

1993

## Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort

Homer E. Moyer Jr.

---

### Recommended Citation

Homer E. Moyer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L L. 707 (1993)

<https://scholar.smu.edu/til/vol27/iss3/10>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## **Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort**

The binational panel process of Chapter 19 will in many respects be the crucible of the North American Free Trade Agreement (NAFTA). As the vehicle for resolving antidumping and countervailing duty cases brought in any of the three contracting countries, Chapter 19 panels will be required to deal with the types of trade conflicts that have historically generated intense, sometimes passionate, controversy.

The Chapter 19 binational panel process is not new. Chapter 19 panels were introduced in 1988 in the U.S.–Canada Free Trade Agreement (CFTA). At the time, some regarded them as insubstantial innovations: the Chapter 19 provisions creating panels neither adopted new substantive law nor established a right of review that would not otherwise exist. Rather, those provisions provided that Chapter 19 panels would serve simply as surrogates for reviewing courts and decide cases in accordance with the same legal standards that courts would apply.

The experience with CFTA binational panels suggests, however, that notwithstanding numerous parallels with the domestic courts they supplant, five-member panels are obviously different from courts and create different dynamics in the review process. The following summary offers a partial snapshot of how the Chapter 19 panel process has operated under the CFTA during its first four years. That picture may shed some light on how binational panels will operate under the

---

\*Mr. Moyer, a former general counsel of the U.S. Department of Commerce and past chair of the ABA Section of International Law and Practice, is a member of the Washington, D.C., law firm of Miller & Chevalier. Mr. Moyer has appeared as counsel before several Chapter 19 binational panels and before both extraordinary challenge committees. The opinions expressed in this article are exclusively the author's. They do not necessarily reflect the views of Miller & Chevalier, any client of the firm, or, indeed, even those who generously assisted in the preparation of this piece. The latter include Amy L. Rothstein, Peter B. Miller, and Philip J. Ferneau. Thanks also to Whitney Sabanosh, Jonathan Gray, Jane LaCroix, and Terry Prosis.

NAFTA, which replicates the binational panel provisions of Chapter 19 without significant change.

## I. Basic Features of Chapter 19 of the NAFTA

Chapter 19 of the NAFTA establishes a trilateral process for "review and dispute settlement in antidumping and countervailing duty matters."<sup>1</sup> In the U.S. context this provision means that panels will review final determinations of both the U.S. Department of Commerce and the International Trade Commission. Thus, the binational panel review provisions of the NAFTA apply to those types of trade cases that have dominated U.S. trade litigation and that have been perhaps the most common form of trade dispute between the United States and Canada and between the United States and Mexico.

The vehicles for review are five-member binational panels composed of panelists from the two countries (or Parties) involved in the dispute.<sup>2</sup> Panelists will be drawn from a seventy-five-person roster developed by the Parties.<sup>3</sup> All candidates must be citizens of the United States, Canada, or Mexico. Although panelists need not be lawyers, a majority of each panel, including the chairman, must be lawyers in good standing. The NAFTA states that the roster "should include judges or former judges to the fullest extent practicable."<sup>4</sup>

When a Party requests panel review, the NAFTA entitles each of the two Parties involved in the case to choose two panelists. Choices are subject to challenge by the opposing Party. The involved Parties either agree on a fifth panelist or, if unable to agree, select the fifth panelist by lot.

In reviewing antidumping and countervailing duty determinations, panels stand in the shoes of the domestic reviewing court that would otherwise decide the case. Panels must apply the same domestic substantive law that the administering agency applies. The NAFTA defines substantive law to include "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."<sup>5</sup> Chapter 19 panels are also bound to apply the same standard of review and the general legal principles as would the reviewing court of the importing Party.<sup>6</sup>

The NAFTA binational panels must meet specific deadlines. Chapter 19 requires the Parties to adopt implementing rules of procedure that will "result in

---

1. NAFTA Chapter 19, Review and Dispute Settlement in Antidumping and Countervailing Duty Matters. Actions taken under section 301 and other trade disputes are not subject to Chapter 19 panel review. *Id.* art. 1901(c)(1).

2. The NAFTA refers to the three contracting countries as "Parties" (initial capital). Participants in a Chapter 19 proceeding are "parties" (lowercase).

3. Panel eligibility requirements and selection procedures are set out in NAFTA annex 1901.2.

4. *Id.* annex 1901.2(1).

5. *Id.* art. 1904(2).

6. *Id.* art. 1904(3).

final decisions within 315 days of the date on which a request for a panel is made.”<sup>7</sup> For remands the NAFTA provides a less precise schedule, stating only that “the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel’s decision.”<sup>8</sup> A panel “shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it.”<sup>9</sup>

Panel decisions on a particular matter are nonreviewable and binding as a matter of law. The narrow exception to this principle, the “extraordinary challenge,” is available only under unusual circumstances of gross misconduct, bias, breach of fundamental procedures, or action that manifestly exceeds the authority panels have been given.<sup>10</sup>

Beyond the review of antidumping and countervailing duty determinations, Chapter 19 contains additional provisions, a few of which differ from those in the CFTA.<sup>11</sup> Both the NAFTA and the CFTA provide that a Party may change its antidumping or countervailing duty law as it applies to the other Parties, but only if the statutory change is expressly applicable to the other Parties, the Parties are notified in advance of the enactment of the changed law, and the statutory change is consistent with the General Agreement on Tariffs and Trade (GATT), the GATT Subsidies Code, or the GATT Antidumping Code, and “the object and purpose of” the agreement.<sup>12</sup> Both agreements also provide for the establishment of a binational panel to issue a declaratory opinion determining whether the statutory change is inconsistent with the requirements of article 1902(2) or has the function and effect of overturning a prior panel decision.<sup>13</sup>

## II. Extrapolating from the CFTA Experience

Because Chapter 19 of the NAFTA is nearly identical to Chapter 19 of the CFTA, the brief history of binational panel review under the CFTA may provide some basis for anticipating how the NAFTA panels will operate. Such extrapolation, however, is subject to some important limitations.

One caution is that the CFTA experience has been strikingly asymmetrical in that CFTA panel decisions have overwhelmingly involved reviews of final determinations made by U.S., not Canadian, agencies. In the first four and one-half years of the CFTA thirty-one Chapter 19 panels and two extraordinary

7. *Id.* art. 1904(14).

8. *Id.* art. 1904(8).

9. *Id.*

10. *Id.* art. 1904(13); *see infra* part VIII.A.

11. *See infra* part VIII.B.

12. CFTA art. 1902(2); NAFTA art. 1902(2).

13. CFTA art. 1903; NAFTA art. 1903.

challenge committees were constituted.<sup>14</sup> Of those thirty-one panels, twenty-three were formed to hear appeals from determinations of either the U.S. Department of Commerce or the U.S. International Trade Commission.

The lopsided incidence of panel reviews simply reflects the relative number of cases brought in the United States and Canada, respectively. Nonetheless, this imbalance complicates any objective evaluation of Chapter 19 panels. For example, some observers may attribute to the process factors that may more fairly be attributable to particular cases or to the conduct of a particular agency. Similarly, for those inclined to evaluate the process by tallying wins and losses for foreign or domestic interests, a brief history dominated by cases from just one country may be more susceptible to simplistic generalizations. Even a limited and asymmetrical database, however, makes speculating about the NAFTA Chapter 19 panels less daring than venturing predictions about the new NAFTA chapters that have no CFTA predecessors.

### III. Are Chapter 19 NAFTA Panels Constitutional?

A threshold question now, as with CFTA, is whether the NAFTA structure of entrusting the review of final antidumping and countervailing duty determinations to binational panels is constitutional. At the time of the CFTA's implementation the chair of the House Judiciary subcommittee posed the issues as follows:

One, does the bill violate Article III of the Constitution by failing to authorize judicial review, and second, does the bill violate the appointments clause. Also, does the due process clause of the Fifth Amendment require that some form of judicial review be available to claimants in these countervailing duty cases and these antidumping cases.<sup>15</sup>

Some opponents of the CFTA argued that Chapter 19 is constitutionally infirm.<sup>16</sup> However, administration officials, constitutional scholars, and various representatives of the international trade bar all concluded that Chapter 19 offends no provision of the United States Constitution. Following this debate, both Houses of Congress approved the CFTA and adopted implementing legislation.<sup>17</sup> The

14. Unless otherwise indicated, the statistical data appearing in this article derive from the February 1992 and March 1993 FTA Dispute Settlement Status Reports issued by the U.S.-Canada Free Trade Agreement Binational Secretariat, U.S. Section.

15. *U.S.-Canada Free-Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 2 (1988) [hereinafter *House Judiciary Hearings*] (statement of Rep. Kastenmeier).

16. *House Judiciary Hearings*, *supra* note 15, at 193, 206-08 (attachment to statement of Andrew P. Vance, chair of Trial and Appellate Practice Comm. of CIIBA) (Chapter 19 would deny equal protection of law under 5th and 14th Amendments).

17. United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified at 19 U.S.C. § 2112 note (1990)); 134 CONG. REC. S12782 (daily ed. Sept. 19, 1988) (Senate passage of bill); 134 CONG. REC. H6665 (daily ed. Aug. 9, 1988) (House passage of bill).

legislation contains, however, special procedures to be followed in the event of a successful constitutional challenge.<sup>18</sup>

Two constitutional questions have been the most persistent.<sup>19</sup> The first is whether replacing judicial review with Chapter 19 panel review violates Article III, Section 1 of the U.S. Constitution, which vests "judicial power of the United States . . . in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This question turns on whether the cases heard by Chapter 19 panels are ones required by the Constitution to be heard by an Article III tribunal. Such inquiry implicates a separation of powers analysis that distinguishes adjudication of "private rights," which requires an Article III court, from adjudication of "public rights," which does not.<sup>20</sup>

A second constitutional question is whether replacing judicial review with review by a panel consisting of persons who have not been appointed by the President and confirmed by the Senate violates the Appointments Clause, Article II, Section 2 of the U.S. Constitution.<sup>21</sup> Those who fault Chapter 19 on this score argue that the U.S. Supreme Court's decision in *Buckley v. Valeo*<sup>22</sup> requires that all persons "exercising significant authority pursuant to the laws of the United States"—including, they argue, Chapter 19 panelists—function as officers of the United States, who must be appointed in accordance with the requirements of the Appointments Clause.<sup>23</sup> In response the CFTA's defenders contend that: (1) the Appointments Clause does not apply because panels act pursuant to international

18. 19 U.S.C. § 1516a(g)(7)(B) (1988).

19. Most commentators accept that the earlier due process concerns regarding Chapter 19 have been answered. See, e.g., Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Panel Arbitral Review Under the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1455, 1457 n.8 (1992) ("The commentary on the FTA has adequately addressed the due process concerns raised by the FTA"); cf. Nat'l Council for Indus. Defense, Inc. v. United States, No. 92-1898 (D.D.C. filed Aug. 9, 1992); see *infra* notes 29-30 and accompanying text.

20. See Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401, 416-19 (1989); Peter Huston, Note, *Antidumping and Countervailing Duty Dispute Settlement Under the United States-Canada Free Trade Agreement: Is the Process Constitutional?*, 23 CORNELL INT'L L.J. 529, 546-49 (1990); Dave Resnicoff, Note, *The United States-Canada Free-Trade Agreement and U.S. Constitution: Does Article III Allow Binational Panel Review of Antidumping and Countervailing Duty Determinations?*, 13 B.C. INT'L & COMP. L. REV. 237 (1990); Gilad Y. Ohana, Note, *The Constitutionality of Chapter Nineteen of the United States-Canada Free-Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989).

21. The Appointments Clause provides:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States . . . ; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

22. 424 U.S. 1, 126 (1976).

23. See, e.g., Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 WASH. & LEE L. REV. 1299, 1302 (1992); Chen, *supra* note 19, at 1481 & n.185.

law (the CFTA), not U.S. law;<sup>24</sup> (2) U.S. panelists qualify as "inferior officers" under the Appointments Clause and Canadian panelists need not qualify because they act pursuant to Canadian law;<sup>25</sup> (3) the Supreme Court historically has not subjected international arbitration to the requirements of the Appointments Clause;<sup>26</sup> and (4) U.S. courts traditionally defer to the President in the conduct of foreign relations.<sup>27</sup>

Chapter 19 had been in operation for over four years when its constitutionality was first challenged. The challenge came from an unexpected direction. In August 1992, two U.S. trade associations with ties to organized labor filed suit in U.S. district court against Chapter 19.<sup>28</sup> Although neither plaintiff had ever been involved in a Chapter 19 review, they argued that their members were threatened by the process because it (1) gave panels composed of U.S. and foreign private practitioners the power to reverse decisions of U.S. agencies and (2) deprived U.S. victims of alleged Canadian unfair trade practices access to U.S. courts.<sup>29</sup> The United States Government responded with a motion to dismiss for lack of jurisdiction, lack of standing, or both.<sup>30</sup> As of March 1,

24. *House Judiciary Hearings*, *supra* note 15, at 78-79 (statement of M. Jean Anderson, U.S. Dep't of Comm. (ABA Report)); *id.* at 126, 134-35, 166-67 (statement and attachment of Joseph P. Griffin, chair of ABA Section on Int'l Law & Practice).

25. William J. Davey, *The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict*, 49 WASH. & LEE L. REV. 1315, 1319-22 (1992).

26. *House Judiciary Hearings*, *supra* note 15, at 79-80 (statement of M. Jean Anderson); *id.* at 105-06 (statement of Prof. Harold H. Bruff); *id.* at 167 (ABA Report).

27. *See, e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936).

28. *Nat'l Council for Indus. Defense, Inc. v. United States*, No. 92-1898 (D.D.C. filed Aug. 9, 1992) (assigned to Judge Royce Lamberth). The plaintiffs claim that the district court has jurisdiction variously under 5 U.S.C. §§ 701-706 (1988) (Administrative Procedures Act), 28 U.S.C. § 1331 (1988) (federal question), 38 U.S.C. § 1337 (1988) (civil action arising under an Act of Congress regulating commerce), 28 U.S.C. §§ 2201-2202 (1988) (Declaratory Judgment Act) and the Fifth Amendment of the United States Constitution. They specifically do *not* argue for jurisdiction under the constitutional challenge provisions expressly provided in the United States-Canada Free-Trade Agreement Implementation Act of 1988, § 401(c)(4), *codified* at 19 U.S.C. § 1516a(g)(4) (1988). Complaint at 3-4, *Nat'l Council for Indus. Defense, Inc.*, No. 92-1898.

29. The plaintiffs specifically contend that Chapter 19 violates: (1) article I by ceding judicial powers to the binational panels; (2) the "Appointments Clause" of article II by vesting judicial power in panelists without the "advice and consent" of the Senate; (3) article III by vesting judicial power in a tribunal other than the Supreme Court or "such inferior courts as the Congress may from time to time ordain and establish"; and (4) the Fifth Amendment by depriving plaintiffs' members and other citizens of due process and equal protection of the laws. As relief, the plaintiffs ask the court to declare the binational panels devoid of authority "to review, reverse, or modify" the decisions of U.S. trade agencies and to declare the U.S. legislation that implements Chapter 19 to be "null and void." *id.* at 7-11.

30. The United States first argues that the FTA Implementation Act's express grant of jurisdiction to the U.S. Court of Appeals for the D.C. Circuit for review of constitutional issues concerning Chapter 19 precludes the district court from entertaining this action under the various jurisdictional and other statutory provisions cited in the complaint. The United States also argues that the plaintiffs do not have standing to bring this case on two grounds: (1) no article III case or controversy exists because plaintiffs have not shown any actual or imminent injury as a result of the defendant's actions; and (2) plaintiffs have not demonstrated that they or their members are within the zone of interests that Congress intended to protect by showing that they or their members meet the statutory requirement (19 U.S.C. § 1677(9) (1988)) of an "interested party" eligible to pursue judicial or Chapter 19 review

1993, the case has been briefed and is now awaiting decision on the U.S. motion to dismiss.<sup>31</sup>

Many observers, this author included, believe that the constitutionality of Chapter 19 will be upheld.<sup>32</sup> At their core, constitutional challenges are based on considerations of separation of powers—whether one branch of government impermissibly encroached on the designated prerogatives or functions of another. The predicate for such concerns does not come into play, however, in the context of the CFTA or the NAFTA, because both agreements were the result of collaborative or joint action by the executive and legislative branches under section 102 of the Trade Act of 1974.<sup>33</sup> If the underlying balance of powers concerns do not apply, or are muted, the strength of any constitutional challenge is significantly weakened.<sup>34</sup>

#### IV. The Dynamics of Binational Panel Decision Making

Although Chapter 19 panels simply “stand in the shoes” of domestic reviewing courts, differences exist between five-member binational panels and the courts they supplant. These differences do not affect the substantive or procedural law that is applicable in panel proceedings—that law is the domestic law of the importing Party. Not surprisingly, however, other differences do distinguish Chapter 19 panels as unique fora with their own distinctive characteristics. With the

---

of an antidumping or countervailing duty case or to challenge the constitutionality of the Chapter 19 process under 19 U.S.C. § 1516a(g)(4) (1988). Defendant's Motion to Dismiss, *Nat'l Council for Indus. Defense, Inc.*, No. 92-1898.

31. Given the significant standing and jurisdictional objections raised by the United States Government's motion, it appears unlikely that the district court will even reach the merits of the plaintiffs' constitutional claims. *Accord* Morrison, *supra* note 23, at 1308 n.46.

32. *See, e.g.*, Harold H. Bruff, *Can Buckley Clear Customs?*, 49 WASH. & LEE L. REV. 1309 (1992); Davey, *supra* note 25; Christenson & Gambrel, *supra* note 20; Thomas W. Bark, Note, *The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?*, 29 VA. J. INT'L L. 681 (1989); *House Judiciary Hearings, supra* note 15, at 147, 176; Memorandum from Congressional Research Service to House Judiciary Committee, J. H. Killian, Possible Constitutional Objections to the Canada-United States Free Trade Agreement, at 222 (Dec. 16, 1987); *cf.*, Morrison, *supra* note 23; Chen, *supra* note 19; Karen H. Albright, Comment, *Chapter 19 of the Canada-United States Free-Trade Agreement: An Unconstitutional Preclusion of Article III Review*, 5 CONN. J. INT'L L. 317, 328 (1989).

33. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988, § 101(a). Under the Trade Act of 1974 Congress authorized the President to enter into multilateral or bilateral trade agreements to reduce or eliminate tariff or nontariff barriers; such agreements remain subject, however, to congressional approval under special expedited, fast-track procedures. 19 U.S.C. § 2112 (1988).

34. Thus, the ABA Report concluded:

[I]t must be recognized that the FTA stands on strong constitutional ground. The FTA provisions at issue were negotiated by the President pursuant to a delegation of authority from Congress and will soon be implemented through legislation. It therefore is highly likely that a reviewing court would uphold this exercise of the pooled authority of Congress (over foreign commerce) and the President (to negotiate international agreements that affect the claims of U.S. nationals).

*House Judiciary Hearings, supra* note 15, at 147; *accord* Davey, *supra* note 25, at 1326-27; Bruff, *supra* note 32, at 1313-14.



addition of a third legal tradition under the NAFTA some of the distinguishing features will become even more pronounced.

First, when a panel stands in the shoes of a court, one obvious difference is that there are considerably more feet. A panel of five judges is not the same as a single judge. Like arguments before panels of three or more judges, the dynamics of hearings before five-member panels frequently differ from single-judge hearings. Five-member binational panels tend to be inquisitive. CFTA panel hearings commonly last several hours or more.<sup>35</sup> Presumably the deliberative and decision-making process of panels likewise reflects both the advantages and complications of adjudicating as a panel.

Second, panels are heterogeneous, typically bringing together a variety of perspectives. By definition, panels include two nationals of one country and three of another. Since the NAFTA does not limit panel rosters to lawyers, panels sometimes include economists or scholars. Because of a change to Annex 1901.2, NAFTA panels will also likely include judges. The results, sometimes evident during hearings, reflect diverse interests that focus on different aspects of a case.

Third, many NAFTA panels, like CFTA panels, will include practitioners with substantial trade law experience and expertise. To such panelists issues that may be arcane to lawyers or judges not specialized in the complex field of trade law are readily understandable, in both legal and practical terms. This level of expertise, not always available in an appellate court, can both inform the panel and serve as an important check on counsel.

Conversely, two or three of the panel members will, if lawyers, have been trained in the law of their own country, not the law of the country that they are obliged to apply. Although they may be knowledgeable in the antidumping or countervailing duty law of their own country, they will be navigating the jurisprudence of another country and possibly relying on their host country colleagues on the panel. Nonlawyer panelists from either country will operate with whatever burdens or advantages accompany that condition.

In the case of the NAFTA panels involving Mexico, panelists will be required to bridge even wider cultural and legal gaps. Unlike both Canada and the United States, Mexico is a civil law country, not a common law country. In addition, Mexico does not have the trade law history and experience of either the United States or Canada. Language differences will present new challenges generally not encountered in CFTA proceedings. In these respects NAFTA panels will face new complications.

One criticism of Chapter 19 CFTA panels is that panelists who are practitioners may have conflicts if they have recently appeared, or may soon appear, before

---

35. The first hearing before the *Live Swine from Canada* panel, for instance, lasted over nine hours, not including a break for lunch. *Live Swine from Canada*, Panel No. USA-91-1904-03, 1992 FTAPD LEXIS 1 (Feb. 12, 1992) (Hr'g before the Panel).

an agency that is a party in the proceeding before the panel.<sup>36</sup> Indeed, at least four proceedings have been suspended because panelists have recused themselves after having been selected to serve on a panel.<sup>37</sup> A recusal may be prompted, for example, when a panelist realizes that an argument being made to the panel is one that is also present, or could be, in a case in which she or he is counsel. Because this particular risk of conflict is most likely to arise with practitioners serving as panelists, it presents a trade-off with the greater expertise that practitioners often bring to the panel process.

At the same time, other conflicts are arguably inherent in the existing process. One of the most conspicuous conflicts is the multiple roles that the administering agency must play. For example, during the course of an antidumping or countervailing duty investigation the Department of Commerce must serve as both active investigator and impartial adjudicator. When the department appears before a Chapter 19 panel, it must become the advocate for the determination it reached below. Conflicts among these various roles are most obvious when a binational panel remands a determination. The agency, having just vigorously argued the correctness of its finding before the panel, is obliged to return to its role as agency decision maker and implement the panel's decision. Having made a fresh determination, the agency must then return to the panel as advocate-defender.

Finally, binational panels are binational. Panelists necessarily bring a binational perspective to their specific Chapter 19 responsibilities. The international agreement by which panelists are commissioned is dedicated to fair, reciprocal treatment of the participating countries. The composition of the panel is itself a constant reminder of the binational character of the process. Whether that translates into a more dispassionate, evenhanded resolution of the issues before panels is a question on which panelists themselves may have the most informed view.

One striking statistic about the binational decision making of panels is that of the twenty-one decisions rendered by Chapter 19 panels as of March 1993, none has ever been decided by a vote divided along lines of nationality. Of these twenty-one decisions, eleven have been unanimous.<sup>38</sup> Panels have also issued four

---

36. The Code of Conduct for Proceedings under Chapters 18 and 19 of the U.S.-Canada Free Trade Agreement establishes strict rules aimed at minimizing the incidence of actual or apparent conflicts of interests among panelists.

37. Pure Magnesium & Alloy Magnesium from Canada, Panel No. USA-92-1904-04 (panel suspended Jan. 27, 1993); Live Swine from Canada, Panel No. USA-91-1904-04 (panel suspended Dec. 23, 1992); Certain Machine Tufted Carpeting Originating in or Exported from the United States of America, Panel No. CDA-92-1904-01 (panel suspended Dec. 8, 1992); Certain Softwood Lumber Products from Canada, Panel No. USA-92-1904-01 (panel suspended Nov. 20, 1992).

38. Live Swine from Canada, Panel No. USA-91-1904-04, 1992 FTAPD LEXIS 6 (Aug. 26, 1992) (Dec. of the Panel); 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, Panel No. CDA 1-91-1904-02, 1992 FTAPD LEXIS 5 (Aug. 26, 1992) (Dec. of the Panel); Red Raspberries from Canada, Panel No. USA-89-1904-01, 1989 FTAPD LEXIS 5 (Dec. 15, 1989), 1990 FTAPD LEXIS 22 (Apr. 2, 1990)

concurring opinions<sup>39</sup> and six partial dissents.<sup>40</sup> In perhaps the most acrimonious case at the agency level—the ITC remand determination in *Fresh, Chilled, and Frozen Pork from Canada* (USA-89-1904-11)—the proceeding was resolved by a unanimous five-member panel and, thereafter, by a unanimous Extraordinary Challenge Committee.<sup>41</sup>

## V. Speed

A principal objective of the compromise that became Chapter 19 of the CFTA was the desire to see trade disputes between the two countries resolved expeditiously. As articulated by the United States, the Parties designed the binational panel process to achieve “quick resolution of [antidumping and countervailing duty] issues between the two countries without unnecessary bilateral trade friction, [while] preserv[ing] the rights of injured companies to obtain relief from unfair trade practices.”<sup>42</sup>

To this end the CFTA sets forth a specific timetable by which panels are required to proceed.<sup>43</sup> The specified timetable is “designed to result in final

---

(Decs. of the Panel); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, Panel No. USA-89-1904-02, 1990 FTAPD LEXIS 2 (Jan. 24, 1990) (Dec. of the Panel); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, Panel No. USA-89-1904-03, 1990 FTAPD LEXIS 3 (Mar. 7, 1990) (Dec. of the Panel); New Steel Rail, Except Light Rail, from Canada, Panel No. USA-89-1904-07, 1990 FTAPD LEXIS 4 (June 8, 1990) (Dec. of the Panel); Fresh, Chilled or Frozen Pork from Canada, Panel No. USA-89-1904-11, 1991 FTAPD LEXIS 1 (Jan. 22, 1991) (Dec. of the Panel); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, Panel No. USA-90-1904-01, FTAPD LEXIS 6 (May 24, 1991), 1992 FTAPD LEXIS 2 (May 15, 1992), 1992 FTAPD LEXIS 7 (Oct. 28, 1992) (Decs. of the Panel).

39. *Fresh, Chilled and Frozen Pork from Canada*, Panel No. USA-89-1904-06, 1990 FTAPD LEXIS 12 (Sept. 28, 1990), 1991 FTAPD LEXIS 4 (Mar. 7, 1991) (Decs. of the Panel); *Fresh, Chilled or Frozen Pork from Canada*, Panel No. USA-89-1904-11, 1990 FTAPD LEXIS 10 (Aug. 24, 1990) (Dec. of the Panel); *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia*, Panel No. CDA-91-1904-01, 1992 FTAPD LEXIS 3 (Aug. 6, 1992) (Dec. of the Panel).

40. *Live Swine from Canada*, Panel No. USA-91-1904-03, 1992 FTAPD LEXIS 1 (May 19, 1992), 1992 FTAPD LEXIS 8 (Oct. 30, 1992) (Decs. of the Panel); *Certain Beer Originating in or Exported from the United States of America by or on behalf of G. Heileman Brewing Company, Inc. and Pabst Brewing Company and the Stroh Brewery Company, their Successor and Assigns for Use or Consumption in the Province of British Columbia (Injury)*, Panel No. CDA-91-1904-02 (Feb. 8, 1993) (Dec. of the Panel); *New Steel Rail, Except Light Rail, from Canada*, Panel No. USA-89-1904-08, 1990 FTAPD LEXIS 5 (Aug. 30, 1990) (Dec. of the Panel); *New Steel Rail, Except Light Rail, from Canada*, Panel No. USA-89-1904-09/10, 1990 FTAPD LEXIS 6 (Aug. 13, 1990) (Dec. of the Panel); *Integral Horsepower Induction Motors, One Horsepower (1 HP) to Two Hundred Horsepower (200 HP) Inclusive, with Exceptions Originating in or Exported from the United States of America*, Panel No. CDA-90-1904-01, 1991 FTAPD LEXIS 9 (Sept. 11, 1991) (Dec. of the Panel).

41. Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, Article 1904.13 Extraordinary Challenge Committee, No. ECC-91-1904-01 USA (June 14, 1991) (Extraordinary Challenge Dismissed).

42. UNITED STATES-CANADA FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF REASONS, H.R. Doc. No. 216, 100th Cong., 2d Sess. 38 (July 26, 1988).

43. CFTA art. 1904(14).

decisions within 315 days of the date on which a request for a panel is made."<sup>44</sup> The NAFTA prescribes the same deadlines.<sup>45</sup>

Generally, panels have met these time limits. Even though panelists are geographically dispersed, of the twenty-one CFTA panel decisions to date, most have conformed to the prescribed schedule.<sup>46</sup> One reason that deadlines may not be met is that a panelist has recused herself or himself to avoid an appearance of conflict.<sup>47</sup> As a result Chapter 19 binational panels produce decisions that, on average, are much prompter than decisions produced by the U.S. Court of International Trade (CIT).<sup>48</sup>

Delays in finally resolving Chapter 19 cases have resulted not so much from panels failing to meet prescribed deadlines, but from the remand process. Article 1904(8) implies that the Parties to the CFTA and the NAFTA contemplated but a single remand to allow for agency "compliance" with the panel's decision.<sup>49</sup> Both the CFTA and the NAFTA provide that a case is to be returned to the panel following remand to an agency only "if needed" and only for a "final decision."<sup>50</sup> The absence of specific time limits for extended remand proceedings in either the CFTA and the NAFTA or the implementing CFTA panel rules—coupled with the agreements' stipulation that panels "establish as brief a time as is reasonable for compliance with the remand"—further suggests that the original conception did not intend protracted remand proceedings.<sup>51</sup>

Delays through one or more remands may be traceable in part to the fact that article 1904 empowers panels only "to uphold a final determination, or remand it for action not inconsistent with the panel's decision."<sup>52</sup> This formulation stops short of expressly authorizing panels to reverse agency determinations, even where a panel finds an agency's action clearly to be legally erroneous or unsupported by substantial record evidence. If, then, parties to a proceeding find an agency's remand determination not to be in "compliance" with a panel's decision,

44. *Id.*

45. NAFTA art. 1904(14).

46. Of the 21 panel decisions, all but five have met article 1904(14)'s 315-day deadline for issuing a decision. The exceptions are Live Swine from Canada, Panel No. USA-91-1904-03, 1992 FTAPD LEXIS 8 (316 days); Live Swine from Canada, Panel No. USA-91-1904-04, 1992 FTAPD LEXIS 6 (320 days); Fresh, Chilled and Frozen Pork from Canada, Panel No. USA-89-1904-06, 1990 FTAPD LEXIS 12 (402 days); New Steel Rail, Except Light Rail, from Canada, Panel No. USA-89-1904-08, 1990 FTAPD LEXIS 5 (363 days); and Replacement Parts for Self-Propelled Bituminous Paving Equipment, Panel No. USA-90-1904-01, 1991 FTAPD LEXIS 6 (344 days).

47. See, e.g., Live Swine from Canada, Panel No. USA-91-1904-04, 1992 FTAPD LEXIS 6 (Panel dec. due Jan. 28, 1993; panel suspended Dec. 23, 1992, due to withdrawal of panelist).

48. See L.M. 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).

49. CFTA art. 1904(8); NAFTA art. 1904(8).

50. CFTA art. 1904(8); NAFTA art. 1904(8).

51. CFTA art. 1904(8); NAFTA art. 1904(8).

52. CFTA art. 1904(8); NAFTA art. 1904(8).

more proceedings, including the possibility of further remands, are likely to ensue.

CFTA panels have remanded to the agency in nine of the twenty-one cases they have decided.<sup>53</sup> Five of the nine have involved multiple remands.<sup>54</sup> In those cases the elapsed time from request for a panel to a final decision was not the 315 days established in the CFTA, but ranged from 383<sup>55</sup> to 927<sup>56</sup> days. The longest—927 days—involved three remands.<sup>57</sup>

The final potential source of delay is an “extraordinary challenge” to a panel decision. Through the end of 1992 a Party had requested an extraordinary challenge in only one case.<sup>58</sup> The challenge committee decided that challenge within seventy-seven days from the date the request for a committee was filed.<sup>59</sup> Thus, final resolution of that case—from the first request for panel review to the day the panel was dismissed—required a total of 612 days.<sup>60</sup>

53. Certain Beer Originating in or Exported from the United States of America by or on behalf of G. Heileman Brewing Company, Inc. and Pabst Brewing Company and the Stroh Brewery Company, their Successor and Assigns for Use or Consumption in the Province of British Columbia (Injury), Panel No. CDA-91-1904-02, 1992 FTAPD LEXIS 5; Red Raspberries from Canada, Panel No. USA-89-1904-01, 1990 FTAPD LEXIS 22; Fresh, Chilled and Frozen Pork from Canada, Panel No. USA-89-1904-06, 1990 FTAPD LEXIS 12; Replacement Parts for Self-Propelled Bituminous Paving Equipment, Panel No. USA-90-1904-01, 1992 FTAPD LEXIS 7; Live Swine from Canada, Panel No. USA-91-1904-03, 1992 FTAPD LEXIS 8; Live Swine from Canada, Panel No. USA-91-1904-04, 1992 FTAPD LEXIS 6; New Steel Rail, Except Light Rail, from Canada, Panel No. USA-89-1904-07, 1990 FTAPD LEXIS 4; Fresh, Chilled or Frozen Pork from Canada, Panel No. USA-89-1904-11, 1990 FTAPD LEXIS 10; and Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia, Panel No. CDA-91-1904-01, 1992 FTAPD LEXIS 5.

54. Live Swine from Canada, Panel No. USA-91-1904-03, 1992 FTAPD LEXIS 8; Red Raspberries from Canada, Panel No. USA-89-1904-01, 1990 FTAPD LEXIS 22; Fresh, Chilled and Frozen Pork from Canada, Panel No. USA-89-1904-06, 1990 FTAPD LEXIS 12; Fresh, Chilled or Frozen Pork from Canada, Panel No. USA-89-1904-11, 1991 FTAPD LEXIS 1; and Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, Panel No. USA-90-1904-01, 1992 FTAPD LEXIS 7.

55. Red Raspberries from Canada, Panel No. USA-89-1904-01, 1990 FTAPD LEXIS 22.

56. Replacement Parts for Self-Propelled Bituminous Paving Equipment, Panel No. USA-90-1904-01, 1992 FTAPD LEXIS 7.

57. *Id.* Panel No. USA-90-1904-01, 1991 FTAPD LEXIS 6 (May 24, 1991) (Panel Op. and Order); Panel No. USA-90-1904-01, 1992 FTAPD LEXIS 2 (May 15, 1992) (Panel Op. and Order); and Panel No. USA-90-1904-01, 1992 FTAPD LEXIS 7 (Oct. 28, 1992) (Panel Op. and Order).

58. Fresh, Chilled and Frozen Pork from Canada, No. ECC-91-1904-01 USA. A second extraordinary challenge committee was requested on Jan. 21, 1993, and delivered Live Swine from Canada, No. ECC-93-1904-01 USA, its opinion dismissing the request, on Apr. 8, 1993, a total of 77 days from start to finish.

59. The request for an extraordinary challenge committee was filed on March 29, 1991. The committee issued its Memorandum Opinion and Order on June 17, 1991. 56 Fed. Reg. 28,741 (1991).

60. The request for panel review was filed on October 13, 1989. The panel was discharged from its duties on June 14, 1991. 56 Fed. Reg. 28,742 (1991).

## VI. Finality

In addition to speed, the twin objective of the Chapter 19 panel process of the NAFTA is finality. Like the CFTA the NAFTA provides that decisions of Chapter 19 binational panels are binding on the contracting Parties, including the administrative agencies that are subject to panel review. Chapter 19 states that panel decisions "shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel."<sup>61</sup> The United States emphasized the point in its Statement of Administrative Action for the CFTA: "It is vital to the success of the Agreement that the implementation of panel and committee decisions be guaranteed."<sup>62</sup>

Panel decisions are likewise nonreviewable. The NAFTA provides that agency final determinations "shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination."<sup>63</sup> Thus, unlike decisions of the CIT, which are appealable to the U.S. Court of Appeals for the Federal Circuit, Chapter 19 panel decisions are not subject to further review. The only exception, one that parallels the rules of finality for arbitral decisions, is the "extraordinary challenge."<sup>64</sup> As discussed in part VIII below, an extraordinary challenge is available only under such extraordinary circumstances as gross misconduct, bias, or an attempt by a panel to take action that is manifestly beyond the powers that panels have been given.

The NAFTA is accordingly unambiguous that the contracting Parties, including the administering agencies, are bound as a matter of law to comply with decisions of Chapter 19 panels. Not only are panel decisions binding on the contracting Parties as a matter of international law. By virtue of the implementing legislation carrying forward the provisions of the NAFTA (or, in the case of Mexico, self-executing treaty provisions), panel decisions also will be binding on administering agencies as a matter of domestic law, as they are under the CFTA.<sup>65</sup> The point that panel decisions are binding is underscored by the language of Chapter 19 itself, which states that in the case of a remand, a panel shall allow "as brief a period of time as is reasonable for compliance with the remand."<sup>66</sup>

The early history of the CFTA includes, however, several cases that have evinced agency reluctance to comply. In cases involving multiple remands, subsequent remands have often included increasingly specific instructions. This pattern,

61. NAFTA art. 1904(9).

62. UNITED STATES-CANADA FREE TRADE AGREEMENT IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 216, 100th Cong., 2d Sess. 267 (July 26, 1988).

63. NAFTA art. 1904(11).

64. See, e.g., *Burchell v. Marsh*, 58 U.S. 344, 349 (1854) (If an award "is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact.").

65. H.R. Doc. No. 216, *supra* note 62, at 267.

66. NAFTA art. 1904(8) (emphasis added).

which finds parallels in U.S. case law dealing with recalcitrant agencies, is predictably most common in cases in which the agencies have been most resistant.<sup>67</sup>

In the early case of *Red Raspberries from Canada*, for instance, a panel was presented with a remand determination that the panel considered to be "unresponsive to the Panel's concerns."<sup>68</sup> The panel was thus presented with the arguably competing considerations of its authority only to "uphold" or "remand" an agency determination and the need to adhere to the CFTA objective of resolving trade disputes promptly.

Agencies have also exhibited resistance to panel decisions in other cases and have even volunteered criticisms of the reviewing authorities established under Chapter 19. For example, the Commerce Department criticized the panel reviewing its final decision in the fourth administrative review of *Live Swine from Canada* and announced that Commerce would not adhere to it in any other cases.<sup>69</sup>

Similarly, in *Fresh, Chilled and Frozen Pork*, the panel reviewing Commerce's subsidy determination found that "there [was] no substantial evidence on the record" to support Commerce's conclusion that a provincial government program was countervailable.<sup>70</sup> It remanded for "reconsideration."<sup>71</sup> On remand, Commerce again found the program to be countervailable, but did not present the additional record support that the panel had requested. Finding "nothing . . . which would support reversal of its earlier determination," the panel again remanded for Commerce "to conform its determination in accordance with the decision of this Panel."<sup>72</sup> Commerce obliged to the extent of removing the program from its countervailing duty calculations, but refused to find the program not countervailable.<sup>73</sup>

Perhaps the most extreme example of agency resistance was the sister panel's review of an injury determination by the International Trade Commission (ITC) in *Fresh, Chilled, and Frozen Pork from Canada*. In the second remand determination in that case, the two-member majority criticized the panel decision, which it characterized as "counterintuitive, counterfactual, and illogical, but legally

67. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (no remand is required when it would unnecessarily "convert judicial review of agency action into a ping-pong game"); *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1575 (Fed. Cir. 1990); *Smith Corona Corp. v. United States*, 698 F. Supp. 240, 254 (Ct. Int'l Trade 1988); *Yuasa-General Battery Corp. v. United States*, 688 F. Supp. 1551, 1555-56 (Ct. Int'l Trade 1988).

68. *Red Raspberries from Canada*, Panel No. USA-89-1904-01, at 3, 1990 FTAPD LEXIS 22 (Apr. 2, 1990) (Dec. of the Panel).

69. *Live Swine from Canada*, Panel No. USA-91-1904-03, at 3 (Dep't Comm. Nov. 19, 1992) (Final Results of Redetermination Pursuant to Panel Remand).

70. *Fresh, Chilled and Frozen Pork from Canada*, Panel No. USA-89-1904-06, at 80, 1990 FTAPD LEXIS 23 (Sept. 28, 1990) (Mem. Op. and Remand Order).

71. *Id.*

72. *Fresh, Chilled and Frozen Pork from Canada*, Panel No. USA-89-1904-06, at 20, 1991 FTAPD LEXIS 4 (Mar. 8, 1991) (Mem. Op. and Order Regarding Commerce's Det. on Remand).

73. *Fresh, Chilled and Frozen Pork from Canada*, Panel No. USA-89-1904-06, at 2 (Dep't Comm. Apr. 11, 1991) (Determination Pursuant to Remand).

binding."<sup>74</sup> The opinion charged that the panel's action represented either "deliberate mischaracterization . . . or a woeful lack of knowledge" and promised that the ITC would not conform future agency practice to the panel's decision.<sup>75</sup> The ITC nonetheless complied with the panel's decision, and subsequent extraordinary challenge to the panel decision was unsuccessful.<sup>76</sup>

The cases involving multiple remands and issues of finality reflect one clear difference between Chapter 19 panels and domestic reviewing courts. Unlike domestic courts, Chapter 19 panels are bound by the NAFTA or CFTA, which is the authority by which they are created. They must accordingly consider their own obligations in light of the explicit objective of the Parties to achieve finality in decisions resolving antidumping and countervailing duty cases. As a result, several panels have specifically addressed and sought to reconcile the arguably competing considerations of limitations to their remand authority and their obligation to achieve final decisions in an expeditious manner.

In some recent cases, U.S. trade agencies have asserted that decisions of the CIT are not binding on the agency.<sup>77</sup> Agencies have also argued that binational panel decisions are not binding precedents.<sup>78</sup> However, in the context of a single case—a "particular matter" before a panel—there is no question that the rulings of the panel are binding as a matter of law.<sup>79</sup>

The early experience of CFTA panels suggests that issues of finality may persist in the NAFTA. On the other hand, the issue may well dissipate as Chapter 19 proceedings become more routine and the jurisprudence of extraordinary challenge committees is established. Agency resistance to Chapter 19 panel review may prove to have been an unsurprising growing pain occasioned by a significant innovation in bilateral dispute resolution. If such growing pains persist, however,

74. Fresh, Chilled and Frozen Pork from Canada, USITC Pub. No. 2362, Inv. No. 701-TA-298, at 19, 1991 FTC LEXIS 95 (Feb. 1991). The ITC normally has six commissioners, but three vacancies existed during this proceeding.

75. *Id.* The ITC vowed not to "change our practice or procedure" and not to "follow the procedural or substantive decisions" of the panel. *Id.* at 5, 34.

76. Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, Article 1904.13 Extraordinary Challenge Committee, No. ECC-91-1904-01 USA (June 14, 1991) (Extraordinary Challenge Dismissed).

77. See, e.g., Certain Softwood Lumber Products from Canada, Panel No. USA-92-1904-01, at A-4 (Jan. 6, 1993) (Comm. Dep't Resp. Br.).

78. The NAFTA affirmatively states that "with respect to the particular matter between the Parties that is before the panel," the decision of the panel "shall be binding." NAFTA art. 1904(9). The Statement of Administrative Action of the United States-Canada Free Trade Agreement Implementation Act provides that panel decisions are not binding precedents on domestic courts, but that courts may look to such decisions for their "intrinsic persuasiveness." H.R. Doc. No. 216, *supra* note 62, at 271. The NAFTA is silent on the extent to which panel decisions may be relied on as prior applications and interpretations of domestic law by subsequent panels. As a matter of practice, CFTA panels have frequently cited prior panel decisions and looked to how they construed and applied the applicable domestic law.

79. CFTA art. 1904(9); NAFTA art. 1904(9).



they will present an issue that goes to the heart of the Chapter 19 binational panel process.

## VII. The Substantive Quality of the NAFTA Panel Decisions

A careful assessment of the substantive quality of the decisions rendered by Chapter 19 CFTA panels would be a substantial undertaking, well beyond the scope of this brief discussion. Any such effort would need to recognize that panel decisions, like court decisions, are not necessarily of uniform quality. More importantly, qualitative evaluations, inherently subjective to some extent, are sometimes colored in the context of contentious trade disputes by the perspective of the evaluator. Notwithstanding these caveats, and acknowledging the author's own prior involvement in CFTA Chapter 19 proceedings,<sup>80</sup> the record of the CFTA panels lends itself to some preliminary observations. The following ones, if not incontestable, are at least broadly supportable.

First, CFTA Chapter 19 panels, on the whole, have demonstrated a high degree of conscientiousness and professionalism. Counsel appearing before Chapter 19 panels routinely face panelists who are exceptionally well prepared. Panel decisions frequently include detailed analyses of the relevant law of the importing Party and careful discussions of the facts. Opinions typically reflect a diligent effort on the part of the panelists to apply the law fairly and correctly. Indeed, some of the most thoughtful discussions of difficult issues to appear anywhere—for example, specificity—are found in opinions of CFTA binational panels.<sup>81</sup>

Second, panel decisions have tended to be substantively consistent with one another. Notwithstanding the fact that the composition of panels differs from case to case, results before Chapter 19 panels have not tended to be either erratic or contradictory.<sup>82</sup> Consistency among panel decisions has undoubtedly been enhanced by the inclination of panels to cite to earlier panel decisions that they have found to be particularly persuasive in their analysis or discussion of applicable law.<sup>83</sup>

80. In several Chapter 19 proceedings, the author has appeared as counsel to the Government of Canada.

81. Commentators have, as a result, given panels high marks. See, e.g., Judith H. Bello et al., *U.S. Trade Law and Policy Series No. 18: Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreement*, 25 INT'L LAW. 489, 516 (1991).

82. Compare *Live Swine from Canada*, Panel No. USA-1904-91-03, 1992 FTAPD LEXIS 1 (May 19, 1992) (Dec. of Panel) with *Live Swine from Canada*, Panel No. USA-1904-91-04, 1992 FTAPD LEXIS 6 (Aug. 26, 1992) (Dec. of the Panel).

83. In *Live Swine from Canada*, for example, the panel cited to *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, Panel No. USA-89-1904-02, at 3-5, 1990 FTAPD LEXIS 2 (Jan. 22, 1990), *Fresh, Chilled or Frozen Pork from Canada*, Panel No. USA-89-1904-11, at 5-13, 1990 FTAPD LEXIS 10 (Aug. 24, 1990), *New Steel Rails, Except Light Rails, from Canada*, Panel No. USA-89-1904-08, at 6-8, 1990 FTAPD LEXIS 5 (Aug. 30, 1990), and *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, Panel No. USA-90-1904-01, at 13-18, 1991 FTAPD LEXIS 6 (May 24, 1991), as well as to U.S. judicial decisions, for their treatment of the standard of review. *Live Swine from Canada*, Panel No. USA-91-1904-03, at 9, 1992 FTAPD LEXIS 1 (May 19, 1992) (Dec. of the Panel).

Third, panels have, quite predictably, not been able to avoid issues of first impression or issues on which the applicable domestic law is unsettled or contradictory. In such circumstances panels are plainly obliged to do as a domestic court would do—construe and apply the law as well as possible on the basis of existing legal authorities. As the case law from CFTA and the NAFTA panels accumulates, it may thus become an important resource for domestic courts presented with similar issues. Although panel decisions are not binding precedents, the Parties have long understood that domestic courts might draw on them. The U.S. implementing legislation for the CFTA, for example, provides that “a court of the United States is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the Agreement.”<sup>84</sup>

### VIII. Extraordinary Challenge Committees and Special Committees: Safety Valves or Second Chances?

The NAFTA contains two different entities that may be regarded as checks or safeguards for the Chapter 19 binational panel review process. One, the extraordinary challenge committee, has been a part of the CFTA and, thus, already the subject of some attention. The other, the special committee, is a new Chapter 19 creation that will be first tested, if at all, in the context of the NAFTA. Each of these entities guards the binational panel process.

#### A. EXTRAORDINARY CHALLENGE COMMITTEES

A panel decision binds the Parties with respect to the matter before it and may be challenged only in extraordinary circumstances. Such challenges, known as “extraordinary challenges,” are available only if:

- (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 . . . , and [the error] has materially affected the panel’s decision and threatens the integrity of the binational panel review process . . . .<sup>85</sup>

The NAFTA provides that extraordinary challenges must be filed “within a reasonable time after the panel decision is issued,” thereby leaving it to the Parties to establish a precise deadline for filing an extraordinary challenge.<sup>86</sup>

NAFTA Annex 1904.13 sets out the extraordinary challenge procedure. It

84. H.R. Doc. No. 216, *supra* note 62, at 123 (codified at 19 U.S.C. § 1516a(b)(1988)); see also *id.* at 271 (“Any consideration of a panel or committee decision by a court would be for its intrinsic persuasiveness as a view regarding U.S. law.”).

85. NAFTA art. 1904(13).

86. *Id.*

states that extraordinary challenge committees will be composed of three members that are selected from a fifteen-person roster "comprised of judges or former judges 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."<sup>87</sup> Each Party names five individuals to the roster. Extraordinary challenges are decided on an expedited basis. Committees are established within fifteen days of the date on which a request for an extraordinary challenge is filed and are obliged to issue decisions within ninety days of being established.<sup>88</sup>

One of the dramas of the NAFTA will be played out on this stage of extraordinary challenge provisions. Unlike Chapter 19 panels themselves, which must operate within the general confines of the existing, applicable domestic law, challenge committees construing and applying article 1904(13) are fashioning a new jurisprudence. That strain of case law will undoubtedly affect how the Chapter 19 panel process will function. If extraordinary challenge committee decisions continue to limit recourse to extraordinary challenges to truly extraordinary abuses of the Chapter 19 panel process, then the arbitral model of nonreviewable dispute resolution will remain intact.

The tensions over the proper role of extraordinary challenges is already evident. Thus far, these challengers have arisen solely with respect to panel reviews of U.S. cases. At least in that context the initial tension has been between a U.S. desire for broader appellate recourse in cases it believes were wrongly decided by a panel and a Canadian desire to restrict extraordinary challenges to rare instances of systemic abuse, such as gross misconduct or *ultra vires* action.<sup>89</sup>

## B. SPECIAL COMMITTEES

The NAFTA Chapter 19 provisions differ in certain other respects from the CFTA provisions. For example, the NAFTA provides that a Party may request consultations with another Party if the application of the other Party's domestic law

- (a) has prevented the establishment of a panel requested by the complaining Party;
- (b) has prevented a panel requested by the complaining Party from rendering a final decision;
- (c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel; or

87. NAFTA annex 1904.13(1).

88. *Id.* 1904.13(1),(2).

89. The most recent catalyst for this debate is a small change in article 1904(13) of the NAFTA from its CFTA predecessor. Already the United States is arguing that the addition of the phrase "failing to apply the appropriate standard of review" indicates broader grounds for an extraordinary challenge. Canada can be expected to argue that the NAFTA only makes explicit what was implicit in the CFTA, as articulated by the first extraordinary challenge committee.

- (d) has resulted in a failure to provide opportunity for review of a final determination by a panel or court of competent jurisdiction that is independent of the competent investigating authorities, that examines the basis for the investigating authorities' determination and whether the investigating authority properly applied domestic antidumping and countervailing duty law in reaching the challenged determination, and that employs the relevant standard of review . . . .<sup>90</sup>

The stated purpose of this elaborate consultation procedure, added for purposes of the NAFTA, is to prevent any Party from thwarting the panel review system. If consultations do not resolve the obstruction to the panel process within forty-five days of the request for consultations (or any other period established by agreement of the consulting Parties), then the complaining Party may request the establishment of a special committee to review the allegations. If the special committee finds in favor of the complaining Party and the Parties are not able to reach a mutually satisfactory solution to the matter within sixty days after the committee's decision, then the complaining Party may suspend the operation of Chapter 19 with respect to the other Party. This provision, in short, provides for suspension in case of systemic failure.

## IX. Conclusions

As of the early spring of 1993 the climate for trade agreements is a bit stormy. The NAFTA has been concluded, but not implemented. In the United States the NAFTA is a political, transition issue for both a new administration and a new Congress. In Canada the prospect of new elections has revived political debate about the CFTA, and thus the NAFTA. In all three countries the backdrop is the fractious and yet unconcluded Uruguay Round of GATT negotiations.

In such a climate observations about Chapter 19 are both timely and likely to prove controversial. Nonetheless, some assessment of the pivotal Chapter 19 provisions is essential to any discussion of the NAFTA.

Many might now agree that the Chapter 19 approach to dispute settlement, particularly in the contentious area of antidumping and countervailing duty law, is not a modest innovation. A commitment to be bound by binational decisions made by five-member panels that bridge different legal cultures but apply the law of just one is a long step from routine appellate review. That it was originally a compromise does not soften the reality that from time to time Chapter 19 panel decisions may uncomfortably bind one or both of the contracting Parties.

Second, the commitment to resolve antidumping and countervailing duty disputes according to a rule of law may also be more ambitious than originally assumed. This complex, specialized area of the law rests on international agreements that do not embody a detailed consensus among the signatories. Some

90. NAFTA art. 1905(1).

legal concepts are highly developed only within the framework of U.S. law and some of those are still inchoate or fluid. To demand consistency, transparency, and predictability of this system of laws, and of an overburdened bureaucracy, is to set a high goal.

When viewed in this context, CFTA Chapter 19 panels have, on the whole, performed impressively. Panel members have exhibited high levels of preparedness, expertise, and conscientiousness. The quality of panel opinions has also generally been high. And panels have demonstrated an ability to avoid resolving contentious issues along national lines. These accomplishments reflect well on both the panelists and those who administer the panel process.

The promise of Chapter 19 is that it will come to be a mutually acceptable means of resolving inflammatory economic conflicts among the three Parties. Under the NAFTA, the panel process will build on the experience gained under the CFTA. If it becomes fully institutionalized, the Chapter 19 process could ultimately inspire a new effort to achieve the objective that has substantially eluded the Uruguay Round and been formally abandoned in the NAFTA—the development of a new set of rules on dumping and subsidies that is comprehensive, precise, and mutually agreed.