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# Chapter 19 of the NAFTA - The Antidumping and Countervailing Duty

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# *Member States Developments*

## *United States: Chapter 19 of the NAFTA*
### *The Antidumping and Countervailing Duty*

On April 19, 1995, the first decision issued by a North American Free Trade Agreement[1] (NAFTA) binational panel overseeing antidumping (AD) and countervailing duty (CVD) cases will be delivered.[2] Soon thereafter, another eight AD/CVD dispute decisions will be filed by binational panels created under Chapter 19 of the accord.[3] Although these cases are not the first before a Chapter 19 binational panel, they will be the first to have undergone the entire process.[4]

Chapter 19 of the NAFTA establishes the review and dispute settlement mechanism

1. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 [*hereinafter* NAFTA].
2. *See Synthetic Baler Twine with a Knot Strength of 200 lbs. or less, Originating in or Exported from the United States of America*, (North American Free Trade Agreement Binational Panel Review Apr. 10, 1995).
3. *See* NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report of FTA and NAFTA Active Dispute Settlement Matters* (Jan. 1995). The eight cases are as follows: (1) *Live Swine from Canada*, USA-94-1904-01 (North American Free Trade Agreement Binational Panel Review of U.S. agencies' determinations) (Decision due: May 31, 1995); (2) *Leather Wearing Appeal from Mexico*, USA-94-1904-02 (North American Free Trade Agreement Binational Panel Review of U.S. agencies' determinations) (Decision due: Aug. 7, 1995); (3) *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*, CDA-94-1904-03 (North American Free Trade Agreement Binational Panel Review of Canadian agencies' determinations) (Decision due: June 23, 1995); (4) *Certain Corrosion-Resistant Steel Sheet Products, Originating in or Exported from the United States of America*, CDA-94-1904-04 (North American Free Trade Agreement Binational Panel Review of Canadian agencies' determinations) (Decision due: July 13, 1995); (5) *Certain Malt Beverages from the United States of America*, CDA-95-1904-01 (North American Free Trade Agreement Binational Panel Review of Canadian agencies' determinations) (Decision due: Nov. 15, 1995); (6) *Imports of Flat Coated Steel Products from the United States of America*, MEX-94-1904-01 (North American Free Trade Agreement Binational Panel Review of Mexican agencies' determinations) (Decision due: July 13, 1995); (7) *Imports of Cut-Length Plate Products from the United States of America*, MEX-94-1904-02 (North American Free Trade Agreement Binational Panel Review of Mexican agencies' determinations) (Decision due: July 13, 1995); and (8) *Imports of Crystal and Solid Polystyrene from the United States of America*, MEX-94-1904-03 (North American Free Trade Agreement Binational Panel Review of Mexican agencies' determinations) (Decision due: Oct. 20, 1995).
4. *See Certain Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, 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*, CDA-94-1904-01 (North American Free Trade Agreement Binational Panel Review) (Panel review terminated by joint consent of participants).

for all AD and CVD cases which arise between the United States, Mexico and Canada.[5] The Chapter utilizes five member binational panels to hear and render decisions on AD/CVD cases brought by the countries or parties.[6] These panels are composed of persons who are citizens of the same countries as the parties requesting panel review. The panels act as surrogates for reviewing courts and decide cases by applying the appropriate standard of review of the country's investigatory agencies that filed the final determination at issue.

The binational panel review process is not an entirely new concept. Binational panels were first introduced in the United States-Canada Free Trade Agreement (CFTA).[7] Although the CFTA originally intended that these panels would only serve as a "temporary 'finger in the dike' until each Party developed a unified antidumping and subsidies code," these five member panels have since been empowered with the unenviable task of deciding trade conflicts which have historically been the cause of intense political debate and controversy.[8]

Since 1995 is the first year in which binational panels will begin issuing their final decisions on U.S., Mexican and Canadian AD and CVD cases, a close look at the major components of Chapter 19 is in order. The following discussion will outline the fundamental concepts incorporated within the Chapter and analyze the dynamics of the AD/CVD dispute settlement mechanism.

## *I. Retention of Domestic Antidumping & Countervailing Duty Laws*

Chapter 19 states that each NAFTA Party shall retain their own internal dumping and subsidy codes.[9] Article 1902 states that these domestic AD/CVD laws include, "relevant statutes, legislative history, regulations, administrative practice and judicial precedents."[10]

### A. UNITED STATES ANTIDUMPING & COUNTERVAILING DUTY LAW

In the United States, the laws regulating AD and CVD duties are set forth in the Tariff Act of 1930. The principle agencies under the Act are the International Trade Commission (ITC) and the International Trade Agency (ITA) of the Department of Commerce. Both of these agencies have been authorized to investigate the alleged "unfair trade practices" of America's trading partners and issue a final determination as to whether a duty should be imposed.

The procedures for determining the necessity of an AD and CVD duty are similar. First, both the AD and CVD provisions require that an interested party, on behalf of an

5. NAFTA, *supra* note 1, Chapter 19.
6. The North American Free Trade Agreement refers to the three signatories—the United States, Mexico, and Canada—as "Parties." A petitioner and respondent before a binational panel are "parties."
7. The United States-Canada Free Trade Agreement, Dec. 12, 1987, U.S.-Can., 27 I.L.M. 281 (1988).
8. *See* George Mason University Law Professor Michael Krauss interview in *Failure of Dispute Settlement Mechanism Could Spell End for NAFTA, Lawyer Says*, INT'L TRADE REP. (BNA) Nov. 16, 1994.
9. NAFTA, *supra* note 1, art.l 1902(1).
10. *Id.* art. 1902(1).

industry, file a petition with the Department of Commerce.[11] Second, upon receiving the petition, the ITA and the ITC begin investigating the substance of the alleged unfair trading practices. If the agencies find, during the preliminary or final stages of the investigation, that the evidence fails to support the allegation(s), the petition is dismissed. On the other hand, if the ITA establishes that goods are being sold at less than fair value, or foreign subsidies are countervailable, and the ITC makes the requisite injury determination, duties "shall" be imposed.[12]

Under the AD provisions of the Trade Act of 1930, the ITA has twenty days to verify whether the petition submitted to the Department of Commerce states a claim.[13] If the petition is valid, the ITC must begin analyzing whether a domestic industry is (i) materially injured, (ii) threatened with material injury, or (iii) the establishment of a domestic industry is materially retarded by the imported merchandise.[14] The ITC must make a preliminary injury determination within forty-five days.[15] If a positive finding is made, the ITA has 160 days to file a preliminary determination regarding the value of the imported goods.[16] A preliminary determination establishing that the goods are imported at less than fair value requires both agencies to file final determinations regarding the petition's allegations.[17] If both agencies conclude that the exporting Party's export practices violate the AD statute, an AD duty equal to the difference between the home market price and the U.S. price is imposed on the goods.

Similar to the AD procedures, the CVD statute requires that the ITA determine within twenty days whether a submitted petition alleges the necessary elements for the imposition of a countervailing duty. However, unlike the antidumping procedures, there are two different CVD statutory sections under the Tariff Act of 1930—those provisions for countries "under the Agreement," and those who are not.

Under section 1671 of the Tariff Act of 1930, "the Agreement" referred to is the General Agreement on Tariffs and Trade (GATT).[18] Countries who are signatories to the GATT, such as Canada, fall under this category. Not all countries who are signatories to the GATT are considered "under the Agreement" for U.S. purposes. For instance, New Zealand is a signatory to the GATT, but was denied status under section 1671 of the Act because it failed to eliminate trade subsidies.[19] However, some countries, such as Mexico (prior to its enrollment as a member of GATT), receive section 1671 status even though they are not "countries under the Agreement."[20]

The benefit of being a "country under the Agreement" concerns the procedures which must be executed prior to the imposition of a countervailing duty. Section 1671

11. The relevant CVD statute is the Tariff Act of 1930, 19 U.S.C. § 1671a(b)(1) (1993). The relevant AD statute is the Tariff Act of 1930, 19 U.S.C. § 1673a(b)(1) (1993).
12. Tariff Act of 1930, 19 U.S.C. § 1673e(b)(1) (1993)(Antidumping) & 19 U.S.C. § 1671e(b)(1) (1993)(Countervailing Duty).
13. Tariff Act of 1930, 19 U.S.C. § 1673a(c)(1) (1993).
14. *Id.* at § 1673(b)(a).
15. *Id.*
16. *Id.* at § 1673b(b)(1)(A).
17. *See id.*, 19 U.S.C. § 1673d.
18. Ralph H. Folsom et. al., INTERNATIONAL BUSINESS TRANSACTIONS (2d ed. 1991) at 377.
19. *See* 50 Fed. Reg. 13111 (1985).
20. Folsom, *supra* note 18, at 377.

requires the ITA to verify that a countervailable subsidy exists and requires the ITC to make an injury determination. If both agencies are satisfied that an existing subsidy materially or threatens to materially injure a domestic industry, or the establishment of an industry in the U.S. is materially retarded, then a countervailable duty shall be imposed.

Unlike section 1671, which requires both agencies to make the appropriate findings necessary to impose a duty, section 1303 merely requires the ITA to determine that a subsidy exists.[21] An injury determination by the ITC is not required.[22] Hence, countries who are not granted section 1671 status are at a severe disadvantage when an importing Party's authorities investigate a complaining party's petition. Since both Mexico and Canada are "countries under the Agreement," section 1303 does not apply.

### B. Modification of Domestic Antidumping & Countervailing Duty Statutes.

Chapter 19 of the NAFTA authorizes Parties to change or modify their internal AD/CVD laws.[23] However, this power is not without limitation. In order to amend domestic AD/CVD statutes, an amending Party must do the following: (1) the Party must specify that the amended statute applies to other Parties, (2) the Party must provide written notification to other Parties in advance, and (3) the subsequent change to the statutory laws can not be inconsistent with the GATT, the GATT Antidumping Code, the GATT Subsidies Code, or the "object and purpose" of the NAFTA.[24]

An affected Party has the right to challenge an amending Party's modified AD/CVD laws. An affected Party may seek a declaratory opinion from a binational panel in regard to the validity of the amended statute in light of the requirements mentioned above.[25] If the panel finds that the amending statute is in violation of one of the requirements, the panel will require both the amending and the affected Party to enter into consultations in order to remedy the repugnant provisions.[26] Then parties have ninety days to conclude a mutually satisfactory solution.[27] Failure to implement corrective legislation within nine months after the end of the ninety day consultation period empowers the affected Party to impose comparable legislative or equivalent executive action or terminate the NAFTA in regard to the amending Party.[28]

## *II. Initiating the Antidumping & Countervailing Duty Dispute Resolution Mechanism*

To activate the trilateral dispute settlement process, the importing Party's AD/CVD investigating authorities must have issued a final determination regarding goods from an exporting Party.[29] In the United States, review by a binational panel may be sought upon

21. Tariff Act of 1930, 19 U.S.C. § 1303(b) (1993).
22. *Id.* at § 1303(b)(1).
23. NAFTA, *supra* note 1, art. 1902(2)(a).
24. *Id.* 1902(2)(b),(c),(d)(i)-(ii).
25. *Id.* art. 1903(1).
26. *Id.* art. 1903(3)(a).
27. *Id.* art. 1903(3)(a).
28. *Id.* art. 1903(3)(b)(i)-(ii).
29. *Id.* art. 1904(2).

the imposition of a duty by the ITA and ITC or where either agency determines that the evidence fails to support the petitioner's allegations and the complaint is dismissed.

Upon publication of the agency's final determination, a request for binational panel review must be made within 30 days.[30] Chapter 19 authorizes either country engaged in the dispute to request a panel review or a person "who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination."[31] By allowing individuals access to panel review, the forum will likely play an even greater role in the "enforcement of substantive norms" since private litigants are more inclined to litigate, whereas a state may prefer inaction or settlement for economic or political reasons.[32]

A Party or person shall not seek judicial review of the investigating agency's final determination in the national judiciary because the binational panel review process supplants judicial review by domestic courts.[33] As a result, the binational panels become surrogates and are required to apply the appropriate legal standards of the national courts.

### A. Binational Panel Standards of Review

When Chapter 19 was adopted, the Parties did not provide for new substantive law governing the settlement of AD/CVD disputes. As a result, when reviewing the final determination of an importing Party's investigating agencies, the panel must "determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party."[34]

The standard of review to be applied in all binational panel hearings is the law that would apply to the competent investigating authority of the importing Party.[35] Therefore, if a petitioner seeks to challenge the ITA's dismissal of an AD complaint because the agency determined that the goods were not sold for less than fair value, the applicable standard of review would be U.S. law.

The standard of review for ITA and ITC final determinations[36] is whether the agency's decision is "unsupported by substantial evidence on the record, or otherwise is not in accordance with the law."[37] In situations where the agencies determine: (1) not to initiate an investigation, (2) not to review a determination based on changed circumstances, or (3) the ITC negatively determines that there is reasonable indication of material injury, threat of material injury, or material retardation, the applicable standard is whether the determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[38]

In Canada, the applicable standard of review for an agency's final determination is

30. *Id.* art. 1904(4).
31. *Id.* art. 1904(5).
32. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 431 (1993) [*hereinafter* Huntington].
33. NAFTA, *supra* note 1, art. 1904(1).
34. *Id.* art. 1904(2).
35. *Id.* art. 1904(3).
36. *Id.* Annex 1911 (United States' standard of review).
37. Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B) (1993).
38. *Id.* at § 1516a(b)(1)(A).

outlined in subsection 18.1(4) of the Federal Court Act.[39] The appropriate Mexican standards of review are set forth in Article 238 of the Federal Fiscal Code.[40]

The Canadian standard of review is more deferential to the final determinations of its competent investigating agencies than either the Mexican or U.S. standards.[41] The Canadian standard of review merely requires that "any evidence" supporting an agency's judgment is sufficient to affirm the determination.[42] Some have suggested that a potential consequence of Canada's deferential standard is that Mexican and U.S. agency determinations will more likely be hailed before a binational panel since their standards of review are more strict and, therefore, more likely to result in reversal.[43] Evidence under the CFTA experience supports this concern. Under the CFTA, 49 AD and CVD cases have been challenged under Chapter 19 of the Agreement.[44] Of these 49 cases, 30 challenged U.S. determinations, whereas only 19 challenged Canadian decisions.[45] Hence, this "imbalance" could lead to "perceptions of unfairness."[46]

The current list of active NAFTA Chapter 19 cases seems to allay these fears.[47] As of January 1995, nine binational panel review cases were pending.[48] Two panels are reviewing U.S. agency's final determinations, three are reviewing Mexican agency's final determinations, and four are reviewing Canadian determinations.[49]

## *III. Composition of the Binational Panel*

The vehicle for reviewing AD/CVD cases are five member binational panels. These five member panels are chosen from a roster of seventy-five individuals[50] developed by

39. NAFTA, *supra* note 1, Annex 1911 (Canadian standard of review).
40. *Id.* Annex 1911 (Mexican standard of review).
41. Huntington, *supra* note 32, at 433.
42. *American Farm Bureau Federation v. Canadian Import Tribunal*, 2–S.C.R.–1324 (1990) (Can.).
43. Huntington, *supra* note 32, at 434.
44. *See* NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report of FTA and NAFTA Active Dispute Settlement Matters* (Jan. 1995); NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report: Completed NAFTA and FTA Dispute Settlement Panel Reviews* (Jan. 1995).
45. *Id.*
46. Huntington, *supra* note 32, at 434.
47. *See* NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report of FTA and NAFTA Active Dispute Settlement Matters* (Jan. 1995).
48. *Id.*
49. *Id.*
50. The following is a list of seventy eligible American candidates for Chapter 19 panels: Bruce Aitken, Barbara Bader Aldave, William P. Alford, Steven W. Baker, John H. Barton, Lawrence J. Bogard, Peggy Chaplin, James Otis Cole, Michael J. Coursey, Gail T. Cumins, Joel Davidow, Sandra L. Degraw, Mark DeBianco, Joseph F. Dennin, Daniel M. Drory, Harry B. Endsley, Frank G. Evans, Howard N. Fenton, III., Harry First, David A. Gantz, Peter J. Gartland, Franklin B. Gill, Lewis H. Goldfarb, Brian S. Goldstein, Elliot J. Hahn, Timothy A. Harr, Mark D. Herlach, Claude Edward Hitchcock, F. Lynn Holec, Michael P. House, Craig L. Jackson, O. Thomas Johnson, Jr., Alan G. Kashdan, Harold H. Koh, Daniel M. Kolkey, John Lowe, Lance C. Luxton, Robert E. Lutz, II., Brian E. McGill, Carol Mitchell, Geoffrey S. Mitchell, Philip D. O'Neill, Jr., Daniel G. Partan,

the Parties.[51] Each Party must submit the names of 25 candidates.[52]

To be chosen as a panelist, each candidate must be a citizen of either the U.S., Mexico, or Canada.[53] Although candidates are not required to be lawyers, Chapter 19 nevertheless mandates that a majority of the panelists, and the chair of each panel, be a lawyer in good standing.[54] Finally, all candidates are required to "be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law."[55] Thus, the AD/CVD dispute settlement mechanism is impaneled with practitioners who have significant trade law knowledge and expertise.[56]

The procedure for choosing judges requires that each party to the dispute appoint two panelists from the roster within thirty days after a request for a panel has been submitted.[57] If a party fails to select two judges, a panelist will be selected by lot on the thirty-first day.[58]

Up to four peremptory challenges may be exercised by each party during the selection of panelists.[59] However, the exercise of peremptory challenges and the selection of alternative candidates must be completed within forty-five days after the request for a panel.[60] If, on the forty-sixth day, a panelist has been struck and no alternative panelist has been chosen, a panelist will be selected by lot.[61]

The fifth panelist must be chosen within fifty-five days of the request for a panel.[62] If the parties fail to agree by the sixty-first day, the fifth panelist will be chosen by lot.[63] Once the fifth panelist is chosen, the panelists will appoint a chair from among the lawyers on the panel.[64]

It has been previously written that binational panels simply "'stand in the shoes' of domestic reviewing courts."[65] The panels apply the standard of review that the court of

*Note 50, continued*

Kathleen F. Patterson, John M. Peterson, Sidney Picker, Jr., Morton Pomeranz, Lauren D. Rachlin, Kenneth B. Reisenfeld, W. Michael Reisman, Jimmie V. Reyna, Bradley J. Richards, Maureen Rosch, Edward L. Rubinoff, Robert E. Ruggeri, Francis J. Sailer, Michael Sandler, Mark Sandstrom, Leonard Sherman, Edwin M. Smith, James F. Smith, Maria T. Solomon, Mary T. Staley, Lawrence Waddington, Steven S. Weiser, and Gary M. Welsh.

51. NAFTA, *supra* note 1, Annex 1901.2(1).
52. *Id.* at Annex 1901.2(1).
53. *Id.* at Annex 1901.2(1).
54. *Id.* at Annex 1901.2(2) & (4).
55. *Id.* at Annex 1901.2(1).
56. *See* Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW 707 (1993).
57. NAFTA, *supra* note 1, Annex 1901.2(2).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at Annex 1901.2(3).
63. *Id.*
64. *Id.* at Annex 1901.2(4).
65. Moyer, *supra* note 56, at 713.

the importing state would apply to the decisions of its competent investigating agencies.

There are many differences between Chapter 19 binational panels and the national judiciaries of each Party. First, binational panels are composed of more than one judge, and as a result, are often more "inquisitive."[66] Panels utilized under Chapter 19 of the CFTA are known to have hearings lasting several hours longer than domestic court hearings.[67] Second, binational panels are composed of persons from different countries; hence, panels are more heterogeneous than domestic forums.[68] Third, sometimes a majority of the individuals sitting on a panel are likely to have not been trained in the law of the forum which they are applying.[69] Fourth, "binational panels are binational."[70] Although candidates are "not to be affiliated with a Party,"[71] the citizenship of the panelists necessarily results in a "binational perspective to their specific Chapter 19 responsibilities."[72]

Despite the differences between binational panels and national courts, evidence indicates that binational panels are just as, if not more, efficient and effective in resolving AD/CVD disputes. The CFTA binational panel experience has led one scholar to write:

> The panelists have been thoughtful; their opinions have been thorough and articulate, and their conclusions on the whole persuasive. ... One could not detect a bias in favor of protectionism or unrestricted trade. While the panels have differed from one another, no "Canadian approach" or "American approach" has emerged. Moreover, it seems that collective decision-making of the panels results in less variation from one panel to another than, for instance, from one judge to another in the Court of International Trade.[73]

Hopefully, these positive characteristics of CFTA panels will be attributable to the binational panels sanctioned under Chapter 19 of the NAFTA.

## *IV. Article 1904: The Resolution of Disputes "With All Deliberate Speed ..."*[74]

Chapter 19 establishes guidelines to promote a quick resolution of AD/CVD disputes.[75] According to Article 1904, final decisions are to be filed by a binational panel

66. *Id.* at 714.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 715.
71. NAFTA, *supra* note 1, Annex 1901.2(1).
72. Moyer, *supra* note 56, at 715.
73. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canadian-United States Free Trade Agreement: An Interim Appraisal*, 24 INT'L L. & POL. 269, 334 (1991).
74. *See Brown v. Bd. of Educ. of Topeka (Brown II)*, 349 U.S. 294 (1995) (U.S. Supreme Court's famous language requiring U.S. District Courts to take such actions and enter such orders and decrees as necessary to admit African-American pupils into public schools).
75. *See* NAFTA, *supra* note 1, art. 1904(14)(a)-(g).

within 315 days of the date in which a request is submitted.[76] In order to achieve this goal, Article 1904 specifies the following time limits:

(a) 30 days for the filing of the complaint;[77]
(b) 30 days for designation or certification of the administrative record and its filing with the panel;[78]
(c) 60 days for the complainant to file its brief;[79]
(d) 60 days for the respondent to file its brief;[80]
(e) 15 days for the filing of reply briefs;[81]
(f) 15 to 30 days for the panel to convene and hear oral argument;[82] and
(g) 90 days for the panel to issue its written decision.[83]

The imposition of strict time constraints results in an expeditious final determination by the binational panel. According to various studies, binational panels are quicker than decisions issued by the U.S. Court of International Trade[84] and twice as fast as the U.S. domestic judicial review system.[85] These figures are applicable also to Canada.[86] Statistics also indicate that Mexican AD/CVD procedures take anywhere from fifteen to eighteen months.[87] Hence, NAFTA panels provide individual parties a quick and cheaper method of resolving AD/CVD disputes.

## *V. Binational Panel Authority*

Chapter 19 confers on panels the authority to affirm the final determinations of agencies or remand the determination for action "not inconsistent with the panel's decision."[88] If the panel remands a case back to the importing Party's agency, those agencies are obligated to comply with the remand in as "brief a time as is reasonable" considering the difficulty of the facts and legal issues involved and the nature of the panel's decision.[89]

76. *Id.* at art. 1904.14.
77. *Id.* at art. 1904.14(a).
78. *Id.* at art. 1904.14(b).
79. *Id.* at art. 1904.14(c).
80. *Id.* at art. 1904.14(d).
81. *Id.* at art. 1904.14(e).
82. *Id.* at art. 1904.14(f).
83. *Id.* at art. 1904.14(g).
84. Moyer, *supra* note 56, at 717; *See* Shambon, *Accomplishing the Legislative Goals for the Court of International Trade: More Speed! More Speed!*, app. (Nov. 3, 1989) (on file with the United States Court of International Trade, Sixth Annual Judicial Conference).
85. Huntington, *supra* note 32, at 433.
86. *Id.* at 433 n. 180.
87. *Id.* at 433 n. 180.
88. NAFTA, *supra* note 1, art. 1904.8.
89. *Id.* at art. 1904.8. This article defines "brief a time as is reasonable" as the amount of time equal to, but not more than, the maximum amount of time permitted by statute for the importing Party's investigating agencies to render a final determination in an investigation.

All panel decisions are binding on the involved Parties.[90] Furthermore, panel decisions are also binding on the competent investigating agencies as a matter of domestic law.[91] However, the scope of the panel's power is limited in that the decisions are binding only in regards to the issue before the panel.[92] Therefore, panel decisions are not accorded precedential value under NAFTA "binational law" or each Party's national law.[93]

## *VI. Review of Panel Determinations*

The decisions issued by binational panels are not subject to national judicial review.[94] Moreover, Parties to the Agreement are prohibited from adopting legislation authorizing their domestic courts to review Chapter 19 AD/CVD disputes.[95]

Binational panel decisions are subject to review within the framework of the NAFTA however. Parties may seek review of a panel's final determination by availing themselves of the extraordinary challenge committee proceedings.

### A. The Extraordinary Challenge Committee

The extraordinary challenge committee (ECC) is composed of fifteen individuals nominated by the Parties.[96] Each Party must name five persons to this roster.[97] The panelists nominated must be a "judge or former judge of a federal judicial court of the United States or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico."[98] Unlike binational panels, non-lawyers cannot be nominated to the ECC roster.

### B. Limitations on a Party's Ability to Seek ECC Review

Chapter 19 limits a Party's right to request an ECC review of a binational panel's judgment. Article 1904 states that a Party must allege within a reasonable time that:

> (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
> (ii) the panel seriously departed from a fundamental rule of procedure, or
> (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review; and
> (b) any of these actions set out in subparagraph (a) has materially

90. *Id.* at art. 9.
91. Moyer, *supra* note 56, at 719.
92. NAFTA, *supra* note 1, art. 9.
93. Huntington, *supra* note 32, at 435.
94. NAFTA, *supra* note 1, art. 11.
95. *Id.* at art. 11.
96. *Id.* at Annex 1904.13(1).
97. *Id.*
98. *Id.*

affected the panel's decision and threatens the integrity of the binational panel review process.[99]

### C. Procedure Under the Extraordinary Challenge Committee

The parties seeking an ECC review of a binational panel's final decision must select three persons to compose an ECC panel within fifteen days of the review.[100] Each party must select one panelist.[101] The parties will decide by lot who will select the third member from the roster.[102]

After the committee has been impaneled, the ECC has ninety days to announce a decision.[103] The ECC's decision is binding on the parties in regard to the issue before the committee.[104] If the ECC determines that one of the grounds outlined in Article 1904(13) has been established, then the ECC shall vacate the binational panel's decision and remand the case to the original panel for "action not inconsistent with the committee's decision."[105] On the other hand, if the evidence fails to establish that an Article 1904(13) element exists, then the petition is dismissed.[106]

As of January 1995, no ECC review panel has been established under Chapter 19 of the NAFTA. However, under the CFTA, three ECC proceedings have been commenced with each resulting in a dismissal of the petition for review.[107] If the CFTA ECC experience is any indication, it is likely that ECCs under the NAFTA will be used sparingly.

## *VII. Article 1905: The Guardian Article of the Binational Panel Review System*

Article 1905 establishes a Party-to-Party special committee designed to protect the binational panel review system. In situations where a Party alleges that another Party's domestic law: (1) hinders a complaining Party's ability to establish a Panel; (2) prevents a panel requested by the complaining Party from rendering a final decision; (3) has prevented the implementation of a panel's decision or denied the decision binding force; or (4) fails to provide review of an investigating authorities' final determination, the complaining party may request consultations with the other party.[108] If the Parties fail to

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at Annex 1904.13(2).
104. *Id.* at Annex 1904.13(3).
105. *Id.*
106. *Id.*
107. *See Fresh Chilled and Frozen Pork from Canada*, ECC-91-1904-01USA (ECC affirmed panel order and dismissed petition for failure to meet the standards of an extraordinary challenge); *Live Swine from Canada*, ECC-93-1904-01USA (ECC affirmed panel decision and dismissed petition for failure to meet the standards of an extraordinary challenge); *Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA (ECC affirmed panel decision and dismissed petition for failure to meet the standards of an extraordinary challenge—one dissenting vote).
108. NAFTA, *supra* note 1, art. 1905(1).

resolve the dispute within forty-five days of the request, the complaining party may request the establishment of a special committee.[109]

This special committee is composed of three judges or former judges chosen from the ECC roster.[110] The special committee shall provide at least one hearing and must prepare an initial report to be presented to the Parties.[111] The Parties are afforded an opportunity to comment on the report prior to the committee's issuance of a final report.[112]

If the committee issues an affirmative finding to one of the allegations, the Parties must again enter into consultations.[113] If the parties fail to agree to a mutually satisfactory solution within 60 days, the complaining Party may suspend: (1) the operation of Article 1904 with respect to the other Party or (2) the application to the Party complained against of such benefits under this Agreement as may be appropriate under the circumstances.[114]

Although the special committee appears to have sufficient "teeth" to act as a deterrent, some have argued that the system should be more strict. First, the language of the Article does not require that the complained against Party comply with the special committee's judgment.[115] The consultation process mandated merely requires that the Parties confer with one another in an attempt to achieve a mutually satisfactory solution.[116] Another problem is the manner in which the Agreement is enforced. The Article's chief method of enforcement is suspension of the Agreement.[117] This enables a Party who seeks a suspension of the binational panel process to attain its objectives by merely failing to comply with a panel's judgment.[118] Hence, the chief enforcement tool under the Article may actually lead to the suspension of the Agreement itself.

## *VIII. Conclusion*

Chapter 19 of the North American Free Trade Agreement is likely to come under increased scrutiny in 1995. Nine decisions are expected to be filed by binational panels between the months of April and November. These decisions will be the first rendered under the binational panel dispute resolution system. Moreover, these decisions will resolve trade conflicts which are notoriously controversial and have been at the base of intense political debate.

Since the Chapter confers power on binational panels to review each Party's investigating agencies' final AD/CVD determinations and issue binding judgments which are not subject to the review of national courts, panels have become the glue which bonds the regional trade pact in the face of trade conflicts which threaten to sheer the Agreement.

*—Clayton Bailey*

109. *Id.* at art. 1905(2).
110. *Id.* at art. 1905(4),(5). *See* Annex 1904.13(1).
111. *Id.* at Annex 1905.6(a),(b).
112. *Id.* at Annex 1905.6(b).
113. *Id.* at art. 1905(8).
114. *Id.*
115. Huntington, *supra* note 32, at 438.
116. NAFTA, *supra* note 1, art. 1905(7).
117. *Id.* at art. 1905(8).
118. Huntington, *supra* note 32, at 438.