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A SILK PURSE OR A SOW'S EAR? THE TREATMENT OF EVIDENCE IN THE FRESH, CHILLED, OR FROZEN PORK FROM CANADA TRADE DISPUTE

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Chapter 19 of the Free Trade Agreement has been generally viewed as a successful mechanism for the resolution of trade disputes between Canada and the United States. The Fresh, Chilled, or Frozen Pork from Canada *dispute, the only case to go before the Extraordinary Challenge Committee pursuant to article 1904.13 of the FTA, is a notable exception. The Panel's treatment of evidence deviated from the process for binational panels established under article 1904(3) of the FTA. By failing to adopt a standard of review required by the law of the importing party, the Panel's reliance on an independent body of law raised concerns about the procedures of future binational panels under the NAFTA. Changes to dispute resolution under Chapter 19 of the NAFTA have in part vindicated the* Pork *Panel's decisions.*

Le chapitre 19 de l'Entente de Libre Échange est considéré comme un mécanisme adéquat pour résoudre les litiges entre le Canada et les États–Unis à l'égard des échanges commerciaux. Le litige du "Fresh, Chilled, or Frozen Pork from Canada," *la seule affaire ayant été devant le Comité Spécial des Contestations en vertu de l'article 1904.13 de l'Entente de Libre Échange, constitue une exception notoire. La considération des éléments de preuve par le panel dévia du processus des tribunaux binationaux établis en vertu de l'article 1904(3) de l'Entente de Libre Échange. En refusant d'adopter la norme de contrôle requise par la loi des parties en présence, la référence par le tribunal à des règles légales indépendantes soulève des inquiétudes au sujet des procédures des futures tribunaux binationaux sous L'ALÉNA. Les changements apportés au processus de résolution de litige en vertu du chapitre 19 de L'ALÉNA ont corrigé en parti la décision du tribunal dans l'affaire* "Pork."

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† LL. B. anticipated 1994 (Dalhousie).

Messy and multifaceted, the *Fresh, Chilled, or Frozen Pork from Canada*[1] decision has been described as "a landmark determination."[2] That case was decided pursuant to Chapter 19 of the Canada–United States Free Trade Agreement (FTA)[3] which outlines resolution mechanisms for certain types of trade disputes between the two countries. The mechanisms include the use of a panel comprised of individuals from the United States and Canada to act as adjudicators of a disagreement. A key issue of contention that arose from the *Pork* case was the presiding panel's analysis of the financial injury to the American pork industry caused by American imports of Canadian pork. The Panel's treatment of evidence, which arguably affected their final decision, represented a deviation from the established process for binational panels under Chapter 19. Accordingly, the *Pork* experience and a similar contention over treatment of evidence in the Chapter 19 case of *Live Swine From Canada*[4] serve to raise a broader question of how evidentiary procedures operate under the dispute resolution mechanisms of the North American Free Trade Agreement (NAFTA).[5]

The key points considered in this paper rest upon article 1904 (3) of the FTA:

> The panel shall apply the standard of review described in article 1911 and the general legal principles that a court of the importing party would apply to a review of a determination of the competent investigating authority.[6]

By not adhering to the legal principles that a court of the importing country would apply in admitted evidence, a panel uses procedure that is contrary to the provisions of the FTA. Accordingly, the *Fresh, Chilled, or Frozen Pork from Canada* case raises a controversy over evidence and poses three fundamental questions:

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[1] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (24 August 1990), USA-89-1904-O6 (Memorandum Opinion and Order) [hereinafter *Pork*].

[2] "Canadians win border battle" *The Globe and Mail* (15 February 1991) B5.

[3] *The Canada–U.S. Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281, art. 1806 [hereinafter FTA].

[4] *In the Matter of Live Swine from Canada* (30 October 1992), USA-91-1904-03 (Decision of the Panel).

[5] *North American Free Trade Agreement Between the Government of Canada, the Government of the Mexican States, and the Government of the United States of America* (Ottawa: Minister of Supply and Services, 1992) [hereinafter NAFTA].

[6] *Supra* note 3, art. 1904(3).

1) If a panel in certain circumstances refuses to consider evidence presented by a government agency, are they acting contrary to American law and therefore contrary to article 1904(3) of the FTA when the United States is the importing party?

2) If a panel in accepting evidence effectively limits how a government agency conducts an investigation, is the panel employing a procedure which is contrary to American law and therefore contrary to 1904(3) of the FTA when the United States is the importing party?

3) If a panel creates and applies independent procedural law which is not based on the law of an importing party, is the integrity of the binational panel review process threatened?

This study traces the development of the pork dispute and of American law as they relate to these issues, and explores the implications of the NAFTA on similar controversies. To give meaning to a discussion of the *Pork* decision, however, it is necessary first to introduce the process of a Chapter 19 dispute and the main facts of that case.

CHAPTER 19

One of the primary Canadian objectives in negotiating the Canada–United States Free Trade Agreement was to create a more predictable way of dealing with dumping[7] and subsidization[8] disputes. To this end, in its negotiation of the FTA Canada pursued a

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[7] Dumping occurs when goods are sold to an importer for less than they are sold in the country from which they are exported or when goods are sold for export at prices below their costs of production. If dumping injures producers of like goods in the importing country, antidumping duties may be imposed by that country. G. McIllory, "Antidumping and Countervailing Duties, Dispute Resolution Under the Canada–U.S. Free Trade Agreement—The First Year in Review" (1990), 4 C.U.B.L.R. 190 at190.

[8] Subsidization occurs when a government provides assistance to stimulate industries, create employment, promote exports or further national objectives. If subsidized goods are exported and they injure producers of like goods in the importing country, countervailing duties may be imposed by the importing country. *Ibid.*

binding dispute mechanism that would apply a jointly agreed set of rules on dumping and subsidies.[9] While the parties agreed to continue working for this result under an imposed seven year deadline,[10] in the interim a procedural solution was found and enunciated in Chapter 19.[11]

Under Chapter 19 of the FTA, both the United States and Canada retained the right to apply their own antidumping and countervailing duty laws to the imports of the other country.[12] The decisions to apply these laws to imports are undertaken by the respective national agencies for each country.[13] In Canada, the Deputy Minister of National Revenue, Customs and Excise determines if dumping and/or subsidization have occurred, and the Canadian International Trade Tribunal decides whether there has been a material injury to an industry.[14] When completed, these determinations are subject to judicial review[15] at the request of either Canada or the United States[16] by a binational panel[17] of five persons chosen from candidates selected by each government.[18] This process replaces domestic judicial review,[19] and does not permit[20] judicial review of binational panel decisions. Moreover, it ensures that panel decisions "shall be binding on the Parties."[21] For every

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[9] T. L. McDorman, "The Dispute Settlement Regime of the Free Trade Agreement" (1988), 2 R.I.B.L. 301 at 318.

[10] *Supra* note 3, arts. 1906 and 1907.

[11] This "sunset clause" is not included in the NAFTA.

[12] *Supra* note 3, art. 1902(1).

[13] A. F. Lowenfield, "Binational Dispute Settlement Under Chapter 19 of the Canada–U.S. Free Trade Agreement: An Interim Appraisal" (Fall 1991), 24 N.Y.U.J. Int'l L. & Pol. 269 at 271.

[14] For the United States, the corresponding agencies are the International Trade Administration of the Department of Commerce (ITA) with respect to dumping and subsidization and the International Trade Commission (ITC) with respect to injury.

[15] Generally speaking, judicial review refers to a superior court or legal body's examination of the conduct of an inferior court, board, committee, or tribunal, to ensure the conduct was proper in law. John Yogis, *Canadian Law Dictionary* 2nd ed. (Toronto: Barron's, 1990) at 120.

[16] Binational panels can also review amendments made to antidumping and countervailing duty legislation pursuant to FTA article 1903(1).

[17] *Supra* note 3, art. 1904(2).

[18] *Ibid.*, Annex 1901.2(1).

[19] *Ibid.*, art. 1904(1).

[20] *Ibid.*, art. 1904(11).

[21] *Ibid.*, art. 1904(9).

binational panel, each country is to appoint two members. The chairperson may be a candidate from either country.[22] There are also specific provisions for choosing a fifth panelist. Both a majority of the panelists and the chairperson are required to be lawyers.[23]

While the request for the establishment of a binational panel must come from the government of either Canada or the United States, both nations are under an obligation to make a request on behalf of an individual, who, under domestic law would have been able to commence judicial review.[24] Accordingly, private parties with an interest in a trade dispute, such as the exporter or importer of challenged goods or a domestic competitor, are entitled to maintain an action for judicial review by a panel, and participate in the proceedings through independent counsel.[25] The FTA further stipulates that a request for a binational panel must be made within 30 days of the issuing of a final determination by a national agency of either the United States or Canada.[26] A failure to make a request within this period precludes review by a binational panel, but still allows for domestic judicial review.[27] With respect to remedies, the decision of a binational panel must be either an upholding of a governmental agency's final determination, or a referral of that determination back to the competent authority to take action consistent with the panel's position.[28] A panel may not substitute its decision for that of the government authority in question. Finally, once action is taken by a government agency in response to a panel's recommendations, the panel may review that action.

The FTA stipulates that the procedural laws of the importing country govern the binational panel review process.[29] The Am–

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[22] *Ibid.*, Annex 1901.2(2).

[23] *Ibid.*, Annex 1901.2(2) and (4).

[24] *Ibid.*, arts. 1904(5) and (15)(b).

[25] *Supra* note 3, arts. 1904(7) and (14).

[26] *Supra* note 3, art. 1904(4); section 44 of the *FTA Implementation Act*, S.C. 1988, c. 65, the Canadian implementing legislation, establishes 25 days following the final determination as the deadline to approach the Canadian Trade Secretariat in order to have a panel review either an American or Canadian decision.

[27] *Ibid.*, arts. 1904(4) and (12)(a).

[28] *Ibid.*, arts. 1904(8) and 1911.

[29] *Ibid.*, art. 1904(2) and (3). The definition for standard of review under article 1911 refers for Canada to s. 28(1) of the *Federal Court Act*, R.S.C. Chapter

erican Statement of Administrative Action that accompanied the *United States–Canada Free Trade Agreement Implementation Act* states that "the panels will apply exclusively the national law and standards of judicial review of the country whose AD [antidumping] or CVD [countervailing duty] decision is under review."[30] Similarly, the explanatory notes that preface the Canadian text of the FTA provide that:

> Findings by a panel will be binding on both governments. Should the panel determine that the law was properly applied, the matter is closed. If it finds that the administrative authority erred on the basis of the same standards *as would be applied by a domestic court*, it can send the issue back to the administrative authority to correct the error and initiate a new determination [emphasis added].[31]

Such stipulations mandate that panelists must not apply different criteria to their review of agency determinations than would occur if the review were before a domestic court. In cases where the United States is the importing party, such as in the *Fresh, Chilled or Frozen Pork from Canada* case, panels must look to the decisional law of the Court of International Trade and of the Court of Appeals for the Federal Circuit for the appropriate legal principles.[32]

In appeals involving final antidumping or countervailing determinations by American agencies, there are two standards of review that would be applied by American courts. Which standard is used depends upon the nature of the determination at issue.[33] The first standard of review applies only to a determination of the United States International Trade Commission whether or not to initiate a review pursuant to section 751(b) of the *Tariff Act of* 1930 as amended:

F–7, and with respect to the U.S., to section 516A(b)(i) of the *Tariff Act of* 1930 as amended, 19 U.S.C. s. 1516a(b)(1).

[30] H.R. Doc. No. 216, 100th Cong., 2d Sess. at 258.

[31] *Supra* note 3 at 268.

[32] See *e.g.*, *In the Matter of Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* (24 January 1990), USA 89-1904-02 (Memorandum Opinion and Order Regarding Scope Determination) at 3–5.

[33] *Supra* note 3, art. 1904(3).

> The court shall hold unlawful any determination, finding, or conclusion found in an action brought under paragraph (2) of subsection (a) of this section, to be arbitrary, capricious, an abuse of direction, or otherwise not in accordance with the law.[34]

The second standard of review which applies to other American final determinations says that:

> The court shall hold unlawful any determination, finding, or conclusion found in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.[35]

The legislation makes it clear that the scope of the above standards of review is not as broad as a trial de novo.[36] Similarly, binational panels are bound to treat evidence solely in the context of a judicial review function and require identification of any perceived error in agency determinations. The matter would be remanded back to the appropriate authority rather than reweighing evidence as would be done in a new trial.[37] Such processes became highly relevant in light of the factual context of the *Fresh, Chilled, or Frozen Pork from Canada* case.

THE FACTS OF FRESH, CHILLED, OR FROZEN PORK FROM CANADA

The case of *Fresh, Chilled, or Frozen Pork from Canada* was reviewed under Chapter 19 of the FTA, beginning in 1990, at the request of two Canadian meat packers, the Canadian Pork Council, the Canadian Meat Council and the governments of Alberta and Quebec. In 1989, the United States International Trade

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[34] Section 516A (b)(1)(A) of the *Tariff Act of 1930*, 19 U.S.C. s. 1516a (1991) as. am. Section 401(c) of the *United States–Canada Free Trade Implementation Act*, S.C. 1988, c. 65.

[35] Section 516A (b)(1)(B) of the *Tariff Act of 1930*, 19 U.S.C. s. 1516a (1991).

[36] *Supra* note 7 at 199. A trial *de novo* has been described as "Strictly . . . a new trial before another tribunal than that which held the first trial, as distinguished from a rehearing before the same tribunal." *R.* v. *Rice*, [1930] 3 D.L.R. 911 at 914 (N.S.S.C.).

[37] See *e.g. Industrial Fasteners Group, American Importers Assoc.* v. *United States*, 525 F.Supp. 885 at 892–3 (1981).

Administration (ITA) determined that a number of Canadian agricultural programs gave countervailable subsidies to pork producers,[38] while the International Trade Commission (ITC) found that the United States pork industry had the potential to be materially injured.[39] Binational panels were formed to address each finding by way of review.

The Panel's first review of the ITC's decision on injury, which is the focus of this paper, investigated the possibility that this finding resulted from (1) inaccurate data on pork production and consumption, (2) questionable conclusions regarding Canada's likely future market penetration in Japan, and (3) unsubstantiated assumptions about the supply of Canadian hogs in response to subsidy programs.[40] A majority of the Commissioners in the ITC decision predicted that Canada's share of the United States market would rise to a level that would injure U.S. pork producers, even though it had been declining.[41] The Panel found that important aspects of ITC's argument were unsubstantiated and that some of its predictions regarding Canadian production growth arose from statistical errors. The case was remanded back to the ITC to review its findings.

On remand the ITC affirmed its finding of a threat of injury. The Binational Panel remanded the case a second time, and maintained that the ITC had made a legal error by reopening the administrative record to new evidence without giving notice to interested parties.[42] Upon this, its third consideration, the ITC reached a negative determination of threat of injury.[43]

On March 29, 1991 the United States Trade Representative Carla Hills formally requested the formation of an Extraordinary

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[38] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (28 September 1990), USA 89-1904-06, 12 T.T.R.D. 2299 at 2302.

[39] *Supra* note 1 at 12.

[40] *Supra* note 1 at 16–28.

[41] *Ibid.* at 32.

[42] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (22 January 1991), USA-89-1904-11 (Memorandum Opinion and Order Regarding ITC's Determination on Remand) at 19.

[43] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (February, 1991), USITC Inv. No. 701-TA-298, 13 IRTD 1453 at 1465.

Challenge Committee pursuant to article 1904.13 of the FTA.[44] That article and its Annex provide for the establishment of a three member committee which is required to decide whether a panelist has violated rules of conduct or whether a panel as a whole has committed a serious violation of procedure or a jurisdictional excess. It also decides whether any of these actions have threatened the integrity of the binational panel review process.[45] In the *Pork* case, the Committee concluded that none of the allegations provided the basis for an extraordinary challenge under FTA article 1904.13 and that the integrity of the binational process had not been threatened.[46]

One point of conflict in the *Pork* case was the sanction of a procedural rule of finality. After a first remand the Panel precluded further consideration of facts and issues by the determining government agency, which in this case was the International Trade Commission. Such an action arguably meant that the treatment by the panel of information received from the ITC differed from the standard of review in American law, thereby deviating from the provisions of FTA articles 1904(3) and 1911.

RULE OF FINALITY

In the second panel decision of the *Fresh, Chilled, or Frozen Pork from Canada* case, the Panel determined that the FTA article 1904(8) reference to a "final decision"[47] indicated that a binational panel was under a duty to "state its views with as much finality as the case permits."[48] It is submitted that the Panel's application of a policy of finality in reviewing a determination on remand was not in accordance with American law, and therefore that the Panel in *Pork* exceeded its authority as set out in articles 1904(2) and (3), which refers to a panel's adherence to the law of an importing country.

According to a number of cases on United States law on antidumping and countervailing duties, there is no limitation on the

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[44] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (14 June 1991), ECC-91-1904-01USA (Memorandum Opinion and Order Regarding Binational Panel Remand Decision II) at 11.

[45] *Supra* note 3, art. 1904.13.

[46] *Supra* note 44 at 24.

[47] *Supra* note 3, art. 1904(8).

[48] *Supra* note 43.

number of times a reviewing court may remand an agency's final determination.[49] Courts have established that remand is appropriate whenever "an agency followed an improper method in making a determination or where there is a deficit in the agency's findings."[50] There has also been judicial support for granting a request for remand if "it fosters and promotes fundamental fairness."[51] Accordingly, it may be argued that American law generally provides for broad scope of an agency's remand proceedings, allowing it to revisit its original determination in its entirety. Such a breadth of scope is, by its nature, incongruous with placing limitations on the number of times a reviewing court may remand a determination of a government authority. These decisions would further support an argument against the existence of a rule of finality in United States antidumping and countervailing duty law, which is underscored by the general principles of American administrative law.

American case law suggests that reviewing courts are prohibited from usurping the administrative function of government agencies.[52] American cases have stated that "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."[53] Through its desire to present a final decision, the Panel in *Pork* limited the number of remands on the Commission's determination, which in turn directly affected the investigatory role of the ITC. The "rule of finality" allowed the Panel to substitute its judgment for that of the ITC on the issues of import penetration[54] and price effects.[55]

The Usurping of Administrative Functions

In the *Pork* case, the International Trade Commission found that there would be an injury to the United States pork industry due to

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[49] See for example *Atlantic Sugar Ltd.* v. *United States*, 744 F.2d 1556 (Fed. Cir. 1984).

[50] *Timkin* v. *United States*, 10 C.I.T. 86, 630 F.Supp. 1327 at 1332 (1986).

[51] *Alhambra Foundry Co.* v. *United States*, 685 F.Supp. 1252 at 1262 (1988).

[52] *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17 at 20 (1952).

[53] *Securities and Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80 at 88 (1943).

[54] Import penetration in this case refers to the notion that an increase in Canadian imports combined with reduced domestic production would result in the sale of more Canadian pork in the United States.

[55] The notion of "price effects" in this case pertains to the belief that the expansion of Canadian pork supply created by Canadian subsidization would have a negative effect on overall price levels.

an increase in Canadian imports and a decline in American production. Commissioner Newquist's data indicated that:

> Excess pork production in Canada, the likelihood of product shifting, and the impending decline in domestic production, all lead me to reaffirm my earlier finding that an increase in import penetration is likely.[56]

In reviewing this position, the panel countered the Commissioner's finding of product shifting,[57] removed certain evidence which he relied on from the administrative record[58] and, in seeking a final determination, effectively denied Commissioner Newquist the opportunity to find further evidence to support his argument. This final act is enunciated in the Panel's statement:

> Although the Panel questions whether Commissioner Renquist would come to an affirmative finding of threat of injury without the support of the product shifting argument, the Panel is moved by the requirements of finality to state its views on two grounds even assuming them to be advanced as independent of the product shifting hypothesis.[59]

Accordingly, it is submitted that the Panel refused to give the Commission an opportunity to establish that a finding of potential injury could have been made on grounds other than product shifting. The Panel then proceeded to address the issue of product shifting by treating evidence in a manner more consistent with a trial *de novo*, than with judicial review. The Panel stated:

> [The Panel] is troubled by arguments which seek to show that Canada's share of the United States pork market, though at a noninjurious level at the time of the ITC's Final Determination, will grow, on the prediction that U.S. producers' sales will decline and that, even if in absolute volume terms Canadian imports remain unchanged or even fall, they "may" therefore take an increasing per-

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[56] *In the Matter of Fresh, Chilled or Frozen Pork from Canada*, Inv. No. 701-TA-298, U.S.I.T.C. Pub. No. 2268, ECC–4 at 32–33.

[57] *Supra* note 42 at 27–28.

[58] *Ibid.* at 19–21.

[59] *Ibid.* at 35.

> centage share of the market. This rests on no substantial evidentiary indication.[60]

Through this declaration, the Panel clearly substituted its own judgment for that of the Commission, and therefore usurped the ITC's function as a government authority. In so doing, it violated a fundamental tenet of United States administrative law.

With respect to American law, section 1581(c) of the *Customs Courts Act* of 1980[61] gives exclusive jurisdiction to the Court of International Trade (CIT) to review antidumping and countervailing duty determinations. If the CIT establishes that a government authority has erred in its final determination, it must remand the determination for the agency's further review.[62] In the case of *Florida Power and Light Co.* v. *Lorion*, the United States Supreme Court stated:

> [T]he proper course . . . is to remand to the agency for additional investigation or explanation. The reviewing court is not . . . empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.[63]

Further, it would appear that an order of remand is a form of relief for a complainant.[64] Under the *Customs Court Act* of 1980, the Court of International Trade

> . . . may order any other form of relief that is appropriate in a civil action, including, but not limited to declaratory judgements, orders of remand, injunctions and writs of mandamus.[65]

Clearly then, by virtue of article 1904(2) and (3) the Binational Panel in *Pork* was subject to the same guidelines in reviewing a final agency determination as the CIT—guidelines which it refused to follow.

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[60] *Supra* note 43 at 37.

[61] *Customs Courts Act*, Pub. L. No. 96-417, 94 Stat. 1727.

[62] *PPG Industries Inc.* v. *United States*, 708 F.Supp 1327 at 1329 (1989).

[63] *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729 at 744 (1985).

[64] Brief of The National Pork Producers Council *et al.*, before The Extraordinary Challenge Committee, made pursuant to FTA article 1904.13; *supra*, note 44 at 32.

[65] 28 U.S.C. s. 2643 (c).

Counter-Arguments

The main arguments in the *Pork* case that attempt to justify the Panel's actions were based largely on the premise that "although panels are to apply substantive law as would a domestic court, their method of operation is also to take into account the FTA's objective of expeditiousness, rather than indefinite review."[66] References to expediency in articles 1904(4), 1904(6), 1904(14) and 1904(15)(g)(ii) are relied upon.[67] This position can be rebutted, however, by noting that none of these articles necessitate that a panel come to its determination after only two reviews. While article 1904(14) does propose a time limit for conducting the initial review of an agency's final determination, it does not address the question of a review of an agency's determinations on remand. Therefore, the notion that the FTA's concern with expediency should allow panels to preclude multiple remands falls short when the text of the agreement is scrutinized.

FEDERAL REGISTER

A second issue involving evidence in the *Pork* case emerged from the Panel's decision not to accept certain data brought forth on remand from the ITC. The ground for this prohibition was that such information was not within the scope of that agency's *Federal Register*[68] notice. In forming that conclusion, the Panel looked to the principles of "fair play"[69] and "due process."[70] With respect to fair play, the Panel decided that if the administrative record were to be reopened, it would be necessary that the participants be afforded notice and an opportunity for a hearing on the new matters considered.[71] On the topic of due process, the Panel looked to the expressed incorporation under article 1911 of the FTA of the general

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[66] *Supra* note 42 at 50.

[67] *Ibid.*

[68] The Federal Register is the United States publication which is the medium for notifying the public of official agency actions. All regulations must be published in the Federal Register. See R. D. Fox, and E. Sowanda, eds., *The Federal Register, What it Is, and How to Use It* (Washington D.C.: U.S. Government Printing Office, 1985) at 3.

[69] *Supra* note 42 at 20.

[70] *Ibid.*

[71] *Ibid.* at 20–21.

legal principle of "due process," and affirmed that it was available to all participants in proceedings subject to FTA review. These principles were deviations from United States law on the issue in favour of an unlegislated procedure, contrary to 1904(2) and (3).

After the first Panel remand, the ITC stated that it would re-open the record on which it had based its original decision "on three narrow aspects,"[72] and invited parties to make submissions pursuant to them. However, the Commission then considered information which went beyond the points specified in both its notice and the Panel's Remand Order.[73] Partly relying on this information (much of which was Canadian government statistics), the Commission upheld its finding of the threat of injury. The consideration of new material was deemed by the Panel to be unacceptable in light of the time limit the Commission had to meet. The Panel felt that "a line must be drawn somewhere,"[74] and set a time limit of ninety days to review a determination on remand.[75] Arguably, by not reviewing the material, the Panel acted independently of United States law.

American case law has suggested that a government authority has the jurisdiction on remand to re-open an administrative record. The United States Supreme Court has reckoned that an agency "should not be too narrowly constrained by technical rules as to the admissibility of proof,"[76] and that if "new evidence [is] necessary to discharge [an agency's] duty [that] previously erroneous denial should not . . . bar it from access to the necessary evidence for correct judgment."[77] The Supreme Court has also dictated that government authorities "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[78] In limiting the scope of its investigation to data provided in its own *Federal Register* notice, the Panel in *Pork* prevented ITC from fulfilling its legislative mandate.

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[72] *Fresh, Chilled, or Frozen Pork from Canada*, Inv. No. 701–TA–298 55 Fed. Reg. 39073 (September 1990) (Notice of Remand).

[73] *Supra* note 13 at 319.

[74] *Supra* note 42 at 7.

[75] *Supra* note 3, art. 1904(8).

[76] *Interstate Commerce Commission* v. *Baird*, 194 U.S. 25 at 44 (1904).

[77] *Fly* v. *Heitmeyer*, 309 U.S. 146 at 148 (1940) [hereinafter *Fly*].

[78] *Federal Broadcasting Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 at 143 (1940).

Based on the cases of *Pottsville* and *Fly*, the Panel in *Pork* should not have been able to deny the ITC an opportunity to obtain the evidence necessary to discharge its duty.[79] United States case law has further indicated that courts cannot impose the methods, procedures and time dimension of the needed inquiry so as to "propel the court into the domain which Congress has set aside exclusively for the administrative agency."[80] Moreover, investigative responsibilities are unconditionally reactivated on remand.[81] It is therefore evident that United States law prohibits reviewing courts from imposing requirements not provided for by statute and from interfering with administrative investigations. The limitation on new evidence placed by the panel in *Pork* represents such interference.

Fair Play and Due Process

As previously indicated, the Panel based its decision not to accept certain data from the ITC on the grounds of "fair play" and "due process." Arguments supporting this position maintain that the Free Trade Agreement itself compels the parties to honour the notion of "due process";[82] article 1904(3) ensures that the Panel apply "general legal principles that a court of the importing party would apply." Correspondingly, article 1911 interprets "general legal principles" to include "principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies." Reliance on this section is questionable, however, because the principle of due process in the *Pork* case "required reference to the judicial precedents of the United States courts construing the United States Constitution."[83] Specifically, the complainants had to be entitled to protection under the United States Constitution to be guaranteed due process pursuant to the Fifth and Fourteenth Amendments. In the wording of these Amendments, the term "citizen" does not include either corporations or aliens.[84] On this basis, the complainants in *Pork* might not be granted the right

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[79] A. Lowenfield, "The Free Trade Agreement Meets its First Challenge: Dispute Settlement and the Pork Case" (1992) 37 McGill L.J. 597 at 613.

[80] *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194 at 196 (1947).

[81] *Supra* note 53.

[82] *Supra* note 42 at 39.

[83] *Supra* note 64, Brief of the National Pork Producers Council *et al.* at 40.

[84] U.S. Const. amend. 14, 1.

of due process as they are identities existing outside of the United States.[85]

On the issue of "fair play," United States case law requires an agency in the case of a remand to give timely notice of evidence upon which it relies to the parties effected by it.[86] Lawyers for the Government of Canada before the Extraordinary Challenge Committee maintained that the ITC did not do this with their determinations on remand. Such an argument, however, is inadequate in light of the fact that what could be deemed to be appropriate notice was given to the parties. Pursuant to the ITC's notice of remand proceedings, the Canadian complainants submitted additional data to the Commission and were only unable to comment upon the structuring of available information into graphs.[87] Any questionable disclosure pertained to a lack of opportunity for the complainants to comment on the format of the data culled by the ITC, which is a completely different matter from being able to criticize the data itself. American case law further indicates that the ITC is not required to hear commentary from the parties before it on every piece of information gathered in an investigation.[88] It can therefore be argued that "due process" and "fair play" are unsatisfactory bases for the restriction of re-opening an administrative record on remand. Based on this and other issues discussed above, it is argued that the Panel's disposition in the *Pork* case toward evidence leads it to deviate from the conditions of Section 1904 (2) and (3) under the FTA. This disposition, it appears, was not a revision of procedure isolated to this one case; it became *de facto* precedent, which found favour in the case of *Live Swine From Canada*.[89]

Live Swine from Canada

In the Chapter 19 case of *Live Swine from Canada* the Binational Panel required, on its first review, the International Trade Ad-

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[85] It should be noted, however, that there is a small body of case law which runs contrary to this position. See *e.g. Traux* v. *Raich*, 239 U.S. 33, and *Plyler* v. *Doe*, 457 U.S. 202 (1982).

[86] *Supra* note 44 at 37.

[87] *Supra* note 64, Brief of the National Pork Producers Council *et al.* at 51.

[88] *Norwegian Nitrogen Company* v. *United States*, 288 U.S. 294 (1933); see also *Timken Company* v. *United States*, 699 F. Supp. 300 at 309 (1988).

[89] *Supra* note 4.

ministration and the United States Department of Commerce ("Commerce") to re-examine evidence pertaining to a Tripartite program "based on evidence in the underlying administrative record."[90] In turn, Commerce did not follow this direction and requested a remand to re-open and add to the administrative record two documents upon which it relied upon. This request was not granted by the Panel. As in the *Pork* decision, the Panel justified its position on the grounds of expeditiousness, as well as the fact that American case law existed on both sides of the issue. The Panel explained that "the need for finality in the panel process requires the record to be kept closed."[91] Accordingly, the actions of this Panel appear to run contrary to United States administrative law.[92] As Chairman Belman interpreted the use of finality in this decision: "one is drawn to the conclusion that the panel . . . hobbled Commerce and denied relief to the petitioners for no good reason."[93] It may be further argued that the treatment of evidence in this case and *Pork* suggests a trend away from adhering to the law of the importing country. Unfortunately, such a trend may only serve to hobble the integrity of the binational panel review process itself.

Integrity of Binational Panels

The decisions of both *Pork* and *Swine* reflect a belief among panelists in Chapter 19 cases that they are not bound to follow procedural law "that a court of the importing country would apply."[94] This idea was implied in the *Pork* decision by that Panel's statements that "a panel is clearly not on the same footing as the CIT"[95] and that the application of American decisions "should take into account certain special and distinguishing aspects of the ITC's authority on a remand determination in an FTA Binational Review."[96] Adherence to special procedural law which differs from that of the court of the importing party sets a dangerous precedent for the

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[90] *In the Matter of Live Swine From Canada* (May 19, 1992), USA-91-1904-03 (Decision of the Panel) at 75.

[91] *In the Matter of Live Swine From Canada* (October 30 1992), USA-91-1904-03 (Decision of the Panel) at 21.

[92] *Supra* note 50.

[93] *In the Matter of Live Swine From Canada*, (October 30, 1992), USA-91-1904-03 (dissenting opinion of Murray J. Belman) at 14.

[94] *Supra* note 3, art. 1904(3).

[95] *Supra* note 42 at 6.

[96] *Supra* note 42 at 14.

integrity of dispute resolutions by binational panels. It may lead to the Extraordinary Challenge Committee being used by litigants as a device for repeated appeals on this ground, rather than for its intended purpose, as a means of protection against gross departures from fundamental rules of procedure.[97]

Besides being contrary to the FTA as contemplated by the United States and Canada, such "special law" could lead to different procedural systems and standards for reviewing antidumping and countervailing duty decisions, depending upon the case. Jurisprudence separate from the domestic laws of contracting countries might well be erratic, giving way to self-styled rules of individual panels rather than established case law. Clearly this would cause evidentiary difficulties for grieving parties engaged in Chapter 19 dispute resolution. A further concern is that the application of different laws by different panels will mean that some look to the law of importing countries while others may depend upon a separate and inconsistent source of law within the FTA. This could create confusion in the international trading community. Parties appearing before binational panels could not be certain which body of procedural law would apply to their antidumping or countervailing duty action. This question becomes magnified in light of the free trade agreement with Mexico. The risk is that the precedent of *Pork* and *Swine* may be followed in future dispute resolution cases under Chapter 19 of the NAFTA. Further deviations from the current standards of review among the three signatories in favour of an independent source of law within that agreement might then develop.

NAFTA

The dispute settlement provisions under Chapter 19 of the NAFTA embody much the same focus as those negotiated under the FTA. Some changes, however, reinforce the position that a binational

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[97] *Supra* note 79 at 620. Consider also the experience of the World Bank *Convention on the Settlement of Investment Disputes between States and Nations of Other States*, 18 March 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (in force 14 October 1966). The *Convention* was undermined by frequent appeals to a procedure for annulment of arbitral awards (art. 52) established as a safety valve for gross violations of due process. See also W. M. Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration" [1989] Duke L.J. 739.

panel must apply the domestic law of the country whose agency is being challenged. They are in large measure an attempt to ensure that Mexico's laws pertaining to trade remedies are compatible enough with those of Canada and the United States to make a Chapter 19 mechanism suitable.[98] Accordingly, if binational panels follow selectively the laws of importing countries as happened in the *Pork* and *Swine* cases, inconsistency, unpredictability, and possibly evidentiary problems will result However, when one focusses on the points of contention in *Pork*, and particularly the Panel's disallowance of data beyond that which was stipulated by the administrative record, such problems may be alleviated through certain terms of the NAFTA.

One relevant new obligation under the NAFTA is article 1907(3) which details actions "desirable in the administration of antidumping and countervailing duty laws."[99] Examples include "publish[ing] notice of initiating of investigations"[100] and "provid[ing] disclosure of relevant information [such as] an explanation of the calculation or the methodology used to determine the margin of dumping."[101] This provision appears to be an attempt to bring Mexico's standards of judicial review and administrative procedures into harmony with those of Canada and the United States thereby establishing similar notions of "due process" among all three countries. The restructuring of Mexico's standards of "due process" is more precisely addressed in Annex 15(d) Schedule B. It should also be noted that a provision (article 1905) exists to deal with disputes if a party's domestic law prevents a binational panel from carrying out its functions.

CONCLUSIONS

In light of the changes to Mexico's trade remedy system under the NAFTA, the manner in which future binational panels treat evidence will be exceedingly important. If panelists selectively ignore the law of the importing country, as this paper establishes that they did in *Pork* and *Swine*, then the potential benefits that Mexico could en-

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[98] G. R. Winham, *Dispute Settlement in NAFTA and the FTA* (Faculty of Political Science, Dalhousie University, 29 September 1992) [unpublished].

[99] *Supra* note 5 at art. 1907(3).

[100] *Ibid.*

[101] *Ibid.*

joy through a closer North American trading relationship may be undermined. In particular, panels could serve to lessen the impact of provisions which emphasize due process simply by disregarding them. This potentially has larger political implications because by ignoring law pertaining to due process, such law may be denied a chance to be a vehicle for change in Mexican administrative law. However, if one focusses on the issue of whether evidence beyond the administrative record can be considered by a panel, then aspects of Chapter 19 of the new agreement look promising indeed.

Arguably, one of the main problems the Panels in both *Pork* and *Swine* faced were the competing requirements of expediting the process according to article 1904(8), and the concern for following U.S. law pursuant to article 1904(2) and (3). In both of these cases, it appears the Panel acted on the premise that allowing the ITC to hear and use new information gained through a re-opening of the administrative records within the established ninety day period was an impossible task. The decision of the Panels to operate inconsistently with United States administrative law (and therefore 1904(2) and (3)) represents a balancing of factors and the choice between the lesser of two evils. Setting aside the ninety day time limit might well have been a greater transgression in view of both the mandate of the panelists to be expedient, and the divergence of case law on issues surrounding the reopening of administrative records.

New provisions of the NAFTA appear to be not only sensitive to the difficulties of priorizing FTA requirements chronicled in the *Pork* and *Swine* cases, but also supportive of the approach taken by the Panels in those cases. The 1907(3) provisions stipulate that the publication of notices indicating investigations, and the disclosure of relevant information, is seemingly consistent with the Panel's position in *Pork* to encourage due process to be applied to all parties, even if it would not be done under the domestic law of the importing country. Pursuant to Annex 1904 15(d), Schedule B, section 12, Mexico will be required to maintain an administrative record of the proceedings of the investigating agency. They are further held to compile "a detailed statement of reasons and legal basis concerning final determinations."[102] Most importantly, there is a stipulation that the final determination "be based solely"[103] on the

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[102] *Supra* note 5, Annex 1904 15(d) Schedule B, 12.

[103] *Ibid.*

administrative record. Had such a clarification existed under the FTA, it would have vindicated the Panel's position on extra-record evidence in *Pork*. This provision augers well as a prevention against similar conflicts over extra-record data in future Chapter 19 panel decisions under the NAFTA.

Despite problems that have emerged with the Chapter 19 dispute resolution mechanisms under the FTA, they appear to have achieved moderate success. As Andreas Lowenfield believes:

> All things considered, the unique binational dispute mechanisms created by the Canada–United States Free Trade Agreement have worked extraordinarily well.[104]

This achievement has been underscored by the fact that there are no provisions under the NAFTA which stipulate that the signatories are to move away from the use of binational panels and work towards jointly agreed rules on dumping and subsidies as articles 1906 and 1907 of the FTA indicated. It is possible that the impact of the problems addressed in this paper was limited because of the context in which they occurred. One may argue also that the evidentiary issues in *Pork* and *Swine* did not threaten the Chapter 19 process because in each case they did not substantially affect the final determination. Indeed, the Extraordinary Challenge Committee in *Pork* found that with regard to the use of a rule of finality and the refusal to reopen the administrative record by the presiding panel, "none of the alleged errors materially affected the panel decision or threaten the integrity of the panel review process."[105]

On the matter of the *Swine* case, a similar response has come from one of the members of the panel who felt that final decision would not have been different had finality not been applied and the administrative record allowed to be re-opened.[106] The fact that these decisions may invigorate future panels to ignore provisions of the NAFTA in favour of their own procedures, even in the name of expediency, is however, extremely serious. Treatment of evidence not based on the law of the importing country could undermine the procedural agenda established under Chapter 19.

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[104] *Supra* note 13 at 334.

[105] *Supra* note 44 at 14.

[106] Interview with Prof. Gil Winham (17 November 1992) Halifax.

It has been argued that the decisions of the Panels in *Pork* and *Swine* with respect to disallowing evidence beyond the administrative record would not transgress panel procedure under the NAFTA, because of the provisions of 1904 15(d) Schedule B, section 12. In view of the discussed use of the rule of finality in the *Pork* and *Swine* cases, it may be suggested that the NAFTA should have included a provision explicitly allowing binational panels to limit the number of times a panel can remand an agency's final determination. Such a provision would clearly be consistent with the spirit of other aspects of the NAFTA which emphasize expediency. It would also be in keeping with the efforts of the NAFTA to create a harmonious trading scheme between the three nations.

The decisions of *Pork* and *Swine* both reflect a balancing of competing requirements of the Canada–United States Free Trade Agreement. In the *Pork* and *Swine* cases, the use of finality by panels and their prohibition on opening the administrative record were inconsistent with American law and therefore did not comply with article 1904(2) and (3) of the FTA. While these evidentiary issues in themselves have been partially addressed under the NAFTA, their effect on the sanctity of the future binational panel decisions is difficult to predict. The larger problem which emerges from *Pork* and *Swine* is that they may set a precedent for future binational panels under the NAFTA to selectively disregard the laws of the importing party and follow an independent body of law. If history shows this to be the message inherited from these cases then Shakespeare's adage that "what's past is only prologue"[107] will carry frightening overtones with respect to international trade. It will help shape a hemispheric trading world that looks less like a stage for successful dispute resolution, and more like a three ring circus, with Canada, Mexico, and the United States as the main attractions.

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[107] William Shakespeare, *The Tempest*, II.ii.261.