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Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold

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I. INTRODUCTION

On January 2, 1989, a free trade agreement between the United States of America and Canada [hereinafter FTA or Agreement] entered into force.[1] The Agreement contained a new form of dispute settlement for issues covered by the FTA. After two years, the specific rules that govern the binational and extraordinary challenge procedures of the dispute mechanism need modification. This paper will examine these procedures as implemented by the FTA involving antidumping (AD) and countervailing duty (CVD) determinations by the United States and Canada [hereinafter the Parties] and recommend specific changes.

In order to understand the current state of the binational dispute mechanism, it is necessary to comprehensively evaluate the entire legal regime. This commentary begins, in Part II, by reviewing the procedural rules [hereinafter Rules][2] negotiated in Chapter

1. Canada-United States Free Trade Agreement, Jan. 2, 1989, *reprinted in* 27 I.L.M. 281 (1989) [hereinafter FTA]. *See* U.S.-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (codified at 19 U.S.C. § 2112 (1988)); An Act to Implement the Free Trade Agreement Between Canada and the United States of America, House of Commons, 34th Parl., 1st Sess., 37 Eliz. 2 (1988).

2. Procedures and Rules for Implementing Article 1904 of the United States-Canada Free-Trade Agreement, Office of Binational Secretariat Publication, 19 C.F.R. § 356 (1988). Notice of effective date. 54 Fed. Reg. 5930 (1989). There are other dispute mechanisms in the FTA. They cover disputes regarding investments, disputes pertaining to emergency measures, and general provisions

Nineteen of the FTA to provide a historical identification of the overriding goals and mechanisms envisioned by the FTA's negotiators. Part III points out selected problems that have emerged over the first two years of the Agreement's operation and proposes specific solutions. Part IV recommends options for implementing the solutions in light of the current North American Free Trade Area negotiations (NAFTA)[3] and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[4] Finally, Part V ties together the solutions to the ultimate success of the free trade process.

II. THE PROCEDURAL RULES

The Rules for binational panel disputes and extraordinary challenges are outlined in Chapter Nineteen of the Agreement and have been codified by the responsible federal agencies.[5] The Rules were drafted with the aim of creating a binding, swift, and independent judicial review of AD and CVD determinations by the parties.[6] The overriding concern from a business perspective[7] in

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which apply to all disputes not specifically dealt with under the above categories. *See* Apuzzo & Kerr, *International Arbitration—The Dispute Settlement Procedures Chosen for the Canada-U.S. Free Trade Agreement*, 5 J. INT'L ARB., Dec. 1988, at 7 (The dispute mechanism for AD and CVD disputes have elements of a judicial hearing).

3. The U.S. Executive Branch received congressional fast-track authority to pursue a free trade agreement with Mexico in May, 1991. 137 CONG. REC. H3516 (daily ed. May 23, 1991). Canada will also participate in the negotiations.

4. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT], *reprinted in* GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1-78 (1969).

5. The agencies responsible for promulgating technical rules of procedure for the binational panels are the U.S. Department of Commerce and the Canadian Department of National Revenue. The Secretariats are independent bodies in each nation's capitol. The American Secretary is James R. Holbein, former Special Assistant to the Director of the Office of International Trade at the Department of State; his office is located at the Binational Secretariat, the U.S. Department of Commerce, Washington, D.C. The Canadian Secretariat is headed by Ellen Beall, former Acting Senior Counsel, Consumer and Corporate Affairs Canada, and is located at Canadian Section, Royal Bank Centre, Ottawa, Ontario.

6. U.S. DEP'T COMMERCE, INT'L TRADE ADMIN., SUMMARY OF THE U.S.-CANADA FREE TRADE AGREEMENT 38 (Feb. 1988).

establishing the binational panel review process is that trade determinations by either government should be completed more quickly than under previous domestic procedures.[8] It is for these reasons that the Rules have been drafted with an eye toward the arbitral rather than the judicial model.[9] The decisions of panels are binding on the parties to the dispute[10] and, in keeping with these requirements, the panels are considered independent and final judicial bodies replacing the domestic courts of both countries.[11] The following section examines the Rules of the binational dispute procedure to provide the reader with an understanding of the basic goals and specific rules. The purpose of presenting this background is to familiarize the reader with the dispute mechanism for the section that follows on the problems that have arisen since the FTA entered into force.

A. The Negotiating History

It is important to understand the background of the Agreement in order to assess whether the Rules have advanced the goals of the original negotiations. The history of the FTA negotiations is also interesting from legal and political perspectives. The Canadian and U.S. governments developed a comprehensive trade agreement, namely the FTA, from what started out as a modest desire to lower

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7. Ferguson, *Dispute Settlement Under the CDA-US FTA*, 47 U. TORONTO FAC. L. REV. 317, 324 (1989). In this article the author, Professor Ferguson, argues that the FTA binational panel process creates an improved trading regime because it is a more stable and predictable environment, thereby reducing trade-distorting behavior. *Id.* There is also the concern of the cost of long and complex CVD proceedings. Normal CVD cases cost litigants hundreds of thousands of dollars. Horlick & Landers, *The Free Trade Agreement Working Group: Developing a Harmonizing and Improved Countervailing Duty Law*, in ABA CONFERENCE NATIONAL INSTITUTE ON U.S./CANADA FTA: ECONOMIC AND LEGAL IMPLICATIONS 405-06 (1988) (transcribing many speeches from the ABA's conference in Washington, D.C., Jan. 28-29, 1988).

8. *See infra* note 34 (describing the speed of the pre-FTA trade dispute procedure).

9. Apuzzo & Kerr, *supra* note 2, at 7-8 (These Canadian economists provide a nonlegal review of the dispute mechanism).

10. FTA, *supra* note 1, art. 1904, para. 9.

11. *See id.* art. 1904, para. 11 ("Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts").

tariffs on particular products.[12] It was during the initial negotiations that the Parties saw the opportunity for a more encompassing approach to trade between the world's largest trading partners.[13] At this point, the talks took on a new perspective as a comprehensive trade regime. It is clear that the Parties also wanted a successful free trade agreement to counter the single European market planned for 1992 and to strengthen their negotiating positions during the Uruguay Round of the GATT.[14] Actually, the GATT dispute mechanism, with which both Canada and the U.S. have been dissatisfied, is under review in the current round where the U.S. and Canada are pushing for a stronger system through improved rules.[15]

From the beginning of the FTA talks, the United States sought the opportunity to make inroads into traditionally protected areas of the lucrative Canadian market.[16] Across the border, the newly elected conservative Canadian government sought more favorable access to traditionally protected U.S. sectors.[17] These objectives and an unusually good relationship between the U.S. and Canadian governments enabled the negotiations to expand. A joint communique of the two leaders put a two-year deadline on the negotiations.[18] Inevitably, the negotiations continued up until the last minute when an agreement was finally reached at, and perhaps later than,[19] the October 3, 1987, midnight deadline.[20] The focus

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12. On St. Patrick's Day in 1985, Prime Minister Mulroney and President Reagan met in Quebec City, Quebec. This so-called "Shamrock Summit" produced a joint communique expressing the leaders' desire to pursue free trade negotiations. *See* 21 WEEKLY COMP. PRES. DOC. 325 (Mar. 25, 1985).

13. In 1986, bilateral trade between Canada and the U.S. was the largest of any two nations, running at approximately 7% of the world's total trade. *Rub Out the 49th Parallel*, ECONOMIST, June 14, 1986, at 18.

14. Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 242-43 (1987).

15. L. Murphy, Brussels Ministerial Inclusive: GATT Talks Suspended to Allow Countries to Reflect on Positions (Jan. 1991) (Louis J. Murphy is Acting Director, Office of Multilateral Affairs) (available at the office of the U.S. Trade Representative).

16. The U.S. wanted access to the Canadian service and investment markets.

17. This is particularly true in the areas of finished goods (e.g. softwood lumber and seafood).

18. *See supra* note 12.

19. Many of the fine details of the FTA were worked out and agreed to after the official deadline.

here is on the dispute mechanism and the outcome of the negotiations. Although not mentioned anywhere in the historical literature, negotiators and direct comparisons reveal that the International Center for the Settlement of Investment Disputes (ICSID), associated with the World Bank, served as the model for the binational dispute mechanism in the FTA.[21]

The binationality of the panels appealed to the Canadians because they perceived the countervailing duty determinations made by the U.S. Department of Commerce as inconsistent on Canadian softwood lumber products. Specifically, in 1983 the Commerce Department made a final determination that the Canadian government did not subsidize softwood lumber.[22] However, faced with a new factual record in 1986, the Commerce Department made a preliminary determination that certain stumpage fees did constitute subsidies requiring application of countervailing duties.[23] Canadians complained that the second determination was politically motivated and unjust after the earlier determination. As a result of this case, the Parties attempted to draft provisions to cover subsidies. However, agreement could not be reached on subsidies in time for inclusion in the FTA. U.S. Representative Sam Gibbons, Chairman of the Subcommittee on Trade, of the Committee on Ways and Means, offered the binational panel mechanism for dispute settlement as a compromise after the Parties failed to obtain substantive agreement on subsidies, AD, and CVD rules.[24] Hence, the compromise left AD and CVD determinations

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20. This deadline was created by the U.S. fast-track negotiating procedure. Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978 (1975), *amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1101, 93 Stat. 144, 307 (1975) (codified at 19 U.S.C. § 2112(b) (1988)).

21. Interview with Jonathan Fried, former Canadian FTA Subsidies Negotiator, currently with the Canadian Embassy in Washington, D.C. (Apr. 8, 1991). *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), *opened for signature* Aug. 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (Canada is not a party to this convention); ECC-91-1904-01 USA (Mar. 29, 1991) (where the judge remarked on counsel's use of the argument that the ICSID model should apply).

22. 48 Fed. Reg. 24,159 (1983).

23. 51 Fed. Reg. 37,453 (1986).

24. *See* J. BELLO & A. HOLMER, GUIDE TO THE U.S.-CANADA FREE TRADE AGREEMENT 815-19 (1990) (providing an excellent account of the eleventh hour negotiations and a first hand account of the American side of the negotiations).

covered by the novel binational panel procedure. Consequently, the Rules for Article 1904 were finalized between the end of the negotiating period and the time that the FTA was to come into effect on January 2, 1989.[25] The general provisions were outlined for the signing of the initial agreement in time for the U.S. fast-track[26] approval procedure. Later, amendments were made by the respective national agencies.[27]

During congressional debate over the FTA implementing legislation, there were questions raised regarding the constitutionality of the binational procedure.[28] The constitutional issues included the fundamental role of U.S. courts under Article III, the appointment of foreign nationals under the Appointments Clause, and due process concerns under the Fifth Amendment.[29] The U.S. negotiators also expressed concern over the constitutionality of the binational procedure, yet guaranteed the finality of all panel decisions through an Executive Order affirming any challenged decisions.[30] Few Americans have criticized the procedure, and there has never been a legal challenge to the

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25. 53 Fed. Reg. 53,212 (1988), *amended by* 54 Fed. Reg. 53,165 (1989). The dispute settlement negotiations were conducted by the negotiators who had been working on the abandoned subsidies provisions.

26. *See supra* note 20.

27. Errors in Federal Register Publication of Panel and ECC Rules, 53 Fed. Reg. 53,212, pt. IV (1988). *See* Amendments to the Article 1904 Panel Rules, 54 Fed. Reg. 53,165 (1989).

28. J. BELLO & A. HOLMER, *supra* note 24, at 818. U.S. Assistant Attorney General for the Office of Legal Counsel questioned whether, under article III, the Canadian panelists should be allowed to decide issues of U.S. law. There are many articles written on this issue, but no solution has been reached. No party has ever challenged the constitutionality of the procedure and the presence of Canadians; although there are persistent and legitimate concerns.

29. *See* Note, *The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?*, 29 VA. J. INT'L L. 681, 711 (1989) (A constitutional challenge would stand up). *See also* Christenson & Gambrel, *Constitutionality of the Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401 (1989); Note, *The Constitutionality of Chapter Nineteen of the United States-Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989).

30. Smoot-Hawley Tariff Act of 1930, Pub. L. No. 71-361, § 516(g)(7)(B), 46 Stat. 590, *amended by* Implementation Act, Pub. L. No. 71-361, 46 Stat. 590 (codified at 19 U.S.C. § 1516(g)(7)(B) (1988)). *See* Exec. Order No. 12,662, 54 Fed. Reg. 785 (1989) (providing for acceptance of panel or committee final determinations. This order was issued to assure Canadians of the validity of the panel decisions and is the so-called "fallback" provision).

procedure itself.[31] Fortunately, comments from Canadians include one by a Canadian panelist who reports that he feels comfortable making decisions with the help of his American counterparts.[32]

While the negotiating history of the dispute mechanism and current evaluation of its effectiveness are informative, the problems arise mainly in trying to fulfill the original intent of the Agreement. Though the Agreement is a compromise document, it does set out to improve the adjudication of trade disputes with an eye toward specific goals.

B. Speed

A primary goal of the binational process is to speed up the appeals from agency trade determinations. As a consequence, the binational procedure must be completed within 315 days from the filing of a Request for Review.[33] This is a substantial improvement over the two to three year period under the previous

31. A legal challenge in the U.S. domestic courts is possible, but has not yet been taken up.

32. *Chapter 19 Binational Panel Reviews Under the United States-Canada Free Trade Agreement: A Practitioners' Workshop*, in Meeting of the Washington, D.C. Bar Association, International Law Section (March 13, 1991) [hereinafter *D.C. Workshop*] (speech by Donald Brown, Q.C., who has served on three *Paving Parts* panels).

33. FTA, *supra* note 1, art. 1904, para. 14. Panels have granted extensions for specific circumstances pursuant to rule 20 when, in the interest of fairness, four of the five panelists agree that such an extension is warranted. *See, supra* note 25, rule 20.

domestic U.S. process[34] and the two to four year period under Canadian procedures.[35]

The Agreement prescribes a more detailed timeline for reviews.[36] While the time schedule may be demanding on the parties, panelists, and secretariats, it is extremely helpful to the business parties involved in disputes. The fixed time schedule allows for a final and binding resolution that can be relied upon in business planning. It also allows the governments to review final determinations for use in ongoing trade negotiations.[37] In other words, the FTA itself provides for negotiations and for the future expansion of FTA coverage. Undoubtedly, negotiators will look to decisions of the binational panels for guidance in future agreements.

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34. *See* Shambon, *Accomplishing the Legislative Goals for the Court of International Trade: More Speed! More Speed!*, in SIXTH ANNUAL JUDICIAL CONFERENCE OF THE U.S. COURT OF INTERNATIONAL TRADE 8 (Nov. 1989). This report indicates that the median time for first remand decisions at the Court of International Trade (CIT) between January 1986 and September 1989 was 22 months. The CIT is the primary court of appeal in the U.S. for international trade disputes. *See* Cannon, Jr., *Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade*, in SEVENTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF INTERNATIONAL TRADE (Dec. 1990) (comparing the FTA dispute mechanism with the CIT process). The previous procedures for appealing a U.S. determination permitted appeal to the CIT and the U.S. federal courts. *See* Note, *Summary of Proceedings of the Seminar on Dispute Resolution Under the Canada-United States Free Trade Agreement*, 26 STAN. J. INT'L L. 153, 161 (1989). The binational panel mechanism has completely replaced this process for both U.S. and Canadian determinations.

35. Ferguson, *supra* note 7. The traditional Canadian procedure allows for a two prong appeal process depending on the issue. A party may appeal to the Canadian International Trade Tribunal (CITT) and then the Federal Court of Appeal (FCA) or the Department of National Revenue (DNR), then the Tariff Board and the FCA once again and, though rare, to the Supreme Court of Canada.

36. *D.C. Workshop*, *supra* note 32 (speech by D. Brown). The review timetable is as follows:

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

FTA, *supra* note 1, art. 1904, para. 14; 53 Fed. Reg. 53,232 (1988) (to be codified at 19 C.F.R. § 356).

37. Under the FTA, the Parties have continued to negotiate areas where agreement was not reached and those requiring further modification.

C. Binding

Panel decisions are binding only on the parties to the particular dispute and, therefore, are not to serve as precedent for other panels or domestic courts and agencies.[38] In particular, the American parties face constitutional issues that arise regarding the binding effect of binational panels.[39] The main issue that arises is whether U.S. courts deciding third country trade cases are bound to apply panel developed law. If there is a successful constitutional challenge to a binational panel or an extraordinary challenge by committee decision, the American parties have included a fallback provision which authorizes the President to affirm decisions regardless of the domestic judicial outcome.[40] This provision was designed to assure Canadians that the process would be binding and politically respected.

D. Independent and Final

The Agreement grants panels and committees a great deal of authority as final decisions are developed independently;[41] they are not controlled or influenced by any agency or Party. Furthermore, in keeping with this mandate, paragraph ten of article 1904 states that the Agreement shall not affect either judicial review procedures or cases appealed under those procedures in third country determinations.[42] Therefore, all third country

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38. FTA, *supra* note 1, arts. 1904(9), (10), (11). *See* J. BELLO & A. HOLMER, *supra* note 24, at 789 (illustrating that this does not include third parties).

39. *See* H.R. DOC. No. 216, 100th Cong., 2d Sess. 261 (1988) (statement of Administrative Action).

40. Exec. Order No. 12,662, 54 Fed. Reg. 785 (1989).

41. FTA, *supra* note 1, art. 1909. This article establishes the national Secretariats as permanent offices "to facilitate the operation of [Chapter Nineteen] and the work of panels or committees." *Id.* Each Party pays for its own Secretariat. The mandate of the Secretariats is to provide logistical support for proceedings. Basically, they serve the same functions as judicial clerks (i.e., record preparation, receive requests for review, organize briefs and similar filings, and disseminate these documents to participants and the public) with the additional task of scheduling and facilitating hearings. Understandably, this is no small undertaking because of the geographic locations of participants and the amount of material submitted under the deadlines established.

42. FTA, *supra* note 1, art. 1904, para. 10.

determinations will be treated in the traditional method of domestic review. Nonetheless, panels are permitted to rely on domestic trade determinations regarding products from third countries. This fulfills the negotiators' desire that the binational panels not create a new parallel body of law for Canadian trade disputes.[43]

To insure that the determinations are final, the Parties have expressly removed the right of domestic judicial review or appeal from panel or committee decisions.[44] Conversely, the Agreement does not affect the existing review procedures or cases appealed under those procedures.[45] It also does not apply to appeals where a panel review is not requested nor to cases that were commenced before the Agreement came into effect.[46] These features strengthen the authority and finality of Chapter Nineteen reviews.

E. Extraordinary Challenges

Despite the fact that the Agreement eliminates the right of private parties to appeal panel decisions to domestic courts, it does provide for review by an extraordinary challenge committee. Article 1904, paragraph 13 establishes the extraordinary challenge procedure.[47] To date, there has been only one request for review.[48]

A cursory examination of the panel decisions might misleadingly indicate that parties to the procedure have been completely satisfied with the panel process. However, upon closer

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43. Interviews with Shirley Coffield and Jean Anderson, U.S. negotiators, in Washington D.C. (Spring 1991).

44. FTA, *supra* note 1, art. 1904, para. 11 ("A final determination shall not be reviewed under any judicial review procedures of the importing Party if either Party requests a panel with respect to that determination within the time limits set forth in this Article. Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts."). This provision raises constitutional questions of judicially guaranteed review. *See* Anderson & Rugman, *The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms* 6 J. INT'L ARB., Dec. 1989, at 65, 74, 77 (providing a comprehensive analysis of U.S. trade law and the exclusivity of FTA panel review, with insight on the Canadian perspective).

45. FTA, *supra* note 1, art. 1904, para. 10.

46. *Id.* para. 12.

47. *Id.* para. 13; *id.* Annex 1904.13.

48. Fresh, Chilled or Frozen Pork from Canada, USA-89-1904-11, ECC-91-1904-01 USA (request for review from an ITC injury determination, 1991).

examination of the literature and professional and academic discussions, it is clear that not all panel decisions have been favorably received. Actually, there was increasing pressure for an extraordinary review. This may be an indication of the need to improve the procedures, if disputants remain dissatisfied.

The extraordinary challenge procedure is only available upon request to the federal governments for appeal, within a reasonable time, from final binational panel decisions. This procedure, as its name indicates, is intended for use in rare cases to safeguard against panelist impropriety and cases where panels have departed from their FTA mandate.[49] Specifically, the FTA allows for a challenge only where the action by a panel or panelist "materially affect[s] the panel's decision and threatens the integrity of the binational panel review process."[50] These types of challenges are meant to be rare and are not required unless one of the governments asks for the review. Private parties do not have the right to invoke an extraordinary challenge committee; they must instead petition the appropriate government which may, in its discretion, request such a committee meeting.[51]

Once the need for a panel has been established, the Parties have fifteen days to choose three members for the extraordinary challenge committee.[52] The members are selected from a roster of

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49. FTA, *supra* note 1, art. 1904, para. 13. The FTA language makes it clear that challenges are only allowed when the actions of a panel seriously depart from the mandate of the FTA. Cannon, *supra* note 34, at 43. *See* J. BELLO & A. HOLMER, *supra* note 24, at 792-93.

50. FTA, *supra* note 1, art. 1904, para. 13(b). "Where, within a reasonable time after the panel decision is issued, a Party [one of the federal governments] alleges that:

a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
ii) the panel seriously departed from a fundamental rule of procedure, or
iii) the panel manifestly exceeded its powers, authority, or jurisdiction set 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.

Id.

51. J. BELLO & A. HOLMER, *supra* note 24, at 791-93.

52. FTA, *supra* note 1, Annex 1904.13.

current and former judges from the United States and Canada.[53] Each country selects one member from its roster and then jointly choose the third. If they cannot agree on a third, the third member is chosen either by the chosen two members or by lot.[54] Unlike binational panels, there are no peremptory challenges of committee members.[55]

Pursuant to the FTA, the two governments have established a separate set of procedural rules for the extraordinary challenge committees.[56] Committees have the authority to affirm, vacate, or remand panel decisions.[57] If the committee vacates the panel's decision, a new panel must be chosen to rehear the dispute.[58] The Rules also specify that the committee has discretion to adopt its own procedures.[59] The committee has even greater discretion to "extend any time period fixed in [the] Rules" in the interests of just, fair, and speedy resolution of challenges.[60] Nonetheless, to insure a speedy process, the committee should make determinations within thirty days of its formation.[61] Similar to binational panels, the committee is to apply the law of the country where the final determination was reached.[62] In so doing, the committee has the

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53. *Id.* The roster totals ten jurists, five from each country. Sitting U.S. federal judges are expressly prohibited from serving as arbitrators under the U.S. Statement of Administrative Action because of ethical and other legal and practical considerations. The rosters are as follows:

For Canada	For the United States
Jules Deschenes	Arlin M. Adams
Willard Z. Estey	Susan Getzendanner
Gregory Thomas Evans	Charles B. Renfrew
Arthur Gordon Cooper	Phillip W. Tone
Nathaniel Theodore Nemetz	Harold R. Tyler, Jr.

J. BELLO & A. HOLMER, *supra* note 24, at 850.

54. FTA, *supra* note 1, Annex 1904.13, para. 1.
55. J. BELLO & A. HOLMER, *supra* note 24, at 814.
56. 53 Fed. Reg. 53,212, *supra* note 25.
57. FTA, *supra* note 1, Annex 1904:13, para. 3.
58. *Id.*
59. 53 Fed. Reg. 53,212, *supra* note 25, rule 20.
60. *Id.* rule 17.
61. *Id.* rule 2.
62. *Id.* rule 25.

authority to look at all relevant evidence in the record,[63] and every decision must be in writing,[64] by majority vote.[65]

With this background of the dispute mechanism, it is now possible to examine the problems that currently face the procedure, and propose potential solutions.

III. EMERGING PROBLEMS

The Rules were negotiated quickly during the closing days of the FTA. Because of this, they were vague and had to be expanded by the two governments after the Agreement was reached, but before it took effect. Inevitably, there have been shortcomings in the procedures. Some of the problems have been purely technical which the Secretariats have been able to circumvent. Other problems have been more fundamental and potentially affect the outcome. This Part examines selected problems that have been encountered during the first two years of the Agreement and suggests practical solutions.

A. Technical Problems

The FTA rules for binational panels and extraordinary challenges were not perfect in their inception, nor was perfection expected. The framers knew that the process would have to be put into effect and adjusted as required. There have been problems with the way that the binational panels were intended to be administered. Two of the major technical problems with the procedural rules are the cumbersome panel selection process and the proper role of the binational secretariats.

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63. *Id.* rule 26.

64. 53 Fed. Reg. 53,212, *supra* note 25, rule 58(2). The written decision of the committee must also include any concurring and dissenting opinions of the committee members.

65. *Id.* rule 55.

1. The Panel Selection Process

The ad hoc panels are chosen by the Parties from a roster (known as "service lists") of fifty individuals, the majority of which must be lawyers[66] "of good character, high standing and repute . . . on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law."[67] In the interest of impartiality, the panelists cannot be affiliated with either Party.[68] Each Party is entitled to exercise four peremptory challenges in confidence[69] which must occur within forty-five days of the request for the panel.[70] Finally, the Parties together are to choose the fifth panelist within sixty days.[71] If they cannot agree, the fifth panelist is selected by lot on the sixty-first day.[72] Once the panel is selected, the panelists are to appoint a chairman from among the lawyers on the panel.[73] All panelists are subject to the Code of Conduct.[74] While the Rules appear to clearly establish the process for panel selection, there are practical problems that have arisen. Some of the problems encountered with panelists have been conflicts of interest,[75] peremptory challenges, distance from the secretariats, and scheduling.

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66. FTA, *supra* note 1, Annex 1901.2(2).

67. *Id.* Annex 1901.2.

68. *Id.* Annex 1904.2(1).

69. *Id.* Annex 1901.2(2). Peremptory challenges are to be exercised simultaneously and in confidence by the Parties.

70. *Id.* The article continues by allowing panel selection by lot of any vacant, unfilled, or struck seat. This article also allows for selection of panelists who do not appear on the official rosters.

71. FTA, *supra* note 1, Annex 1901.2(3).

72. *Id.*

73. *Id.* art. 1901.2, para. 4. If the panelists cannot decide, by majority vote, on a chairman, the chairman is selected by lot. *See* J. BELLO & A. HOLMER, supra note 24, at 807 (This promotes the appointment of lawyers to the panel, so that the Parties increase their chances of obtaining the chairmanship).

74. FTA, *supra* note 1, art. 1910 (promulgated through an exchange of letters). *See* 54 Fed. Reg. 53,212, *supra* note 25.

75. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(A) (1980) ("A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity"). Actually, several of the panelists, as prominent trade lawyers, have had to turn down appointments because of clients they represent or areas of law they may be arguing that impact potential issues before the panels.

a. Conflicts of Interest

The selection of practicing international trade lawyers for the majority of the binational panel roster slots inevitably leads to issues of conflicts of interest. One American legal panelist has had to decline four times because of potential conflicts.[76] Actually, many attorneys on the rosters appear before the panels as counsel of record or before administrative bodies which are often parties to binational disputes. Ivan Feltham, Professor of Business and Trade Law at the University of Ottawa, has said that it is nearly impossible to find panelists to serve and meet the conflict of interest requirements.[77] In the *Pork* CVD case, suspension of the entire proceeding was required when a panelist had to recuse himself after being selected.[78] Other panelists are hesitant to serve because of the one year prohibition against representing any of the parties involved, including the government.[79] Nonetheless, panelists are allowed to engage in other business during the term of the panel, subject to the Code of Conduct provisions.[80]

The difficulty with using a small community of legal professionals as panelists is obvious: the relationship between private practitioner and binational panelist has the potential of becoming blurred in appearance, if not in actuality. Despite the objective professionalism that is to be expected from panelists, it is impossible to completely separate personal experiences and views on how trade law should evolve. Actually, it is possible that a lawyer as a panelist in one case could argue for a similar position in a private capacity by reference to the preceding opinion in which

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76. *D.C. Workshop, supra* note 32 (speech by David A. Gantz). It was also commented that, in the end, this should not threaten the efficient functioning of the binational panel process.

77. 8 Int'l Trade Rep. (BNA) 813 (May 29, 1991) (stated at a conference on May 17, 1991, sponsored by the Center for Trade Policy and Law in Ottawa, Canada).

78. FTA, *supra* note 1, Annex 1901.2, para. 9.

79. *Id.* art. 1910. Code of Conduct was agreed to in exchange of letters. 53 Fed. Reg. 53,212, *supra* note 25.

80. *Id.* Annex 1901.2, para. 10. *See* J. BELLO & A. HOLMER, *supra* note 24, at 809. Panelists are allowed to engage in business during their tenure in order to encourage people to serve. However, under FTA Annex 1901.2(11), panelists are prohibited from appearing as counsel before other panels at the time of their service for obvious appearance reasons. Panelists also enjoy immunity from suit and legal process relating to performance in their official capacity. FTA, *supra*, Annex 1901.2(12).

he or she participated. Also, because the roster is limited to a small number of trade lawyers, clients will likely seek those lawyers on the service lists in order to gain a potential advantage. Nonetheless, there are ways to overcome this problem.

The binational service lists could be expanded, as has been done in the U.S.,[81] to include a larger cross-section of the legal community and more nonlegal professionals. A larger number of panelists would increase the pool of experienced panelists and reduce the chance of encountering conflicts. The extension of membership to nonlegal persons would also reduce the chance of selecting those who represent trade clients in private practice. Of course, the chairman would still have to be legally trained. An added benefit from the inclusion of outsiders in the process, though requiring more preparation time, would be the fresh perspectives they would offer the process and decision making.[82]

b. Peremptory Challenges

Despite the provisions in the FTA for peremptory challenges by the Parties, there is no allowance for input from the disputants as this part of the process occurs in confidence. In fact, under the Rules, the only way to make a peremptory challenge is to wait until the end of the process and go forward through the extraordinary challenge procedure. This delay makes the process extremely cumbersome, as the most logical opportunity for peremptory challenges has past.

One suggestion has been to follow the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).[83] The UNCITRAL rules would require challenge of a panelist within fifteen days of receiving information worthy of challenge.[84] This would reduce frivolous challenges, save time and

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81. The U.S. has expanded its panel roster from 25 to 50 members.

82. *D.C. Workshop*, *supra* note 32 (speech by P. Ehrenhaft)

83. Note, *supra* note 34, at 178 (comments by Stewart Baker, trade lawyer from Steptoe & Johnson in Washington, D.C.) (citing UNCITRAL Arbitration Rules, art. 11, para. 1, U.N. Sales No. E.77.V.6 (1977), *reprinted in* UNCITRAL 140, U.N. Sales No. E.86.V.8 (1986)).

84. Note, *supra* note 34, at 178.

money, and further legitimize those panelists selected.[85] Another option could be to allow domestic national courts to hear such challenges as an interlocutory matter.[86] As has been pointed out, there is no neutral party to resolve such preliminary disputes.[87] The strongest argument is for a more open selection process where the participants, in combination with their national governments, are allowed input in the original selection process while keeping the peremptory challenges confidential to all but the parties involved. This would be a workable solution requiring little change in the current procedure.

c. Administrative Problems

The U.S. Secretary for the Binational Secretariat, James Holbein, reports that there are problems getting the voluminous documents and administrative records to panelists in time for panel hearings.[88] Mr. Holbein also reports that the official allowance of facsimile transmission of documents has been a saving grace in meeting the rigid timetables set out in the FTA.[89] Understandably, the task of scheduling all parties for oral hearings in either nation's capital is no small undertaking. There does not appear to be any solution to these administrative tasks short of allowing extensions of time deadlines by the Secretariats, which would sacrifice the goal of a speedy procedure. However, violations by the submitting parties could be dealt with more severely in the form of sanctions and potential loss of filing privileges to encourage compliance.

Additionally, the financial rewards for service by panelists are extremely low: $400 Canadian (U.S. $340) per day plus travel costs and expenses.[90] The panelists also lose time from their lucrative

85. *Id.*

86. *Id.* (proposal by Professor George Bermann).

87. *Id.* at 177 (comments by Mr. Baker).

88. Interview with James Holbein, U.S. Secretary for the Binational Secretariat (Feb. 26, 1991).

89. 53 Fed. Reg. 53,212, *supra* note 25, rule 25(1)(b).

90. FTA, *supra* note 1, Annex 1901.2, para. 13. The panelists are also authorized to hire assistants at the rate of $200 Canadian ($170 U.S.) per day pursuant to letters exchanged between the Parties under article 1910. *Id.*

private practices. Yet, the expense has not deterred panelists from deciding to serve. Undoubtedly, there are fringe benefits from serving. These fringe benefits probably include increased stature as an expert on the FTA and the personal satisfaction of public service.

2. *The Role of the Secretariats*

The next issue that arises is what role the binational Secretariats should play. Presently, the Secretariats are limited to a purely administrative role, serving as clerks for the binational panel.[91] Apparently, the negotiators contemplated a substantive role for the Secretariats, but ultimately abandoned this idea.[92]

There are two areas in which these Secretariats could play a greater role. First, the Secretariats could serve as motions judges, deciding issues of the timeliness of filing deadlines. In fact, domestic court clerks already perform this function. The concept of a motions judge is discussed in greater detail in Part III.B. Second, they could propose and amend the procedural rules, subject to national supervision. The Secretariats are the obvious bodies to be given this authority as they must work within the Rules and can best evaluate the areas which need change. Actually, the Secretariats already perform this function through internal, informal discussions. The 1989 amendments to the Rules were a result of this process. Such an expansion of the Secretariats' formal role would also add continuity to the institutions. Of course, the Parties would have to draw clear lines between technical and substantive amendments, reserving the latter for international negotiation.

It has also been suggested that the two Secretariats work together to further harmonize procedures between the two institutions for panel review.[93] This would add to the perception of procedural fairness regardless of the location in which the

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91. *Id.* art. 1909.

92. Note, *supra* note 34, at 177 (comments by Professor Lowenfeld).

93. Interview with J. Alston, Assistant at the U.S. Binational Secretariat (June 12, 1991). Ms. Alston stated that the Canadian rules of procedure are the same as the U.S. Rules.

dispute is heard.[94] It is important to remember that the staffs of the Secretariats are intimately involved with the annual caseloads and gain valuable experience that infrequent participants and government agencies do not always share. Once again, there is the concern that the ultimate decision making authority should remain with the Parties.

There have already been amendments to the Rules because of technical inconsistencies as well as required additions to the language of the original Rules. This process should continue and be formalized as the Secretariats encounter difficulties administering the binational process. However, the major changes that are required in some areas are not subject to agency modification as they require international negotiation and legislative approval.

B. Outcome-Affecting Problems

Some of the problems that have been identified in the Rules potentially affect the final resolution of disputes. These include what should be done with problems that arise before a tribunal is empaneled to hear and render its opinion, and what effect that decision should have once handed down.

1. Prehearing Problems

Prehearing issues that arise face the common problem that there is no authority in place, other than fully constituted panels, empowered to decide these issues. In the domestic setting, a judge is available to rule on pretrial issues that potentially affect the final outcome or whether a case is heard at all. FTA Chapter Nineteen has no such equivalent. At present, there must be a panel formed to hear the issue, and then make a ruling. This often occurs on the same day as the hearing itself because of difficulties in scheduling all the participants.

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94. Note, *supra* note 34, at 179 (comments of Ms. Landers).

a. Interim Notice of Motions Practice

The Rules provide for a motions practice.[95] The motion rules follow traditional common law practice, but place no substantive limits on the type of motions that may be filed. There are also no allowances for variations from the strict time limits of the overall dispute timetable, not even for the panel itself.[96] Fortunately, the Rules do allow telephone conference calls for hearing motions.[97] Personal appearance by the participants is not required.[98]

In practice, the notice of motion procedure has been used to dismiss one dispute after it was found that the initial Request for Review had been filed too late.[99] After the panel makes its ruling, it immediately dissolves itself.

There have also been problems with the motions practice on substantive issues. Panels are required to hear and decide motions on the same day that they hear the dispute.[100] This presents the parties to the dispute with the problem of not knowing how the panel will rule and having to proceed based on a strategy that may be wasteful of all participants' time and money. This is a cumbersome and wasteful method of disposing of all but the most important issues.

The obvious solution, once again, is to establish a motions judge position. This independent jurist could resolve the issues before they are presented to the panel. One suggestion is to give the chairman of the panel this authority. Under such a scheme, the dispute would stay within the binational process, and at the full hearing the whole panel would be able to hear complaints from the disputants about any questionable rulings. The important point remains that the parties can continue the preparation of their cases with knowledge of the ruling on their motions, at least until the

95. 53 Fed. Reg. 53,212, *supra* note 25, rule 63.

96. *Id.* rule 63(4).

97. *Id.* rule 66(2).

98. *Id.* rule 66(1).

99. Oil Country Tubular Goods from Canada, USA-90-1904-02 (1991). This panel was formed, heard the arguments regarding a late filing for a request for review or filing of briefs, and then dismissed the case altogether.

100. *D.C. Workshop*, *supra* note 32 (speech by G. Horlick).

panel meets as a whole. Depending on the importance of the motion, the parties may decide to alter their legal strategy. This would also decrease the administrative burden on the Secretariats by allowing the issue to be resolved before the panel meets.

b. Joinder of Claims and Parties

The next issue impacts the efficiency of the procedure. There are two administrative determinations that must be made in any AD or CVD case. First, the Commerce Department determination of dumping or subsidization must be made. Second, the ITC must find material injury or threat of material injury to domestic U.S. industry.[101] The Canadian procedure involves a similar process.[102] The parties adversely affected by these determinations often seek redress at each stage.

Inefficiency exists where the parties must go through the procedure two or more times in order to get review after each determination in the administrative process. For example, three U.S. cases have appeared before the binational panels multiple times.[103] Under this scenario, it is possible that two panels could exist simultaneously. This occurred in the *Paving Parts* case.[104] The panels were composed of the same membership because the Parties were responsible for their appointment and foresaw the potential division of labor. This allowed for consolidation of the panels and a more efficient process. Nonetheless, there have been

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101. 19 U.S.C. § 1677(7)(F) (codifying the U.S. law on material injury determinations). *See* GATT, *supra* note 4, art. VI.

102. Canada follows the same GATT "material injury" standard as the U.S.

103. *See* Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06 (review of Commerce Department CVD determination 1991), USA-89-1904-11, ECC-91-1904-01 USA (review of ITC CVD injury determination 1991); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, USA-89-1904-02 (review of Commerce Department AD scope determination 1990), USA-89-1904-03 (review of Commerce Department AD determination 1990), USA-89-1904-05 (panel consolidated with case -03 1990), USA-90-1904-01 (review of Commerce Department use of information in AD determination 1991); *New Steel Rails from Canada*, USA-89-1904-07 (review of Commerce Department CVD determination 1990), USA-89-1904-08 (review of Commerce Department antidumping determination 1990), USA-89-1904-09/10 (review of ITC injury determinations 1990).

104. *D.C. Workshop*, *supra* note 32 (speech by L. Koteen) (response by B. Allberger, Chair of *Paving Parts*) (panel consolidated USA-89-1904-05 with -03).

two additional *Paving Parts* panels from separate Commerce Department determinations.[105] The two *New Steel Rails* cases are examples of different panel memberships for the subsidy and injury reviews.[106]

In anticipation of the duplication, the negotiators included rules for joint panel reviews.[107] However, this is conditioned on acceptance by all the participants; subject to an objection being filed within twenty days after the filing of the first Request for Review.[108] It has been pointed out, in light of the *Pork* case, that the real problem occurs when there is a remand to one agency while another panel is meeting on a separate stage of the overall determination.[109] For instance, the *Pork* case involved simultaneous reviews of the subsidy determination by the Commerce Department and the material injury finding by the ITC.

This problem is not unique to the FTA process. The federal court system is often burdened with duplicate claims and parties. Unlike the binational process, federal judges have the authority to join issues and interested parties.[110] The difference lies in the amount of resources that are available to convene a panel and the cost to litigants. This duplication could thwart the primary objectives of the FTA. The panels are designed to speed up the dispute process and save all parties time and money. Fortunately, the Parties reserve the right to appoint panelists. By appointing the same members to both panels, the Parties can avoid a turf battle that could develop between two competing panels. Ultimately, the long term solution must allow for joinder of parties and issues by

105. *See* USA-89-1904-02 (Commerce Department scope determination 1990), USA-90-1904-01 (Commerce Department 1988-89 annual administrative review 1991).

106. *See* USA-89-1904-07 (subsidy determination 1990); USA-89-1904-08 (AD determination 1990).

107. 53 Fed. Reg. 53,212, *supra* note 25, rules 36-38.

108. *Id.* rule 36(3).

109. *D.C. Workshop, supra* note 32 (speech by J. Tupin).

110. *See generally* FED. R. CIV. P. 13, 14, 18, 19, 20, 22, 24 (Counterclaims and Cross-Claims, rule 13; Third-Party Practice, rule 14; Joinder of Claims and Remedies, rule 18; Joinder of Persons Needed for Just Adjudication, rule 19; Permissive Joinder of Parties, rule 20; Interpleader, rule 22; Intervention, rule 24). *See also* C. WRIGHT & A. MILLER, 9 FEDERAL PRACTICE AND PROCEDURE § 2383, at 259 (1971) (Federal courts have broad discretion regarding consolidation).

an overseeing authority, perhaps the motions judge suggested above.

c. Alternate and Competing Fora

When the FTA came into force, petitioners were given the choice of an alternative forum in which to file their trade cases. Previously, they had been limited to the agencies themselves, the Court of International Trade (CIT), and the federal court system. The situation was similar on the Canadian side.[111] The binational panel provides an international flavor because of its composition and faster result. But there are disadvantages that parties may want to consider before opting for the Chapter Nineteen procedure.[112]

The ultimate question facing the petitioner is whether it is necessary to file simultaneously in the traditional forums in order to protect any rights. The *New Steel Rails* case provided the first test of this choice issue.[113] The petitioner filed a summons and complaint in the CIT simultaneously to preserve action on the constitutional issue of standing.[114] The CIT accepted the petition but wisely stayed the proceeding until after the panel had made its final determination. The CIT action was undoubtedly taken to guarantee the petitioner a day in court, with the underlying hope that resolution of the matter would let the CIT avoid the difficult jurisdictional questions under the FTA.

Practitioners have recently stated that the panel should get the first bite at constitutional issues, but that parties should have the

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111. As of June 1991, Canada has not had any binational panel decisions–though there have been two Requests for Review. Rick Dearden, an Ottawa lawyer, explains this situation as a result of the CITT's reputation for fair hearings and the reluctance of the Federal Courts of Appeal to overturn CITT decisions. Actually, none have been overturned in the last decade. 8 Int'l Trade Rep. (BNA) 814 (May 5, 1991). Ellen Beall, the Canadian Binational Secretary, explains the disparity through a Canadian's perception of the Agreement having greater importance and wanting to obtain all its benefits. *Id.* at 651 (May 1, 1991).

112. *See* J. Cannon, Jr., *Dispute Settlement in the Article 1904 U.S.-Canada Binational Panel Versus the Court of International Trade*, 7th Annual Judicial Conference of the U.S. CIT (Dec. 1990) (providing an excellent evaluation of the pros and cons of choosing a forum for trade cases).

113. *See* USA 89-1904-07 (1990).

114. The petitioner questioned whether FTA panels were given the authority to decide questions on this constitutional issue.

option of domestic review. However, after domestic review panel consideration of constitutional issues may not be necessary.[115] Others have commented that a technical reading of the FTA does not allow for such a review. Rather, the Parties reserved their national laws and procedures in the FTA, and a challenge to constitutionality would violate the FTA itself.[116] This technical reading is most persuasive because in the event a FTA panel were to strike down a statute as unconstitutional, there would not be an opportunity for appeal.[117] From an American jurisprudential standpo,int this view is compelling. The question of the constitutionality of statutes goes beyond the scope of review envisioned by the framers of the FTA. The FTA was primarily designed to be a temporary device to resolve specific disputes regarding the application of U.S. trade law to the particular facts. If the panel were to be given the authority to strike down statutes, it would have a more encompassing impact on U.S. trade jurisprudence, extending well beyond the parties to the dispute to effect trade laws enacted to cover third country disputes. Such authority would clearly exceed the original mandate of the FTA.

This problem demonstrates that the Parties must make it possible for panels to decide the issue originally and allow appeal to the domestic courts. Otherwise, litigants will be able to delay the final determination of disputes by filing interlocutory motions in other fora and thereby circumventing the goal of speed.[118]

2. *Panel Decisions*

There has been increasing discussion of the panel decisions themselves. To date there have been thirteen U.S. cases and two Canadian cases.[119] As more decisions emerge, there will be an opportunity to examine how the decisions are framed and received as an independent body of law.

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115. *D.C. Workshop, supra* note 32 (speech by R. Trainer).
116. *Id.* (speech by J. Cannon, Jr.).
117. *Id.* (speech by J. Tupin).
118. *Id.* (speech by B. Allberger).
119. Binational Secretariat, Dep't Commerce, *Caseload Report* (June 1991) (available monthly).

a. Use of Legal Authority

It is clear from the FTA that the panels are only supposed to rely on U.S. or Canadian trade law, depending upon which government action they have been convened to review. However, uncertainty exists when the area of law involved has not been decided, when there is a split of authority, or where the law includes the application of international law such as GATT decisions.

i. Issues of First Impression

There will undoubtedly be novel issues presented which may include areas of law not yet considered by the CIT or federal courts. If the issue is truly one of first impression, a panel should analyze it as would a domestic court of the country whose law is in question. The panel should look at the jurisprudence in the area and render its decision as to whether the agency made the determinations in accordance with domestic law. An important point raised by Judge Carman of the CIT is that panels should defer to agencies when questions of first impression arise.[120] Also, panel decisions are only binding on the parties to a dispute.[121] Therefore, any new law developed for a particular panel dispute will not apply to third countries. In keeping with this position, the primary concern of U.S. negotiators was to avoid the development of two separate bodies of trade law: one towards Canada and another toward third countries.[122]

120. Note, *supra* note 34, at 167 (comments by J. Cannon, Jr.).

121. *Id.* at 168 (comments by J. Toupin, Assistant General Counsel for the U.S. International Trade Commission).

122. *Id.* at 164 (comments of Jean Anderson, former Chief Counsel for International Trade at the U.S. Department of Commerce and member of the U.S. negotiating team for the FTA subsidies and trade dispute working group).

ii. Split of Authority

Another problem that faces panels occurs when there is a split of authority that has not been resolved by the domestic legal regime. This issue was squarely raised in the *Paving Parts* case. In that case, the panel found that the CIT had reached conflicting results in the *Zenith*[123] and *Atcor*[124] cases on the issue of rebated taxes. The *Paving Parts* panel reasoned that stare decisis did not apply, and made their decision following the precedent of *Zenith* alone. Because of the different law being used by the panel, when deciding the forum in which to file, the litigants must consider that the panel's choice of precedent may be more favorable and that there is no possibility of appealing the panel's decision.[125] This is an unforeseen, yet unavoidable, consequence of the binational procedure. Nevertheless, it should not be detrimental if panels make rational choices and explain their reasoning.

iii. Application of International Trade Law

Finally, it is important to remember that the FTA was negotiated in light of the General Agreement on Tariffs and Trade (GATT).[126] In particular, the Chapter Nineteen procedure focuses on domestic pricing and subsidies, areas both specifically covered in the GATT Subsidies Code.[127] In the U.S., there have been fairly clear limitations placed on the use of the Code as a source of law in reviewing agency decisions.[128] Gary Horlick, a Washington trade lawyer and former deputy assistant Commerce

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123. Zenith Electronics Corp. v. United States, 10 Ct. Int'l Trade 268, 633 F. Supp. 1382 (1986), *aff'd*, 875 F.2d 291 (7th Cir. 1989).

124. Atcor, Inc. v. United States, 11 Ct. Int'l Trade 148, 658 F. Supp. 295 (1987).

125. Cannon, Jr., *supra* note 34, at 31-33.

126. GATT, *supra* note 4, art. XXIV.

127. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619. *See Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations*, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 (1979).

128. Note, *supra* note 34, at 166 (comments of Mr. Toupin). *See* J. BELLO & A. HOLMER, *supra* note 24, at 851.

Secretary, stated that panels should be allowed to apply GATT codes and laws agreed to by the Parties.[129] As regards the use of another country's law, the FTA makes it clear that panels cannot rely on foreign law unless a domestic court would do the same.[130]

The idea of including general GATT law and codes in the body of law available for binational disputes is appealing. Those provisions signed by both countries should not raise disputes. It is also appealing in the sense that if binational panels are able to rest their decisions on this body of international law, it could reduce the likelihood of resort to the cumbersome GATT dispute mechanism, something both Parties should desire.

b. The Role of Dissenting Opinions

At the inception of the binational process, it was feared that there would be bloc voting reflecting a national bias. It has also been said that the national rosters contain individuals of great stature which could cause problems as they would be strong-minded, making it difficult to arrive at unanimous decisions. As a result, there were proposals that unanimity should be required in all decisions and that dissenting opinions should not be published.[131] However, the experience has been quite the opposite. All but two of the decisions have been unanimous, and no block voting has occurred.[132] All tolled, there have been six unanimous decisions, two dissents by nationals of other states, and two concurring opinions.[133]

None of the concerns raised above has created any controversy. This is probably a reflection of panel unanimity and the unbiased

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129. 8 Int'l Trade Rep. (BNA) 813, 814 (May 29, 1991).

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

131. Note, *supra* note 34, at 177 (comments of Judge Carman). *See* FTA, *supra* note 1, Annex 1901.2, para. 5 (Dissenting and concurring opinions must be published).

132. 8 Int'l Trade Rep. (BNA) 814 (May 29, 1991) (comments by R. Dearden). ITC Acting Chairperson Ann Brunsdale said that "the opinions of the panels to date have been fair, balanced, and unbiased . . . the panels have voted on the facts rather than in national blocs." *Id.*

133. A. Lowenfeld, Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-U.S. Free Trade Agreement: An Interim Appraisal 9 (Dec. 1990) (unpublished manuscript presented at the Administrative Conference of the United States).

professionalism that has been exhibited by the panelists. Even the *Pork* case, probably the most controversial to date, was a four-to-one majority decision.

c. Consistency Among Panel Decisions

As both Canada and the United States have common law systems of jurisprudence, the question of consistency among panel decisions must be addressed. The panelists are primarily lawyers trained in the use of precedent. Also, the membership of panels is constantly changing. Therefore, the law that panelists use to decide cases is likely to be that decided in previous panel decisions.

David Gantz, Chairman of the *New Steel Rails* CVD panel, said that he sees no problems with panels relying on previous binational decisions. He views such reliance as a necessity in order to provide consistency and prevent duplication of effort.[134] For example, the *Pork* CVD case cited the *New Steel Rails* decision on the issue of the burden on the ITC when finding threat of material injury.[135] This use of prior decisions is likely to continue as more decisions are rendered. There has been a problem obtaining prior panel decisions. Recently, that has been overcome as both LEXIS and Westlaw computer services have added the decisions to their databases.

The question remains regarding the resolution of conflicting precedent set by previous decisions, as in the *Paving Parts* resolution of conflicting CIT opinions. There is no FTA negotiating history on this point. Currently, the panel decides how much use to make of previous panel decisions. The answer is not simple and obviously remains unsettled for future panelists to decide. However, the experience of the panelists and the reluctance of making new law weighs heavily against a new review of recurring issues.

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134. *D.C. Workshop*, *supra* note 32 (speech by D. Gantz).

135. USA-89-1904-11 at 10. *See* Cannon, Jr., *supra* note 34, at 32 (comments of the panelists').

d. Interim Relief

The forms of relief available to FTA petitioners in AD and CVD cases evokes comparison with the old procedures. The CIT and domestic U.S. courts have greater interim powers than binational panels (e.g., injunctive relief and an interlocutory procedure allowing for stays). This can be very important in the business context: deciding in which forum to file without fearing tactical requests for binational review by another party in search of a more favorable forum. In the U.S. system, preliminary injunctions can mean the life or death of a business venture. This is because, once the Commerce Department and the ITC have made an affirmative injury determination, the Customs Service is instructed to liquidate all merchandise that enters the country related to the resolution. Under CIT injunctive powers, a party affected by such a determination can enjoin the liquidation until there is a final judicial decision.[136] The parties risk their case becoming moot if they do not act to preserve their injury claim.[137] Unfortunately, an injunction requires the CIT to rule on the merits of a case, a judgment which the FTA leaves exclusively to binational panels. Therefore, the disputants appear to be without interim relief under the FTA regime as panels have no comparable injunctive or protective powers.

The difference in available relief will likely lead to forum-shopping, something frowned upon by the U.S. domestic legal system. The obvious solution to this deficiency is to create a procedure for petitioners to obtain interim relief from agency determinations. This procedure would either give the panel's chairman or proposed motions judge the same authority to enjoin the liquidation of alleged violating goods or allow for resort to the domestic courts while the panel process is ongoing.

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136. Kennedy, *Binational Dispute Settlement Under the Canada-U.S. Free Trade Agreement*, 13 MD. J. INT'L L. & TRADE 71, 90 (1988).

137. Zenith Radio Corp. v. United States, 710 F.2d 806 (Fed. Cir. 1983).

3. The Extraordinary Challenge in the Pork Case

The extraordinary challenge process has been invoked only once to date.[138] The Parties made it clear in the FTA that such a challenge was to be requested only in rare cases. On March 29, 1991, the Bush Administration requested the formation of an extraordinary challenge committee to review the *Pork* binational panel final decision.[139] The invocation of the process in the *Pork* case is a significant development in the history of the Agreement. For that reason, the challenge must be looked at closely to determine if there are significant problems with the dispute mechanism.

In the *Pork* case, two ITC Commissioners wrote a scathing attack on the panel's remand of the case. The dispute involved a 1989 ITC injury determination[140] after a Commerce Department CVD investigation of *Fresh, Chilled, and Frozen Pork from Canada.* The Canadian-chaired panel[141] determined that the ITC received evidence beyond those issues in the record. On the second remand the ITC reluctantly held that U.S. pork producers were not injured nor threatened with material injury despite a Commerce Department determination that Canadian pork was subsidized.[142] In the remand opinion, Commissioners Rohr and Newquist devoted twenty-eight pages of a thirty-two-page opinion to a description of what they felt were violations of the FTA by the binational panel.

Characterizing the panel's decision as "counterintuitive, counterfactual, and illogical but legally binding," the Commissioners expressed their views on the panel's remand of

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138. *Fresh, Chilled or Frozen Port from Canada,* ECC-91-1904-01USA (request for an extraordinary challenge committee).

139. Former U.S. Court of Appeals Judge Arlin Adams chaired the Committee; he sat with Willard Estey, former Justice of the Supreme Court of Canada, and Gregory Evans, former Chief Justice of Ontario. 8 Int'l Trade Rep. (BNA) 569 (Apr. 17, 1991).

140. USITC Pub. 2218, Inv. No. 701-TA-298 (final Sept. 1989), 54 Fed. Reg. 37,838 (1989).

141. Simon V. Potter of Canada chaired the panel; E. David Tavender and John Whalley of Canada, and Kathleen F. Patterson and Tom M. Schaumberg of the U.S., participated. Both Potter and Tavender have served on other binational panels.

142. USITC Pub. 2218, *supra* note 140, at 4-5.

their decision.[143] The majority went out of its way to make clear that it completely disagreed with the panel's determination in the case, but was required to follow the decision under U.S. implementing law.[144] The Commissioners first accused the panel of violating the FTA itself in arriving at a preordained result favorable to the Canadian party. They said that the panel, in finding an independent form of due process within the FTA, went beyond domestic U.S. law in criticizing the ITC's evidence gathering methods.[145] The Commissioners continued by noting that the panel unnecessarily restricted the ITC's ability to remand a case to an agency by using the excuse that the matter must be completed within the 315 day period required by the FTA.[146] Additionally, the opinion pointed out that the panelists inconsistently criticized the ITC for relying on a Canadian publication that was made available after its original opinion, while the panel itself used a U.S. publication that came out at an even later date.[147] The opinion made clear that, while the ITC was forced to comply with the panel's ruling, the ruling should not be held to alter U.S. administrative law or practice. Finally, they concluded that the method of administrative review was not affected by this decision.[148]

In a concurring opinion, Acting Chairman Brunsdale, expressed her support for the panel's criticisms. She stated, without the benefit of being able to read the majority's opinion,[149] that the panel's views on due process and product shifting were well taken. However, she had reservations regarding the panel's interpretation of the U.S. AD statute,[150] but she understood the confusion in

143. *Id.* at 19-34.
144. *Id.* at 34.
145. *Id.* at 6-7.
146. *Id.* at 8-10.
147. USITC Pub. 2218, *supra* note 140, at 10-12.
148. *Id.* at 12-18.
149. It is ITC practice that the majority opinion is not released to any Commission members outside the majority until public release.
150. 19 U.S.C. § 1677(7)(C)(ii).

that the ITC uses the statute in a confusing manner.[151] In a separate forum, Brunsdale has noted that the Chapter Nineteen procedure has worked well, but that panels may be showing too much deference to ITC decisions.[152] She explained that the ITC must be required to "make the substance of [its] decisions more clear."[153]

Predictably, the Canadian response was that the panel process had worked to produce a fair, expeditious, and binding result.[154] John Crosbie, the Canadian international trade minister, characterized the U.S. invocation of the extraordinary challenge procedure as "harmful to the Free Trade Agreement if every trade dispute ends up in [a challenge]."[155] Prime Minister Mulroney has stated that the Canadian government considers the challenge an abuse of the dispute resolution process and that the outcome will influence Canada's participation in future trade agreements, presumably referring to the on-going NAFTA talks.[156] Canadian lawyer, Rick Dearden warns that the challenge already sets a dangerous precedent and that the "whole system [will] fall apart unless this is an aberration."[157] Perhaps in an act of appeasement, the Commerce Department complied with the binational panel's ruling at least until the extraordinary challenge committee had issued its determination.[158]

The American administration appears to have requested a review for collateral reasons. A letter signed by Members of Congress pleaded the case for a review, threatening withholding of fast-track authority needed for the GATT and NAFTA negotiations.[159] Senator Tom Daschle called for congressional

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151. *D.C. Workshop*, *supra* note 32 (speech by J. Cannon) (providing an insightful analysis, critical of the panel's application of U.S. administrative law).

152. 8 Int'l Trade Rep. (BNA) 813, 814 (May 29, 1991).

153. *Id.*

154. 8 Int'l Trade Rep. (BNA) 264 (Feb. 20, 1991) (comments of John Crosbie, the Canadian Minister of International Trade).

155. 8 Int'l Trade Rep. (BNA) 569 (Apr. 17, 1991) (comments before the Canada Society).

156. *Id.*

157. 8 Int'l Trade Rep. (BNA) 813, 815 (May 29, 1991).

158. *Id.*

159. Interview with Jonathan Fried, *supra* note 21.

review of the FTA, in light of the ITC decision, before the U.S. entered negotiations on the NAFTA.[160]

The outcome of the challenge was in favor of the Canadian pork producers.[161] The Committee summarily dismissed the contentions of the U.S. petitioner and the U.S. government. If the case had gone against them, the Canadians could have carried it further to the GATT dispute mechanism.[162] This could have been viewed as a setback to the usefulness of the Free Trade Agreement. However, a reassessment of its usefulness may still be in order in light of the problems identified above. On a cautionary note, the new Canadian Minister for International Trade, Michael Wilson, has said that Canada will not reopen the FTA, but will participate in the on-going NAFTA discussions.[163]

IV. METHODS OF CHANGE

There are many ways to make the changes that have been suggested above. The method chosen depends on the impact it will have on the original Agreement. That is, the more fundamental the change, the more likely it is that it will require an amendment to the implementing legislation in both countries, something that is difficult to accomplish. Also on the horizon are the on-going NAFTA negotiations which include Canada, the U.S., and Mexico. On a global platform, the current Uruguay Round of the GATT is in the process of revising its trade dispute mechanism.[164] Any of these fora could provide the opportunity to replace and, thereby, amend the U.S.-Canada FTA.

The changes that require legislative action are those primarily in the "outcome affecting" category. The Executive Branch of the United States is hesitant to reopen the Agreement fearing, with good reason, congressional tinkering. However, there are certain areas that could be improved given the opportunity.

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160. 8 Int'l Trade Rptr. (BNA) 342 (March 6, 1991).
161. *See supra* note 138 (request for extraordinary challenge committee).
162. 8 Int'l Trade Rep. (BNA) 497 (Apr. 3, 1991).
163. 8 Int'l Trade Rep. (BNA) 804 (May 29, 1991).
164. Murphy, *supra* note 15.

The most significant adjustment, to make the system more efficient for all parties, is the addition of a motions judge. This person could adjudicate prehearing motions and give a more direct statement on the type of claims that can and should be joined for consolidated proceedings.

The extraordinary challenge procedure is the only source of appeal from binational panel decisions. Yet, there remain issues that are reasonably thought improper for panel review (e.g. constitutional issues not addressed by the U.S. judicial system). It must be decided whether the panels should have the authority outright or whether such issues should be deferred to a domestic court first. It is this writer's opinion that panels must be given the authority to make all decisions as the court of first resort.

A. Upcoming Opportunity: NAFTA

On February 5, 1991, President Bush announced after consultations with President Salinas of Mexico and Prime Minister Mulroney of Canada, that there was agreement between the leaders to enter negotiations for a trilateral free trade agreement.[165] This negotiation currently aims to develop a similar trade dispute mechanism. Carla Hills, the U.S. Trade Representative, stated that the NAFTA negotiations will recommend the establishment of a dispute settlement mechanism similar to the one under discussion above.[166] Inevitably, the parties will use the binational panel

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165. Press Release, Office of the Press Secretary, The White House, Press Conference by the President (Feb. 5, 1991), *partly reprinted in* Auerbach, *Talks Begin On 3-Nation Trade Pact; Canada Will Join U.S. and Mexico*, Wash. Post, Feb. 6, 1991, § Financial, at B1 (final ed.), *and in* Auerbach, *Factions Din in Positions Against Mexico Trade Pact; Opposition Fears Loss of Jobs, Factories*, Wash. Post, Feb. 8, 1991, § Financial, at F1 (final ed.). The President also noted that the goal of the negotiations was to "link [the] three economies in bold and far reaching ways." Additionally, he said, "A free trade area encompassing all three countries would create a North American market of 360 million people, with annual production of more than $6 trillion." Significantly, he continued by saying, "A successful trade agreement . . . would be a dramatic first step toward the realization of a hemispheric free trade zone, stretching from Point Barrow Alaska to the Straits of Magellan. . . . In cooperation with Mexico and Canada, we will work actively to conclude these negotiations expeditiously." *Id.*

166. Statement of Ambassador Carla Hills, United States Trade Representative, before the Subcommittee on Commerce, Consumer Protection, and Competitiveness, Committee on Energy and Commerce, U.S. House of Representatives 5 (Mar. 20, 1991).

procedure as a model. One difficulty that has been identified is that the Mexican civil law system complicates the idea of simply overlaying the current procedure,[167] while Canada and the U.S. share a common judicial procedure and similar statutory trade law regime.

What will come of these negotiations, or even what the specific objectives are, remains secret for protection of negotiating positions. Therefore, it is difficult to say definitively what the agreement will look like and how it will ultimately mesh with the U.S.-Canada FTA. However, the fast-track procedure, under which the U.S.-Canada FTA is being negotiated,[168] provides the opportunity for a completely new North American agreement that encompasses the changes contemplated above in the trilateral setting.

B. The Uruguay Round: GATT

The recent incorporation of free trade into the international trading system was expanded and codified after World War II with the inception of the GATT.[169] The GATT system seeks the elimination of trade barriers through negotiation similar to the FTA process.[170] The GATT dispute mechanism has recently been renegotiated in draft form to produce a more streamlined procedure.[171] There are those who suggest that the FTA was negotiated to provide a model for GATT dispute resolution reform.[172] In reality, the FTA is a regional improvement,

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167. Auerbach, *U.S., Mexico Get Down to Business on Trade Talks*, Wash. Post, May 28, 1991, § Financial, at E4 (final ed.). Senator Moynihan noted differences with the Mexican judiciary in the area of dispute settlement under the NAFTA negotiations. *Id.*

168. 8 Int'l Trade Rep. (BNA) 803 (May 29, 1991). The House of Representatives, on May 23, 1991, and the Senate, on May 24, 1991, approved the fast-track presidential negotiating authority. The House of Representatives (by a vote of 231 to 192) and the Senate (by a vote of 59 to 36), rejected resolutions that would have denied fast-track authority. *Id.*

169. GATT, *supra* note 4.

170. Davey, *Dispute Settlement in the GATT*, 11 FORDHAM INT'L L. J. 51 (1987).

171. GATT, *supra* note 4.

172. Parker, *Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement*, 23 J. WORLD TRADE, No. 3, at 83 (1989) (noting the differences between the GATT and the FTA). Some differences are: the GATT has membership of over 103 countries, the FTA has a more

designed to go further by protecting against bias and eliminating excessive delays in processing complaints. The GATT's main difference with the FTA is that private parties are the initiators and participants in the process.[173]

The fact remains that if the FTA dispute mechanism is perceived as a success, it can be cited as a model for a future dispute resolution regime worldwide. If, on the other hand, the binational panels do not gain similar acceptance in the global forum, there is nothing lost, as the North American trade relationship will not have sacrificed anything.

V. CONCLUSIONS

In the end, the binational panel process, which started out as an unforeseen outgrowth of the unresolved subsidies negotiations, has worked remarkably well. Its success, in large measure, is a tribute to the panelists and Secretariats. The panel's continued success will require the interim modifications suggested above. However, the on-going NAFTA negotiations may provide the opportunity for incorporating the adjustments into whatever dispute mechanism emerges.

On a larger scale, the acceptance of such a procedure may greatly influence changes in the GATT dispute mechanism. This could ultimately improve the world trade system and give new life to what many feel is a system in decay. Ultimately, the fair and peaceful resolution of trade disputes can only improve political and economic relations throughout the world as long as others view the Chapter Nineteen process with envy.

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substantive regime, and Canadian-U.S. trade law is relatively similar to each other. Nonetheless, the FTA is an experiment that fits neatly within the GATT framework, and the Treaty itself often refers to the GATT by name. *Id.*

173. Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 338 (1988).