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Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in the Light of Softwood Lumber III?

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SHOULD THE NORTH AMERICAN FREE TRADE AGREEMENT DISPUTE SETTLEMENT MECHANISM IN ANTIDUMPING AND COUNTERVAILING DUTY CASES BE REFORMED IN THE LIGHT OF *SOFTWOOD LUMBER III*?

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I. INTRODUCTION

The softwood lumber dispute is a good illustration of the operation of the Canada-U.S. Free Trade Agreement (FTA)[1] dispute settlement mechanism in antidumping and countervailing duty cases. It is the longest-running trade dispute between the United States and Canada, having lasted eleven years and gone through three distinct stages. Canada's experience with U.S. trade laws during the dispute had a profound effect on the negotiation of the FTA, resulting in the adoption of an original system of dispute settlement.

The recent *Softwood Lumber III* extraordinary challenge committee (ECC) report,[2] which reviewed the U.S. Department of Commerce International Trade Agency's finding of subsidy, provides an opportunity to analyze the performance of the binational panel system, particularly the extraordinary challenge committee procedure. This is the third extraordinary challenge committee that has been convened,[3] but *Softwood Lumber III* is the first dispute in which both the binational panel and

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1. Canada-United States Free Trade Agreement, Dec. 22, 1987 and Jan. 2, 1988, ch. 19, 27 I.L.M. 281 [hereinafter FTA]. Final antidumping and countervailing duty determinations may be reviewed by a binational panel. In exceptional circumstances panel decisions may be reviewed by a binational extraordinary challenge committee. *Id.* arts. 1901, 1904, Annexes 1901.2, 1904.13, at 386–90, 393–395.

2. In re Certain Softwood Lumber Products from Canada, No. ECC-94–1904-01USA, 1994 FTAPD LEXIS 11 (Binational Review) (Aug. 3, 1994) [hereinafter *Softwood Lumber III*].

3. The other extraordinary challenge committees were: In re Fresh, Chilled, or Frozen Pork from Canada, ECC-91–1904-01 USA, 1991 WL 153112, 4 TCT 7037 (June 14, 1991) [hereinafter *Pork from Canada*] and In re Live Swine from Canada, ECC 93–1904-01 USA, 1993 WL 566371, 5 TCT 8088 (April 8, 1993) [hereinafter *Live Swine*].

the extraordinary challenge committee divided along national lines. It is also the first in which serious allegations of an appearance of bias were levied against two of the Canadian members of the binational panel.

The first two extraordinary challenge committees and the Canadian majority in *Softwood Lumber III* defined a narrow role for the ECC based upon a standard of review that limited the ECC to determining whether the binational "panel conscientiously attempted to apply the appropriate law as they understood it."[4] The ECC was not required to determine whether the panel applied the relevant law correctly.[5] The issue expressly left open by the first two challenges was whether an error of law alone is sufficient to constitute a material threat to the integrity of the binational panel process as required by the standard of review provision of the Free Trade Agreement.[6] The *Softwood Lumber III* challenge raised the same issue, as the United States Trade Representative (USTR) and the Coalition for Fair Lumber Imports (Coalition) asserted that the binational panel so misconstrued U.S. law that the integrity of the process was threatened.

The Canadian majority on the committee held that the narrow threshold had not been met.[7] The U.S. dissent by Judge Malcolm Wilkey, a former Chief Judge of the Court of Appeals for the D.C. Circuit, contains a strongly worded condemnation of the *Softwood Lumber III* binational panel and extraordinary challenge committee majority determinations, as well as the entire binational panel mechanism.

> I submit that the well intentioned system of Extraordinary Challenge Committees, as a substitute for the standard appellate review under United States law, has failed. It has failed both at the Panel and the Committee levels to apply United States law, substantively, and most clearly in regard to the United States standard of review of administrative agency actions. The system runs the risk, not only of producing egregiously erroneous results as in the instant three to two panel decision, but also of creating a body of law—even though formally without precedential value—which will be divergent from United States law applied to countries not members of NAFTA.[8]

Judge Wilkey's dissenting opinion raises a number of issues, the most important of which is the degree of deference that should be paid by

4. The ECC standard of review is provided in FTA, *supra* note 1, art. 1904(13), at 388–89.

5. *Id.*; *see also Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *20–21.

6. *See* FTA, *supra* note 1, art. 1904.13(b), at 389.

7. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *79–80.

8. *Id.* at *205.

the reviewing panel to the administrative agencies. He argues that virtually absolute deference must be given, unless there has been a "totally irrational" exercise of discretion. If Judge Wilkey is correct, this raises the question of whether there is any need for a binational panel mechanism.

In the chapter of the Free Trade Agreement that addresses binational panel dispute settlement in antidumping and countervailing duty cases, the standard of review to be applied to U.S. decisions is defined as the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930.[9] Under this section, the standard of review to be applied by the Court of International Trade and the Federal Circuit Court of Appeals is that the court shall hold unlawful any determination, finding, or conclusion that is not supported by substantial evidence on the record or otherwise not in accordance with law. FTA Article 1904(3) requires binational panels to apply this standard when reviewing a U.S. final determination.[10]

The first prong—"substantial evidence on the record"—applies to "factual determinations."[11] Although the courts often accord deference to the agency's construction of the evidence, it must be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[12] Thus, while an agency has discretion to give a reasonable interpretation of the evidence, a reviewing body is not compelled to give absolute deference to such interpretation.

The second prong—"otherwise not in accordance with law"—applies to issues of law and matters the resolution of which depends more on underlying policy than on evidentiary considerations. The deference to be shown by a reviewing body to an agency determination on such questions depends on the nature of the question at issue. A reviewing court's role is greater where the legal question does not relate to the construction of the agency's governing statute. In these circumstances, a court may overturn an agency determination if it is "incorrect."[13]

A disturbing undercurrent runs throughout the dissent: the role of nationality that Judge Wilkey cites as the reason for his view that U.S. law had been misapplied. One may question his Honor's argument that the *Softwood Lumber III* result did turn on the issue of nationality and that the determination likely would have been different had a U.S. majority

9. FTA, *supra* note 1, art. 1911, at 391, 393.

10. *Id.* art. 1904(3), at 387.

11. Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1559 (Fed. Cir. 1984).

12. Matsushita Elec. Indus. Co., Ltd., v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

13. *See generally* Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 445–46 n.29 (1987); Crandon v. United States, 494 U.S. 152, 158 (1990).

been selected at either the binational panel or extraordinary challenge committee level.[14]

Nationality played such a role in Judge Wilkey's eyes that he expressed concern regarding the inclusion of Mexican panelists in the future.[15] If Canadian panelists could completely misunderstand the process of administrative review in the United States despite Canada's common law traditions and similar institutions, Mexican panelists cannot hope to perform adequately due to Mexico's different standards and civil law institutions.[16] Actually, the United States should be more concerned with the exercise of discretion by Mexican administrative officials in antidumping and countervailing duty disputes commenced in Mexico against U.S. goods and services than with their expected performance on binational panels and extraordinary challenge committees.

The role of nationality takes on more sinister connotations in light of the allegations of an appearance of bias made against Canadian panelists Hunter and Dearden and the allegation of a "serious conflict of interest" against Hunter.[17] These allegations magnify the perception that the position taken by the Canadian panelists is not based upon principle. The positions could be taken out of their proper context and used by U.S. interest groups and congressional opponents to discredit the binational panel system, thereby increasing pressures for change. This is unfortunate because a review of the binational panel determinations indicates that no allegations of bias or bad faith were made. This Article will not deal with the allegations of bias in order to focus upon what we consider to be the more important issue of the function of the binational panels and extraordinary challenge committees.

By overstating the role of nationality, Judge Wilkey undermined his argument regarding the application of the correct standard of review. There are a number of instances where Judge Wilkey's dissenting opinion goes far beyond the arguments that were made before the committee. For instance, there was no argument made relating to the issue of nationality, and, while Judge Wilkey might suggest that the "problem" of nationality underlies the entire binational panel process, he is wholly on his own on this issue. Because Congress expressly decided to have Canadian panelists participate in the review of final antidumping and countervailing duty determinations, reasonable differences are bound to arise—especially due to the standard of "substantial evidence on the record."

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14. Prior ECCs were unanimous decisions of Canadian and United States judges.

15. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *215.

16. *Id.*

17. *Id.* at *68–69.

Judge Wilkey appears to have magnified the issue of nationality in order to supply the element that appears to have been missing in the arguments made in the challenge: the threat to the integrity of the process. In doing so, his Honor appears to descend into the forum and become an advocate. In the context of an international dispute settlement mechansim, an element of unfairness may be introduced when Judge Wilkey criticizes the Canadian members of an international tribunal for not understanding complex—yet never-argued—aspects of U.S. law. As a result, his criticism of the Canadian Committee members—and their ability to comprehend U.S. principles of judicial review—must be taken with a healthy degree of skepticism.

The problem is exacerbated by the fact that the dissent appears to have done much to feed U.S. criticisms of the Chapter 19 mechanism. Congress clearly intends to modify trade laws to ensure that a "proper measure" of deference be given to the administrative agencies. The comments of Judge Wilkey build upon subtle changes made in the North American Free Trade Agreement (NAFTA)[18] provisions regarding the ECC and incorporate references to strongly worded congressional reports released in November 1993 regarding the implementation of NAFTA. These reports deal in part with the "misapplication" of U.S. law in *Softwood Lumber III*.

One response of the United States has been to introduce amendments in the GATT 1994[19] implementing legislation specifically directed at "correcting" countervailing duty laws. The determination of a "countervailable subsidy" requires a finding of specificity and preferentiality in the bestowal of some grant or advantage to a particular group. Generally available subsidies are not countervailable. The amendments expressly reject the sequential factor analysis regarding specificity and the market distortion test regarding preferentiality, upon which the *Softwood Lumber III* determination turned. The creation by the United States of a domestic institution, the World Trade Organization (WTO) Dispute Settlement Review Commission, is also designed to control WTO Dispute Settlement Body or Appellate Body panel reports perceived to be inimical to U.S. interests.

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18. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (entered into force Jan. 1, 1994), 32 I.L.M. 289, 605 [hereinafter NAFTA].

19. Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (GATT Secretariat 1994) [hereinafter RESULTS OF THE URUGUAY ROUND]. Portions of the Final Act also appear in General Agreement on Tariffs and Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1125 (1994).

Article 1903(1)(b) of the FTA includes a panel review mechanism of such amendments for a declaratory opinion as to whether they are inconsistent with the FTA or GATT or whether they are designed specifically to overturn a binational panel determination.[20] It will be interesting to see if the amendments in the WTO implementing legislation are subjected to such a mechanism, which to date has never been used and is unlikely to provide an effective brake on the amendments because it is not binding. The only remedy is that Canada will be permitted to adopt the same provisions in its own domestic trade laws, which would be quite acceptable to the United States.

The United States has taken other steps to ensure that the "correct" standard of review is applied by future panels and extraordinary challenge committees. The NAFTA implementing legislation requires the appointment to the roster and panels of Article III[21] judges, both active and retired, "whenever possible." Article III judges sit in the Court of International Trade and the Federal Circuit Court of Appeals. The United States is thus attempting to use the same category of judges in both forums, which is one way in which to ensure consistency of interpretation. It is a clever move because Canadian panelists will likely defer to U.S. judges with respect to the proper interpretation of the U.S. standard of review and proper degree of deference that must be paid to the Department of Commerce and the International Trade Commission. Judge Wilkey is an Article III judge.

Finally, the Coalition could launch *Softwood Lumber IV* in respect of a trading period subsequent to that used in *Softwood Lumber III,* in the hope that an U.S. majority on either the binational panel or extraordinary challenge committee would reverse *Softwood Lumber III.* The Coalition has recently warned "that the Canadian side must make major changes to its timber practices quickly or face another investigation that could lead to border tariffs."[22] The problem of inconsistent results would

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20. FTA, *supra* note 1, art. 1903(1)(b), at 387.

21. Article III judges are those appointed pursuant to Article III of the United States Constitution. Extraordinary challenge committees must comprise judges or former judges exclusively. NAFTA, *supra* note 18, Annex 1904.13(1), at 68.

22. *U.S. Fires up Softwood Lumber Dispute: Washington Wants to Reduce Canadian Imports While Industry Threatens to Launch New Trade War,* GLOBE & MAIL, Sept. 21, 1995, at B1. The Coalition issued its warning during binational consultations to which Canada agreed in December 1994, in return for the abandonment of the Coalition's constitutional challenge of the ECC *Softwood Lumber III* determination. In December 1994, the Coalition made clear that it was not renouncing the possibility of commencing a new complaint. Mr. Singleton, the chairman of the lobby has stated that ". . . should the consultations ultimately prove unproductive, the coalition will reassess its strategy, including the possibility of new litigation and recourse to trade remedies." The abandon-

become manifest if a *Softwood Lumber IV* reversed the *Softwood Lumber III* determination on the same substantive issues.

What are the implications for the binational dispute settlement mechanism of the *Softwood Lumber III* result? The response in the United States, including the legislative amendments, indicates a fundamental flaw: binational panel determinations can be easily overturned through a legislative amendment or a new investigation. Critics would point out that this is the first time that such an amendment has occurred, that no new investigation has been commenced, and there is no guarantee that the United States would win *Softwood Lumber IV*. However, legislative amendments directed at closing the "loopholes" that permitted Canada to win *Softwood Lumber III* do not bode well for the mechanism, especially since, so far, this has been one of the most important disputes in which Canada was involved. The *Softwood Lumber* dispute also highlights the awkward compromise that is the FTA/NAFTA mechanism. The Canadian goal had been to eliminate existing antidumping and countervailing duty rules and to negotiate a new set of laws modelled on competition law principles with a binational tribunal to enforce them. This goal proved elusive because U.S. trade officials wanted strict limits placed upon what they considered to be trade distorting practices through Canada's improper use of subsidies. As a result, the binational panel mechanism was introduced as a stop gap measure. There is a need to control the exercise of the broad discretion granted to administrative tribunals by the complex web of domestic trade laws established upon the broad principles included in the GATT. The question is how to do it effectively.

This Article analyzes the extraordinary challenge committee report, and particularly the U.S. dissent, due to its importance in summarizing U.S. complaints regarding the performance of the dispute settlement mechanism. The implications of the *Softwood Lumber III* case are also considered, including the prospects of fundamental reform of the rules and institutions for the settlement of trade disputes. The Article does not purport to discuss the merits of the Canadian or U.S. position on the issues pertaining to subsidies or whether U.S. law is settled in the area of natural resource-based countervailing duty cases.[23]

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ment of the challenge represents a truce and not a settlement. *Trade Talks Face Rough Ride*, GLOBE & MAIL, Dec. 19, 1994, at B1; *see also Ottawa Makes It Official: Softwood Lumber Fight Is Over*, GLOBE & MAIL, Dec. 16, 1994, at B2.

23. To get a full understanding of the case and the arguments made, the authors recommend that the Briefs filed on the Extraordinary Challenge be reviewed (available from the NAFTA Secretariats in Ottawa and Washington).

II. EXTRAORDINARY CHALLENGE COMMITTEE: PRE-SOFTWOOD

The FTA provided that there was to be no right of appeal from a panel decision to the domestic courts.[24] However, a Party could, within "a reasonable time," bring an "extraordinary challenge."[25] Three committee members were appointed from a ten person roster comprised of judges and former judges of a federal court of the United States or a court of superior jurisdiction of Canada. Each Party selected one member and the third was selected by the two members or, if necessary, by lot from the roster.[26] Before *Softwood Lumber III*, there had been two extraordinary challenge committees convened.[27] Both challenges were brought by the United States after significant pressure from interest groups and Congress. In both cases, the committees, with a majority of Canadian members, unanimously affirmed the decision of the binational panel and established a relatively high threshold for a successful appeal to the ECC.

In the first committee decision, *Pork from Canada*, the committee reviewed its role in the binational panel mechanism. It found that the extraordinary challenge committee was not intended to function as an appellate court and a panel decision may be reversed only in "extraordinary" circumstances.[28] The mechanism was intended solely as "a safeguard against an impropriety or gross panel error that could threaten the integrity of the [binational panel review] process."[29] The committee set out a number of factors indicating the narrowness of ECC review. First, the committee commented on the limited circumstances under which a challenge could be brought.[30] Secondly, the committee pointed out that the text of FTA Article 1904(13) contained "strong, descriptive terms" such as "gross," "serious," "fundamental," "materially," "manifestly," and "threatens," which "highlight the committee's formidable standard of review."[31] Thirdly, the procedural rules narrowly circumscribed the nature of the review by limiting the review to thirty days and also restricted the panel to three judges or former judges, instead of a five member panel with expertise in international trade law. Fourthly,

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24. FTA, *supra* note 1, art. 1904(11), at 388.

25. *Id.* art. 1904(13), at 388–89.

26. *Id.* Annex 1904.13(1), at 395.

27. *Pork from Canada*, 1991 WL 153112; *Live Swine*, 1993 WL 566371.

28. *Pork from Canada*, 1991 WL 153112, at *3.

29. *Id.* at *3 (quoting The White House, Office of the Press Secretary, Summary of the U.S.-Canada Free Trade Agreement, at 37, (Feb. 1988)).

30. *Pork from Canada*, 1991 WL 153112, at *3–4.

31. *Id.* at *4.

only the parties to the agreement could request an extraordinary challenge. The committee concluded:

> In short, the role of an Extraordinary Challenge Committee, as the name implies and as the FTA provisions and procedural rules suggest, is to review Binational Panel decisions in only exceptional circumstances. Only upon evidence of egregious error that achieves the threshold requirements set forth in FTA Article 1904.13(a) and (b) may an extraordinary challenge be maintained.[32]

The "narrowly-defined" test set forth in Article 1904.13 of the FTA provided:

> Where, within a reasonable time after the panel decision is issued, a Party alleges that:
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> (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
> (ii) the panel seriously departed from a fundamental rule of procedure, or
> (iii) the panel manifestly exceeded its powers, authority or jurisdiction set 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, that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.[33]

The panel held that the three branches of the test are conjunctive:

> Thus, in order to sustain an extraordinary challenge the Committee *first* must find that a panel or panel member is guilty of one of the actions set forth in paragraph "a." *Second*, the Committee must find that such action "materially affected the panel's decision." And *third*, the Committee must determine that the action "threatens the integrity of the binational panel review process."[34]

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32. *Id.* at *5.

33. FTA, *supra* note 1, art. 1904(13), at 388–89.

34. *Pork from Canada*, 1991 WL 153112, at *4.

The panel stated that its "only function" was to ascertain whether each of the three requirements had been established and that evidence of egregious error achieving the narrow threshold requirements will suffice.[35] The requirements of "materiality" and "threat to the integrity of the binational panel review process" are important distinguishing characteristics in the extraordinary challenge standard of review. For instance, the committee found that these requirements distinguished the ECC standard from a similar standard of review under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.[36]

At the time, the USTR did not find fault with the *Pork from Canada* definition of the narrow role of the extraordinary challenge committee. The USTR argued in his Brief as follows:

> The United States does not contend that every erroneous decision by a binational panel threatens the integrity of the binational panel system. The extraordinary challenge committee is not designed to function as a routine appeal procedure. Rather, it was intended by the Parties as a safeguard for the binational dispute settlement mechanism. It is to be used only in rare circumstances, such as in the event of an impropriety or manifest legal error that could threaten the integrity of the panel process . . . .[37]
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> Given the fundamental importance of strict adherence by FTA panels to their legal charters, however, any substantial departure by a binational panel from its FTA mandate threatens to undermine the integrity of the interim panel system, and may compromise efforts to establish a more permanent decision-making mechanism. In cases in which a panel has assumed powers not assigned to it under the FTA or has failed to observe its duty to apply the domestic law of the importing country, such behaviour threatens the fundamental tenets of the panel system, and the basis for the agreement between the parties to that system.[38]

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35. *Id.* at *4 (emphasis added).

36. *Id.* at *9 n.4.

37. It is interesting to note that the testimony of Ms. Jean Anderson is cited as authority for this statement, in the Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 2d Sess. 72–73 (1988). At the time she was the Chief Counsel for International Trade, U.S. Department of Commerce. In *Softwood Lumber III*, she represented the Canadian Government and Judge Wilkey relied upon excerpts of her testimony before various committees.

38. Brief of the United States at 12–13, *Pork from Canada*, ECC-91-1904 USA.

The extraordinary challenge committee did not decide whether an error of law would be sufficient to set aside a binational panel decision, leaving the issue to be determined by future committees. Instead, the committee defined a "conscientious application" standard in the following manner:

> With respect to subparagraph 1904.13(a)(iii), the role of this Committee is to ensure that the Panel has articulated the correct test for review and that it has conducted an analysis of pertinent facts taken from the ITC record in order to apply the relevant standard of review. The primary role of this Committee under subparagraph 1904.13(a)(iii) involves the determination of a failure on the part of the Panel to conform to this standard. That failure, in the words of subparagraph 1904.13(a)(iii), must be "manifest." The Committee is not directed by Article 1904.13 to review the record of the ITC to determine the adequacy of the action and decision taken by the Panel. We are neither authorized nor directed to substitute our judgment on the issue of "substantial evidence" for the judgment of the Panel. We are required only to satisfy that the appropriate United States law has been conscientiously applied.
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> The issue as to jurisdiction of the Committee in the event an error of law is committed by the Panel in the interpretation or application of the admittedly applicable United States law was not raised before the Committee. Therefore, this issue need not be addressed here. It should be added that no such error of law that would constitute an excess of jurisdiction is "manifest" in the reasons for decisions taken by the Panel.[39]

The extraordinary challenge committee in *Live Swine*[40] was asked to review the binational panel's reversal of finding of countervailability by the Department of Commerce. The binational panel had rejected Commerce's finding that the government programs in question were *de facto* specific because the actual number of users was small relative to the total number of potential users. The rejection was made on the basis that "Commerce's fundamental reliance on the finding of a 'small' number of beneficiaries constitutes a purely mathematical analysis . . . not in accordance with law."[41]

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39. *Pork from Canada*, 1991 WL 153112, at *8–9.

40. *Live Swine*, 1993 WL 566371.

41. Brief of the United States at 6, In re Live Swine from Canada, ECC-91-1904-01USA [hereinafter *Live Swine* Brief].

The position of the USTR regarding the role of the extraordinary challenge mechanism had changed from that asserted in argument before the *Pork from Canada* committee. Counsel for the USTR argued that a failure to apply the correct standard of review is sufficient for the committee to set aside a binational panel's determination:

> Proper application of the judicial standard of review of the importing country is fundamental to the integrity of the binational panel process. The requirement that panels apply the correct standard is expressly established at Article 1904.3. Its inclusion was an essential element in the bargain struck between the United States and Canada in establishing the process. Accordingly, given its central importance to the binational panel process, it is difficult to imagine a case that more clearly presents a threat to the integrity of the process than one such as this in which a binational panel has issued a decision fundamentally at odds with well-established U.S. law and judicial precedent.
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> . . .
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> . . . [T]he text of the CFTA and the longstanding views of both Parties make clear that application of the correct judicial standard of review is fundamental to the proper functioning of the binational panel review process. Accordingly, failure to apply that standard plainly "threatens the integrity" of that review process and requires that the Majority's decision be overturned by this Committee.
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> . . .
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> . . . The obligation to apply the correct standard of judicial review is fundamental to the operation of the binational panel process. Both Parties have recognized its central importance in maintaining the efficacy of the system.[42]

The USTR brief in *Live Swine* contained a detailed argument that the binational panel had committed errors of law with respect to the issue of specificity. The argument included an assertion that "the Panel Majority unequivocally established a new obligation under U.S. law: namely, that in order to make an affirmative determination of specificity, Commerce must make an affirmative 'finding' with respect to at least two factors identified in Commerce's proposed regulations."[43]

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42. *Id.* at 12–14.

43. *Id.* at 11.

The *Live Swine* extraordinary challenge committee once again defined a high threshold for a successful challenge, requiring more than legal error:

> The ECC should address systemic problems and not mere legal issues that do not threaten the integrity of the FTA's dispute resolution mechanism itself. A systemic problem arises whenever the binational panel process itself is tainted by failure on the part of a panel or a panelist to follow their mandate under the FTA.[44]

The *Live Swine* committee accepted that a misapplication of the U.S. or Canadian standard of review by the binational panel could result in a successful challenge. The committee stated:

> The North American Free Trade Agreement ("NAFTA") makes explicit what was implicit in the FTA that if a panel fails to apply that appropriate standard of review, it manifestly exceeds "its powers, authority or jurisdiction," the first prong of our three-part test, FTA Article 1904(a)(iii) . . . . Neither Party challenged the proposition that if the Panel failed to apply the proper standard of review, it had violated prong one of the test.[45]

The committee also declared that the challenge process "is not intended to function as a routine appeal"[46] and that "the ECC cannot become an appeal forum for every frustrated participant in the binational panel process."[47] The "ECC should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process."[48] Rather, the committee accepted the "conscientious application" standard of review set out in the *Fresh Pork* challenge:

> During oral argument, Counsel for the Canadian government argued that it was required that a Panel "expressly refuse" to apply a standard of review prescribed in applicable domestic law in order to conclude that the Panel "manifestly exceeded its . . .

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44. *Live Swine*, 1993 WL 566371, at *3.
45. *Id.* at *4.
46. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *21.
47. *Id.* at *24.
48. *Id.* at *21.

> jurisdiction." . . . Express rejection is not required. The appropriate test is whether the Panel accurately articulated the scope of review and, as the first ECC stated, whether it "has been conscientiously applied." . . . Although we cannot say here, based upon the record before us, that the Panel did not conscientiously apply the appropriate standard of review, that is not to say that in another case if a panel simply cites the correct standard of review and the record does not reflect the conscientious application of it, that panel would not be manifestly exceeding its jurisdiction.[49]

The *Live Swine* ECC thereby articulated a standard of review that left open a window of opportunity for future committees to take a more interventionist role. However, the committee did not find that the threshold had been met in this instance, even though it felt that the panel may have erred with respect to the conclusions it reached.[50] There is even a suggestion in a footnote to the text that the panel failed to distinguish legal issues from factual issues in their determination.[51]

The *Live Swine* committee determination is important because it confirms the "conscientious application" standard of review. It also confirms that a failure to apply the appropriate standard of review can result in a successful challenge. However, legal errors that do not threaten the integrity of the binational dispute process will not be sufficient. A legal error in the determination of specificity will not necessarily result in a successful challenge, even though the USTR argued that the "Panel Majority unequivocally established a new obligation under U.S. law."[52] No threat to the binational panel system was found even though the USTR argued that "one practical effect of decisions such as the Majority's in this case would be to establish a separate body of U.S. subsidies law for Canadian products . . . ."[53] All of these issues are material to the *Softwood Lumber III* dispute which, in many respects, duplicates the argument made before the *Live Swine* extraordinary challenge committee.

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49. *Live Swine*, 1993 WL 566371, at *4.

50. *Id.* at *5.

51. Footnote 8 states: "Panels should take care to distinguish legal issues from factual ones, particularly where as here they base their decision upon the resolution of such issues." *Id.* at *7 n. 8.

52. *Live Swine* Brief, *supra* note 41, at 11.

53. *Id.* at 18.

III. NAFTA: CHANGES TO BINATIONAL DISPUTE SETTLEMENT MECHANISM

In order to place the *Softwood Lumber III* extraordinary challenge committee determination in its proper context, it is important to review some of the subtle differences between the FTA and the NAFTA dispute settlement mechanisms. The *Live Swine* ECC panel report highlights one of the changes made to the ECC standard of review in the NAFTA, the clarification being set out in italics:

> NAFTA 1904(13) Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:
>
> (a) . . .
>
> . . . (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, *for example by failing to apply the appropriate standard of review*;[54]

A further change is included in NAFTA Annex 1904.13(3) as follows:

> Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. *After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established,* and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed.[55]

The time period in which the ECC review is to be undertaken has also been lengthened, with an increase from thirty days under the FTA to ninety days under NAFTA.[56] In its report regarding the implementation of NAFTA, the House Committee on Ways and Means stated the following with respect to these changes:

> Two additional important changes from U.S.-Canada FTA procedures for ECCs are found in Annex 1904.13 of the NAFTA.

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54. NAFTA, *supra* note 18, art. 1904(13), at 688 (emphasis added).

55. *Id.* Annex 1904.13(3), at 688 (emphasis added).

56. *Id.*

> Under the NAFTA, ECCs, if convened, must examine the legal and factual analysis underlying the findings and conclusions of the panel's decision. Annex 1904.13 of the NAFTA also triples the length of time available to the ECC to undertake its review. The United States sought the changes in Annex 1904.13 based on its experience under the U.S.-Canada FTA. By expanding the period of review and requiring ECCs to look at the panel's underlying legal and factual analysis, the changes to Annex 1904 clarify that ECC's responsibilities do not end with simply ensuring that the panel articulated the correct standard of review. Rather, ECCs are also to examine whether the panel correctly analyzed the substantive law and underlying facts.[57]

Further changes are evident in the NAFTA implementing legislation in the United States. The Joint Senate Committee report states with respect to the selection of panelists and committee members:

> Subsection [402(a) of the implementing legislation] further provides that the rosters of potential panelists shall be comprised to the fullest extent practicable[58] of judges and former judges and requires the USTR to appoint judges and former judges to serve on panels and committees convened under Chapter 19 . . . .
>
> The Committee strongly believes that judges and former judges should be encouraged to serve on binational panels. . . . [T]he Committee is concerned that binational panels constituted under the CFTA have, in several cases, failed to apply the appropriate standard of review. The Committee believes that this problem could be ameliorated to some extent through the participation of judges and former judges in the panel process. In addition, the Committee believes that the use of judges and former judges may avoid potential conflict of interest problems that may arise when members of the trade bar, trade consultants or other experts in international trade are appointed to serve on binational panels and committees. The Committee recognizes that these individuals are sometimes called upon to make decisions regarding issues that may arise in other cases in

57. NAFTA Implementation Act, H.R. REP. NO. 361, 103d Cong., 1st Sess. 75–76 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2625–26 [hereinafter House NAFTA Report].

58. NAFTA Annex 1901.2(1) provides: "The roster shall include judges or former judges to the fullest extent practicable." NAFTA, *supra* note 18, at 687.

> which they or their firms are participating. It may be difficult to ensure that panelists fully segregate their client interests from their responsibilities on binational panels. Again, the Committee believes that appointing sitting judges to binational panels could help avoid potential conflicts . . . . To this end, the Committee urges the USTR to look not only to sitting Article III judges, but also to Administrative Law Judges and retired judges who meet the qualifications set forth in Annex 1901.2.[59]

The report of the Senate Committee on the Judiciary makes clear the purpose that underlies these changes:

> There are several advantages to having judges and former judges serve as panelists. For example, 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 antidumping and countervailing duty 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.
>
> For these reasons, the United States hopes not only to include judges and former judges on the roster to the fullest extent practicable as required by Annex 1901.2, but also to appoint judges and former judges to individual panels and committees whenever they are willing and available to serve.[60]

The Senate and House reports also dealt directly with the *Softwood Lumber III* dispute, indicating that the binational panel was in error in its application of the standard of review by not providing sufficient deference to the Department of Commerce. The Joint Committee report of the Senate states:

> The Committee believes, however, that FTA binational panels have, in several instances, failed to apply the appropriate standard of review, potentially undermining the integrity of the binational process.

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59. NAFTA Implementation Act, S. REP. NO. 189, 103d Cong., 1st Sess. 35–36 (1993) [hereinafter Senate NAFTA Report].

60. *Id.* at 126.

> Specifically, the Committee believes that some binational panels have not afforded the appropriate deference to U.S. agency determinations required by the United States Supreme Court . . . . Absent a direct conflict with the plain language of the statute, panels, like the courts for which they substitute, are restricted to examining whether the agency's view is a permissible construction of the statute. The Committee emphasizes in this regard that it is the function of the courts, and thus panels, to determine whether the agency has correctly applied the law, not to make the ultimate decision that Congress has reserved to the agency.[61]

The Joint Senate Committee report goes on to deal with the two substantive grounds upon which the *Softwood Lumber III* dispute turned. The application of countervailing duties requires a finding of both specificity and preferentiality. With respect to specificity, the binational panel required Commerce to adduce evidence regarding four factors that have been set out in proposed regulations.[62] Assuming that the specificity requirement is met, the preferentiality issue arises. Commerce found that "different Canadian provinces sold cutting rights to timber on publicly-owned lands at 'preferential rates' measured against the 'benchmark' prices charged in alternate markets."[63] The issue that arose was whether or not Commerce had to prove that a distortion of the market process occurred, with Commerce taking the position obviously that it did not.[64] Commerce refused to consider whether or not "market distortion" occurred, even though it used this factor as one of

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61. *Id.* at 42.

62. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *85–86. These four factors had been discussed in Chief Judge Nies's decision of the United States Court of Appeals in *PPG Indus., Inc. v. United States*, and they were codified in proposed regulations. 928 F.2d 1568, 1576 (Fed. Cir. 1991). These factors include:

> (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.

63. *Softwood Lumber III*, FTAPD LEXIS 11, at *11.

64. *Id.* at *17–18.

the grounds for finding log export restrictions countervailable.[65] The most powerful element of the binational panel decision was its finding that, once "market distortion" must be considered, Commerce fundamentally misunderstood the economic analysis that was submitted on behalf of Canada.[66] Even before the binational panel in *Softwood Lumber III* released its final remand on December 17, 1993, the Senate Committee asserted that the binational panel had been wrong on both the sequential factor issue and the market distortion test:

> [T]he Committee is concerned that, in several cases, binational panels have misinterpreted U.S. law and practice in two key substantive areas of U.S. countervailing duty law—regarding the so-called "effects test" and regarding the requirement that a subsidy must be "specific" to an industry. Thus, the Committee believes it is appropriate to clarify U.S. law and practice in these two areas, so that these misinterpretations can be corrected.
>
> *Economic Effects Test*—In [Certain Softwood Lumber from Canada] . . . the binational panel misinterpreted U.S. law to require that, even after the Department of Commerce has determined that a subsidy has been provided, the Department must further demonstrate that the subsidy has the effect of lowering the price or increasing the output of a good before a duty can be imposed.
>
> Such an "effects" test for subsidies has never been mandated by the law and is inconsistent with effective enforcement of the countervailing duty law.
>
> . . . From a policy perspective, the Committee believes that an "effects" analysis should not be required . . . .
>
> *Specificity* . . . .
>
> . . . .
>
> Several recent binational panels [*Softwood Lumber III* and *Live Swine*] have misinterpreted U.S. law and practice to require the Department to consider and weigh all relevant factors. However, another binational panel [*Magnesium from Canada*] correctly concluded that current Department practice is proper on the question of specificity. Due to this confusion, the Committee believes it is appropriate to clarify how U.S. law should be applied.[67]

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65. *Id.* at *8.

66. *Id.* at *14–15.

67. Senate NAFTA Report, *supra* note 59, at 42–43.

The Senate report then goes on to address the issue of the proper measure of deference to be given to the Department of Commerce and the International Trade Commission:

> It has been, and remains the intent of Congress that the Department have wide discretion to determine whether specificity exists in any particular case, in light of the requirement of the countervailing duty law that the Department countervail fully subsidies that are conferred on particular industries or group of industries. . . .
>
> It is the Committee's expectation that, in the future, binational panels will properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the ITC. If they do not, the Committee expects the Administration to avail itself of the extraordinary challenge procedures set forth in Annex 1904.13. Paragraph 13 of Article 1904 specifically provides that the extraordinary challenge procedure may be invoked where a panel has manifestly exceeded its powers, authority or jurisdiction by failing, for example, to apply the appropriate standard of review, where such action has materially affected the panel's decision and threatens the integrity of the binational panel process. Because the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces, the Committee believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.
>
> As provided under Annex 1904.13, the Committee believes that an extraordinary challenge committee should vacate an original panel decision or remand it to the original panel for action not inconsistent with the committee's decision if a binational panel has based its decision on a material misrepresentation of U.S. law or has failed to apply the appropriate standard of review. The Committee believes that the mere fact that a panel claims to have applied U.S. law and the proper standard of review is not a sufficient basis for an extraordinary challenge committee to uphold a panel decision if the committee's serious inquiry into the matter, as required under Annex 1904.13, reveals that the panel has not, in fact, properly applied U.S. law or the standard of review.[68]

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68. *Id.* at 43–44.

It appears that the United States is attempting to enforce more closely the U.S. standard of review. The Senate Committee was not reticent in declaring that the binational panel in *Softwood Lumber III* was wrong. The interesting aspect here is that the original panel determination was issued on May 6, 1993, the committee report was released on November 2, 1993, and the final binational panel remand was released on December 17, 1993. The U.S. minority focused in part upon the majority's affirmation of its earlier position that a market distortion test was required.[69] The minority reversed its earlier position that such a test was required, indicating that even their concurrence in the May 6, 1993, initial remand was in error and should be reversed. The reason stated by the minority for this reversal was its view that a new determination of the Federal Circuit Court of Appeals should be interpreted broadly. This view is found in *Daewoo Electronics Co., Ltd. v. International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO*.[70] The U.S. minority on the panel in *Softwood Lumber III—2d Remand* commented:

> [T]wo struts in *Daewoo* . . . are relevant to this Panel's procedure. The first strut reinforces the posture of deference that United States administrative law accords to agency review. The second strut reinforces the posture of deference owed to the methodologies developed by the agency to implement its statutory mandate when the statute itself does not indicate them . . . . *Daewoo* explicitly affirms reasonable, simply executed methods as satisfactory for the fulfillment of U.S. law and explicitly rejects the need for complex econometric proof . . . . The Majority implies that we find that "the burden imposed on the agency by the economic analysis and the probative value of the result" are "dispositive." With respect, this misstates our position . . . . [T]he factor of an "onerous burden" supplements and refines these authoritative sources and confirms that it is reasonable to defer to the agency's simpler, surer, and more rapid methodology . . . . *Daewoo*

69. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *16.

70. 6 F.3d 1511 (Fed. Cir. 1993). The Federal Circuit Court of Appeals examined the applicable standard of review in circumstances where Commerce was considering three different taxes on color television sets as adjustments to the U.S. price in a dumping determination. In its first determination, Commerce adjusted the U.S. price for all three taxes instead of looking at the issue whether the taxes were actually passed on to consumers in the Korean market. The CIT agreed with the Korean appellants and remanded with directions that Commerce should undertake an econometric study of the Korean market to determine the tax incidence, or "pass through," of the commodity taxes upon consumers. The Federal Court of Appeals disagreed with the CITs directions and held that the CIT could not impose its construction of the statute upon the Agency.

> clarifies the standard of review and, in its light, it is clear that the Panel's May 6, 1993 decision was wrong. Accordingly, in our view, *Daewoo* requires us to revise key parts of that decision.[71]

Further,

> We believe that the Majority interprets *Daewoo* far too narrowly. The Majority holds *Daewoo* to mean that this Panel cannot dictate how Commerce must find market distortion, implying that whether Commerce must find market distortion is simply beyond question. The Majority reduces the implication of *Daewoo* to the conclusion that the Panel cannot require Commerce to prefer one methodology over another in analyzing market distortion. The Majority asserts that "market distortion is a fundamental assumption of countervailability under the statute," thereby rendering it untouchable. This begs the question.
>
> *Daewoo* itself did not deal with how Commerce must analyze tax incidence but whether it must analyze tax incidence . . . .
>
> . . . In light of *Daewoo*, the Panel should defer to the methodology employed by Commerce in its Final Determination.[72]

The modifications to the binational panel procedure directed at changing the composition of the panel and committees, along with the change in wording to the relevant provision, all point to the fact that the United States is attempting to ensure that the panels will "properly" interpret U.S. law and defer to the administrative agencies. The inclusion of judges "to the maximum extent practicable" appears to be an attempt to make the review much more judicial in nature by using individuals who are most skilled in the principles of administrative review and to whom the other panel members are likely to defer with respect to these principles. The intention to maximize the use of Article III judges should be noted because they are the ones who sit on the Court of International Trade and the Federal Circuit Court of Appeals.[73] A way to ensure uniformity of interpretation would be to have

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71. In re Certain Softwood Lumber Products from Canada, No. USA-92-1904-01, 1993 FTAPD LEXIS 15, *175–77 (Binational Panel) (Dec. 17, 1993) [hereinafter *Softwood III—2d Remand*].

72. *Id.* at *214–16.

73. The present U.S. NAFTA roster has no judges. It is our understanding that a new roster is being considered that may include judges if they are available and willing to serve.

The Canadian Statement on Implementation states that:

> Canada notes that, while the text of NAFTA makes specific reference to the rosters for panels being comprised "to the fullest extent practicable" of sitting or retired judges, it

Article III judges sit on binational panels exclusively. Such a suggestion could be implemented by appointing judges only as a practice or by removing the words "to the fullest extent practicable" from NAFTA Annex 1901.2(1).

Canada does not believe that the changes have materially affected prior practice:

> With respect to the extraordinary challenge provisions of the NAFTA, its operation will remain the same as that which had operated under chapter 19 of the FTA. The addition to article 1904.13(a)(iii) of the example: ". . . the panel manifestly exceeded its powers, authority or jurisdiction set out in the article, for example, by failing to apply the appropriate standard of review, . . ." does not expand the scope of an extraordinary challenge proceeding from what had been negotiated under the FTA. The example simply makes explicit what was implicit in the FTA. Where an ECC finds that a panel has failed to apply the appropriate standard of review, it must then determine whether that failure materially affected the panel's decision and whether that failure threatens the integrity of the binational panel review process. Only if all three of these conditions are met will the challenge be successful. There have been two extraordinary challenges brought under the FTA. In both the Fresh, Chilled or Frozen *Pork from Canada* and the *Live Swine* IV cases, the Committees rejected the challenges brought by the United States. In the Swine IV case, the Committee correctly characterized the example set out in article 1904.13(a)(iii) of the NAFTA as making explicit what was implicit under the FTA and stated that where a panel fails to apply the proper standard of review, it has violated one prong of a three-prong test for a successful challenge.
>
> The change of the time frame in Annex 1904.13.2 for the conduct of an ECC proceeding from "typically within 30 days" to "within 90 days" reflects reality and practice (i.e., the average length of time for a proceeding, based on two ECCs under the

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does not preclude participation by other qualified experts. It is Canada's intent, therefore, that binational panels will be made up of experts in international trade law, including lawyers, non-lawyers and sitting or retired judges, who will be chosen on the basis of objectivity, reliability, sound judgment and expertise in the trade area.

C. GAZ., Jan. 1, 1994, Part I, at 204.

FTA, has been approximately 70 days). Annex 1904.13.3 would make it explicit that an ECC must examine the legal and factual analysis underlying a binational panel's decision in order to determine whether one of the grounds for resorting to the extraordinary challenge procedure has been established. In Canada's view, this was implicit in chapter 19 of the FTA.[74]

IV. *SOFTWOOD LUMBER III* EXTRAORDINARY CHALLENGE

The Department of Commerce launched the first *Softwood Lumber* countervailing duty investigation in 1983, but dismissed it upon finding that the "stumpage program" (the cost charged to logging companies for cutting government-owned stands of timber) was not a specific subsidy, since it was generally available.[75] Commerce made this decision on the basis of the "inherent characteristics" test, wherein the limitation on the number of users was due to the inherent characteristics of the resource and did not arise from any limitation imposed by government.[76] Commerce also found that there were too many users in too wide a range of industries for the program to be considered specific.[77] Congress "aggressively asked" Commerce to justify its decision in congressional hearings that took place soon after, and a number of bills were proposed to redefine what a countervailable subsidy was in order to impose duties upon imports of softwood lumber from Canada.[78]

Commerce launched *Softwood Lumber II* in 1986 at the active suggestion of the Reagan Administration. The Administration may have channelled the *Softwood Lumber* dispute back before the ITA/ITC as part of a strategy to defeat the bills that had been proposed:

> The executive branch successfully fought the passage of these bills, arguing that they would be a violation of U.S. GATT obligations. Nevertheless, when a softwood lumber case was reinitiated in 1986, the DOC ruled in a preliminary decision that the same stumpage program constituted a countervailable sub-

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74. *Id.*

75. In re Certain Softwood Lumber Products from Canada, No. USA-92-1904-01, 1993 WL 566370, at *90 n.106 (Binational Review) (May 6, 1993) [hereinafter *Softwood Lumber III—1st Remand*].

76. *Id.*

77. *Id.*

78. Robert E. Baldwin & Michael O. Moore, *Political Aspects of the Trade Remedy Laws*, *in* DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 267 (Richard Boltuck & Robert E. Litan eds., 1991).

sidy. Many observers believe that this reversal represents one instance at least in which the DOC yielded to intense congressional pressure.[79]

In *Softwood Lumber II*, Commerce made a preliminary finding that the stumpage programs were specific and that provincial governments exercised discretion in the administration of the programs.[80] Commerce found a preliminary duty of 14.5%, "based upon a purported comparison between revenues from stumpage charges and the provincial government's costs of administering their stumpage systems."[81] The threat of unilateral action against Canadian exports was sufficient to convince Canada to enter into a voluntary Memorandum of Understanding (MOU) on December 30, 1986, imposing an export tax of 15%. The Canadian government then undertook to negotiate changes in provincial stumpage practices.[82] The result was a decline in the Canadian share of the U.S. softwood market from 33% in 1987 to 26.7% in 1990.[83]

Softwood Lumber III began on September 3, 1991, when Canada notified the United States that it intended to terminate the MOU as British Columbia, Quebec, and Alberta (92% of softwood exports) had implemented significant changes to their programs, thereby increasing log costs.[84] On October 4, 1991, the USTR ordered a bonding requirement on Canadian softwood lumber at 15% under the authority of Section 301.[85] "Immediately upon termination of the MOU Commerce ... abandoned the cost/revenue comparison methodology on which [*Softwood*] *Lumber II* and the MOU had been based and claimed that stumpage prices were below market giving a subsidy which was passed to the lumber producers."[86] On October 31, 1991, Commerce formally self-initiated the third investigation, thus dispensing with the requirement

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79. *Id.*

80. *Softwood Lumber III—1st Remand*, 1993 WL 566370, at *3.

81. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *5–6.

82. *Id.*; Softwood Lumber Products Export Charge Act, R.S.C., ch. 12 (1985 3rd Supp.).

83. ANDERSON & FRIED, SUBSIDIES AND COUNTERVAILING DUTIES IN THE UNITED STATES-CANADA FREE TRADE AGREEMENT 6 (1989).

84. Minister of Industry, Science and Technology and Minister for International Trade, *Canada to Terminate Canada-U.S. Softwood Lumber Agreement*, News Release No. 188, September 3, 1991. The Softwood Lumber Products Export Charge Act ceased to be in force on March 3, 1992. *See* C. GAZ., Mar. 25, 1992, Part II, at 1303.

85. 19 U.S.C. § 2411 (1994). *See U.S. Retaliating Against Canada's Lumber Imports*, CHI. TRIB., Oct. 5, 1991, at 1; 56 Fed. Reg. 50,738 (1991).

86. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *6.

of a petition from the affected U.S. industry.[87] Canada responded by requesting a GATT panel to determine whether the Section 301 action or self-initiation proceedings were justified pursuant to the GATT agreements. In December 1991, Commerce expanded its countervailing duty investigation to include British Columbian export restrictions on logs, which had been in place for more than 80 years and which never had been part of either *Softwood Lumber I* or *Softwood Lumber II*. Commerce announced a preliminary duty finding on March 6, 1992, of 14.48% and made a final determination on May 15, 1992, of 6.51%.[88] The International Trade Commission in a separate decision found that it could not "conclude that there is clear and convincing evidence on the record of no material injury . . . and that there is no likelihood that contrary evidence will be developed in a final investigation."[89] At a rate of 6.51%, duties payable by Canadian exporters amounted to approximately $200 million a year. Both decisions were appealed to a binational panel. The decision regarding Commerce's finding of a countervailable subsidy was released on May 6, 1993. The panel decision with respect to the ITC finding of injury was released on July 26, 1993. Commerce released its remand determination on September 17, 1993, and the final remand by the binational panel was released on December 17, 1993.

A. *Argument Before the Committee*

The briefs filed by the USTR and the Coalition contained an argument that an error of law occurred that was sufficient in and of itself to threaten the integrity of the binational panel process and thereby justify a successful challenge. They raised the very issue that had been left undecided by the *Fresh Pork* decision: whether an error of law alone can lead to a successful challenge. In many respects, the argument contained the same elements that had been considered by the *Live Swine* committee. One of the issues in *Softwood Lumber III* was the determination of specificity and the allegation that the binational panel had established a new obligation under U.S. law. The alleged "threat to the integrity of the binational panel process" also involved the allegation that a separate body of U.S. subsidies law for Canadian products would emerge if the decision were left to stand.

The argument in *Softwood Lumber III* discloses that the USTR and the

87. In re Softwood Lumber from Canada, No. USA-92-1904-02, 1993 WL 313374, at *3 (Binational Review) (July 26, 1993) [hereinafter *Softwood Lumber III—July 26, 1993 Remand*].

88. *Id.*

89. *Id.*

Coalition fully accepted the *Fresh Pork* and *Live Swine* precedents. For instance, the argument was based upon an acceptance of the "conscientious application" of the U.S. standard of review, which had been established as the ECC standard in these decisions.[90] Their acceptance was confirmed in argument.

The *Softwood Lumber* challenge committee was given an opportunity to add to the definition of what the "conscientious application" standard entails. Counsel for the USTR argued that the standard involved both a subjective and an objective element:

> Now, according to the ECC in *Live Swine*, a manifest excess includes a failure to apply the standard of review of the importing country. Also according to the *Swine* ECC, the issue is not just whether the Panel identified the correct standard of review, but also whether it has conscientiously applied that standard of review to the facts and circumstances of the case.
>
> Now, dictionaries define the word "conscientious" as careful and meticulous, and also, governed by one's conscience. Of course, the Committee can't know whether the Panel followed its conscience, and we're not asking it to decide that, but the Committee can look at the decision and try to determine whether the Panel carefully applied the standard of review.[91]

Further,

> As I indicated in the opening of my remarks, conscientious has two different meanings, a subjective one and [an] objective one. Subjective in accordance with one's conscience. Objective, careful, diligent, meticulous. And it's not clear what the *Swine* ECC meant by that, but it's basic that it's going to be impossible for this ECC or anyone to probe the hearts and minds of the Panelists to see whether they were acting in accordance with their conscience.[92]

Unfortunately, neither the majority nor the minority commented on this submission.

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90. Brief of the United States at 24, In re Certain Softwood Lumber Products from Canada, No. ECC-94–1904-01USA, [hereinafter USTR Brief]; ECC Record, In re Certain Softwood Lumber Products from Canada, No. ECC-94–1904-01USA, at 49 [hereinafter ECC Record].

91. ECC Record, *supra* note 90, at 9.

92. *Id.* at 35.

B. *Majority ECC Opinion: Justices Hart and Morgan*

Similar to the earlier ECC determinations, the Canadian majority interpreted the standard of review narrowly with a high threshold to be met by the complainant. Mr. Justice Hart states:

> The role of a party requesting an extraordinary challenge committee is therefore a very difficult one. In this case, not only must it be shown that 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 or that the panel manifestly exceeded its powers, authority or jurisdiction by failing to apply the appropriate standard of review but that these actions had materially affected the panel's decision and also *threatened the integrity of the binational panel review process*.[93]

The ECC is *once again* held not to be an appellate court reviewing routine allegations of errors of law. The decision is consistent with *Live Swine*'s pronouncement that the ECC is not to "become an appeal forum for every frustrated participant in the binational panel process."[94] The ECC is meant to determine whether the panel acted within its mandate by articulating the standard of review and conscientiously attempting to apply it.

> The Extraordinary Challenge Committee function is to determine whether a panel or panel member violated the three-prong standard of the extraordinary challenge procedure. It is not an appellate court nor is it endowed with that court's extensive jurisdiction. Its jurisdiction is restricted to the correction of an "aberrant panel decision" and any "aberrant behaviour of panelists" that would threaten the integrity of the binational panel system when such action, is unwarranted . . . . In short, as the name implies and as the FTA provisions and procedural rules suggest, the role of the Extraordinary Challenge Committee is to review Binational Panel decisions only in exceptional circumstances and to vacate those decisions where it is established that (a) the Panel or member thereof was guilty of the conduct prescribed in section (I) of Article 1904.13 or that the panel was in breach of sections (II) or (III) and that such actions materially

93. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *24–25.

94. *Live Swine*, 1993 WL 566371, at *3.

> affected the panel's decision and threatens the integrity of the binational panel system.[95]

The extraordinary challenge committee will uphold a binational panel determination if an appellate court could reach the same conclusion as did the binational panel. The committee's role is not to determine whether the law that is applied is absolutely correct or whether the decision is in strict accord with established United States law. The ECC does not decide what weight should be given to any decided case.

> We are not an appellate court and should not substitute our view of the evidentiary record for that of the panel nor should we determine whether the law applied is absolutely correct but merely whether the panel conscientiously attempted to apply the appropriate law *as they understood it*.[96]

This definition of the "conscientious application" standard by Mr. Justice Morgan is unfortunate in the sense that he appears to have defined a subjective standard. He does not provide any analysis that rejects the USTR submission that an objective element is implicit in the standard nor does he explain how the binational panel met this part of the standard, if an objective element indeed exists.

The majority found that the panelists had articulated the proper standard of review and had conscientiously applied it.[97] The majority addressed two issues: firstly, the panel's determination of specificity and, secondly, the requirement that market distortion be found in the particular circumstances of the softwood lumber market in order to find preferentiality.[98] Mr. Justice Hart found no error of law with respect to specificity and no error of law sufficient to constitute a "threat to the integrity of the binational panel process" on the issue of market distortion.[99] He also found that it could not be said that an appellate court could not reach the same conclusion as the binational panel:

> It is apparent that the panelists articulated the proper standard of review and in my opinion the entire panel in its May decision and the majority in its December decision conscientiously ap-

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95. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *92–93.
96. *Id.* at *60–61.
97. *Id.* at *61.
98. *Id.* at *44.
99. *Id.* at *61–62.

plied the appropriate law. There can be differences in view concerning that law but there is nothing in the record which appears to me to be an attempt to avoid the standard of review required by law.[100]

Mr. Justice Hart further wrote,

> On the assumption that this recent pronouncement [*Saarstahl*][101] by the CIT represents the law of the United States it is difficult to say that the panel majority did not apply the appropriate standard of review when reaching its conclusions. Because this is a case of first impression I cannot say that an appellate court in the United States could not reach the same conclusion as the unanimous panel of May 1993 and the majority panel of December 1993. The arguments made on both sides had a solid foundation in court precedents and the amount of deference extended to the agency was in tune with the novelty of the exercise.[102]

In support of the narrowness of the extraordinary challenge committee standard of review, Mr. Justice Hart points to the uniqueness of the exercise in which the United States and Canada were engaged:

> I would like to point out that in reality the replacement of court adjudication by a five member panel of experts in international trade law *may very well reduce the amount of deference to the Department in the future*. When the Court of International Trade reviews the determinations of Commerce it would be expected to bow to the expertise within the Department. When the parties to the FTA agreed to replace that court with this type of

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100. *Id.* at *61.

101. Saarstahl, AG v. United States, Court of International Trade, 858 F. Supp. 187, 193 (1994). *Saarstahl* rejected Commerce's argument that it was not required to look at subsequent events once it had determined that a subsidy had been bestowed:

> Because the countervailable benefit does not survive the arm's length transaction, there is no benefit conferred to the purchaser . . . . The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.

Id.

102. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *42.

> panel they must have realized and intended that a review of the actions of Commerce or of the Canadian agency would be more intense. The panels have been given the right to make a final determination of the matters in dispute between the two countries in a relatively short period of time without any judicial review. Apparently each government felt that this system was more satisfactory than the one which was replaced.[103]

The majority opinion, as seen above, turned on the same principles that represented the underpinnings of the earlier extraordinary challenge committee determinations. No attempt was made to ensure consistency with United States law because that is not the object of the exercise, unless the departure is not only material but also so serious that it *threatens the integrity of the binational panel process*. It is possible for an error of law to threaten the integrity of the process, but presumably not every error of law could, even if such error might be sufficient to justify reversal by the Federal Circuit Court of Appeals in the United States. The "threat to the system" requirement must have meaning within the statute, and it seems unusual that the wording would not, in some manner, create a different appellate process than that in the United States.

In upholding the binational panel determination, the majority recognized that binational panels have a relatively strong role to play and that there are limits to the deference that they have to pay to the administrative agencies. Surprisingly, Mr. Justice Hart boldly asserts in the passage quoted above that the binational panel mechanism "may very well reduce the amount of deference to the Department [of Commerce] in the future."[104] It may have been more accurate to say that the deference to be provided to the agencies was intended to be the same, but the binational panel system will tolerate decisions showing less deference than the Court of International Trade or the Federal Circuit Court of Appeals as long as they do not threaten the integrity of the binational panel system. Any reduction of deference to the administrative agencies is important for Canada. The effectiveness of the binational panels depends upon the degree of intrusiveness they have through the mechanism of review. The binational panel mechanism is powerless if the panels must always defer to the agencies. The *Live Swine* and *Softwood Lumber* binational panel results tend to support the suggestion by Mr. Justice Hart that a mechanism based upon review by five trade

103. *Id.* (emphasis added).

104. *Id.* at *43.

experts acts as an invitation to review and analyze more closely the underlying facts and economic arguments than would be possible before the Court of International Trade.

C. *Minority ECC Opinion: Judge Wilkey*

Judge Wilkey's dissent is a strongly worded condemnation of the binational panel system. It is based upon a rejection of the extraordinary challenge committee standard of review that had been developed and applied by the first two ECC panels and the *Softwood* ECC majority. Judge Wilkey uses the window of opportunity that was provided by the *Live Swine* ECC panel determination to expand the standard of review dramatically. His Honor rejects any suggestion that the ECC was to have a limited jurisdiction intended merely to protect the integrity of the binational panel system that accords deference to the binational panel interpretation of United States trade law.[105] Judge Wilkey asserts that the standard of review articulated by Mr. Justice Hart is flawed when the latter states that the binational panel system ". . . may very well reduce the amount of deference to the Department in the future" and that the appellate standard is whether the panel conscientiously attempted to apply the appropriate law.[106] With respect to the question of deference, Judge Wilkey states:

> One of my colleagues, Justice Hart, has reached the somewhat astonishing conclusion that this whole substitute appellate review system of Panels and ECCs ". . . may very well reduce the amount of deference which *can* be paid to the Department in the future." And that this was "*intended.*" I submit that this totally violates the fundamental agreed concept that the standard of appellate review in each country would remain the same.
>
> This will be news to the Commerce Department, that their agency discretion and deference to their expertise, mandated by United States statutes and time-honored in practice, has been diminished exclusively by the votes of the Canadians on the Panel and on this ECC.
>
> This also is a frank admission that the vigorous denial by the Canadian parties that two different bodies of U.S. law, in both substance and procedure, would inevitably emerge from their proposed standard of appellate review is false. It is clear that a

105. *Id.* at *213–16.
106. *Id.* at *213.

> new body of United States law, fathered by Binational Panels and ECCs under the CFTA (soon NAFTA), will be created, while long established U.S. law will continue to be applied to imports from all other countries.[107]

With respect to the standard of a conscientious attempt to apply the law, Judge Wilkey identifies Mr. Justice Morgan's definition as a purely subjective standard:

> What standard, what test is this? Can the Panel simply say "We tried. We really tried. We may be wrong on the U.S. law but we did apply it as we [mis]understood it"? And expect an Extraordinary Challenge Committee to say "Well done. That's all we can expect"?
>
> This Standard of Review by an ECC could never possibly have been intended by the two parties to the CFTA.[108]

Judge Wilkey then points to the dangers of such a standard:

> The failure of the substitute appellate review system in place of customary United States judicial review of administrative action confronts us with two dangers. The first is that egregiously wrong results will be achieved in individual cases, of which I believe this is a prime example. The second and most threatening to the integrity of the whole system is that a lack of appreciation of the standards of judicial review under U.S. law will create a dangerous divergence in United States trade law as applied to relations with Canada and Mexico, parties to the NAFTA agreements, compared to relations with other nations, such as Japan, South America and the European Union.[109]

1. Binational Panel: A Perfect Substitute

Judge Wilkey submits that the standard of judicial review of an extraordinary challenge committee duplicates the standard of review of the U.S. Court of Appeals for the Federal Circuit when reviewing a Court of International Trade decision but with the slight distinction

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107. *Id.* (emphasis added).
108. *Id.* at *215–16.
109. *Id.* at *216.

that the ECC proceedings are limited to "important breaches."[110] The redefined standard is based upon the proposition that the binational panel system was intended to be a perfect substitute for U.S. administrative review mechanisms, which would apply U.S. law in a similar fashion producing similar results:

> If this substitute appellate system had not been intended to achieve similar results in applying U.S. law, the United States would have never agreed to it. The United States never contemplated that *United States law* would be *changed* by a binational body. If the substitute appellate system does not achieve similar results in applying U.S. law, it may not be long continued.[111]

Much of the dissenting opinion is dedicated to establishing this proposition, as it is fundamental to Judge Wilkey's entire criticism of the majority opinion. Once the proposition is accepted, it forms the basis for the rejection of the majority standard, together with the view that the binational panel system is threatened and that Canadian panelists will never understand the process of administrative review in the United States. Judge Wilkey's first argument in support of the proposition is that the FTA was intended to preserve and apply domestic U.S. law, as evidenced by FTA Article 1902 (1) which states:

> Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.[112]

Secondly, his Honor argues that the binational panel system in the FTA and NAFTA was represented to both governments as applying domestic laws without change:

> [The Free Trade Agreement] was sold to the Congress and to the Parliament by its sponsors in both countries on the representation that the domestic law, substantive and procedural, would

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110. *See id.* at *127–35.

111. *Id.* at *138 (emphasis added).

112. FTA, *supra* note 1, art. 1902(1), at 386. *See Softwood Lumber III*, 1994 FTADP LEXIS 11, at *128.

> continue to apply unchanged ... and that, particularly, the standard of judicial review would be maintained by the two tier (Panel and ECC) appellate substitute for the domestic courts of each country.[113]

He bases this conclusion in part on testimony of the Canadian government's lead counsel, Ms. Jean Anderson, who, at the time the Free Trade Agreement was being reviewed by Congress, was the Chief Counsel for the International Trade Administration of the Commerce Department.[114]

Thirdly, in order to establish the true intent of Congress, Judge Wilkey relies heavily on the comments in the congressional reports with respect to the implementation of NAFTA in November 1993. The Congressional hearings occurred contemporaneously with the *Softwood Lumber III* binational panel review. Thus, Judge Wilkey had to deal with the question of relevance of contemporaneous legislative pronouncements. He establishes the link by relying upon the passage in the *Live Swine* ECC report, which indicated that the wording added to the ECC three prong test in NAFTA "makes explicit what was implicit in the FTA, that if a panel fails to apply the appropriate standard of review, it manifestly exceeds its powers, authority or jurisdiction, the first prong ...."[115] The Senate Report, quoted above, clearly rejects the position of the binational panel and the majority of the extraordinary challenge committee in upholding that a market distortion test is required. The Senate also supports the fundamental premise of Judge Wilkey's argument that the binational panel system is to act as a perfect substitute:

> It is the [Senate] Committee's expectation that, in the future, binational panels will properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the ITC .... [E]xtraor-

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113. *Softwood Lumber III*, 1994 FTADP LEXIS 11, at *135.

114. It has been suggested that Canada's retention of Ms. Anderson was a tactical error, allowing Judge Wilkey to quote the extracts from her testimony in 1988 to discredit the Canadian position in *Softwood Lumber III*. We do not share this view. The briefs that were filed on all three challenges quoted Ms. Anderson's testimony for different purposes. For instance, the USTR quoted Ms. Anderson in 1991 on the *Fresh Pork* Challenge as authority for the proposition that the Challenge procedure was relatively narrow and not meant to redress every error of law. The retention of Ms. Anderson was justified due to the importance of the dispute and her role in the negotiation and "legislative history" of the mechanism.

115. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *135 (quoting *Live Swine*, 1993 WL 566371).

> dinary challenge procedures may be invoked where a panel has manifestly exceeded its powers, authority or jurisdiction by failing, for example, to apply the appropriate standard of review, where such action has materially affected the panel's decision and threatens the integrity of the binational panel process. Because the central tenet of Chapter 19 is *that a panel must operate precisely as would the court it replaces*, the Committee believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.[116]

The House of Representatives Committee on Ways and Means also comments upon the *Softwood Lumber III* binational panel determination of May 6, 1993:

> The decisions of a few binational panels convened under the U.S.-Canada FTA have underscored the importance of the NAFTA's emphasis on the proper application of the judicial standard of review . . . .
>
> . . . One case also involved a question of whether the Department of Commerce must measure the price and output effects of a subsidy before countervailing that subsidy. In this regard, the Administration argued that U.S. law, including the decisions of U.S. courts, provides that once the Department of Commerce has found that a subsidy has been provided, it does not have to show that the subsidy affected the price or output of the product.
>
> In these circumstances, the United States could seek recourse to the extraordinary challenge procedure. If that procedure were not successful in correcting the misapplication of law, Article 1902 describes notification and consultation requirements attendant to each NAFTA party's rights to change or modify its law. It is the Committee's understanding that the Administration would carefully adhere to these procedures in supporting legislation to correct the problem.[117]

In this passage, the Committee on Ways and Means rejects the binational panel determination, indicates that the purpose of the ECC is to correct "the problem," and then provides the clear remedy if the ECC fails to do so: "legislation to correct the problem."

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116. *Id.* at *191–92 (quoting Senate NAFTA Report, *supra* note 59, at 43–44) (emphasis added).

117. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *195–97 (quoting House NAFTA Report, *supra* note 57, at 75).

Fourthly, Judge Wilkey analyzes the threshold, or three prong-test, for extraordinary challenge committee review, in order to establish its similarity to the U.S. appellate process. He argues that the first of these requirements (that the panel manifestly exceeded its powers, authority, or jurisdiction set forth), "is nothing more or less than a shortened version of the two principal elements of the judicial review standard of the [U.S.] Administrative Procedure Act."[118] He does distinguish between the U.S. standard of review and the ECC standard, suggesting that the second and third prongs of the ECC test, "materially affect[ing] a panel's decision" and "threaten[ing] the integrity of the Binational Panel review process," make the ECC standard "somewhat different" from the Court of Appeals for the Federal Circuit standard.[119] He defines the difference in an interesting manner, stating that these two prongs

> . . . smacks [sic] of the standards which the Supreme Court employs in granting certiorari, i.e., the Supreme Court only grants certiorari when there is at stake the interpretation or operation of an important substantive law or an important violation of judicial procedure, such as due process under the criminial law.[120]

Certiorari may be granted where a decision has been rendered by a United States court of appeals or a state court of last resort in conflict with another decision rendered by those courts.[121] It also may be

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118. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *130–31. Judge Wilkey states that the FTA wording has been "directly derived from the Administrative Procedure Act of 1946," which provides:

> The reviewing court shall—
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> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be:
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . .
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> . . .
>
> (E) unsupported by substantial evidence in a case [involving adjudication on the record]

5 U.S.C. § 706 (1994). Note the difference in the standard. The ECC requires that the panel "manifestly exceeded" where (c) above requires only a determination "in excess of statutory jurisdiction."

119. *Softwood Lumber III*, *supra* note 2, 1994 FTAPD LEXIS at *133.

120. *Id.* at *133–34.

121. SUP. CT. R. 10.1; *see* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 29 n.2 (1991).

granted where the guidance of the Supreme Court is needed on an important question of federal law or where the departure from the accepted and usual course calls for supervision of the Supreme Court.[122] It is apparently designed to ensure that federal laws are interpreted in a consistent manner so that conflicts can be resolved. Judge Wilkey asserts that supervision is called for by the ECC because the panel system has strayed so far from the "substitute scheme for judicial review" process that it was meant to be.[123] If Judge Wilkey's certiorari analogy is correct, the extraordinary challenge committee will become a regular court of appeal having as its primary function the prevention of inconsistent interpretations of domestic trade laws among binational panels and between the case law emanating from NAFTA and the case law emanating from the traditional route of appellate review in the United States.

2. ECC: De Novo Review

Judge Wilkey's redefined standard of review duplicates that of the Court of Appeals for the Federal Circuit standard used in reviewing administrative decisions. He accepts the definition of that standard as having been correctly set out in the following cases. In *PPG Industries, Inc. v. United States*, the standard was defined as:

> To determine whether the Court of International Trade correctly applied that standard in reaching its decision, this court must apply anew the statute's express standard of review to the agency's determination. Therefore we must affirm the Court of International Trade unless we conclude that the ITA's determination is not supported by substantial evidence or is otherwise not in accordance with law.[124]

The standard of review was described in *Daewoo Electronics v. International Union* in the following terms:

> On review of this issue, like the trial court, we look to see whether substantial evidence supports the decision of the ITA on this issue.[125]

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122. SUP. CT. R. 10.1(a); *see* NOWAK & ROTUNDA, *supra* note 121, at 29 n.2.

123. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *183.

124. 978 F.2d 1232, 1236 (Fed.Cir. 1992) (citing Atlantic Sugar, Ltd v. United States, 744 F.2d 1556, 1559 (Fed.Cir. 1984) [hereinafter *PPG V*], *quoted in Softwood Lumber III*, 1994 FTADP LEXIS 11, at *162. For the standard of "substantial evidence," see notes 11 and 12 and accompanying text.

125. 6 F.3d 1511, 1520 (Fed.Cir. 1993), *quoted in Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *162–63.

In Judge Wilkey's opinion, the ECC's task is to apply this standard of review:

> We are the second tier of review, as is the Federal Circuit. The Federal Circuit has defined its role very clearly . . . . We look both at the Panel's rationale to see how they did their job, applying U.S. standards of judicial review. . . *and* to how the Commerce Department did its job on Redetermination, applying the same statutory standard as the CIT and the Panel is supposed to, as laid down by the Federal Circuit in *PPG V* and *Daewoo*.[126]

According to Judge Wilkey, the *Softwood Lumber* ECC was required to determine first whether Commerce complied with the binational panel's instructions in its remand on May 6, 1993. The remand directed Commerce to analyze all four factors set forth in *PPG Industries v. United States*[127] when determining the issue of specificity and a market distortion test for preferentiality.[128] If Commerce failed to do so, the *Softwood Lumber* ECC still had to determine whether the binational panel was incorrect in its instructions when it mandated that Commerce undertake these analyses. The basis upon which this determination is made is whether the "methodology and policy [prescribed by the panel was] flatly in excess of 'its powers, authority and jurisdiction' under long established United States standards for review of agency actions."[129] Judge Wilkey states further:

> Our role is not to decide the correct methodology or policy for Commerce, either in the past or in the future. Our role is to decide whether ITA correctly decided this case, following the directions of the Panel on the Remand.[130]

Judge Wilkey further writes,

> When Congress specifies a methodology in a statute, the agency implementing the statute must comply with that methodology, and it is incumbent on the court engaged in administrative review to assure itself that Congress' intentions were fulfilled and to check that the methodology was followed. When

126. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *170 (emphasis added).
127. 928 F.2d 1568.
128. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *170.
129. *Id.* at *171.
130. *Id.*

> Congress does not specify methodology, it is understood that it is instructing and empowering the implementing agency to devise and apply what it deems an appropriate methodology. A court engaged in administrative review may not superimpose its own methodology . . . .[131]

Judge Wilkey reinforces the degree of deference to the Department of Commerce which he characterizes as being the "master of antidumping law."[132] The binational panel must determine whether the administrative agency has contravened express wording in the statute. If it has not, the binational panel must affirm the administrative agency's determination unless the agency has engaged in a totally irrational exercise of discretion.[133]

> In other words, when there is a gap in the statute it is the agency, not a reviewing court, which is authorized by Congress to fill it. In our case, it is the ITA, not the Binational Panel, which is authorized to say how many factors it will consider on specificity, and whether a finding of market distortion is necessary. The statute is silent. The panel majority usurped the function of the ITA.[134]

Judge Wilkey's redefinition of the standard of review is notable because it makes the ECC a regular appellate level with a traditional standard of review that is required to produce the same results as the U.S. appellate system. It is no longer functioning as a purely ad hoc tribunal to determine issues on a case by case basis with its determinations having no status as binding precedents. Whereas the majority standard of review focused upon the binational panel and whether it conscientiously applied the correct standard, the minority standard refocuses the inquiry and requires the ECC to engage in a de novo review of the administrative agency determination.[135] The majority

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131. *Id.* at *179–80.

132. *Id.* at *173 (quoting *Daewoo*, 6 F.3d at 1516).

133. *Id.*

134. *Id.* at *168–69.

135. In responding to the majority finding that an ECC "should not substitute our view of the evidentiary record for that of the panel," Judge Wilkey states:

> Wrong focus. Our task is to find out if the Panel substituted its view of the evidence for that of the ITA, and if so, to set the Panel Decision aside and affirm the agency.

Id. at *215.

standard did not require the ECC to ensure that the binational panel decision was in strict accord with U.S. law or was absolutely correct, while the minority standard is premised on the correct interpretation and application of U.S. law. The majority standard defers to the binational panel with respect to the interpretation and weighing of any decided case, whereas the minority standard requires the ECC itself to interpret and weigh the case law.

3. Application of the Standard

Judge Wilkey finds that both the binational panel and the majority of the extraordinary challenge committee have misapplied the appropriate U.S. standard of review used by the Court of International Trade and the Court of Appeals for the Federal Circuit. The *Softwood Lumber III* binational panel did not defer to the administrative agency in the manner required under U.S. law. Commerce adequately responded to the directions by the binational panel to apply the four factors from *PPG V* and market distortion and, in any event, the directions by the binational panel to consider these issues was "flatly in excess of 'its powers, authority and jurisdiction' under long established United States standards for review of agency actions."[136] His Honor points to the fact that there has been no breach of the statute:

> The statement above, that the Commerce Redetermination findings and conclusions were in conformity with and were in no way violative of the statute and normal administrative procedure, highlights a significant—perhaps decisive—fact in evaluating the Panel majority opinion: there is not a word in any statute which Commerce is accused of violating. There is no administrative action here which is "precluded by statute." To anyone who has had even a casual introduction to United States administrative law, this is a clear signal that only a totally irrational exercise by the agency of the discretion entrusted to it by Congress (extremely broad when trade law is concerned, as the Federal Circuit has held) would justify setting aside its action.[137]

Judge Wilkey finds that Commerce made the case for the choice of its marginal cost theory much stronger than the panel majority had for its

136. *Id.* at *171.
137. *Id.* at *172–73.

rent theory. As a result, he believes that the panel had simply substituted its decision for that of Commerce.

> Basically, the Panel opinion attempts to redo, to reevaluate the evidence, to redetermine the technical issues before the administrative agency. The Panel places its own interpretation and makes its own evaluation of the weight of the evidence. In addition, the Panel insists upon its own methodology, thus violating the principles that where there is a gap in the statute, because the Congress has not prescribed precisely the methodology to be used, this is confided to the Agency's expertise and discretion.[138]

Wilkey further writes,

> Confronted with a comparatively new economic situation to be addressed, it is the ITA of the Commerce Department—not the courts (or the substitute Panel)—to whom Congress has given discretion to formulate policy and methodology adequate to the circumstance .... Unless the Panel majority or my colleagues can show that Commerce acted contrary to a specific provision of the governing statute—and neither has even pretended to assert this—Commerce's Redetermination must prevail.[139]

Judge Wilkey's comments in this regard may go too far. It is apparent that certain panels have shown less than the appropriate deference and have been inclined to substitute their own views for those of the agencies. This is balanced somewhat by the recognition that neither the Court of International Trade nor the Court of Appeals for the Federal Circuit have been completely consistent in this regard. Whenever a reviewing body is involved in determining whether an agency has acted reasonably, it is difficult to draw a fine line between what is a reasonable or unreasonable statutory interpretation in a particular set of circumstances. The concept of what constitutes "substantial evidence on the record" is similarly subject to interpretation. Nevertheless, Judge Wilkey does not mince words in commenting upon the intrinsic merit of the majority of the binational panel:

> In summary, I believe that this Binational Panel Majority opinion may violate more principles of appellate review of agency

138. *Id.* at *174.
139. *Id.* at *175.

action than any opinion by a reviewing body which I have ever read.[140]

4. Threat to the Binational Panel System

Judge Wilkey finds that the misapplication of U.S. law represents a threat to the dispute settlement system. The majority interpretation could not have been intended by the parties to the FTA since it was expressly agreed that U.S. law would be applied.[141] As a result, the credibility of the binational panel system is undercut by the panel determinations amounting to aberrations when compared with U.S. jurisprudence. His Honor submits that the practical effect of this misapplication is that a body of law will emerge for disputes determined pursuant to the FTA/NAFTA dispute settlement provisions, parallel and distinct from that applied to cases that are subject to the regular appellate procedure in the United States.[142]

He also points to the risk of the development of an inconsistent body of law even among cases determined according to the FTA and NAFTA provisions.[143] The most graphic illustration of this risk of inconsistency is evident when comparing the treatment of the sequential factor analysis in *Softwood Lumber III* to that in *Pure Alloy Magnesium from Canada*.[144]

Apart from the issue of inconsistency, Judge Wilkey submits that the *Softwood Lumber III* result is an aberration because of the majority's failure to apply, or even to heed, the precise instructions of Congress, which in itself will discredit the entire binational panel system:

> Nonacceptance by this Extraordinary Challenge Committee of the unusually strong, precise, and specific language of these Reports would produce a dangerous adverse reaction in the Senate and the House, imperilling the whole substitute system of appellate review by the binational panels and the Extraordinary Challenge Committees . . . . The next Extraordinary Challenge Committee will be bound by the Senate and House view of the meaning of the language in NAFTA as part of its concurrent contemporary legislative history. If this ECC does not agree with

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140. *Id.* at *177–78.

141. *See id.* at *220–23.

142. *Id.* at *216.

143. *Id.*

144. In re Pure And Alloy Magnesium From Canada, No. USA-92–1904-03, 1993 FTAPD LEXIS 7 (Binational Panel) (Aug. 16, 1993).

> this interpretation, our decision will be an anomaly, an aberrant decision in the jurisprudence of review of administrative agency action.[145]

Judge Wilkey identifies one problem with the binational panel system as the lack of training of panelists in the principles of U.S. administrative review.[146] The same would be true with respect to panels involving Canadian cases whose majority are U.S. experts in trade law. Judge Wilkey asserts that the problem is that the binational panelists are selected for their expertise in international trade law or economics and without regard to training in the principles of administrative review. Inevitably, the panelists will interfere with the proper functioning of the administrative agencies, will not give them proper deference, and will continue to substitute their determination for that of the agencies.[147]

The propensity of the binational panels and committees to interfere with administrative agencies gives rise to Judge Wilkey's concern that the structure of the two-tier appellate review system has been frustrated as a result of the majority interpretation of the role of the extraordinary challenge committee. The *Softwood Lumber* ECC majority held that committees are required to defer to the binational panel interpretation of the principles of U.S. administrative review, the exact area in which they have no experience or expertise. In a sense, the ECC is held hostage to a panel that is incapable, according to Judge Wilkey, of properly interpreting its role and complying with the fundamental requirement of deference to agency action. This represents a material threat to the dispute settlement system because extraordinary challenge committees, Judge Wilkey would argue, are intended to be the second tier safeguard to ensure that the proper standard of review is applied. The retired judges who constitute the roster from which ECC members are chosen are expected to be experienced in the principles of administrative review and, therefore, in a position to check the enthusiasm of the binational panelists in substituting their decision for that of the administrative agencies. The importance of the subtle changes in the NAFTA implementing legislation requiring the use of Article III judges to the fullest extent practicable to serve as panelists now becomes evident. The United States will try to ensure that the proper standard of review is applied.

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145. *Softwood Lumber III*, 1994 FTAPD 11, at *187–88.

146. *Id.* at *220.

147. *Id.* at *212–20.

Judge Wilkey asserts that the majority has frustrated the extraordinary challenge committee in its role as a safeguard:

> My two colleagues have quoted the *Live Swine* ECC Decision to this effect:
>
> > The ECC should be perceived as a *safety valve* in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process.
>
> Given the obvious errors on the merits in our Binational Panel 3–2 Decision and the unfortunate violations of the Code of Conduct, I fear that my colleagues, by this Decision, have tied down the safety valve.[148]

5. Issue of Nationality

The most disconcerting aspect of Judge Wilkey's dissent is the difficult issue of nationality reflected in the split along national lines at both the binational panel and ECC levels. Judge Wilkey argues that the Canadian binational panelists and ECC majority simply do not have the training in the principles of U.S. administrative review that would qualify them to participate in the review of U.S. agency determinations:

> The point is that since an Extraordinary Challenge Committee replaces in the hierarchy a Court of Appeals composed of generalists on substantive matters but experts on judicial review of administrative agency action, and since it was specified that an ECC should be composed of former judges, there is no way for Canadian members of these ECCs to have become immersed in the standards of judicial review of agency action in the United States. Canadian administrative law is different. Canadian review standards are different, and Canadian members necessarily do not have the same familiarity with U.S. standards of review that U.S. members do. And yet, it is U.S. law that must be applied here.[149]

Judge Wilkey's criticism of the lack of understanding by Canadians of the U.S. legal principles is replete throughout the dissent. For instance,

148. *Id.* at *223.

149. *Id.* at *209–10.

Canadians do not understand the role of legislative history in the United States,[150] do not understand the role of concurrent pronouncements by Congress,[151] do not understand the principles upon which U.S. precedents should be weighed,[152] and completely misunderstand the degree of deference that must be accorded to the administrative agencies under U.S. law.[153] Judge Wilkey concludes that the Canadians involved on the binational panel and the extraordinary challenge committee simply do not understand the "principles of judicial review of administrative agency action under United States law."[154]

However, Judge Wilkey feels compelled to comment that he does not believe that the Canadian extraordinary challenge committee members were biased:

> I do not think that any Canadian members of this or previous ECCs have arrived with any particular animosity against the U.S. Commerce Department, and I certainly do not suggest in

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150. "Putting it frankly, bluntly and perhaps impolitely, the basic problem on accepting these Reports in this case is that the English Courts accept no legislative history at all and the Canadians follow closely in their footsteps." *Id.* at *181.

151. Judge Wilkey states:

> My view is that to ignore the clearly expressed views of seventy-five members of the United States Senate and the House Ways and Means Committee (speaking for eight other Committees), expressed at the time it was repassing virtually the identical language of the CFTA in the NAFTA legislation, is not only to misinterpret United States law but to imperil the whole binational review scheme. My colleagues treat the Senate and House views as of no consequence . . . .
>
> My position is that *any* United States court would feel *compelled* to accept the views of the seventy-five members of the Senate Joint Committees and the House Ways and Means Committee as they spoke to the language of both CFTA and NAFTA. Hence, my colleagues refusal to accept this legislative history may be good Canadian law but it is violative of their obligation to apply United States law in this case. To ignore these two extraordinarily powerful Congressional Reports may not be "unjudicial" by Canadian Standards, but it may be highly injudicious.

Id. at *204–05 (emphasis added).

152. Indeed, the entire second Annex to Judge Wilkey's determination is a detailed analysis as to how the Canadian panelists, counsel and ECC members misunderstood and misapplied U.S. case law with respect to *Saarstahl, PPG,* and other cases. *Id.* Annex 2, at *247.

153. This is most clearly seen in Judge Wilkey's discussion of Justice Hart's "astonishing conclusion that this whole substitute appellate review system of Panels and ECCs '. . . may very well reduce the amount of deference which *can* be paid to the Department in the future.' And, that this was '*intended.*' " *Id.* at *214.

154. *Id.* at *211.

> the slightest any bad faith on the part of my Canadian colleagues—indeed, they have been most assiduous in striving to understand and discuss rationally U.S. law—but it is a fact that out of six votes cast on the three ECC Committees, not one of the Canadian votes has been in support of a United States Commerce Department decision. The same has been true at the Panel level in the three cases which have gone to Extraordinary Challenge Committees. And in the instant case, the total vote to sustain the Department of Commerce on the issues which are in litigation here has been two Americans on the Panel and the one American on the Committee.[155]

Nevertheless, Judge Wilkey attributes the failure of the binational panel system to the issue of nationality in terms that bring into question the integrity of all of the Canadian panelists and committee members:

> On the question as to whether United States law was accurately applied by the Panel majority, the delicate matter of the split along U.S./Canadian lines assumes some importance. The two Americans in very strong language voted to sustain the Commerce Department's *Redetermination* as being in accordance with United States law, particularly after the Federal Circuit in Daewoo illuminated (and mandated) their path; *the three Canadians purported not to understand the clear (to me) application of Daewoo to this case*: Question: if you were a corporate chief executive seeking an opinion on United States law on which to rely, would you prefer to receive it from three Canadian or two American lawyers. And if you did get it from a foreign law firm,what would your board of directors say? This illustrates that the problem here is *not* one of good faith, but of competence and experience in the jurisprudence of a particular jurisdiction.[156]

By the use of the words "purported not to understand," Judge Wilkey challenges the integrity of all the Canadians who were involved on both levels of review because the panel majority interpretation of the *Daewoo* decision was accepted by Mr. Justice Hart,[157] by implication, and by Mr. Justice Morgan explicitly.[158]

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155. *Id.* at *210–11.

156. *Id.*

157. *Id.* at *37–42, *54–55.

158. *Id.* at *97–100.

Mr. Justice Hart responded to both the issue of nationality and Judge Wilkey's argument that the binational panel and ECC did not properly defer to Commerce:

> It is unfortunate that the decision in this matter has not been unanimous because there is always a chance that it will be interpreted as a decision based on national interest when the two Canadian members of the Committee form a majority and the American member files a dissent. We are however all judges of long experience and since the issue before us is one of first impression a sincere difference of opinion should not be unexpected.
>
> I have had the opportunity to read the dissenting opinion of my American colleague and it presents very well his concerns. He worries that not enough deference is paid to the Commerce Department as he believes it must be under United States law. In my opinion, however, he is demanding almost absolute deference leaving almost no breathing space for a reviewing tribunal. If this is the correct law to apply then there is no need for a binational panel under the FTA.[159]

If one accepts the proposition by Judge Wilkey that deference must be paid by the panels and the committees to the Department of Commerce, then what was the point of substituting the panel system for the Canadian and U.S. normal appellate tribunals? Perhaps this was done to placate Canadian public opinion opposed to the FTA. If, on the other hand, the panels and committees are not to be hemmed in by Commerce decisions, then Canada would have overcome the perception that U.S. trade remedies are enforced by Commerce subject to political pressure. Canadian argument on the challenge identified some of the reasons for Canada's negotiation of the panel mechanism. These included the fact that five experts would hear the dispute instead of a single judge of the Court of International Trade, who is shackled by a heavy docket, and that the procedure would be quicker.

V. IS THE WILKEY INDICTMENT OF THE EXTRAORDINARY CHALLENGE COMMITTEE PROCEDURE JUSTIFIED?

Judge Wilkey's dissenting opinion is important, due to the response it has fueled in the United States but also due to its timing when the

159. *Id.* at *80.

WTO implementing legislation was before Congress. The question arises whether his indictment of the binational panel process, particularly the extraordinary challenge committee procedure, is warranted and fair.

His Honor has placed emphasis on the degree of deference required pursuant to U.S. law regarding judicial review of agency determinations and also upon the hitherto subtle changes in NAFTA that provide a basis for his argument. The modifications to the ECC standard of review[160] confirm that a failure by the binational panel to apply the appropriate standard of review may be sufficient to overturn the panel determination and that the ECC is required to undertake an examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision. NAFTA also has provided a period of ninety days in which the ECC is to undertake this analysis. This is three times the period that had been allowed to the FTA ECC mechanism. These changes would not be necessary if the ECC were simply to determine whether misconduct had occurred equivalent to bribery of a panelist. The *Live Swine* extraordinary challenge committee specifically recognized that the NAFTA modifications created an opportunity for the ECCs to become more interventionist. The Congressional reports confirm the intention behind these modifications. They must be taken seriously, irrespective of whether Judge Wilkey has been somewhat adventurous in relying upon congressional pronouncements as to the meaning of legislation made in the midst of a binational panel review. The intention of the United States to use Article III judges to influence the manner in which the U.S. standard of review is applied also confirms U.S. resolve to control better the binational panel mechanism and the application of the U.S. standard of judicial review.

Judge Wilkey's analysis regarding the interpretation of the ECC standard of review is based upon the modifications to the relevant wording in NAFTA. It appears that the ECC standard of review has been broadened. However, the ECC standard continues to require a high threshold. Thus, a finding that "a panel manifestly exceeded its powers, authority or jurisdiction . . . for example by failing to apply the appropriate standard of review" must still be accompanied by a finding that the failure has "materially affected the panel's decision and threatens the integrity of the binational panel review process." This requirement does distinguish the extraordinary challenge standard from a regular appellate standard of review. It appears to be different from the circumstances in which certiorari will be granted by the U.S. Supreme Court.

160. *See supra* Part II.

The extraordinary challenge committees in the future will have to resolve the tension in the wording and the degree to which the amendments give them a more intrusive right to review binational panel determinations and move it closer to a regular appellate standard.

Judge Wilkey's indictment of the mechanism goes far beyond the arguments made before the ECC, thereby discrediting the most controversial aspects of the dissent. He does so seemingly in order to supply the missing element that the alleged errors of law represent a threat to the binational panel system. He criticizes the committee majority for three failures:

> Regrettably, we have the action of this ECC and the two opinions of my colleagues explaining that action. To my mind those opinions reveal another failure to appreciate and apply United States law. Specifically:
>
> 1. The failure to appreciate that the two-tier substitute system of review is designed to replace the U.S. judicial review system manned by judges holding life tenure . . . . And that an ECC manned by judges dispossessed of all power is no substitute at all . . . .
> 2. The failure to apply the Federal Circuit's highly relevant and therefore mandatory holding in *Daewoo* to this case . . . .
> 3. The failure to consider all the legislative history, the highly specific and relevant Reports of the Senate and House extraordinary committees, dealing with the legislation in identical language of *both* 1988 and 1993. I have read that *Canadian* Courts would not consider this, but I *know* that United States court would feel *compelled* to weigh the words of both these Committee Reports.
>
> Thus is United States law ignored by the majority decision of this ECC.[161]

A review of the briefs filed by the USTR and the Coalition and of the transcripts from the two days of hearings indicates that only one reference can be found to the proposition that the binational panel system was meant to "operate precisely as would the court it replaces," and it is included in the Coalition's brief.[162] No oral argument was made

161. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *218–219.

162. The systematic nature of the Majority's rewrite of U.S. law violates the FTA's directive that the binational panels are not to make their own law. "Because the central tenet of Chapter 19

in respect of this proposition, with even Counsel for the Coalition stating that an ECC is not an appellate court and that its job is slightly different because the Court of Appeals for the Federal Circuit determines whether the Commerce Department did its job properly whereas the ECC's focus is upon the binational panel.[163] The USTR and Coalition accepted *Fresh Pork* and *Live Swine* and the "conscientious application" standard that had been set out in those precedents. Judge Wilkey is wholly on his own when he sets out his detailed comparison between the Court of Appeals for the Federal Circuit and the extraordinary challenge committee that he uses to criticize the majority for not "appreciating the two tier system" and applying the same standard of review as that of the Court of Appeals for the Federal Circuit. The concept that the distinguishing characteristic of a "threat to the binational panel system" is equivalent to certiorari was never mentioned in argument. At no time did Judge Wilkey put the question to Canadian Counsel, notwithstanding the fact that the Canadian Brief squarely addressed the issue that the ordinary grounds for an appeal to the Federal Circuit were beyond the jurisdiction of the Committee.[164] He

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is that a panel must operate precisely as would the court it replaces, the Committee . . . believes that the misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process." The Majority's decision creates conflicting law for subsidized Canadian imports and subsidized imports from other countries. Indeed, the binational panels themselves have issued conflicting opinions with respect to Canadian imports. Having negotiated to preserve its own laws, the United States cannot accept a back-door attempt to circumvent them. Brief in Support of Reversing the Binational Panel's Majority Decision on Remand at 81–82, In Re Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01USA.

163. The ECC Record provides a window into this debate:

> CHAIRMAN WILKEY: [T]he question, like the question before the Appellate Court in this city, would be did they conscientiously apply the law?
>
> MR. RAGOSTA: I agree with that, Judge Wilkey, although I'd make one distinction, which is this Committee does not—it isn't an Appellate Court. In an Appellate Court, the Federal Circuit actually asked the question of whether the Commerce Department did its job, and it looks at the Court of International Trade. Your job is slightly different. It's very close, but it's different, and you've correctly stated it.
>
> Your job is to determine whether the Panel [did its job]. You are the third of the process, you are to control the second part of the process. Was the Panel doing its job?

ECC Record, *supra* note 90, at 48–49.

164. Count Two of the Request for the Challenge "asserts that the Panel misread U.S. cases, statutes and regulations, and thereby committed legal error in ruling that market distortion is an element of a countervailable subsidy that may not be irrebuttably presumed . . . . This offers no more than the ordinary grounds for an appeal to the Federal Circuit, and is beyond the jurisdiction of this Committee." Joint Brief in Opposition to the Request for an Extraordinary Challenge Committee at 42, In re Certain Softwood Lumber Products from Canada, N. ECC-94-1904-01USA.

then criticized the Canadian Committee members for not accepting and applying his advocacy of the Federal Circuit/certiorari analogy even though it was unsupported by the arguments before the Committee. Judge Wilkey's dissent went well beyond the arguments made, and there is questionable foundation for his criticism of the Canadian Committee in this regard.

It is clear that Canadian Counsel and trade officials would have responded to Judge Wilkey's interpretation of the function and role of the binational dispute settlement mechansim had they been given the opportunity to do so. Canadian trade officials criticize Judge Wilkey's Federal Circuit/certiorari analysis on the ground that the binational panel is designed to replace both the Court of International Trade and the Federal Circuit Court of Appeals. The extraordinary challenge committee, on the other hand, is intended to be a completely new, innovative procedure limited to exceptional circumstances when the binational panel has gone astray.

The third criticism relating to legislative history also was not argued before the committee. The USTR and the Coalition did cite the congressional reports that were released in November 1993 but made no argument that they were important as legislative history and offered no precedents or academic authorities to support the view that they should be accorded weight even though they represented contemporaneous statements. The only argument made with respect to the weight to be accorded to the reports was by Canadian Counsel, who indicated that the reference to the reports confirmed the desperation of the applicants.[165] Judge Wilkey did not respond to Counsel's submission, giving no opportunity for a response to the potential importance of the reports.

With respect to the requirement of a "threat to the integrity of the process," the role that Judge Wilkey gives to nationality is also a factor that was not advanced in either written or oral argument. The USTR argued only that the serious threat is such an important element that the failure to apply the standard is sufficient:

> The Panel's decision constitutes a serious threat to the integrity of the binational panel process. As noted above, application of the standard of the review is the bedrock element of the deal struck between the Parties establishing the binational panel

165. ECC Record, *supra* note 90, at 102. Although it is appropriate and proper for a court to refer to legislative history contemporaneous with the passage of a law, *ex post facto* observations by a subsequent Congress may represent an attempt to "rewrite" history and thus have little if any probative value in any effort to correctly discern the intent of the Congress that passed the law in question.

system. Thus, a panel's failure to put this standard into practice is, *per se*, an aberrant decision that constitutes a threat to that process. Three circumstances of this particular proceeding magnify this threat to the process to an intolerable level.

First, as described above, the manner by which the Panel failed to apply the standard of review caused it to reach findings that, in essence, created new substantive countervailing duty law and new obligations on the investigating authority. Like the standard of review, each Party's retention of its respective substantive law was fundamental to the FTA deal.

Second, the Panel's failure occurred on issues that are central to countervailing duty law in the United States. Specificity is an issue that must be resolved in virtually every single CVD investigation. Similarly, the issue of whether the statute requires Commerce to find that a program has an output or price effect goes to the core of the CVD law. Contrary to the suggestion of the Majority that it was finding only a narrow exception to the normal subsidy rules in the natural resource context, the Panel's conclusion lends itself to application to nearly every CVD investigation. It will always be possible to raise a claim (on its face not frivolous) that the particular program at issue has no significant price or output effects—indeed, as described above Commerce has faced many such claims already. According to the majority's reasoning, Commerce would be required to examine and make findings on such claims, contrary to what is contained in U.S. law.

Third, in terms of the amount of cross-border trade in the product at issue, the case is many times larger than any previous case reviewed by an FTA binational panel. Not surprisingly, the case is by far the most closely watched binational panel proceeding ever. The Parties have recently carried over and extended the FTA binational panel process to the NAFTA. If a Panel's manifest failures are permitted to stand in a case such as this, it cannot but seriously weaken the prospects for the functioning of that process in the future.[166]

This is the entire written argument on the issue of a "threat to the integrity of the process." The brief of the Coalition is somewhat more developed, arguing that the decision creates conflicting law for subsidized Canadian imports and subsidized imports from other countries.

166. USTR Brief, *supra* note 90, at 112–13.

There was not even a hint from Judge Wilkey during the oral argument that he considered Canadians incapable of comprehending U.S. principles of appellate review of agency action. His comments regarding the supposed national bias of Canadian panelists is disingenuous. For instance, he argues that "it is a fact that out of the six votes cast on the three ECC Committees, not one of the Canadian votes has been in support of a United States Commerce Department decision."[167] He forgets to mention that the two U.S. judges who sat on the *Live Swine* and *Fresh Pork* challenges concurred in the result and the narrow definition of the role of the challenge process. A review of the binational panels that have been convened to date to review final determinations of the Department of Commerce or the International Trade Agency confirms that there has been a remarkable degree of unanimity in the panel results.[168] *Softwood Lumber III* is the only decision that has split along national lines at either the binational panel or ECC levels. Canadian trade officials argue that a trend of one is no trend at all and that Judge Wilkey's dissent must be viewed as an aberration, at least for now.[169]

Judge Wilkey's comments regarding nationality are essential to his finding that a threat exists to the integrity of the binational panel process. Canadian Counsel argued that the alleged divergence between the law regarding Canadian imports and other imports could not represent a threat. Firstly, the binational panel decisions have no force as precedents and, secondly, any divergence would be transitory because

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167. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *211.

168. A review of the composition and decisions of some 57 FTA panels to date does not appear to support Judge Wilkey. Of the 19 FTA panel cases involving Canadian determinations, 14 have been completed. Of those 14, 6 were terminated by the parties, and 6 of the 8 panels that issued rulings made unanimous decisions. Half of the 6 unanimous decisions were by panels with a Canadian majority composition, and half were by panels with an U.S. majority composition. The Canadian majority unanimous decisions resulted in 2 remands to the Canadian agency and one affirmation of a Canadian decision, and so did the 3 U.S. majority unanimous decisions. Of 32 FTA panel cases involving U.S. determinations, 23 have been completed. Of those, 7 were terminated by the parties, and 12 of the 16 panel decisions that resulted were unanimous. Half of the 12 unanimous decisions were by Canadian majority panels, and the other half were by U.S. majority panels. All of the Canadian majority unanimous decisions resulted in remands to the domestic U.S. agency, while 3 of the U.S. majority unanimous panels resulted in remands and 3 others resulted in affirmations of the original decision. Of the 16 completed panel rulings on U.S. determinations, 13 remanded the original determination to the U.S. agency, yet 10 of the 13 remands were unanimous.

169. Comments of Debra Steger, General Counsel, Canadian Import Trade Tribunal, Trade War and Peace: Panels and Committees under the FTA and NAFTA, Canadian Bar Association of Ontario, (Oct. 19, 1994) (Chateau Laurier Hotel, Ottawa).

the binational panels would be required to follow any future Federal Circuit Court of Appeals precedent inconsistent with the binational panel decisions. Judge Wilkey falls back on the issue of nationality to reject the argument:

> That assumes that the future Binational Panels and ECCs do a more accurate job in interpreting U.S. law than has been done in this case. With an increasing body of erroneous CFTA or NAFTA law, correction is increasingly unlikely to happen in the substitute system. It is only if we can get out of the system that a correction will be likely to be made.[170]

It seems to be an astounding statement to say that Canadians will never understand and correctly apply U.S. law. According to this view, no correcting mechanism exists, and the binational panel system should be rejected.[171] The ECC, however, was never designed to eliminate inconsistencies between panel determinations, such inconsistencies being somewhat refreshing in light of the straight-jacketed approach of a Court of International Trade that is extremely reluctant to overturn an earlier decision of another Court of International Trade judge. In *Softwood Lumber III*, the issue concerning the Circuit Court decision in *Daewoo* was not whether it bound the panel but rather what was decided by the court.

Judge Wilkey's comments regarding nationality appear to represent the real threat to the integrity of the binational panel process. Also, it is difficult to imagine that the U.S. panelists were not aware of the congressional reports that had just been released, even though, surprisingly, no mention was made of them in the December 1993 remand, at which time the panelists reversed their position. The U.S. panel minority cited the *Daewoo* precedent as the reason for the reversal of its position, but it is generally conceded that *Daewoo* simply restated U.S. principles of appellate review. During the oral argument, Judge Wilkey suggested that *Daewoo* "woke up" the U.S. minority on the panel. With respect to the failure of the U.S. minority to mention the congressional reports, he states in the dissenting opinion that:

> Apparently these Reports were not called to the attention of the Panel, they are not discussed, although they certainly would

170. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *218.

171. In Canada, Supreme Court judges decide cases involving the civil law or the common law. By analogy, a panelist could easily school herself or himself in the legal system of another country.

> have had an impact on the Panel and been mentioned at least by the dissenters had the Panel become aware of them.[172]

We are of the opinion that what woke up the U.S. minority were the congressional reports, not *Daewoo*. It is hard to believe that two experts in international trade law would not have followed the debate regarding the implementation of the NAFTA, or that the Coalition would not have made the minority aware of these congressional reports. The failure to refer to them in the December remand may be due to the minority's uncertainty with respect to the status of contemporaneous legal pronouncements. No attempt was made by the USTR or the Coalition before the ECC to give weight to the reports, although they did cite them. It is only Judge Wilkey who boldly pronounces that they must be given significant weight and does the legal research upon which he attempts to prove his point. It is unfortunate that Canadian Counsel had no opportunity to respond to the weight to be accorded to these reports. As a result, *Daewoo* may not have been as important a factor as the influence upon the minority of congressional reports expressly telling the U.S. panelists that they were wrong. In fact, the inclusion of Canadians on the panel may have acted as an important safeguard for the process.

VI. LIKELY RESPONSE IN THE UNITED STATES

The most important response has been the inclusion in the WTO implementing legislation, dated September 26, 1994, of specific provisions amending U.S. law to reflect the U.S. minority's interpretation of the appropriate trade law. With respect to specificity, the amendments reject the requirement asserted by the Canadian majority in *Softwood Lumber III* that all four factors be considered before a positive finding can be made. The Statement on Administrative Action declares that:

> Section 771(5A)(D)(iii) lists the factors to be examined with respect to *de facto* specificity. These factors, found in Article 2.1(c) of the Subsidies Agreement, and corresponding to the factors analyzed by Commerce under existing practice, are: (1) the number of enterprises, industries or groups thereof which actually use a subsidy; (2) predominant use of a subsidy by an enterprise, industry, or group; (3) the receipt of disproportionately large amounts of a subsidy by an enterprise, industry, or

172. *Softwood Lumber III*, 1994 FTAPD LEXIS 11, at *181.

group; and (4) the manner in which the authority providing a subsidy had exercised discretion in its decision to grant the subsidy.

The Administration intends that Commerce seek and consider information relevant to all of these factors. However, given the purpose of the specificity test as a screening mechanism, the weight accorded to particular factors will vary from case to case. For example, where the number of enterprises or industries using a subsidy is not large, the first factor alone would justify a finding of specificity, because the absurd results envisioned by *Carlisle* would not be threatened if specificity were found. On the other hand, where the number of users of a subsidy is very large, the predominant use and disproportionality factors would have to be assessed. Because the weight accorded to the individual *de facto* specificity factors is likely to differ from case to case, clause (iii) makes clear that Commerce shall find *de facto* specificity *if one or more of the factors exist*.[173]

The Statement on Administrative Action also deals with the issue of preferentiality and the Canadian insistence of the majority upon "market distortion" being found:

Section 771(5)(C) provides that in determining whether a subsidy exists, Commerce is not required to consider the effect of the subsidy. In *Certain Softwood Lumber Products from Canada* USA-92–1904-02, a three-member majority ruled that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation. In so ruling, the majority misinterpreted the holding in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), which was limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries. Although this panel decision would not be binding precedent in future cases, *the Administration wants to make clear its view that the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under its investigation or review*.[174]

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173. United States Statement of Administrative Action at 261, Uruguay Round Agreements Act, Pub L. No. 103–465 (Dec. 8, 1994) (emphasis added) (on file with *Law and Policy in International Business*). In Canada, see *World Trade Organization Implementation Act*, Bill C 57, as adopted by the House of Commons on Nov. 30, 1994, S.C. 1994, ch.47, amending s.2(7.4) of *Special Import Measures Act*, R.S.C. 1985 ch. s-15, as to the same effect.

174. *Id.* at 256 (emphasis added).

This indicates one major weakness of the binational panel mechanism in that there is no effective restriction upon the legislative amendments directed at overturning binational panel determinations. Of course, an amendment itself will not overturn a binational panel. However, the nature of antidumping and countervailing duty law is such that the complaints are commenced in respect of a particular defined period of time. The Coalition can rely on the simple expedient of filing a complaint regarding a subsequent period and hope that the result is overturned by legislative amendments or possibly by the occurrence of a U.S. majority on either the binational panel or the ECC.

Both the FTA and NAFTA include a mechanism intended to restrict the adoption of legislative amendments having the effect of overturning binational panel determinations, but it may not be effective. It will be instructive to see if the present amendments will be submitted to this mechanism. Article 1902(2) of the FTA and NAFTA provides that each party reserves the right to change or modify its laws upon notification and consultation.[175] Should the consultations not prove successful, a review mechanism was included in Article 1903 that allows the convening of a panel for a declaratory opinion as to whether, *inter alia*:

> [S]uch amendment has the function and effect of overturning a prior decision of a panel made pursuant to [the Free Trade Agreement dispute settlement system] and does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of Article 1902.[176]

The panel report is not binding and only requires the parties to begin consultations immediately to achieve a "mutually satisfactory solution" to the matter within ninety days of the issuance of the final declaratory opinion.[177] The following remedy is available if the responding party proceeds to make an amendment against the recommendation of the panel:

> If remedial legislation is not enacted within nine months from the end of the 90-day consultation period referred to in subparagraph (a) and no other agreement has been reached, the Party that requested the panel may:
>
> i) take comparable legislative or equivalent executive action; or

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175. *See* FTA, *supra* note 1, art. 1902(2), at 386; NAFTA, *supra* note 18, art. 1902(2), at 682.

176. FTA, *supra* note 1, art. 1903(1)(b), at 386; *see also* NAFTA, *supra* note 18, art. 1903(1)(b), at 682.

177. FTA, *supra* note 1, art. 1903(3)(a), at 387; NAFTA, *supra* note 18, art. 1903(3)(a), at 682.

> ii) terminate the agreement upon 60-day written notice to the other party.[178]

These provisions have been considered to represent a significant achievement that amounts to a potential brake on increases in protectionism.

> Such a review of statutory amendments is particulary important as it will reduce the probability that general increases in protectionism will affect the two countries. In other words, if either country wishes to increase its level of protectionism, its legislation will be held up until the panel's decision. Hence, those drafting legislation will be more likely to include exemptions for the other member of the FTA. Further, unless the other country is the particular target for the amendments, an exemption will more or less automatically be made because the entire FTA could be threatened.[179]

However, it seems to us that the argument that legislators in the United States would be concerned with reciprocal legislative action being taken or that the FTA or NAFTA would be put at risk is not persuasive. The United States would probably welcome Canadian action amending the *Special Import Measures Act*[180] along the lines of the U.S. legislation. The FTA/NAFTA legislative review mechanism, therefore, subjects trade legislation to scrutiny but does not effectively control it. Any amendment to trade legislation can be made, even if it has the effect of overturning a prior binational panel decision under Chapter 19 of the FTA or NAFTA. Therefore, there is no question that the United States can respond effectively to the *Softwood Lumber III* determination.

VII. REFORM OF THE NAFTA DISPUTE SETTLEMENT MECHANISM: OPTIONS

A. *General Remarks*

Should the present mechanism be eliminated or reformed in the light of Judge Wilkey's dissenting opinion so soon after NAFTA was enacted? The *Softwood Lumber III* dispute highlights the awkward compromise that is the FTA/NAFTA dispute settlement system. There is a need to

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178. FTA, *supra* note 1, art. 1903(3)(b), at 387; *see also* NAFTA, *supra* note 18, art. 1903(3)(b), at 682–83.

179. A.M. Apuzzo & W.A. Kerr, *International Arbitration: The Dispute Settlement Procedures Chosen for the Canada-U.S. Free Trade Agreement*, 5 J. INT'L ARB. 7, 11 (1988).

180. SIMA, 1984, ch.25, s.1, as amended; *see also* World Trade Organization Implementation Act, *supra* note 173 (adding s.2(7.4) to SIMA).

control the exercise of discretion by the administrative agencies under the antidumping and countervailing duty laws, regulations, and administrative practices in Canada and in the United States. So far it has proven impossible to negotiate a new set of substantive rules that would place the mechanism on a more rational footing. The FTA binational panel system was a political expedient, ostensibly meant to respond to the Canadian perception that the Court of International Trade and the U.S. Court of Appeals for the Federal Circuit have been too deferential to the administrative agencies. Judge Wilkey would argue that the deference shown to the administrative agencies reflects the proper application of U.S. law. Actually, one aspect of the mechanism chosen was to allow a greater concentration of trade expertise to scrutinize final administrative determinations at a faster pace and not to rewrite or redefine U.S. or Canadian trade laws.

The dispute settlement system included in NAFTA cannot control effectively the exercise of discretion by U.S. administrative agencies due to the narrow standard of judicial review to be applied. Therefore, it is difficult to ensure that domestic trade laws are applied in a neutral fashion. The weakness of the NAFTA mechanism also results from the fact that Congress can overturn a panel result, even in circumstances in which the binational panel was correct in its application of both the standard of review and U.S. trade law. The limits of the mechanism are that (a) Congress can simply change the law; and (b) the domestic industry in the United States can file sequential complaints, either before or after the amendment has passed through Congress. And there is nothing that Canada can do except duplicate the amendment, thereby "stepping up" its own joint trade law system to a new level of abstraction. One important reform would be to introduce more effective restrictions to the NAFTA mechanism crafted to restrict legislative or regulatory amendments designed specifically to overturn binational panel determinations.

Canadians should be careful in asserting that the system is just fine as it is, because there may be an U.S. panel majority in the next softwood dispute, and Canadians may need a more powerful ECC to have at least an opportunity to reverse the result. Canada has argued that the binational panel system need not promote consistency, as it is only an ad hoc arbitral process that is meant to get a result quickly and is not binding in respect of any other dispute. This does not seem to be an adequate answer. Inconsistency between panel determinations brings the entire process into disrepute. Canada's goal in devising a dispute settlement system should be to influence administrative practices. Canada can only do so if the system has some measure of credibility with

the administrative agencies. This may be an elusive goal with respect to the relationship between the binational panels and the Department of Commerce, as evidenced by the *Live Swine* and *Softwood Lumber III* binational panels. Strengthening the powers of review of the extraordinary challenge committees is one way of addressing this issue. The current perception in the United States is that there is no effective review of binational panel determinations. The system might have more credibility if the second tier conducted a more thorough review and came to the same conclusion on the merits of the dispute.

B. *Change In Trade Laws*

How should the dispute settlement system be changed? The best way would be to change the economically irrational trade laws upon which the whole superstructure of trade remedies and agency practices have been built. Antidumping laws, for instance, should be replaced with a harmonized regime of predatory pricing laws. The quid pro quo for fundamental reform would be stringent limits placed upon Canada's ability to provide subsidies to domestic industries. This is made clear in the Senate report on the implementation of NAFTA:

> Section 406 [of the implementing legislation] sets forth the negotiating objectives of the United States with respect to subsidies, for any future trade negotiations with a NAFTA country:
>
> (1) achievement of increased discipline on domestic subsidies provided by a foreign government, including the provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations; the provision of goods or services at preferential rates; the grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry; and the assumption of any costs or expenses of manufacture, production, or distribution;
>
> (2) achievement of increased discipline on export subsidies provided by a foreign government, particularly with respect to agricultural products; and
>
> (3) maintenance of effective remedies against subsidized imports, including, where appropriate, countervailing duties.
>
> In the Committee's view, the more detailed negotiating objectives spelled out in section 406 reflect the importance to both the

> U.S. Government and U.S. industries of achieving more effective rules and disciplines concerning the use of government subsidies. At the same time, they build upon the concerns set out in section 409(a) of the CFTA Act with respect to obtaining greater disciplines on Canadian subsidy programs that adversely affect U.S. industries which directly compete with subsidized imports .... The Committee anticipates close consultation with the Administration with respect to any future subsidy negotiations conducted pursuant to Article 1907.[181]

It is questionable whether Canada wants reform at the price of freedom to use subsidies to address issues and values that are fundamental to Canada. The Canadian government pursues many objectives that are not necessarily rational from an economic standpoint. One example is provided by the Canadian Internal Trade Agreement, signed on July 18, 1994, in which the importance of regional development is stressed and a number of exceptions are built into the agreement to allow the federal and provincial governments to pursue this goal.[182] Of course, narrow

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181. Senate NAFTA Report, *supra* note 59, at 39–40.

182. Agreement on Internal Trade (Canada), July 18, 1994 (on file with *Law and Policy in International Business*). The Agreement provides in article 101:

> It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of goods, services, persons and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

Id. art. 101. However, this objective is immediately qualified in article 102(4) with respect to regional development: "In applying the principles set out in paragraph 3, Parties recognize: . . . (c) the need for exceptions required to meet regional development objectives in Canada . . . ." *Id.* art. 102(4).

Article 1802 provides:

> (1) The Parties recognize that measures adopted or maintained by the Federal Government or any other Party which are part of a general framework of regional economic development can play an important role in encouraging long-term job creation, economic growth, industrial competitiveness or in reducing economic disparities.
>
> (2) Subject to paragraphs 3 through 7, the provisions of Part III [General Rules] and Part IV [Specific Rules on inter alia, procurement, investment, labor mobility, environmental protection] of this Agreement do not apply to a measure adopted or maintained by the Federal Government or any other

exceptions have been provided in the WTO Agreement on Subsidies allowing regional development programs, but a review of the Canadian Internal Trade Agreement between the provinces and the federal government indicates that Canada has an interest in regional development subsidies that may go beyond the limits envisioned by the WTO. As a result, Canada wants reform but may not be willing to pay the price for it. Both Canada and the United States may have an interest in maintaining the current system of trade laws because they are disguised protectionist devices to preserve the status quo. The trade law regime provides a safety valve in the United States to channel protectionist sentiments in Congress in a manner permitting the signing of international trade agreements. In Canada, the regime allows the government to maintain its ability to use subsidies to pursue such goals as regional development. Of course, there may come a time when Canada may be willing to limit its ability to provide subsidies, if the current debt problems evolve into a debt crisis such as that which Mexico faced in 1982 and which New Zealand weathered in the mid-1980s.

C. *Options For The Settlement Of Disputes*

Assuming that reform of the underlying trade law regimes beyond the implementation of the WTO agreements will not occur, what are the options? The first is to do nothing and leave the mechanism unchanged. If that is the case, it appears quite certain that a tug of war will take place with respect to the proper measure of deference to be accorded to the administrative agencies. Nationality may play a role in this tug of war in a manner that tends to bring the entire mechanism into disrepute. The importance of this concern will depend upon the degree

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Party which are part of a general framework of regional economic development provided that:

(a) the measure does not operate to impair unduly the access of persons, goods, services or investments of another Party; and

(b) the measure is no more trade restrictive than necessary to achieve its specific objective.

Id. art. 1802.

Both Canada and the United States have accepted significant new disciplines in the Uruguay Round, especially with respect to domestic subsidies having an import displacement effect. Note also that article 1809 of the Canadian Internal Trade Agreement provides: "Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any national, enterprise, state or other person any right, claim or remedy, other than those existing immediately prior to the coming into force of this Agreement, under any international agreement." *Id.* art. 1809(1).

to which a trend does emerge that nationality is relevant to the determination of disputes. Inconsistencies will likely arise between binational panel determinations. The resolution of such inconsistencies will depend upon whether the extraordinary challenge committees take advantage of the window of opportunity created by *Live Swine* and Judge Wilkey's views and become more interventionist. The next extraordinary challenge committee, most likely to be determined under the NAFTA provisions, will be an important litmus test as to the future of the mechanism, particularly the role of nationality, if there is a U.S. majority on the committee.

The second option is to eliminate the binational panel mechanism entirely and return to the Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. The argument for the elimination of the mechanism is that it is of little use if the changes in NAFTA and the utilization of Article III judges result in a degree of deference that provides identical results to the Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. Canada may not accept the elimination of the mechanism due to the success it has enjoyed and the pressure it has placed upon the administrative agencies to produce better-reasoned decisions. Canada may also oppose the elimination of the mechanism even if it produces results identical to those of the U.S. courts due to the timeliness of the system:

> FTA dispute resolution is more than twice as fast as U.S. judicial review. Whereas all but two FTA panels have met the FTA's deadline of 315 days (about ten and a half months), judicial review to the Court of International Trade ("CIT") typically takes about 26 months. Even considering the delays in two FTA panels, since some panels have made their decisions before the deadline, the median time for a panel decision is ten and a half months. . . .
>
> The FTA not only provides for quick panel decisions, it also offers speedier remands than the CIT. The median length of time for a first remand to a binational panel is a little over four months compared to six months for a first CIT remand. For a second remand, the median length of time for a binational panel is two and a half months whereas a second remand to the CIT takes five months.
>
> [With respect to extraordinary challenges], [w]hile there has only been one extraordinary challenge to date,[183] the entire challenge

183. This was written before the *Live Swine* ECC request in January 1993.

process took only two and a half months.[184] By comparison, an appeal to the Court of Appeals for the Federal Circuit typically takes over ten months.[185]

In the United States, there is apparently no limit on the number of remands that can take place.[186] The binational panels have given the administrative agencies one remand[187] in which to review their decision but, on a second remand, have virtually directed the administrative agencies to a specific finding. However, the timeliness of the process should not be overstated. Pursuant to the FTA, the complete dispute settlement system is 795 days (390 for U.S. domestic process plus 405 days for the binational process with a second remand and ECC review).[188] This is also the case with respect to the annual reviews. *Softwood*

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184. The maximum is now ninety days under NAFTA Annex 1904.13(2) instead of thirty days under FTA Annex 1904.13(2). NAFTA, *supra* note 18, Annex 1904.13(2), at 688; FTA, *supra* note 1, Annex 1904.13(2), at 395.

185. G.N. Horlick & F.A. DeBusk, *The Functioning of FTA Dispute Resolution Panels*, *in* NEGOTIATING AND IMPLEMENTING A NORTH AMERICAN FREE TRADE AGREEMENT 1, 9 (L. Waverman ed., 1992).

186. *See, e.g., Pork from Canada*:

> Though commentators regularly express the view that the Chapter 19 Panel Review of the FTA was meant to replace the judicial review (in the United States) of the Court of International Trade ("CIT"), a Panel is clearly not on the same footing as the CIT, which is not constrained to issue a "final decision" on a second review. Indeed, in the case of Atlantic Sugar Ltd. v. United States, 744 F.2d 1556 (Fed. Cir. 1984), there were several successive remands.

In re Fresh, Chilled, or Frozen Pork from Canada, No. USA-89-1904-11, 1991 FTAPD LEXIS 1, *6 (Binational Review) (Jan. 22, 1991).

187. The powers of binational panels are limited to remands that require the domestic agencies to review and/or change their decision:

> The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand . . . . In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall issue a final decision within 90 days of the date on which such remand action is submitted to it.

FTA, *supra* note 1, art. 1904(8), at 388–89.

188. The 315 day time limit is for the rendering of an initial panel decision and does not include the time limit required for a remand or the extraordinary challenge committee procedure. The process is extended by 90 days for a remand and an additional 75–90 days for the extraordinary

Lumber III took just under three years (October 4, 1991, through August 4, 1994). In *Live Swine*, it took more than three and one-half years to complete the fourth administrative review of the original countervailing duty order of August 15, 1985. But timeliness and finality are not sufficient reasons to preserve a separate NAFTA dispute settlement mechanism. U.S. trade representatives may be willing to impose similar restrictions upon the Court of International Trade and the Federal Circuit Court of Appeals if the NAFTA mechanism were eliminated. This action is, however, unlikely.

Of course, if Chapter 19 procedures were eliminated, it would still be possible for any party to NAFTA, as a member of the WTO, to resort to the Dispute Settlement Body, if the legislature, judiciary, or administrative bodies of another party took measures not in conformity with obligations assumed under relevant WTO covered agreements, thereby impairing or nullifying any benefit accruing directly or indirectly to the complaining member under such agreements.

A third option is to broaden the powers of the extraordinary challenge committee to make it a regular appellate tribunal. The ECC cannot act as a proper check on the binational panels under the standard of review emerging from the first two ECC determinations and from the majority of the *Softwood Lumber III* ECC. There is a risk of inconsistency between panel determinations to a degree that is unacceptable in an area of the law where it can be expected that the same dispute will emerge once again in a new iteration, covering a different trade period or a different product. Unfortunately, *Softwood Lumber III* suggests strongly that the composition of the panels has the potential to promote inconsistent findings between iterations even within the same dispute. *Prima facie*, the extraordinary challenge committee should have powers of review that will promote consistency between panels in order to eliminate factors such as nationality from the dispute settlement process.

A fourth option is to leave the binational panel mechanism as it is but require that only judges shall be chosen as panelists, the assumption being that judges would better apply the principles of judicial review of agency action than ad hoc panelists who are experts in international trade. Presumably, judges would be chosen who have experience in judicial review of final determinations in antidumping and countervailing duty determinations. The NAFTA has already introduced this concept by requiring that the "roster shall include judges or former judges to the fullest extent practicable"[189] and that "[a] majority of the

challenge committee procedure. The U.S. system is designed to be a maximum 390 days, but this is regularly extended through remands.

189. NAFTA, *supra* note 18, Annex 1901.2(1), at 687.

panelists on each panel shall be lawyers in good standing."[190] The United States has provided in its implementing legislation that the USTR is required to appoint judges and former judges to serve on both panels and committees, although it remains to be seen whether judges will be included on the U.S. roster.[191] Canada may become increasingly receptive to the appointment of judges to the panel. There may be a trend emerging whereby the composition of panels is changing from the inclusion of practitioners to non-lawyers and academics. It has been argued that *Softwood Lumber III* will accelerate this trend because of the allegations of bias that were brought against the two Canadian panelists before the extraordinary challenge committee. It was stated that "*Softwood Lumber III* would send a chill up my spine particularly if I was in a large firm."[192] An amendment to the NAFTA would be required for rosters to be composed entirely of judges or retired judges. This option represents an acceptance that the mechanism should be an exact substitute for the domestic appellate process.

A fifth and more radical option is to allow administrative agencies to continue investigating complaints and making preliminary determinations. The agencies would then act as advocates, along with the domestic industries, before binational or trinational panels that would make the final determination. The final determination would then be subject to the appellate review channels of the nation in respect of which the determination was made. This would address many of the concerns expressed in Judge Wilkey's dissent, both practically and constitutionally. The agencies would continue to play an important role in the entire process and give the immediate relief and protection that preliminary duties entail. The panels would be able to perform the function for which they are truly suited: using their trade expertise to determine the dispute. The safeguard protecting the U.S. position would be that their own appellate channels, the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit, would review the binational panel determination as they would any other antidumping or countervailing duty determination. No constitutional issues would then arise, and there would also be no problem of conflicting panel determinations.

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190. *Id.* Annex 1901.2(2), at 687.

191. Senate NAFTA Report, *supra* note 59, at 35–36. ECC members must be judges or former judges. NAFTA, *supra* note 18, Annex 1904.13(1), at 688.

192. Statement of Michael Flavelle, Flavelle Kubrick & Lalonde, Ottawa, Trade War and Peace: Panels and Committees under the FTA and NAFTA, Meeting of the Canadian Bar Association of Ontario (Oct. 19, 1994). The Canadian government has not found it difficult to find practitioners to staff panels.

Judge Wilkey may not be impressed by this solution. His Honor would comment that the problem is rooted in the difficulty that foreign panelists have in divorcing themselves from their legal training and experience in order to apply U.S. trade law principles correctly. If they do not understand the principles of judicial review, how are they going to understand the principles of U.S. trade law and administrative practices? The answer would apparently lie in the fact that they are trade law experts. However, Judge Wilkey indicated that Commerce is the master of antidumping and countervailing duty policy and would argue further that Commerce has the benefit of continuity that is lost when resort is made to an ad hoc panel that may take time to be appointed and become familiar with the case.

A sixth option would be to replace the ad hoc binational panel system and ECC with a permanent international trade review tribunal comprised of three nationals of each NAFTA country and a presiding member who is not a NAFTA national, all appointed for a lengthy period or permanently. The decisions of the tribunal would be final and binding on the parties involved and, where necessary, would be enforceable directly by registration in the court of competent jurisdiction of the non-complying NAFTA party instead of resorting to compensation and suspension of benefits or terminating the agreement. The members of the tribunal could be trained in the various national standards of judicial review through special educational programs at major law schools of the parties. Exchange programs could be arranged with the different administrative agencies to enable the appointees to spend a period of time with each to gain a better appreciation of the manner in which they carry out their investigations. The introduction of a permanent review tribunal should solve the problem of consistency and permit the United States to appoint active or retired Article III judges to the court. A process of review involving a single stage would address Canada's concern for an expedited process if the NAFTA time limits were imposed upon such tribunal. Instead of applying existing national standards of judicial review of administrative action, the tribunal could be given the power to review final determinations in an unrestricted manner or in accordance with a uniform broad and intrusive standard of judicial review.

Finally, another option would be to submit final determinations to binding arbitration, with the decisions being enforceable in the national courts.

VIII. LESSONS FROM WTO 1994

The dispute settlement mechanism that has emerged from the GATT 1994 Agreements provides some important lessons for the reform of the

NAFTA dispute settlement mechanism. Firstly, the antidumping dispute settlement mechanism indicates that the United States will strongly resist any curb placed upon the powers of the Department of Commerce or the International Trade Commission. This is evident by the United States' insistence to include the following provisions:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[193]

In the first sub-paragraph, the Dispute Settlement Body (DSB) panel is required to defer to the determination and evaluation of facts by the Department of Commerce and the International Trade Agency (in the United States) as long as the process was unbiased and objective. The DSB panel is not permitted to substitute its establishment and evaluation of the facts, even if it would have reached a different conclusion. The second subparagraph requires that the DSB panel defer to the administrative agencies in circumstances where an interpretation of the consistency of the implementing legislation with the GATT 1994 Agreements, or an interpretation of a WTO question, has been brought into question. Where a panel finds that a relevant provision of the Agreement is, in its eyes, capable of more than one "permissible" (that is, "reasonable") interpretation, then the panel is required to defer to the administrative agencies.[194]

Once again, the DSB panel cannot substitute its preferred permissible alternative determination. These provisions require significant deference to the administrative agencies, and they are reminiscent of the constraints placed upon the binational panels by the standard of

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193. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 17(6), *reprinted in* RESULTS OF THE URUGUAY ROUND, *supra* note 19, at 168, 193.

194. *Id.* art. 17(6)(ii), at 193.

judicial review established by *Chevron U.S.A., Inc. v. NRDC*[195] and its progeny.

The inclusion of these provisions, which are limited to matters arising under the Antidumping Code, is unfortunate. They were part of a set of proposals, all of which were extremely protectionist, made by the U.S. government in November 1993 before the GATT 1994 Agreements were approved on December 15, 1993.[196] DSB panels should be free to interpret WTO law and determine whether national law is consistent with WTO principles. Now, it is quite conceivable that the DSB panels may be required to endorse two conflicting national interpretations of the same WTO principle, if both interpretations are permissible. Article 17.6 reduces the role and function of the DSB panels to that of judicial review. Professor Robert Hudec has confirmed the importance of a standard of review in defending the arbitrary rules of thumb which are enshrined in the antidumping law:

> The most plausible reason for a higher-than-average rate of GATT violations in AD/CVD cases is that AD/CVD decisions contain so many opportunities for findings of "error." The legal basis of an AD/CVD proceeding is a meticulous examination of price/cost information or government benefits to determine if there has been any "abnormal" business or government conduct. Analysis of "material injury" involves a myriad of similar choices about the relevant industry, market, time period, data and so forth. Each case involves hundreds of these issues. When AD/CVD measures are imposed in a judicialized procedural setting, the answers to all these questions are highly transparent. Given the arbitrary nature of AD/CVD standards and concepts to begin with, there is always something to disagree with in the way that any answer has been derived. This is particularly so where administrators adopt rules-of-thumb to keep from being submerged in detail. *Rules of thumb usually err on the side of being too restrictive, and without a standard of review explicitly protecting such rules of thumb, they are particularly difficult to defend internationally*. Needless to say, the fact that AD/CVD complaints tend to experience a high rate of adverse legal rulings creates a

195. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

196. *See Negotiators Down in the Dumps Over U.S. Draft: Washington Set to Take on the World in Clash Over Anti-Dumping Proposals*, FIN. TIMES, Nov. 25, 1993, at 6.

> high probability of legal failure, given the limited ability to revise AD/CVD actions once taken.[197]

The introduction of a limited deference by the DSB panels to national administrative agencies gives the rules of thumb a much greater chance of being defended internationally.

Secondly, the appellate procedure introduced by the WTO[198] is much broader than the extraordinary challenge committee procedure. The WTO mechanism includes a standing appellate body composed of seven members serving a four year term with each appeal being heard by three members serving in rotation.[199] The grounds of appeal are set out as follows:

> An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel.[200]

The WTO standard is appellate and approximates that used in the U.S. Court of Appeals for the Federal Circuit, whereby errors of law are reviewable. This difference between the ECC and WTO process of review is important when evaluating Judge Wilkey's dissent in the *Softwood Lumber III* ECC. The appellate standard in the WTO Dispute Settlement Understanding is much broader than the current, narrowly defined standard for the ECCs. It seems illogical that the WTO standard will ensure greater consistency of interpretation than the NAFTA standard. Nevertheless, the creation by the United States of the World Trade Organization Dispute Settlement Review Commission indicates that Judge Wilkey's concerns are being taken seriously by the Americans. This Commission, which is comprised of five federal appellate judges, must review panel or appellate body reports adopted by the

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197. Robert E. Hudec, et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948–1989*, 2 MINN. J. GLOBAL TRADE, 1, 88–89 (1993)(emphasis added).

198. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17, *reprinted in* RESULTS OF THE URUGAY ROUND, *supra* note 19, at 404, 417 [hereinafter Dispute Settlement Understanding].

199. *Id.* art. 17(2), at 417–18.

200. *Id.* art. 17(6), at 418. Appellate review was demanded by the United States as the price for accepting the automatic adoption of panel reports. It has been argued that since both NAFTA and GATT panel rulings are binding only on the parties to the case and only in respect of the particular matter before the panel, neither the ECC nor the Appellate Body were designed to ensure absolute consistency in jurisprudence. We do not accept this argument. The Appellate Body will strive for consistency when interpreting GATT principles and obligations.

Dispute Settlement Body to determine if rulings adverse to the United States have exceeded the panel's authority, added to U.S. obligations or diminished its rights, acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from applicable procedures. It must also determine whether such action has materially affected the outcome of the dispute. Following a positive finding by the Commission, any member of Congress can introduce a resolution calling for the President of the United States to negotiate a solution in the WTO. After three positive determinations by the Commission in any five year period, any member of Congress can introduce a resolution of "disapproval" of U.S. participation in the WTO. If enacted by Congress and signed by the President, the United States would commence to withdraw from the WTO. This peculiar system of domestic judicial review would have a chilling effect upon the actions of the Dispute Settlement Body of the WTO in cases where the United States is involved.[201] Nevertheless, the system has been deemed to be politically expedient as a safety valve against possible improprieties by WTO dispute settlement bodies.

IX. CONCLUSION

The most effective reform of the NAFTA binational dispute settlement mechanism would probably be to create a permanent NAFTA international trade review tribunal. This proposal addresses most of the concerns expressed by Judge Wilkey as well as Canada's desire to maintain the more positive aspects of the present mechanism. However, if the creation of such a tribunal were not possible, Canada should not resist the possible evolution of the extraordinary challenge committee into a second tier of review more closely resembling a regular appellate system of review. It seems inconsistent to have such a second tier of review in the WTO process but not in NAFTA.[202]

It is unlikely that any more substantial reform is possible at the present time. The environment created in the United States by the perceived failure of panels and committees to apply the correct standard of review and the allegations of national bias are such that it will be difficult to discuss reform in any meaningful way.

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201. Of course, any WTO member can withdraw from the Agreement on six months notice. Marrakesh Agreement Establishing the World Trade Organization, art. XV(1), *reprinted in* RESULTS OF THE URUGUAY ROUND, *supra* note 19, at 6, 17.

202. This has been rejected in some quarters on the ground that the FTA/NAFTA panels were designed to provide expeditious and final review as a replacement for judicial review by domestic courts where conflicting court decisions and divergent jurisprudence are not unknown and, therefore, no interest would be served in turning the ECC into an appellate body.

Negotiation of fundamental changes to the trade law regime must take place at the time major trade agreements are under consideration, when they can be combined with numerous other issues providing a balance of advantages and disadvantages that have a chance to pass through Congress as a package. Any limit that is sought to be placed upon U.S. administrative tribunals will generally be perceived as negative and unfair and create significant political opposition in Washington. As a result, fundamental reform of the dispute settlement system has a very limited chance of succeeding on its own.

The environment for change will not improve until the United States becomes deeply concerned with the manner in which its exports are being targeted by other nations, especially developing nations, as it has fostered a trade law system that pays significant dividends to countries that adopt a similar system and enthusiastically engage in its use.

It must be kept in mind that procedures for the settlement of trade disputes are intimately connected with the applicable substantive law and that Chapter 19 was included in the FTA/NAFTA because the parties could not come to an agreement on a substitute system of rules for dealing with unfair pricing and government subsidization. Since cross-border dumping of goods can have no place in the NAFTA internal market governed by the free movement of goods, the existing national antidumping laws should cease to apply to NAFTA countries at the end of the maximum transitional period of fifteen years.[203] With respect to subsidies, the adoption of the WTO Agreement on Subsidies and Countervailing Measures by NAFTA members[204] should overcome past difficulties as it meets their concerns, especially those of the United States. There is really no need for different rules on subsidies and countervailing measures applicable to NAFTA members *inter se*. Considering that the new most elaborate and effective system of dispute settlement contained in the WTO Dispute Settlement Understanding applicable to the antidumping and subsidies codes offers more guarantees of due process than the FTA/NAFTA procedures, there is little justification for relying exclusively on the remedies provided by Chapter 19, especially in light of the criticism of the panel system highlighted in the *Softwood Lumber III* case. Once the WTO Agreement on Subsidies and the Dispute Settlement Understanding are in place, NAFTA mem-

203. Dumping should be subject to the national competition laws. In the European Union, see the original section of Article 91(2) of the Treaty of Rome, concerning the "boomerang effect." Treaty Establishing the European Community, Mar. 25, 1957, art. 91(2), 298 U.N.T.S. 3, 50–51.

204. In Canada, see House of Commons of Canada, Bill C-57. In the United States, see Uruguay Round Agreements Act, Dec. 8, 1994, Pub. L. No. 103–465, 108 Stat. 4809.

bers could easily eliminate Chapter 19 and revert to the pre-FTA system of settlement of trade disputes and, when necessary, the WTO procedures, at least until a NAFTA international trade review tribunal can be created.[205] The quid pro quo for the elimination of the Chapter 19 mechanism would be: (1) that the WTO determinations in antidumping and countervailing duty disputes between NAFTA members would be binding and enforceable on them; and (2) that the preliminary and final determinations of administrative tribunals could be immediately adjudicated by WTO panels without waiting for U.S. appellate channels to be exhausted. Perhaps on the accession of Chile to the NAFTA, the parties will seriously consider this practical, logical, and painless solution, especially now that the United States can rely on the WTO Dispute Settlement Review Commission as the ultimate guardian of domestic trade law purity and integrity.

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205. Judge Wilkey is in agreement with the proposition that Chapter 19 could be eliminated and that the WTO procedures could be used in NAFTA antidumping and countervailing duty disputes. On June 21, 1995, he appeared before the Congressional Committee on Ways and Means, Subcommittee on Trade, which was conducting hearings relating to the accession of Chile to NAFTA. The conclusion to Judge Wilkey's written submissions was as follows:

> To conclude: Chapter 19 of FTA/NAFTA as a dispute settlement mechanism has demonstrably failed; with hindsight we can see that failure was built in. Redesigning a new process that will not only work between the United States and Canada but also take into consideration the traditions and jurisprudence of Mexico and Chile is a daunting task. The new GATT/WTO has a well thought out Dispute Settlement Understanding to which all four countries have already agreed, and to which the United States contributed much in the negotiation. In substantive issues covered it would fit NAFTA. The Chapter 19 process has been made redundant; AD/CVD disputes among the NAFTA signatories may be decided by invoking the WTO Dispute Settlement Understanding. Why not utilize the machinery already constructed?
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> I assume that particular decision is not within the scope of the Committee's task at the moment. In line with its assigned task, I respectfully recommend: (1) that the Fast Track authority for negotiation with Chile be granted without the dispute settlement of Chapter 19 or any other mechanism included; (2) that hearings be conducted by the appropriate committees to consider making the DSU (Dispute Settlement Understanding) of GATT/WTO a part of NAFTA; (3) that in the meantime no further proceedings under Chapter 19 be undertaken by the Executive; (4) that the hearings under (2) be designed to produce a replacement for Chapter 19 which could then be negotiated with Canada, Mexico and Chile. There is no reason to delay the basic negotiations between the three NAFTA partners and Chile while we work out what we desire as a dispute settlement mechanism.

Written Testimony of Malcolm R. Wilkey, Before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives, 7–8, June 21, 1995 (on file with *Law and Policy in International Business*).