-Rolled Steel Sheet originating in or exported from the United States,* CDA-93-1904-09, 6-7.

[43] *Binational Panel Review in the matter of Synthetic Baler Twine with a knot strength of 200 lbs or less originating in or exported from the United States,* CDA-94-1904-02, 5-8.

subjected the Tribunal to more scrutiny that domestic courts have when applying the deferential standard of review. John Coleman - chair of the CITT stated that, "panels have scrutinized cases more carefully and have demanded more information and quantifiable proof than was previously required by the Federal Court of Canada."[44]

Panels have applied a more rigorous, exacting standard of review to Revenue Canada determinations. Unlike Canadian review courts, panels have either partially or completely remanded all of the cases involving Revenue Canada for re-consideration. On the face of the evidence, critics could use the more "intrusive" standard of review to argue that panels have not adhered to Canadian administrative law and practice. Nevertheless, panels have upheld the Canadian standard of review inspite of their activeness. In *Gypsum Board, Beer*, and *Tufted Carpets*, the panels applied the "reasonableness" standard and reviewed whether the Canadian agency committed an error of law. Taken together, the determinations were thoroughly considered, persuasively reasonable, and rejected Revenue Canada's interpretation of the SIMA as "unreasonable."[45] The *Gypsum Board* panel fully remanded Revenue Canada's formulation of the "period of investigation" (POI). The American complainants raised the POI issue as an alleged error of law, and argued that the "correctness" standard was applicable. The panel disagreed, and held that the agency could exercise discretion in the matter because the SIMA did not explicitly stipulate how the POI was to be formulated in a dumping investigation. The panel maintained that the most appropriate standard of review was the "reasonableness" standard in light of the discretion that the agency enjoyed within its core areas of expertise. The panel looked to the facts of the case and found that while setting the POI was within Revenue Canada's area of expertise, it used unreasonable evidence to support an affirmative dumping investigation.[46] Therefore, the *Gypsum Board* panel employed the Canadian standard of review properly by affirming the discretion and deference that the agency was due. Nevertheless, the panel did not allow the agency to use unreasonable evidence to substantiate an affirmative determination, and thereby subjected the antidumping order to a rigorous, but appropriate, process of judicial review.

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[44] William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 142.

[45] *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of American by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia,* CDA-91-1904-01; *Binational Panel Review in the matter of Certain Machine Tufted Carpeting Originating in or exported from the United States of America,* CDA-92-1904-01; *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States,* CDA-93-1904-01.

[46] *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States,* CDA-93-1904-01, 4-8.

In summary, Americans have tended to be more critical about the application of the U.S. standard of review than Canadians have been of their own. Ironically, if certain panels could be accused of erring when using one of the two standards of review, it could be the Canadian standard of review that may have been applied incorrectly in a small number of cases. For example, the *Pipe Fittings* panel may have gone beyond its authority when applying the standard of review to the CITT's affirmative injury determination. The *Pipe Fittings* panel summarized the Canadian standard of review by indicating that it was necessary to ensure that the agency acted within its jurisdiction by following rules of procedure, and that an agency's decision was patently reasonable. The panel also stressed that deference had to be accorded to the administrative agency, inspite of the fact that the panel review came after 1994. The 1994 repeal of the CITT's privative clause did not apply to 1993 CITT decisions.[47] The *Pipe Fittings* panel exercised the standard of review in a very passive, deferential way. It upheld the CITT even though the agency had not given detailed reasons or expert analysis to support its affirmative injury determination. Inspite of the deferential standard of review, however, the *Pipe Fittings* panel may have gone beyond its proper authority by considering an issue that had not been examined by the CITT.[48] The CITT omitted to discuss whether cast and wrought fittings were similar to drainage, waste, and vent fittings because the disputing parties had not provided the agency with much information on the issue. Nevertheless, the panel decided the issue instead of allowing the CITT to do so in a remand determination. The panel suggested that the CITT could choose to give greater weight to factors such as physical similarity, manufacturing methods, marketing methods, and pricing when deciding a "like-goods" issue. Therefore, even though it developed the standard of review correctly, the panel may have erred when putting it into practice.

The second case that could imply that a panel may have used the Canadian standard of review incorrectly was the *Certain Beer* dispute.[49] The CITT issued an affirmative injury determination after concluding that dumped beer products from the United States caused injury to similar goods in British Columbia. In accordance with the SIMA and the GATT's Antidumping Code, the CITT defined the "domestic industry" as a regionally concentrated market. In *Certain Beer*, the panel found that the process of assessing the regional nature of a market and the

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[47] *Binational Panel Review in the matter of Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, made of cast copper alloy, wrought copper alloy or wrought copper, originating in or exported from the United States,* CDA-93-1904-11, 5-6.

[48] William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 117-119.

[49] *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia,* CDA-91-1904-02.

determination of whether a concentration of dumped imports existed in the market was an issue within its jurisdiction. Consequently, the panel decided that the "correctness" standard of review should be used. The panel justified its decision because the regional nature of the market was a determination that the CITT had to make before it could exercise jurisdiction to decide the issue of material injury.[50]

The *Certain Beer* panel may have erred when deciding to employ the "correctness" standard. As explained above, Canadian courts had only used the "patently unreasonable" standard when examining the CITT because of its privative clause. The panel may have misapplied the test by improperly assessing the relevant legislative provisions and the nature of the CITT's expertise in dealing with the issues at hand. The panel felt that the CITT should be allowed to develop new tests (e.g., distribution tests, ratio tests, density tests) to determine if there was a concentration of dumped imports in a regionally concentrated market. By stating that the CITT had to be allowed to develop new tests of concentration, the panel effectively held that the determination of whether a concentration of dumped imports in the B.C. market was a jurisdictional issue.[51] Consequently, the panel should have perhaps employed the "patently unreasonable" test when considering an issue within an agency's jurisdiction as Canadian courts had always done in the past .

Michael Greenberg, Chairman of the *Certain Beer* panel, gave credence to this argument when he dissented with the majority's use of the standard of review. He felt that the panel should have applied the "patently unreasonable" test for jurisdictional issues. Greenberg stated:

> In my view, this difference [between the "correctness test" and the "patently unreasonable" test] is fundamental. It affects the credibility of the binational panel review process, which should include a proper curial deference to the expertise of the administrative agencies entrusted with the task of interpreting and applying the national antidumping and countervailing duty laws. As an ad hoc panel, we should be particulary sensitive to act with the judicial restrain called for by the Supreme Court in mandating the "patently reasonable" standard of review

[50] *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia,* CDA-91-1904-02, 16.

[51] Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 17-19.

for alleged errors of law and fact by the CITT.[52]

Interestingly, a member of the CITT wrote a concurring opinion to the Determination on Remand in which she agreed with Greenberg's comments. She supported the notion that the "patently unreasonable" standard was the appropriate one to use when the Tribunal allegedly committed errors in interpreting the SIMA.[53]

Notwithstanding those two cases, however, panels have employed the Canadian and American standards of review correctly, and have disproven the arguments of American critics. Panels have used leading opinions to guide them when applying standards such as the substantial evidence test, errors of law test, correctness test, patent reasonability test, and considerable deference. While they have acknowledged the importance of agency discretion and deference, the majority of panels have stressed the importance of reasonable, substantiated determinations that reflected record evidence. Consequently, panels have tended to use the American standard more "actively," as U.S. agencies have been remanded more than Canadian ones. Of the 16, AD/CVD cases American cases that have been reviewed by panels, the DOC has been partially remanded 9 times, and completely remanded 3 times. The ITC was remanded twice out of five panel reviews. All of Revenue Canada's AD/CVD determinations were remanded by binational panels - 1 was completely remanded and the other four were partially remanded. The CITT was remanded once, and partially remanded twice out of 10 panel reviews. Placed into percentages, American agencies have been remanded 66% of the time while Canadian agencies have been remanded at a percentage of 47%. With the exception of a number of controversial CVD cases in the United States (e.g., pork, live swine, and softwood lumber), administrative agencies in both countries have been quick to comply with panel remand orders.

(B) Binational panels and the creation of a second body of trade law

An ideal way to determine if binational panels have begun to create a second body of trade law as critics have alleged would be to compare an AD/CVD/injury determination that was appealed to both a Chapter 19 panel and to a domestic review court. Assessing whether a second body of law was generated in the two review processes could then be done by comparing the decisions. Unfortunately, this type of analysis is very difficult to undertake because of two considerations. First, there have only been a very small number of cases where the two review

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52 Greenberg's concurring opinion in *Binational Panel Review in the matter of Certain Beer Originating in or exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for use or consumption in the Province of British Columbia,* CDA-91-1904-02, 41.

53 Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 20.

channels have been used simultaneously. In the United States, one ITC determination and 8 Department of Commerce determinations have been taken to panels and to the CIT. One of the DOC determinations that was appealed to both forums involved goods from Mexico, and therefore does not directly apply because this paper considers Canada-U.S. disputes only. In Canada, 2 Revenue Canada and 6 CITT determinations have been appealed to panels and the Federal Court of Appeal.[54] Second, and more importantly, the issues that were considered in those cases were rarely the same because different players and circumstances were involved.[55]

Putting those two considerations aside, one can discuss the applicability of the critique regarding the creation of a second body of trade law by comparing similar issues that were discussed by panels and review courts in different cases. By doing so, it becomes clear that the critique about a second body of trade law is unsubstantiated. William Ince and Michele Sherman, counsel for Canadian parties in 8 of the first 14 American cases before Chapter 19 panels, indicated that panels have not created a second body of trade law because they have decided issues in many of the same ways that domestic review courts have done. For Ince and Sherman, panelists have not been more "independent minded" than domestic judges. They have simply set a new standard for thorough and well-reasoned opinion writing which has distinguished them from their counterparts in domestic courts of review.[56] Indeed, Department of Commerce officials indicated that with the exception of the *Pork* and *Softwood Lumber* cases, panels have decided issues and treated the Department in the same manner as the CIT has traditionally done.[57]

For example, the *New Steel Rails* panel issued a decision that was similar to the CIT's finding in *Armco Inc. v United States* (1990). The *New Steel Rails* panel remanded Commerce's affirmative CVD determination because it felt that the Department's conclusion regarding loan

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[54] See Appendix B for a summary of those cases.

[55] Perhaps the two notable exceptions are the cases regarding the DOC's determination on leather wearing apparel from Mexico and CITT's determination on corrosion-resistant steel. The leather wearing apparel case was appealed to the CIT initially, and then taken to a binational panel when the CIT determined it to be the more appropriate channel of judicial review. The CIT and panel examined the same issue (sufficiency of normal remedies) and decided it differently. In corrosion-resistant steel, a binational panel and the Federal Court of Appeals considered some of the same issues (causation, exclusions, cumulation) and decided them in the same way by upholding the agency's determination.

[56] Telephone conversation with Ms. Michele C. Sherman of Cameron and Hornbostel, Washington D.C., July 19, 1996; William Ince, Michele Sherman, "Observations on the Binational Panel Process under Chapter 19 of the U.S.-Canada Free Trade Agreement," Presentation to the Administrative Conference of the United States' Forum (April 23, 1991), 3.

[57] William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 69.

guarantees was commercially unreasonable, based on an assumption, and was not grounded on the administrative record. The panel also remanded Commerce because it did not explain why it had changed its policies regarding loan guarantees. The CIT issued a similar decision in *Armco*. The Court reversed a negative CVD determination because the DOC departed from its previous practice of assigning a 15 year period of useful life of assets in the steel industry when assessing loan guarantees.[58]

Similarly, the panel in the *Bituminous Paving Equipment* dispute adhered to the CIT's decision in *Atcor Inc. v United States* (1987). As explained above, *Atcor* held that the DOC did not need to conduct a full econometric analysis for tax laws. Instead, *Atcor* maintained that Commerce only had to obtain evidence on whether the manufacturer included the passed through tax in their home market sales. The *Bituminous Paving Equipment* panel exercised its authority to concur with some CIT decisions and reject others. It chose to adhere to the CIT's reasoning in *Atcor* and reject the Court's opinion in *Zenith* on the issue of a full econometric analysis for pass-through taxes. It justified its use of *Atcor* for efficiency's sake. To give even more credence to its decision, the panel cited the Court of Appeals for the Federal Circuit's decision in *Smith Corona Group v United States* (1983). As did the court, the panel held that a full econometric analysis was an excessive practice and denied the efficiency required in the administration of AD/CVD laws.[59]

Furthermore, the *Red Raspberries* panel reached conclusions regarding agency discretion that were reflective of three CIT decisions. In *Silver Reed, Timken,* and *U.G.F.C. Co.*, the CIT concluded that while an administrative agency was required to follow its own regulations and practices, it had discretion in interpreting the statute it administered.[60] Similarly, the *Red Raspberries* panel found that the DOC was not required to use home market prices in all circumstances except those specifically enumerated in American trade laws and regulations. Commerce had discretion to use other indicators such as third country sales when determining the margin of dumping. Nevertheless, the panel also held that while the DOC could fill in the "gaps" of statutes and regulations, it had to have a reasonable justification for doing so. In other

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58 *Binational Panel Review in the matter of New Steal Rail, except light rail, from Canada*, USA-89-1904-07; *Armco Inc. v United States* 733 F. Supp 1514 (CIT, 1990); Andreas F. Lowenfeld, "Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," *New York University Journal of International Law and Politics*, Vol. 24, No. 1 (Fall, 1991), 292-293.

59 *Binational panel review in the matter of Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada,* USA-89-1904-03, 22-24.

60 *Silver Reed America Inc. v United States* 581 F. Supp 1290 (CIT, 1984); *Timken Co. v United States* 673 F. Supp 495 (CIT, 1987); *U.H.F.C. Co. v United States* 706 F. Supp 914 (CIT, 1989).

words, agency discretion had to be based on Commerce's regulations and past practices.[61]

Therefore, binational panels have not created a second body of trade law because they have issued decisions that have been very similar to domestic courts. "They," the Americans critics, were wrong. Because panels have followed national jurisprudence, they have "naturally reached conclusions that have been similar to those of domestic courts."[62] Indeed, the Chapter 19 system protects itself against the development of a second body of trade law in two ways. First, panel decisions are only binding on the involved parties and in regards to the particular issues before the panel. Panels may not bind future panels or domestic courts when confronted by similar issues. Second, the Chapter 19 system is inherently self-correcting. Panels must apply domestic AD/CVD laws, and therefore must acknowledge any changes to those laws. They must also affirm judicial precedents from higher domestic courts if they conflict with a previous panel's ruling. In other words, panels must adhere to domestic courts every time that an appeallate court rules on an issue, even if the domestic court's decision was different than a previous panel's ruling. Failure to apply domestic laws, adhere to changes, or to affirm upper courts could subject a panel's decision to an ECC review.[63]

(C) The binational panel review process violates the U.S. Constitution

The legitimacy of constitutional arguments is difficult to assess from the Chapter 19 experience because the majority panels have not directly examined constitutional questions. Instead, panels have focused their attention to trade issues because their purpose is to assess the compatibility of AD/CVD determinations with domestic trade remedy laws and practices. Nevertheless, the relevancy of constitutional critiques may be discussed in more general terms to evaluate the Chapter 19 system. As explained, constitutional scholars and legislative committees have concluded that the Chapter 19 process is constitutionally sound. They have maintained that the binational panel system of review does not violate Articles II and III of the U.S. Constitution or the due process clause of the Fifth Amendment.[64]

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61 *Binational Panel Review in the matter of Red Raspberries from Canada,* USA-89-1904-01, 19-20.

62 William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 136-137.

63 Guillermo Aguilar Alvarez et al, "NAFTA Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations," in William Robson, S. Dahlia Stein (eds), *Trading Punches: Trade Remedy Laws and Disputes Under NAFTA* (Washington: National Planning Association, 1995), 35-36.

64 Literature on the constitutionality of Chapter 19 is extensive. Informative pieces include: Gordon A. Christenson, Kimberly Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement," *The International Lawyer,* Vol. 23, No. 2 (Summer, 1989); Demetrios G. Metropoulos, "Constitutional Dimensions of the North American Free Trade Agreement," *Cornell International Law Journal*, Vol. 27, No. 1

(1) Article III and the replacement of domestic judicial review

The debate surrounding Article III hinged on the way that Chapter 19 replaced domestic judicial review with binational panel review. Critics alleged that Chapter 19 jarred the constitutional framework of the United States because it allowed private parties to elect to substitute binational panel review for domestic judicial review of final AD/CVD/injury determinations. In other words, Chapter 19 limited the CIT's and CAFC's jurisdiction to hear challenges of final AD/CVD/injury determinations. The issue over Article III thus became one of whether Congress had the power to create "non-Article III" courts such as Chapter 19 panels, and in so doing, could limit the power of judicial review by Article III courts.[65]

American courts affirmed the right of Congress to create non-Article III courts in a number of landmark decisions (e.g., *American Insurance Co. v Canter* (1828)). Based on these decisions, the issue surrounding Article III changed slightly. The issue became one of whether a Chapter 19 panel was exercising the "judicial power of the United States" set out by Article III of the Constitution, or was merely carrying out powers that Congress had delegated to it under Article I, Section 8. In this way, the Article III debate raised a separation of powers issue that distinguished different types of cases from each other because of the jurisdiction of different types of courts over them. The critical case distinction surrounding the jurisdiction of Chapter 19 panels was whether a case involved "public rights" or "private rights." The U.S. Supreme Court distinguished between public and private rights in *Northern Pipeline Construction Co. v Marathon Pipe Line Co.* (1982). The Court held that public rights cases dealt with matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," and "only to matters that historically could have been determined exclusively by those departments." The Court built on the "public rights" doctrine in *Thomas v Union Carbide Agricultural Products Co.* (1985) and *Commodity Futures Trading Commission v Schor* (1986) to determine that non-Article III courts had jurisdiction over public rights cases. Furthermore, the *Thomas* and *Schor* Courts ruled that international trade issues such as antidumping and countervailing duties fell within the "public rights doctrine" because they involved governmental actions vis-a-vis

(Winter, 1994); Stewart A. Baker, Shelly P. Battram, "The Canada-United States Free Trade Agreement," *The International Lawyer,* Vol. 23, No. 1 (Spring, 1989); Thomas A. Bark, "The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?" *Virginia Journal of International Law*, Vol. 29 (1989).

[65] "Article III courts" are those that Congress is empowered to create in Article III, Section 1 of the U.S. Constitution. Article III judges enjoy lifetime tenure and a set salary in order that they are independent of Congress. Article III courts have jurisdiction over the cases and controversies outlined in Article III, Section 2. "Non-Article III courts" are those "tribunals inferior to the Supreme Courts" that Congress is able to create pursuant to Article I, Section 8 of the Constitution. They do not enjoy lifetime tenure and are not subject to Article III constraints.

individual citizens. Therefore, the rulings supported the conclusion that Congress could indeed authorize binational panels to act as non-Article III courts and replace domestic review courts in AD/CVD disputes.

(2) The appointments clause of Article II, Section 2

Article II, Section 2 of the U.S. Constitution contains the appointments clause. It empowers the president to "nominate, and with the advice and consent of the Senate, to appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States." The appointments clause also provides that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone." The debate regarding the compatibility of Chapter 19 and the appointments clause centered on the ways that binational panelists were selected. Could persons who were not officers of the United States (i.e., not appointed under Article II) be authorized to overrule federal officers in the DOC and ITC who were properly appointed? In other words, the issue of whether Chapter 19 violated Section II hinged on the source and significance of the panelists and/or EEC members. Critics of Chapter 19 argued that Article II, Section 2 required all officers of the United States, courts, and heads of departments to be nominated and appointed by the president after receiving the Senate's approval. Moreover, they argued that the appointments clause restricted the powers of those individuals who were not appointed according to the Article II procedure. Critics pointed to the Supreme Court's ruling in *Buckley v Valeo* (1976) to justify their claims. *Buckley* held that the appointments clause had to be applied to "any appointee exercising significant authority pursuant to the laws of the United States." Because binational panels were empowered to give binding direction to U.S. agencies, critics argued that panelists did have authority under U.S. law and had to be appointed via Article II. In light of the fact that panelists were not appointed by the president on advice from the Senate, critics charged that the panel review process violated Article II, Section 2 of the Constitution.

The dispute over Article II was resolved by Articles 1904 (2) of the FTA and NAFTA. Articles 1904 (2) incorporated the trade remedy laws of Canada, Mexico, and the United States into the Agreements. Consequently, they provided that panelists were able to exercise their authority to review the determinations of domestic agencies pursuant to the international laws of the FTA and NAFTA instead of according to the domestic laws of the three countries. The concept whereby panelists who were not appointed according to the appointments clause could exercise authority under international law instead of under domestic law was upheld by the U.S. Supreme Court in *Seattle Master Builders v Pacific Northwest Electric Power and Conservation Planning Council* (1986). The Court found that a Council whose members were not presidentially appointed was constitutional despite its authority over federal agencies because the Council performed its duties pursuant to international laws. *Seattle Master Builders* therefore applied to Chapter 19 panelists, because they too, performed duties according to international laws.

Chapter 19 was also deemed compatible with the appointments clause because the American panelists were "inferior officers" and could be authorized by Congress and the president to perform their duties as a result. Panelists were not given the power to implement their decisions by Chapter 19. Instead, they were only permitted to remand AD/CVD determinations to the administrative agencies that released them. In this way, panel decisions were executed by those officials and/or agencies who were appointed under Article II. Interestingly, Congress and the executive branch anticipated a constitutional challenge on the basis of Article II. In the event that it was argued that a binational panel could not direct the DOC or ITC to implement its order, the president was authorized to direct the relevant U.S. agency to comply with the panel's order.

Finally, Chapter 19 has been recognized as constitutional because the Supreme Court has not subjected international tribunals to the requirements of the appointments clause. American courts have traditionally deferred to the president and international tribunals in the conduct of international relations. Article II gave the president the authority to conduct foreign affairs. In exercising the authority to settle trade disputes, the executive branch/president has historically taken a range of actions that affected the claims and even lawsuits of Americans. The courts have traditionally not interfered with such actions. In *Dames and Moore v Regan* (1981), the Supreme Court recognized the executive branch's ability to settle disputes by international tribunals when Congress approved. Therefore, because both the executive and legislative branches agreed to the creation of Chapter 19, the authority of the panelists over domestic tribunals was agreed to as well. Indeed, the process by which American panelists are placed onto the Chapter 19 roster requires the USTR to generate a list of potential candidates and submit it to the Senate's Finance Committee and the House Ways and Means Committee for approval. The list of panelists may only be changed in the event that the USTR and Congress so agree. In this way, the executive and legislative branches tacitly approved the panelists that would be placed on a Chapter 19 panel in the event of a dispute.

(3) Due process, the Fifth Amendment, and Chapter 19

The final challenge to the constitutionality of Chapter 19 revolved around the Fifth Amendment and the principle of due process. Critics of Chapter 19 feared that the constitutional rights of individuals to procedural due process would be endangered because Article III courts were replaced with binational panels. If binational panels were to survive a due process challenge, the Chapter 19 process had to assure litigants of an independent and impartial forum, and afford them an adequate opportunity to present their case.

The vast majority of legal experts who have examined the due process issue have concluded that it is moot. Binational panels did not jeopardize the constitutional right to due process for four reasons. First, binational panels were only given authority to examine final AD/CVD determinations when they applied the standards of review of the importing country. The

standards of review that were used by panels were the very ones used by domestic courts, and consequently upheld the principle of due process. Second, due process was not sacrificed because American, Canadian, or Mexican parties have the option of invoking a binational panel. Panels do not have to be requested to challenge a final AD/CVD determinations. Domestic review courts may be convened in very narrow circumstances. Third, the panel process met the requirements of due process by including principles such as essentials of notice, fairness, use of the administrative record, transparency, and other general legal principles. NAFTA negotiators went to great lengths to ensure that Mexico's regime was amended to utilize these principles as Canadian and American courts did. Finally, due process was not endangered because Chapter 19 panels were impartial, apolitical forums to settle disputes. The salaries paid to panelists for their services and selection processes were affirmed as provisions that would protect binational panels from political interference, just as the salaries and tenure provisions protected domestic courts when exercising their authority.

Indeed, Chapter 19 panels have upheld the principle of due process in their decisions. For example, the *New Steel Rails* panel found that the DOC's use of "best-information-available" (BIA) did not violate the Canadian rail producer's right to due process because the complainant had been sufficiently warned of the possible use of BIA if it failed to support the information it submitted to the agency.[66] Similarly, the *Fresh, Chilled, and Frozen Pork* panel remanded an injury determination to the ITC because it had been based on inconsistent sources and inaccurate information, and thereby upheld the principle of due process. Furthermore, when reviewing the ITC's determination on remand, the panel held that the ITC had denied the complainants "fair play" and due process by including new evidence on the record without affording notice and a new hearing.[67] Finally, a panel upheld the principle of due process by demanding that the Department of Commerce give a full explanation of its methodology in the *Red Raspberries* dispute. Instead of deferring to the agency's discretion, the *Red Raspberries* panel actively rejected the DOC's statement that the agency "simply knows inadequacy when we see it," and demanded that facts be used to support the conclusion that the home market and third country sales were inadequate as a basis for determining the margin of dumping. The panel concluded that because Commerce did not provide an adequate explanation of its methodology, the panel could not apply the substantial evidence standard or principles of due process to determine the legality of the affirmative dumping determination.[68]

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[66] *Binational Panel Review in the matter of New Steal Rail, except light rail, from Canada*, USA-89-1904-07.

[67] *Binational Panel Review in the matter of Fresh, Chilled, and Frozen Pork from Canada*, USA-89-1904-11.

[68] *Binational Panel Review in the matter of Red Raspberries from Canada*, USA-89-1904-01, 20-24.

In summary, the Chapter 19 process has proven to be constitutionally sound, thus disproving the arguments of American critics once again. As the above review indicates, panels have not directly examined constitutional questions because they were created to review the adminstration of AD/CVD laws. However, a binational panel that was convened to review a Mexican antidumping order did discuss constitutional issues because they proved to be relevant to the case. The *Cut-to-Length Plate Products* panel considered the compatibility of SECOFI's[69] dumping determination and the "guarantee of legality" of Articles 14 and 16 of the Mexican Constitution. The panel held that it was to ensure that the SECOFI did not abuse the rights of American steel producers during its dumping investigation. The panel felt that its authority to remand SECOFI's determination came not only from the NAFTA but from the Mexican Constitution as well.[70] The *Cut-To-Length Plate Products* dispute illustrates that Chapter 19 panels can be expected to respect constitutional provisions if they affect the issues before them, thereby preserving the importance of those laws in the three political systems, and the constitutionality of the Chapter 19 system in the future.

(D) Binational panels and conflicts of interest

The *Softwood Lumber* dispute politicized conflict of interest charges. A binational panel was convened to review Commerce's CVD determination for softwood lumber imports from Canada. American lumber producers were unhappy with the panel's remand order. They lobbied the USTR to request that an Extraordinary Challenge Committee be convened to review the panel's findings. The USTR argued that Panel Chair Richard G. Dearden (Canadian) and Panelist Lawson Hunter (Canadian) had materially violated the FTA's rules of conduct by failing to disclose information about their personal clients and those that their law firms represented. Consequently, the USTR maintained that the two panelists were guilty of a serious conflict of interest and placed the integrity of the panel in jeopardy.

The majority of the ECC rejected the conflict of interest charges. Justice Hart explained that the FTA's rules of conduct required panelists to submit a disclosure statement before serving on a panel. For example, panelists were required to disclose: (1) any direct or indirect financial or personal interest in the outcome of the proceeding; (2) any existing or past financial, business, professional, family or social relationship, or any such relationship involving a family member, current employer, partner, or business associate; (3) public advocacy of a position on an issue in dispute in the proceeding that was not in the normal course of legal or other representation. The purpose of the disclosure statement was to reveal any interests or relationships that could

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[69] SECOFI (Secretari de Comercio Y Formento Industrial) is Mexico's administrative agency for AD/CVD/injury determinations.

[70] *Memorandum, Opinion, and Order of the Majority in the matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States,* Mex-94-1904-02, 33.

affect the panelist's independence and impartiality or that might reasonably create the appearance of bias. Once appointed to a panel, members were required to make a reasonable effort to become aware of, and to disclose, any interests or relationships that could affect their ability to serve impartially. Hart explained that the disclosure obligations were not to be so severe that it would be impractical for members of the legal or business community to serve as panelists, and deprive the Parties and participants of the services of those who might be best qualified to serve as members. Panelists were therefore only required to disclose relationships or interests that could have bearing on the impartiality or integrity of the process.

Along with Justice Hart, Justice Morgan dismissed the American allegations about the conduct of the two panelists. Both members of the ECC demonstrated that Dearden and Hunter had submitted the proper disclosure statements when being considered for the panel. Moreover, the Canadian and American governments approved them when forming the binational panel in 1992. Indeed, Justice Hart held that "allegations were not raised against Dearden or Hunter until after the panel had twice decided the issue against the position of the United States although there was ample opportunity to do so." He hinted that political interference and lobbying efforts were behind the USTR's charges. Hart reprimanded the USTR for publicly bringing misconduct allegations against the two panelists without waiting for all of the facts to be disclosed or for the two governments to investigate the charges.[71]

Justices Hart and Morgan acknowledged that the firms that Dearden and Hunter worked for had represented Canadian lumber groups in the past. However, they insisted that the American allegations about conflict of interest were unfounded because neither of the two panelists had a direct link to those other groups when serving on the panel that reviewed the DOC's subsidy determination. Furthermore, Hart and Morgan felt that it was ironic that the USTR brought conflict of interest charges against Dearden when he had done legal work for the USTR itself. Dearden had earned approximately $25,000 after he provided the American government with legal advice on Chapter 19 during the FTA negotiations. They also observed that two American panelists in the softwood lumber case had also provided legal counsel to the American government. One American panelist had billed an American governmental agency $3.8 million in 1992-1993. The other had been a sitting member of the Advisory Committee on International Law for the U.S. Department of State while serving on the panel. Both Hart and Morgan questioned why those facts had not been raised by the USTR in the conflict of interest charges against Dearden - surely their activities with the U.S. government were just as informative,

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[71] Justice Gordon L.S. Hart, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Committee Proceedings in the matter of Certain Softwood Lumber Products from Canada ECC-94-1904-01 USA, 30-31.*

costly, and prone to conflict of interest charges as Dearden's were.[72] Hart and Morgan did note that Dearden and Hunter may have been negligible in their responsibility of disclosing any interests or relationships that could have affected their ability to serve on a panel once it had been formed. Nevertheless, they concurred that a serious conflict of interest did not result from Dearden's or Hunter's actions.[73]

In summary, conflict of interest allegations have not been substantiated as the *Softwood Lumber* case demonstrates. Indeed, protecting the Chapter 19 panel process from conflict of interest charges is facilitated by the rules of conduct, the four pre-emptory challenges that each government may make when the panel is selected, and the ability of panelists to withdraw. Panelists are wary of the potential for conflicts of interest, and therefore supply necessary information as the rules of conduct require. Moreover, a number of Chapter 19 panelists have withdrawn during the process of review to protect the integrity of the process. Finally, as the ECC decision illustrates, governments and panels are striving to ensure that panelists are chosen well and uphold their role as impartial, independent arbiters.

(E) Chapter 19 panels are faster than domestic judicial review

One of the principle objectives for the Chapter 19 process of review was to settle AD/CVD disputes quickly. The timelines set out in Chapter 19 have accomplished that goal as proponents hoped would occur. Panels have issued decisions within the 315 day timeframe in the majority of cases. Of the 30 Canada-U.S. disputes settled under Chapter 19 of the FTA, 15 decisions were given on time, and 15 were slightly late due to remands or suspensions (i.e., late panel selection or panelist withdrawal). Of the six decisions reached by NAFTA panels regarding Canada-U.S. disputes, 5 were released on time, and 1 was late (no official reason given for delay).

The degree to which panels have stayed within the 315 day timeframe has made the Chapter 19 system faster than the domestic processes of judicial review in Canada and the United States. This is most true when Chapter 19 is compared to the American process. The average panel process without remands is 359 days. Comparatively, the average American review process

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[72] Justice Gordon L.S. Hart, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Committee Proceedings in the matter of Certain Softwood Lumber Products from Canada ECC-94-1904-01 USA,* 31-32.

[73] Justice Gordon L.S. Hart, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Committee Proceedings in the matter of Certain Softwood Lumber Products from Canada ECC-94-1904-01 USA,* 46-49; Hon. Herbert Morgan, *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Committee Proceedings in the matter of Certain Softwood Lumber Products from Canada ECC-94-1904-01 USA,* 25-28, 44-46.

(without remands) is 734 days and the average Canadian process (without remands) is 462 days. Even if remands are included in the panel process of review, the Chapter 19 is still a faster system. The average panel review, including remands has taken 502 days. When decisions are appealed further, the average time for a panel/ECC review ha been 683 days, while the average time for a CIT/CAFC review has been 1210 days in the United States, and 1062 days for a Federal Court of Appeals/Supreme Court review in Canada.

A number of cases illustrate the quicker nature of the Chapter 19 system. The DOC issued a number of affirmative dumping determinations on steel products in June and July of 1993. Dofasco, Stelco, IPSCO Inc., and Continuous Colour Coat Inc. filed separate complaints for binational panel review of the determinations regarding corrosion-resistant carbon steel products and certain cut-to-length carbon steel plate on August 19, 1993. Panels were convened in response to the request. The Complainants filed briefs with the panels on March 22, 1994. Commerce and a number of U.S. steel producers filed their response briefs in support of various aspects of the final dumping determinations on May 23, 1994 and June 7, 1994. Oral arguments were presented before the panels on July 11-12, 1994. The *Corrosion-Resistant Carbon Steel* and *Cut-To-Length Plate* panels released their decisions on October 31, 1994 - slightly more than one year after being requested. The panels affirmed in part, and remanded in part, the agency's affirmative dumping determinations. The Determinations on Remand were unanimously affirmed by both panels on July 11, 1995 - slightly two years after the panels were requested.[74]

The DOC's affirmative dumping determinations did not only involve Canadian steel producers, but producers from France, Spain, the Netherlands, Finland, German, Brazil, and Belgium as well. Steel firms in those 7 countries appealed the affirmative dumping determination to the CIT when the Canadian firms requested binational panel review in August of 1993.[75] To date, the CIT has reached a final decision in 5 of the 7 requests for judicial review. Of the cases where a decision was released, the CIT delayed making a decision until 1994-1995, and is considering remands in a number of cases. Decisions have not been given in 2 of the cases even though the cases were briefed and argued in late 1994 and early 1995.

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[74] *Binational Panel Review in the matter of Certain Corrosion-Resistant Carbon Steel Products from Canada,* USA-93-1904-03; *Binational Panel Review in the matter of Cut-To-Length Carbon Steel Plate from Canada,* USA-93-1904-04.

[75] The seven countries appealed the DOC's affirmative dumping determination because of the agency's use of best-information-available and the highest aberrant concept. The cases included: France - *Usinor Sacilor v United States* (December 19, 1994, CIT No. 93-09-00592-AD, Slip Op. 94-197); Spain - *Empresa Nacional Siderurgica v United States* (March 6, 1995, CIT No. 93-09-00630-AD, Slip Op. 95-33); Netherlands - *National Steel Corporation v United States* (December 13, 1994, CIT No. 93-09-00616, Slip Op. 94-194); Finland - *Rautarukki Oy v United States* (March 31, 1995, CIT No. 93-09-00560-AD, Slip Op. 95-56); Germany - *Thyssen Stahl v United States* (November 17, 1995, CIT No. 93-09-00586-AD, Slip Op. 95-183); Brazil - no case name to date; Belgium - no case name to date.

Similarly, CITT determinations regarding hot-rolled, cold-rolled, and corrosion-resistant steel sheets were appealed to binational panels and to the Federal Court of Appeals. The three binational panels completed the review process in the allotted time, but the domestic process of judicial review took more than 2 years for all 6 cases to be completed.[76]

Comparing the treatment of the steel cases in the two domestic systems and the binational panel process clearly illustrates how much faster the Chapter 19 system of review is. The panel processes (including remands) were completed within 2 years. However, the domestic processes took more than 2-3 years, and is still not completed for all 7 countries that challenged the final determination in the United States.

Interestingly, domestic courts in Canada and the United States have amended their rules of procedure which may speed up the domestic processes of review and make them comparable to the Chapter 19 process. The CIT modified some of its rules of procedures to replicate the timelines of the binational panels process. The CIT Clerk's Office indicated that the Court acted to significantly increase the speed at which it released AD/CVD decisions after Chapter 19 came into operation.[77] Effective on January 1, 1993, CIT Rule 56.2 incorporated time limits similar to those of Chapter 19 of the FTA and NAFTA. While time limits were not imposed on the judges, oral arguments must now be limited to 30 days after the closing of the briefing schedule, and proposed judicial protective orders and motions to enjoin liquidation must be filed within 30 days of the complaint. Rule 56.2 also provided for detailed judicial management of the progress of a matter, including the briefing schedules and the required filing of status reports with the court. In addition, the CIT adopted some of the procedural simplifications of the panel process. Parties before a binational panel do not need to file a motion for intervention or an answer. Instead, the panel rules simply provide for the filing of a Notice of Appearance by interested parties. The CIT changed its rules of procedure to parallel the binational panels rules. The amendments to the rules in 1993 eliminated the requirement for an answer for actions before the Court.[78]

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[76] The cases included: *Stelco Inc. v CITT et al* (1995), F.C.J. No. 832, Court File no. A-410-93; *Stelco Inc. v Citt et al* (1995), F.C.J. No.831, Court File No. A-360-93 ; *Canadian Klockner v Stelco Inc.* (1995), F.C.J. No. 973, Court File No. A-294-94; *A.G. Der Dillinger Huttenwerke v Canada* (1995), F.C.J., No. 833, Court File No. A-375-93; *Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996), F.C.J. No. 52, Court File No. A-432-94; *Companhia Siderurgica Nacional v Canada* (1996), F.C.J. No. 54, Court File No. A-411-94.

[77] Michael Greenberg, "Chapter 19 of the US-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the CIT," *Law and Policy in International Business,* Vol. 25, No. 1 (1993), 46-47.

[78] Robert E. Burke, Brian F. Walsh, "NAFTA Binational Panel Review: Should it be continued, eliminated, or substantially changed," *Brook Journal of International Law*, Vol. 20, No. 3 (1995),532-533.

The Federal Court of Appeals is also in the process of amending its rules of procedure to implement a faster system of caseflow management. Under the proposed system, the Court's Rules will require that applications for judicial review be perfected and a hearing date requisitioned within 180 days of commencement, the hearing be held within 30 to 90 days of perfection, and judgement rendered within 30 days of hearing, unless the circumstances of the case or of the judge require otherwise. In other words, most applications for judicial review are to be disposed of within 240 to 300 days of commencement. Parties who consider these time limits either too long or too short may request that the proceeding be transferred to the "Specially Managed Proceedings" track. The Court may then fix a different timetable tailored to suit the particular requirements of the case. Allison Small, Executive Officer to the Chief Justice of the Federal Court of Appeals, revealed that while the proposed changes were in no way by-products of the timelines of Chapter 19, the streamlined system illustrates a movement for faster judicial proceedings that has been developing in the Canadian and American legal systems since the late 1980s.[79]

Challenges to efficiency and timeliness of the Chapter 19 process of review have come from three sources. First, panelists have often withdrawn because of other commitments or conflicts of interest. Second, panels have often been slowed because of delays in depositions, motions, filing of briefs, and oral arguments. Most importantly, however, the remand process has slowed the process of review. Chapters 19 of the FTA and NAFTA did not place a timetable for remands into the process of review. The negotiators did not foresee a long remand process because their goal was to have panels issue binding decisions that were complied with quickly and without controversy. The remand process has ranged from 383-927 days. Generally speaking, Canadian and American agencies have complied quickly, quietly, and completely with panel decisions. However, American CVD cases have seen the most remands - of the 6 cases heard by panels regarding subsidies, all were remanded, 4 were remanded twice, and 2 were reviewed by Extraordinary Challenge Committees.

At a first glance, it could be argued that the lack of a set timeframe for the remand process is a problem for the Chapter 19 system. Nevertheless, the lack of a timeframe is not the real challenge to the efficiency and timeliness of the Chapter 19 system. The remand process has been plagued by a deeper problem that is endemic to international agreements - the issue of compliance. The constant redetermination phenomenon is a major problem in the United States. The DOC and ITC have often refused to accept the Chapter 19 panels as valid review bodies. Some, in the controversial disputes over lumber, pork, and live swine, have openly displayed their displeasure of having a binational panel dictate how they were to interpret and apply American AD/CVD laws. For example, the ITC finally conceded to the *Fresh, Chilled, and*

[79] Telephone interview with Allison L. Small, Executive Officer to the Chief Justice of the Federal Court of Appeals, August 13, 1996.

Frozen Pork panel's orders in its second remand determination. However, even though the majority of Commissioners reversed their two previous affirmative determinations, they did so unwillingly and accused the panel of greatly exceeding its scope of authority. Commissioners Rohr and Newquist accused the binational panel of issuing a "counterintuitive, counterfactual, and illogical, but legally binding conclusions," that illustrated, "a woeful lack of knowledge about how the U.S. countervailing duty law operates." They ended their attack by conceding to the panel's authority and stated, "we have no choice but to determine that the domestic industry is not threatened with material injury," because the panel's decision is binding on us.[80]

This cavalier attitude has made American agencies hesitant and/or resistant to adhere to panel orders, and has subjected them to a constant string of remands when they are before panels.[81] American agencies have tended to accept remands from the CIT more readily than from binational panels. Of the 15 cases that were decided by binational panels from 1989-1994, 3 required a remand (20%), 6 reburied two remands (40%), and 1 required three remands (7%) before American agencies complied with the panel's orders. In comparison, the CIT issued 132 decisions between 1989-1994. The DOC and ITC required 1 remand in 35 cases (26%) and 2 remands in 7 cases (5%). [82]

(F) Panel decisions are consistent, thorough, and predictable

Proponents of the Chapter 19 process of judicial review hoped that panels would issue well-reasoned, consistent, thorough decisions that could add predictability to the administration and application of trade remedy laws in North America. Canadian producers often felt as if their case had not been reviewed thoroughly by CIT judges. Decisions were often brief and extremely deferential to administrative agencies. Furthermore, exporters in Canada were dismayed by the seeming lack of consistency, and hence uncertainty, that characterized CIT decisions. As explained, the CIT often issued different decisions on similar issues because judges sat as individuals when reviewing AD/CVD determinations. Consequently, even though Chapter 19 did not require panels to apply the decisions of previous ones, proponents hoped that panelists would look to their colleagues and begin to apply American and Canadian trade laws more consistently and thoroughly. Exporters on both sides of the border could therefore be assured of a more predictable environment that allowed them to trade confidently.

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80 United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Second Remand* (Washington: February, 1991), 3, 17-18.

81 Interview with Tom MacDonald, Director-General of the U.S. Economic and Trade Policy Division (DFAIT), July 4, 1996.

82 United States General Accounting Office, *U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels* (Washington: GAO, 1995), 74-75.

The vast majority of commentators have concurred that Chapter 19 panels have issued well-reasoned, consistent, thorough decisions since 1989, thereby affirming the arguments of Chapter 19 supporters. The high quality of panel decisions has been facilitated by the degree to which panelists have scrutinized the relevant issues under review. Acting within the Canadian and American standards of review, panelists have applied their expertise to the issues before them. Counsel to involved parties in Chapter 19 cases have commented that panels ask more challenging, probing questions, demand more precise answers, and inquire into controversies more than domestic review courts do. Experiences as economists, trade law professors, or trade lawyers have placed panelists in positions to ensure that American and Canadian trade laws were applied properly and fairly. Panelists have deeply probed into the methodology used by administrative agencies, and have demanded specific reasons for why the panel should show deference. In contrast, domestic review courts have tended to grant deference almost automatically when reviewing administrative agencies in Canada and the United States. [83]

For example, the CIT cited "agency discretion" to uphold a final determination even though the agency had departed from previous practices, policies, and regulations in *Chevron USA Inc. v National Resource Defense Council* (1984). Moreover, in *A.G. der Dillinger Huttenwerke v Canada* (1995), the Federal Court of Appeals dismissed a foreign steel makers's appeal of the CITT's injury determination regarding certain hot-rolled carbon steel plate and high strength low-alloy plate. The producer felt that the CITT should have excluded it from the injury analysis because its goods were not "like" the domestic goods in the investigation. The Federal Court of Appeal upheld the CITT by referring to the "large measure of discretion" that Section 43 (1) of the SIMA gave to the agency. Even though detailed reasons were not given by the Tribunal, the Court affirmed the CITT in a 2 page decision because it "clearly understood the applicant's position, gave it careful consideration, and granted substantial relief."[84] Similarly, the Court released very brief, sketchy decisions in *Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996) and *Siderurgica Nacional v Canada* (1995).[85] In both cases, the Court deferred to the CITT's expertise and ability to issue withhold complex, technical information. Therefore, neither the CIT nor the Federal Court of Appeal offered detailed reasoning or asked probing questions when

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[83] United States General Accounting Office, *U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels* (Washington: GAO, 1995), 54; Andreas Lowenfeld, "Reflections on Dispute Settlement Under the FTA: Where Do We Go From Here?" The Hyman Soloway Lecture, (Ottawa: Centre for Trade Policy and Law, May 18, 1993), 7-8; Telephone conversation with Ms. Michele C. Sherman, Cameron and Hornbostel, Washington D.C., July 19, 1996; William Ince, Michele Sherman, "Observations on the Binational Panel Process under Chapter 19 of the U.S.-Canada Free Trade Agreement," Presentation to the Administrative Conference of the United States' Forum (April 23, 1991), 3.

[84] *A.G. Der dillinger Huttenwerke v Canada* (1995), F.C.J., No. 833, Court File No. A-375-93.

[85] *Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996), F.C.J. No. 52, Court File No. A-432-94; *Companhia Siderurgica Nacional v Canada* (1996), F.C.J. No. 54, Court File No. A-411-94.

making their decisions. Instead, the Courts quickly deferred to the administrative agencies even though they had changed their policies and practices, and withheld evidence in their determinations. Consequently, it is safe to conclude that the issues did not get the kind of scrutiny that a binational panel surely would have offered them in the Chapter 19 process of review.

In addition, the high quality of panel decisions has resulted from the well-reasoned, detailed, thorough decisions that have been released. Panel decisions have been lengthy, and have offered detailed summaries of the history of the dispute, the AD/CVD determination in question, the issues at hand, the relevant standard of review, relevant court and panel decisions, and the panel's conclusions. They have provided much more analysis and information than domestic courts have generally done. For example, a CITT determination of dumped hot-rolled steel sheet was appealed to the Federal Court of Appeal by non-NAFTA parties and to a binational panel by American parties. The panel and Court addressed some of the same issues in the course of review. However, the Court either dealt with them much more summarily than the panel did or did not review them at all.[86] The *Hot-Rolled Steel Sheet* panel addressed the issues of cumulation and price suppression with respect to goods from the United States in 11 pages.[87] In *Stelco Inc. v Canada* (1995), the Federal Court of Appeal dealt with the same issues by stating that "allegations that the Tribunal failed to consider the 'cumulative' effect of dumped imports (assuming it had such an obligation) or to consider the alleged injury due to price suppression simply do not find support in the reasons given."[88] While the two review bodies reached the same decision (to uphold the CITT's injury determination), the Panel issued a much longer decision (124 pages vs the Court's 3 pages) because its members were trade experts and economists who had expertise in the field of trade remedy law. Their knowledge and experience allowed them to analyze the issues in more detail and to ask more probing questions to fully appreciate the appropriateness of the CITT's determination.

Panel decisions have also been substantively consistent with one another. Panels have not issued contradictory decisions even though they are ad hoc bodies. They have used other relevant panel decisions as persuasive arguments to support their own conclusions. The *Corrosion Resistant Steel Sheet* panel referred to three FTA panels to help it assess which items of cost Revenue Canada was to use when calculating the margin of dumping. Because there was little to guide them on the issue, the panelists examined the *Beer*, *Gypsum*, and *Cold-Rolled Steel* panels to

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86 Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 37.

87 *Binational Panel Review in the matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products originating in or exported from the United States,* CDA-93-1904-07.

88 *Stelco Inc. v Canada* (1995), F.C.J. No. 832, Court File No. A-410-93.

reach the proper definition of "cost" under the SIMA.[89] Those three panels examined whether costs such as interest expenses, maintaining a parent entity, interest on financing obligations at the parent level, bankruptcy expenses, and pension plans were connected to the costs of production. All three panels stressed that certain costs could be used by Revenue Canada when determining normal values and margins of dumping if they were legitimately connected to the subject goods. Based on the three panel decisions, the *Corrosion Resistant Steel Sheet* panel concluded that the goal of Sections 16 and 19 of the SIMA was to find the connection between the item in question and the cost of the good under investigation. The three FTA panels implied that Revenue Canada or future FTA/NAFTA panels, "obtain as accurate a picture as possible of the costs during the relevant period so as to compare that price to the price charged to consumers in Canada." It was this "connection" test that the panel used to ensure that Revenue Canada included direct and indirect costs attributed through the appropriate distribution of general corporate expenses in the *Corrosion-Resistant Steel Sheets* case.[90]

In general, there has been less variation between panels than between domestic review courts (especially the CIT). Analysts concur that it is positive that panels have referred to each other because it has helped to create consistency. By seeking consistency, panels have moved towards the ideal standard for domestic courts and agencies - panels are doing what domestic courts and agencies ought to do in the process of judicial review. Furthermore, referring to one another has been a natural and positive practice which has allowed panelists to see how other experts have treated similar issues and to ensure that domestic laws and practices were applied properly and consistently during the process of review. [91]

In summary, consistency, thoroughness, and predictability has been the result of the collective decision-making style of panels. Unlike domestic review courts, panels are convened to review one case in detail. Panelists therefore take the time to consult with one another to reach the best possible consensus possible. High quality decisions have also stemmed from the expertise of the panelists. Finally, the consistency of the panel decisions has flowed from the work of the

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89 *Binational Panel Review in the matter of Certain Beer originating in or exported from the United States by G. Heilman Brewing Co. Inc., Pabst Co., and the Stroh Brewery Co. for Use or Consumption in the Province of British Columbia,* CDA-91-1904-01; *Binational Panel Review in the matter of Gypsum Board originating in or exported from the United States*, CDA-93-1904-01; *Binational Panel Review in the matter of Certain Cold-Rolled Steel Sheet originating in or exported from the United States,* CDA-93-1904-08.

90 *Binational Panel Review in the matter of Certain Corrosion Resistant Steel Sheet Products originating in or exported from the United States,* CDA-94-1904-03, 16-17.

91 Joel Robichaud, "Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada," (Ottawa: Unpublished, 1995), 39; William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 136.

NAFTA Secretariats. As explained, the Secretariats have helped to create consistency by familiarizing panels with procedural rules and relevant court/panel decisions. According to a former Chapter 19 panelist, the Canadian Secretariat "made us [the panelists] aware of other experiences. It was the consistent element throughout the whole process" of judicial review.[92]

Therefore, the Chapter 19 system of panel review, "has made the international trade agencies of the United States [and Canada] more attentive to developing a record and sticking to it, to consistency in interpreting their own regulations and precedents, and to the importance of explaining their actions with more case when they have departed from prior practice," as proponents hoped that it would.[93] Consequently, administrative agencies and exporters have been able to become more confident that Chapter 19 panels will subject AD/CVD determinations to a serious, careful review as a result, and have become more assured that the consistency and predictability of the North American trade field can only increase. "We" were right!

(G) Binational panels are a fairer forum of judicial review

Canadian negotiators hoped to create a fairer, bilateral forum for their producers to appeal American AD/CVD orders in. They represented the appeals of Canadian exporters that the American process was biased in favour of producers from the United States. Foreign producers were unable to receive a fair hearing in the American process of judicial review.

The fair, binational flavour of the Chapter 19 system can perhaps be best assessed to examining how many decisions have been unanimous versus how may have split according to national lines. Politically oriented, national biases are not likely to be a factor if a panel has been unanimous and/or has not split according to national lines. Fairness can thus be expected more often in the absence of national biases.

The vast majority of panel decisions have been unanimous. 29 of the 37 (79%) of the panels that completed their reviews of Canadian-American disputes were unanimous between January, 1989 and July, 1996.[94] Panels were unanimous in almost all of the opinions on remand as well. Partial dissents were issued in 7 of the 9 instances (87.5%) where panels were divided. In other words, a panelist completely disagreed with the majority's decision in only 1 out of 37 cases of Chapter 19 review. In the other 36 cases, the five panelists agreed with each other on all, or

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[92] Binational Secretariat-Canadian Section, *Service Standards Survey Report* (Ottawa: Young and Wiltshire, February 1994), 6.

[93] Andreas Lowenfeld, "Reflections on Dispute Settlement Under the FTA: Where Do We Go From Here?" The Hyman Soloway Lecture, (Ottawa: Centre for Trade Policy and Law, May 18, 1993), 7.

[94] See Appendix C for a summary of the panels that have been unanimous or divided.

most, of the issues that were brought before them. Similarly, the majority of ECCs (2 out of 3) have also been unanimous.

More importantly, panels have not split according to national lines in most instances. The only notable exceptions are the ECC in *Softwood Lumber* and the panel in *Flat Hot-Rolled Carbon Steel.* [95] In *Softwood Lumber*, two of the three members of the ECC were Canadians and upheld the panel's decision, while the sole American vehemently disagreed with their views. In *Flat Hot-Rolled Carbon Steel,* 2 American panelists partially disagreed with the 3 Canadian members over the issue of causation. However, the 2 Americans concurred with the (Canadian) majority on all other issues and affirmed the majority's decision to uphold the agency's findings.

Therefore, panels have been very cohesive, united bodies. Panelists have not allowed themselves to side with their country's administrative agencies in the binational process of review. Instead, they have worked cooperatively to ensure that their task of reviewing the administration of AD/CVD laws was done properly and fairly. Such cohesiveness and unanimity has given panels a larger measure of credibility. Because they have not divided according to national lines, they have been perceived as more impartial bodies that have treated Canadian and American exporters more fairly than domestic courts have done. In this respect, panels have proven the proponents of Chapter 19 correct. Chapter 19 has offered a fairer, more impartial process of judicial review because of its binational, unified nature.

3. Conclusions and Policy Implications

(A) Conclusions

The Chapter 19 process of judicial review has disproven the arguments of its critics and substantiated those of its proponents. "They" were wrong, and "we" were right! Since 1989, experience has proven that most panel decisions:

- have been consistent with the two standards of review

- have been similar to domestic court decisions and have not created a second body of trade law exclusive to FTA/NAFTA countries

- have not violated the U.S. Constitution

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[95] *United States-Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Committee Proceeding in the matter of Certain Softwood Lumber from Canada*, ECC-94-1904-01 USA; *Binational Panel Review in the matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products originating in or exported from the United States,* CDA-93-1904-07.

- have not created conflicts of interest

- have been issued within the proper timeframes

- have been thorough, consistent, well-reasoned, and fair

Chapter 19 process of review has been able to manage the increased number of Canada-U.S. disputes well because it has become the "policy equivalent of fighting fair [and has] strengthened judicial processes and procedural due process in what can be painful and unavoidable AD/CVD actions."[96] Consequently, the Chapter 19 system has given North American exporters greater confidence that the AD/CVD laws of each country will be applied properly and fairly. Indeed, the fact that Chapter 19 has been supported by business people in all three NAFTA countries indicates that it is widely seen as introducing fairness and predictability into disputes over the use of unfair, politically motivated trade remedies. Moreover, the rising number of exports between Canada, Mexico, and the United States confirms the enhanced degree of confidence in North American trade since 1989.

(B) Policy Implications

For William Davey, a rule-based, rule-enforcement system of trade resembles a judicial system, and establishes procedures for a party to complain about the actions of another, creates a consultation procedure for discussing the complaint, institutes a neutral decision-making mechanism to judge the merits of the complaint, and creates an enforcement mechanism to "punish" a party which refused to remove the offending measure.[97] In many ways, Davey's system parallels Chapter 19. Chapter 19 allows parties to complain to their governments, who may seek to settle the dispute via negotiations and/or request the formation of a binational panel to assess the appropriateness of an AD/CVD determination. What Chapter 19 does not do is establish a strict enforcement mechanism to "punish" a party which refused to remove the offending measure. Chapter 19 authorizes panels to issue binding decisions which are not to be appealed under routine circumstances. However, Chapter 19 does not empower panels to enforce their binding decisions. After a panel remands a determination, it is the responsibility of the "remanded" administrative agency to comply with and execute the order. Furthermore, as signatories of the FTA and NAFTA, the three governments are obligated to ensure that the

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[96] Gilbert R. Winham, Annie M. Finn, "Accession to NAFTA: The Implications of Extending Chapter 19 Dispute Settlement of Antidumping and Countervailing Disputes," in Joseph McKinney, Melissa Essary (eds), *Free Trade for the Americas: Issues in Economics, Trade Policy and Law* (Waco: Baylor University Press, 1995), 104.

[97] William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 4-5.

Agreements are complied with and executed properly. In other words, they too have the responsibility to ensure that panel decisions are complied with quickly and entirely.

Unfortunately, the degree to which international trade agreements are complied with is often plagued by the "paradox of international law." Even though countries have been jumping on the bandwagon to sing the praises of "the rule of law," "stringent international rules," and "effective international regimes," they have been hesitant to allow those laws, rules, and regimes to override domestic ones. Desires for protecting sovereignty and independent decision-making ability have often taken precedence over enforcing and complying with international rules and institutions. International rules are, after all, only as good and as strong as the will of the member states to uphold them.

Chapter 19 panels are not exempt from the paradox of international law as the *Softwood Lumber* and *Fresh, Chilled, and Frozen Pork* disputes clearly attest. Political manipulation has caused American administrative agencies and officials in the executive branch to bow to national concerns regarding sovereignty and protectionism instead of to broader continental goals of unobstructed, politically neutral free trade. The problem has not been as acute in Canada, but has the potential to develop as well. Members of the Canadian Steel Producers Association, for example, are calling for more stringent, "American-style" trade remedy laws to guard them from foreign producers. The Softwood Lumber Agreement of April, 1996 also gave the media the impression that Canadian lumber producers and federal and provincial governments had given up on the Chapter 19 system and returned to diplomatic negotiations to settle bilateral disputes.[98]

Consequently, the issue of compliance in the face of the paradoxical nature of international law leads to an obvious, but vital policy implication for Canadian trade policy-makers. Canadians must constantly advocate the importance of rules and effective institutions in international trade. Canadians must always remind their trading partners, especially those south of the 49th parallel, that jointly formulated rules were put in place, agreed to, and must be preserved and promoted. Canadians must never give their trading partners the option of compliance. Compliance is essential to a prosperous, well-functioning, free trade agreement.

One means to encourage compliance is to extol the strengths of the Chapter 19 system. Ad hoc, binational panels have been able to issue timely, well-reasoned decisions that respect domestic laws and administrative practices. Some have suggested that a permanent panel would be a more appropriate forum for reviewing AD/CVD laws. However, in light of the successful experience with Chapter 19 thus far, the structure of panels should not be changed. The ad hoc panels have issued excellent, thorough decisions because panelists have been chosen for their expertise on

[98] See, for example, Jeffrey Simpson, "When it comes to trade the Americans just never give up," *Globe and Mail* (February 16, 1996); "How committed is Ottawa to the principles of free trade?" *Financial Post* (February 23, 1996).

certain issues. Ad hoc panelists have also been able to bring fresh, sharp perspectives to issues whereas permanent courts or tribunals can be prone to offering stale, repeated conclusions. Finally, ad hoc panels have not become backlogged like permanent tribunals can be, and have therefore been more likely to uphold the timelines of Chapter 19.

Moreover, Canadians need to continually impart the value of rule-based trade to the Americans. We need to illustrate that the panel system has proven to be constitutional, compatible with domestic laws and judicial practices, and has been able to produce high quality, consistent decisions that uphold domestic laws. Chapter 19 has improved the climate for settling bilateral trade disputes in domestic legal circles. An Anti-Chapter 19, pro-U.S. protectionism lobby has grown extremely loud in Washington. Lumber, steel, semi-conductor, and pork producers have joined hands to hire powerful legal and lobby firms to ensure that American laws stay intact. Firms such as Dewey Ballantine are paid millions of dollars to engineer a constant stream of litigation against any firm, producer group, or country that challenges U.S. trade laws. Conventional wisdom holds that American politicians understand the politics of interest groups and lobbying. Allan Gotlieb extolled the importance of practicing public diplomacy to get a message in the American media and to politicize a point of view. He also insisted that co-opting like-minded American parties will only help because domestic lobbies have more influence than foreign ones do.[99] Canadian governments, policy-makers, and interest groups need to create an effective pro-Chapter 19 lobby to counter the critics in less competitive industries who have the ear of the U.S. Administration and Congress. Bringing like-minded officials and business groups from the United States and Mexico into the fight would help to politicize the importance of Chapter 19 as well. The FTA and NAFTA Chapter 19 negotiations have proven that Canadians can get Americans to accept their beliefs in rule-based trade by continually pushing a certain point of view. Therefore, the empirical evidence upholding the strengths of Chapter 19 must be stressed in bilateral relations to ensure that American officials preserve and promote the value of the binational process of judicial review at home.

Second, compliance could be encouraged by building on the strengths of the Chapter 19 system. Even though the panel system has proven to be effective and not plagued by the problems that have critics alleged, it can be improved. To counter the "remand phenomenon," a timetable could be placed into Chapter 19 to ensure that remands are applied quickly and complied with completely. In the event that timetables were unacceptable, an enforcement body such as the Dispute Settlement Board of the WTO board could be instituted to see that panel decisions are implemented as they were intended to be. Second, Chapter 19 could be improved and compliance encouraged by making panelists more familiar with the trade laws, administrative practices, and cultural idiosyncracies of Canada, Mexico, and the United States. Training

[99] Allan Gotlieb, *I'll be with you in a minute Mr. Ambassador: The Education of a Canadian Diplomat in Washington* (Toronto: University of Toronto Press, 1991), 131.

seminars and communication networks could educate panelists about their roles and areas of trade law that they may not be entirely familiar with. Public awareness campaigns could also be undertaken to educate interested parties about the expertise of the panelists who will review important trade cases. Extolling the expertise of panelists could only increase the confidence that policy-makers and interest groups have in the Chapter 19 system, and could therefore increase the probability that panel decisions were complied with in their entirety.

Finally, perhaps the most important means to encourage compliance is to demonstrate it. Personal relationships work best when individuals "practice what they preach." International trade relationships should be no exception. Canadian administrative agencies, governments, and trade policy-makers need to accept panel decisions and apply them quickly and completely, even if they seem to go against the "national interest." Better to comply with a binational panel decision regarding the administration of an aspect of domestic laws than to cause a trade dispute to escalate, and thus subject Canadian exporters to American protectionism. Furthermore, the federal government must continue to take the lead in encouraging individuals and administrative agencies in Canada to comply with the FTA/NAFTA in general, and Chapter 19 panel decisions in particular. In addition, the federal government should back away from the search for harmonized trade laws and focus their energy on strengthening the Chapter 19 system. If the American critics perceive that Canadians are not fully committed to the binational panel process because panel decisions are not implemented and/or Canadians are constantly searching for harmonized laws so that Chapter 19 would become irrelevant, they could convince others in the U.S. to weaken the system that has proven extremely beneficial for North American trade.

APPENDIX A - Summary of Chapter 19 Disputes (January, 1989-July, 1996)

CASE NUMBER	CASE NAME	OUTCOME
CDA-96-1904-01	Bacteriological culture media from Becton Dickinson and Company and Difco Laboratories of the United States and from the Unipath Limited of the United Kingdom (dumping determination)	Decision due April 17, 1997
CDA-95-1904-01	Certain Malt Beverages from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-95-1904-02	Fresh, Whole, Delicious, Red Delicious and Golden Delicious Applies, originating in or exported from the United States of America (dumping determination)	Terminated by sole requester
CDA-95-1904-03	Machine Tufted Carpeting originating in or exported from the United States of America (dumping determination)	Terminated by sole requester
CDA-95-1904-04	Refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America (dumping determination)	Decision due October 9, 1996
CDA-94-1904-01	Fresh, Whole, Delicious, Red Delicious and Golden Delicious Applies, originating in or exported from the United States of America, excluding Delicious, Red Delicious and Golden Delicious Apples Imported in Non-Standard Containers for Processing (injury determination)	Terminated by joint consent of participants

CDA-94-1904-02	Synthetic Baler Twine with a Knot Strength of 200 lbs or Less, originating in or exported from the United States of America (injury determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-94-1904-03	Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-94-1904-04	Certain Corrosion-Resistant Steel Sheet Products, originating in or exported from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-93-1904-01	Gypsum Board originating in or exported from the United States of America (dumping determination)	Unanimously remanded the agency's determination
CDA-93-1904-02	Gypsum Board originating in or exported from the United States of America (injury determination)	Terminated by joint consent of participants
CDA-93-1904-03	Tomato Paste in Containers Larger than 100 Fluid Ounces, originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants
CDA-93-1904-04	Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat treated or not, originating in or exported from the United States of America (dumping determination)	Joined with CDA-93-1904-05 and CDA-93-1904-07

CDA-93-1904-05	Certain Hot-Rolled Carbon Steel Sheet Products originating in or exported from the United States of America (dumping determination)	Joined with CDA-93-1904-04 and CDA-93-1904-07
CDA-93-1904-06	Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat treated or not, originating in or exported from the United States of America (injury determination)	Joined with CDA-93-1904-04 and CDA-93-1904-06 Unanimously affirmed agency's determination
CDA-93-1904-07	Certain Flat Hot-Rolled Carbon Steel Sheet Products originating in or exported from the United States of America (injury determination)	Joined with CDA-93-1904-05 and CDA-93-1904-07 Panel affirmed, with two partial dissents, the agency's determination
CDA-93-1904-08	Certain Cold-Rolled Steel Sheet originating in or exported from the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-93-1904-09	Certain Cold-Rolled Steel Sheet originating in or exported from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-93-1904-10	Certain Solder Joint Pipe Fittings originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants

CDA-93-1904-11	Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, originating in or exported from the United States of America (injury determination)	Panel, with one dissent, affirmed the agency's determination
CDA-93-1904-12	Preformed Fibreglass Pipe Insulation with a Vapour Barrier originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants
CDA-93-1904-13	Preformed Fibreglass Pipe Insulation with a Vapour Barrier originating in or exported from the United States of America (injury determination)	Dismissed due to failure to file briefs
CDA-92-1904-01	Certain Machine Tufted Carpeting originating in or exported from the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-92-1904-02	Certain Machine Tufted Carpeting originating in or exported from the United States of America (injury determination)	Remanded the determination to the agency twice in each instance affirming part of the determination
CDA-91-1904-01	Certain Beer originating in or exported from the United States of America by G. Heileman Brewing Company Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination

CDA-91-1904-02	Certain Beer originating in or exported from the United States of America by G. Heileman Brewing Company Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (injury determination)	Unanimously affirmed in part, and remanded in part, with one concurring opinion, the agency's determination
CDA-90-1904-01	Integral Horsepower Induction Motors (injury determination)	Affirmed, with one partial dissent, the agency's determination
CDA-89-1904-01	Polyphase Induction Motors from the United States of America (dumping and subsidization determination)	Affirmed, with one partial dissent, the agency's determination
USA-95-1904-01	Porcelain-on-Steel Cookware from Mexico (AD administrative review)	Unanimously, with one concurring opinion of two panelists, affirmed in part and remanded in part the agency's determination
USA-95-1904-02	Gray Portland Cement and Cement Clinker from Mexico (AD administrative review)	Decision due on July 31, 1996
USA-95-1904-03	Color Picture Tubes from Canada (dumping determination)	Affirmed, with one dissenting opinion, the agency's determination

USA-95-1904-04	Oil Country Tubular Goods from Mexico (dumping determination)	Decision due July 12, 1996
USA-95-1904-05	Fresh Cut Flowers from Mexico (AD administrative review)	Decision due October 23, 1996
USA-94-1904-01	Live Swine from Canada (CVD administrative review)	Unanimously affirmed in part and remanded in part the agency's determination
USA-94-1904-02	Leather Wearing Apparel from Mexico (CVD administrative review)	Remanded determination at the request of the agency
USA-93-1904-01	Certain Cold-Rolled Steel Flat Products from Canada	Proceedings stayed by panel - order pending a final resolution of the negative injury litigation before the CIT
USA-93-1904-02	Certain Hot-Rolled Steel Flat Products from Canada (dumping determination)	Proceedings stayed by panel - order pending a final resolution of the negative injury litigation before the CIT
USA-93-1904-03	Certain Corrosion-Resistant Carbon Steel Flat Products from Canada (dumping determination)	Panel, with two dissenting opinions, affirmed in part and remanded in part the agency's determination

USA-93-1904-04	Certain Cut-to-Length Carbon Steel Plate from Canada (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
USA-93-1904-05	Certain Corrosion-Resistant Carbon Flat Steel Products (injury determination)	Unanimously affirmed the agency's determination
USA-92-1904-01	Certain Softwood Lumber Products from Canada (CVD determination)	In two decisions, each with two dissents, panel overturned agency's determination
USA-92-1904-02	Certain Softwood Lumber Products from Canada (injury determination)	Unanimously remanded the agency's determination three times, in the third instance affirming part of the determination
USA-92-1904-03	Pure and Alloy Magnesium from Canada (CVD determination)	Unanimously affirmed in part and remanded in part the agency's determination
USA-92-1904-04	Pure and Alloy Magnesium from Canada (dumping determination)	Unanimously affirmed the agency's determination
USA-92-1904-05/06	Magnesium from Canada (injury determination for AD and CVD investigations)	Unanimously affirmed in part and remanded in part the agency's determination

USA-91-1904-01	Oil Country Tubular Goods from Canada (scope exclusion request from DOC investigation)	Terminated at the requests of the participants
USA-91-1904-02	Iron Construction Castings from Canada (AD administrative review for 1985-1987)	Terminated at the requests of the participants
USA-91-1904-03	Live Swine from Canada (CVD administrative review for 1988-1989)	In two decisions, panel affirmed in part and remanded in part, with one partial dissent, the agency's determinations
USA-91-1904-04	Live Swine from Canada (CVD administrative review for 1989-1990)	In two unanimous decisions, panel affirmed in part and remanded in part the agency's determination
USA-91-1904-05	Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD administrative review for 1989)	Terminated at the requests of the participants
USA-90-1904-01	Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD administrative review for 1989-1990)	Remanded the determination three times, in each instance, affirming part of the determination
USA-90-1904-02	Oil Country Tubular Goods from Canada (DOC abolishment of end use certification procedure)	Terminated at the requests of the participants

USA-90-1904-03	Sheet Piling from Canada (AD duty and cancellation of suspension agreement administrative review)	Terminated at the requests of the participants
USA-89-1904-01	Red Raspberries from Canada (AD administrative review for 1986-1987)	Unanimously remanded agency twice
USA-89-1904-02	Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD administrative review for 1986-1987)	Unanimously affirmed the agency's determination
USA-89-1904-03	Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD administrative review for 1986-1987)	Unanimously affirmed the agency's determination
USA-89-1904-04	Dried, Heavy Salted Codfish from Canada (AD administrative review for 1986-1987)	Terminated at the requests of the participants
USA-89-1904-05	Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD administrative review for 1986-1987)	Consolidated with USA-89-1904-03 and terminated
USA-89-1904-06	Fresh, Chilled, and Frozen Pork from Canada (CVD determination)	In two decisions, panel unanimously affirmed in part and remanded in part, with one concurring opinion in each, the agency's determinations

USA-89-1904-07	New Steel Rails, Except Light Rails, from Canada (CVD determination)	Unanimously affirmed in part, and remanded in part the agency's determination
USA-89-1904-08	New Steel Rails, Except Light Rails, from Canada (dumping determination)	Affirmed, with one partial dissent, the agency's determination
USA-89-1904-09/10	New Steel Rails from Canada (injury determination)	Affirmed, with one partial dissent, the agency's determination
USA-89-1904-11	Fresh, Chilled, and Frozen Pork from Canada (injury determination)	Unanimously remanded, with one concurring opinion, the agency's determination twice
MEX-96-1904-01	Cold-Rolled Steel Sheet, originating in or exported from Canada (dumping determination)	Terminated at the requests of the participants
MEX-96-1904-02	Rolled Steel Plate originating in or exported from Canada (dumping determination)	Decision due December 9, 1996
MEX-96-1904-03	Hot-Rolled Steel Sheet originating in or exported from Canada (dumping determination)	Decision due December 9, 1996
MEX-95-1904-01	Seamless Line Pipe originating in the United States of America (dumping determination)	Terminated at the requests of the participants

MEX-94-1904-01	Imports of Flat Coated Steel Products in and from the United States of America (dumping determination)	Decision due September 20, 1996
MEX-94-1904-02	Imports of Cut-to-Length Plate Products from the United States (dumping determination)	Panel, with two dissenting opinions, remanded the agency's determination
MEX-94-1904-03	Polystrene and Impact Crystal from the United States of America (dumping determination)	Decision due July 18, 1996
ECC-94-1904-01-USA	Certain Softwood Lumber Products from Canada ECC proceeding	ECC, with one dissenting opinion, dismissed the request for failure to meet the standards of an extraordinary challenge and affirmed panel decisions and orders
ECC-93-1904-01-USA	Live Swine from Canada ECC proceeding	Unanimously dismissed the request for failure to meet the standards of an extraordinary challenge and affirmed panel decisions and orders

ECC-91-1904-01-USA	Fresh, Chilled, and Frozen Pork from Canada ECC proceeding	Unanimously dismissed the request for failure to meet the standards of an extraordinary challenge and affirmed panel decisions and orders

APPENDIX B - Determinations That Have Been Appealed to Binational Panels and Domestic Review Courts (1989-1996)

AGENCY DETERMINATION	BINATIONAL PANEL'S DECISION	DOMESTIC REVIEW COURT'S DECISION
ITC Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom Inv nos. 701-TA-319-332, 334, 336-342, 344, 347-353 Inv nos. 701-TA-573-579, 581-592, 594-597, 599-609, 612-619. August, 1993	Certain Flat Rolled Carbon Steel Products from Canada USA-93-1904-05 November 4, 1994 Unanimously affirmed the agency's determination	*Nippon Steel v U.S.* 93-09-00555-INJ April 3, 1995 Affirmed the agency's determination

CITT Investigation into the matter of certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, heat-treated or not, originating in or exported from Belgium, Brazil, the Czech Republic, Denmark, the Federal Republic of Germany, Romania, the United Kingdom, the United States of America, and the former Yugoslav Republic of Macedonia Inv. No. NQ-92-007 May 6, 1993	Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat treated or not, Originating in or Exported from the United States of America CDA-93-1904-06 December 20, 1994 Unanimously affirmed the agency's negative determination	*Stelco Inc. v CITT et al* (1995), F.C.J. No. 832, Court File No. A-410-93 Affirmed the agency's determination *Stelco Inc. v CITT et al* (1995), F.C.J. No. 831, Court File No. A-360-93 Affirmed the agency's determination *A.G. Der Dillinger Huttenwerke v Canada* (1995), F.C.J. No. 52, Court File No. A-375-93 Affirmed the agency's determination
CITT Investigation into the matter of Cold-Rolled Steel Sheet Products from the Federal Republic of Germany, France, Italy, the United Kingdom, and the United States of America Inv. No. NQ-92-009 July 29, 1993	Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America CDA-93-1904-09 July 13, 1994 Unanimously affirmed the agency's determination	*Canadian Klockner v Stelco Inc.* (1995), F.C.J. No. 973, Court File No. A-294-94 Affirmed the agency's determination

CITT Investigation into the matter of certain corrosion-resistant steel sheet products originating in or exported from Australia, Brazil, France, The Federal Republic of Germany, Japan, The Republic of Korea, New Zealand, Spain, Sweden, The United Kingdom and the United States of America Inv no. NQ-93-0077 July 29, 1994	Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of American (Injury) CDA-94-1904-04 July 10, 1995 Unanimously affirmed the agency's determination	*Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996), F.C.J. No. 52, Court File No. A-432-94 Affirmed the agency's determination *Companhia Siderurgica Nacional v Canada* (1996), F.C.J. No. 54, Court File No. A-411-94 Affirmed the agency's determination
REVENUE CANADA In the matter of Certain Flat Hot-Rolled Carbon Steel Products originating in or exported from the Federal Republic of Germany, France, Italy, New Zealand, the United Kingdom, the United States of America File 4258-90- April 29, 1993 Published in the *Canada Gazette,* Part I, Vol. 127, No. 20 (May 15, 1993), 1591.	Certain Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States of America CDA-93-1904-05 May 18, 1994 Panel did not issue a decision - dumping and injury determinations dealt with by one panel in the matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products (CDA-93-1904-07) where panel affirmed, with two partial dissents, the agency's findings	Producers from Brazil and Belgium appealed cases to Federal Court of Appeals but withdrew petitions before process of review began.

DOC Notice of Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate Products from Various Countries 58 Fed. Reg. 37, 136 (July 9, 1993) 58 Fed. Reg 44, 170 (August 19, 1993)	Certain Corrosion-Resistant Carbon Steel Products from Canada USA-93-1904-03 October 31, 1994 Panel, with two dissenting opinions, affirmed in part and remanded in part the agency's determination Certain Cut-to-Length Carbon Steel Plate from Canada USA-93-1904-04 October 31, 1994 Panel unanimously affirmed in part and remanded in part the agency's determination	*National Steel Corp v U.S.* No. 93-09-00616-AD December 13, 1994 Partially remanded agency's determination for certain hot-rolled and cold-rolled carbon steel products from the Netherlands *Usinor Sacilor v U.S.* No. 93-09-00592-AD December 19, 1994 Partially remanded agency's determination for certain carbon steel plate products from France *Empresa Nacional Siderurgica, S.A. v U.S.* No. 93-09-00630-AD March 5, 1995 Affirmed agency's determination for certain cut-to-length carbon steel plate from Spain *Rautaruukki Oy v U.S.* No. 93-09-00560-AD March 31, 1995 Remanded agency's determination for certain cut-to-length carbon steel plate from Finland *Thyssen Stahl AG v U.S.* No. 93-09-00586-AD November 17, 1995 Remanded agency's determination for carbon steel from Germany

DOC Administrative Review of the CVD Order for Leather Wearing Apparel from Mexico (1992) 59 Fed. Reg. 43,815 August 25, 1994	Leather Wearing Apparel from Mexico USA-94-1904-02 April 11, 1995 Remanded final determination at the request of the DOC	*Firenze Designs, Inc. v United States* Court No. 94-09-00557 September 28, 1994 CIT dismissed complaint for lack of jurisdiction

APPENDIX C - Unanimous Versus Divided Chapter 19 Panels (January, 1989 - July, 1996)

CASE	UNANIMOUS OR DIVIDED
CDA-95-1904-01	Unanimous
CDA-94-1904-02	Unanimous
CDA-94-1904-03	Unanimous
CDA-94-1904-04	Unanimous
CDA-93-1904-01	Unanimous
CDA-93-1904-04/05/06	Unanimous
CDA-93-1904-07	Divided - Panelists Cecil Branson (American) and Daniel Partan (American) partially dissented re: causation but concurred with the remainder the majority's opinion
CDA-93-1904-08	Unanimous
CDA-93-1904-09	Unanimous
CDA-93-1904-11	Divided - Panelist Leonard Santos (American) partially dissented re: like goods issue but concurred with the remainder of the majority's opinion
CDA-92-1904-01	Unanimous
CDA-92-1904-02	Unanimous
CDA-91-1904-01	Unanimous
CDA-91-1904-02	Unanimous
CDA-90-1904-01	Divided - Panelist James Garaghty (American) partially dissented re: the exclusion of one company from the investigation but concurred with the remainder of the majority's opinion
USA-95-1904-033	Unanimous

USA-94-1904-01	Unanimous
USA-93-1904-03	Divided - Panelist Steven Weiser (American) and Panelist Maureen Irish (Canadian) disagreed with the majority's affirmation of the agency and finding that the agency's statutory mandate was ambiguous
USA-93-1904-04	Unanimous
USA-93-1904-05	Unanimous
USA-92-1904-01	Divided - Panel Chair Richard Dearden (Canadian) and Panelist Paul Weiler (American) partially dissented re: the specificity of B.C.'s log export restriction but concurred with the remainder of the majority's opinion
USA-92-1904-02	Unanimous
USA-92-1904-03	Unanimous
USA-92-1904-04	Unanimous
USA-92-1904-05/06	Unanimous
USA-91-1904-03	Divided - Panel Chair Murray Belman (American) partially dissented re: linkage of two subsidy programs but concurred with the remainder of the majority's opinion
USA-91-1904-04	Unanimous
USA-90-1904-01	Unanimous
USA-89-1904-01	Unanimous
USA-89-1904-02	Unanimous
USA-89-1904-03	Unanimous
USA-89-1904-06	Unanimous
USA-89-1904-07	Unanimous

USA-89-1904-08	Divided - Panelist David Tavender (American) partially dissented re: the extent of the agency's information and reasoning but concurred with the remainder of the majority's opinion
USA-89-1904-09/10	Divided - Panelist Richard Gotlieb (American) partially dissented re: degree to which affirmative injury finding was supported by substantial evidence but concurred with the remainder of the majority's opinion
USA-89-1904-11	Unanimous
ECC-94-1904-01-USA	Divided - ECC member Malcolm Wilkey dissented re: panel's use of the standard of review
ECC-93-1904-01-USA	Unanimous
ECC-91-1904-01-USA	Unanimous

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