DISPUTE RESOLUTION INVOLVING STATES
RÈGLEMENT DE DIFFÉRENDS IMPLIQUANT ÉTATS

Dispute Resolution in the *Canada-United States Free Trade Agreement*: One Element of a Complex Relationship

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The number and complexity of links between Canada and the United States have given rise to a multiplicity of disputes. Consequently, the two countries have explored most dispute resolution techniques familiar to modern states. In this article, the author analyzes the dispute resolution mechanisms adopted in the *Free Trade Agreement*, specifically Chapters 18 and 19, and situates them in the broader context of Canada-U.S. relations.

Chapter 18, the general dispute resolution mechanism, is centred around the Commission. The Commission is a political body which supervises the implementation of the *Agreement* and its future elaboration through a variety of techniques: consultations, binding arbitration, and panels of experts. Ultimately most disputes under Chapter 18 will be resolved by the consensus of the parties acting through the Commission. By contrast, the Commission has no role in Chapter 19 which deals with the highly sensitive area of antidumping and countervailing duties. The author concludes that the parties opted for a more court-like model in this area because they felt it was unlikely that disputes could be fairly or effectively determined if they relied exclusively on their ability to achieve consensus.

The author draws out this contrast by examining some of the cases decided under the two Chapters thus far. He concludes that the mechanisms are generally working well, though a few problems have become apparent. It is these problems and the broader issues underlying the alternative dispute resolution mechanisms which the negotiators of any North American Free Trade Agreement must confront.

Le nombre et la complexité des liens entre le Canada et les États-Unis ont suscité de nombreux différends qui ont incité les deux pays à explorer la plupart des techniques de résolution des différends connues des États modernes. Dans cet article, l'auteur analyse les mécanismes de résolution de différends adoptés dans l'*Accord de libre-échange* dont plus particulièrement les chapitres 18 et 19 ; il les situe dans le contexte global des relations entre le Canada et les États-Unis.

Le mécanisme général de résolution des différends du Chapitre 18 est centré principalement sur la Commission. La Commission est un organe politique qui supervise la mise en oeuvre de l'*Accord* et son élaboration future par diverses techniques : consultations, arbitrage obligatoire et groupes d'experts. Ultimement, la plupart de ces conflits seront résolus par un consensus des parties obtenu par l'intermédiaire de la Commission. Par contre, la Commission ne joue aucun rôle quant aux dispositions du Chapitre 19 qui gouvernent les domaines fort délicats des droits antidumping ou compensateurs. L'auteur conclut que les parties ont opté pour un modèle plus judiciaire dans ces domaines, réalisant qu'il était peu probable qu'ils arrivent à une résolution juste et efficace s'ils se fiaient exclusivement à leur habileté à chercher un consensus.

L'auteur élabore ce contraste à la lumière de la jurisprudence concernant ces deux chapitres. Il en conclut que les mécanismes sont généralement efficaces, malgré l'émergence de quelques problèmes. Ce sont à des tels problèmes et aux questions plus larges des mécanismes de résolution de différends que les négociateurs d'Accords de libre-échange nord-américains seront confrontés.

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Synopsis

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I. Background of Disputes Between Canada and the United States

A. Canada-Unitcd States Relations and Dispute Resolution

Canadians and Americans often repeat that they share the largest undefended border in the world. That is not to say, however, that there have not been more or less "neighbourly" disputes between them. A degree of friction is inevitable given the numerous economic, political and cultural activities which spill across that border or which, while taking place within the one state, produce consequences in the other. Few matters remain purely domestic when one considers the amount of transborder trade,[1] cross-border investment,[2] tourism, and other links which bind the two countries together. To a lesser degree this situation is now extending to Mexico.

These transnational links are at many levels. At the governmental level they are primarily of federal concern but they may extend to state and provincial

[1]For the period of March 1990-February 1991 (12 mos.), Canadian imports from the United States were $92.66 billion (Cdn) and Canadian exports to the United States were $109.89 billion (Cdn) (*Summary of Canadian International Trade* (Ottawa: Statistics Canada Cat. No. 65-001, February 1991)).

[2]At year end 1989, United States direct investment in Canada was $75.825 billion (Cdn) and Canadian direct investment in the United States was $50.122 billion (Cdn) (*Canada's International Investment Position (1988-90)* (Ottawa: Statistics Canada Cat. No. 67-201, April 1991)).

authorities,[3] even municipalities;[4] at the individual and corporate level they are extensive.

As a result of these intergovernmental contacts, recognition of interdependence ranges from *ad hoc* arrangements to formal agreements. At the informal end of the spectrum *ad hoc* arrangements have grown up between administrative officials from both countries without any need for a formal government arrangement. For example, fisheries officials now coordinate the activities of conservation officers on both sides of the border through the mechanism of the Great Lakes Fisheries Commission. This policing function was never a part of the formal mandate of the Commission but has developed as a result of experience in cooperation over the years. It remains as an informal administrative practice. In other cases such informal practices have evolved into specific binational regulatory regimes. An example is the multijurisdictional disclosure system between Canada and the United States which has grown out of cooperation between securities administrators.[5] Furthermore, the National Conference of Commissioners on Uniform State Laws of the United States and the Uniform Law Conference of Canada have set up joint committees to examine legislation of interest to the two bodies. This has resulted in the adoption of uniform state and provincial laws in areas of common interest.[6] At the other end of the spectrum, the two countries have formalized their economic interdependence and provided for the limited free movement of goods in agreements dealing with defence production and the manufacturing of automobiles, to name two familiar examples.[7]

In addition to cooperation, the interdependence and closeness of the countries have produced a multiplicity of disputes and dispute resolution mechanisms (DRM). Early disputes between the two countries related to boundary delimitation and there remain unresolved boundaries to this day.[8] Subsequent disputes have involved more environmental or economic issues, the latter often

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[3]For example, The Council of Great Lakes Governors is eomposed of representatives of the governments of the Great Lakes States and Provinces and manages water resources for the Great Lakes Basin.

[4]Great Lakes mayors and reeves from municipalities on both sides of the border meet annually to discuss issues which fall within their jurisdictions and which have an effect on the entire Great Lakes Basin. This group extends as far as Montreal.

[5]See C. Jordan, "Securities Law: Proposed Multijurisdictional Disclosure System between Canada and the United States" (1990) 1 C.U.B.L.R. 141; "Cross-border shopping for securities markets?" *The Financial Post* (19 June 1991) 9.

[6]See, for example, the Report of the Joint Committee recommending the adoption of the Uniform Transboundary Pollution Reciprocal Access Act, adopted by the National Conference of Commissioners on Uniform State Laws, July 1982 and the Uniform Law Conference of Canada, August 1982. This law is now in force in Ontario, P.E.I., and Manitoba in Canada and in Montana, New Jersey, Michigan, Wisconsin, and Colorado (and is presently being considered in Oregon) in the United States.

[7]*Canada-United States Agreement Concerning Automotive Products*, 9 March 1965, 17 U.S. Stat 1372, T.I.A.S. No. 6093, (1966) Can. T.S. No. 14; on Canadian-American cooperation in defence production, see J.J. Kirton, "The Consequences of Integration: The Case of the Defence Production Sharing Agreement" in A. Axline *et al.*, eds, *Continental Community?: Independence and Integration in North America* (Toronto: McLelland & Stewart, 1974), 116.

[8]Sec E.B. Wang, "Adjudication of Canada-United States Disputes" (1981) 19 C.Y.I.L. 158.

as a result of the overwhelming economic presence of United States interests in Canada. Many of the areas of economic friction were addressed by the substantive provisions of the *Free Trade Agreement*.[9]

In the 1960s disputes arose over Canadian tax policies towards *Time* and *Reader's Digest* when these two publications protested discriminatory taxation rules designed to foster Canadian publications in the interest of maintaining our cultural identity. Concern for cultural identity continues in Canada and was addressed in the *FTA*, article 2005 which exempts cultural industries.

The importance of American investment in Canada and attempts by Canadian governments to control it have often been a source of friction. In 1974 the federal government adopted the *Foreign Investment Review Act*.[10] Its application to American investment led to vigorous protests, particularly when it was applied to mergers of two American companies, one or both of which had Canadian assets.[11] Local sourcing requirements imposed by the agency led to a United States complaint under the *General Agreement on Tariffs and Trade*,[12] a position upheld by a *GATT* panel which found that some requirements of the agency violated article III(4) of the *General Agreement*.[13] The election of a Conservative government in 1984 produced a less nationalistic stance and one more anxious to encourage foreign investment. Nonetheless, under the renamed *Investment Canada Act*[14] important controls remain, notably in sensitive areas such as energy and cultural industries. Controls were reduced again by the terms of the *FTA*[15] but even there important reservations are made for energy and other sensitive sectors.[16]

Disputes over trade in Canadian energy resources and policies have been a considerable source of friction for United States' interests in the past. The nationalistic provisions of the National Energy Program (NEP) were perceived as a threat to the United States' source of supply and the rate of return on their investments in Canada.[17] The *FTA* addressed these concerns by developing a

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[9]*Canada-United States Free Trade Agreement*, 22 December 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281 [hereinafter *FTA* or *Agreement*] (Part A, Schedule to the *Canada-United States Free Trade Implementation Act*, S.C. 1988, c. 65; entered into force 1 January 1989).

[10]S.C. 1973-74, c. 46.

[11]*Dow Jones & Co. Inc.* v. *A.G. Can.* (1980), [1981] 1 F.C. 428, 113 D.L.R. (3d) 395, aff'd (1981), 122 D.L.R. (3d) 731 (C.A.); *A.G. Can.* v. *Fallbridge Holdings Ltd* (1979), 7 B.L.R. 275 (Fed. T.D.), aff'd (1985), 63 N.R. 17, 31 B.L.R. 57 (C.A.). For a general discussion of the United States reaction to the *Foreign Investment Review Act*, see S. Unger, "The United States Response to Canadian Foreign Investment Policies" (1982) 1 Boston U.I.L.J. 19; J.F. Dennin, "The U.S. Commerce Dept. Study of Canadian Foreign Investment Policies" (1982) 1 Boston U.I.L.J. 37; D.F. Vagts, "Canada's Foreign Investment Policy: An International Perspective" (1982) 1 Boston U.I.L.J. 27.

[12]*General Agreement on Tariffs and Trade*, 30 October 1947, Can. T.S. 1947 No. 27, 55 U.N.T.S. 187, T.I.A.S. No. 1700, 1st supp. B.I.S.D. (1953) 6 [hereinafter *GATT* or *General Agreement*].

[13]*Canada — Administration of the Foreign Investment Review Act* (*United States* v. *Canada*) (1984), *GATT* Doc. L/5504, 30th supp. B.I.S.D. (1982-83) 140 [hereinafter *FIRA*].

[14]R.S.C. 1985, c. I-21.8.

[15]*Supra*, note 9, c. 16.

[16]*Ibid.* annex I607.3(4), art. 2005.

[17]See W. Graham, "Types of Regulation of Foreign Investment in Canada apart from the Foreign Investment Review Act: An Overview" in B.M. Fisher, ed., *Legal Aspects of Doing Business in Canada* (New York: Practising Law Institute, 1983) 589; Unger, *supra*, note 11.

continental energy policy which assures security of access to Canadian suppliers and security of supply to American consumers.[18] These issues raise complex legal problems involving sensitive materials such as uranium and a fairly intense regulatory framework on both sides of the border.[19] Pipelines for natural gas and transmission lines for electric power cross the border in increasing density. Interdependence thus grows and while disputes may take a different form than in the past, the potential for future disputes within the framework of the *FTA* has probably increased.

Not all disputes have been brought within the umbrella of the *FTA*. The potential for disputes over such issues as acid rain,[20] water diversion projects[21] and other consequences of a shared environment is considerable.

Because of the interrelation between so many activities many disputes have arisen in the past over the exercise of jurisdiction by one state over activities which the other considers as falling within its exclusive, or at least within its primary jurisdictional ambit. The exercise of anti-trust and export control jurisdiction by United States authorities over activities in Canada have produced sharp exchanges. Protective legislation was adopted by Canada (modeled on the U.K. statute) designed to block the application of American law where that exercise of jurisdiction is perceived as "adversely affecting significant Canadian interests."[22] In the area of criminal law a treaty has been entered into to address the issue of jurisdiction.[23] Finally, as noted above, in some areas such as securities, transboundary cooperation amongst the authorities has become substantial.[24]

As a consequence of the complexity and number of links between the two countries, Canada and the United States have explored most dispute resolution techniques familiar to modern states. Their trade disputes have often been the subject of working party or panel resolution within the framework of *GATT*.[25]

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[18]*FTA*, *supra*, note 9, c. 9.

[19]The principal regulatory body in Canada is the National Energy Board. In the United States it is the Federal Energy Regulatory Commission. For a discussion of their respective jurisdictions and the implications of the *FTA*, see S.P. Battram & R.H. Lock, "The Canada/United States Free Trade Agreement and Trade in Energy" (1988) 9 Energy L.J. 327.

[20]Canada has resorted to direct lobbying of the United States Congress to deal with its concerns over acid rain. Some degree of progress was achieved with the recent *Clean Air Act Amendments* (1989), s. 1940, 101st cong., 1st sess. (1989).

[21]The dispute over North Dakota's Garrison Diversion unit was addressed by the International Joint Commission, which was established by the *Boundary Waters Treaty*, *infra*, note 32.

[22]*Foreign Extraterritorial Measures Act*, S.C. 1984, c. 49, s. 5(I). Also see W.C. Graham, "The Foreign Extraterritorial Measures Act" (1985-86) 11 Can. Bus. L.J. 410; J.G. Castel, *Extraterritoriality in International Trade* (Toronto: Butterworths, 1988).

[23]*Canada-United States Treaty for Mutual Assistance in Criminal Matters*, 18 March 1985, 24 I.L.M. 1092.

[24]*Supra*, note 5 and accompanying text.

[25]For example, *United States Tax Legislation (DISC)* (*E.E.C.* v. *United States*) (1976), *GATT* Doc. L/4422, 23rd supp. B.I.S.D. (1975-76) 98; *FIRA*, *supra*, note 13; *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon* (*United States* v. *Canada*) (1988), *GATT* Doc. L/6268, 35th supp. B.I.S.D. (1987-88) 98; *Canada — Import Restrictions on Ice Cream and Yogurt* (*United States* v. *Canada*) (1989), *GATT* Doc. L/6568, 36th supp. B.I.S.D. (1988-89) 68; *United*

They have resorted to *ad hoc* arbitration[26] and to the International Court of Justice.[27] Various agreements foresee the need to consult prior to taking action.[28] Most, however, contain no specific DRMs. The federal structure of the two countries introduces an additional complicating factor — the resolution of many disputes involves the coordination of more than one level of government.

There exist some two hundred bilateral treaties between Canada and the United States (and innumerable letter agreements and understandings between officials of various levels of government), yet only a few of them contain a specific DRM.[29] Both governments are members of various general agreements for the settlement of disputes between them[30] and also certain multilateral treaties providing for the judicial settlement or arbitration of disputes relating to the interpretation or application of those treaties.[31]

Perhaps the most illustrative agreement between the parties, for the purpose of illuminating attitudes towards DRMs, is the 1909 *Boundary Waters Treaty*.[32] That treaty established a permanent International Joint Commission to deal with applications for the use, obstruction or diversion of boundary waters. The Commission was also charged with making reports and recommendations with respect to differences between the two countries involving their rights or those of their inhabitants along the boundary that were referred to the Commission jointly by the two governments. Over the years, the Commission has con-

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States — Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada (*Canada* v. *United States*) (1990), *GATT* Doc. DS7/R replacing L/6721 (5 September 1990).

[26]*Gut Dam Arbitration* (*Canada* v. *United States*) (1969), 8 I.L.M. 118; *Trail Smelter Arbitration* (*United States* v. *Canada*) (1931-41), 3 R.I.A.A. 1905.

[27]*Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada* v. *United States*), [1984] I.C.J. Rep. 246.

[28]*Canada-United States Memorandum of Understanding as to Notification, Consultation and Cooperation with respect to the Application of National Anti-Trust Laws*, 9 March 1984, 23 I.L.M. 275; *Canada-United States Treaty for Mutual Assistance in Criminal Matters*, *supra*, note 23; *Canada-United States Treaty Relating to Cooperative Development of the Water Resources of the Columbia River Basin*, 17 January 1961, (1961) 44 Dept of State Bull. 234.

[29]See ABA-CBA Joint Working Group on the Settlement of International Disputes, *Settlement of Disputes under the Proposed Free Trade Area Agreement*, 1 April 1987, at 8-9 [hereinafter *FTA Report*].

[30]See, for instance, the *Convention for the Prevention of Smuggling of Intoxicating Liquors*, 23 January 1924, 43 U.S. Stat. 1761, T.I.A.S. No. 685, 12 Bevans 414, 17 L.N.T.S. 182 (*The I'm Alone* (*Canada* v. *United States*) (1935), 3 R.I.A.A. 1609, 29 AJIL 326 was submitted to a Joint Commission under this convention); *Canada-U.S. Agreement Concerning Transit Pipelines*, 28 January 1974, 28 U.S.T. 7449, T.I.A.S. No. 8720.

[31]Among these treaties are: *Convention on International Civil Aviation*, 7 December 1944, 61 U.S. Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295, 3 Bevans 944; *Constitution of the International Labor Organization, as amended in 1946*, 9 October 1946, 62 U.S. Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35, 4 Bevans 188; *Convention on the Political Rights of Women*, 31 May 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 133; *Vienna Convention on Diplomatic Relations*, 18 April 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; *International Telecommunications*, 25 October 1973, 28 U.S.T. 2495, T.I.A.S. No. 8572.

[32]*United States-Great Britain Treaty Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, 11 January 1909, 12 Bevans 319, [1923] III Redmond 2607 [hereinafter *Boundary Waters Treaty*]; *Waterways Treaty Act*, S.C. 1911, c. 28.

sidered more than two hundred applications and references, and its recommendations, based on careful technical studies and consultations with all the interested parties, have usually been accepted by the two governments. In recent years, the Commission has been asked by the two countries for recommendations concerning not only water levels and use but also water and air pollution. However, no case has ever been submitted to the Commission for "decision" under article 10 of the treaty, in other words for binding determination. Submission under that provision depends on a special agreement of both countries requiring, as far as the United States is concerned, prior advice and consent of the Senate.[33]

As a result of these and other factors, the Canadian Bar Association (CBA) and the American Bar Association (ABA) recommended, in a report addressed to their two governments that a permanent tribunal be established between the two countries to deal with disputes arising between them. This tribunal would have had compulsory jurisdiction over any question regarding the interpretation, application or operation of a treaty in force between them and optional jurisdiction over other issues such as environmental issues and the transnational application of civil and criminal laws.[34] These recommendations remain unacted upon by either government, although the committee which drafted them was able to have some limited influence in the discussions concerning the DRM for the *FTA*.[35]

The reluctance of governments to hand disputes over to third party arbitrators has been much remarked upon by international scholars. When vital state interests are at stake, the political consequences of an adverse decision may just be unacceptable. This reluctance has been true in both countries. In the United States, even the high points of political willingness to resort to international arbitration have been tempered by serious reserves. Professor Tom Franck, in a speech given to the Canadian Council on International Law, contrasted the rhetoric of the United States which has often professed its loyalty to international arbitration in the abstract, but which has usually backed off if it appeared that resort to third party adjudication might produce a result which would not be in the interest of the United States.[36] Indeed, Professor Hudec has suggested that American enthusiasm for improved *GATT* dispute settlement procedures has recently cooled with the realization that the United States may lose more cases

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[33]*Supra*, note 29 at 9.

[34]ABA-CBA Joint Working Group on the Settlement of International Disputes, *Settlement of International Disputes between Canada and the United States of America*, resolutions adopted by the ABA on 15 August 1979 and the CBA on 30 August 1979 with accompanying reports and recommendations.

[35]See *FTA Report*, *supra*, note 29; ABA-CBA Joint Working Group on the Settlement of International Disputes, *Preliminary Information Report on the Elements of Canada-United States Free Trade Agreement of October 4, 1987*, 10 November 1987.

[36]"Messianism and Chauvinism in America's Commitment to Peace Through Law" (1986) C.C.I.L. Proc. 101.

than it will gain in this process.[37] Such recent cases as the *Section 337 case* would seem to support this analysis.[38]

B. The Specific Context of the FTA: *Canada-United States Trade Policies in the 1980s*

The DRMs achieved in the *FTA* must be appreciated not only in this general context, but also in the context of developments in United States trade law in the 1980s. The *FTA* owes its genesis to a fear by Canadians that access to the American market would be denied by virtue of ever increasing protectionist sentiment in the United States in the early 1980s. Evidence of this protectionist sentiment may be found in a series of legislative measures. The *Trade and Tariff Act of 1984* brought in section 301 and the 1988 *Omnibus Trade and Competitiveness Act* expanded this to "super 301."[39] Specific amendments to trade legislation clearly targeted certain Canadian practices. For instance, section 232 of the *Trade and Tariff Act of 1984* dealt with border broadcasting.[40] Other provisions, while technical in nature, had considerable practical significance in contingent protectionism cases. Obtaining anti-dumping duties or countervail was made progressively easier. Canadian industry was uneasy as important sectors, steel for example, watched United States laws applied to imports. A specific case, *Softwood Lumber*, confirmed fears of an unfair application of American law.[41] In addition, the role of Congress increased in trade policy formation, and Congress is traditionally more susceptible to the protectionist pressures of constituents than the Administration.[42] As George Will has said, when it comes to politics, "free trade ranks just below Christianity and above jogging on the lists of things constantly praised but only sporadically practised."[43]

These factors moved the Canadian government to consider the DRM of the *Agreement* to be of paramount importance. Canada's need for binding rules and an effective DRM was further mandated by the disparity in the size of the two countries and the:

> consequential disequilibrium in power and in relative dependence of the one on the other. This disparity leads Canadians to fear that the United States could use its political and economic leverage to resolve disputes under a trade agreement to its advantage — indeed to unilaterally revise that agreement.[44]

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[37]R. Hudec, "Mirror, Mirror on the Wall" (Paper presented at 1990 annual meeting of the C.C.I.L., 19 October 1990) [unpublished].

[38]*United States — Section 337 of the Tariff Act of 1930* (*E.E.C.* v. *United States*) (1989), *GATT* Doc. L/6439, 36th supp. B.I.S.D. (1988-89) 345 (adopted 7 November 1989).

[39]*Trade and Tariff Act of 1984*, Pub. L. 98-573, 24 I.L.M. 823. *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. 100-418, 28 I.L.M. 15.

[40]*Ibid.*

[41]See G.W.V. Janesen, *Canada-United States Trade Relations: The Lessons of the Softwood Lumber Countervail Case* (Ottawa: Conference Board of Canada, 1984).

[42]See H.H. Koh, "Congressional Controls on Presidential Trade Policymaking after *I.N.S.* v. *Chadha*" (1986) 18 N.Y.U.J. Int'l. L. & Pol. 1191.

[43]This comment was made by George Will during a recent television programme.

[44]L. Legault, "Canada-United States Trade: A Legal Framework for the Management of Interdependence" (Address to the ABA National Institute on International Litigation and Arbitration in

Investors in Canada must be given the security of knowing that this cannot occur.

In addition, the system of trade and economic policy formation and regulation in the United States is such that, because of the division of powers between the executive and legislative branches and the sub-division between economic agencies and semi-autonomous regulatory commissions within and without the Administration there is:

> a uniquely complex and diffuse network of decision making. In the absence of appropriate forms of binding dispute settlement it is unclear to whom Canada could turn to ensure proper enforcement of an agreement.[45]

This problem is compounded by direct access by individuals to trade remedies under United States law resulting in the inability of governments to influence the process through traditional diplomatic channels.[46]

At the same time one could discern an evolution in American thinking in favour of a more effective DRM in trade matters. In a report of the United States International Trade Commission (USITC) to the Senate Finance Committee on trade dispute settlement under the *GATT*, it was pointed out that one of the weaknesses of the *GATT* lay in the absence of clear and binding rules and an accompanying binding DRM which could apply to those rules.[47] It was clear that one project on the American agenda for the Uruguay Round was the elaboration of more effective enforcement procedures for the *GATT*. The results achieved at the mid-term meeting in Montreal, where there was agreement to extensive revisions of the *GATT* dispute resolution system (notably with the addition of an arbitration option), is some evidence of the success of that position.[48] One may speculate as to why this is so. In my opinion, it reflects the same insecurities on the part of the United States with regard to the *GATT* that Canada has with regard to the United States. The United States' loss of its hegemonic position has meant that it can no longer enforce power diplomacy when it comes to Japan and the EEC; it is therefore in its interest to require clear rules with a binding dispute mechanism to enforce them. This of course represents a radical departure on the part of the United States from its position in other areas of international law as may be reflected in such cases as the International Court of Justice's decision in the *Nicaragua case*.[49]

New York, 2 April 1987) [unpublished]. At that time Mr. Legault was Minister of Economics and Deputy Head of Mission, Canadian Embassy, Washington.

[45]*Ibid.*

[46]Similar propositions were advanced by a speech prepared for Allan Gotlieb and delivered by Mr. Legault. L. Legault, Address (Canada-United States Law Institute, 3 April 1987) [unpublished].

[47]USITC, *Review of the Effectiveness of Trade Dispute Settlement under the GATT and the Tokyo Round Agreements* (Washington: USITC Pub. 1793, December 1985) [hereinafter *USITC Review of GATT Dispute Settlement*].

[48]"*GATT* Adopts New Dispute Settlement Procedures, Country Review System" (1989) 62 *GATT* Focus 1.

[49]See Franck, *supra*, note 36; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *United States)*, [1986] I.C.J. Rep. 14.

II. Comparison of the Dispute Resolution Mechanism in the *FTA*

The first point that must be made about the *FTA* is that there is not one dispute resolution mechanism, but many. The two principal mechanisms are contained in Chapter 18, the general provision, and Chapter 19, governing national anti-dumping and countervailing duty actions. To these may be added provisions specific to certain sections such as arbitration in the case of certain agricultural disputes,[50] direct consultation between immigration authorities,[51] direct control by national architectural professional organizations[52] and the use of working parties, to name a few. In other areas a binational dispute mechanism is specifically excluded as inappropriate to the circumstances, as in the case of Investment Canada decisions[53] or the chapter on financial services.[54]

Overall, the system is marked by a considerable degree of flexibility, allowing the parties to select the mechanism which they consider most appropriate to the dispute. Resort to *GATT* rather than the *FTA* is permitted. Conciliation, mediation, arbitration, and the use of working parties are all provided for. Some areas are given a discrete system where appropriate, others are exempted entirely where national considerations are too sensitive or where the rules which were drafted were not developed enough to support a system for their application and interpretation. In many cases discrete systems are selected which correspond to the nature of the substantive rules with which they are associated, such as in the case of the architects or arbitration in the case of Chapter 11. Two weaknesses of the *GATT* system, the length of time to get panel decisions and the blocking of reports in Council or the failure to implement them, have been addressed.[55]

The remainder of the article will focus on the two basic DRMs in the *Agreement*: Chapter 18 and Chapter 19. Chapter 18 is the general system which applies to the greater part of the *Agreement*; Chapter 19 governs anti-dumping and countervailing duties, both in respect of new legislation and administrative determinations.

A. Chapter 18, The General Dispute Resolution Mechanism

1. Analysis of Chapter 18

Central to the functioning of the general DRM is the Commission. The Commission has two roles. It is the manager of the *Agreement* in the sense that it has, pursuant to article 1802(1), the duty to supervise the proper implemen-

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[50]*FTA*, *supra*, note 9, annex 705.4(16).

[51]*Ibid.* art. 1503.

[52]*Ibid.* annex 1404.

[53]*Ibid.* art. 1608(1).

[54]See subsection II.A.2.

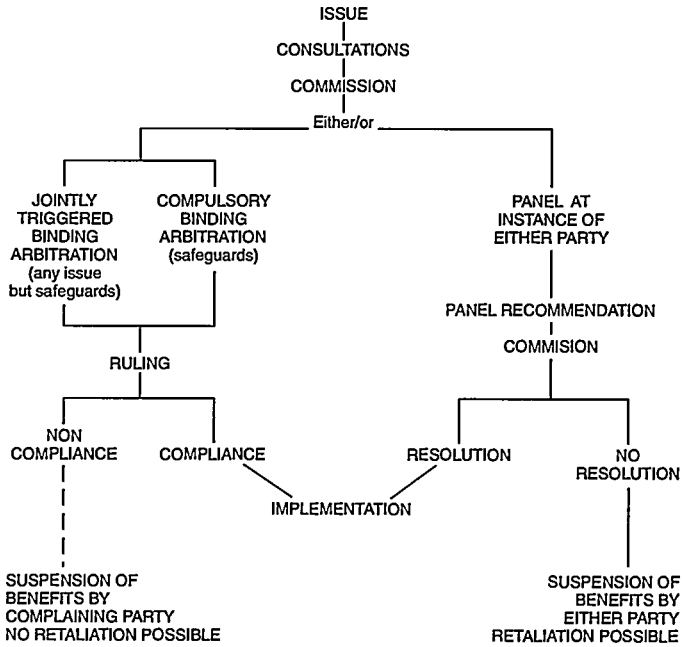
[55]The failure of the Contracting Parties to adopt *GATT* panel recommendations is becoming a serious concern in the efficacy of that system. See "*GATT* Dispute Settlement Stymied by Non-Implementation of Reports" (1991) 81 *GATT* Focus 1; "Canada Urges Adoption of Pork Panel Report" (1991) 82 *GATT* Focus 3.

The specific provisions of the *FTA* pointed to in this paragraph are cited in the sections whicb follow.

tation of the *Agreement*, its future elaboration and to consider any matters which affect its operation. It also has a pivotal role in the DRM. The Commission is by nature a political body; its principal members are the cabinet level officers in the two countries responsible for international trade.[56] It operates by consensus.[57]

In the case of the "institutional provisions" dealing with general dispute resolution, the Commission has a significant role, both at the beginning and toward the end of the procedure. It may act in some cases as a "traffic director" to indicate what forum will be used to consider the issue and, in the case where binding arbitration is not resorted to, it will determine what will be done about a panel's recommendation. It selects the arbitrators and may establish the procedure in some cases. A diagrammatic presentation of the Chapter 18 process is depicted in Figure 1.

Figure 1: Chapter 18 Dispute Settlement Mechanism*



* *Applies to all matters except antidumping and countervail laws and financial services, which have separate provisions*

Briefly, the system is as follows:

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[56] *FTA*, *supra*, note 9, art. 1802(2); see W. Graham, "The Role of the Commission in the Canada-United States Free Trade Agreement: A Canadian Perspective" in *United States/Canada Free Trade Agreement: The Economic and Legal Implications* (Conference Materials) (Washington: American Bar Association National Institute, January 1988) 233.

[57] *FTA*, *ibid.* art. 1802(5). See F. Iaccobucci, Deputy Minister of Justice of Canada, Address (Fifth Annual Trade Law Seminar in Ottawa, 15 October 1987) [unpublished].

1. If a dispute arises the parties have a duty to consult (article 1804).

2. If a dispute arises that falls both under the *Agreement* and the *GATT* the complaining party may choose either forum. The forum chosen is exclusive (article 1801(2), 1801(3)).

3. If the complaining party does not go to the *GATT* and consultations are not successful, either party may call upon the Commission to meet within 10 days and endeavour to resolve the dispute promptly. The Commission may call for the assistance of a mediator or technical advisors if it deems it appropriate (article 1805).

4. If this procedure produces no satisfactory result then:

a) in the case of safeguard disputes ("Emergency Action"), the Commission shall refer the matter to compulsory binding arbitration in accordance with the procedures established for that purpose (article 1806(1)).

b) in all other cases, the Commission may either

i) refer the matter to binding arbitration (article 1806(1)), or

ii) if not referred to arbitration, then upon the request of either party, refer the matter to a panel of experts which is established in accordance with the procedures agreed upon (article 1807).

5. In the case where binding arbitration is used (either in respect of safeguards or otherwise), the arbitrators' ruling disposes of the issue and the offending party is obliged to comply, failing which, and in the absence of any agreement by the parties as to appropriate compensation, the aggrieved party may suspend corresponding benefits of the other party who is not allowed to take any retaliatory measures (article 1806(3)). (There is no particular role for the Commission in this process.)

6. In the case where the matter is referred to a panel of experts the Commission may appoint the fifth panelist and fix the procedure for the panels. The panelists are to be chosen on the basis of objectivity and, "where appropriate," are to have "expertise in the particular matter under consideration" (article 1807(1); this may have particular significance in certain service sectors). Upon receiving the panel's recommendation the Commission "shall agree on the resolution of the dispute, which normally shall conform with the findings of the panel" (article 1807(8)). The solution is, "whenever possible," to consist of the elimination of the offending measure or compensation (article 1807(8)).

7. Where the Commission does not agree on a resolution of the dispute as above, the party which considers that its fundamental rights or anticipated benefits under the *Agreement* have been impaired may suspend benefits of equivalent effect to the other party until a resolution of the dispute (article 1807(9)).

In two other minor ways the Commission may affect procedures. It may decide not to publish a panel's finding (article 1807(7)). And, in the case where a party objects to a panel's recommendation, the Commission (along with the

parties) may request the panel to reconsider its decision in the light of such objections (article 1807(6)).

In examining the Commission's role in this procedure one's first point of departure, for comparison purposes, is naturally the DRMs contained in the *GATT* and its various codes. A second consideration which also strikes one about the Commission's role, in the case of this *Agreement*, concerns those where it has been given a role and those where it has not.

To take the latter point first, the Commission has no role in respect of anti-dumping or countervailing duty disputes (AD/CVD) where special procedures have been elaborated (Chapter 19). It may have the limited role of a mediator in the case of "Emergency Action" disputes, but where the parties cannot agree on a resolution to such a dispute, the question must proceed to binding arbitration (article 1103). These two areas, where special procedures have been provided for, are those where the parties (more particularly Canada) are especially sensitive because of recent trade frictions. In both cases, the guiding and ultimately determinative role of the Commission has been either excluded entirely or limited to that of a mediator prior to arbitration. One can only presume that this is because the parties were not prepared to concede that these types of disputes could be fairly or effectively determined if their ultimate disposition was to depend upon the consensus decision of the parties themselves sitting as the Commission. One might also assume that some of the more unfortunate experiences gained from the *GATT* procedures, in particular problems which have arisen because of the political process which occurs at the time of the Contracting Parties' approval of panel decisions,[58] influenced the very different procedures selected for these particular disputes. They effectively illustrate the proposition that the less trust there is between the parties the greater the need there is for a "tight" or more court-like model of DRM.

All other general disputes about the interpretation and application of the *Agreement* are governed by the general provisions which emphasize the consensus role of the Commission, both at the initiating and concluding phases of the procedures. In this sense, it may be said that the DRM of the *Agreement* replicates the *GATT* model.

In addition, article 2011 introduces the notion of nullification and impairment, as giving rise to the right to resort to the DRM provided for in Chapter 18. This general concept, borrowed from article XXIII of the *GATT*, could give rise to some interesting questions particularly where anticipated benefits are conceived.[59]

One feature of the general DRM that one must bear in mind is that the ultimate sanction provided for by the *Agreement* is retaliation by the injured party,

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[58]See, *supra*, note 55 and accompanying text.

[59]J.H. Jackson, "*GATT* Machinery and the Tokyo Round Agreements" in W.R. Cline, ed., *Trade Policy in the 1980's* (Washington: Institute for International Economics, 1983) 159. Jackson refers to the notion of nullification and impairment in the *GATT* as "exceedingly ambiguous" (*ibid.* at 182).

or notice of withdrawal from the *Agreement*. In this sense the *GATT* model has prevailed over the Canadian position which clearly favoured a binding dispute resolution mechanism which would avoid both the procedural problems of the *GATT* and the retaliation or "tit for tat" nature of its sanction mechanism (which in the end, results in the erection of additional trade barriers rather than the elimination of the offending measure). This aspect of a suspension of benefits of equivalent effect (articles 1806(3), 1807(9)) may well prove awkward in the services area where failure by one party to observe the *Agreement* in respect of one service (say tourism) may result in retaliation in an entirely unrelated area (say architecture, chartered accountancy, etc.).

Whenever one is discussing the characteristics of any DRM in an international agreement one must emphasise the direct relationship between the substantive rules of the *Agreement* and the procedures established to enforce them.[60] This *Agreement* certainly confirms that proposition. When we examine the case of Emergency Action, for example, we see that it was possible to agree to binding arbitration because the rules are fairly clear in Chapter 11 as to the conditions under which Emergency Action may be resorted to, whether under the bilateral or global track. Disputes might arise as to the meaning of "substantial" imports which contribute "importantly" to "serious" injury, for example (article 1102(1)). Debate over the appropriate threshold which justifies resort to internal protective remedies often takes place in *GATT*. This is surely the type of issue which can be left to a binational panel of experts for a judicial-type resolution. Furthermore, the ultimate consequences of an "unfavourable" (in the political sense) judgment to either party are fairly limited. The same observations might be made about the provision for binding arbitration in the case of government support programs for wheat and barley (annex 705.4(16)).

When we turn to the general rules which will apply to services, no one can foresee the nature or scope of all types of future disagreements or their ultimate consequences. In such cases, where there is a high degree of uncertainty there is a corresponding reluctance on the part of nations to accept any binding DRM. In the case of services then, the Commission, in its political role, remains in control of the procedure and the acceptability of a panel decision. In the end, either party has the power to frustrate the Commission's ability to come to a decision which will adversely affect its interests. In this sense the *FTA* retains the basic features of the *GATT* DRM, although reference should also be made to article 1807(8) which provides that the "resolution shall be non-implementation or removal" of the objectional measure or compensation. This seeks to address a weakness in the *GATT* system where even this "normal" consequence that should flow from the breach of an international obligation is not the guaranteed result of a panel ruling.

Another aspect of the Chapter 18 DRM that is worthy of note is the fact that the parties have exclusive access to it. There is no institutionally conceived

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[60]On DRMs, clear rules and the *GATT* experience see *USITC Review of GATT Dispute Settlement*, *supra*, note 47; R. Hudec, "*GATT* Dispute Settlement after the Tokyo Round: An Unfinished Business" (1980) 13 Cornell Int'l L.J. 145; Jackson, *ibid.*

role for private sector, or provincial or state participation in the process. This may well affect the acceptability of the system as a whole, particularly where such parties' rights and interests may be determined by the dispute resolution process. The American and Canadian Chambers of Commerce foresaw this issue and made active representation concerning the need for private sector participation in the dispute resolution process during the elaboration of the *Agreement*.[61] It certainly contrasts with the EEC system which envisages access to the Court of Justice by parties directly affected by Community measures and the appearance before the Commission of parties whose rights are being determined by it.[62] This may represent a serious gap in the institutional system worked out in this *Agreement*. In trade matters, perhaps more than other categories of international disputes, private parties regularly seek the aid of their government because of violations by other governments. Access to the appropriate domestic courts or administrative tribunals are only a part of the solution to this problem; access to some international machinery is also important. Subsequent to the *Agreement*'s Preliminary Transcript the parties seem to have recognized this problem by providing for a right of access by interested parties in the case of AD/CDV disputes (Chapter 19, articles 1904(5), 1904(7)) but such participation is excluded elsewhere in the *Agreement*.

Because the Commission is not a tribunal and the *Agreement* does not provide for any similar institution there is also no possibility of reference from domestic tribunals along the lines provided by article 177 of the *Treaty of Rome*. This type of reference served as the basis for the recommendation of the CBA and ABA to the two governments that it would be desirable to include in any agreement an appropriate arrangement for access by private persons, preferably to a permanent joint Canada-United States Free Trade Tribunal which would have had jurisdiction to interpret the *Agreement* and decide disputes arising thereunder.[63] In addition, any person whose rights or interests under the *Agreement* might be affected by the actions of a domestic tribunal would be able to have an issue of the interpretation of the *Agreement* referred to the Trade Tribunal.[64] No such reference to the type of Commission constituted under this *Agreement* would be appropriate and the parties did not see fit to establish any special panel procedures for this purpose. The *Agreement* envisages, instead, a much more limited procedure for the giving of standing to the parties to intervene, either jointly or individually, before national tribunals when issues involving the interpretation of the *Agreement* are involved.[65]

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[61]See Committee on Canada-United States Relations of the Canadian and United States Chambers of Commerce, *Summary Report*, Scotsdale, Arizona, 1-3 April 1987 at 5.

[62]*Treaty Establishing the European Economic Community*, 23 November 1957, 298 U.N.T.S. 11, art. 173 [hereinafter *Treaty of Rome*].

[63]*FTA Report*, *supra*, note 29 at 22.

[64]*Ibid.* at 22.

[65]*Supra*, note 9, art. 1808. It is interesting to note the title to art. 1808, "Referrals of Matters from Judicial or Administrative Proceedings" which would suggest that the drafters originally had the idea of an art. 177-type reference from domestic tribunals and then drew back from it once the limitations of the Commission as an appropriate forum for such references were appreciated.

2. Comparison to Chapter 14 and Chapter 17

Financial services called for special treatment when it came to a DRM. There is a fundamental difference between the approach of the Financial Services chapter (Chapter 17) and the Services chapter (Chapter 14). The latter focused on "trade in services," the ability to provide a given service without the necessity of providing a permanent establishment in the other state; only by providing for cross-border service would trade in such services be made more liberal. Such an approach was impossible in the case of financial services. It was recognized that in some cases one may speak of an "export" of a service. Investment advice or underwritings on the part of securities firms or the provision of insurance by insurers or electronic funds transfers by banks are a few examples. Thus, insurance falls within Chapter 14 rather than Chapter 17. In general, however, it was recognized that banking, trust company and other financial operations do require a long-term equity investment in the place where the service is provided. This establishment is subject to close regulatory control, often by different levels of government. Changes in this regulatory framework, particularly those involving a different attitude towards "non-residents," could not be realized quickly or easily.

There are several consequences of the specific nature of financial services in respect of the substantive provisions. The concept of "national" treatment in Chapter 17 (equality of competitive opportunity) differs from that in Chapter 14. As Chapter 17 stands alone the investment review restrictions do not apply, nor do the government procurement articles. The actions of states (banking) and provinces (securities, trusts) are not specifically dealt with. Finally, there is the express recognition that there is much more work to be done on both sides of the border to complete the process, that the chapter does not represent "the mutual satisfaction of the parties concerning the treatment of their financial institutions."[66]

These substantive considerations had a definite effect upon the dispute resolution system which would be appropriate for this chapter. The United States negotiators were of the view that, given the relatively few disputes in this area, there was no need for any such mechanism. They were also concerned about the lack of expertise in the complex laws and practices in financial matters that might prevail amongst persons normally called upon to sit on panels that would rule on such issues. Appeals from decisions made by the Federal Reserve to the Commission could scarcely be tolerated in such circumstances. Ultimately, any system taking control over such crucial decisions out of the hands of the financial establishment might create instability and uncertainty in the financial markets.[67]

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[66]*Ibid.* arts 1702(4), 1703(4).

[67]C. Lohmann & W. Murden, "Policies for the Treatment of Foreign Participation in Financial Markets and their Application in the United States-Canada Free Trade Agreement" in *The Canada-U.S. Free Trade Agreement: Analysis of the Text* (Conference Materials) (Ottawa: University of Ottawa, 22 January 1988).

As a result the only DRM governing this chapter is a provision for consultations between the United States Department of the Treasury and the Canadian Department of Finance (article 1704(2)). In the event that these consultations fail, there is no back-up provision in the form of arbitration or panel recommendations or even a reference to the Commission. This may be an unfortunate lacuna in the *Agreement* but the reasons why the parties were unable to arrive at a more sophisticated form of dispute resolution in these circumstances are fairly evident if we return to those elements which must underlay any successful resort to the arbitral process.

In the first place, it is clear that the rules in this area are fairly embryonic. The very notion of equality of competitive opportunity was a recognition of the complex and often very different regimes which prevail on both sides of the border (particularly the role of Glass-Steigel and state jurisdiction on banking operations in the United States). The complexities of the situation are compounded by the authority which can be exercised by various levels of government and very powerful administrative organs of government in this highly sensitive and crucial sector. The confidence necessary to entrust matters to a panel of experts to review local decisions or provide recommendations could not be found in these circumstances. Too many unforeseeable political consequences could arise should powerful forces — the Federal Reserve in the United States or the Securities Commissions in the provinces, to name only two elements in the host of state and federal regulatory agencies that have a role to play in this area — be unwilling to accept the result of an arbitrated difference. In the final analysis, one is also left with a suspicion that the fact that the disputes were to pass through the hands of "trade" officials sitting as the Commission, to some extent determined the attitude of the finance officials negotiating this part of the *Agreement*; in the pecking order of government, it is said, trade officials are not at the same level as finance.

The essential conditions necessary for confidence in an arbitral system were therefore lacking in these circumstances and the best the parties could agree to was the traditional international solution to such a situation: the recognition of a duty to consult. There could be no better illustration of the limits of the use of an arbitral system in any international arrangement and also of the relative importance of financial services in terms of national "sovereignty" issues, as opposed to other types of services, than the different treatment which these two sectors received when it came to accepting some degree of international control over the process of interpretation and application of the *Agreement.*

3. Application of Chapter 18

There have been two panels appointed under Chapter 18. The first dispute involved landing requirements for west coast salmon and herring.[68] Original requirements had been challenged before a *GATT* panel and found to be inconsistent with article XI of the *GATT.*[69] Subsequent to that decision the Canadian

[68] *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring: Final Report of the Panel* (1989), 2 T.C.T. 7162, 1 T.T.R. 237 [hereinafter cited to T.C.T.].

[69] *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon, supra,* note 25.

legislation was amended to try and bring the landing measures within the *GATT* as regulations in relation to conservation as permitted by the *GATT* article XX(g). These measures extended to 100% of Canadian herring and salmon caught off the west coast.[70]

The Panel insisted that the Canadian landing requirements imposed a greater burden on foreign than domestic fishermen and purchasers of their products.[71] It considered that the genuineness of a measure's conservation purpose should be determined by considering whether it would have been adopted if Canadian nationals would have had to bear its cost.[72] In so doing it examined the objective conservation benefits of the measure from the standpoint of its data quality and administrative advantages and compared these to trade-neutral measures which might achieve the same end.[73]

Following a detailed consideration of the issues, the Panel concluded that the conservation benefits of the landing requirement would depend on the volume of unlanded exports which would be expected to occur in the absence of a landing requirement. In the case of the salmon and herring fisheries at issue, the Panel was of the opinion that Canada's landing requirement applicable to 100% of the catch could not be said to be "primarily aimed at" conservation within the meaning of *GATT* article XX(g) and was therefore not exempt pursuant to *FTA* article 1201.[74] The Panel was, however, of the view that a landing requirement could be considered to be primarily aimed at conservation if provision were made to exempt from landing such proportion of the catch which would not affect the data collection and management needs of each fishery.[75] An exact measure of such an amount would be difficult to arrive at, but a range of 10-20% of the catch would provide appropriate guidance as to how much should be exempt.[76]

The Panel decision is an interesting one from several perspectives. In the first place, it introduces the notion of "proportionality" into the interpretation of trade-restrictive measures, a notion very familiar to European trade lawyers.[77] Secondly, it illustrates the advantages of having the Commission to review panel decisions. The Panel's discussion of the selective landing requirements (10-20% of the catch) was not phrased as a recommendation, neither was it precise enough to be applicable without further discussion between the parties. In

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[70]See T.L. McDorman, "Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem" (1990) 1 C.U.B.L.R. 177.

[71]*Supra*, note 68 at 7170-71.

[72]*Ibid.* at 7172.

[73]*Ibid.* at 7173-77.

[74]*Ibid.* at 7175, 7179.

[75]*Ibid.* at 7179.

[76]*Ibid.* at 7177-78, 7179.

[77]See, for example, D. Lasok & J.W. Bridge, *Law and Institutions of the European Communities*, 4th ed. (London: Butterworths, 1987) c. 4 at 172-73. Proportionality tests are also becoming familiar to Canadian lawyers in litigation under the *Canadian Charter of Rights and Freedoms*. In the trade law context, provisions of the *Customs Act* were struck down as violations of *Charter* rights in *R.* v. *Iraco Canada II Inc. and Biamonte* (1989), 17 C.E.R. 245 (Ont. C.A.).

the end, the Commission was able to reach a consensus. Canada maintains its landing requirements but exempts 20% of the salmon and herring. This quota is to be made available to the United States and will rise to 25% in 1991-92 after which time it will be reviewed. Canada will be entitled to inspect and verify its conservation regulations in respect of 100% of the catch through the use of sea landing stations on American fishing vessels.[78] British Columbia processors lose their monopoly but in the result maintain considerable benefits.

In the end, this case may be said to demonstrate the value of the flexible nature of the DRM system. The Panel acted as both an adjudicator and mediator: the Commission was able to pick up the guidance offered and work out a politically balanced and acceptable arrangement.[79] It may also be said, however, that since the two governments arrived at their own decision it may be queried whether the "panel procedure hastened or slowed up the final solution."[80]

Optimistic conclusions about this first case are somewhat attenuated by the experience of the second dispute involving red lobster imports into the United States.[81] That case challenged legislation enacted by the United States which prohibits the sale of smaller lobsters. This legislation applies to lobsters wherever caught and affects imports of legally caught Canadian lobsters into the United States. Canadian lobster fishermen recognized that this conservation measure was necessary to replenish American stocks which had been overharvested but argued that the United States had no right to apply it to Canadian imports which had been legally harvested from the more conservatively managed, and copious, Canadian stocks. In this case the two governments narrowly circumscribed the power of the Panel to make broad recommendations by drafting very restrictive terms of reference. This may have backfired on the Canadian position because the question asked was whether the United States law was inconsistent with article 407 of the *FTA* (which incorporates *GATT* article XI limits on import restrictions) and, if so, whether *FTA* article 1201 (which incorporates article XX of the *GATT*) was applicable.

The Panel, splitting on national lines, held that article 407 was inapplicable because this was a case of national treatment in the terms of article III of the *GATT*.[82] They were of the view that article III and article XI could not both be applicable to the same situation. The majority therefore never turned its attention to the question of article XX and the appropriateness of the restrictions. Neither did they rule on the measure's compatibility with article III as this ques-

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[78]Government of Canada, News Release No. 038, "Decision of the Canada-United States Trade Commission on the Elements of an Agreement in respect of the Matter of West Coast Salmon and Herring" (22 February 1990).

[79]McDorman, *supra*, note 70 at 188-89.

[80]A. Lowenfeld, "Binational Dispute Settlement under Chapters 18 and 19 of the Canada-United States Free Trade Agreement, An Interim Appraisal" (Address to the Administrative Conference of the United States, December 1990) at 72.

[81]*In the Matter of Lobsters from Canada* (1990), 3 T.C.T. 8182, 2 T.T.R. 72 [hereinafter cited to T.C.T.].

[82]*Ibid.* at 8198-8210.

tion was not asked of them,[83] but they suggested that, as the measure applied equally to domestic and imported lobsters, it was not a case of illicit discrimination prohibited by article III.[84] In the result, the decision was rejected by the Canadian government, as was an industry-discussed compromise which would have harmonized Canadian non-St. Lawrence Gulf size limits with those imposed by the United States in exchange for some United States concessions. In the end, other markets will be sought for the smaller Canadian lobsters.[85]

Some Canadian observers have roundly criticized this Panel's decision on the ground that the automatic application of article III should not have precluded the possibility of the matter falling within article XI as well.[86] The split along national lines is also somewhat disquieting.[87] It leaves this observer wondering whether, in cases of this nature where *GATT* rules apply to the dispute, we might not be further ahead referring the matter to a *GATT* panel.

B. Chapter 19[88]

1. Analysis of Chapter 19

Chapter 19 contains a set of provisions specifically designed to deal with problems caused by the application of local contingent protectionist measures against the other party's imports. From a Canadian perspective Chapter 19 responds to preoccupations that the American contingent protectionist laws are applied subjectively rather than objectively and that if this were to continue it would impede the free access which the *FTA* is supposed to provide. United States concerns related less to access and more to providing discipline to what they regard as pervasive and extensive subsidies in Canada.

There were several concerns. Firstly, Canadians were disturbed by the rising number of anti-dumping and countervailing duty actions commenced by United States firms as a response to foreign competition in the past few years (some 300 since 1980).[89] Secondly, there is a perception that other countries' national authorities, particularly those at the administrative level, "cheat" by applying their law in the most protectionist way. This is particularly true of the material injury test in dumping and subsidy cases,[90] but it also extends to ques-

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[83]*Ibid.* at 8210.

[84]*Ibid.* at 8201.

[85]See B.C. Swick-Martin & E. LeGresley, "Recent International Trade Law Developments" (1991) 5 C.U.B.L.R. 79 at 82.

[86]T.L. McDorman, "Dissecting the Free Trade Agreement: Lobster Panel Decision" (1991) 18 Can. Bus. L.J. 445.

[87]*Ibid.*; see also (1990) 10 Free Trade Observer 119.

[88]See generally on Ch. 19: "Conference Proceedings: Canada-United States Free Trade Agreement: Implementation of Chapter 19" (1991) 17 Can.-U.S. L.J. 1.

[89]Ontario Centre for International Business, *Countervailing Duty Law: An Economic Perspective* (Working Paper No. 11) by A.O. Sykes (Toronto: Ontario Centre for International Business, 1988-89) at 2; D.M. Repp, "Anti-Dumping and Countervailing Duties: Protection at a Cost" (1989) 15 J. Corp. L. 65 at 67.

[90]*Ibid.*; M. Hart, "The Ongoing *FTA* Negotiating Agenda-Continued Rule Making" in *Customs & Trade Law Developments* (Toronto: Canadian Institute, 1989) 1.

tions such as the definition of what constitutes a subsidy subject to countervail.[91] Overall, rules have been developed which favour United States petitioners.[92]

This accusation should not be levelled exclusively at United States authorities. Canada, too, has distorted or applied *GATT* contingent protectionist rules in ways which our *GATT* partners have found to be unacceptable. In *Boneless Beef*,[93] a *GATT* Panel found that the application of anti-dumping and countervailing duties to boneless beef from Europe violated *GATT* obligations. And the recent decisions in the *Corn cases* may certainly be scrutinized from the point of view of how they conform to the *GATT* standards.[94]

Thirdly, there was a concern that laws might be changed subsequent to the *Agreement* in response to special interest pressures which would increase the protectionist elements of contingent protectionist legislation. The Canadian view certainly was that successive amendments to United States trade remedy law prior to, and including 1988, had created a climate in which American petitioners were encouraged to resort to those laws as a part of their "business strategy" in buying time against foreign competition.[95]

Two different systems were devised to respond to these concerns. The answer to the first two problems was to replace the supervisory jurisdiction of the Federal Court, both in the United States and in Canada, with binational panels. These panels replace national judicial review procedures of final anti-dumping and countervailing duty determinations.[96] The panel review is to be conducted in accordance with the general legal principles that the courts of the importing country would apply.[97] Parties to procedures before the national tribunals or one of the signatories to the *Agreement* have the right to request the

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[91]See, for example, *Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada*, 51 Fed. Reg. 37453 (ITC (1986)); *Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada*, 54 Fed. Reg. 30774 (Dept. Commerce (1989)). Like many criticisms of United States practice one must be careful about generalizations. Cases may be found which counter this trend. See, for example, the decision of the United States Court of Appeals in *IPSCO* v. *United States and Lone Star Steel Co.*, 899 F.2d. 1192 (Fed. Cir. 1990) and comments thereon by M. McConnell, (1991) 70 Can. Bar Rev. 180.

[92]See J. Terry, "Sovereignty, Subsidies and Countervailing Duties in the Context of the Canada-United States Trading Relationship" (1988) 46 U.T. Fac. L. Rev. 48 at 69ff.

[93]*Canada — Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC* (*Canada* v. *E.E.C.*) (1987), (Report of the Panel unadopted by the Parties to date).

[94]*Subsidized Grain Corn in all Forms, Excluding Seed Corn, Sweet Corn and Popping Corn, Originating in or Exported from the United States of America* (1987), 14 C.E.R. 1 (C.I.T.), aff'd in (sub. nom. *National Corn Growers Assn.* v. *Canada (Import Tribunal)*), [1989] 2 F.C. 517, 2 T.C.T. 4053 (C.A.), aff'd in (sub. nom. *American Farm Bureau Federation* v. *Canadian Import Tribunal*), [1990] 2 S.C.R. 1324, 3 T.C.T. 5303 [hereinafter *Corn cases*] (Mr. Justice MacGuigan's dissent in the Federal Court of Appeal strongly expressed the view that the C.I.T. panel discussion was not *GATT*-consistent).

[95]J. Fried, "The Challenge of the *FTA* — Chapter 19" (1991) 17 Can.-U.S. L.J. 11 at 13; see also R. Grey, *United States Trade Policy Legislation: A Canadian View* (Montreal: The Institute for Research on Public Policy, 1982); A. Rugman & A. Verbeke, "Strategic Management & Trade Policy" (1989) 3 J. Int'l Eco. Stud. 139.

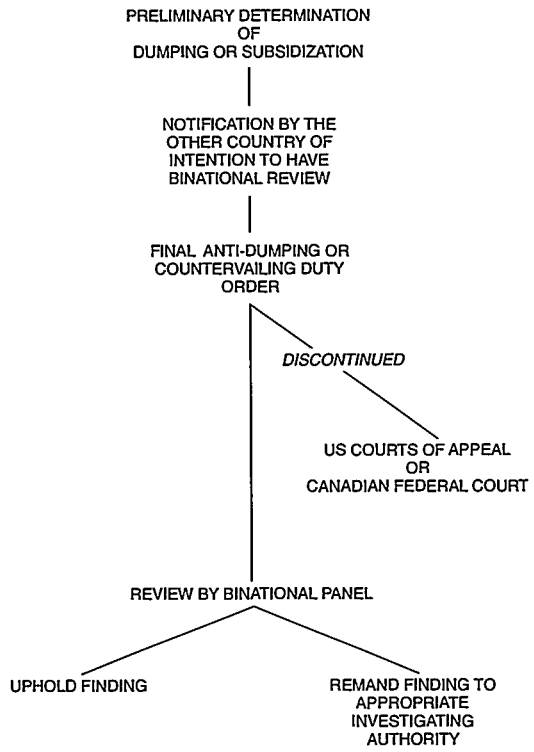
[96]*FTA*, *supra*, note 9, art. 1904(1).

[97]*Ibid.* art. 1904(3).

establishment of such a panel.[98] The panels have the power to remand a national decision back to the national authorities for a decision not inconsistent with its conclusions.[99] The decisions of the panels are binding on the parties.[100] This system should ensure that national decisions are based upon legal principles rather than political pressure.

In addition, rules have been established for the appointment of panelists, their qualifications, the time frame within which decisions are to be made, etc.[101] Parties involved in the national proceedings have a right to participate in hearings before the panels.[102] The standard to be applied by the binational panel is to be that which the national court would have applied in reviewing the decision. A diagrammatic representation of this procedure is depicted in Figure 2.

Figure 2: Chapter 19 Dispute Settlement On Final AD/CVD Orders



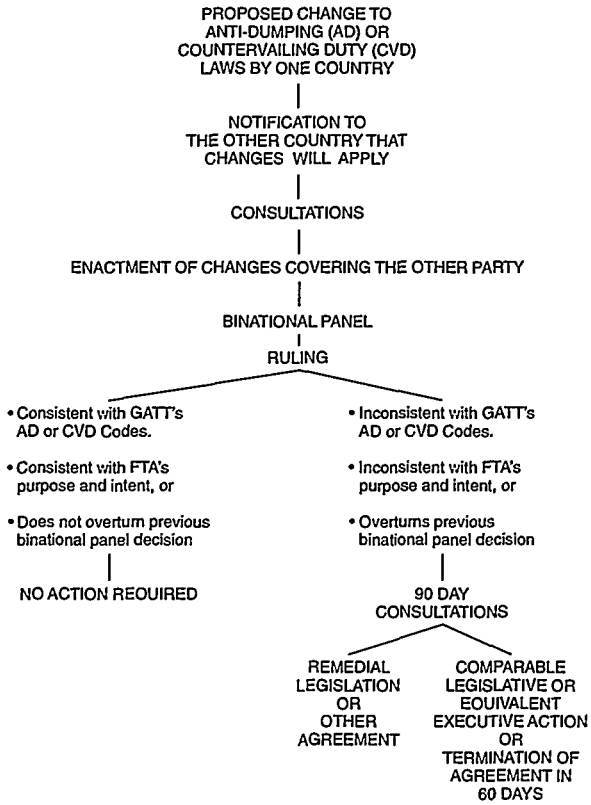
In the case of new laws, both parties reserve the right to apply their own anti-dumping and countervailing laws and the right to change or modify such laws.[103] Any modifications, however, will only apply to goods from the other

[98] *Ibid.* art. 1904(5).
[99] *Ibid.* art. 1904(8).
[100] *Ibid.* art. 1904(9).
[101] *Ibid.* annex 1901.2, annex 1903.2.
[102] *Ibid.* arts 1904(5), 1904(7).
[103] *Ibid.* art. 1902.

party if such application is specified in the amending statute and the other party has been notified in writing of such amendment.[104] Such amendments are to be consistent with the *GATT*, the applicable *GATT* codes and "the object and purpose of the Agreement."[105]

In the event of such an amendment, a party may request a binational panel review of the amendment to see whether or not it corresponds to the provisions of article 1902 and may recommend modifications to the statute. In the event such modifications are not made, the other party is entitled to take comparable legislative or equivalent executive action or terminate the *Agreement*.[106] A diagrammatic representation of this procedure is depicted in Figure 3.

Figure 3: Chapter 19 Changes to AD or CVD Laws



In addition, a secretariat is established with permanent offices to facilitate the operation of this Chapter.[107]

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[104] *Ibid.* art. 1902(a), (b).
[105] *Ibid.* art. 1902(d)(i), (ii).
[106] *Ibid.* art. 1903(b).
[107] *Ibid.* art. 1909.

During the course of negotiating this Chapter it was recognized that the replacement of the United States Federal Court by the binational panel might give rise to some constitutional problems in the United States. As a result, an Extraordinary Challenge Procedure to deal with the case of excess of jurisdiction was provided for in article 1904(13) and annex 1904.13.

The system described above is a temporary one. The provisions of the Chapter will be in effect for five years, with provision for a possible addition of a further two years.[108]

These procedures were perceived as temporary measures for several reasons. In the case of anti-dumping duties it may be assumed that their application will become less and less necessary as market integration occurs between the two countries. As all tariff and non-tariff barriers wither away, dumping from one jurisdiction into the other becomes less and less likely as the dumped goods will just return into the home market of the dumper. This is the European experience where there is no longer any dumping laws in effect in intra-European trade. This is presently not true of North America where significant non-tariff barriers still maintain an effective border, even where tariffs have been eliminated. In a recent case, for example, a Canadian purchaser purchased $100 000 worth of brand-name Heinz ketchup very cheaply in the United States, applied French-language labels to conform to Canadian regulations, paid customs duties and sought to sell the product in Canada at prices significantly lower than those charged by the Canadian producers, a 100% subsidiary of the United States company. While the ketchup was selling at lower prices than those charged in Canada, it could not be said to be dumped as the ketchup had been bought at prices charged by the manufacturer in the United States. Heinz Canada was able to obtain an injunction preventing the sale of the ketchup in Canada on the grounds of a trademark violation, as Heinz Canada owns the trademark in Canada and was able to demonstrate that it had invested in its development.[109] It may be then that dumping regulations will retain their importance for some time in spite of calls for their replacement by a continental competition regime.[110]

Insofar as subsidies are concerned, it was recognized that subsidies are a very difficult issue. There is a significant difference between the opinion of the two parties as to what constitutes a properly countervailable subsidy. United States authorities generally consider that Canadians resort extensively to subsidies for various purposes, particularly regional development. Canadians are of the view that Americans use other means to achieve the same ends (particularly in militarily related research and development subsidies).

The problem of subsidies has been described by John Jackson as raising the most troublesome aspects of international trade law.[111] It is perhaps not surpris-

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[108]*Ibid.* art. 1906.

[109]See "Fed. Crt. Enjoins Sale of Imported 'Grey Market' Ketchup" 11:1 Lawyers Weekly (3 May 1991) 7.

[110]Dumping corresponds to predatory pricing in domestic law and the case has been advanced for competition law to replace anti-dumping duties; see C. Goldman, "Competition, Anti-Dumping and the Canada-U.S. Trade Negotiations" (1987) 12 Can.-U.S. L.J. 95.

[111]See J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1989).

ing therefore that this issue proved to be too politically contentious and technically complicated to be resolved during the negotiations. The failure to do so certainly represents a significant failure of one of the principal Canadian objectives in the negotiations. As a result a working group was set up to develop "more effective rules and disciplines concerning the use of government subsidies" and report back to the parties.[112] To some extent this process was linked to the parallel work in the Multilateral Trade Negotiations (MTN). The failure of the Uruguay Round has meant that this committee is now commencing its work. No doubt some use of the draft code provisions developed as a part of that Round will serve as a background for the work of this committee.

2. Panel Reports under Chapter 19

There have been a significant number of cases under this Chapter (some eleven binational panels have reported to date and many other cases are pending). Synopses of these cases are reported both in the *Canada-United States Free Trade Reporter* and the *Canadian Trade Law Reports.*

Generally, the system may be said to be working well.[113] In one case, for example, involving the export of red raspberries from Canada, the binational Panel challenged the International Trade Administration's (ITA) use of the constructive price mechanism for determining the existence of dumping and the amount of the dumping duty. Having sent the case back to the ITA for a review of the principles on which they had based an application of constructive values, and having had the ITA reaffirm its finding, the Panel, on a second consideration of the case, found that the use of the constructive value test of sales in Canada could not be supported on the principles enunciated by the ITA itself. In fact the Panel found that the ITA had misapplied its own test; it therefore ordered the ITA to make an amended final results determination within 30 days using higher market sales of two of the parties involved (of three) for price comparison purposes.[114]

There have been a series of challenges to the application of American countervailing duties to pork product exports to the United States.[115] An examination of the Panel decisions in these cases is most interesting as the Panels have had to consider the nature of subsidies granted by provincial as well as federal authorities in Canada. In one case the Panel came to the conclusion that the USITC's determination of injury was unacceptable: "[t]he USITC's record does not disclose substantial evidence of any imminent shift from imports of hogs to

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[112]*FTA*, *supra*, note 9, art. 1907.

[113]G. Gwynne-Timothy, A. Anderson & A. Rugman, "The 'Replacement Parts' Binational Dispute Panel Cases: Reining in Administered Protection in America?" (1991) 5 C.U.B.L.R. 1.

[114]*In the Matter of Red Raspberries from Canada* (Remand Opinion) (1990), 3 T.C.T. 8175, 2 T.T.R. 214.

[115]*In the Matter of Fresh, Chilled or Frozen Pork from Canada* (24 August 1990), 3 T.C.T. 8276; *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (28 September 1990), 3 T.C.T. 8308, 4 T.T.R. 64; *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (22 January 1991), 4 T.C.T. 7014; *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (8 March 1991), 4 T.C.T. 7026 [hereinafter *Pork cases*].

imports of pork or of any threat therefrom of material injury to the domestic pork industry."[116] The use of new evidence by the USITC in a subsequent review was also found to have violated the principles of fair play and due process.[117] These Panel decisions in effect confirm the conclusions of the *GATT* Panel on countervailing duties on fresh and frozen pork from Canada.[118]

3. Problem Areas under Chapter 19

While the cases under Chapter 19 leave considerable room for encouragement, there remain several problem areas. The first is that of establishing acceptable discipline in the subsidies area. Considerable disagreement remains between the two countries based on their different traditions and perspectives on the role which subsidies play in their respective industrial policies. This factor is further complicated by the large role which state and provincial, and even municipal, subsidies play in this area.[119]

The *Agreement* only allows another five years to work out suitable arrangements and the lack of success in the Uruguay Round does not lend a great deal of confidence to finding easy solutions. Will it be satisfactory, if no solution is found, just to extend the operation of Chapter 19 for a further few years?

In the United States the question about the constitutionality of the Chapter 19 arrangement remains a potential hazard for the system. While the better view appears to be that the arrangement is constitutional, this does remain an issue.[120]

A potential source of friction lies in the different administrative law standards by which the panels are to operate. The panels replace judicial review of final anti-dumping and countervailing duty determinations. They are to apply the general legal principles that the courts of the importing party would otherwise have applied in such a review. In this regard it would appear that the United States is somewhat "disadvantaged" vis-à-vis Canada. Federal Court review of the USITC's material injury findings have been somewhat broader than those which would occur under Canadian law. The test referred to in the American cases of whether the decision is supported by "substantial evidence" on the record[121] is very different from that in the Canadian cases of "any evidence" on which the finding of the Canadian International Trade Tribunal (CITT) can be based. In the recent *Corn case*[122] the Supreme Court of Canada

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[116]*In the Matter of Fresh, Chilled and Frozen Pork from Canada*, Memorandum opinion and order regarding ITC's determination upon remand (22 January 1991), 4 T.C.T. 7014 at 7026.

[117]*Ibid.* at 7020-21.

[118]The *GATT* Panel decision is cited *supra*, note 25. The *FTA* Panel decisions were the subject of an extraordinary challenge under art. 1904(13); see *infra*, note 130 and accompanying text.

[119]On the importance of subsidies to the *FTA* negotiations, see J. Anderson & J. Fried, "The Canada-U.S. Free Trade Agreement in Operation" (1991) 17 Can.-U.S. L.J. 397.

[120]See, on this point, a thorough review by the Committee on International Trade, The Association of the Bar of the City of New York, *The United States/Canada Free Trade Agreement: Binational Review Procedures for Antidumping and Countervailing Duty Cases* (1988) 43 Association of the Bar of the City of New York Record 784. This is also, I understand, a serious concern to Mexicans insofar as the jurisdiction of the Mexican Federal Court is concerned.

[121]The standard of review appears in the *Tariff Act of 1930*, 19 U.S.C. as amended, s. 1516A (b)(1)B.

[122]*Supra*, note 94.

showed a high degree of diffidence towards the role of the CITT as an administrative tribunal. In the view of the majority of the Court, section 76 of the *SIMA*[123] was equivalent to a privative clause. Court review of the Tribunal's jurisdiction will therefore only be exercised in cases of most egregious error. The court will not interfere if there is "any evidence" on which the Tribunal's judgment may be based. Insofar as questions of law are concerned, the court will only interfere where the Tribunal's decision is "patently unreasonble." This "curial deference" to the Tribunal's jurisdiction has been clearly set out in the recent decision of the Panel in the *Induction Motors case.*[124]

It would thus appear that there is a strong possibility that over the years American decisions will be subject to tighter scrutiny than Canadian ones. This is likely to lead to some disagreement and friction once Americans believe that, albeit in this narrow technical area, the "level playing field" has been tilted against them.

To this there must be added an additional complexity. Pursuant to Chapter 19, the decisions of the Deputy Minister under the *SIMA* as to the existence of dumping or subsidization are now subject to judicial review.[125] As this is not subject to any privative clause, any review would presumably be subject to a higher degree of review normally exercised by the Federal Court. We are thus in a position where in Canada we have gone from a situation where the acts of the Deputy Minister in making a preliminary determination of dumping or subsidization have been virtually unreviewable as being administrative in nature,[126] to one where a fairly wide degree of judicial intervention would be recognized, subjecting the Deputy Minister to a higher standard of accountability to the courts than the CITT.

In addition, there remain, from the Canadian perspective, some concerns about how well this system will work. If in fact contingent protectionism remains as an effective non-tariff barrier on the American side and Chapter 19 does not achieve its aim of reducing the way in which countervail and anti-dumping actions may be used to harass competitive foreign imports, then access to the American market under the *FTA* is not guaranteed. Under these conditions, Canadians, and probably parties from other countries, will not be willing to realize the large investment in plant and equipment necessary to service the whole of the North American market from Canada and will, possibly on advice given by their legal counsel, make their investments in the United States with a view to shipping the goods back to Canada. If this "chilling effect" of American trade remedy law remains in place, the *Free Trade Agreement* will have proved to have been a Trojan horse which has drained investment and talent

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[123]*Special Import Measures Act*, R.S.C. 1985, c. S-15 [hereinafter *SIMA*].

[124]*In the Matter of Certain Dumped Integral Horsepower Induction Motors* (11 September 1991), CDA-90-1904-01 [hereinafter *Induction Motors case*]; see also (1991) 24 Can. Trade L.R. 7.

[125]See *SIMA*, *supra*, note 123.

[126]*In Re Sabre International Ltd*, [1974] 2 F.C. 704.

away from Canada rather than fostering our enrichment through the benefits of a continental market.[127]

Finally, we must ask whether the institutions which have been crafted under the *Agreement* are sufficiently sophisticated to respond to the needs created by the greater degree of economic integration produced as a result of the *Agreement.* The finality and effectiveness of European Court of Justice decisions make an interesting, and different, model to compare in this regard.

An examination of the recent *Pork cases* sends out conflicting signals, some worrisome, some encouraging, about the way the system is working. Dissatisfaction in the United States with the decisions of panels in the *Pork cases,*[128] led to the use of an Extraordinary Challenge Procedure. Article 1904(13) provides that a panel decision may be set aside where there has been gross misconduct by a panelist, a departure from fundamental principles of procedural justice or a manifest error of jurisdiction and that such a situation has materially affected the panel decision, which, in turn, threatens the integrity of the binational review process. A panel considering such a challenge must consist of senior judges from both jurisdictions, a provision inserted to meet some of the constitutional concerns in the United States.

There are several concerns about the use of the procedure in this case. As there was no suggestion of corruption or bias or a failure to observe natural justice before the tribunal, there is a real fear in Canadian quarters that the use of the procedure in these circumstances, relying on the excess of jurisdiction test, is an attempt by Americans to have an appeal procedure introduced into the system. Lawyers familiar with arbitration will know all too well how attempts are made to challenge arbitration awards before the courts on jurisdictional grounds when the real motive is that one does not like the result. If there is regular recourse to such a procedure it will introduce expense, complexity and delay which will, in themselves, constitute non-tariff barriers which the agreement sought to eliminate. This case involved two hearings before the ITC, two panels and the Extraordinary Challenge, a time-consuming and expensive procedure.[129] It also politicizes an area which was supposed to be depoliticized.

On the positive side, the unanimous ruling of the tribunal consisting of two Canadian and one American judge, which rejected the challenge did so in terms that made it clear that the Extraordinary Challenge Procedure was reserved to

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[127]In the recent dispute which has arisen over the ruling by U.S. customs authorities concerning North American content to be attributed to Honda Civic's, a spokesperson for Honda Canada is reported to have said, "Canadians should be concerned, ... If this type of harassment at the border is not addressed, it will send a clear message to all manufacturers not to locate future investments in Canada" ("Canada-built Hondas hit for U.S. duty" *The Toronto Star* (2 March 1992) 1). It is interesting to note that any appeal to a binational panel in this case will be under Chapter 18, not Chapter 19 and therefore will not be binding as it would be in the latter case.

[128]*Supra,* note 115.

[129]See "Chapter 19 Binational Panel Activity: Panel Activity Centres on Canadian Pork" (1991) 16 Free Trade Observer 210 at 213.

narrowly circumscribed cases of "aberrant" panel decisions.[130] Here it could not be said that there was "manifest error" in the application of United States law as alleged. Nor could it be said that the impugned decision threatened the binational review process as a whole (not just in this particular case). Further, the support of the Panel's interpretation of "the lack of evidence of underselling as an absence of evidence of causation of material injury based on likelihood of negative impact on United States pork prices"[131] may well encourage a more rigorous examination of the causal link in material injury cases, an issue which deserves more attention on both sides of the border. In the end then, this Extraordinary Challenge may serve to support one of the consequences of the panel process: the possibility of panel review enforcing a greater degree of intellectual rigour in the decisions of national administrative tribunals.

Conclusion

Whether the *Agreement* will work to its fullest potential to achieve its goal of market access and thus economic integration remains to be seen. What is very clear already, however, is the capital nature of the role which the dispute resolution mechanism must play in that process. This factor must be borne in mind when we consider both the role and the features of any DRM in a possible tripartite agreement between Canada, Mexico and the United States.

Some preliminary questions about any such system immediately spring to mind, notably whether the complexities of adding another civilian jurisdiction and a third language would not require the availability of specialists which only a permanent tribunal could provide.[132] The present *FTA* system of selecting from a pool of panelists may just not be possible in this new context. To this may be added such other issues as improving access by individuals to the Chapter 18 process, the appropriateness of extending or the political willingness to extend Chapter 19-type procedures to Mexico, the problems which tripartite, rather than bipartite resolution of disputes may give rise to, etc. There may well be legitimate concern, in fact, that American politicians, troubled by just how far the DRM of the *FTA* has gone and reinforced in their fears by the results of the *Pork cases*, may use the Mexican negotiations as a means to seek to recover some of the power exercised by the binational panels under the *FTA*.

Canadian lawyers have become much more sophisticated recently in their knowledge of trade law issues. Courses in this area are now a part of the main stream curriculum of many of our law schools. With our bilingual as well as common law and civil law legal traditions, we have many natural advantages in this area. We have, however, a long way to go to catch up with the level of experience and sophistication of the highly specialized United States (particularly

[130] *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (14 June 1991), 4 T.C.T. 7037 (Ex. Chall. Ctee) at 7040.

[131] *Ibid.* at 7044.

[132] In the *Induction Motors case*, *supra*, note 124, for example, an English speaking panel was required to deal with serious inconsistencies between the English and French texts of *SIMA* (s. 76(5)).

Washington) trade bar. We will have our work cut out for us if we are going to make the *Free Trade Agreement*, with its possible extension to Mexico, work for our clients and our own national interests.