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Binational Dispute Settlement Under the Canada - U.S. Free Trade Agreement

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I. INTRODUCTION

A. *Current Trade Relations*

The recent spate of antidumping ("AD") and countervailing duty ("CVD") actions between the United States and Canada has been a major irritant in relations between these trading partners.[1] Many Canadians view the United States' use of these trade remedies as thinly veiled protectionism which threatens predictable and assured access to the American market.[2] Whether or not it is warranted, the Canadian perception was bolstered by the notorious 1986 softwood lumber case in which the International Trade Administration of the Department of Commerce ("ITA") found Canada's method for valuating standing timber on government land a countervailable subsidy.[3] This determination is completely at odds with the position the ITA had adopted just three years earlier on the same Canadian program.[4] Similarly, many

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1. By one count, the United States conducted ten antidumping and thirteen countervailing duty investigations involving imports from Canada during the five-year period from 1980 to 1985; Canada completed 31 AD investigations against United States imports during the same period. Battram & Glossop, *Dispute Resolution Under the Canada/United States Free Trade Agreement* in UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 299, 309 (ABA 1988). For recent AD and CVD cases, see Canadian Meat Council v. United States, 661 F. Supp. 622 (Ct. Int'l Trade 1987) (live swine); Alberta Pork Producers' Marketing Board v. United States, 669 F. Supp. 445 (Ct. Int'l Trade 1987) (hogs from Canada); BMT Commodity Corp. v. United States, 667 F. Supp. 880 (Ct. Int'l Trade 1987) (codfish from Canada); Fresh Cut Flowers from Canada, 52 Fed. Reg. 2,134 (1987); Oil Country Tubular Goods, 51 Fed. Reg. 15,037 (1986); Certain Red Raspberries from Canada, 50 Fed. Rg. 26,638, 47,124 (1985); *ITC Begins Investigation of Fabricated Structural Steel Imported from Canada*, [Jan.-June] Int'l Trade Rep. (BNA), No. 5, at 143 (Feb.3, 1988); *Margins as High as 85 Percent Found in Preliminary Ruling on Canadian Potash*, [July-Dec.] Int'l Trade Rep. (BNA) No. 34, at 1067 (Aug. 26, 1987) ("In Ottawa, the government's reaction was immediate and sharp"); *Canadian Tribunal Recommends that Cabinet Trim Countervailing Duty on U.S. Corn Imports*, [Jan.-June] Int'l Trade Rep. (BNA) No. 42, at 1316 (Oct. 28, 1987); Int'l Trade Rep. (BNA) No. 29, at 946 (July 22, 1987) (Canadian Import Tribunal imposes duties on dumped imports of chain saws from U.S., Sweden, and West Germany); Int'l Trade Rep. (BNA) No. 35, at 1098 (Sept. 2, 1987) (Revenue Canada finds dumping of U.S. imports of fertilizer handling, blending, conveying equipment).

2. Wonnacott, *The United States and Canada: The Quest for Free Trade*, in POLICY ANALYSES IN INTERNATIONAL ECONOMICS 7 (1987).

3. Certain Softwood Products from Canada; Preliminary Affirmative Countervailing Duty Determination, 51 Fed. Reg. 37,453 (1986). For a legal and economic analysis of the softwood products cases, see Wonnacott, *supra* note 2, at 89-102.

4. Certain Softwood Products from Canada; Final Negative Countervailing Duty

Americans may see recent AD and CVD determinations by Revenue Canada as transparent attempts to retaliate in kind, particularly the recent ruling on subsidized corn imported from the United States.[5]

To some observers these trade actions signal the drawing of battle lines between the world's two largest trading partners, with war looming just over the horizon. Still, considering the relatively few AD or CVD actions taken by either country against the imports of the other prior to 1985, these trade cases arguably were nothing more than high profile posturing.[6] Discrete sectors of the American business community were anxious to draw attention to perceived unfair Canadian trade practices in anticipation of the forthcoming free trade negotiations.[7] However, one thing is certain: these cases hardened Canada's resolve that any free trade agreement with the United States must include a binding binational mechanism for settling disputed AD and CVD cases.

B. *Background*

The United States significantly lowered its tariff barriers following the Kennedy and Tokyo rounds of multilateral trade negotiations conducted under the aegis of the General Agreement on Tariffs and Trade ("GATT").[8] However, in the Canadian view, AD and CVD laws effectively replaced the tariff wall as a type of contingent protection for domestic industries injured by foreign competition.[9] This perceived development was of special concern and even a source of alarm to Canada, a country which depends heavily on the U.S. market: merchandise exports account for twenty-five percent of Canada's GNP and nearly eighty percent of those exports go to the United States.[10] Canada's economic survival and future prosperity hinges on secure access to the American market. The mere threat of an AD or CVD action jeopar-

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Determination, 48 Fed. Reg. 24,159 at 24,167 (1983).

5. Revenue Canada, Final Determination on Subsidized Corn from the United States of America (1987). For an overview of the U.S. and Canadian AD and CVD duty laws, see ROSSIDES, U.S. IMPORT TRADE REGULATION 195-283 (1986); PATERSON, CANADIAN REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 105-46 (1986).

6. *See* Wonnacott, *supra* note 2, at 66-67.

7. For example, the U.S. softwood lumber industry filed their CVD petition with the Commerce Department just two days before formal FTA talks were to begin. *See* Koh, *A Legal Perspective*, in PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT 98 (Stern, Trezise & Whalley eds. 1987).

8. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5-6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948).

9. Wonnacott, *supra* note 2, at 62-70.

10. *Id.* at 2.

dizes the predictability and security of that market and, thus, can deter trade.[11] This, in turn, could adversely affect the Canadian national economy.

C. *The Negotiations*

Against this backdrop, the initial Canadian objective during the free trade negotiations was, not surprisingly, to obtain reciprocal exemptions from AD and CVD actions.[12] The chances of negotiating such an exemption and, later, winning congressional approval were slim from the outset. The United States had rejected an identical proposal during the negotiation of the U.S.-Israeli free trade agreement, despite the fact that much smaller volumes of trade were at stake.[13] If an exemption was not negotiable between two countries with such strong political and military ties as the United States and Israel, then, a fortiori, the chances of securing this kind of exemption for Canada where the economic stakes were considerably higher were nil. Forced to retreat to second best, the Canadian negotiators made the creation of a binational panel to review disputes over AD and CVD determinations a sine qua non to concluding a free trade agreement ("FTA").[14] After reaching an impasse on this issue, an eleventh-hour agreement was reached on October 3, 1987, provided, inter alia, for binding, binational panel review of AD and CVD cases involving imports from Canada and the United States.[15] On January 2, 1988, President Reagan and Prime Minister Mulroney signed a free trade agreement that included this binational panel review provision.[16]

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11. For example, "the CVD investigation into Canadian lumber imports, undertaken in 1986, was interpreted as harassment because a similar investigation several years ago had ended with the determination that there were no countervailable subsidies." Wonnacott, *supra* note 2, at 67.

12. *See Free Trade Agreement Meets All of Canada's Demands, Mulroney Tells House of Commons*, [July-Dec.] Int'l Trade Rep. (BNA) No. 39, at 1211 (Oct. 7, 1987).

13. Free Trade Agreement, Apr. 22, 1985, United States - Israel, *printed in* 24 INT'L LEGAL MATERIALS 653-87 (1985). In 1983, U.S. non-military exports to Israel totaled $1.7 billion, while U.S. imports from Israel were $1.3 billion. *Authority for Trade Agreements with Israel and Canada*, S. Rep. No. 510, 98th Cong., 2d Sess. 7 (1984).

14. *Canadian Negotiator Walks Out on Free Trade Talks, Leaving Future of Accord in Jeopardy*, [July-Dec.] Int'l Trade Rep. (BNA) No. 38, at 1178 (Sept. 30, 1987).

15. *U.S., Canadian Officials Attain Trade Pact in Down-to-the-Wire Negotiating Session*, [July-Dec.] Int'l Trade Rep. (BNA) No. 39, at 1210 (Oct. 7, 1987).

16. Free Trade Agreement, Jan. 2, 1988, United States - Canada, *printed in*

The articles of the FTA on the binational review panel have been the subject of sharp criticism on both sides of the border. Canadians charge that they do not go far enough, while Americans maintain that they go so far as to be unconstitutional.[17] This paper addresses two facets of the dispute settlement mechanism: the composition, jurisdiction, and procedures of the panel; and the AD and CVD issues which may prove the most nettlesome in reviewing final determinations by the ITA or the United States International Trade Commission ("ITC"). To place these two topics in context, this paper first outlines the contents of the FTA and its ramifications for GATT.

II. Overview of the FTA

A. *Contents*

The United States-Canada FTA has been tagged with many labels, most of which are hyperbolic in tenor — historic, unprecedented, ground breaking, trail blazing. Regardless of one's sympathies, it is difficult not to think of the FTA in these terms. The FTA covers all trade in goods and most trade in services between two countries with the world's largest volume of two-way trade.[18] Simply put, the United States buys more from and sells more to its northern neighbor than any other country. In the two-year period of 1984-85, Canada bought twenty-two percent of all U.S. exports, twice that of second-place Japan.[19]

As might be expected, negotiations with such an ambitious agenda and broad scope have produced a prolix document.[20] The FTA, grouped into eight separate parts and divided into twenty-one chapters, contains 150 articles establishing the parties' basic obligations. Annexes flesh out the details of implementation for some of the barer articles. Substantively, the most significant provisions are those covering trade in goods and services, government procurement, and investment. The most significant procedural provision, and certainly the most controversial aspect of the entire FTA, is the binational dispute panel.

COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. Doc. No. 100-216, 100th Cong., 2d Sess. (1988), at 297 (1988) [hereinafter FTA].

17. *See* 4 Int'l Trade Rep. (BNA) 1212 (1987); *Customs Trade Bar Criticizes FTA Binational Dispute Panel, Citing Constitutional Issues*, [July-Dec.] Int'l Trade Rep. (BNA) No. 50, at 1589 (Dec. 23, 1987).

18. Wonnacott, *supra* note 2, at 2.

19. *Id.*

20. The copy of the Agreement published by the Canadian Department of External Affairs is over 300 pages, 250 of text, the balance explanatory notes.

To break it down more specifically, Part One of the FTA outlines objectives and scope. Part Two regulates trade in goods and provides three formulae for the elimination of all tariffs on bilateral trade by January 1, 1998: in a few sectors, such as computers, motorcycles, and whiskey, tariffs cease immediately upon entry into force on January 1, 1989; for others, such as paper, paints, and furniture, elimination occurs in five equal annual stages, beginning January 1, 1989; all other tariffs, such as steel, textiles, and appliances, will disappear by 1998 in ten equal annual steps.[21] Part Three, on government procurement, lowers the threshold in the GATT Government Procurement Code from $171,000 to $25,000.[22] All federal government purchases above this threshold will be open to competitive bidding by each party. Part Four covers trade in services, investment, and business travel.[23] Canada and the United States have undertaken to accord national treatment to most services by agreeing to treat each other's agriculture, mining, construction, insurance, real estate, and commercial service providers in the same manner as each party treats its domestic industries providing those services.[24] In the area of investment, the same obligation is assumed in connection with the establishment of new businesses;[25] but the rules for acquiring existing businesses in Canada have been liberalized.[26] Part Five, financial services, accords national treatment to investors in the financial services market.[27] Part Six, the dispute settlement procedure, is our focus and will be explained in detail below. Part Seven assembles a number of miscellaneous provisions.[28] Finally, Part Eight deals with entry into force and duration of the FTA.[29]

B. *GATT*

The importance of the FTA provisions covering investment and trade in services, while in themselves noteworthy, transcend this agreement. These provisions may portend important progress in the current

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21. FTA, *supra* note 16, art. 401

22. *Id.* art. 1304.

23. *Id.* arts. 1401-1611.

24. *Id.* arts. 1401, 1402, Annex 1408. Excluded from coverage are transportation services, most telecommunications services, and the services of doctors, dentists, lawyers, and teachers.

25. *Id.* art. 1602.

26. *Id.* art. 1607. The review threshold by Investment Canada for acquisition of existing businesses is to be raised from CDN $5 million to CDN $150 million by 1992.

27. *Id.* arts. 1701-1706.

28. *Id.* arts. 2001-2012.

29. *Id.* arts. 2101-2106.

round of multilateral trade negotiations ("MTN") the "Uruguay Round," being held in Geneva under GATT auspices. [30] Both investment and trade in services are on the Uruguay MTN agenda, extending a GATT MTN round beyond the subject of trade in goods for the first time.[31] Ideally, this FTA will serve as a catalyst and model for the Uruguay Round negotiators, creating momentum for the successful conclusion of multilateral GATT agreements which cover the subjects of investment and services.[32] With the United States-Canada FTA, the prospects for their inclusion in future GATT Codes are significantly improved, though not necessarily guaranteed. Conversely, without the FTA covering these subjects, their successful negotiation in the Uruguay Round was almost certainly doomed.

While the FTA provisions on trade in services and investment are "trail blazing" and may generate the momentum needed to advance to the Uruguay Round agenda, a United States-Canada FTA may simultaneously exacerbate world trade frictions by causing trade diversion from third countries. As tariffs between the United States and Canada fall to zero, goods from the two countries may be more attractive than goods from third countries, thereby threatening the level of third-country exports to the United States and Canada.[33] This FTA also conflicts with one of the pillars of international trade, the most-favored-nation ("MFN") principle, enshrined in GATT's Article I.[34] In recognition of the political and economic inevitability of such preferential trading arrangements, GATT authorizes the creation of FTA's and exempts

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30. THE URUGUAY ROUND, A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS (Finger & Olechowski eds. 1987).

31. *Id.* at 10, 207.

32. *See* Morici, *Impact on the United States*, in BUILDING A CANADIAN-AMERICAN FREE TRADE AREA 70 (Fried, Stone & Trezise eds. 1987); *U.S.-Canada FTA Investment, Financial Portion Could Serve as GATT Model, U.S. Official Says*, [July-Dec.] Int'l Trade Rep. (BNA) No. 40, at 1264 (Oct. 14, 1987); *U.S.-Canada Free Trade Accord Could Serve as Uruguay Round Model, GATT Official Says*, [July-Dec.] Int'l Trade Rep. (BNA) No. 40, at 1268 (Oct. 14, 1987). *See generally* HUFBAUER & SCHOTT, TRADING FOR GROWTH: THE NEXT ROUND OF TRADE NEGOTIATIONS (Policy Analyses in Int'l. Economics No. 11, 1985); Trade Policies for a Better Future, Proposals for Action (GATT Working Paper 1985).

33. *See* Biggs, *An International Perspective* 134-40, in PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT, *supra* note 7; *see also* DAM, THE GATT: LAW AND THE INTERNATIONAL ORGANIZATION 283-88 (1970).

34. General Agreement on Tariffs and Trade, *supra* note 8. Although multilateral, nondiscriminatory trade may be disrupted by a bilateral, preferential trading arrangement such as the FTA, it is not necessarily without some benefits, such as bringing negotiators closer together on issues before them at the Uruguay Round.

them from the MFN obligation, provided they meet three tests.[35] First, the tariffs and restrictions "on substantially all the trade [in goods] between the constituent territories in products originating in such territories" must be eliminated.[36] Second, this must be accomplished "within a reasonable length of time."[37] Under the third test, which is essentially a standstill provision, GATT insists that "the duties and other regulations [agreed to in the FTA] . . . shall not be higher or more restrictive" than those in existence before the FTA.[38] The United States-Canada FTA readily passes all three tests. All trade in goods, the only kind of trade currently the subject of GATT regulation, between the two countries will be duty-free in ten years. The ten-year phase-in period compares favorably with other GATT-approved FTA's, and is therefore probably "reasonable."[39] In addition, the agreement creates no express barriers to trade not already in existence prior to conclusion of the FTA. In short, the United States-Canada FTA is in prima facie compliance with GATT's threefold prerequisite.[40]

III. INSTITUTIONAL PROVISIONS OF THE FTA

The FTA contains two broad institutional provisions for implementing, interpreting, and enforcing its obligations. First, Chapter 18 establishes the Canada-United States Trade Commission ("the Commission") as the basic institution of dispute resolution. The Commission's mandate is to implement and enforce the substantive provisions of the FTA.[41] Second, Chapter 19 creates the binational panel for re-

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35. *Id.* art. XXIV, para. 8(b).

36. *Id.*

37. *Id.* para. 5(c).

38. *Id.* para. 5 (b). In addition to these three substantive steps, Article XXIV, para. 7(a)-(b), requires notice of the proposed FTA to be given to other GATT contracting parties. Once negotiated, the FTA is to be submitted for GATT review. *See* JACKSON, WORLD TRADE AND THE LAW OF GATT 581-619 (1969); DAM, *supra* note 33, at 274-95.

39. *See* Koh, *supra* note 7, at 107-10 and JACKSON, *supra* note 38, at 603-10.

40. *Compare* Note, *The U.S.-Israel Free Trade Area: Is GATT Legal?* 19 GEO. WASH. U. J. INT'L L. & ECON. 199 (1985); Note, *International Trade—Agreement for the Establishment of a Free Trade Area between the Government of the United States of America and the Government of Israel*, 27 HARV. INT'L L.J. 289 (1986).

41. FTA, *supra* note 16, art. 1802, para. 1, provides:

> The Parties hereby establish the Canada-United States Trade Commission (the Commission) to supervise the implementation of this Agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation.

In addition to resolving disputes under the Agreement, the Commission is to supervise

viewing both statutory amendments and administrative determinations concerning AD and CVD laws.[42]

In addition to these broad institutions, several sectors have separate frameworks for implementing and supervising the FTA provisions applicable to them. For example, the agreement expressly divests the Commission of jurisdiction over financial services; disputes in this arena are to be resolved through notification and consultation between the Canadian Department of Finance and the United States Department of the Treasury.[43] The FTA features several other mechanisms: working groups, committees, and consultation procedures for resolving sectoral disputes placed outside the jurisdiction of the Commission.[44]

A. *The Canada-United States Trade Commission*

The creation of the Trade Commission in Chapter 18 establishes the mechanism for resolving most FTA disputes. The principal representatives to the Commission are the Minister of International Trade for Canada and the United States Trade Representative, or their designees.[45] Chapter 18 delineates a number of specific rights and duties. First, Article 1803 requires a party to notify the other of any measure which "might materially affect the operation of [the FTA]." Article 1804, mirroring the GATT Article XXII obligation to consult with any other contracting party "with respect to any matter affecting the operation of [GATT]," permits either party to request consultations on any matter which, in the opinion of the requesting party, may affect the operation of the FTA.[46] If consultation fails, a party may submit the

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its implementation, thus performing a management function as well. *See* Graham, *The Role of the Commission in the Canada-U.S. Free Trade Agreement: A Canadian Perspective*; Robinson, *Dispute Settlement under Chapter 18 of the U.S.-Canada Free Trade Agreement*, in UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 233, 261 (ABA 1988).

42. FTA, *supra* note 16, arts. 1901-1911.

43. *Id.* art. 1801, para. 1; *id.* art. 1704, para. 2.

44. For example, the parties are to notify and consult with one another on customs matters under Annex 406. A Working Group is created under Annex 705.4 to discuss issues concerning grains. Several Working Groups are created under Article 708, paragraph 4, to implement provisions of the FTA affecting other agriculture products. That same Article establishes a joint monitoring committee to check the progress of these Working Groups. Article 1503 calls for the establishment of procedures for consulting on the temporary entry of business persons.

45. *Id.* art. 1802, para. 2.

46. FTA, art. 2011 borrows another GATT feature from its Article XXIII: nullification or impairment as measures of injury to a party regardless of whether the event causing the injury violates GATT. *See* JACKSON, *supra* note 38, at 163-92.

issue to the Commission which in turn may refer it to mediation.[47] If the problem is not resolved within thirty days, the Commission may refer the dispute to binding arbitration or to a panel of experts.[48] After arbitration, the party found in violation must comply with the decision, or the aggrieved party "shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."[49] This provision closely parallels GATT Article XXIII's remedy for nullification or impairment of GATT benefits, leaving it ultimately with the offending party to cease and desist. Also, like GATT panel proceedings, only the two governments, through their designated representatives, may appear before the Commission or panels; private parties have no standing and no right to intervene.[50]

Unfortunately, these dispute resolution mechanisms may be no different from GATT, where it is simply left to the offending party to accede to a panel decision finding it in violation. Like GATT contracting parties, the FTA parties have failed to surrender enough sovereignty to give this chapter's sanctions any real bite. Apparently, the FTA negotiators have forgotten a painful yet valuable lesson from the GATT experience: without sufficiently strong institutions to manage economic integration, it will probably unravel eventually.

Although broad, the jurisdictional mandate of the Commission does not include AD and CVD disputes.[51] Responsibility for settling disputes involving these two trade remedy laws has instead been vested in a binational review panel under chapter 19 of the FTA.

B. *Binational Panel Review*

Chapter 19 of the FTA, the most controversial in the entire agreement, creates not one but two panel procedures. The first is designed to review final AD and CVD administrative determinations, substituting this binational panel review for judicial review.[52] The second has been established to screen amendments to each country's AD and CVD laws. These two procedures, however, are intended only as stop-gap measures, not permanent features of the FTA landscape. Under Article

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47. FTA, *supra* note 16, art. 1805.

48. *Id.* art. 1806, para. 1. Article 1807 provides for five-member arbitration panels and the procedures for conducting the arbitration. Paragraph 2 provides for submission to a panel of experts.

49. *Id.* art. 1807, para. 9.

50. *See id.* arts. 1805-1807.

51. *Id.* art. 1807, para. 1.

52. *Id.* art. 1904, para. 1.

1906, the parties have five years to develop a substitute system for the current AD and CVD legal regime. If no substitute is agreed to or implemented within that period, the parties will have an additional two years within which to reach agreement.[53] Failing such agreement, either party may terminate the FTA on six months' notice. Article 1906 only hints at the kind of substitute the parties are supposed to adopt, leaving many unanswered questions: Will the substitute system exempt each country from the other's AD and CVD laws? Will the definition of a countervailable subsidy be narrowed in order to exempt more or most Canadian assistance programs? Will a larger de minimis subsidy and dumping margin, currently .5 percent in the United States, be adopted so that only the most serious cases will receive administrative relief? The FTA response to these questions is cryptic at best.[54] Article 1907 directs the parties to establish a Working Group that will:

> a) seek to develop more effective rules and disciplines concerning the use of government subsidies;
>
> b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and
>
> c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.[55]

It is difficult to say whether this mandate contemplates a wholesale revision of the AD and CVD statutory schemes applied to each party's imports or something far less ambitious. One can, however, predict fairly safely that the most contentious subject on the Working Group's agenda will be subsidies, given the very sensitive nature of this subject for Canada.

Before examining the provisions of Chapter 19 which alter existing AD and CVD practice, consider five current practices that Chapter 19 has not changed. First, Canada and the United States retain the right to apply their AD and CVD laws to each other's imports.[56] Since Canada's chief goal in entering the FTA negotiations was to obtain an ex-

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53. *Id.* art. 1906.

54. *See* Horlick & Landers, *The Free Trade Agreement Working Group: Developing a Harmonized and Improved Countervailing Duty Law* and Powell, *Antidumping Law and the United States/Canada Free Trade Agreement: Possible Next Steps* in UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 399, 415 (ABA 1988).

55. FTA, *supra* note 16, art. 1907, para. 1.

56. *Id.* art. 1902, para. 1.

emption from the United States' AD and CVD laws, this represents a significant Canadian concession.

Second, future amendments to AD or CVD laws by Congress or Parliament will apply to American or Canadian imports, respectively, only if the amendment expressly provides.[57] Article 1902's weak standstill provision permits the application of AD and CVD amendments only to the extent that they are consistent with GATT, the GATT Antidumping Code,[58] the GATT Subsidies Code,[59] and the object and purpose of the FTA. The weakness lies in the notorious vacillation of the GATT Subsidies Code over the legality of domestic subsidies. For example, the first paragraph in Article 11 of the GATT Subsidies Code provides:

> Signatories recognize that subsidies other than export subsidies [i.e., domestic subsidies] are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable.

The second paragraph of the same article goes on to provide:

> Signatories recognize, however, that [domestic] subsidies . . . may cause or threaten to cause injury to a domestic industry of another signatory . . . . Signatories shall therefore seek to avoid causing such effects through the use of subsidies.

This vacillation is largely reflected in Article 1902 of the FTA which states that its object and purpose is

> to establish fair and predictable conditions for the progressive liber-

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57. *Id.* art. 1902, para. 2(a). Before amendments are made to the AD or CVD laws, the parties must notify and consult with each other on the proposed amendment prior to its enactment. *Id.* para. 2(b)-(c).

58. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT, Basic Instruments and Selected Documents 171-88 (1980). *See id.* art. 1902, para. 2(d)(i).

59. Agreement on Implementation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, GATT, Basic Instruments and Selected Documents 56-83 (1980). *See id.* art. 1902, para. 2(d)(i). *See generally* HUFBAUER & ERB, SUBSIDIES IN INTERNATIONAL TRADE (1984); Barcello, *Subsidies, Countervailing Duties and Antidumping after the Tokyo Round*, 13 CORNELL INT'L L. J. 257 (1980).

> alization of trade between the two countries while maintaining effective disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.[60]

The Preamble to the FTA includes two objectives which arguably would authorize use of domestic subsidies: "to promote productivity, full employment, and a steady improvement of living standards in their respective countries;" and "to reduce government-created trade distortions while preserving the Parties' flexibility to safeguard the public welfare."[61] This absence of a bright line definition of prohibited subsidies is a matter that will undoubtedly be addressed by the Article 1906 Working Group.

A third item left unchanged by the FTA is the applicable law in a binational panel review of a final AD or CVD administrative determination. The domestic law of the country whose determination is challenged will be the source of applicable law, including legislative history, regulations, administrative practice, and case law to the extent a court of the importing country would rely on such materials in reviewing an AD or CVD determination.[62]

Fourth, Chapter 19 does not alter the judicial review of administrative determinations which are not final.[63] This preserves the power of the United States Court of International Trade ("CIT") to enjoin liquidation of entries subject to a final AD or CVD determination pending binational panel review, to order disclosure of confidential business information submitted to the ITA or the ITC during an AD or CVD investigation, and to review an ITA decision not to conduct an AD or CVD investigation.

Fifth and finally, Chapter 19 is prospective only; it applies only to those final determinations and statutory amendments made after the FTA's entry into force.[64]

1. *Panel Review of AD and CVD Statutory Amendments*

Although the commitments made by the parties under the Article 1902 standstill provision on AD and CVD statutory amendments are

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60. FTA, *supra* note 16, art. 1902, para. 2(d)(ii).

61. *Id.* at Preamble.

62. *Id.* art. 1904, para. 2.

63. *Id.* art. 1904, para. 10. Article 1911's definition of "final determination" is discussed *infra* notes 120-131 and accompanying text.

64. *Id.* art. 1905.

comparatively weak, they derive some force from the creation of a panel procedure for reviewing all such statutory amendments.[65] The terms call for any AD or CVD amendment to be referred to a panel for a declaration (1) whether the amendment is consistent with the FTA, the Antidumping Code, the Subsidies Code, and GATT generally;[66] or (2) if the amendment reverses a binational panel decision, whether that amendment conforms with GATT, the two GATT Codes, and the FTA.[67] The FTA makes no provision for private parties to resort to an Article 1903 panel proceeding. Only Canada and the United States, through their national representatives, may demand and appear in this panel proceeding.[68]

The composition of all Chapter 19 panels is governed by the same rules for challenges to statutory amendments and to administrative determinations. Annex 1901.2, paragraph 1, states that "the Parties shall develop a roster of individuals to serve as panelists in disputes under this Chapter." Annex 1901.2 further provides for five-member panels with each party appointing two panelists and a fifth neutral panelist being mutually selected by the parties or by the four appointed panelists.[69] A majority of these members must be lawyers.[70]

Much of the panel's procedure is delineated in the FTA as well. The panelists must base their decisions solely on the parties' oral and written submissions.[71] Unless the parties otherwise agree, proceedings leading to the panel's final declaratory opinion are confidential, and the parties may agree not to publish the opinion.[72] The panel will operate under rigorous time constraints: an initial opinion with findings of fact and a determination must be issued within ninety days of appointment of the panel chair.[73] In the event of an affirmative determination, i.e., one that finds the statutory amendment in violation of Article 1902, the panel may make recommendations on how the amendment can be brought into conformity.[74] The parties may request reconsideration of the panel's initial opinion within fourteen days of the determination;

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65. *Id.* art. 1904; Annex 1903.2.

66. *Id.* art. 1903, para. 1(a).

67. *Id.* art. 1903, para. 1(b).

68. *See id.* art. 1903; Annex 1903.2.

69. *Id.* Annex 1901.2, para. 1-3.

70. *Id.* Annex 1901.2, para. 2.

71. *Id.* Annex 1903.2, para. 1.

72. *Id.* para. 1, 5.

73. *Id.* Annex 1903.2, para. 2. The chair should be appointed promptly after the fifth panelist is selected. *Id.* Annex 1901.2, para. 4; *id.* Annex 1903.2, para. 2.

74. *Id.* Annex 1903.2, para. 3.

within thirty days of the request, a final opinion is to be issued.[75] If the panel recommends modifications to the offending amendment, the parties are to consult about how to remedy the nonconformity.[76] As part of the consultations, the parties may draft remedial legislation which, absent some other agreement, must be enacted within nine months of the close of consultations. If remedial legislation is not enacted, the aggrieved party has the right either to retaliate with comparable legislative or executive action, or to terminate the FTA.[77]

In sum, although the commitment to refrain from enacting protectionist AD or CVD statutory amendments may lack a hard edge, the remedial provisions that can be invoked following the enactment of such amendments do have potential sting. Whether the threat to terminate the FTA or to retaliate with reciprocal legislative or executive action will be credible, or even effective if carried out, remains to be seen. One thing is certain: Chapter 19 has set the stage for high-stakes brinkmanship.

2. *Panel Review of Final AD and CVD Determinations*

The second dispute settlement forum created under Chapter 19 is the binational panel for reviewing final AD and CVD determinations. This panel's function, simply stated, is to replace the domestic judicial review of these administrative determinations.[78] Its composition and procedures are identical to Article 1903 panels.[79] The panel applies the substantive law, standard of review, and general legal principles of the importing party.[80] This body of law includes existing AD and CVD statutes, their legislative history, administrative regulations and practice, rules of statutory construction, and case law to the extent they would be considered by a domestic reviewing court.[81] Rules of procedure for the panel are to be based upon judicial rules of appellate procedure, further judicializing the process.[82] Private parties' standing and rights to review are the same as would be available for judicial review under domestic law.[83] An expedited time schedule requires decisions

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75. *Id.* para. 4.
76. *Id.* para. 3(a).
77. *Id.* art. 1903, para. 3(b)(i)-(ii).
78. *Id.* art. 1904, para. 1.
79. *See supra* notes 52-53 and accompanying text.
80. *Id.*; FTA, *supra* note 16, art. 1911.
81. *Id.* art. 1904, para. 2-3.
82. *Id.* para. 14.
83. *Id.* para. 5 & 7.

within 315 days of the date of the initial request for panel review.[84] Decisions of the panel are binding and ordinarily final.[85] They can be subject to challenge only under specified extraordinary conditions: 1) gross misconduct, bias, or serious conflict of interest; significant departure from a fundamental procedural rule; or exercise of powers exceeding Article 1904; and 2) these occurrences must materially affect the panel's decision and threaten the integrity of the binational panel review process.[86]

This procedural context serves as an introduction to the overall binational panel review. The remainder of this article addresses the issues that are most likely to arise on a recurring basis in the course of binational panel review of United States AD and CVD determinations.

a. Disclosure of Confidential Information

In paragraph 14 of Article 1904, Canada and the United States agree to adopt procedural rules for implementing the article's provisions governing panel review of final AD and CVD determinations. Among the rules to be promulgated are those "concerning . . . the protection of business proprietary and other privileged information," including sanctions against persons participating before panels for improper release of such information.[87] The Article further provides that:

> each Party shall amend its statutes or regulations to ensure that its courts shall give full force and effect, with respect to any person within its jurisdiction, to all sanctions imposed pursuant to the laws of the other Party to enforce provisions of any protective order or undertaking that such other Party has promulgated or accepted in order to permit access for purposes of panel review or of the extraordinary challenge procedure to confidential, personal, business proprietary or other privileged information . . . .[88]

These commitments clearly contemplate two changes in existing practice: 1) giving binational panels the power to impose sanctions against anyone who discloses confidential proprietary information in violation of administrative or judicial protective orders, and 2) making sanctions

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84. *Id.* para. 14.

85. *Id.* para. 9 & 11.

86. *Id.* para 13. The extraordinary challenge panel consists of three members selected from a roster of judges and former judges from the U.S. federal bench and the Canadian courts of superior jurisdiction. *Id.* Annex 1904.13, para 1.

87. *Id.* art. 1904, para. 14.

88. *Id.* para. 15(e).

imposed by the ITA or the ITC against violators of administrative protective orders enforceable in Canadian courts.[89] A third change suggested by these provisions vests the binational panel with the power to order disclosure of proprietary information in the possession of an administrative agency.[90]

Concerned parties need to know more specifically the types of information to be treated confidentially, the conditions for gaining access to it, and the sanctions for unlawful disclosure. As expected in the course of investigations focusing on price, volume, and sales information, the ITA and the ITC receive vast amounts of highly confidential business information. Importers and foreign manufacturers supplying such coveted information understandably have a keen interest in keeping it from the hands of competitors, particularly the petitioner. At the same time, they are under strong pressure to provide the investigating agencies with the complete and accurate information needed to evaluate a petition's merits. Regardless of its confidential status, the ITA and ITC are not only authorized but required by statute to use the best information available.[91] The Trade Agreements Act of 1979 requires that the ITA and ITC "shall, whenever a party or other person refuses or is unable to produce information requested in a timely manner and in the form required, . . . use the best information available."[92] While the petitioner's information will frequently be the "best available," it will not necessarily be the most accurate. Once the investigating agency has proprietary information, other parties to an AD or CVD administrative proceeding genuinely need access to this confidential information in order to challenge the agency's determination effectively.[93]

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89. *Id.* Annex 1901.2, para. 8, further provides:

The United States of America shall establish appropriate sanctions for violations of protective orders issued by it and of undertakings given to Canada. Canada shall establish appropriate sanctions for violations of undertakings given to it and protective orders issued by the United States of America. Each Party shall enforce such sanctions with respect to any person within its jurisdiction. Failure by a panelist to sign a protective order or undertaking shall result in disqualification of the panelist.

90. *Id.* art. 1904; *See* discussion, *infra* notes 91-106.

91. 19 U.S.C. § 1677e(b) (1982).

92. *Id.*

93. For an excellent overview of the subject of confidential information supplied during an AD or CVD investigation, see PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS § 7.01-.08 (1987) (International Business and Law Series, Vol. 3, 1987). *See also* Garfinkel, *Disclosure of Confidential Documents under the Trade Agreements Act of 1979; A Corporate Nightmare?* 13 L. & POL'Y INT'L BUS. 465 (1981); Kaplan, *Processing Antidumping and Countervailing Investigations* in THE COMMERCE DEPARTMENT SPEAKS ON IMPORT ADMINISTRATION AND EXPORT ADMINIS-

Congress assured parties to the investigation access to such confidential information by authorizing the ITA and the ITC to release proprietary information under an administrative protective order.[94] An attorney or representative who receives confidential information must swear: 1) not to disclose the information to any other person, including officers and employees of the client; 2) to use the information solely for the pending investigation; and 3) to take security measures to prevent release of the information.[95] After the proceeding, all information under protective order and any copies must be returned to the releasing agency accompanied by an attestation that to the best of the person's knowledge no other copies of the material have been retained or exist.[96] Considering how current the proprietary information will be in most cases, the potential for harm from unlawful disclosure is substantial.[97]

If the agency decides to release proprietary information, the supplier may then withdraw the information rather than have it released to a competitor. If either agency denies a request for release of confidential information, a requesting party may apply to the CIT for an order directing the ITA or ITC to make the information available pursuant to a judicial protective order.[98] In ruling on requests for disclosure, the CIT uses a balancing test which weighs the needs of the person requesting disclosure against: 1) the interests of the government in having the flow of that kind of information unimpaired in both the present case and in future cases, and 2) the interests of the person who sup-

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TRATION 1984, at 13, 48-52 (Practicing Law Institute 1984).

94. 19 U.S.C. § 1677f (1982 & Supp. IV 1986). The ITA's regulations for releasing business confidential information are contained at 19 C.F.R. §§ 353.28-.29, 355.18-.19 (1988). Information that will receive confidential treatment includes trade secrets, production costs, prices of actual transactions, and customer names. *Id.* §§ 353.29(c), 355.19(c) (1988). Comparable ITC regulations are found at 19 C.F.R. § 201.6 (1988).

95. 19 C.F.R. §§ 353.30(b), 355.20(b), 207.7(b) (1988). Binational review panelists are also required to sign a protective order with regard to proprietary or other confidential information which they see in the course of their review. FTA, *supra* note 16, Annex 1901.2, para. 7.

96. 19 C.F.R. §§ 353.30(d), 355.20(d), 207.7(c) (1988).

97. PATTISON, *supra* note 93, § 7.08[6], at 7-31 n.29.

98. 19 U.S.C. § 1677f(c)(2) (1982 & Supp. IV 1986). Judicial protective orders closely parallel administrative protective orders. *See* PATTISON, *supra* note 93, § 7.08[5]. For a sampling of the treatment such requests have received in the Court of International Trade, see American Spring Wire Co. v. United States, 566 F. Supp. 1538 (Ct. Int'l Trade 1983); Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982). *See also* Zenith Radio Corp. v. United States, 764 F.2d 1577 (Fed. Cir. 1985); United States Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

plied the information in protecting its business secrets.[99] In practice, the CIT has been generous in granting access to proprietary information to ensure that requesting parties are able to prepare their cases adequately.[100]

Sanctions for violating an administrative protective order include termination of the investigation,[101] and exclusion from practice before the ITA and ITC for a period of up to seven years.[102] The ITA also may refer the violation to the ethics committee of the appropriate bar association.[103] When a violation of its protective order occurs, the CIT may even disbar offending attorneys or commence other disciplinary action for "dishonest or unethical conduct."[104]

The binational panels may draw upon this wealth of well-developed practice to shape their own rules. Article 1904 appears to make panels rely on agencies and the courts for release of proprietary information.[105] Although the panels may punish violation of another tribunal's protective order, they lack any express authority to order the release of such information. This is consistent with the interlocutory nature of such protective orders. The release of confidential information under protective order ordinarily occurs, if at all, during an investigation, not after it has been concluded. Since binational panel jurisdiction is only triggered by final determinations, there would seem to be no occasion when the panel could order disclosure of confidential information consistent with that jurisdictional limitation. In order for parties to ITA or ITC investigations to launch a successful challenge, they would first need access to the information, confidential or otherwise, which

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99. *See, e.g.*, Jernberg Forgings Co. v. United States, 598 F. Supp. 390, 392 (Ct. Int'l Trade 1984).

100. The CIT's generosity in ordering the release of this information is counterbalanced by stringent judicial protective orders designed to safeguard the integrity of the proprietary information. *See, e.g.*, Roquete Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982); Monsanto Ind. Chem. Co. v. United States. 5 I.T.R.D. 1462 (Ct. Int'l Trade 1983).

101. 19 C.F.R. §§ 353.30(e)(1), 355.20(e)(1) (1988).

102. *Id.* §§ 353.30(c), 355.20(e), 207.7(d). *See* Powell, *Commerce Procedures for Imposing Sanctions for Violation of an Antidumping or Countervailing Duty Protective Order* in THE COMMERCE DEPARTMENT SPEAKS 1987 (Practicing Law Institute 1987). For the procedures used by the Commerce Department in imposing sanctions for violation of a protective order, see 19 C.F.R. §§ 354.1-.17 (1988).

103. 19 C.F.R. §§ 353.20(c), 355.20(e) (1988).

104. Ct. Int'l Trade R. 74(d).

105. FTA, *supra* note 16, art. 1904, para. 15 provides a non-exhaustive list of some of the amendments the parties must make to their AD and CVD laws, none of which call for cutting back on the power of the courts to order release of proprietary information under protective order.

those agencies will rely upon when making their final determination. Without that information it would be next to impossible to expose, for example, computational errors by the agency. Such access would thus have to be given well in advance of the date of the final determination.

Even though advance access to confidential information would seem to be an absolute prerequisite to challenging an agency's decision, the judicial review provisions of the AD and CVD law allow the CIT to release confidential information during the course of its review of the administrative record.[106] However, binational panels apparently may not do the same. Besides the adverse effect on expeditious panel decisions that would arise from having a five-member panel determine whether to release confidential information, the fact that panelists are required to execute a protective order runs counter to an argument that they may also release that which they have sworn to keep secret.

b. Preliminary Injunctions Pending Panel Review

If at the conclusion of an AD or CVD investigation both the ITC and the ITA reach final affirmative determinations, i.e., a decision that imports of the product under investigation are being sold at less than fair value and are causing injury to a domestic industry (AD), or that such imports are being subsidized and are causing material injury to a domestic industry (CVD), all entries of the merchandise during the investigation period will be liquidated according to the subsidy or dumping margin provided in the ITA's final order.[107] That margin will in turn serve as the basis for imposing estimated AD or CVD duties on all future entries of the subject merchandise until the first administrative review of the final order, at which time all entries during the review period will be liquidated according to the margin of dumping or subsidization found to have actually existed during the review period.[108] Once entries are liquidated, the final duty assessment phase of the entry process, those entries cannot again be reached either for the purpose of imposing higher duties or for refunding an improper assessment

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106. 19 U.S.C. § 1516a(b)(2)(B) (1982) provides:

> The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

107. *Id.* §§ 1673d(c), 1673e.

108. *Id.* § 1675(a). The period generally is the twelve-month period immediately preceding the administrative review.

of AD, CVD, or any other kind of customs duty.[109] In short, liquidation is final and all liquidated entries are beyond the reach of both the administrative agencies and the courts.[110] As a consequence, unless liquidation is enjoined, the Customs Service will liquidate all merchandise covered by an AD or CVD final order in accordance with the ITA instructions contained in that order until reversed by the CIT or Court of Appeals for the Federal Circuit ("CAFC").[111]

Any such judicial opinion is solely prospective; only unliquidated entries of the subject merchandise in existence at the time the opinion is issued will be affected by the court's opinion.[112] Consequently, unless an injunction suspends the liquidation of entries which are the subject of an ITA final order, any appeal challenging a final determination or subsequent administrative review of that determination will be deemed moot to the extent that entries which are the subject of that determination or administrative review have been liquidated.[113] If all the entries covered by a final determination or administrative review have been liquidated, the entire case will be mooted. Thus, the importance of obtaining an injunction that suspends liquidation cannot be minimized for a party aggrieved by a final determination. Without such an injunction, an aggrieved party's right to judicial review may well be lost.[114]

In ruling on applications for such injunctions, the CIT employs a traditional four-prong test: 1) whether the petitioner is likely to prevail on the merits, 2) whether the petitioner would suffer irreparable injury in the absence of an injunction, 3) whether the balance of hardships favors the moving party, and 4) whether the public interest is served.[115] If the Canadian government or any party aggrieved by a final determination involving Canadian imports elects to take its challenge to the

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109. *Id.* §§ 1516a(c)(1), 1516(d).

110. *See id.* §§ 1516a(c)(1), 1516(d). Reliquidation of entries is permitted under limited circumstances (clerical error, mistake of fact, improper classification, or fraud in the entry), and under limited time periods (90 days in the case of misclassification, one year in the case of clerical error, two years in the case of fraud). *Id.* §§ 1501, 1520(c)(1), 1521(1984); 19 C.F.R. 173.0 *et seq* (1988). *See* ROSSIDES, *supra* note 5, at 54-55.

111. *Id.* § 1516a(c)(1) (1982).

112. *See id.*

113. United States Steel Corp. v. United States, 792 F.2d 1101 (Fed. Cir. 1986). *See generally* Seastrum, *Death of a Trade Case: What is Mootness? When Does It Matter? And What Happens to a Moot Case?* in THE COMMERCE DEPARTMENT SPEAKS 1987, *supra* note 102, at 617.

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

115. American Spring Wire Corp. v. United States, 578 F. Supp. 1405 (Ct. Int'l Trade 1984); Atlantic Steel Co. v. United States, 592 F. Supp. 679 (Ct. Int'l Trade 1984).

binational review panel, that party will want to have liquidation of the subject entries enjoined. Because Chapter 19 gives the panel no powers in equity, an aggrieved party will have to seek injunctive relief from the CIT. However, since the traditional four-prong test necessarily assesses the merits of the aggrieved party's challenge, the court's ruling on the injunction raises the question of the effect of its view of the merits on the binational panel. Legally, the CIT's view should have no effect. Because a preliminary injunction is by its nature ad interim and tentative, the ruling should have no bearing on the outcome of a panel review proceeding.

A CIT denial of a preliminary injunction could have devastating implications for any binational review panel proceeding. Assuming the panel applies the mootness principle as the CIT would,[116] the binational panel would be divested of jurisdiction. Given the virtually automatic issuance of injunctions, the prospect of this occurring seems unlikely, at least in the context of section 751 administrative reviews following the CAFC's *Zenith Radio* decision.[117] Nevertheless, a close examination of that decision and its CIT progeny indicates that the rationale for granting injunctive relief in such cases has been to preserve the aggrieved party's right to judicial review, a right that would otherwise evaporate if all subject entries were liquidated.[118] The goal of these decisions seems to be to preserve jurisdiction by enjoining liquidation, placing all such injunctions in effect under the All Writs Act.[119] If so, it is difficult to see how the All Writs Act confers the requisite authority upon the CIT to enjoin liquidation of entries in a case the merits of which the court issuing the injunction has no possibility of ever reviewing because it lacks subject matter jurisdiction over the case.

While the CIT and Congress have repeatedly stated that injunctions are extraordinary relief, unless the CIT routinely enjoins the liquidation of entries involving Canadian products that are the subject of a final determination, binational review panels face the real prospect of having cases brought before them regularly rendered moot.

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116. The panel should do so under Article 1911's definition of applicable "general legal principles" which includes mootness. FTA, *supra* note 16, art. 1911.

117. *See Zenith Radio Corp.*, 710 F.2d at 806.

118. *Id.*

119. 28 U.S.C. § 1651 (1982). Federal courts are empowered by that Act to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

c. Determinations Subject to Binational Panel Review

As noted above, the parties have agreed to replace judicial review with binational panel review of "final antidumping and countervailing duty determinations."[120] Five administrative determinations are included in the category of "final determination" relating to the United States:[121]

> (1) a final affirmative determination by the ITA or the ITC under the AD or CVD statutes, including any negative part of such a determination;
> (2) a final negative determination by the ITA or the ITC under the AD or CVD statutes, including any affirmative part of such a determination;
> (3) periodic administrative reviews under section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675, by the ITA or the ITC of any outstanding AD or CVD determination;[122]
> (4) a determination by the ITC not to review a final AD or CVD determination based upon changed circumstances; and
> (5) a determination by the ITA as to whether a particular type of merchandise is within the class or kind of merchandise described in an outstanding AD or CVD order.[123]

The determinations which are not covered by this definition and are therefore still subject to judicial review are: ITA decisions to suspend or not to initiate AD or CVD investigations;[124] ITC findings of no reasonable indication of material injury;[125] and an injurious effect determination by the ITC (i.e., a determination by the ITC whether the injurious effects of imports subject to a suspension agreement are eliminated by the agreement).[126] The negative determinations resulting from

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120. FTA, *supra* note 16, art. 1904, para. 1.

121. *Id.* art. 1911.

122. *See* Bello & Holmer, *Review and Revocation of Antidumping and Countervailing Duty Orders*, 19 INT'L LAW. 1319 (1985); Moreland, *Periodic Administrative Reviews in Antidumping and Countervailing Duty Proceedings* in THE COMMERCE DEPARTMENT SPEAKS 1987, *supra* note 102, at 135.

123. *See* Bello & Holmer, *The Scope of "Class or Kind of Merchandise" in Antidumping and Countervailing Duty Cases*, 20 INT'L LAW. 1015 (1986).

124. *See* 19 U.S.C. §§ 1516a(a)(1)(A), 1516a(a)(2)(B)(iv) (1982 & Supp.II 1984).

125. *Id.* § 1516a(a)(1)(C). *See* Bello & Holmer, *Recent Developments Regarding Antidumping and Countervailing Duty Injury Determinations*, 20 INT'L LAW. 689 (1986).

126. 19 U.S.C. §§ 1516a(a)(2)(B)(v), 1671c(h), 1673c(h) (1982 & Supp. II

no investigations or no injury are subject to review under an arbitrary, capricious, or abuse of discretion standard.[127] The others are reviewed under the substantial-evidence-on-the-record standard.[128]

Considering the determinations that are still subject to CIT review, the direct effect of a decision by the ITA not to initiate an investigation is to destroy whatever hopes the petitioner had of having antidumping or countervailing duties imposed on Canadian imports. The same result flows from a negative ITC determination as to whether there is a reasonable indication of material injury from such imports, because a preliminary negative injury determination by the ITC terminates the investigation as well.[129] As a consequence, CIT review of these two determinations can have a significant impact on the ultimate outcome, with reversal possibly leading to the imposition of AD or CVD actions on imports of merchandise from Canada.[130] It is not just insignificant agency determinations then that have been reserved under the FTA for judicial review.[131]

d. Requesting Binational Panel Review

Under section 516A of the Tariff Act of 1930, as amended,[132] an interested party[133] who was a party to the administrative proceeding may commence judicial review in the CIT by filing a summons with the court within thirty days of the date of publication in the Federal Register of the final AD or CVD order.[134] Any other interested party has the

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1984).

127. *Id.* § 1516a(b)(1)(A).

128. *Id.* § 1516a(b)(1)(B).

129. *Id.* §§ 1671b(a)(2), 1673b(a)(2).

130. *See* Bello & Holmer, *supra* note 125, at 690-98. In the case of a suspension agreement, an interested party can still request that the investigation be continued to its final phases. 19 U.S.C. §§ 1671c(g), 1673c(g) (1982 & Supp. II 1984).

131. In the case of suspension agreements, so few of them have been concluded by the ITA that they have not been a major source of dispute. *See* Bello & Holmer, *Suspension and Settlement Agreements in Unfair Trade Cases*, 18 INT'L LAW. 683 (1984).

132. 19 U.S.C. § 1516a (1982 & Supp. IV 1986).

133. "Interested party" is defined at *id.* § 1677(9), and includes the foreign manufacturer of the merchandise that is the subject of the investigation, the government of the country where such merchandise is produced, the domestic manufacturer of a like product, and domestic trade or business associations whose members produce a like product.

134. *Id.* § 1516a(a)(2)(A).

right to appear and be heard as a party in interest before the CIT.[135] The binational panel review provisions of the FTA alter the procedure for initiating review, but they preserve the standing provision of section 516A. Under Article 1904, paragraph 2, only the governments of Canada and the United States may request panel review, and that request must be made within the same thirty day period currently applicable under section 516A.[136] However, the FTA also requires either government to ask for panel review "upon request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of a final determination."[137] With regard to the standing of interested parties, the relevant Article provides:

> Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had standing to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel.[138]

An interested party will find itself in an insoluble dilemma if its government fails to request panel review after a demand to do so has been made by the interested party. Under Article 1904, paragraph 4, "[f]ailure to request a panel within the time specified in this paragraph shall preclude review by a panel."[139] Likewise, under section 516A of the Tariff Act the failure to file a summons within the requisite thirty-day period is a jurisdictional defect precluding CIT review of the final determination.[140] Thus, unless an interested party protects itself by filing a summons with the CIT and simultaneously asking its government for binational panel review, it could be denied an opportunity for either panel or judicial review of a final AD or CVD determination.

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135. *Id.* § 1516a(d).

136. FTA, *supra* note 16, art. 904, para. 4.

137. *Id.* para. 5.

138. *Id.* para. 7.

139. *See also id.* para. 11 & 12. Paragraph 11 of Article 1904 provides in part that "[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." Paragraph 12 is a corollary provision that states in part that Article 1904 "shall not apply where . . . neither Party seeks panel review of a final determination . . . ."

140. *See* Bethlehem Steel Corp. v. United States, 742 F.2d 1405 (Fed. Cir. 1984); British Steel Corp. v. United States, 573 F. Supp. 1145 (Ct. Int'l Trade 1983).

e. Filing the Administrative Record

Judicial review of final AD and CVD determinations is on the record.[141] The standard of review is whether the determination is unsupported by substantial evidence on the record, or is otherwise not in accordance with law.[142] This standard is incorporated by reference in Article 1911 for binational panel review.[143] The "administrative record" in either judicial or binational panel review is identical. The Tariff Act of 1930, as amended, provides that the record shall consist of

> (i) a copy of all information presented to or obtained by . . . the administering authority [the ITA], or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings . . .; and
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.[144]

Article 1911 parrots this definition of "administrative record" by defining the record for review as follows:

> a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of ex parte meetings as may be required to be kept;
> b) a copy of the final determination of the competent investigating authority, including reasons for the determination;
> c) all transcripts or records of conferences or hearings before the competent investigating authority; and
> d) all notices published in . . . the *Federal Register* in connection with the administrative proceeding.[145]

Although the content of the administrative record to be filed with either the CIT or the binational review panel does not differ, the time

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141. 28 U.S.C. §§ 1581(c), 2640(b)(1982 & Supp. II 1984); 19 U.S.C. § 1516a(b)(1)(B) (1982)

142. 28 U.S.C. §§ 1581(c), 2640(b)(1982 & Supp. II 1984); 19 U.S.C. § 1516a(b)(1)(B) (1982)

143. FTA, *supra* note 16, art. 1911.

144. 19 U.S.C. § 1516a(b)(2) (1982).

145. FTA, *supra* note 16, art. 1911.

permitted for filing the record does vary slightly. To challenge a final administrative determination one must file a summons with the CIT within thirty days of publication of the final AD or CVD order in the Federal Register, and the complaint must thereafter be filed with the court no more than thirty days after the filing of the summons.[146] The ITA and the Commission then have forty days from the date of service of the complaint to file the administrative record with the CIT.[147] Thus, by statute, the administrative agencies have 100 days from publication of the final order to file the administrative record with the CIT. In practice, however, this time period is frequently much longer. Typically, one or both of the agencies will request extensions of thirty to sixty days which are usually unopposed by the other parties and routinely granted by the CIT.[148] Until the administrative record is filed, the time for filing briefs does not begin to run, thereby protracting the judicial review process.

The time requirements for filing the administrative record with the binational review panel are approximately the same. A request for panel review must be made within thirty days of the date of publication of the final AD or CVD order in the Federal Register.[149] Thirty days after the request, a complaint must be filed with the panel.[150] The administrative record must be filed within thirty days after the complaint,[151] which brings the total number of days for filing the record to ninety. Article 1904, paragraph 14, states that the binational review panel rules "shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made." Although a laudatory goal, the 315-day deadline will seldom be met unless the human and financial resources of the ITA and the ITC are increased or the record for review that must be filed with the panel is appreciably reduced. Absent some improvement in either or both, there is no reason to expect that the administrative record will be compiled and filed any more swiftly for binational panel review than for judicial review.

f. The Role of Stare Decisis in Panel Proceedings

Article 1902, paragraph 1, states that the applicable AD and CVD

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146. 19 U.S.C. § 1516a(a)(2) (1982 & Supp. II 1984).

147. 28 U.S.C. § 2635(b)(1) (1982).

148. This observation is based on the author's experience both as a CIT law clerk and litigator.

149. FTA, *supra* note 16, art. 904, para. 4.

150. *Id.* para. 14(a).

151. *Id.* para. 14(b).

law includes "judicial precedents." Article 1904, paragraph 2, qualifies this by adding, "to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." The question that these two articles fail to answer, indeed, a question not directly addressed anywhere in Chapter 19, is the status of an article 1904 panel vis-a-vis the courts in the United States or Canada. Article 1904, paragraph 2, instructs panels to follow judicial precedent to the extent that a *court* would do so, but the question remains, *which* court? Since the panel replaces the courts, presumably it has a hierarchical status no lower than that of the CIT. Unfortunately, it remains unclear whether its status is more closely analogous to the CIT; to the CAFC, the appellate court that reviews CIT final judgments; or to the United States Supreme Court. If, in this hierarchy, panels are on the same level with the CIT, then panels may find decisions of the CIT persuasive, but not binding on them under the doctrine of stare decisis.[152] If the panel is in fact a surrogate CIT, AD and CVD decisions of the CAFC would be binding on a panel. On the other hand, if Article 1904 panels are analogized to the CAFC, then those appellate opinions, written by three-judge panels of the Federal Circuit, would not bind a panel, although decisions en banc would, just as they would any three-member CAFC panel.

It seems very unlikely that an Article 1904 panel could be analogized to the Supreme Court, thereby rendering all CIT and CAFC decisions merely persuasive. Chapter 19 proceedings include an "extraordinary challenge" procedure which permits an appeal only on very limited grounds such as bias, gross misconduct, or egregious procedural errors.[153] In cases taken up to the Supreme Court, there is, of course, no further appeal. Nevertheless, the extraordinary challenge permitted in Article 1904 can only be to procedural errors which materially affect the panel's decision; no extraordinary challenge can be made directly attacking the merits of a panel decision. Thus, although the existence of the extraordinary challenge procedure undercuts the argument that Article 1904 panels are analogous to the Supreme Court, four provisions in Chapter 19 support the contention that Article 1904 panels are comparable to the highest court of the importing party for purposes of stare decisis. First, the element of finality that is the hallmark of a Supreme Court decision is also one of the features of an Article 1904

152. For an analysis of stare decisis and its use within the Court of International Trade, see Powell & Concannon, *Stare Decisis in the Court of International Trade: One Court or Many?* in U.S. TRADE LAW AND POLICY 351 (Practicing Law Institute 1987).

153. FTA, *supra* note 16, art. 1904, para. 13.

panel, since the decisions are binding and there is no alternative forum.[154] Second, there is no judicial review of, or appeals from, panel decisions.[155] Third, panel decisions share much of the same immunity from legislative attack as do the constitutional decisions of the Supreme Court. Congress cannot repeal Supreme Court rulings on constitutionality by legislative enactment; only a constitutional amendment or a Supreme Court overruling of its prior decision has such effect. Similarly, if an amendment to either country's AD or CVD statute reverses a prior panel decision, that amendment may be challenged in a binational panel review proceeding under Article 1903. If the statutory amendment fails to conform with the purposes of the FTA, it must be repealed or the aggrieved party may take comparable legislative or executive action in retaliation.[156] Panel review of final AD and CVD determinations is virtually unassailable judicially or legislatively, not unlike Supreme Court constitutional decisions. Finally, the parties are to adopt rules of procedure for the panels based upon judicial rules of appellate procedure,[157] a further indication that binational panels are at least on an equal footing with the CAFC for purposes of stare decisis.

Besides these four FTA provisions, the well-known Canadian desire for greater control over its economic destiny in the administration of the AD and CVD laws in the United States, coupled with Chapter 19's charge to the parties to establish a substitute AD and CVD legal regime within five years, signals a break with the past to the greatest extent possible consistent with the express terms of that Chapter. In short, a fair reading of Chapter 19 suggests that judicial precedent plays only a persuasive role in binational panel review proceedings. The lack of rigid adherence to the doctrine of stare decisis by the CIT may very well free the hands of a binational panel when faced with this issue.[158]

Is the converse equally true? That is, do binational panel review decisions have any stare decisis effect, either in the parties' courts or in

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154. *Id.* para. 1 & 9. The first paragraph eliminates all judicial review of AD and CVD administrative determinations involving Canadian or American imports (assuming panel review is requested); paragraph nine provides that panel decisions are binding on the parties.

155. *Id.* para. 1.

156. *Id.* art. 1903, para. 3(b)(i).

157. *Id.* art. 1904, para. 14.

158. See Cameron & Russo, *Recent Trends in the Application of Stare Decisis by the Court of International Trade* in COMMERCE DEPARTMENT SPEAKS 1987, *supra* note 102, at 547.

subsequent panel proceedings? Article 1904, paragraph 9, provides that "[t]he decision of a panel . . . shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel." The gravamen of this provision appears to be that the issues finally determined and the claims ultimately resolved by a panel are res judicata, but not stare decisis. For example, if the identical challenge, both factual and legal, were made in either a subsequent judicial or panel proceeding, the parties would be barred from again advancing an argument that had been already rejected in an earlier panel proceeding.[159] However, given the factually fluid nature of most AD and CVD cases, the effect of panel decisions "with respect to the particular matter" would not seem to present an insurmountable hurdle vis-a-vis the doctrine of stare decisis to a party intent on pressing a particular legal challenge.

In sum, absent domestic legislation instructing the courts otherwise, panel decisions would have no binding precedential value in the domestic courts of either country, although a reviewing court might find such decisions persuasive.[160] Binational panel constructions of the AD and CVD statutes thus might be instructive for, but not binding on, the CIT and CAFC. The CIT will continue to be bound by decisions of its two superior courts, the CAFC and the Supreme Court, but no institutional constraints will compel adherence to binational panel decisions. One thorny consequence of having these parallel review procedures, of course, is that two different interpretations of the same law may co-exist with no ready mechanism for reconciling them.

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159. *See* Rosenthal, Staley & Beeckman, *The U.S. Antidumping and Countervailing Duty Laws: Does Familiarity Breed Res Judicata?*, *id.* at 581, where the authors conclude that "the rules of res judicata . . . should be sparingly and cautiously applied. Each case, by necessity, will involve different imports. When different entries of goods are involved, different factual issues can easily arise that will distinguish one case from another." *Id.* at 614

160. The U.S. FTA implementing legislation, Pub. L. No. 100-449, 102 Stat. 1851, § 401(d), "makes clear that a U.S. court shall not be bound by, but may consider, a final decision of a binational panel . . . ." S. Rep. No. 509, 100 Cong., 2d Sess. 34 (1988), *reprinted in* 1988 U.S. Code Cong. & Ad. News 2395, 2429. In a CIT challenge to a final AD or CVD administrative determination not involving Canadian imports, could an American manufacturer which was a stranger to the binational panel review proceeding make use of a panel interpretation of the AD or CVD law so as to bind the ITA or ITC and prevent either from taking a position at odds with the panel decision? The answer to this question appears to be a clear no. In United States v. Mendoza, 464 U.S. 154 (1984), the Supreme Court held that "nonmutual offensive collateral estoppel" is not to be extended to the United States.

g. Application of the Cumulation Provision to Canadian Imports

The Trade and Tariff Act of 1984 amended the AD and CVD laws to require the ITC, when making AD and CVD injury determinations, to cumulate imports of the product from all countries under investigation.[161] As noted in the legislative history, this amendment "requires cumulation of imports from various countries that may each account individually for a small percentage of total market penetration but when combined may cause material injury."[162] The 1984 Act provides:

> For purposes of clauses (i) and (ii) [regarding the price and volume of imports], the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such products compete with each other and with the like products of the domestic industry in the United States market.[163]

Thus, two criteria must be met before the ITC may cumulate. First, the imports must be subject to investigation. Second, the imports must not only compete with the domestic industry's products, but also with other imports of the like product. This second criterion necessarily entails an additional requirement that the imports be sold in the United States approximately within the same time period.[164]

Petitioners before the ITC have had their hand appreciably strengthened by this provision. In the past, imports from a number of countries might not have been a cause of material injury to a domestic industry when considered in isolation because the volume of imports from any one country might not have been sufficiently great to show such injury. However, when the imports from all countries are considered together, the burden for petitioners in showing the requisite material injury is significantly lightened. The cumulation provision, already a powerful tool for petitioners, was made even more formidable by the

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161. 19 U.S.C. §§ 1301, 1677(7)(C)(iv) (1982 & Supp. II 1984). This amendment settled a long debate within the ITC whether cumulation should be done where simultaneous investigations were being conducted of imports of the product from different countries. For background on the ITC's cumulation practice before the 1984 amendment, see Bello & Holmer, *supra* note 125, at 705-09.

162. H.R. Conf. Rep. No. 1156, 98th Cong., 2d Sess. 173 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5290.

163. 19 U.S.C. § 1677(7)(C)(i) & (ii) (1982 & Supp. II 1985).

164. H.R. Conf. Rep. No. 1156, *supra* note 162 ("marketing of imports that are accumulated [should] be reasonably coincident").

CIT in *Bingham & Taylor, Inc. v. United States*,[165] where it required the ITC to "cross-cumulate," meaning it would have to aggregate imports from two or more countries in simultaneous AD and CVD injury investigations for purposes of volume and price analysis.

Unless the cumulation provision is amended to exempt Canadian imports, it will tie the binational panel and the CIT into a knot of Gordian proportions. As the *Bingham & Taylor* case shows, the likelihood of Canadian imports being included with imports of other countries in an ITC cumulation analysis is not hypothetical; it has happened, and in a case where the ITC developed virtually all of its criteria for applying the cumulation provision. In *Oil Country Tubular Goods from Argentina, Canada, and Taiwan*,[166] the ITC rejected several arguments by Canadian producers that the cumulation provision should not be applied to imports of their product. For example, the ITC found that the degree of fungibility between the Canadian product, imports of the product from different countries under investigation, and the like domestic product was sufficient to warrant cumulation, notwithstanding an argument by the Canadians that the higher quality of their product reduced its fungibility. The ITC also found that the Canadian product competed with imports from other countries in the United States market even though the ports of entry for many of the Canadian imports differed from those for other countries.[167] In a case involving the import of fresh flowers, the ITC cumulated imports from countries entitled to an injury test under the 1979 CVD law, including

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165. 627 F. Supp. 793 (Ct. Int'l Trade 1986), *aff'd*, 815 F.2d 1482 (Fed. Cir. 1987). This case, incidentally, involved Canadian imports of iron construction castings.

166. Inv. Nos. 701-TA-255-256, 731-TA-275-277 (preliminary), USITC Pub. 1747 (Sept. 1985). For two additional cases involving Canadian imports and cumulation, *see* Certain Brass Sheets and Strips from Brazil, Canada, France, Italy, the Republic of Korea, Sweden, and West Germany, Inv. Nos. 701-TA-269-270 (preliminary), USITC Pub. 1837 (May 1986); Iron Construction Castings from Brazil, Canada, India, and the People's Republic of China, Inv. Nos. 701-TA-249-252, 731-TA-262-265 (preliminary), USITC Pub. 1720 (June 1985). For other cases where the Commission has developed and applied its cumulation criteria, *see, e.g.*, Certain Welded Carbon Steel Pipes and Tubes from India, Taiwan, Turkey, and Yugoslavia, Inv. Nos. 701-TA-251-253, 731-TA-271-274 (preliminary), USITC Pub. 1742 (Aug. 1985); Certain Cast-Iron Pipe Fittings from Brazil, Korea, and Taiwan, Inv. Nos. 731-TA-278-281 (preliminary), USITC Pub. 1753 (Sept. 1985); Certain Steel Wire Nails from the People's Republic of China, Poland, and Yugoslavia, Inv. Nos. 731-TA-266-268 (preliminary), USITC Pub. 1730 (July 1985); Certain Carbon Steel Products from Austria and Sweden, Inv. Nos. 701-TA-225, 227-228, 230-231, 731-TA-219 (final), USITC Pub. 1759 (Sept. 1985).

167. For a further analysis of the Commission's determination in the *Oil Country Tubular Goods* case, see Bello & Holmer, *supra* note 125, at 707-08.

Canada, with imports from countries not entitled to such a test.[168]

Already a source of friction between the United States and Canada due to its demonstrated potential for easing the petitioner's burden of proving injury, the cumulation provision also throws the binational review panel and the CIT together into a jurisdictional morass. When Canadian imports are combined with other countries' imports as the subject of an AD or CVD injury investigation, it may be impossible to isolate the Canadian portion of any final injury determination. If the entire case is brought before the CIT, and if binational panel review has been requested for the Canadian portion of the determination, the CIT will lack jurisdiction to review the Canadian portion of the determination. This raises the question of how the CIT will be able to review the balance of the ITC determination without also considering the role Canadian imports played in the injury determination. Conversely, a binational review panel would exceed its jurisdictional mandate if it considers any part of an ITC injury determination that stems from a consideration of imports from third countries. At the same time, the panel will be unable to assess the ITC's cumulation analysis unless it does precisely that which it is prohibited to do. One sensible solution is to cut this Gordian knot by enacting a statutory exemption for Canadian imports from the cumulation provision of the Trade and Tariff Act of 1984. Regrettably, Congress has rejected this suggestion in the FTA implementing legislation, setting the stage for inconsistent judicial and panel decisions in companion cases stemming from the same ITC affirmative injury determination.[169]

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168. Certain Fresh Cut Flowers from Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, Kenya, Mexico, the Netherlands, and Peru, Inv. Nos. 303-TA-17-18, 701-TA-275-278, 731-TA-327-334 (preliminary) (1986). Entitlement to the injury test is based generally on whether the country is a signatory to the GATT Subsidies Code.

169. The Senate report to the FTA implementing legislation noted that

> [a]ll other options for the treatment of panel and court decisions involving affirmative ITC determinations in which it cumulatively assesses the effect of imports from Canada and other countries are administratively unworkable and would accord the Agreement a substantive impact on the antidumping and countervailing duty laws that is not intended.

S. Rep. No. 509, 100th Cong., 2d Sess. 34 (1988), *reprinted in* 1988 U.S. CODE CONG. & AD. NEWS 2429. The report added:

> [I]n a case where the ITC has made an affirmative injury determination on the basis of cumulating imports from Canada with imports from other countries, the CIT is to decide the case before it (concerning imports from other countries) on the record as it was before the ITC at the time the ITC made its original determination.
>
> The outcome of a binational panel proceeding in a companion case concerning the imports from Canada that were cumulated shall have no bearing on the ITC's

IV. CONCLUSION

The binational panel review provisions of the United States-Canada FTA are at once boldly innovative and fraught with potential pitfalls. That the United States and Canada were able to agree to a mechanism for resolving the AD and CVD imbroglio is a credit to the persistence of the negotiators and the flexibility of their superiors. Although the binational panel review provisions are a second-best solution for Canadians, they are not a bad second best. Canadians should rest somewhat easier with these provisions in place. Binational panel review holds great promise as a workable modus vivendi for both Canada and the United States vis-a-vis their AD and CVD laws.

On a broader perspective, and perhaps of even more importance, binational panel review may prove to be a model for GATT dispute settlement. The binational panel review provisions of the United States-Canada FTA are proof that the world's two largest trading partners are capable of relinquishing a sufficient amount of national sovereignty given the political will to do so. Other countries should take note and follow their lead.

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record or on the validity of the ITC determination as it affects imports from other countries. Moreover, the CIT, in deciding the companion case before it, shall disregard any action taken by the ITC to implement a final decision of a binational panel . . . .

Id.