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INTRODUCTION

The United States-Canada Free Trade Agreement[1] expressed the mutual desire of Canadian and American exporters to secure permanent access to the other country's market. Of particular concern to Canada during the FTA negotiations was the perceived need to reduce the impact of such non-tariff barriers to trade as American antidumping (AD) and countervailing duty (CVD) laws.[2] It was

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1 United States-Canada Free-Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988) (hereinafter "*FTA*"). The FTA was implemented in the United States by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (noted at 19 U.S.C. § 2112 (1988)).

2 The perception in Canada that the United States government had excessively used different forms of "contingent protection" to protect domestic industry from unfavorable foreign competition appears to have been justified. Between 1980 and 1988, twenty-two antidumping cases and eleven countervailing duty cases were initiated against Canadian exports, resulting in the application of definitive duties in nine and six of these cases respectively. However, during the same period, Canada was an even more frequent utilizer of its trade remedy regime. Between 1980 and 1988, Canada initiated fifty AD and one CVD action(s) against United States exports,

recognized that eliminating tariff levels under the FTA would only nominally benefit Canadian exporters if American non-tariff barriers were allowed to retain their existing status.[3] Chapter 19 of the FTA was created to address this Canadian concern.

The FTA Chapter 19 system provided for review by five-member panels[4] of antidumping, countervailing duty, and material injury determinations made by one party respecting goods of the other party.[5] Chapter 19 allowed both Canada and the United States to retain their domestic trade remedy laws,[6] and provided that cases would be reviewed under the domestic law of the country whose agency made the final determination in dispute.[7] Chapter 19 also established a detailed set of rules and deadlines for panel review,[8] a Code of Conduct for panelists,[9] and an "Extraordinary Challenge Committee" that would be available in exceptional circumstances to review a binational panel decision.[10]

Nearly all of the 49 cases initiated under Chapter 19 of the FTA have been completed and, as such, it is now possible to draw some

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resulting in the application of definitive duties in twenty-four and one case(s) respectively. The United States data was gathered from the United States Department of Commerce International Trade Administration Central Records Unit: "*Antidumping and Countervailing Duty Actions for all cases active on or after January 1, 1980: A Federal Register History Current Through August, 1994.*" The Canadian data was collected with the assistance of Mr. Richard Lane and Mr. John MacKay, Revenue Canada Customs Excise and Taxation: Antidumping and Countervailing Duty Division.

3 Canada actually sought complete exemption from U.S. AD/CVD laws and fought to create an alternative body of trade rules that would apply equally between the two countries. Chapter 19 was a compromise solution that arose when the U.S. refused to grant Canada such an exemption. *See* William K. Ince & Michele C. Sherman, *Binational Panel Reviews Under Article 19 of the U.S.-Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution*, 37 FED. B. NEWS & J. 136, 137-38 (1990).

4 During the FTA, panelists were appointed on an *ad hoc* basis from a roster of 25 candidates prepared by each country. *See FTA*, *supra* note 1, Annex 1901(2).

5 *FTA*, *supra* note 1, art. 1904.

6 *FTA*, *supra* note 1, art. 1902.

7 *FTA*, *supra* note 1, art. 1904(2). Antidumping and countervailing duty investigations in the United States are made by the International Trade Administration (ITA), while injury determinations are made by the International Trade Commission (ITC). Final ITA and ITC determinations can be appealed to the Court of International Trade (CIT), and then further to the Court of Appeals for the Federal Circuit (CAFC). In Canada, Revenue Canada (RC) is responsible for AD/CVD determinations, while the Canadian International Trade Tribunal (CITT) investigates injury. In Canada, the applicable adjudicatory bodies are the Federal Court of Canada and the Federal Court of Appeals.

8 *FTA*, *supra* note 1, art. 1904(14).

9 The FTA Code of Conduct For Proceedings Under Chapter 18 and 19 of the Canada-US Free Trade Agreement was established pursuant to *FTA*, *supra* note 1, art. 1910. The Code was published at 123 Can. Gazette I 96, art. II (1989).

10 *FTA*, *supra* note 1, annex 1904.13 (hereinafter "*ECC*").

conclusions as to how this hybrid dispute settlement system performed over the past five years.[11] From the perspective of Canadian exporters, Chapter 19 binational panel review appears to have provided an effective, albeit limited, remedy to the application of U.S. trade remedy laws by inducing a more disciplined administration of those laws. By contrast, from an American exporter's perspective, the FTA Chapter 19 system has failed to provide substantive relief from injurious Canadian agency determinations. This asymmetry in results, and, more important, the way in which Canadian panelists have examined certain United States agency final determinations, have together caused significant controversy in the United States. This disquiet was the direct catalyst behind changes to the binational panel process during the recent North American Free Trade Agreement[12] negotiations.

During the FTA, Chapter 19 panel decisions were largely well reasoned, thoroughly researched, professionally administered and rarely divided along national lines.[13] Further, FTA Chapter 19 cases were resolved expeditiously, and decisions did not serve to create a body of trade law jurisprudence divergent from that which existed in either Canada or the U.S.. Nevertheless, the general enthusiasm that accompanied the Chapter 19 process during its early years may be waning in Canada and the United States alike. Because of recent

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11 Of the 49 requests for binational panel review, 32 cases have been completed with decisions delivered, 13 cases were terminated at the joint request of the participants before an initial decision was delivered, two cases are still active with four decisions issued, and two cases have been stayed indefinitely pending the resolution of related CIT litigation. The data used in this Study was obtained from various sources, including the *Status Report* that is issued monthly by the NAFTA Secretariat(s) in Ottawa and Washington, as well as notices published in the Federal Register and the Canada Gazette. The data is current as of July 1, 1995, and all calculations in this Study were made in reference to that date.

12 *See* The North American Free Trade Agreement Between the Government of the United States, the Government of Canada and the Government of the United Mexican States, *done* Dec. 17, 1992, 32 I.L.M. 289, 605 (1993) (hereinafter "*NAFTA*").

13 During the FTA years, there was a general consensus among commentators that the quality of Chapter 19 decisions was high. *See, e.g.*, Judith Bello et al., *Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreement*, 25 INT'L LAW. 489 (1991); David Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407 (1993); Homer E. Moyer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707 (1993); Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269 (1991); William C. Graham, *Dispute Resolution in the Canada-United States Free Trade Agreement: One Element of a Complex Relationship*, 37 MCGILL L.J. 544 (1992); Gary Horlick and F. Amanda DeBusk, *Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One-half Years*, 37 MCGILL L.J. 574 (1992); and J. Robichaud and D. Steger, *Chapter 19 of the Canada-U.S. Free Trade Agreement: The First Five Years* (Paper prepared for a Symposium on International Trade, Universidad Nacional Autonoma de Mexico, Mexico City, Mexico (October 18, 1993) (on file with author).

changes to Chapter 19 under NAFTA, this binational "experiment" in coming years may come to resemble more the traditional system of judicial review which Chapter 19's hybrid model of adjudication and arbitration was intended to replace. Such a development could harm the interests of competitive North American exporters as administering agencies would once again wield broad discretionary powers in the interpretation and application of complex trade remedy laws. The parties to NAFTA must immediately strengthen their commitment to creating a new system that will permanently resolve the commercial uncertainty and market distortions caused by protectionist trade remedy laws.

The principal objective of this Study is to demonstrate that Chapter 19 under the FTA — while bedeviled by a few minor procedural imperfections — disproportionately advanced the interests of Canadian exporters over that of their United States counterparts, and that the asymmetry in results was largely attributable to (i) disparate "standards of judicial review," and (ii) a firm commitment on the part of panelists to formulate and consistently apply an unyielding version of the United States standard to U.S. agency final determinations. Part I of the Study begins by examining the aggregate statistics produced by Chapter 19 panel review during the FTA. Part II considers certain Chapter 19 cases reviewing Canadian agency final determinations and provides an analysis of the most salient cases brought against United States agencies. Part III analyzes changes to Chapter 19 under NAFTA, and suggests that the positive aspects of Chapter 19 binational panel review during the FTA may be diluted in coming years because of these alterations.

I. The Chapter 19 Experience: 1989-95[14]

This Part examines the aggregate statistics that have been provided by the thirty cases where FTA binational panels rendered decisions. The data demonstrate that: (i) Canadian exporters realized substantial reductions in duties following appeal to binational panels while U.S. exporters enjoyed no such success; (ii) panel opinions were often unanimously delivered; (iii) panel "remand" procedures limited somewhat the effectiveness of Chapter 19 panel review; and (iv) the suspension of binational panel review due to the withdrawal of panel-

[14] The FTA was superseded by NAFTA on January 1, 1994. However, for the purposes of NAFTA Chapter 19, Article 1906 provided that any FTA Chapter 19 case initiated prior to the implementation of NAFTA would be reviewed after January 1, 1994 by way of the Chapter 19 rules and procedures as contained in the FTA.

ists is a growing problem which may have been exacerbated by recent developments.

A. Canadian Exporters: Disproportionate Beneficiaries?

The Chapter 19 process has clearly advanced the interests of Canadian exporters as seen on Chart One on the following page.

Chart One supports a finding that Canadian exporters enjoyed greater success under Chapter 19 than did their U.S. counterparts. Of the fourteen matters where panels reviewed ITA final determinations, panel decisions effectively forced the ITA to reduce or remove duties in nine instances. For Canadian exporters this result represents a substantial improvement over appeal to the CIT, which overturned agency determinations less frequently.[15]

The reduction of duties in nine out of fourteen AD/CVD cases is a significant accomplishment for Canadian exporters. Yet the question that must be asked is *to what degree* are duties being reduced in ITA redeterminations? Only substantial reductions in duty levels, especially for smaller exporters, would offset the costs associated with binational panel litigation.

Reductions in duty levels were large. If one compares initial duties (final agency determinations) with post-panel review agency redeterminations, it is clear that panels found in most cases that the ITA improperly calculated a significant portion of the duty in its final determination.

The magnitude of this "misapplication" of U.S. trade remedy law by the ITA depends on the case in question. According to the data, the percentage of the initial duty that was applied by the ITA in violation of domestic law was, on average, 28.20%.

While the 28.20% average reduction represents only an estimate of the success enjoyed by Canadians to date, the number is a fairly accurate indicator of what has transpired since January 1, 1989. This number may, if anything, *underestimate* the overall success realized by

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[15] On average, panels remanded final determinations in a greater proportion of cases than did the CIT over the same period of time. During the period 1989-1994, the CIT remanded about 1/3 of its cases. In contrast, Chapter 19 panels reviewing U.S. agency determinations remanded about 2/3 of the time. *See* United States General Accounting Office, *U.S.-Canada Free Trade Agreement: Factors Contributing to Controversy in Appeals of Trade Remedy Cases to Binational Panels*, (GAO/GGD-95-175 BR), Washington D.C., June 16, 1995, p.75 (hereinafter "*GAO Study*").

CHART ONE
CHANGES IN DUTY LEVELS FOLLOWING PANEL REVIEW[16]

CASES BROUGHT AGAINST THE ITA	INITIAL DUTY LEVEL (%)	POST PANEL-REVIEW DUTY LEVEL (%)	% REDUCTION
RED RASPBERRIES	—	—	—
Marco Estates	9.15	9.15	0
Clearbrook Packers	2.59	0	100
Mukhtiar & Sons	3.67	0	100
PAVING EQUIPMENT (AD 89-1904-03)[17]	1.31	1.31	0
PAVING EQUIPMENT (AD 90-1904-01)	9.47	4.96	47.62
NEW STEEL RAILS (CVD)	112.34	94.57	15.81
NEW STEEL RAILS (AD)	38.79	38.79	0
PORK (CVD)	Cdn $.08/kilo	Cdn. $.03/kilo	62.5[18]
LIVE SWINE (CVD 91-1904-03)	—	—	—
i.) for sows/boars	Cdn $ .0047/lb	Cdn $ .0040/lb	14.89
ii.) for all other live swine	Cdn $ .0449/LB	Cdn $ .0051/lb	88.64
LIVE SWINE (CVD 91-1904-04)	—	—	—
i.) for sows/boars	Cdn $ .0049	Cdn$ .0045/lb	8.16
ii.) for all other live swine	Cdn $ .0932	Cdn$ .0927/lb	5.36
MAGNESIUM (AD)	33	21	36.36
SOFTWOOD LUMBER (CVD)	6.51	0	100
MAGNESIUM (CVD)	7.61	7.61	0
CORROSION-RESISTANT STEEL SHEET (AD)	22.9	18.71	18.3 (A)
CUT-TO-LENGTH CARBON STEEL PLATE (AD)	61.95	61.88	0 (A)
CASES BROUGHT AGAINST REVENUE CANADA			
BEER (AD) WEIGHTED AVERAGE	29.8	30	0
Heileman	33.6	34.1	1.5% *increase*
Stroh's	15.06	15.06	0
Pabst	14.9	14.9	0
TUFTED CARPET (AD)	11.97	13.23	10.53% *increase*
GYPSUM BOARD (AD)	27.28	36.06	32.18% *increase*
COLD ROLLED CARBON STEEL SHEET (AD)	8.3	8.3	0
AVERAGE CHANGE IN DUTIES RESULTING FROM PANEL REVIEW AGAINST U.S. AGENCIES: 28.20% REDUCTION[19] AGAINST CDN AGENCIES: 10.67% *increase*			

16 Unless otherwise specified, all duty levels are weighted average duty levels. As such, one must keep in mind that while a weighted average antidumping duty may have decreased following binational panel review for the industry as a whole, petitioning companies with a small volume of imports may not have benefited from this reduction in the average duty level.

17 There were actually two challenges brought in this case. While *Paving Equipment* USA-89-1904-03 challenged the amount of the antidumping duty, Canadian exporters argued in *Paving Equipment* USA-89-1904-02 that the subject exports should not have been included within the scope of the ITA's antidumping order. The latter case has not been listed in the above chart because it did not directly challenge the calculation of an antidumping or countervailing duty level.

18 The reduction in the countervailing duty in *Pork* eventually reached 100% when the ITC reversed its affirmative material injury finding.

19 When determining the average change in weighted average duty levels resulting from panel review, this calculation was made without reference to the reduction in duties in *Red Raspberries*, because of the fact that no weighted average post-panel review antidumping duty level could be calculated in that case. Also, each product under review in the *Live Swine* cases

Canadian exporters, in real dollar terms. This is because some of the products which have realized above-average reductions in duties - *Softwood Lumber*[20] (one hundred percent of CVD removed) and *Pork*[21] (fifty-five percent of CVD removed) - constitute a larger percentage of Canadian exports to the United States than some of the other products listed in Chart One. Canadian softwood lumber exports to the United States are roughly $8 billion/yr.[22] Recently, exports of Canadian pork to the U.S. were estimated at $350 million annually.[23]

In stark contrast to their Canadian counterparts, American exporters challenging Revenue Canada final antidumping determinations enjoyed no success under Chapter 19 of the FTA. With respect to American exporters appealing final Revenue Canada antidumping determinations, *Beer*[24] is illustrative of the approach that Chapter 19 panels employed. In that case, three American brewers were found to have dumped beer in British Columbia at rates of 33.6% (Heileman), 15.06% (Stroh's) and 14.9% (Pabst) respectively. The weighted average AD was found to be 29.8%. Following appeal to a Chapter 19 binational panel, not only were duties maintained for Pabst and Stroh's, but they were actually *increased* for Heileman to 34.1%. Revenue Canada's recalculation resulted in a new weighted average antidumping duty of 30%.[25]

Similar outcomes resulted in the three other cases where panels reviewed final Revenue Canada antidumping determinations. In

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was treated as a separate case, as it was difficult in those situations to determine a weighted average duty level.

20 Certain Softwood Products from Canada, No. USA-92-1904-01, 2 N.Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.20A, B.20B (Dec. 17, 1993) (hereinafter "*Softwood Lumber*").

21 Fresh, Chilled and Frozen Pork from Canada, No. USA-89-1904-06, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.10A, B.10B (Sept. 28, 1990) (hereinafter "*Pork-CVD*").

22 John Schreiner, *U.S. Lumber Industry Plans Another Duty Fight*, THE FINANCIAL POST, July 12, 1995, at 3.

23 Gary N. Horlick and F. Amanda DeBusk, The Functioning of U.S. - Canada Free Trade Agreement Dispute Settlement Panels, Appendix One, page 1 (Sept. 1, 1991), (unpublished manuscript, O'Melveny and Myers, Washington, D.C.).

24 In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia, Memorandum Opinion and Order No. CDA-91-1904-01, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.16 (Aug. 6, 1992) (hereinafter "*Beer-Dumping*").

25 Statistics gathered from Revenue Canada officials (Jan. 1995).

Tufted Carpets-AD[26] an initial 11.97% duty was increased to 13.23% as a consequence of panel review. In *Gypsum Board*,[27] duties were raised on American exports from 27.28% to 36.06% following Chapter 19 review. Finally, in *Cold Rolled Carbon Steel Sheet*,[28] Revenue Canada's recalculation of its original 8.3% antidumping duty resulted in no increase or decrease in the weighted average duty level. American exporters are undoubtably disappointed with these results.

Turning to an examination of final "injury" determinations, we see that both Canadian and U.S. exporters were relatively unsuccessful in overturning final injury determinations. Chart Two illustrates this phenomenon.

In theory, successful appeal of an injury determination would be more important than a successful margin of dumping or unfair subsidization challenge. A panel finding that an affirmative injury determination had violated domestic law would result in the immediate removal of all antidumping and countervailing duties, and a refund of amounts paid in association with those penalties. On the other hand, a relatively successful AD or CVD case - as in *Pork-CVD* [29] where duties were reduced by fifty-five percent - will not result in the immediate refund of duties, but only in a reduction in those duty levels.

The injury phase of *Pork*[30] shows the advantages of challenging both CVD and injury determinations before binational panels. *Pork-CVD*[31] was important in that it effectively forced the ITA to conclude that certain government programs were not "de facto specific" and thus not "countervailable."[32] Yet *Pork*[33] proved to be even more sig-

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26 In the Matter of Final Determination of Dumping Made by Revenue Canada, Customs and Excise, Regarding Certain Machine Tufted Carpeting Originating in or Exported from the United States of America, Opinion and Panel Decision, No. CDA-92-1904-01, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.25.A, B.25B (May 19, 1993) (hereinafter "*Tufted Carpets-AD*").

27 In the Matter of the Final Determination of Dumping Made by the Deputy Minister of National Revenue, Customs and Excise, regarding Gypsum Board Originating in or Exported from the United States of America, No. CDA-93-1904-01, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.27A (Nov. 17, 1993) (hereinafter "*Gypsum Board*").

28 In Re Cold-Rolled Steel Sheet, Panel No. CDA-93-1904-08, 1995 FTAPD Lexis 4 (Jan. 1, 1995).

29 *Pork-CVD*, *supra* note 21.

30 In the Matter of: Fresh, Chilled and Frozen Pork from Canada, Memorandum Opinion and Order regarding ITC's determination on remand, No. USA-89-1904-11, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.8A, B.8B (Jan. 22, 1991) (hereinafter "*Pork*").

31 *Pork-CVD*, *supra* note 21.

32 The ITA will find a subsidy as countervailable if it is either 'de jure' or 'de facto' specific. For a more complete discussion of the "specificity" test *see infra* pages 580-583.

33 *Pork*, *supra* note 30.

CHART TWO
PANEL REVIEW OF INJURY CASES

PRODUCT	FINAL DETERMINATION	POST-PANEL DETERMINATION	EFFECT
CASES BROUGHT AGAINST THE ITC			
Steel Rails	Threat of Material Injury	Upheld	38.79% AD and 94.57% CVD maintained
Pork	Threat of Material Injury	Reversed	2.9% AD removed
Softwood Lumber	Material Injury	Stayed	6.51% CVD removed
Magnesium	Threat of Material Injury	Upheld	21% ADD and 7.61% CVD maintained
Flat Rolled Carbon Steel Products	Material Injury	Upheld	Redetermined duty of 18.71% maintained
CASES BROUGHT AGAINST THE CITT			
Induction Motors	Threat of Material Injury	Upheld	14% AD maintained
Beer	Material Injury	Upheld	30% AD maintained
Tufted Carpet	Material Injury	Upheld	13.23% AD maintained
Hot Rolled Carbon Steel Sheet	No Present Injury	Upheld	RC unable to give effect to 13% AD
Cold Rolled Carbon Steel Sheet	Material Injury	Upheld	8.3% AD maintained
Pipe Fittings	Material Injury	Upheld	47% AD maintained
Hot Rolled Carbon Steel Plate	No Present Injury	Upheld	RC unable to give effect to 11.5% AD

nificant in that its result effectively ordered the removal of all duties. As a result of *Pork*, the automatic removal of duties on the Canadian exports would have been ordered *regardless* of the outcome of *Pork-CVD*. Thus while exporters may appeal both AD/CVD and injury determinations to binational panel review, securing a victory on an injury determination is most critical to one's interests.

A brief examination of the injury cases illustrates that Canadian exporters enjoyed little success when challenging ITC final determinations. Canadian exporters were successful in challenging ITC final determinations in *Pork*[34] and appeared likely to succeed in *Softwood*

34 *Pork supra* note 30.

Lumber[35] before proceedings in that case were stayed.[36] However, Canadian exporters during the FTA were unsuccessful in challenging affirmative injury determinations in *New Steel Rails*,[37] *Magnesium*,[38] and *Flat Rolled Carbon Steel Products*.[39]

American petitioners were universally unsuccessful in appealing final affirmative injury determinations. In *Induction Motors*,[40] the panel's affirmation of a CITT finding led to the maintenance of a 14% antidumping duty. In *Beer*,[41] the panel's approval of the CITT's injury determination translated into the perpetuation of a weighted-average thirty percent duty. In *Tufted Carpets from the U.S.*[42] and *Cold*

35 Softwood Lumber from Canada, No. USA-92-1904-02, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.21A, B.21B and B.21C (hereinafter "*Lumber-Injury*").

36 By August 4, 1994, the binational panel in *Lumber-Injury* had remanded to the ITC three times, rejecting the ITC's assertion that price suppression by the subject Canadian imports had caused material injury to the U.S. industry. On August 3, 1994, the *Softwood Lumber* countervailing duty challenge was terminated, following an Extraordinary Challenge Committee's approval of the panel's second opinion. A 6.51% CVD was thereafter ordered removed from Canadian imports of softwood lumber. The removal of the CVD rendered the outcome of the injury case moot, and a stay was issued in *Lumber-Injury*. The case was officially terminated on January 27, 1995.

37 In the Matter of New Steel Rails from Canada, Opinion of the Panel, Nos. USA-89-1904-09, USA-89-1904-10, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.7 at 7 (Aug. 13, 1990) (hereinafter "*New Steel Rails*"). In this case the panel was less demanding of the ITC than it was in other cases. This was one of the few times during the FTA where the Chapter 19 panel's examination of the ITC final determination failed to address the issue of whether there was a rational connection between the evidence relied on and the conclusion reached by the administering agency. For a more detailed examination of this panel decision, *See* THOMAS M. BODDEZ & MICHAEL J. TREBILCOCK, UNFINISHED BUSINESS: REFORMING TRADE REMEDY LAWS IN NORTH AMERICA 117-23 (Toronto: C.D. Howe Institute, 1993).

38 In the Matter of Pure and Alloy Magnesium from Canada, Final Decison of the Panel, USA-92-1904-06, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.24B at 13 (Jan. 27, 1994).

39 In the Matter of Certain Flat-Rolled Carbon Steel Products from Canada, No. USA-93-1904-05, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.33 (Nov. 4, 1994).

40 In the Matter of Certain Dumped Integral Horsepower Induction Motors, No. CDA-90-1904-01, 1 N.Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.12 (Sept. 11, 1991) (hereinafter "*Induction Motors*").

41 In the Matter of Certain Beer Originating in or Exported from the United States of America by or on behalf of G. Heilman Brewing Company Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia, No. CDA-91-1904-02, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.14A, B.14B (Aug. 26, 1992) (hereinafter "*Beer*").

42 In the Matter of an Inquiry made by the Canadian International Trade Tribunal Pursuant to Section 42 of the Special Import Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America, No. CDA-92-1904-02, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.26A, B.26B, B.26C (April 7, 1993) (hereinafter "*Tufted Carpets*").

Rolled Steel Sheet,[43] American petitioners once again failed to have the panel force reversal of injury determinations. This time the level of ADs that were maintained was 13.23%[44] and 8.3% respectively. Finally, in *Pipe Fittings*,[45] American exporters failed to secure any relief from a 47% antidumping duty when the binational panel unanimously upheld a CITT affirmative injury determination.

Apart from *Tufted Carpets*, the cases of *Flat Hot-Rolled Carbon Steel Sheet Products*[46] and *Flat Hot-Rolled Carbon Steel Plate*[47] are the only other cases decided since the FTA's inception which appear to have benefited U.S. exporters. In those cases, two Canadian steel companies challenged the CITT's finding that the subject U.S. imports had not caused and were not causing material injury to the Canadian industry. In both instances, Chapter 19 panels upheld the CITT's conclusions. While these decisions assisted U.S. exporters by preventing Revenue Canada from applying antidumping duties to their products, Chapter 19 panels continued their practice of affirming CITT final determinations.

To summarize, FTA Chapter 19 panel review asymmetrically benefited Canadian exporters in their efforts to remove non-tariff barriers to trade. While panels for the most part upheld ITC final injury determinations, they routinely found under the FTA that the ITA had misapplied U.S. AD/CVD law. These findings, in turn, corresponded directly to reductions in duty levels for Canadian exporters. At the same time, panels found that both Revenue Canada and the CITT had properly interpreted and applied Canadian trade remedy law. As a

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43 In the Matter of Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America (Injury), No. CDA-93-1904-09, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.30 (July 13, 1994) (hereinafter "*Cold Rolled Steel Sheet*").

44 In *Tufted Carpets*, *supra* note 42, the panel's affirmation of the CITT's "threat of material injury" determination led to the maintenance of the 13.23% duty. However, in its redeterminations on remand, the CITT reversed its "past and present" material injury determination. This reversal led to a partial refund of duties for the petitioning U.S. exporters.

45 In the Matter of Certain Solder Joint Pressure Pipe Fittings and Solder Joint Drainage, Waste and Vent Pipe Fittings, Made of Cast Copper Alloy, Wrought Copper Alloy or Wrought Copper, Originating in or Exported from the USA, Memorandum Opinion & Order, No. CDA-93-1904-11 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.35 (Feb. 13, 1995) (hereinafter "*Pipe Fittings*").

46 In the Matter of Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating In or Exported from the United States of America, No. CDA-93-1904-07, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.28A. (May 18 1994) (hereinafter "*Hot Rolled Steel Sheet*").

47 In the Matter of Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Plate, Heat-Treated or not, Originating in or Exported from the U.S.A., No. CDA-93-1904-06 2 N. Am. Free Trade Agreement: Disp. Settlement (Oceana), Booklet B.34 (Dec. 20, 1994) (hereinafter "*Hot Rolled Steel Plate*").

result, U.S. exporters realized neither reductions in duty levels, nor reversal of final injury determinations. Part II of this Study will attempt to explain why this disparity in results took place.

B. The Composition Of Panel Opinions

The aggregate statistics of FTA Chapter 19 panel review also shed some light on the composition of panel opinions. Has there been a discernible correlation between the nationality of panelists and the positions which they have taken in the resulting panel opinion(s)?

CHART THREE (A)
COMPOSITION OF PANELS IN CASES BROUGHT AGAINST UNITED STATES AGENCIES

CASE	RESULT	REASONS FOR DISSENT
RED RASPBERRIES		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous remand	—
PAVING EQUIPMENT (89-1904-02)	Unanimous approval of final determination	—
PAVING EQUIPMENT (89-1904-03)	Unanimous approval of final determination	—
PAVING EQUIPMENT (90-1904-01)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous remand	—
3rd Panel Opinion	Unanimous order to ITA to comply with panel directions	—
STEEL RAILS (89-1904-07)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous approval of redeterminaion	—
STEEL RAILS (89-1904-08)	4 Panelists approved final determination	The dissenting Canadian panelist argued that the ITA had applied the wrong standard of review when calculating dumping margins by way of "best information available".
STEEL RAILS (89-1904-09/10)	Unanimous approval of final determination	—
PORK (89-1904-06)		
1st Panel Opinion	Unanimous remand	One American panelist issued a statement of "additional views" in which he suggested how the ITA could best perform its "specificity" analysis.
2nd Panel Opinion	Unanimous remand	—
PORK (89-1904-11)		
1st Panel Opinion	Unanimous remand	One Canadian panelist issued "additional views" in which he criticized the ITC for producing an unreasoned final determination.
2nd Panel Opinion	Unanimous remand	—
LIVE SWINE (CVD 91-1904-03)		

1st Panel Opinion	Unanimous remand	One U.S. panelist issued additional views suggesting that the panel remand order was too demanding.
2nd Panel Opinion	All but one panelist, an American, remanded the ITA's redetermination on remand.	The U.S. panelist dissented arguing that the panel majority had applied the wrong standard of review.
LIVE SWINE (CVD 91-1904-04)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous approval of redetermination	—
Softwood Lumber (CVD)		
1st Panel Opinion	Unanimous Remand	—
2nd Panel Opinion	3 Canadian panelists approved the redetermination on remand	The two American panelists dissented, arguing that the Canadian majority had applied the wrong standard of review.
SOFTWOOD LUMBER (INJURY)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous remand	—
3rd Panel Opinion	Unanimous remand	—
MAGNESIUM (92-1904-03)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous affirmation of redetermination	—
MAGNESIUM (92-1904-04)		
1st Panel Opinion	Unanimous Remand	—
2nd Panel Opinion	Unanimous affirmation of redetermination	—
MAGNESIUM (92-1904-05/06)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous affirmation of redetermination	—
CORROSION-RESISTANT STEEL (93-1904-03)		
1st Panel Opinion	Unanimous agreement on most remanded issues	One American and one Canadian panelist dissented from the majority's refusal to remand one issue to the ITA, which concerned construction of the 1930 *Tariff Act.*
2nd Panel Opinion	Unanimous remand	—
CUT-TO-LENGTH STEEL (93-1904-04)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous remand	—
FLAT-ROLLED CARBON STEEL (93-1904-05)	Unanimous affirmation of final determination	—

As Chart Three (A) demonstrates, where binational panels issued decisions reviewing United States agency final determinations, those panels frequently agreed on whether a final determination warranted affirmation or whether it needed to be remanded to the administering U.S. agency for redetermination. Of the 19 such cases, a total of 35

panel opinions were delivered under the FTA.[48] Of those 35 panel opinions, all but four were unanimous. This would seem to provide clear evidence that binational panels conducted their affairs in a relatively harmonious manner when reviewing U.S. agency findings.[49]

In the four cases where dissenting opinions were delivered in cases reviewing U.S. agency final determinations, the main source of disagreement between the panel majority and the dissenting panelist(s) concerned the applicable "standard of review." In those four cases, dissenting panelists generally divided along national lines as to what constituted the appropriate standard of review, *i.e.* American panelists took positions supportive of the ITA or ITC, while Canadian panelists affirmed the arguments advanced by the aggrieved Canadian exporter(s). Thus, in *New Steel Rails*,[50] where the panel majority upheld an affirmative ITC injury finding, the dissenting Canadian panelist argued that the standard of review applied by the majority was overly deferential to the U.S. agency.[51] In *Live Swine*,[52] where the panel majority remanded the ITA's antidumping calculations, the dissenting American panelist argued that the standard of review applied by the majority was too strict and that the ITA was entitled to greater judicial deference.[53] In *Softwood Lumber*,[54] the two dissenting United States panelists argued vehemently that the panel majority, composed of three Canadians, had egregiously applied an overly-stringent standard of review which contravened United States judicial practice.[55] Similarly, in *Corrosion-Resistant Carbon Steel Products*,[56] a Canadian panelist dissented from the majority's affirmation of an ITA finding. The Canadian panelist contended that the ITA's construction and application of U.S. antidumping law contradicted the express language

48 This is because of the fact that many cases resulted in the issuance of two, or, at times three, panel opinions.

49 However, in three additional cases, panelists, while not officially dissenting, issued statements of "additional views" in which they departed from the panel majority as to the applicable standard of review.

50 *See New Steel Rails, supra* note 37.

51 *New Steel Rails, supra* note 37 at 40 (dissenting opinion of Richard Gottlics).

52 Live Swine From Canada, No. USA-91-1904-03, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklets B.13, B.13B (hereinafter "*Live-Swine*").

53 *Id.* Booklet B.13B (Oct. 30, 1992) at 69.

54 *See Softwood Lumber, supra* note 20, Booklet B.20B.

55 *Softwood Lumber, supra* note 20, Booklet B.20B at 69-110.

56 In the Matter of Certain Corrosion-Resistant Carbon Steel Flat Products from Canada, Opinion and Order of the Panel, No. USA-93-1904-03, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.31 (Oct. 31, 1994).

of the statute, and would have remanded the matter to the ITA for redetermination.[57]

Have binational panels been split along national lines when examining Canadian agency determinations? Chart Three (B) on the following page lists how panels have examined Revenue Canada and CITT final determinations.

As Chart 3(B) shows, binational panels have been largely in agreement when affirming or remanding final Canadian agency determinations. Of the eleven cases where panels examined CITT or Revenue Canada final determinations, seventeen panel decisions were rendered. Of those seventeen opinions, ten were unanimous, while seven resulted in the issuance of dissenting opinions.[58]

Did the dissenters diverge from the panel majority along national lines when reviewing Canadian agency determinations? In five of the seven cases where U.S. panelists delivered dissenting opinions, they did. In *Induction Motors*[59] the dissenting U.S. panelist argued that the CITT's final injury determination should not be affirmed and that a more challenging mode of review was required than that employed by the majority. In *Beer*,[60] one United States panelist dissented from the majority's decision to affirm the Tribunal's injury finding, arguing that an overly deferential standard of review had been applied. In *Tufted Carpets*,[61] a dissenting U.S. panelist asserted that the panel majority, in its second opinion, had applied an overly deferential standard of review when upholding an affirmative CITT injury determination.[62] In *Cold Rolled Steel Sheet*,[63] a U.S. panelist dissented from the majority's approval of Revenue Canada's antidumping determination and would have remanded the determination for recalculation of the dumping margins.[64] Finally, in *Pipe Fittings*,[65] a U.S. panelist dissented from the majority's affirmation of the CITT's redetermination

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57 *Id.* at 81. In this case, the panel majority remanded a number of issues to the ITA for redetermination. The majority, however, affirmed the ITA's construction of U.S. antidumping law on one of the issues in dispute, whereas the dissenting Canadian panelist would have remanded this matter to the ITA for reconsideration. Note that in this case, one U.S. panelist joined the dissent and would have also remanded this issue to the ITA for reconsideration.

58 In two of the seventeen opinions, panelists issued statements of "additional views" in which they disagreed with the approach taken by the majority, but where they agreed with the result.

59 *Induction Motors*, *supra* note 40, at 80.

60 *Beer*, *supra* note 41, Booklet B.14B at 4-5 (Feb. 8, 1993).

61 *Tufted Carpets*, *supra* note 42, Booklet B.26B, at 10-13 (Jan. 21, 1994).

62 This dissenting opinion will be discussed, *infra*, at page 565.

63 *Cold Rolled Steel Sheet*, *supra* note 28.

64 *Cold Rolled Steel Sheet*, *supra* note 28, at 15.

65 *Pipe Fittings*, *supra* note 45, at 16-22 (dissenting opinion of Leonard E. Santos).

CHART THREE (B)
COMPOSITION OF PANELS IN CASES BROUGHT AGAINST CANADIAN AGENCIES

CASE	RESULT	REASONS FOR DISSENT
INDUCTION MOTORS	4 panelists affirmed the final determination	One American panelist dissented, taking issue with the CITT's choice of methodology.
BEER (AD)	Unanimous remand	—
BEER (INJURY)		
1st panel opinion	Unanimous remand	One U.S. panelist wrote a concurring opinion, where he argued that the standard of review chosen by the majority was legally incorrect and overly rigorous.
2nd panel opinion	4 panelists affirmed the redetermination	One U.S. panelist dissented, stating that he would have remanded to the CITT with an order to overturn its affirmative injury determination.
TUFTED CARPETS (AD)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	Unanimous affirmation of redetermination	—
TUFTED CARPETS (INJURY)		
1st Panel Opinion	Panel majority remanded final determination	One Canadian and one American panelist dissented, arguing that the application of a more deferential standard of review was required.
2nd Panel Opinion	4 panelists remanded on one issue	One U.S. panelist dissented, arguing that the panel majority had applied an overly deferential standard of review.
3rd Panel Opinion	Unanimous approval of second redetermination	—
GYPSUM BOARD		
1st Panel opinion	Unanimous remand	—
2nd panel opinion	Unanimous approval of redetermination	—
HOT ROLLED STEEL SHEET (93-1904-07)	3 panelists affirmed the final determination	One U.S.and one Canadian dissented, asserting that a stricter standard of review was required.
HOT ROLLED STEEL PLATE (93-1904-06)	Unanimous affirmation of final negative injury determination	—
COLD ROLLED STEEL SHEET (93-1904-08)		
1st Panel Opinion	Unanimous remand	—
2nd Panel Opinion	4 Panelists affirmed the redetermination	One U.S. panelist dissented, arguing that Revenue Canada had not complied with panel remand instructions.
PIPE FITTINGS	4 Panelists affirmed the final determination.	One U.S. panelist dissented, arguing that the majority should have been less deferential to the CITT.
COLD ROLLED STEEL SHEET (93-1904-09)	Unanimous affirmation of final affirmative injury determination	The 2 U.S. panelists issued statements of "additional views" in which they suggested that the CITT needed to offer improved reasoning in its final determinations.

on remand. The dissenting panelist found that the CITT's conclusion were based on speculation and that the majority had been forced to reconcile conflicting evidence in sustaining the Canadian agency's decision.[66]

Of the seven cases where dissenting opinions were delivered, dissenting panelists twice took a position that crossed national lines. In the first of three decisions rendered in *Tufted Carpets*,[67] one American panelist refused to endorse the majority's remand instructions and instead would have employed a more deferential standard of review in order to affirm the CITT's affirmative injury finding. Similarly, in *Hot-Rolled Steel Sheet*,[68] a U.S. panelist refused to accept the position of the three-member majority, which had upheld a CITT negative injury determination. In that case, the U.S. panelist argued that a less deferential standard of review was applicable, and would have remanded to the CITT with respect to the agency's "causation" analysis.[69]

In sum, binational panels under the FTA's Chapter 19 generally issued unanimous opinions when reviewing U.S. and Canadian agency final determinations. In the eleven Chapter 19 cases where dissenting panel opinions were delivered, dissenting panelists usually took issue with the standard of review that had been applied by the majority. In such instances, dissenting Canadian panelists sought to inform their U.S. counterparts as to what standard of review was applicable under Canadian administrative law, and debated U.S. jurisprudence with a view to fashioning a more rigorous standard of review that could be applied to U.S. agency final determinations. At the same time, where U.S. panelists issued dissenting opinions, they frequently did so in order to dispute the interpretation of U.S. law made by Canadian panelists, and to formulate a less deferential standard of review that could be applied to Canadian agency final determinations.

C. Time Limits and the "Remand" Process.

The statistics are conclusive in showing that Canadian exporters benefited greatly from Chapter 19 panel review, particularly in appeals of ITA antidumping and countervailing duty calculations.

Besides reducing or eliminating duty levels, an equally pointed concern in the FTA negotiations was to ensure that final panel deci-

66 *Pipe Fittings*, *supra* note 45, at 20.
67 *Tufted Carpets*, *supra* note 42, Booklet B.26A at 49 (April 7 1993).
68 *Hot Rolled Steel Sheet*, *supra* note 46, at 57-65.
69 *Hot Rolled Steel Sheet*, *supra* note 46, at 57.

sions would be made as quickly as possible. To address this concern, Chapter 19 created a 315 day deadline from the date of request for a panel until the delivery of a first panel decision.[70] FTA Chapter 19 panels were reasonably successful in making an initial decision within this time-frame. Of the thirty cases where panels issued decisions, this deadline was met fourteen times. During the FTA, Chapter 19 panels on average issued first decisions within 360 days from the day that a request for panel review was made.

A more striking statistic with respect to time deadlines concerns the duration of panel review. In the 30 completed FTA cases where panels issued decisions, the average duration of panel review was 511 days.[71] This is longer than was initially anticipated, and these delay problems have become one of the more serious procedural deficiencies in the Chapter 19 process.[72] Nevertheless, this is still a considerable improvement over the situation which existed prior to the FTA, where the CIT averaged 734 days to complete its review of a final determination.[73]

This Chapter 19 "defect" is a direct product of the "remand" process. Negotiators purposely limited the mandate of binational panels so that panels could either affirm a final determination, or "remand" that determination to the appropriate investigating agency.[74] The agency would then, in its "redetermination on remand," take action "not inconsistent with the panel decision."[75] The system was structured in this manner so that panels would be expressly prohibited from substituting their own conclusions for those of the determining agencies.

Chart Four on the following page shows that Chapter 19 panels used their "remand" powers extensively. Of the thirty FTA cases where panel decisions were rendered, twenty were remanded to do-

70 *FTA*, *supra* note 1, art. 1904(14).

71 The duration of panel review was calculated by using the date of the request for Chapter 19 panel review and the date that the final Chapter 19 panel decision or order was delivered. In the three cases where a Chapter 19 panel decision was challenged before an Extraordinary Challenge Committee, the duration of panel review was calculated with reference to the date of the ECC opinion.

72 The average duration of panel review in the eleven completed Chapter 19 cases that reviewed Canadian agency final determinations was 459 days, while the average duration of review in the nineteen completed cases which examined United States agency determinations was 542 days.

73 In cases where CIT decisions were appealed to the CAFC, the duration of panel review was 1,210 days. *See GAO Study*, *supra* note 15, at 57-8.

74 *FTA*, *supra* note 1, art. 1904(8).

75 *FTA*, *supra* note 1, at 1904(8).

mestic agencies for "reconsideration." Of those twenty remand orders, fourteen were to United States agencies and six to Canadian agencies.

CHART FOUR
CASES RESULTING IN REMANDS (A=ACTIVE)

AGAINST U.S. AGENCIES	# of Remands	Elapsed Time (Days)	Average (Days)
RED RASPBERRIES	2	460	
PAVING EQUIPMENT (90-1904-01)	2	867	
STEEL RAILS (89-1904-07)	1	347	
PORK (CVD)	1	631	
PORK (INJURY)	2	609	
LIVE SWINE (91-1904-03)	2	640	
LIVE SWINE (91-1904-04)	1	644	
MAGNESIUM (AD)	1	422	
MAGNESIUM (CVD)	1	491	
MAGNESIUM (INJURY)	1	489	
SOFTWOOD LUMBER (CVD)	2	797	
SOFTWOOD LUMBER (INJURY)[76]	3	741	
CORROSION-RESISTANT CARBON STEEL	2	721 (A)	
CUT-TO-LENGTH CARBON STEEL	2	721 (A)	AVG = 612
AGAINST CDN AGENCIES			
BEER (AD)	1	315	
BEER (INJURY)	1	481	
TUFTED CARPET (AD)	1	517	
TUFTED CARPET (INJURY)	2	694	
GYPSUM BOARD (AD)	1	441	
COLD ROLLED STEEL SHEET (AD)	1	545	AVG = 498

The data supports a finding that panels challenged U.S. agency determinations quite stringently and as a matter of course. Even after the U.S. agencies submitted redeterminations on remand, panels were often unwilling to affirm those recalculations.[77]

In sharp contrast, Chapter 19 panels ordered Canadian agencies to "reconsider" their findings for a second time in a single case.[78] Such asymmetry is consistent with our general conclusion: FTA Chapter 19 panel review effectively forced the reversal of unsubstantiated United States agency determinations, but failed to provide the same

76 *Supra* note 35. This case was stayed as of August 4, 1994. *See supra* note 36 and accompanying text. The duration of panel review calculated in this case is the time period between the request for panel review and the date on which the proceedings were stayed.

77 On eight separate occasions, panels remanded U.S. agency determinations for a second time.

78 *Tufted Carpets*, *supra* note 42.

type of relief for American exporters challenging Revenue Canada and CITT final determinations.

The remand procedure was a central cause behind the extended delays that afflicted Chapter 19 decision-making during the FTA. This was particularly evident in some of the more controversial Chapter 19 cases. In *Pork*[79] (609 days), *Pork-CVD*[80] (631 days), *Softwood Lumber*[81] (797 days) and *Lumber-Injury*[82] (741 days), panels evinced a firm intention to reject agency conclusions that were not rationally connected to supporting evidence. However, even in less controversial cases such as *Paving Equipment*[83] (867 days) and *Tufted Carpets*[84] (694 days), the protracted duration of panel review suggests that panels were somewhat circumscribed in their ability to expeditiously dispose of applications.

Panel application of a notional rule of "finality" prevented the time delay problem from becoming even more acute. In a number of cases, including *Softwood Lumber*,[85] *Live Swine*,[86] and *Pork*,[87] panels prevented domestic agencies on remand from re-opening the administrative record or from adducing new evidence to support previously-determined conclusions. These panels in effect used the remand process to terminate review by "instructing" the agency to overturn "unsustainable" conclusions. In *Softwood Lumber*,[88] for example, the panel concluded, after having already remanded once to the ITA with a request for more "substantial evidence:"

> this is the second occasion on which Commerce has failed to provide a rational explanation of how the evidence before it leads logically to the conclusion that the provincial stumpage programs are specific under U.S. law. Its examination of the evidence on this occasion, while not according to law, has been detailed, and in the Majority's view there is little to gain from putting the parties to the time and expense of another remand. . . [w]e therefore remand this issue to Commerce for a determi-

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79 *Pork, supra* note 30.

80 *Pork-CVD, supra* note 21.

81 *See Softwood Lumber, supra* note 20.

82 *See Lumber-Injury, supra* note 35.

83 Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada Decision of the Panel, No. USA-90-1904-01, 1 N. Am. Free Trade Agreements: Disp. Settlements (Oceana), Booklets B.11A (May 24, 1991), B.11B (May 15, 1992), B.11C. (Oct. 28, 1992) (hereinafter "*Paving Equipment*").

84 *Tufted Carpets, supra* note 42.

85 *See Softwood Lumber, supra,* note 20.

86 *Live Swine, supra* note 52.

87 *Pork, supra* note 30.

88 *See Softwood Lumber, supra* note 20, Booklet B.20B.

nation that the provincial stumpage programs *are not* provided to a specific enterprise. . .[89]

The power to invoke "finality" was not explicitly provided for in Chapter 19.[90] However, Chapter 19 of the FTA does state - and this was relied upon by numerous panels - "(the panel) shall issue a *final* decision within ninety days of the date on which such remand action is submitted to it."[91]

As a result of this ambiguity in the FTA's provisions, the U.S. government twice challenged a panel's ability to "invoke finality" before Extraordinary Challenge Committees. U.S. parties alleged that such a "draconian" application of finality had not been followed by the Court of International Trade, and that since binational panels were to serve as surrogates for domestic courts, the panels were in effect "inventing" rules of procedure.[92]

In both the *Pork*[93] and *Live Swine*[94] Extraordinary Challenges, the Committees unanimously upheld a Chapter 19 panel's ability to terminate panel proceedings. In the *Pork*[95] Extraordinary Challenge, the Committee concluded:

> Taking into consideration the Panel's mandate to resolve matters expeditiously, the Committee cannot find that the Panel clearly exceeded its authority under these circumstances in remanding the ITC's determination for action not inconsistent with the Panel's first and second remand decisions.
>
> The Committee notes that there are *no restrictions* on the Panel's power to remand with or without instructions to the competent investigating authority.[96]

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89 *See Softwood Lumber, supra* note 20, Booklet B.20B at 31 (emphasis added).

90 Article 1904(8) of the FTA was vague as to limitations on the number of remands that a panel could order. *FTA, supra* note 1, art. 1904(8).

91 *FTA, supra* note 1, art. 1904(8) (emphasis added).

92 This statement was actually made by a U.S. panelist who dissented in *Live Swine, see supra* note 52, Booklet B.13B (Oct. 30 1992), at 12. However, his comments are illustrative of way in which U.S. parties framed their allegations before the *Pork, Swine, and Softwood Lumber* ECCs.

93 In the Matter of Fresh, Chilled or Frozen Pork from Canada, Memorandum Opinion and Order Regarding Binational Panel Remand Decision II No. ECC-91-1904-01 USA, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.8C (June 14, 1991) (hereinafter "*Pork ECC*").

94 In the Matter of Live Swine from Canada, Extraordinary Challenge Committee Proceeding, Memorandum Opinion and Order Regarding Binational Panel Remand Decision and Order, No. ECC-93-1904-01 USA, 1 N. Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.13C (April 8, 1993) (hereinafter "*Swine ECC*").

95 *Supra*, note 93.

96 *Supra* note 93 at 24 (emphasis added).

The approach adopted by the *Pork*[97] ECC was reaffirmed by the *Live Swine*[98] Extraordinary Challenge Committee. By upholding the validity of this "rule of finality," the *Live Swine* Committee strengthened a panel's ability to terminate proceedings after the panel issued a second remand order.

From the perspective of Canadian exporters, the rule of "finality" has been a positive aspect of the Chapter 19 process and has partially offset the problems associated with a panel's limited remedial powers. American agencies have, unsurprisingly, been much less enthusiastic about this development.

Notwithstanding some pointed criticism of the Chapter 19 decision-making process by the United States government before Extraordinary Challenge Committees, it appears that the ability of a Chapter 19 panel to terminate the adjudication after a second remand decision had a disciplining effect, particularly on the two U.S. administering agencies. The observations of one commentator during a midterm review of the Chapter 19 experience remain true at the end of the FTA Chapter 19 experiment:

> I have no doubt that the existence of the binational review procedure has made the international trade agencies of the United States more attentive to developing a record and sticking to it, to consistency in their own regulations and precedents, and to the importance of explaining their actions with more care when they have departed from prior practice.[99]

We will now conclude our examination of the aggregate Chapter 19 statistics by considering another chief contributor to the time delay problem: the suspension of panels due to the withdrawal of panelists.

D. The Withdrawal of Panelists.

In Canada, the replacement of traditional judicial review with binational panel review was a much celebrated achievement.[100] Exporters anticipated that appealing United States agency determinations before adjudicative bodies consisting of lawyers and academics familiar with the intricacies of trade remedy law would afford them with an opportunity to challenge AD/CVD and injury findings with

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97 *Supra* note 93.

98 *Supra* note 94.

99 ANDREAS F. LOWENFELD, "REFLECTIONS ON DISPUTE SETTLEMENT UNDER THE FTA: WHERE DO WE GO FROM HERE?" (Address to Centre for Trade Policy and Law, University of Ottawa, May 18 1993) (unpublished). *See also*, Robichaud and Steger, *supra* note 13, at 20.

100 *See* A. Andrew Anderson and Alan Rugman,*The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms* 6 J. INT'L ARB. 4, 65 (1989).

greater efficacy. From the outset, however, it was recognized that the success of the Chapter 19 experiment would be fundamentally tied to an ability to attract and retain qualified individuals to serve as panelists.

To date, the two countries have not had difficulty in attracting individuals conversant in the complexities of unfair trade law to serve as panelists. However, a problem has arisen with respect to *retaining* panelists for the duration of the review process. In total, eleven panelists have withdrawn from Chapter 19 cases after the initiation of panel proceedings. Of those panelists, seven have removed themselves from review of Canadian agency determinations, while four have "recused" themselves from proceedings examining United States agency determinations.[101]

A number of lawyers have removed themselves from binational panels because of the occurrence of non-related developments that could put into question their impartiality, such as perceived conflicts of interest. The specter of more panelists withdrawing from panels - or refusing to participate on them altogether - may have been heightened by recent pronouncements of the *Softwood Lumber* Extraordinary Challenge Committee.[102]

In the *Softwood Lumber* Extraordinary Challenge, the U.S.T.R. alleged that two Canadian panelists had breached the FTA's "Code of Conduct" by failing to disclose adequately information concerning their legal practices. The U.S.T.R. contended that this non-disclosure threatened the integrity of the binational panel process because: (i) a company in which one of the Canadian panelists held an interest had been retained by the Canadian Department of Transport on a non-related matter during the course of his tenure as a panelist, thus allegedly affiliating him with the Canadian government; and (ii) both of the panelists allegedly had failed to disclose in a timely manner the relationships that their law firms had with lumber companies that were interested in the outcome of the litigation.

The majority of justices on the Extraordinary Challenge Committee, both Canadian, dismissed the allegations. Justice Hart found that the two panelists had made "reasonable" efforts to maintain their impartiality, and concluded that only a "willful" failure to disclose infor-

101 The 11 withdrawals actually affected 13 cases. This is because two of the panelists in question were appointed to serve on two separate panels concurrently.

102 In the Matter of Certain Softwood Lumber Products from Canada, Memorandum Opinion and Order, No. ECC-94-1904-01 USA, 2 N. Am. Free Trade Agreements: Disp. Settlement (Oceana) (Aug. 3, 1994) (hereinafter "*Lumber ECC*").

mation would be sufficient to threaten the integrity of the binational panel review process.[103] Justice Morgan was somewhat more critical of the panelists, calling one of them "remiss" in failing to update disclosure statements during the course of the *Softwood Lumber* panel review. Nevertheless, he also found that the non-disclosure was not of sufficient magnitude so as to constitute a "material breach" within the meaning of the Chapter 19 Code of Conduct.[104]

By contrast, the sole American sitting on the Committee, Judge Wilkey, found that the violations of the Code of Conduct clearly threatened the integrity of the panel process. Where the Canadian judges implied that annulling the panel decision on account of the allegations would have had the effect of deterring qualified individuals from serving as panelists, the U.S. judge appeared more concerned with disciplining the alleged "misconduct." After chronicling the alleged violations committed by the Canadian panelists, Judge Wilkey concluded that vacating the panel's decision was imperative:

> I cannot think of anything that could more materially affect a Panel's decision than to have two of the necessary votes cast by members who have failed to disclose matters which would affect their impartiality. Likewise, to tolerate such failure to disclose would constitute the most obvious and dangerous threat to the integrity of the Binational Panel review process, because the selection of those members rests entirely on the voluntary, complete and continuing disclosure of any possible affiliations casting doubt on the members' impartiality. If we want to sabotage the entire Panel Review process, we can do it by tolerating these clear and unmistakable violations and declining to vacate the Panel's opinion in this case.[105]

The Extraordinary Challenge Committee in *Softwood Lumber* confirmed how important it is for panelists to comply with disclosure obligations and to avoid the appearance of impropriety or bias. The revised Code of Conduct[106] implemented under NAFTA builds on the *Softwood Lumber* experience by creating even more stringent disclosure requirements for Chapter 19 panelists.[107]

While this episode emphasized how the success of the Chapter 19 experiment is inexorably tied to full and complete disclosure by panel-

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103 *Id.* at 32.

104 *Id.* at 50-52.

105 *Id.* at 106.

106 The NAFTA Code of Conduct was published in the United States at: North American Free Trade Code of Conduct for Proceedings Under Chapters 19 and 20, 59 Fed Reg. 8720 (1994).

107 For an analysis of the NAFTA Code of Conduct, *see* James R. Holbein and Alicia D. Greenridge, *NAFTA Code of Conduct Provides International Guidelines for Ethical Behavior,* 1 NAFTA LAW & BUS. REVIEW OF THE AMERICAS 1 (forthcoming).

ists, there is a danger that creating too high a threshold as to what constitutes a material "conflict of interest" may impair the effectiveness of the Chapter 19 system under NAFTA. One must remember that the international trade bar, from which panelists are chosen, is concentrated in a small number of law firms. This is particularly the case in Canada where firms engaging in international trade are often retained by federal, provincial, and municipal governments on non-trade related matters. If panelists who are lawyers are deemed to be affiliated with their national government(s) merely by reason of the fact that their law firms have been retained by such governments on non-related matters, and if such affiliation is taken automatically to constitute a "conflict of interest," a high proportion of qualified candidates will be unable, and, eventually, unwilling, to serve as Chapter 19 panelists in the future. With a depletion of lawyers willing to participate, the hybrid Chapter 19 dispute resolution mechanism could revert toward the traditional system of more deferential judicial review. If such a scenario materializes, the FTA's express objective of providing more careful scrutiny of final agency determinations could be frustrated.[108]

In summary, the statistics provided in Part I of this Study appears to support the following conclusions: First, Canadian exporters disproportionately benefited from the implementation of binational panel review. Since 1989, Canadians were quite successful in appealing antidumping and countervailing duty determinations before binational tribunals. In contrast, binational panel review of Canadian agency findings did not formally assist aggrieved American exporters. To date, they have not succeeded on a single antidumping or injury petition.

Second, panel opinions under Chapter 19 were generally unanimously delivered. Where dissenting decisions were given, the main source of divergence between majority and dissent concerned the applicable "standard of review."

Third, the "remand" problem, resulting from a limited panel mandate, caused delays in the panel review process. However, panel application of a notional rule of "finality" somewhat resolved this problem. The ability to effectively terminate proceedings appeared to have a disciplining effect on domestic agencies, as those bodies began

108 This dim prognosis has not yet been borne out under NAFTA. To date, the more stringent NAFTA Code of Conduct does not appear to have discouraged qualified lawyers from serving on Chapter 19 panels. Interview with James R. Holbein, U.S. Secretary of the NAFTA Secretariat, in Washington D.C. (Jan. 15, 1995), and follow-up discussions.

to produce more persuasive final determinations and redeterminations on remand.

Finally, there has been an increase in recent years in the number of panels that have been suspended due to the withdrawal of panelists. Such a development may be exacerbated in the coming years as a stricter view of the disclosure obligations might dissuade panelists from participating in the process.

II. Explaining the Disparity of Results

The aggregate statistics of binational panel review during the FTA years showed that Canadian exporters, when compared to their American counterparts, enjoyed a disproportionate amount of success in their appeal of final agency determinations. There are a number of reasons that might explain why this disparity of results arose. First, it is possible that Canadian agencies had superior legal representation before binational panels. Most Chapter 19 analysts would agree, however, that the quality of legal representation during Chapter 19 litigation has not significantly diverged across national lines for the administering agencies.

Second, the asymmetry in results could be explained if one believed that Canadian agency final determinations were simply more clearly articulated and well reasoned than those produced by U.S. agencies. Such a finding is supported by the fact that binational panels only remanded six Canadian agency final determinations for redetermination, while fourteen such U.S. agency final determinations were returned for "reconsideration."

While the quality of final determinations does not seem to have differed much across national lines, it is possible that ITA final determinations may be grounded more on supposition than are final determinations made by Revenue Canada. For example, ITA antidumping and countervailing duty calculations are often made by using "Best Information Available" ("BIA") in the absence of more solid evidentiary support.[109]

109 BIA is a rule which the U.S. Congress created to assist the ITA render AD and CVD determinations in cases where a respondent refuses or is unable to produce information, or where a respondent significantly impedes an antidumping investigation. In situations where the ITA does not receive a "complete, accurate and timely response to the Secretary's request for factual information," the ITA may "construct" the relevant data by relying on the "best information available." 19 U.S.C.A. § 1677(e)(c)).

Both the ITA and Revenue Canada are entitled under the GATT[110] to use BIA, but the ITA has employed such methodology more often than Revenue Canada. If ITA final determinations are disproportionately based on BIA, and if Revenue Canada's determinations are more substantiated with actual evidence, binational panels would have greater scope to attack ITA conclusions on grounds that such findings lack evidentiary support.[111]

A third possible explanation for the disparity in results can be traced to differences between Canadian and American trade remedy regimes. While Canadian and American trade laws are similarly grounded in GATT treaty obligations, both countries have enjoyed wide latitude when interpreting their responsibilities under the GATT Subsidies and Antidumping Codes. As a result, Canada and the United States have codified in domestic statutes somewhat different interpretations and approaches to the concepts of "countervailable subsidy," "antidumping," and "material injury." If the *Special Import Measures Act*[112] confers on Canadian administering agencies a greater level of deference and discretion than that accorded to the ITA and ITC by the *Trade Agreements Act of 1979,*[113] it should be relatively more difficult to reverse a Canadian agency determination on grounds that the agency misinterpreted or exceeded its statutory mandate.[114]

While a detailed comparison of the two legal regimes is beyond the scope of this Study, there are some substantive differences between U.S. and Canadian trade remedy regimes. Rather than supporting the assertion that the Canadian regime is structured in such a way so as to facilitate a greater number of affirmative determinations of dumping, unfair subsidization and material injury, there are two differences which suggest that the United States regime is somewhat more "protectionist" in its approach to trade remedy laws. First, United States law with respect to what constitutes a "countervailable subsidy" was broader in scope than the approach adopted in Canada

110 Both the Canadian and American BIA rules are derived from GATT art. VI(8), which provides: "In cases in which any interested person refuses access to or otherwise does not provide necessary information within a period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available."

111 This was the case throughout the FTA Chapter 19 experience. Panels repeatedly rejected and remanded ITA final determinations that were disproportionately reliant on BIA. *See, e.g., Paving Equipment, supra* note 83.

112 Special Measures Import Act, R.S.C. 1985 c.S-15 (hereinafter "*SIMA*").

113 19 U.S.C. § 1673 (1979).

114 For a thorough comparison of Canadian and American trade remedy regimes, *see* James R. Holbein, et. al., *Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law*, 26 INT'L LAW 873 (1992).

during the FTA years.[115] This is not surprising given Canada's more benign approach to the use of governmental assistance to the private sector. Second, it has been effectively argued that the threshold that must be met in order to find "material injury" is lower in the United States than in Canada, and thus can be more easily met.[116] On the whole, then, it is difficult to conclude that the relative success of Canadian agencies in defending their final determinations before binational panels can be attributed to more "protectionist" Canadian trade remedy laws.

While the aforementioned factors may have played some role in causing the disparity of Chapter 19 results under the FTA, there are two other causes that seem more responsible for producing the asymmetric outcomes. First, there existed a disparity in the standards of judicial review that were applied to final Canadian and American agency determinations during the FTA.[117] Although the standard of review applicable to Revenue Canada findings appears similar to the standard of review relevant to United States agency final determinations, the standard applicable to final CITT determinations is more deferential than the general United States standard.[118] This is because the existence of a "privative" clause[119] effectively "insulated" CITT determinations from the same type of exacting and unyielding review that has characterized examination of United States agency determinations and Revenue Canada findings. This divergence in standards

115 Under the Uruguay Round Subsidies Code, subsidies are classified as actionable, non-actionable and prohibited. Part V of the Subsidies Code sets out detailed rules governing countervailing duties. CVDs may only be imposed on actionable and prohibited subsides. *See generally* MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE ch. 6 (1995).

116 *See* Holbein, *supra* note 114, at 888.

117 Article 1904(3) requires that panels, when reviewing the administrative record, "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing country would apply." Such general legal principles include "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies." *See FTA*, *supra* note 1, art. 1911.

118 The standard of review applicable to U.S. agency determinations is contained in 19 U.S.C. § 1516a(b)(1)(B). The standard applicable to the CITT and to Revenue Canada during the FTA was contained in § 28(1) of the Federal Court Act, R.S.C. 1985, c.F-7 (hereinafter "FCA").

119 In Canadian administrative law practice, such clauses refer to explicit language found in an enabling statute which seeks to "protect" the substance of agency's determination from judicial review. The privative clause that affected CITT final determinations during the FTA was found in the SIMA, *supra* note 112, § 76(1):

> 76. Orders and findings of Tribunal final. — (1) Subject to this section, subsection 61(3), paragraph 91(1)(g), section 96(1) and Part II, every order of the Tribunal under this Act is *final and conclusive* (emphasis added).

Effective as of January 1, 1994, the "privative clause" applicable to the CITT was repealed. *See* North American Free Trade Agreement Implementation Act, S.C. 1993, c.44, § 217(1).

of review made reversal of CITT determinations much less likely than reversal of United States agency final determinations during the FTA.

The other factor responsible for the asymmetry of outcomes concerns the manner in which binational panels *formulated* and *applied* the somewhat divergent standards of review. When examining United States agency final determinations, Chapter 19 panels meticulously surveyed and debated conflicting propositions that exist in United States administrative law jurisprudence concerning the applicable standard of review. These panels routinely used conflicting statements from leading U.S. cases to construct a relatively stringent standard of review, and then applied that standard in their review of the final determination in dispute. The application of this exacting and unyielding approach to judicial review has resulted in the effective reversal of several United States agency findings.

In sharp contrast to panels examining United States agency determinations, panelists reviewing CITT agency findings rarely explored and debated the value and weight of conflicting propositions in Canadian administrative law concerning the appropriate standard of review. The dedication that panelists displayed in constructing a relatively strict standard of review when ITA and ITC determinations were in dispute was notably absent from binational panel review of CITT determinations.

Where panels did examine the standard of review applicable to the CITT, panelists were unsure as to precisely how much deference was required to be granted to the CITT under Canadian law. In the two cases where a relatively strict standard of review was employed, panels remanded final CITT determinations on grounds that there lacked a rational nexus between conclusions and supporting evidence.[120] On the whole, however, binational panels generally followed the precedent set by Canadian courts and accorded broad deference to CITT final determinations.[121]

Binational panel review of Revenue Canada final determinations was more exacting than review of CITT conclusions, attributable, in large part, to the fact that Revenue Canada findings are not "insulated" by a privative clause. Panels formulated and employed the standard of review applicable to Revenue Canada quite effectively and challenged complex Revenue Canada determinations rigorously. As will be explained below, the fact that American exporters have not

120 *See Beer, supra* note 41 and *Tufted Carpets, supra* note 42.

121 *See*, for example, *Pipe Fittings, supra* note 45 and *Cold Rolled Steel Sheet, supra* note 43.

realized large reductions in duty levels is more attributable to other factors than to excessive panel deference.

The balance of this Part of the Study is devoted to showing that these two factors have been the most significant causes behind the asymmetry of outcomes. We will begin by examining panels decisions that reviewed CITT and Revenue Canada final determinations, and will then proceed by examining three cases which were brought against United States agencies. Before each discussion, some background on the applicable standard of review is provided.

A. Cases Reviewing Canadian Agency Determinations

1. The "CITT" Standard of Review

In Canada, the Federal Court Act sec. 28(1)[122] sets out the standard of review which is to be applied by reviewing bodies to Revenue Canada and CITT final determinations. A reviewing court can set aside an agency determination if the appropriate investigating authority:

> (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
> (b) erred in law in making its decision or order, whether or not the order appears on the face of the record; or
> (c) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

When ascertaining how much deference needs to be accorded to the decisions of expert government tribunals, Canadian courts first examine the legislative intention behind the decision to confer jurisdiction on the administrative tribunal. In situations where the administrative tribunal is not protected by a "privative" clause, and where petitioners have been granted a statutory right of appeal, courts will examine the tribunal's decision and underlying reasoning strictly. On the other hand, in cases where petitioners are not granted a statutory right of appeal, and where the administering agency *is* protected by a privative clause, judicial deference is at its highest.[123]

During the FTA years, the standard of review that Canadian courts would apply to final CITT determinations was different from that which would be applied to final Revenue Canada findings be-

122 Federal Court Act R.S.C. 1985, ch. F-7 § 28(1)(1970-71-72)(Can.) (hereinafter "*FCA*").

123 Pezim v. British Columbia (Superintendent of Brokers) 2 S.C.R. 557 at 590 (1994) (hereinafter "*Pezim*").

cause of the existence of a "privative" clause.[124] The Supreme Court of Canada has outlined the standard of review to be applied to administrative tribunal decisions in the presence of a such a clause:

> [w]here the relevant legislative provision is a true privative clause, judicial review is limited to *errors of jurisdiction* resulting from an error in interpreting a legislative provision limiting the tribunal's powers or a *patently unreasonable error on a question of law* otherwise within the tribunal's jurisdiction.[125]

Thus, when reviewing a CITT final determination, judicial review of alleged errors may proceed only if it is demonstrated that the Tribunal (i) exceeded its jurisdiction, or (ii) committed a "patently unreasonable" error of law or fact.

When considering an administering agency's "jurisdiction" under FCA § 28(1)(a), Canadian courts first turn to an examination of the agency's empowering statute. Generally, the agency will have exceeded its jurisdiction, and thus subjected itself to judicial review, if it has erred, no matter how reasonably, in its interpretation of the legislative provision which defines and limits its jurisdiction.[126] The more specialized the administering agency - ascertainable only by examining the purpose and complexity of the empowering legislation - the more diffcult it will be to characterize an error as "jurisdictional."

If the expert tribunal is found to have exceeded its jurisdiction, its determination will be reviewed by way of the "correctness" test. If a reviewing body concludes that the agency has inquired into matters which were not authorized by statute, the agency's determination will be deemed "incorrect" and the reviewing body will remand the decision for "redetermination." This "correctness" test, when employed, is very demanding on the agency under review.

It is difficult for Canadian courts to find that expert tribunals such as the CITT have exceeded their jurisdiction. The *SIMA*,[127] which the CITT is commissioned to administer, is highly specialized legislation which, in turn, makes it difficult to successfully frame alleged CITT misconduct as "jurisdictional." Therefore, even though Canadian administrative law does provide for exacting judicial review, the application of the stringent "correctness" test to a CITT determination will rarely occur.

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124 *See supra* note 119 and accompanying text.

125 United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., 2 S.C.R. 316 (1992) (Can.) (emphasis added).

126 U.E.S., Local 298 v. Bibeault, 2 S.C.R. 1048, 1088 (1988) (Can.).

127 *See supra* note 112.

If a reviewing body concludes that the CITT has maintained "jurisdiction," it may still review alleged mistakes if it finds that the agency made a "patently unreasonable" error of law or finding of fact under FCA § 28(1)(b) and (c).

An important recent discussion of the Supreme Court of Canada which considered the "patently unreasonable" test in the presence of a privative clause is found in *National Corn Growers Association., Local 740 v. Canada* (Import Tribunal).[128] In this case, the Court reviewed a final material injury determination made by the Canadian Import Tribunal.[129] Justice Wilson, speaking for the minority, examined the bounds of the "patently unreasonable" test. She concluded that in the presence of a privative clause the courts should neither undertake a meticulous analysis of a tribunal's reasoning nor interfere with an administrative tribunal's conclusions so long as the tribunal has "properly interpreted its constitutive statute in a patently reasonable fashion."[130]

Justice Gonthier, for the majority, held that a court would interfere with the conclusions of a specialized tribunal only where it was found that the tribunal's conclusions could not be sustained on "*any* reasonable interpretation of the facts or law or where the agency exceeded its jurisdiction."[131]

While the Gonthier approach in *Corn Growers* may facilitate a more rigorous review of an expert tribunal's reasoning than the Wilson approach in that case, the decision did not overturn the ingrained judicial deference that exists in Canada to specialized agencies protected by privative clauses. The "patently unreasonable" test, which *must* be applied in the presence of a privative clause to errors of fact or law, still gives broad discretion to the findings of an administering agency. Subsequent cases have concluded that so long as there exists "any evidence" capable of supporting a tribunal's decision, Canadian courts will give "curial deference" to such tribunals and will not find an expert tribunal's decision "patently unreasonable."[132] This judicial approach is clearly more deferential than the "correctness" test outlined above, and, as will be explored below, is more accomodative of the expert body under review than are U.S. courts.

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128 National Corn Growers Ass'n v. Canada (Import Tribunal), 2 S.C.R. 1324 (1990) (hereinafter "*Corn Growers*").

129 This administrative body became the CITT in 1990.

130 *Supra* note 128, at 1348.

131 *Supra* note 128, at 1353-1383.

132 Bell Canada v. Canada (C.R.T.C.), 1 S.C.R. 1722, 1746 (1989) (Can.).

2. *CITT Cases*

The quality of FTA Chapter 19 panel decisions reviewing the seven CITT injury determinations was high, although panelists were frequently divided as to how much deference was required under the "patently unreasonable" test. At times, panels strongly challenged CITT findings and remanded on issues where there was not a clear connection between conclusions and supporting evidence. In those instances, panels formulated and applied a relatively rigorous standard of review. In most cases, however, panels dealt with complex matters in a traditionally deferential manner, upholding complicated and, at times, contradictory CITT findings by concluding that those determinations were not "patently unreasonable."

As was previously outlined, the existence of a "privative" clause is the primary reason that disputable CITT determinations have been upheld by panels. An examination of the *Beer*[133] case will illustrate (i) that panels attempted under the FTA to apply the less deferential "correctness" test to their review of CITT determinations in an effort to challenge unfounded CITT conclusions with greater austerity, but that (ii) such panels had difficulty avoiding the reality that Canadian administrative law dictates that alleged errors of law must be dealt with by way of the highly deferential "patently unreasonable" test.[134]

Also evident in the seven cases where Chapter 19 panels reviewed CITT determinations is the fact that panels rarely explored the bounds of Canadian administrative jurisprudence in an effort to determine precisely how much discretion had to be given to the CITT's findings under the "patently unreasonable" test.[135] Yet, even in the few cases where panelists did seek to fashion and employ a strict version of that test, they ultimately upheld the CITT's material injury determinations. This uncertainty concerning how much deference must be accorded under Canadian law to alleged CITT errors of law will be explored with reference to *Tufted Carpets*.[136]

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133 *Beer*, *supra* note 41.

134 Where the administrative tribunal in Canada is protected by a privative clause, see the leading case of *Canadian Union of Pub. Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 which held that where an expert tribunal is acting within its jurisdiction, only "patently unreasonable" errors of law are reviewable.

135 Again, this stands in contrast to Chapter 19 review of U.S. agency determinations where panelists routinely debated U.S. standard of review jurisprudence. *See, e.g., Softwood Lumber*, *supra* note 20, Booklet B.20B where the majority and dissent discussed at length how recently decided CIT cases affected the U.S. standard of review.

136 *Tufted Carpets*, *supra* note 42.

Certain Beer Originating in the United States

The main issue in *Beer* concerned the CITT's finding that a concentration of dumped United States imports had caused material injury to the beer industry in the Province of British Columbia. In its final determination, the CITT had found that the dumped U.S. imports had led to "price suppression" which in turn had caused material injury by contributing to the poorer financial performance of British Columbian beer producers. The Tribunal, however, appeared to have failed to demonstrate that the dumped imports in and of themselves were a cause of the material injury. Given that American imports constituted a negligible percentage of the amount of beer consumed in British Columbia, and that domestic producers had lost profits as a result of other changes occurring within the industry, it was tenuous at best to conclude that the dumped imports were causing material injury.[137]

American petitioners alleged that the *SIMA*[138] required the Tribunal to inquire solely into the causal link which may have existed between the dumped imports and material injury. They argued that the statute did not permit the Tribunal to inquire as to the existence of a causal link between "extraneous factors" and material injury. Since the Tribunal could not find the manifestation of material injury without combining the effects of dumping and non-dumping extraneous factors, the U.S. petitioners contended that the CITT had exceeded its jurisdiction under FCA § 28(1)(a). They asserted that as a result of this violation, the binational panel was required to employ the "correctness" test during its review.

In the first of two opinions, the panel rejected the Canadian industry's request to frame the U.S. exporters' allegations as "errors of law," and thereby precluded application of the deferential "patently unreasonable" standard of review.[139] Instead, the panel attacked the Tribunal's findings by applying the more stringent "correctness" test on grounds that the agency had failed to conduct the type of inquiry required by the SIMA.[140] In a well-reasoned opinion, the panel concluded that the SIMA had not authorized the Tribunal to make an inquiry as to the existence of a causal link between extraneous factors

137 The CITT had found that changes in consumer preferences had led Molson and Labatt to change their packaging configuration from bottles to cans. The Tribunal concluded that the cost implications that resulted from this move were attributable to the American imports, all of which were packaged in cans.

138 *See supra* note 112, § 42(1)(a).

139 *Beer, supra* note 41, Booklet B.14, (Aug. 26, 1992) at 21.

140 *Beer, supra* note 41, Booklet B.14 (Aug. 26, 1992) at 30.

(*i.e.*, non-dumping factors) and material injury. The panel remanded this issue for redetermination becuase it concluded that the Tribunal had transgressed the "correctness" standard.[141]

In a concurring opinion the chairman of the panel, an American, agreed that the agency had considered extraneous matters when conducting its causation analysis, and remanded accordingly.[142] He disagreed with the standard of review that the majority had applied. Instead of the "jurisdiction" approach employed by the majority and its concomitant, the more unyielding "correctness" test, the chairman concluded that an "error of law" had been committed, and that the "patently unreasonable" standard of review was therefore applicable.[143] He warned the majority that when a reviewing body is deciding whether an issue is to be classified as an "error of law" or as a "breach of jurisdiction," Canadian law requires that the administering agency be given the "benefit of the doubt."[144] The chairman remanded the determination to the CITT on grounds that the Tribunal's causation analysis was "patently unreasonable."[145]

In its redetermination on remand the CITT substantiated its original determination, but its re-affirmation of material injury still appeared far from compelling.[146] Nevertheless, the panel majority, in a cursory four-page judgment, upheld the CITT's redetermination by finding that it was not "patently unreasonable."[147] With respect to its treatment of the standard of review issue, the panel held:

> The scope of this Panel's inquiry in a review of the Determination on Remand is much narrower than was the scope of its review of the Tribunal's original Determination. The panel's inquiry in reviewing the Determination on Remand is thus limited to deciding whether the Tribunal addressed the question that the Panel directed to it, followed the panel's instructions, and is so doing reached a result that is not patently unrea-

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141 *Beer, supra* note 41, Booklet B.14 (Aug. 26, 1992) at 30.

142 *Beer, supra* note 41, Booklet B.14 at 38 (Concurring Opinion of Chairman Greenberg).

143 *Beer, supra* note 41, Booklet B.14 at 31 (Concurring Opinion of Chairman Greenberg).

144 *Beer, supra* note 41, Booklet B.14 at 34 (Concurring Opinion of Chairman Greenberg).

145 *Beer, supra* note 41, Booklet B.14 at 37 (Concurring Opinion of Chairman Greenberg).

146 In reaffirming its original finding that the U.S. imports had caused material injury to the Canadian industry, the CITT again took into account extraneous factors. The Tribunal's redetermination was based on an examination not only of the effects of the dumped U.S. imports, but also of other beer imports which had entered the B.C. market two years prior to Revenue Canada's affirmative dumping finding. As the dissenting chairman noted in the second *Beer* panel opinion, taking into account such extraneous factors contravened the GATT Antidumping Code. *See Beer, supra* note 41, Booklet B14.B at 3-5 (Feb. 8, 1993) (Dissenting Opinion of Chairman Greenberg).

147 *See Beer, supra* note 41, Booklet B14.B (Feb. 8, 1993) at 2.

sonable and is supported by at least some evidence in the Tribunal's investigative record.[148]

The most noteworthy aspect of *Beer* is how the panel applied a more lenient standard of review in its second opinion from the relatively rigorous standard employed in its first. In the first decision, when the panel employed the unyielding "correctness test," it challenged the agency's conclusions stringently, requiring the Tribunal to demonstrate that a rational nexus existed between price suppression and material injury. By contrast, once the more deferential "patently unreasonable" test was employed in the second opinion, the panel affirmed the redetermination simply on grounds that the Tribunal had successfully provided *some* evidentiary support for its conclusions.

Beer illustrates how the presence of a privative clause has helped "insulate" the CITT from rigorous binational panel review. At the outset of the case, the panel knew that because of the presence of the privative clause, it would be obliged to examine alleged "errors of law" by way of the deferential "patently unreasonable" test. In an effort to avoid this deferential approach to judicial review, the panel majority in its first opinion carefully tried to frame the alleged error as one of "jurisdiction," to which the more stringent "correctness" test could be applied. But the panel's rejection of this approach in its second opinion - presumably on account of the dissenting chairman's warnings - demonstrated how difficult it is under Canadian administrative law to categorize alleged CITT errors as jurisdictional. In short, this case demonstrates how difficult it is to avoid employing the deferential "patently unreasonable" test when examining alleged CITT misconduct.[149]

Given the fact that the panel felt obliged to employ the deferential "patently unreasonable" test, its second opinion is unsatisfactory for two reasons. First, while the panel appears to have rejected the

148 *See Beer, supra* note 41, Booklet B14.B (Feb. 8, 1993) at 1-2.

149 The *Beer* panel's preference for the "patently unreasonable" standard over that of "correctness" set a precedent. In the five subsequent Chapter 19 cases that reviewed CITT final determinations, not once was an alleged Tribunal error classified as a breach of jurisdiction. Instead, panels uniformly characterized and examined alleged CITT mistakes as "errors of law" or "errors of fact". As a consequence, the more deferential "patently unreasonable" test was applied by panelists as a matter of course. The clearest example of this development was manifest in *Hot-Rolled Steel Sheet, supra* note 46. In that case the panel was faced with the issue of whether to characterize an alleged CITT error in interpretation of the SIMA "material injury" test (§ 42(1)(a)) as a breach of jurisdiction or as an error of law. The panel refused to consider the CITT's approach to causation as a matter of jurisdiction, and instead concluded that matters of statutory interpretation raised alleged errors of law. By so doing, the panel reaffirmed the notion that an extremely high threshold must be met before alleged CITT errors would be reviewed by way of the less deferential jurisdiction/correctness approach. *See id.* at 14-15.

"correctness" test in favor of the "patently unreasonable" approach, it offered in its second opinion no explanation as to why it had changed the applicable standard of review. This stands in sharp contrast to Chapter 19 panel decisions which reviewed United States agency final determinations. In almost all of those cases, panels - in second and third opinions - went to great lengths explaining the applicable standard of review.

A second problem with the second *Beer* decision has to do with its quality and length. The panel's opinion was notably short and not especially well-reasoned. Again, this stands in sharp contrast to panel review of United States agency redeterminations on remand. Where panels in the latter situation issued second and third decisions, those opinions continue to be of high quality when compared to initial decisions.[150]

Given that panels were effectively unable to employ the more exacting "jurisdiction"/"correctness" approach to alleged CITT errors, the logical question to ask next is: how effective were the panels in formulating and applying the "patently unreasonable" test? *Tufted Carpets*[151] illustrates that panels were deferential when applying this approach.

Tufted Carpets from the United States

In this case, U.S. exporters appealed a CITT determination which had found that dumped imports of tufted carpeting had caused, were causing, and were likely to continue to cause material injury to the production of like goods in Canada.[152] The Tribunal had concluded that dumping had caused a significant increase in United States imports, a substantial loss of market share by Canadian manufacturers, and the erosion and suppression of Canadian carpet prices.[153]

What is most significant about this case is how the majority and dissent diverged with respect to their formulation and application of the Canadian standard of review. In the first of three panel opinions, the majority made a thorough attempt to trace the evolution of the "patently unreasonable" test, and to articulate the requirements and limitations of that standard.

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150 The most vivid example of this is *Softwood Lumber, supra* note 20. In that case, the majority and dissent wrote opinions which together were over 200 pages in length.

151 *Tufted Carpet, supra* note 42.

152 Canadian Int'l Trade Tribunal Finding: Machine Tufted Carpeting, 126 Canada Gazette I 18, 1159-60 (1992).

153 *Id.*

In its attempt to trace the evolution of the "patently unreasonable" test, the panel majority concluded that reviewing bodies in Canada have traditionally been reluctant to review the *manner* in which expert tribunals reached final determinations.[154] The majority affirmed that the conventional approach applied by Canadian courts was restricted to ascertaining whether or not a tribunal's determination could be sustained by "any evidence."[155] The majority conceded that this type of judicial review effectively precluded reviewing bodies from examining whether agency results flowed logically from supporting evidence.[156]

The majority then suggested that recent decisions with respect to the "patently unreasonable" test had broadened the mandate of reviewing bodies. Instead of being restricted to examining whether or not a tribunal result could be sustained by "any evidence," the panel concluded that reviewing bodies were now required under Canadian law to ensure that the methodology employed by the administering agency was reasonable. For authority with respect to this change in Canadian judicial practice, the panel majority cited the reformulation of the "patently unreasonable" test by Justice McLachlin in *Lester (W.W.)*v.*U.A.J.A.P.P.I. Local 740*:[157]

> Courts should exercise caution and deference in reviewing the decisions of specialized administrative tribunals, such as the Labour Board in this case. This deference extends both to the determination of the facts and the interpretation of the law. Only where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of facts, or where the interpretation placed on the legislation is patently unreasonable, can the court interfere.[158]

The panel majority then offered its interpretation of this proposition:

> It is obvious from the statement "only where the evidence, viewed reasonably, is incapable of supporting a tribunal's finding of fact," that the Court is saying not only must the relevant evidence be examined but also this evidence must be viewed reasonably. Thus, it is not a question of whether there is no evidence, but rather *whether the evidence relied on is capable of supporting the tribunal's finding of fact (that is, evidence that rationally or logically supports the findings)*.[159]

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154 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993) at 4.

155 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993) at 4.

156 *Tufted Carpets, supra* note 42, Booklet B.26A at 5-6 (April 7, 1993). For authority on this proposition, the panel cited various cases including Japan Electrical Manufacturers Association, et al. v. the Anti-Dumping Tribunal, et al., 12 C.E.R. 260, 268 (F.C.A. 1987).

157 W.W. Lester (1978) Ltd. v. U.A., Local 740 [1990] 3 S.C.R. 644, 688-89.

158 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993) at 9.

159 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993), at 9 (emphasis added).

After citing a number of other recent judicial propositions supporting a more active judicial role, the panel formulated its own version of the "patently unreasonable" test:

> If a reviewing Panel finds that the decision of a specialized tribunal cannot be sustained on any reasonable interpretation of the facts or where the evidence viewed reasonably is incapable of supporting the tribunal's findings of fact, the tribunal's decision will be deemed patently unreasonable. Put another way, *if a rational or logical relationship does not exist between the evidence and the decision of the tribunal, such decision will be deemed patently unreasonable.*[160]

Not surprisingly, once the panel employed this relatively exacting approach to the CITT's final determination, it found that nearly all of the Tribunal's conclusions were not rationally connected to supporting evidence.[161]

The two dissenters, one American and one Canadian, disagreed with the strict standard of judicial review formulated by the majority. Where the majority had chosen certain judicial statements to illustrate that the standard of review had recently become more rigorous, the dissent chose other propositions to deny that the deferential "any evidence" test had been weakened or displaced. For example, where the majority had cited *Lester* to justify a more expansive role for reviewing bodies, the dissent drew upon another statement made by Justice McLachlin in that same case to support the orthodox approach to judicial review:

> If there is *any* evidence capable of supporting a finding of successorship, the court will defer to the board's finding even though it may not have reached the same conclusion. However, absent any such evidence, the decision must fall.[162]

The dissenting panel chairman, a Canadian, thereafter formulated his own version of the "patently unreasonable" test:

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160 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993), at 11 (emphasis added).

161 The panel majority remanded the final determination on a number of counts. First, the panel remanded the CITT's affirmative "future injury" finding on grounds that this conclusion lacked evidentiary support. Second, on the issue of past and present causation, the panel found that the CITT had not considered whether non-dumping factors could have assisted the United States industry in gaining Canadian market share. Such non-dumping factors included (i) a more innovative and fashionable U.S. product line, (ii) better service and marketing practices associated with United States imports, and (iii) cost advantages associated with United States imports. The panel ordered the Tribunal to examine whether these three factors could have been responsible for the past material injury. Third, the panel ordered the CITT to ensure that FTA tariff reductions and a strengthening Canadian dollar were not responsible for the decline in carpet prices. The panel ordered the agency to provide more specific information as to the affects of these factors on the Canadian industry. *See Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993) at 11-22.

162 *Tufted Carpets, supra* note 42, Booklet B.26A (April 7, 1993) at 28 (emphasis added).

> these decisions of the Supreme Court of Canada stand for the proposition that if there is no evidence to support a finding or conclusion which is central to the tribunal's decision, the decision is rendered patently unreasonable. However, if there is any evidence capable of supporting a finding, the reviewing panel should not re-weigh the evidence. It is only where the decision cannot be sustained on any reasonable interpretation of the facts that a reviewing panel should intervene.[163]

Not surprisingly, since dissenters employed a standard of review that was considerably more lenient on the Tribunal than the standard articulated by the majority, they would have affirmed the CITT's final determination in its entirety.

The panel's second opinion was delivered on January 21, 1994.[164] Once again, the majority and dissent diverged on the applicable standard of review. The panel majority in the second opinion - which majority now included the two original dissenters as well as the newly appointed Canadian panelist - chose not to reapply the rigorous standard of review that had been so carefully debated, formulated and applied in the initial majority decision. Instead, the new majority concluded that a more deferential approach was applicable to review of agency redeterminations.[165]

On the matter of past and present material injury, the majority rejected the Tribunal's analysis. The panel found that the Tribunal had not performed any of the analyses ordered by the panel in its initial opinion.[166] The majority thereafter remanded for a second time on the issue of past and present material injury, and ordered the Tribunal to establish more clearly the critical nexus between dumping and material injury.[167]

The outcome in *Tufted Carpets* was effectively decided with respect to the matter of "future injury." In its redetermination on remand, the Tribunal had reaffirmed that there existed a threat of material injury to the Canadian industry. The Tribunal attributed this threat of material injury to: (i) large United States manufacturing overcapacity; (ii) "soft" demand conditions in the United States; and

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163 *Tufted Carpets*, *supra* note 42, Booklet B.26A (April 7, 1993) at 33.

164 *Tufted Carpets*, *supra* note 42, Booklet B.26B (Jan. 21, 1994). Note that a Canadian panelist who had sided with the dissent in the first decision withdrew before the second decision was issued. He was replaced with another Canadian panelist who sided with the majority in the second panel opinion.

165 *Tufted Carpets*, *supra* note 42, Booklet B.26B (Jan. 21, 1994) at 3. As authority for its conclusion that a more deferential standard of review applied to redeterminations on remand, the panel cited the cursory approach adopted in *Beer*, *supra* note 41, during that panel's review of a redetermination on remand.

166 *Tufted Carpets*, *supra* note 42, at 4-6.

167 *Tufted Carpets*, *supra* note 42, at 6.

(iii) the need, on the part of large United States plants, to achieve maximum operational efficiencies by producing round-the-clock. The agency concluded that material injury was likely because these conditions were "likely to persist for some time."[168]

The majority affirmed the agency's "future injury" finding. With little substantive analysis the panel held that there existed evidence in the administrative record to support the Tribunal's findings.[169]

The sole dissenting panelist, an American member of the majority in the panel's initial opinion, refused to affirm the Tribunal's future injury finding. The panelist criticized the majority for applying a more deferential standard of review in the second panel opinion than that formulated and applied by the majority in the initial panel decision.[170] The dissenting panelist argued that the "patently unreasonable" standard required that *each* Tribunal conclusion be sustained with supporting evidence. Employing this relatively strict approach, the dissent rejected the Tribunal's redetermination on two grounds. First, it found that the Tribunal had not clarified which of the aforementioned three factual conclusions was essential to its determination of future injury. It would have ordered the Tribunal in a second redetermination to state exactly which of its factual conclusions was fundamental to its finding of future injury.[171] Second, the dissenting panelist could not find evidence in the administrative record capable of supporting a conclusion that "soft" United States demand would persist into the future.[172] Again, the dissent would have remanded on this issue for further clarification. The dissent concluded by stating that since the panel majority was already remanding on the issue of past and present injury, it was not unreasonable to request the Tribunal to further substantiate its affirmative future injury finding.[173]

In its second redetermination on remand, the Tribunal concluded that there existed no past and present material injury to the Canadian industry.[174] The Canadian Carpet Institute sought panel review of this finding. At the same time, the American petitioners requested that

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168 *See Tufted Carpets, supra* note 42, at 6. The CITT also based its final determination on certain of the recommendations specified by the "Committee on Antidumping Practices" issued pursuant to Article 3:6 of the GATT Antidumping Code.

169 *Tufted Carpets, supra* note 42, at 9.

170 *Tufted Carpets, supra* note 42, at 11-12.

171 *Tufted Carpets, supra* note 42, at 10.

172 *Tufted Carpets, supra* note 42, at 11.

173 *Tufted Carpets, supra* note 42, at 12.

174 In the Matter of a Remand under Section 77.15 of the Special Import Measures Act Respecting Machine Tufted Carpeting Originating in or Exported from the United States of America, CDA-92-1904-02, 1994 FTAPD LEXIS 7, *8 (Feb. 11, 1994).

the binational panel reconsider its previous affirmation of the CITT's "future injury" finding.

In its third opinion, the panel unanimously affirmed the Tribunal's finding that there existed no past and present injury.[175] The panel, however, refused to accede to the U.S. exporter's request that the affirmative "future injury" determination be reconsidered.[176] This decision was sufficient to defeat the United States petitioner's application for relief.[177]

Tufted Carpets illustrates two reasons why American exporters had so little success when appealing CITT final determinations to Chapter 19 panels. First, the presence of a privative clause limited how stringently the panel could challenge CITT findings. Rather than being able to examine alleged "errors of law" strictly, the panel was confined by the highly deferential "patently unreasonable" test. Had the panel been able to apply the standard of "reasonableness" to the alleged error of law - as it would have in review of a Revenue Canada determination - the panel may have remanded the Tribunal's affirmative "future injury" finding. That the panel upheld the CITT on the "future injury" issue is, in large part, a testament to the deferential nature of the "patently unreasonable" test and the standard of review applicable to CITT final determinations.

Second, the case demonstrates how panels reviewing CITT determinations have been inconsistent when determining how much deference is required by the "patently unreasonable" test. Rather than reaffirm its commitment to the strict standard of review so carefully developed and applied in its initial decision, the panel majority in the second opinion opted for a more lenient version of the standard of review. The majority made *no* reference to the list of judicial propositions that had been adopted in the initial panel opinion; instead, it chose to apply a more deferential version of the "patently unreasonable" test. With the employment of this more acquiescent standard, the panel upheld the Tribunal's questionable "future injury" determination.

While the employment of this deferential standard of review in the second panel opinion in *Tufted Carpets* inhibited the ability of the U.S. exporters to secure relief, and while this approach arguably con-

175 *Tufted Carpets, supra* note 42, Booklet B.26C (April 21, 1994) at 8.

176 *Tufted Carpets, supra* note 42, Booklet B.26C (April 21, 1994) at 5.

177 SIMA allows the Tribunal to find material injury if the agency finds either (i) past and present material injury; (ii) future injury; or (iii) both past/present and future injury. Thus, if the Tribunal finds that a threat of future injury exists by way of dumped imports, an affirmative material injury finding may be upheld by a reviewing body.

travenes the intention behind the FTA to reduce non-tariff barriers to trade, to apply this acquiescent standard of review to CITT findings is simply to adhere to well-established principles of Canadian administrative law. In Canada, in the face of a privative clause, reviewing bodies *cannot* - as the first panel majority in *Tufted Carpets* discovered - command an expert tribunal to demonstrate that a "rational connection" exists between conclusions and supporting evidence. Although such an outcome was unfortunate from the perspective of U.S. exporters, any deviation from this approach would violate Canadian administrative law and tradition.

In the five other cases where Chapter 19 panels reviewed CITT findings, all five final determinations were upheld in their entirety in initial panel decisions.[178] In those cases, alleged CITT mistakes were routinely examined as "errors of law" and, hence, the "patently unreasonable" test was applied as a matter of course. Unlike the first panel majority in *Tufted Carpets*, the panels in these cases did not attempt to survey Canadian jurisprudence with a view toward developing an unyielding standard of review. Instead, panels routinely accepted the traditional "any evidence/curial deference" approach to the "patently unreasonable" test.

In summary, American exporters were unsuccessful when appealing CITT final determinations for three main reasons. First, because it is difficult to categorize a CITT mistake as one of jurisdiction, binational panels reviewed most alleged errors as "errors of law." Second, because of the existence of a privative clause, alleged CITT "errors of law" were reviewed by way of the highly deferential "patently unreasonable" test. Third, binational panels reviewing CITT final determinations did not consistently attempt to articulate and apply a stringent version of the "patently unreasonable" test. As a consequence of these three factors, panels routinely upheld CITT conclusions so long as there has existed "any evidence" in support of them.

Given that panels were quite deferential to CITT final determinations, and that this was driven in large part by the existence of a "privative" clause, one would have expected that the absence of such statutory protection for Revenue Canada findings would have resulted in more rigorous panel examination of Revenue Canada final determinations. It is to this issue that we now turn.

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178 These cases were *Hot Rolled Steel Sheet, supra* note 46, *Cold Rolled Steel Sheet, supra* note 43, *Hot Rolled Steel Plate, supra* note 47, *Pipe Fittings, supra* note 45, and *Induction Motors, supra* note 40.

3. *The Revenue Canada Standard of Review*

Revenue Canada final determinations, like those of the CITT, can be appealed on any of the three grounds listed in the Federal Court Act sec. 28(1).[179] Hence, if Revenue Canada exceeds its jurisdiction, or commits an error of law or fact, the agency's final determination can be remanded for "redetermination."

The absence of a privative clause with respect to Revenue Canada final determinations is most significant in relation to alleged errors of law. Where CITT errors of law could be reviewed only by way of the "patently unreasonable" test, alleged Revenue Canada errors of law may be examined by way of the "reasonableness" standard.

Canadian courts have held that a reviewing body should not interfere with Revenue Canada's interpretation of the *SIMA* unless that interpretation is *not reasonable* or is *clearly wrong*.[180] If there is more than one reasonable interpretation of the *SIMA*, a reviewing body must not substitute its judgment for that of Revenue Canada unless the agency is not reasonable, or is clearly wrong.[181] Again, this is a highly deferential standard of review.

4. *Revenue Canada Cases*

Under the FTA four cases were completed where panels issued opinions reviewing Revenue Canada final determinations. As illustrated in Part I of this Study, American exporters did not realize reductions in antidumping duty levels in any of these cases. Instead, antidumping duties were actually increased in three instances following appeal to Chapter 19 panels.

Binational panels examining Revenue Canada determinations were required primarily to consider alleged agency "errors of law." While there were a few instances where alleged Revenue Canada mistakes were categorized as errors of fact, the overwhelming majority of issues which panels analyzed were alleged errors of law. As such, the "reasonableness" standard was applied as a matter of course.

Generally speaking, binational panels applied the reasonableness standard rigorously. This stands in stark contrast to the generally deferential approach which panels took to CITT final determinations, and approximates the manner in which panels examined United States agency final determinations. The four panel decisions reviewing Rev-

179 *FCA, supra* note 118.

180 *Canadian Pacific Limited v. Canadian Transport Commission*, 79 N.R. 13, 16-17 (F.C.A. 1987).

181 *Id.*

enue Canada final determinations were thoroughly considered and persuasively reasoned. In all four cases, panels rejected Revenue Canada's interpretation of the *SIMA* as "unreasonable," and remanded to the agency for redetermination.

If binational panels stringently examined Revenue Canada determinations, what, then, accounts for the fact that duty levels often *increased* following panel review? This strange result is not as paradoxical as it first may appear. What must be remembered when considering these cases is that both American exporters *and* their Canadian competitors challenged Revenue Canada final determinations before binational panels. Where American exporters argued that Revenue Canada's misinterpretation of the *SIMA* resulted in the calculation of a duty level which was too high, Canadian parties contended that the agency made other errors of statutory interpretation which resulted in the calculation of too low of a duty level. While binational panels accepted the arguments of both parties, and remanded to Revenue Canada accordingly, the agency's recalculations led to the imposition of higher overall duty levels. An examination of *Gypsum Board*[182] well illustrates this phenomenon.

Gypsum Board from the United States

In December 1992, Revenue Canada issued a final determination in which it found that eight American companies had dumped gypsum board in Canada at a weighted average margin of 27.28%. This final determination was challenged on two grounds. First, American exporters argued that Revenue Canada had made an error of law when it chose a two month "Period of Investigation" ("POI"). The American parties asserted that the choice of this period was prejudicial to them because it artificially increased the level of antidumping duties. Furthermore, they alleged that this choice of a March-April POI contravened prior Revenue Canada practice.[183]

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182 *See Gypsum Board, supra* note 27.

183 *SIMA* § 3 dictates that antidumping duty levels are equal to the price charged by the exporter for the product in the country of export ("normal value") reduced by the price charged by the exporter for the "like"product in Canada ("export price"). The objective of Revenue Canada in selecting a POI is to select a period which accurately reflects the exporters' normal value and export price. Canadian trade laws and regulations do not provide for a standard POI, so Revenue Canada has a significant amount of discretion in choosing one. The American parties in this case alleged that Revenue Canada had been unreasonable because it chose a period of investigation where the petitioning exporters had increased their price charged to United States customers, but where those exporters had not yet passed the price increase on to their Canadian customers. The American petitioners argued that since a price increase was made on

On the other major issue in review, Canadian producers of gypsum board alleged that Revenue Canada had erred by not including certain interest expense when calculating the United States exporters' cost of production. Had the agency included these expenses, they argued, it would have calculated higher normal values and, hence, greater dumping margins.[184]

The panel rejected Revenue Canada's treatment of the POI issue. While the panel acknowledged that deference was to be accorded the agency, it found that Revenue Canada's refusal to select a more representative POI was clearly unreasonable. The panel concluded that the complaints of the United States exporters were meritorious, and thereafter remanded the issue to Revenue Canada with an order to recalculate normal values and export prices using a more representative POI.[185]

With respect to the matter of interest expense, the panel again carefully surveyed what was required by the *SIMA*, and again rejected the approach that had been taken by Revenue Canada as "unreasonable." The panel found that every type of corporate expenditure, no matter how extraordinary or unrelated to production, had to be allocated to all products in some reasonable manner.[186] The panel remanded this matter to Revenue Canada with an order to allocate interest expense to the United States exporters' costs of production.[187]

In its redetermination on remand, Revenue Canada complied with the panel's instructions. The agency lengthened the POI from two months to a more representative four month period, and apportioned to the respective United States exporters the interest expense associated with their corporate parents' activities. While the extension of the POI led to a decrease in antidumping levels, the inclusion of the interest expense in normal value calculations had the effect of increasing duty levels. In the end, the increase in the duty level caused by the inclusion of interest expense exceeded the decrease in

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their exports to Canada shortly after the end of the POI, a longer POI would have been more representative of their position. *Gypsum Board, supra* note 27, at 6-9.

184 *SIMA* § 19(b) requires Revenue Canada to calculate an exporter's cost of production by including certain interest expense. *SIMA*, c. 25, 1984 S.C. 739, 758 (Can.). The American exporters had argued before Revenue Canada that certain interest expenses related to leveraged buy-outs were not related to their production or operations, but rather were expenses associated with the activities of their parent companies. Revenue Canada accepted this argument, and in its final determination excluded interest expense when calculating the exporters' cost of production and normal values.

185 *Gypsum Board, supra* note 27, at 17-18.

186 *Gypsum Board, supra* note 27, at 27-28.

187 *See Gypsum Board, supra* note 27, at 28.

the duty caused by extending the POI so that the overall weighted average antidumping duty level rose.[188]

The panel's treatment of the issues in dispute in *Gypsum Board* was rigorous and detailed. In particular, its disposition of the "interest expense" issue was informative. To date, no previous final determination had dealt with interpreting this section of the *Special Import Measures Act* and the relevant regulations. The panel's decision that interest expense incurred by a corporate parent had to be apportioned amongst subsidiaries clarified what had heretofore been an undeveloped aspect of Canadian trade law.[189]

The outcome in *Gypsum Board* is reflective of how the other cases brought against Revenue Canada were decided. In *Beer-Dumping*[190] and *Tufted Carpets*,[191] American exporters *and* members of the Canadian industry challenged Revenue Canada final determinations. In both of those cases, panels examined the alleged agency errors of law in an unyielding manner. However, in both cases, recalculation of the initial duty level following redeterminations on remand again led to small increases in overall duty levels.

In summary, binational panel review of Revenue Canada final determinations has been stringent. While duty levels increased for American exporters, one should not conclude that this has been the result of excessive panel deference to agency findings. If panels continue under NAFTA to apply this exacting mode of review in future Revenue Canada cases, antidumping duty levels are likely to decline.

We have seen that binational panels have examined CITT findings deferentially, but that consideration of final Revenue Canada determinations has been relatively exacting. We will now examine the United States standard of review and how binational panels have applied that standard to United States agency final determinations. As will be explained, panels have been consistent in the approach that they have taken to both ITA and ITC final determinations.

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188 In Feb. 1994, Revenue Canada's redetermination on remand was filed with the U.S.-Canada FTA Binational Secretariat. In the Matter of Gypsum (Dumping), CDA-93-1904-01, 1994 FTAPD Lexis, 3, *5 (Feb. 16, 1994). The Panel thereafter affirmed the redetermination on remand. In the matter of Gypsum Board Originating in or Exported from the United States, Order Pursuant to Subrule 75(4) (Mar. 24, 1994).

189 Revenue Canada officials have privately welcomed this panel report as the judgment made clear what the agency's responsibilities will be the next time that it faces a similar issue.

190 *Beer-Dumping, supra* note 24.

191 *Tufted Carpets-AD, supra* note 26.

B. Cases Reviewing United States Agency Determinations

1. The United States Standard of Review

The standard of review to be applied in Chapter 19 panel review of a United States agency final determination has been statutorily framed as follows:

> The court shall hold unlawful any determination, finding, or conclusion found. . . to be unsupported by *substantial evidence on the record*, or *otherwise not in accordance with law*.[192]

The United States standard of review provides binational panels with two prongs of review authority. First, a panel may find that the ITA or ITC has made a determination not supported by *substantial evidence* on the record. Second, panels are to ensure that agencies have not made *errors of law* when making final determinations. In this respect, binational panels are once again to consider:

> 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.[193]

a. The "Errors of Law" Test

Chevron U.S.A. Inc. v. Natural Resources Defense Council[194] is one of the most important decisions in U.S. administrative law.[195] *Chevron* stands for the proposition that in determining whether an agency's application and interpretation of a statute is "in accordance with law," a court need not conclude that "the agency's interpretation is the only reasonable construction or the one this court would adopt had the question initially arisen in a judicial proceeding."[196] Instead, a reviewing court must determine on judicial review whether the agency's conclusion is based on a "permissible" construction of the statute.[197]

U.S. courts generally have applied the *Chevron* principle to judicial review of ITA and ITC final determinations. In so doing, the courts have granted U.S. agencies broad discretion in their administration of U.S. trade remedy laws.[198] Where the agencies have employed

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192 Tariff Act of 1930, 19 U.S.C.A. § 1516a(b)(1)(B)(i) (1995) (emphasis added).

193 *FTA*, *supra* note 1, art. 1904(2).

194 467 U.S. 837 (1984) (hereinafter "*Chevron*").

195 1 Kenneth Davis and Richard J. Pierce, ADMINISTRATIVE LAW TREATISE § 3.2, at 110 (1994).

196 *Id.* at 843, n. 11.

197 *Id.* at 842-43.

198 *See* PPG Industries, Inc. v. United States, 928 F.2d 1568, 1572 (Fed. Cir. 1991).

a choice of methodology that was not specifically authorized by statute, the courts have often cited the following proposition in upholding that choice:

> If . . . Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . .
>
> If the agency's choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one the Congress would have sanctioned.[199]

Although the *Chevron* principle of "deference" has been followed regularly when aggrieved foreign exporters have challenged ITA and ITC final determinations before the CIT, U.S. courts have recently weakened this approach to judicial review.[200] For example, in *Dole v. United Steelmakers*,[201] the U.S. Supreme Court did not apply the *Chevron* test to see if the Office of Management and Budget ("OMB") had adopted a permissible reading of the Paperwork Reduction Act. Instead, the court remanded after concluding that the OMB had not applied "the most natural" interpretation of that statute.[202] Other recent cases have similarly diluted the classic *Chevron* principle of deference and have espoused a more activist judicial role for review of agency determinations.[203]

b. The "Substantial Evidence" Test

U.S. courts have invariably begun any discussion of the "substantial evidence" test by citing the following well-established proposition:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[204]

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199 United States v. Shimer, 367 U.S. 374, 382-83 (1961).

200 *See* Pierce, *supra* note 195, § 3.5, at 130.

201 110 S. Ct. 929 (1990).

202 *Id.* at 934.

203 *See*, for example, K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) and INS v. Cardoza-Fonseca, 480 U.S. 421, 447-48 (1987). *But see* Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 647 (1990) and Lechmere v. NLRB, 502 U.S. 527, 536 (1992), where the Supreme Court reaffirmed its commitment to the *Chevron* test.

204 Matasushita Electric Industrial Co., Ltd. v. United States, 750 F. 2d 927, 933 (Fed. Cir. 1984)(citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

The substantial evidence test requires the reviewing authority to accord broad deference to an expert agency's statutory interpretation, as well as to the methodologies selected and applied by that agency. Deference has been found to be especially applicable to factual findings made by an expert agency.[205] Even where a view opposing the agency's may appear to be reasonable, courts have held that "it is not the ambit of the Court to choose the view which it would have chosen in a trial de novo, as long as the agency's decision is supported by substantial evidence."[206]

Notwithstanding the generally deferential approach which the courts have taken to the substantial evidence test, there do exist propositions in United States jurisprudence that limit the amount of discretion reviewing bodies will grant expert government agencies. U.S. courts have held that when assessing the substantiality of the evidence during judicial review, reviewing bodies must consider the evidence on the record as a whole, including the "body of evidence opposed to the [agency's] view."[207] Those courts have also held that: (i) reviewable determinations may be remanded if they lack a "reasoned" basis;[208] and (ii) a reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning.[209]

This brief examination of cases reviewing the U.S. standard of review shows that U.S. appellate courts have been unable to articulate clearly how much deference must be accorded to final determinations of expert agencies. These judicial decisions illustrate that determining what constitutes "substantial evidence" and what may be deemed an "error of law" involves subjective judgment.

An examination of the following three cases will demonstrate that Chapter 19 panels have used the latitude which exists in United States jurisprudence to formulate a relatively unyielding U.S. standard of review. The consequent employment of this rigorous standard has forced United States agencies to provide reasoned determinations where conclusions flow logically from supporting evidence.

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205 *See* Universal Camera Corp., 340 U.S. 474, 480-81 (1951), and Smith-Corona Group v. United States, 713 F. 2d 1568, 1576 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984).

206 *See* Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int'l Trade 1987).

207 Universal Camera, *supra* note 205, at 477 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

208 American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed. Cir. 1986).

209 USX Corp. v. United States, 655 F. Supp. 487, 492 (CIT 1987).

2. *Fresh, Chilled and Frozen Pork from Canada*

Pork[210] has been chosen because it is representative of how Chapter 19 panels formulated and applied the "substantial evidence" test during the FTA years. From the perspective of Canadian exporters, the way that the panel employed the "substantial evidence test" was encouraging. From the viewpoint of the ITC, the panel's conclusions and directions were unduly intrusive.[211]

In the "subsidies" phase of the *Pork* dispute, the ITA had found that various federal and provincial agricultural assistance programs had conferred "countervailable" benefits on Canadian producers of fresh, chilled and frozen pork.[212] This decision was appealed by Canadian exporters to a binational panel.[213] At the same time, a binational panel was requested to examine a final determination of the ITC[214] in which that agency had found that imports of pork from Canada were presently posing a "threat" of material injury to the United States industry within the meaning of the *Tariff Act of 1930,* as amended.[215]

In its final determination, the ITC had concluded that the countervailable subsidies conferred on Canadian pork would increase Canadian production at a rate which would exceed the anticipated increase in Canadian consumption. The ITC reasoned that this excess of production over consumption would be exported to the United States and that as a result, the American industry would suffer injury by way of "price suppression."

The ITC supported its conclusion with various questionable statistics. When justifying in their final determination why so little evidence had been submitted in support of their conclusions, a majority of the Commissioners stated that "determinations of a threat of injury are inherently less amenable to quantification because of the fact that they involve projection of future events."[216]

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210 *Pork, supra* note 30.

211 For a more detailed examination of the *Pork* case, see Andreas Lowenfeld, *The Free Trade Agreement Meets its First Challenge: Dispute Settlement and the Pork Case*, 37 McGILL L.J. 597 (1992).

212 Fresh, Chilled and Frozen Pork from Canada, 54 Fed. Reg. 30,774 (ITA 1989) (final determination).

213 *Pork-CVD, supra* note 21. For a detailed examination of how binational panels demanded "rational" United States agency decision making in *Pork-CVD*, *see also* BODDEZ AND TREBILCOCK, *supra* note 37, at 123-52.

214 *Fresh, Chilled and Frozen Pork from Canada*, 54 Fed. Reg. 37,838 (ITC 1989) (final determination).

215 19 U.S.C. § 1671d(b)(1)(A)(ii) (1994).

216 *Supra* note 214. The majority relied for precedential support on Hannibal Industries Inc. v. United States, 710 F. Supp. 332, 338 (Ct. Int'l Trade 1989).

The evidence adduced to support the affirmative "threat of material injury" determination was thin. The ITC had found that the production of Canadian pork had increased from two billion pounds in 1986 to 2.6 billion pounds in 1988. The agency had then inferred from this statistic that the excess of production over consumption in Canada - 600 million pounds - would be exported to the United States.[217]

In its initial opinion, the binational panel spent a considerable amount of time examining the United States standard of review. The panel initiated its careful analysis by recognizing that United States jurisprudence required "great deference" to be accorded to the findings of administrative agencies.[218] The panel then carefully surveyed leading cases in United States administrative law to articulate a relatively strict "substantial evidence" test. To support its position, the panel summarized its understanding of the "substantial evidence" test by referring to a number of well-established United States judicial propositions:

> In assessing the evidence, the Panel must consider the Record as a whole, including evidence on the Record which detracts from the substantiality of the evidence relied on by the agency making its determination . . . The proscription against a Panel reweighing the evidence does not foreclose a Panel from ever deciding that an ITC determination is unsupported by substantial evidence; nor is the deference properly owed to the ITC's determination without limits. The panel may not permit the agency "under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress."[219]

After the panel formulated this relatively unyielding version of the United States "substantial evidence" requirement, it applied the test to the ITC final determination. After careful review of all of the issues in dispute, the panel concluded that the ITC's "threat of material injury" finding was not sustainable because it lacked evidentiary support.[220] One of the panelists made the following observation:

> not only were there inaccuracies in the interpretation of basic production data underlying the majority (ITC) opinion but, in addition, there are a number of areas in which there were, in my opinion, an incom-

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217 Prior to its final determination, the ITC had evidence on hand that appeared to detract from the strength of its conclusions. For example, the U.S. Department of Agriculture had provided evidence to show that the "increase" in Canadian pork production was the result of a change by the Canadian Department of Agriculture in the method of counting and reporting pork production. Further, the Canadian Meat Council had provided evidence that the actual increase in pork production was 170 million lbs., not 600 million. This evidence was apparently never examined by the ITC.

218 *Pork*, *supra* note 30, Booklet B.8A at 8 (Aug. 24 1990).

219 *Pork*, *supra* note 30, Booklet B.8A at 9.

220 *Pork*, *supra* note 30, Booklet B.8A at 27-28.

pleteness in the analytical logic which linked cause (various factors) and effect (threat of injury).[221]

The effect of the panel's analysis was to undermine a significant portion of the ITC's reasoning. The matter was remanded to the ITC for redetermination.

In its redetermination on remand, the ITC re-opened the administrative record and admitted new evidence as to the threat of material injury.[222] The ITC now suggested that "product-shifting" was the underlying cause of the "threat" of material injury.

The ITC's theory was based on its prediction that increases in subsidy payments on hogs in Canada would lead to the imposition by the ITA of a higher CVD on Canadian imports of live swine. The ITC reasoned that these higher duty levels on swine would cause Canadian swine producers to sell more of their product to Canadian pork producers, who would then respond by producing more pork. The ITC concluded that since some of this increased Canadian pork production would be exported to the United States, there existed a "threat" of material injury to the United States industry.[223]

This new theory appeared to be as tenuous as its predecessor. The panel, in its second panel opinion, rejected the ITC's new rationale for lack of evidentiary support. The "substantial evidence" test was again employed, and the panel found that the theory of "product-shifting" was mere "conjecture." Since the new theory did not buttress the ITC's determination of "threat of material injury," the panel *ordered* the ITC to find that Canadian pork imports posed "no" threat of material injury to American industry.[224]

In its second redetermination on remand, the ITC complied with panel instructions and concluded that there existed no threat of material injury to the American industry.[225] However, the tone of the ITC's redetermination was noticeably acrimonious. The agency alleged that the panel had egregiously intruded into its factual decision-making capacity, "impermissibly" reweighed evidence, and clearly violated the FTA's mandate by applying a standard of review inconsistent with that required by United States law.[226]

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221 *Pork, supra* note 30, Booklet B.8A at 48.

222 In the Matter of Fresh, Chilled, or Frozen Pork from Canada, Views on Remand, Inv. No. 701-TA-298, USITC Pub. No. 2230 (Oct. 1990).

223 *Id.*

224 *Pork, supra* note 30, Booklet B.8B (Jan. 24, 1991) at 51.

225 Fresh, Chilled or Frozen Pork From Canada, Second Remand Determination, Inv. No. 701-TA-298 (Feb. 12, 1990).

226 *Id.*

After this episode, the U.S. government had to decide whether or not to seek an Extraordinary Challenge Committee to review the ITC's allegations.[227] In so doing, the U.S. government was forced to recognize that the FTA set a higher threshold for ECC action than the standard for an appeal in the U.S. court system. The FTA stipulated that an ECC could only vacate or remand a panel's decision 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
ii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and
b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process.[228]

The U.S.T.R. proceeded to request the formation of an ECC to address the issue of whether or not the panel had applied a "de novo" standard of review instead of the correct standard of "substantial evidence on the record."[229]

The Extraordinary Challenge Committee, in a unanimous opinion, concluded that so long as a panel made a conscientious attempt to articulate and apply the United States standard of review, it would not interfere with a panel's conclusion. Only a "manifest" breach of this duty would justify vacating a panel decision.[230] Applying this maxim to the ITC allegations, the Committee was satisfied that the panel had not breached its mandate.

Pork exemplifies why Canadian exporters have enjoyed such a high degree of success by way of the Chapter 19 process. The case illustrates three important phenomena.

First, the binational panel carefully demonstrated, through its examination of United States jurisprudence, that the United States standard of review could be formulated and applied in such a way so as to effectively force United States agencies to support their conclusions with substantial reasoning. The ECC's approval of the panel's second opinion basically validated the notion that panels could construct and employ a relatively exacting "substantial evidence" test. This decision

227 The FTA Extraordinary Challenge Committee procedure could only be invoked at the request of either the Canadian or U.S. government. *FTA, supra* note 1, art. 1904(13).

228 *FTA, supra* note 1, art. 1904(13).

229 *Pork ECC, supra* note 93, at 25.

230 *Pork ECC, supra* note 93, at 27.

was a resounding victory for those who have expressed their concern with the administration of United States trade remedy laws.[231]

Second, the panel in *Pork* formulated and applied an unyielding standard of review in both its initial opinion *and* in its subsequent review of the ITC's redetermination on remand. This stands in sharp comparison to panel review of CITT final determinations. As was illustrated in *Beer* and *Carpets*, even when Chapter 19 panels have stringently examined CITT determinations in initial decisions, they rarely conducted subsequent reviews of Tribunal redeterminations with the same level of intensity.

Third, *Pork* demonstrated that the Extraordinary Challenge Committee was not to function as an ordinary appellate court. The *Pork* Committee established that a panel's decision could be remanded or vacated only if the panel had "manifestly" exceeded its mandate in a way which threatened the integrity of the Chapter 19 process. Although the Committee did not identify what level of panel misconduct would constitute a "manifest" breach of mandate, the Committee's decision reinforced the notion that panel decisions were to be dispositive of the issue in dispute.

3. *Live Swine from Canada*[232]

Where *Pork* showed how the "substantial evidence" test could be used to essentially overturn a U.S. agency final determination, *Live Swine* exemplifies how panels employed the "errors of law" test to discipline United States agencies. The case provides another clear illustration of how panels have used the flexibility provided by U.S. administrative law jurisprudence to require more rational agency decision-making.

In 1991, the ITA found that nine Canadian programs were "de facto" limited to a "specific" group of agricultural commodities.[233] Among these programs were the Canadian National Tripartite Stabilization Scheme for Hogs ("Tripartite") and the Quebec Farm Income Insurance Program ("FISI"). The official purpose of these two programs was to provide direct payments to farmers whose income had been reduced due to adverse changes in commodity prices.

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231 *See generally*, ALAN M. RUGMAN AND ANDREW D.M. ANDERSON, ADMINISTERED PROTECTION IN AMERICA (1987); and Anderson and Rugman, *supra* note 100.

232 *See supra* note 52.

233 These conclusions were made during the ITA's fourth administrative review of the CVD order on live swine as published in Live Swine from Canada; Final Results of Countervailing Duty Administrative Review, 56 Fed. Reg. 28531 (June 21, 1991).

The ITA identified Canadian producers of live swine as beneficiaries of these programs. As a result of this finding, the ITA concluded that benefits received by producers of live swine were "countervailable." Thereafter, the ITA applied CVDs of Cdn.$ .0047/lb. on Canadian exports of sows and boars, and Cdn.$ .0049/lb. on exports of all other live swine. Canadian exporters sought binational panel review of these findings.

The main issue in *Live Swine* concerned whether Tripartite and FISI were "de facto specific" as defined by 1988 amendments to the *Tariff Act* of 1930. "De facto specificity" was - and remains to be - an extremely controversial area of U.S. countervailing duty law.[234] The process of determining what satisfies the "de facto specificity" test has been a source of considerable confusion in the past for the ITA, as well as for reviewing courts. Before proceeding, some explanation of this concept may be useful.

Prior to 1988, the ITA applied U.S. countervailing duty law by analyzing whether a foreign government had made benefits available *generally* to a foreign enterprise or industry. If the ITA found that such benefits had been conferred on a foreign item or product that was later exported to the United States, the ITA could penalize the subject imports with countervailing duties. This methodology was traditionally referred to as the "general availability" approach.

This approach to determining which foreign subsidies were "countervailable" appeared unduly broad and thus impractical. The test theoretically allowed the ITA to find as "countervailable" such benefits as highways, education, and other "grants" that governments routinely provided to their populations at large. In 1985, a U.S. court rejected the "general availability" test.[235]

What has come to be known as the "specificity test" was statutorily enacted immediately thereafter.[236] The test, grounded in the definition of "subsidy" provided in sec. 771(5) of the Tariff Act of 1930, stipulated that domestic subsidies were only "countervailable" if they were "provided to a specific enterprise or industry, or group of enterprises or industries."[237]

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234 For a comprehensive examination of the evolution of United States CVD law, *see* Richard Diamond, *A Search For Economic Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507 (1990).

235 Cabot Corp. v. United States, 620 F. Supp. 722, 732 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F. 2d 1539 (Fed. Cir. 1986).

236 Section 771(5)(A)(ii) of the Tariff Act of 1930, as amended, codified at 19 U.S.C. § 1677(5)(A)(ii)(1994).

237 *Id.*

While the "de facto specificity" test reduced the scope of American countervailing duty law, careful steps were taken by Congressional drafters to maintain portions of the antecedent, wider, "general availability" test. A "Special Rule"[238] was enacted to allow the ITA to categorize a subsidy as "specific" - and hence "countervailable" - even though that subsidy may also have been "generally available." This enactment bestowed considerable discretion on the ITA, and allowed United States countervailing duty law to retain an important part of its mandate.

Following the enactment of this "Special Rule," the Department of Commerce issued "Proposed Regulations" that described how it planned to perform its "specificity" analysis.[239] The relevant parts of the Regulations are as follows:

> (b)(1) Selective treatment, and a potential countervailable domestic subsidy, exists where the Secretary determines that benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry, or group of enterprises or industries.
>
> (2) In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:
>
> (i) The extent to which a government acts to limit the availability of a program:
>
> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
>
> (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.[240]

In its final determination in *Live Swine*, the ITA asserted that Tripartite was "countervailable" under U.S. law. The ITA drew this conclusion after it found that only ten Canadian agricultural commodities benefited from this Canadian program when the 'universe' of potential beneficiaries of the program was over a hundred products. With respect to FISI, the ITA found that only thirteen commodities had received assistance from the Quebec government while sixty-nine agricultural commodities were actually produced in Quebec. Given the relatively small number of commodities insured by both programs,

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238 19 U.S.C. § 1677(5)(B).

239 These factors have been codified by Commerce at paragraph 355.43(b) of the Proposed Regulations. 54 Fed. Reg. 23366, 23379.

240 *Id.* Note that while the Department stated that each of the four factors had to be "considered," it did not state that the presence of each of these factors was necessary to ground an affirmative finding of "specificity."

the ITA found that the number of commodities covered by the programs were "too few" to justify a finding of "non-specificity." Both programs were thereafter deemed "*de facto specific*" because their benefits were limited to a small number of industries, even though, theoretically, those benefits were "generally available."

The principal issue in dispute before the Chapter 19 Panel was whether the ITA had interpreted the 1988 amendment to the *Tariff Act* of 1930[241] and its own Proposed Regulations reasonably. Given that (i) the amended statute was silent as to how the "specificity test" was to be administered, and that (ii) the Department's Proposed Regulations were ambiguous as to how many of its criteria had to be considered before an affirmative "specificity" finding could be made, reviewing bodies were required under United States law to defer to the agency's statutory interpretation so long as that interpretation was "reasonable."[242]

The Chapter 19 panel in *Live Swine* initiated its review of the ITA's final determination by articulating the same strict standard of review that had been formulated and applied in *Pork.* In so doing, the panel surveyed a number of judicial propositions and concluded:

> a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view.[243]

After outlining the applicable standard of review, the panel proceeded to examine in considerable detail recent United States jurisprudence concerning the "specificity" test and the Department's "Proposed Regulations." After reviewing recent cases, the panel summarized the judicial test that had to be applied to a review of the ITA's "specificity" analysis:

> "Commerce does not perform a proper *de facto* analysis if it merely looks at the number of companies that receive benefits under [a] program." Roses Inc. v. United States, 774 F. Supp. 1376, 1380 (Ct. Int'l Trade 1991). "It is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." *Id.* at 1384. Rather, Commerce must examine all relevant factors to determine whether "if, *in its application*, the program [at issue] results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." PPG Industries, *supra,* at 1576 (emphasis in

241 *Supra* note 236.

242 *Chevron, supra* note 194, at 843.

243 In the Matter of Live Swine from Canada, No. USA-91-1904-03, 1992 FTAPD Lexis 1 (May 19, 1992) at *11-12 (citing *Universal Camera, supra* note 205, at 488).

> original). To fulfill this requirement, Commerce must comply with its own proposed regulations, as expressly approved by the Court of Appeals for the Federal Circuit, in PPG Industries, *Id.*, and it "must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place."[244]

When the panel applied this stringent mode of judicial review in its first opinion, it found "unreasonable" the ITA's conclusion that Tripartite and FISI were de facto specific.[245] The panel found that: (i) the ITA's final determination resulted solely from an application of only one of the criteria of the Proposed Regulations, *i.e.* that the number of program recipients was small relative to the universe of potential beneficiaries; and (ii) the ITA had failed to consider the other factors which were required by the agency under its own Proposed Regulations. The panel remanded the decision to the ITA on grounds that the final determination was "not in accordance with U.S. law."[246]

In its redetermination on remand the ITA re-affirmed its original finding that the two Canadian farm maintenance programs were *de facto* specific.[247] The redetermination, however, was made with virtually no consideration of the "other factors" which the panel had ordered the agency to assess.

In its second decision, the panel majority again rejected the ITA's conclusions as "not in accordance with the law."[248] The majority found that the ITA's "mathematical" approach to the specificity analysis was not consistent with the express directive of the Court of International Trade in *Roses II*.[249] The majority repeated what it had held in its first decision: satisfying the first criterion of the Department's Proposed Regulations was not sufficient for an affirmative finding of *de facto* specificity.[250]

In rejecting the ITA's conclusions the majority reviewed U.S. jurisprudence at length. The majority relied particularly on *PPG Indus-*

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244 *Id.* at *29-31.

245 *Live Swine, supra* note 52, Booklet B.13 (May 19, 1992), at 36, 42.

246 *Live Swine, supra* note 52, Booklet B.13 (May 19, 1992), at 68-70.

247 Live Swine from Canada, Determination on Remand (ITC Investigation No. C-122-404) (July 20, 1992).

248 *Live Swine, supra* note 52, Booklet B.13B (Oct. 30, 1992) at 14.

249 Roses Inc. v. United States, 774 F. Supp. 1376, 1380 (Ct. Int'l Trade 1991). In that case it was held that "Commerce does not perform a proper de facto specificity analysis if it merely looks at the number of companies that receive benefits under the program; the discretionary aspects of the program must be considered from the outset." *Id.* at 1380.

250 *Live Swine supra* note 52, Booklet B.13B (Oct. 30, 1992) at 14.

tries,[251] which stood for the proposition that "if, in its *application*, the program results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries," the ITA was required to look at *all* of the other salient factors in the regulations.[252]

In dismissing the agency's redetermined findings, the majority concluded:

> It appears that Commerce has taken a unidimensional, mathematical approach to the determination of specificity, despite the Agency's statement in its "Background" to its Proposed Regulations that "the Department must exercise judgment and balance various factors in analyzing the facts of the particular case." Commerce also stated that "the specificity test cannot be reduced to a precise mathematical formula." Yet Commerce, in our judgment, has resorted to just such a "precise mathematical formula" in finding that the benefits conveyed under the Tripartite Program were countervailable simply because they were "small".[253]

This second panel decision triggered a considerable amount of controversy. One of the U.S. panelists, Murray Belman, wrote a dissenting opinion in which he charged that the majority had seriously breached its mandate.[254] Belman asserted that rather than deferring to the agency's interpretation of the 1988 statute and its Proposed Regulations, the majority had advanced its own interpretation of U.S. countervailing duty law.[255]

On the applicability of the Proposed Regulations, Belman stated that the ITA's interpretation was reasonable, and therefore in accordance with U.S. law. He argued that it was a "gross mischaracterization" to suggest that the ITA's approach was "mechanical" and "mathematical."[256] Further, the dissenting panelist asserted that U.S. law did not require an evaluation of the other enumerated factors in the Department's Proposed Regulations, and that the ITA's reliance on the "small number of users" criterion satisfied the requirements of the statute.[257]

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251 PPG Industries v. United States, 928 F.2d 1568 (Fed. Cir. 1991).

252 *Id.* at 1576 (emphasis added).

253 *See Live Swine, supra* note 52, Booklet B.13B at 13-14 (citations omitted).

254 *Live Swine, supra* note 52, Booklet B.13B at 39 (Dissenting Opinion of Murray J. Belman).

255 *Live Swine, supra* note 52, Booklet B.13B at 40 (Dissenting Opinion of Murray J. Belman).

256 *Live Swine, supra* note 52, Booklet B.13B at 38 (Dissenting Opinion of Murray J. Belman).

257 *Live Swine, supra* note 52, Booklet B.13B at 38-39 (Dissenting Opinion of Murray J. Belman).

Belman's criticism of the way that the panel utilized the standard of review is particularly illuminating. His comments are representative of the way that many U.S. officials have felt about the FTA binational panel review process:

> [T]his panel's decision is breathtaking. The panel shows no recognition of the limitations imposed by United States law on reviewing bodies confronted with a highly technical, fact-intensive record, and no consideration of the impact of its decision on the binational process. While panel decisions are not binding on United States courts, they do influence other binational panels; if given precedential respect by other panels, this panel's decision would cause a fundamental change in the way United States countervailing duty law is administered in cases involving Canadian products.[258]

It was not a surprise, then, when the U.S.T.R. requested an Extraordinary Challenge Committee to review the majority's second decision. The U.S.T.R. invocation averred several violations, including the serious charge that the panel majority had manifestly exceeded its powers and authority by disregarding its responsibility to rule on whether the ITA's interpretation of the "de facto specificity" test was reasonable under U.S. law.[259]

The *Live Swine* ECC began its examination of the allegations by addressing the role of an Extraordinary Challenge Committee under the FTA. The Committee unanimously stated that the ECC procedure was a "safety valve" available only in exceptional circumstances to correct "aberrant" panel behavior.[260] While reaffirming that a high threshold had to be met before a panel decision could be vacated or remanded, the Committee rejected the Canadian government's argument that the ECC procedure should be analogous to the restrictive judicial review of a private commercial arbitration under U.S. law.[261]

The Committee next addressed the issue of whether or not the panel majority had manifestly exceeded its powers, authority or jurisdiction, within the intendment of FTA Article 1904(13)(a)(iii). The Committee established that a panel would not be found to have com-

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258 *Live Swine, supra* note 52, Booklet B.13B at 40 (Dissenting Opinion of Murray J. Belman) (footnote omitted).

259 *Swine ECC, supra* note 94, at 1 (*citing* In the Matter of Live Swine from Canada, No. ECC-93-1904-01 USA, Office of the United States Trade Representative Request For An Extraordinary Challenge Committee at 7 (Jan. 21, 1993)).

260 *Swine ECC, supra* note 94, at 3 (citing *United States-Canada Free Trade Agreement Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives*, H. Serial No. 60, 100th Cong., 2d Sess. 69, 75-76 (1988) (prepared testimony of M. Jean Anderson, Chief U.S. Negotiator of Binational Panel Provisions); H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 5 and 12 (1988)).

261 *Swine ECC, supra* note 94, at 4.

mitted such a violation so long as the panel (i) accurately articulated the applicable standard of review, and (ii) conscientiously applied that standard throughout its decision.[262]

With respect to the first of this two prong test, the Committee was satisfied that the panel majority had accurately articulated the applicable standard of review. The Committee drew this conclusion after finding that the panel's decision had properly recognized: (i) the statutory standard of review contained in § 5516A(b)(1)(B) of the *Tariff Act* of 1930, as amended; (ii) the "Special Rule"[263] which gave the Department of Commerce broad discretion in administering its "de facto specificity" analysis; and (iii) the duty placed on reviewing bodies by *Chevron*[264] and its progeny to defer to an administering agency's statutory interpretation of a statute in cases where there was little statutory guidance.[265]

Satisfied that the panel had properly articulated the correct standard of review, the Committee next examined whether or not the panel had "conscientiously" applied that standard throughout its decision. The Committee concluded that the panel may have "erred" in its finding that the ITA's determination was neither in accordance with law, nor based on substantial evidence.[266] Nevertheless, on balance, the Committee was not persuaded that the panel had failed to conscientiously apply the properly articulated standard of review.[267]

The *Live Swine* ECC decision affirmed the principle that a very high threshold had to be met before a panel's decision would be deemed a manifest breach of jurisdiction. The Committee's refusal to vacate or remand the panel decision - even though it believed the panel may have "erred" - confirmed what had been established by the *Pork ECC*: Chapter 19 panels were to have significant latitude when formulating and applying the relevant standard of review.

The *Live Swine* ECC reaffirmed that a panel's decision would only be vacated or remanded in the most egregious of circumstances; however, rather than clearly delineating under what circumstances a panel would be found to have failed to apply the correct standard of

262 *Swine ECC, supra* note 94, at 5-6.
263 19 U.S.C. § 1677(5)(B) (1994).
264 Chevron, *supra*, note 194.
265 *Swine ECC, supra* note 94, at 5.
266 *Swine ECC, supra* note 94, at 6.
267 *Swine ECC, supra* note 94, at 6.

review, the Committee may have "clouded" matters.[268] While the Committee found that (i) the panel may have "erred" in its application of the standard of review, but that (ii) such error was not of sufficient magnitude so as to constitute a "failure to apply the standard of review conscientiously," the Committee did not explain exactly what type of error would constitute a "failure to apply the standard of review conscientiously."[269] In refusing to establish the point at which an error in the application of the standard of review became so serious as to constitute a "failure to apply the appropriate standard," the Committee failed to clarify the limits of a Chapter 19 panel's jurisdiction within the meaning of Article 1904(13)(a)(iii).

To summarize, the *Live Swine* episode illustrates how Chapter 19 panels under the FTA could effectively force U.S. agencies to reverse portions of their final determination.[270] *Live Swine,* like *Pork,* demonstrated that the flexibility present in U.S. "standard of review" and "de facto specificity" jurisprudence could be interpreted and applied in such a way so as to force more reasoned agency decision-making. The careful formulation and employment of a relatively rigorous version of the "errors of law" test - in both its initial and subsequent opinion - allowed the panel majority to challenge unsubstantiated ITA conclusions with effectiveness. The Extraordinary Challenge Committee's decision in *Live Swine* confirmed that a Chapter 19 panel could engage in such rigorous and activist judicial review without necessarily exceeding its mandate or jurisdiction.

Panel application of the U.S. standard of review has never been as controversial as it was in the case of *Softwood Lumber.* The case provides another clear illustration of how Chapter 19 panelists utilized the wide scope which exists in United States jurisprudence in order to fashion and apply a relatively unyielding standard of review.

4. Softwood Lumber from Canada

Before its resolution, this conflict had been one of the most long-standing and acrimonious disputes to plague the Canada-United

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268 Jordan B. Goldstein, *Dispute Resolution Under Chapter 19 of the United States- Canada Free-Trade Agreement: Did the Parties Get What They Bargained For?* 31 STAN. J. INT'L L. 275, 299 (1995).

269 *Id.*

270 The panel's finding that Tripartite and FISI had provided benefits which were "non-countervailable" led to a reduction in the original duty on sows and boars by 14.89%, and on all other live swine by 88.64%. The remainder of the duties on these items was maintained because the panel affirmed the ITA's finding that other Canadian governmental programs *had* conferred countervailable benefits on Canadian producers of live swine.

States commercial relationship. Indeed, one of the primary catalysts behind the Canadian desire to consummate the FTA was a need to eliminate United States CVD actions against Canadian softwood lumber exports. The conflict, which was recently examined by an Extraordinary Challenge Committee, had continued unabated for over eleven years.

A complete examination of the history leading to the recent Chapter 19 case is beyond the scope of this Study, as is an enumeration and evaluation of all of the issues in this case.[271] Our examination will be confined to an analysis of how the panel reviewed the ITA's finding that Canadian "stumpage programs" were "de facto specific."[272] The way that the panel disposed of this issue is illustrative of the manner in which it resolved the other major issues in review.

In its final determination, the ITA found that the Canadian government had set stumpage fees - *i.e.*, the price charged to remove a tree - at artificially low levels.[273] The agency reasoned that as a result, a countervailable benefit had been conferred on beneficiaries of the Canadian federal program, which group included Canadian producers of softwood lumber.

As a result of these findings, the ITA calculated that Canadian exports of softwood lumber were being unfairly subsidized at a rate of 6.51%.[274] Countervailing duties were applied accordingly. Canadian exporters appealed to a Chapter 19 panel.

In determining that Canadian softwood lumber exporters were part of a "specific industry" that had benefited from preferential stumpage prices, the ITA based the crux of its determination on one evidentiary finding: that the number of users of Canadian stumpage was limited and finite.[275] Before the *Softwood Lumber* binational panel, the ITA argued that once it found that a subsidy had been conferred upon a "limited number of users," it was not required under United States law to examine the other enumerated factors in its Proposed Regulations.[276] In the alternative, the ITA contended that it

271 For a thorough history of the *Softwood Lumber* dispute, *See Recent Developments in United States - Canada Softwood Lumber*, 25 LAW & POL'Y INT'L BUS. 1187-1203 (1994).

272 Again, to apply a CVD, the "specificity" test requires that there must exist: (i) a subsidy; and (ii) a *specific* industry which benefits from that subsidy. Our analysis will concentrate on whether the benefits of Canadian stumpage programs were bestowed on a "specific industry."

273 Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (1992).

274 *Id.*

275 *Id.* at 22583.

276 Response of the Investigating Authority, January 6, 1993, IV.C.III.

had "considered" all of the enumerated criteria, but had decided that only one - the limited number of users - was required to support an affirmative finding of specificity.[277]

Before examining whether the ITA had administered its Proposed Regulations reasonably, the binational panel undertook another thorough analysis of the United States standard of review. The panel carefully articulated the "substantial evidence" and "errors of law" tests, and acknowledged that it could not depart from those formulations in a "clandestine" attempt to change United States law.[278] The panel then put the ITA on notice by stating that it would take a proactive role in its capacity as a reviewing body:

> While this panel is obligated to show deference to the agency's expertise, we are entitled to ensure that the agency's interpretation of the statute is *reasonable*.[279]

When the panel rigorously reviewed the ITA final determination - in a way that by now had become routine under the FTA - it found difficulties with the agency's reasoning. As in *Live Swine*, the *Softwood Lumber* panel flatly rejected that an affirmative finding of "specificity" could be grounded on consideration of only one of the four factors in the Department of Commerce's Proposed Regulations.[280] The panel found that: (i) the evidence provided by the ITA concerning "number of users" was not dispositive of the issue at hand; and (ii) there existed evidence on the record regarding factors such as the lack of "dominant" or "disproportionate" use of stumpage by the Canadian softwood lumber industry that could reasonably have informed the ITA's "specificity" analysis.[281] The panel reasoned that had the ITA considered these other factors, the agency may well have found that Canadian stumpage programs failed the "specificity" test.[282]

Of particular importance for this review is the way by which the panel justified its rejection of the ITA methodology. The panel based its repudiation of the ITA findings on solid jurisprudential support, citing the most recent formulation of the "specifity test," *PPG IV*, and concluding:

> the Court of Appeals for the Federal Circuit has stated in PPG IV that Commerce must consider all of the factors in the Proposed Regulations

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277 *Softwood Lumber Products, supra* note 273, at 22583.
278 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 19.
279 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 29 (emphasis added).
280 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 31-32.
281 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 31-32.
282 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 31-32.

> "in light of the evidence in the record in determining the specificity in a given case." Nowhere in either the Preliminary Determination nor the Final Determination is there a reference to any record evidence regarding government action, disproportionate use, or government discretion.[283]

In its redetermination on remand, the ITA found that Canadian stumpage users constituted one large group of two or three smaller industries and that this was "too few" to justify a finding of "non-specificity."[284] In addition, the agency provided data showing that these industries were disproportionate users of stumpage.[285]

Before addressing the ITA's redetermination, the panel majority's second decision once again canvassed the United States standard of review. The recent case of *Daewoo Electronics Co. Ltd. v. U.S.*[286] had reviewed in detail the standard applicable to judicial review of U.S. agency decisions. In that case, which was concluded in the time period between the panel's initial and second opinions, Court of Appeals for the Federal Circuit found that reviewing agencies were required to give deference to the ITA's choice of analytical and empirical methodology. This new judicial authority appeared to buttress the ITA's argument that the panel was obliged under United States law to defer to the agency's "reasonable" findings.[287]

In its detailed discussion of the standard of review, the majority concluded that the "general" statements in *Daewoo* articulating "deference" did not have the effect of overturning the "specific" pronouncements of United States courts in cases such as *PPG IV*.[288] The majority asserted that the ITA was still legally obliged to (i) consider all four of its enumerated criteria in the "Proposed Regulations;" and (ii) apply the "specificity" test in a reasonable and rational manner.[289]

The majority completed its discussion of the standard of review by finding that *Daewoo* did not create a "new" or "expanded" standard of deference and that, as a result, it would apply the same type of careful review as that applied in the first panel opinion:

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283 *Softwood Lumber, supra* note 20, Booklet B.20A (May 6, 1993) at 32 (citing PPG Industries v. United States, 978 F. 2d 1232 (Fed. Cir. 1992)(hereinafter "PPG IV").

284 Department of Commerce, International Trade Administration, Determination Pursuant to Binational Panel Remand (hereinafter "*Determination on Remand*"), at 19, 25 (Sept. 17, 1993) as cited in *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 14-15 notes 76-77.

285 *Determination on Remand, supra* note 284 at 41.

286 6 F.3d 1511 (Fed. Cir. 1993) (hereinafter "*Daewoo*").

287 *Id. Daewoo* was a case where the ITA's interpretation of U.S. antidumping law, as contained in 19 U.S.C.A. § 1677a(d)(1)(c), was in dispute.

288 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 14.

289 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 14.

> Although review under the substantial evidence standard by definition is limited, application of the standard does not result in the wholesale abdication of the Panel's authority to conduct a meaningful review of the Commission's determination. Indeed a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering the appeal process superfluous. The deference to be afforded an agency's findings and conclusions is therefore not unbounded.[290]

By employing this standard, the majority flatly rejected the ITA's finding that the number of users of stumpage was "too few" to be considered "non-specific."[291] The majority found the ITA's methodology to be "mechanical and mathematical," and therefore in contravention of both United States law and the agency's established practice.[292]

In finding that the ITA had not adequately evaluated each of the four factors in its "Proposed Regulations," the majority's tone was notably critical:

> The complete lack of reasoned analysis regarding whether or not the number of industries using stumpage is too few, and the mechanical, mathematical way in which Commerce decided that the users of stumpage are too few to be non-specific, is contrary to law and legal precedent. . . [T]he analysis of dominant or disproportionate use . . . is either irrelevant or perverse. The use of the statistics relating to whether sawmills account for a dominant or disproportionate share of stumpage is similarly mechanistic, conclusory, or, in some cases, misleading . . . Since Commerce has been unable to provide a rational legal basis for a finding that the provincial stumpage programs are specific and in light of the efficiency with which the Panel Review is intended to resolve these disputes, we therefore remand this issue to Commerce for a determination that the provincial stumpage programs *are not* provided to a specific enterprise. . .[293]

The majority's decision on the issue of 'stumpage programs' was split along national lines. Where the Canadian majority decided that *Daewoo* did not grant the ITA unbounded deference to create its own methodology, the dissent, comprised of the two American panelists, asserted that the majority had misconceived and misapplied the appropriate standard of review.[294] The dissent alleged that the majority had failed to provide the amount of deference required by *Daewoo,* which case had reinforced the "posture of deference" that United

290 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 11 (quoting *Lumber-Injury, supra* note 35, Booklet B.21A (July 26, 1993) at 9).

291 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 25.

292 *Softwood Lumber, supra* note 20, Booklet B.20B, (Dec. 17, 1993) at 31.

293 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 31-32 (emphasis added).

294 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 72-78.

States administrative law accords to agency determinations.[295] In a particularly charged opinion, the dissent found that the panel was engaged more in statutory and regulatory amendment than judicial review, and that this action clearly violated the requirements of United States law.[296]

Once again the United States requested the formation of an Extraordinary Challenge Committee. Its request alleged that the binational panel had manifestly exceeded its powers, authority and jurisdiction by ignoring the United States standard of review. The U.S.T.R. concluded that this breach of duty threatened the very integrity of the binational panel process.

The majority of the ECC, consisting of retired Canadian judges, upheld the disputed majority decision. As in the *Pork* Extraordinary Challenge, the Committee in *Softwood Lumber* inferred that the panel must be flexible when determining what constitutes "substantial evidence."[297] The ECC majority recognized further that while the panel majority and dissent had differed in their views concerning the applicable substantive law, the panel majority nevertheless had not failed to conscientiously apply the standard of review required under United States law.[298]

The dissenting opinion, written by Retired United States Circuit Judge Malcolm Wilkey, manifested the amount of discontent which had been created in certain U.S. circles following episodes such as *Pork, Live Swine* and, now, *Softwood Lumber.* The dissenting judge castigated the panel majority for flagrantly violating the "standard of review" requirement and concluded that this blatant breach of duty threatened the integrity of the binational panel process.[299]

On the matter of *Daewoo*, Judge Wilkey concluded that that case simply re-affirmed that United States administering agencies were to enjoy discretion when choosing and applying methodology.[300] He held that when there existed a "gap" in a statute with respect to methodology, Congress was implicitly authorizing the administering agency - *and not a reviewing body* - to fill it accordingly.[301] On this failure to apply the correct United States standard of review, the dissenting judge concluded:

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295 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 77.
296 *Softwood Lumber, supra* note 20, Booklet B.20B (Dec. 17, 1993) at 87.
297 *Softwood Lumber ECC, supra* note 102, at 18 (Opinion of Hart, J.)
298 *Softwood Lumber ECC, supra* note 102, at 25 (Opinion of Hart, J.).
299 *Softwood Lumber ECC, supra* note 102, at 81-91 (Wilkey, J., dissenting).
300 *Softwood Lumber ECC, supra* note 102, at 73-76 (Wilkey, J., dissenting).
301 *Softwood Lumber ECC, supra* note 102, at 76 (Wilkey, J., dissenting).

> In summary, I believe that this Binational Panel Majority opinion may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read.[302]

Judge Wilkey's dissent went considerably beyond examining the *Softwood Lumber* majority decision: the charges amount to an indictment of the entire Chapter 19 process. His opinion concluded that the Chapter 19 system - at both the panel and ECC level - had failed.[303] The vituperative tone of Judge Wilkey's comments suggest that it was inevitable from the outset that substitution of binational panel review for traditional judicial review would violate established precepts of United States administrative law:

> The record shows that five (or in this case three) distinguished "experts" have shown no deference whatsoever to the "experts" in the ITA of the Commerce Department.
>
> Psychologically, why should they be expected to show the deference to administrative agency action which is required as a fundamental tenet of United States judicial review of agency action? The panel members are experts; they know better than the lowly paid "experts" over in the Commerce Department, and they have felt inclined to say so. Repeatedly, most vividly in this particular case, they seem to have substituted their judgment for that of the agency. They have not hesitated to say that the agency was *wrong* on its methodology, *wrong* in the choice of alternate economic analyses, *wrong* in its conclusions, and that the Panel of five experts knows far better how to do it. All of this of course is directly contrary to long-standing United States law concepts of review of agency action.[304]

The ECC's approval of the panel majority's decision resulted in the removal of the entire 6.51% CVD on Canadian exports of Softwood Lumber to the United States.[305] The victory was the largest yet for Canadian exporters under the FTA.

5. *Cases Brought Against U.S. Agencies - Conclusions*

Pork, Live Swine and *Softwood Lumber* each showed that the advent of FTA Chapter 19 binational panel review has advanced the interests of Canadian exporters. Binational panels in those cases used the "substantial evidence" test and "errors of law" requirement to effectively force reversal of unsubstantiated U.S. agency conclusions and to ensure that those agencies were consistent in their choice and application of methodology. In the domain of trade remedy law,

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302 *Softwood Lumber ECC, supra* note 102, at 80 (Wilkey, J., dissenting).
303 *Softwood Lumber ECC, supra* note 102, at 91 (Wilkey, J., dissenting).
304 *Softwood Lumber ECC, supra* note 102, at 92 (Wilkey, J., dissenting) (emphasis added).
305 And Refund of those duties.

where the calculation of dumping and subsidy margins is intrinsically tied to the choice of methodology employed, promoting methodological consistency has furthered the pro-competitive objective of the United States-Canada Free Trade Agreement.

Although it is clear that exporters, Canadian more than American, tangibly benefited from Chapter 19 binational panel review, this fact in and of itself is not sufficient to characterize the FTA Chapter 19 experience as a "success." Before drawing such a conclusion, one should be satisfied that binational panels have not achieved the FTA's objective of guaranteeing the impartial application of trade remedy laws at the expense of another important FTA express objective, namely, ensuring that panelists apply the same standard of review and general legal principles that would otherwise be applied by courts of the importing party.

Judge Wilkey's dissent in *Softwood Lumber* asserted that Chapter 19 binational panels have, at times, exceeded their jurisdiction by applying an "incorrect" standard of review. Recently, in written testimony before the U.S. House of Representatives Ways and Means Committee Subcommittee on Trade,[306] Judge Wilkey elaborated on these conclusions. He contended that the FTA Chapter 19 system had "failed" because panelists: (i) lack accountability; (ii) are too prone to conflicts of interest; (iii) cannot avoid the temptation to "redo" the work of the administering agencies; and (iv) have no experience with judicial review.[307] On this last point, Judge Wilkey wrote:

> The ad hoc panels have no feeling for the unique standards of judicial review, which in many respects is a unique American institution. There is no sense of deference to the expertise of the administrative agency, which the CIT does have. More damaging to the fairness of the system, foreigners, even Canadians, lack an essential knowledge of United States law, both substantive and procedural, or perhaps are unwilling to apply it against the traditions of their own law.[308]

Are these criticisms accurate? Have binational panelists, particularly the Canadians, been unable to accord the proper level of deference required under United States law? Has this lack of familiarity with the requirements of United States judicial review caused the

306 *Should the NAFTA Chapter 19 Dispute Settlement Mechanism of Ad Hoc Panels Be Continued or Extended to Other Countries*: Before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives, June 21, 1995 (written testimony of Malcolm R. Wilkey, retired United States Circuit Judge), *available in* 1995 WL 371096 (F.D.C.H.).

307 *Id.* at *3.

308 *Id.* at *3-4.

Chapter 19 system to fail in its express objective? These crticisms appear misplaced for three reasons.

First, allegations that binational panels have failed to show the proper level of deference to U.S. agencies because they have applied the "wrong" standard of review may be somewhat misguided. To suggest that a panel has applied an "incorrect" standard of review implies that there exists a "correct" standard. As has been shown throughout this Study, besides the limited guidance provided by statute, *i.e.*, by the "substantial evidence" and "errors of law" tests, the applicable standard of review is not a clearly ascertainable instrument which can be identified and applied with ease. Instead, it is composed of a number of different elements including *conflicting* judicial propositions. Determining what constitutes the applicable standard of review therefore involves subjective judgment and discretion on the part of reviewing courts or panels,[309] and is often the source of considerable disagreement between reasonable, informed individuals. In short, there rarely exists a single "correct" standard of review and, thus, it is difficult to argue that panels have applied the "incorrect" standard.

When those who criticize Chapter 19's performance under the FTA argue that panelists have applied the wrong standard of review, what they seem to be implying is that they oppose the *manner* by which Chapter 19 panels have applied the United States standard of review. It is true that binational panels, after having enunciated the proper standard of review, applied that standard rigorously and at times unrelentingly to United States agency final determinations. It is also true that this binational experiment, *i.e.*, the conduct of judicial review with non-judges and foreign citizens, will naturally cause concern for those who question the qualification of these "surrogate" judges. Nevertheless, the fact that the United States and Canada developed this binational system to begin with speaks to their mutual purpose to change the *manner* by which reviewing bodies would conduct the review of administrative agency final determinations. This fact cannot be ignored when assessing the performance of the FTA Chapter 19 system.

Second, it has been suggested that Chapter 19 panelists lack an essential understanding of U.S. procedural and substantive law. This and other studies have found that panelists have proven adept at interpreting and applying complex trade remedy laws as well as the requirements of U.S. and Canadian administrative law during review of

309 *GAO Study*, *supra* note 15, at 35.

final determinations. Nonetheless, it is recognized that there is a subjective element to determining what constitutes United States "law" on any given matter and that, as a result, it is possible to conclude that Chapter 19 panelists have failed to properly interpret procedural and substantive U.S. law.

What is indisputable is that there has been a general consensus among commentators that FTA Chapter 19 panel decisions have been of high quality:

> Panel decisions which have been rendered so far have been quite lengthy and detailed. Each decision has addressed a number of issues. Panels have given detailed attention to every issue brought before them. They have taken their role very seriously, and have produced carefully thought-out decisions.[310]

Finally, it is far from clear that Chapter 19 panelists have delivered decisions that uniformly diverge from the opinions which would have been rendered by the CIT had these binational panel cases been brought before that court. As was outlined above, a few cases challenging United States agency determinations have caused considerable controversy. Notwithstanding these cases, FTA Chapter 19 panels for the most part produced uncontroversial decisions and outcomes which could well have fallen within the range of opinions rendered by the CIT. If the CIT has produced a "spectrum" of decisions in which judicial review has ranged from "deferential" to "rigorous," the FTA Chapter 19 cases would fall within this range, albeit at the "rigorous" end of that spectrum.

III. Chapter 19 Dispute Settlement under NAFTA

This study has asserted that Canadian exporters asymmetrically benefited from the application of the FTA's Chapter 19 process. To summarize, the factors which contributed to the disparity of results under the FTA were:

> i) A relatively flexible United States "standard of review" which, when applied by panelists, could be used to effectively overturn agency determinations;
> ii) The existence of a "privative" clause which, when combined with Canada's ingrained judicial predisposition toward "deference," protected the CITT from exacting panel review;
> iii) Panel ability to invoke a rule of "finality" which effectively limited further opportunity for U.S. domestic agencies to re-formulate and support their conclusions;

310 *See* Robichaud and Steger, *supra* note 13, at 17. These conclusions have been confirmed by the GAO in its recent study. *See GAO Study*, *supra* note 15, at 65.

iv) A high threshold which had to be surmounted if panel decisions were to be successfully challenged before Extraordinary Challenge Committees;
v) The use of international trade lawyers and economists as panelists; and
vi) A consistent effort on the part of panelists reviewing United States agency final determinations to formulate and apply an unyielding standard of review, both in initial panel opinions and in subsequent judgments.

Is it possible that Canadian exporters will continue to enjoy similar levels of success under NAFTA? While NAFTA Chapter 19 largely incorporates the FTA's rules and procedures, a number of amendments to the FTA system have been made that could materially change the way that the Chapter 19 system operates.

A. NAFTA and Chapter 19

NAFTA Chapter 19 largely duplicates, on a trilateral basis, procedures that were in effect between the United States and Canada under the FTA. It provides for binding binational panel review of final AD, CVD and material injury determinations involving goods of NAFTA countries,[311] and for binational panel review of changes to existing anti-dumping and countervailing duty laws of the parties.[312]

One significant addition to the Chapter 19 system is Article 1905. This provision establishes a "special committee" review process which is intended to "safeguard" the trilateral panel system. The special committee process provides recourse in the event that the application of a party's domestic law prevents the establishment of a panel, precludes the panel from rendering a final decision, interferes with the implementation of a panel decision, or does not provide opportunity for effective and meaningful review of a final determination by a NAFTA panel or national court.[313]

The first step under the safeguard mechanism is for the NAFTA countries to consult on the matter in dispute. If the two governments involved cannot resolve the matter through consultations, the complaining NAFTA country has recourse to a special committee to consider the allegation.[314] If the committee makes an affirmative finding, the parties must enter into further consultations. If such consultations fail to resolve the matter, the complaining party may suspend the op-

311 *NAFTA*, *supra* note 12, art. 1904.
312 *NAFTA*, *supra* note 12, art. 1903.
313 *NAFTA*, *supra* note 12, art. 1905(1).
314 *NAFTA*, *supra* note 12, art. 1905(2)-(4).

eration of the binational panel review system under Article 1904 or withdraw "other benefits" under NAFTA.[315] If the complaining party suspends Article 1904 or NAFTA benefits, the party complained against may reciprocally suspend the operation of Article 1904 and may also reconvene the special committee to determine whether the suspension of benefits was "excessive" or whether the problem complained of has been corrected.[316]

The safeguard system offers one major advantage over the FTA. Under the FTA the only recourse available to the United States or Canada if they were concerned with the other country's effective implementation of Chapter 19 was abrogation of the entire Agreement.[317] NAFTA Article 1905 permits a party to suspend operation of Article 1904 with respect to a government that has failed to meet its Chapter 19 obligations.[318] Article 1905 thus provides an "effective and balanced method for ensuring that Chapter 19 continues to operate as the NAFTA countries intended, without jeopardizing the entire NAFTA."[319]

Notwithstanding this useful addition, NAFTA has altered the FTA Chapter 19 system in two other respects which have the potential to dilute some of the positive aspects of the FTA Chapter 19 system.

First, a major factor which contributed to the efficacy of Chapter 19 decision-making was the utilization of international trade lawyers and economists as panelists. FTA panelists produced decisions which were well reasoned, thoroughly considered, and which reflected the panelists' knowledge of the complexities of trade remedy laws. While attentive to matters of jurisdiction, panelists refused to yield to unsupported agency findings.

The level of international trade law expertise that was present on FTA Chapter 19 panels could be reduced under NAFTA due to an alteration made to the provisions governing the establishment of Chapter 19 panels. Annex 1901.2 has been amended under NAFTA to the effect that the roster of panelists maintained by each of the contracting parties "shall include judges or former judges to the fullest extent possible."

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315 *NAFTA*, *supra* note 12, art. 1905(8).

316 *NAFTA*, *supra* note 12, art. 1905(10).

317 *The North American Free Trade Agreement Implementation Act Statement of Administrative Action*, 1 N.A. Free Trade Agreements: Treaties (Oceana), Booklet 8 (Feb. 1994) at 181 (hereinafter "*U.S. Statement of Administrative Action*").

318 *Id.*

319 *Id.*

It is interesting to note how Canada and the United States have differed in their interpretation of this amendment. Canada, eager to downplay the significance of this change, asserted in its *Statement on Implementation*[320] that it intended to continue staffing its Chapter 19 roster with lawyers, non-lawyers and sitting or retired judges.[321] The Canadian government emphasized that expertise in the area of international trade will continue to play a central role in its selection of Chapter 19 panelists.

By contrast, the United States, in its *Statement of Administrative Action*, accentuated the importance of this alteration. Instead of concentrating on the importance of choosing individuals with expertise in international trade, the United States asserted that there were "several advantages" to having judges and former judges serve as Chapter 19 panelists:

> . . .the participation of panelists with judicial experience would help to ensure that, in accordance with the requirement of Article 1904, panels review determinations of the administering authorities *precisely* as would a court of the importing country by applying *exclusively* that country's AD and CVD law and its standard of review. In addition, the involvement of judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law.[322]

If the U.S. interpretation of this amendment is eventually accepted and followed by the other NAFTA parties, the Chapter 19 system could revert toward the pre-FTA system of traditional judicial review of final determinations. Judges, by training, are more attentive to questions of jurisdiction, and are less likely to challenge agency determinations with the same degree of rigor as have FTA panelists. This would be especially true if the judges appointed by the parties to serve as Chapter 19 panelists had no prior experience with trade remedy law. In short, a decrease in the utilization of non-judges as panelists and a concomitant increase in the use of judges and former judges could lead to a more deferential type of Chapter 19 panel review.

A second significant alteration to the FTA Chapter 19 system concerns amendment of the Extraordinary Challenge Committee procedures. Under the FTA, an Extraordinary Challenge Committee's responsibilities ended with ensuring that a panel articulated and applied the correct standard of review. Under NAFTA, an Extraordi-

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320 *North American Free Trade Agreement Canadian Statement on Implementation*, 1 N.A. Free Trade Agreements: Treaties (Oceana) Booklet 12A, Issued October 1994 (hereinafter "*Canadian Statement on Implementation*").

321 *Id.* at 115.

322 *U.S. Statement of Administrative Action, supra* note 317, at 178 (emphasis added).

nary Challenge Committee's mandate has been broadened in two important respects.

First, an Extraordinary Challenge Committee under NAFTA is explicitly authorized to examine a panel's analysis of substantive law and underlying facts.[323] Again, Canada and the United States have offered disparate interpretations of this amendment. Where the Canadian government has asserted that this amendment only makes "explicit" what was already "implicit" under the FTA,[324] the United States sees this expansion as an "important change."[325] When combined with the fact that Extraordinary Challenge Committees now are entitled to 90 days to undertake their review,[326] as opposed to 30 days under the FTA, it becomes evident that the Extraordinary Challenge Committee procedures have been modified in order to resemble those applicable to appellate courts.

Apart from procedural changes made to the ECC process, there has been another, more important, and potentially problematic, alteration to the FTA system. During the FTA years, panel decisions were effectively non-reviewable except under a narrow list of unusual circumstances which included gross misconduct, bias, breach of fundamental procedures, or action that 'manifestly' exceeded a panel's mandate.[327] The decisions of the three Extraordinary Challenge Committees confirmed the notion that panels were to have considerable latitude when examining final determinations.

Under NAFTA Article 1904(13)(iii), an Extraordinary Challenge Committee can now vacate or remand a panel opinion if it finds that the panel "failed to apply the appropriate standard of review." Yet again, the two countries have offered different interpretations of this amendment. Where Canada has stated that this alteration "does not expand the scope of an extraordinary challenge proceeding from what had been negotiated under the FTA,"[328] the United States considers this change to be "significant."[329]

Merely articulating and faithfully applying the United States standard of review may no longer be sufficient to immunize a panel decision from successful extraordinary challenge. Given the fact that there has been, at times, considerable disagreement between panelists

323 *NAFTA*, *supra* note 12, Annex 1904.13.
324 *Canadian Statement on Implementation*, *supra* note 320, at 115.
325 *U.S. Statement of Administrative Action*, *supra* note 317, at 179.
326 *NAFTA*, *supra* note 12, Annex 1904.13.
327 *FTA*, *supra* note 1, Annex 1904.13.
328 *Canadian Statement on Implementation*, *supra* note 320, at 115.
329 *U.S. Statement of Administrative Action*, *supra* note 317, at 178.

as to what constitutes the appropriate "standard of review," judges on Extraordinary Challenge Committees may now be invited to examine how a binational panel both articulated *and* applied the relevant standard. While the three ECC decisions under the FTA did not address the specific issue of defining and applying the applicable standard of review, it is possible that future Committees could become much more involved with the substantive factual and legal issues in dispute.

Whether or not these alterations to the FTA Chapter 19 system will in practice significantly change the way that Chapter 19 system operates under NAFTA remains to be seen. To date, the NAFTA Chapter 19 system appears to have functioned in much the same way as it had under the FTA. Nevertheless, since there has as yet been no Extraordinary Challenge Committee invoked under Chapter 19 of the NAFTA, it may be premature to assess the overall effects of these alterations.

What is clear at the present time is that the changes to the Chapter 19 framework outlined above have the potential to move the process away from a surrogate hybrid system of "expert" review and more towards the traditional mode of judicial review which Chapter 19 was originally designed to replace. To the extent that there is a clear divergence between the U.S. and Canada as to the significance of these amendments to the Chapter 19 system, the potential for conflict has increased.

B. The Canadian Standard of Review

In addition to the direct changes made by NAFTA to the Chapter 19 system, an important amendment has also been made to the Canadian standard of review. As was shown earlier in this study, the presence of a "privative" clause, when combined with the ingrained judicial deference that exists in Canada to specialized administrative agencies, has made it extremely difficult for U.S. exporters to secure reversal of CITT final determinations.

Effective as of January 1, 1994, the *Special Import Measures Act* was amended to implement certain of Canada's obligations under Chapter 19 of the NAFTA. Among these changes, the CITT's "privative clause" was repealed.[330]

As a result of this amendment, one might presume that NAFTA Chapter 19 panels would now be able to review alleged CITT errors of law by way of the "reasonableness" standard instead of the highly

330 *See discussion, supra,* note 119.

deferential "patently unreasonable." The Supreme Court of Canada, however, recently dispelled any notion that the absence of a privative clause will subject expert agencies such as the CITT to more unyielding judicial review.

The court in *Pezim*[331] recently considered the standard of review applicable to "errors of law" when an expert agency is not "protected" by way of a privative clause. Justice Iacobucci made the following observation:

> [E]ven where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.[332]

When examining *how much* judicial deference has to be accorded to an expert tribunal, the Justice concluded that courts were required to show "considerable deference" in cases where the agency was not "protected" by a privative clause.[333]

Two recent NAFTA Chapter 19 panels reviewing CITT final determinations applied *Pezim*.[334] Both panels confirmed that reviewing bodies must, in the absence of a "privative clause," give "considerable deference" to the expert agency when examining alleged errors of law.

How much deference must be granted by a reviewing body under the "considerable deference" standard? The Chapter 19 panel in *Baler Twine* explored this issue:

> In the current case, while the Tribunal's decision is not protected by a privative clause, there is no right of appeal from its decisions. The only right that arises is one of judicial review. There is no reason, in logic or in law, to conclude that it is entitled to anything less that "considerable deference." While that deference does not extend to the point of patent unreasonability, it resides close to that end of the spectrum of deference.[335]

NAFTA Chapter 19 panels will be required to employ the "considerable deference" approach outlined in *Pezim* when reviewing alleged errors of law. While this test may provide reviewing bodies with somewhat more latitude than the "patently unreasonable" test, it re-

331 *Pezim, supra* note 123, at 590.

332 *Pezim, supra* note 123, at 591.

333 *Pezim, supra* note 123, at 598-599.

334 *See* In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of America, (Injury), CDA-94-1904-04 1995 WL 416312 (N.A.F.T.A. Binat. Panel), at *6 (July 10, 1995); In the Matter of Synthetic Baler Twine with A Knot Strength of 200 Lbs or less Originating in or Exported from the United States of America, No. CDA-94-1904-02, (April 10, 1995) 2 N.Am. Free Trade Agreements: Disp. Settlement (Oceana), Booklet B.36 at 6, (hereinafter "*Baler Twine*").

335 *Baler Twine, supra* note 334, at 11.

mains a highly deferential standard. As a result, even though the privative clause has been repealed, U.S. exporters should not expect this development to translate directly into more rigorous binational panel review of alleged CITT agency errors of law.

C. The Limits of Chapter 19

There are a number of limitations to the Chapter 19 process which have become increasingly apparent in recent months. First, changes made to the Chapter 19 system under NAFTA could cause the system to lose its distinctiveness as a hybrid model of adjudication and arbitration. If such a development materializes, it is possible that this binational panel system will come to resemble traditional domestic judicial review.

Second, the recent Supreme Court of Canada decision in *Pezim* has underscored the fact that the Canadian standard of review, applicable to both Revenue Canada and the CITT, is highly deferential. U.S. exporters under NAFTA, therefore, should not expect the NAFTA Chapter 19 system to provide them with substantial relief from injurious Canadian agency decisions.

A third limitation concerns the NAFTA Chapter 19 system's potential to create a body of jurisprudence which diverges from that which has been and will continue to be created by domestic courts with respect to non-NAFTA exporters. A recent study has concluded that FTA Chapter 19 panels made reference to other Chapter 19 panel opinions.[336] The study, however, could not conclusively find that a separate jurisprudence was emerging because reference to Chapter 19 decisions was often made for the purpose of familiarizing the reader with the history of the dispute, or illustrating the functioning of the panel process.[337]

Even if one finds that no considerable jurisprudence has yet emerged from the FTA Chapter 19 cases, it will become increasingly difficult in coming years to avoid the creation of such a divergent body of law as the number of decided Chapter 19 cases increases.

A fourth limitation in the NAFTA Chapter 19 system is that this dispute resolution mechanism cannot guarantee secure market access for NAFTA exporters. If a final AD/CVD or material injury determination is made by one NAFTA party concerning goods of another NAFTA party, the Chapter 19 system can provide an effective remedy

336 *GAO Study*, *supra* note 15, at 81-83.
337 *GAO Study*, *supra* note 15, at 83.

toward ensuring that review of that determination is impartial. Even if an exporter succeeds, however, in having a duty level removed following Chapter 19 panel review, as was the case in *Softwood Lumber*, the Chapter 19 system cannot preclude the initiation of another trade remedy action against the same exporter(s) in the future. The Chapter 19 system should therefore be seen as a limited remedy providing, at best, temporary relief from injurious trade remedy law actions.[338]

A fifth limitation built into the NAFTA Chapter 19 system is that this mechanism only provides a way of reducing or eliminating duties resulting from *improperly* applied trade remedy laws. To the extent that the application of a duty results from the *proper* application of domestic trade remedy law, Chapter 19 panels must uphold contested final determinations.

In Part I of this study it was shown that U.S. exporters have enjoyed little if any success in securing reversal of duty levels. Canadian exporters, on the other hand, have reduced duties by about 28% by appealing final determinations to Chapter 19 binational panels. While these results are undoubtedly positive from the perspective of Canadian exporters, the fact remains that 72% of contested duties are being "affirmed" following Chapter 19 review. Given the fact that Chapter 19 litigation is expensive, that the process can become protracted and that the scope for success is limited, petitioners in the future may find that the costs of the Chapter 19 procedure outweigh the expected reduction in duty levels. This would be especially the case for smaller exporters who do not have the resources to finance protracted review of final determinations.

The most serious problem facing exporters is that the Chapter 19 system, by its nature, is limited in the type of relief that it can furnish. Panels to date have done their best to ensure that national AD/CVD law has been correctly applied. In this respect, the FTA Chapter 19 system has provided an effective "check" on administered protection. What the Chapter 19 experience has also shown, however, is that the "gravamen" of these disputes lies with the underlying trade laws themselves.[339]

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338 As an example, even though Canadian exporters succeeded in the latest round in *Softwood Lumber*, there is recent evidence to suggest that the U.S. softwood lumber industry is preparing to initiate a new CVD case against Canadian exporters. *See* Schreiner, *supra* note 22, at 3.

339 *See* Michael Reisman and Mark Wiedman, *Contextual Imperatives of Dispute Resolution Mechanisms: Some Hypotheses and Their Applications in the Uruguay Round and NAFTA*, J. of Glo. Tr. (forthcoming).

NAFTA Chapter 19 cannot be expected to remedy the shortcomings in trade remedy regimes which policy makers have not had the will to address. Americans, Canadians and Mexicans, therefore, should remain attentive to the structural limitations of the current Chapter 19 system, and should take bold steps to eliminate deficiencies in the underlying trade remedy laws themselves.[340] Only eradicating the market distortions and commerical uncertainty caused by trade remedy laws will provide North American exporters with the secure access to NAFTA markets which they require to increase their global competitiveness. Until such substantive changes to trade remedy laws are undertaken, any criticism of the Chapter 19 system for its inability to provide NAFTA exporters with secure market access will be misplaced.

340 For a timely examination of proposals to reform domestic trade remedy laws, *see* Thomas M. Boddez and Michael J. Trebilcock, *The Case for Liberalizing Trade Remedy Laws in North America*, 4 Minn. J. Glob. Tr. 1 (1995).