Dispute Resolution Panels of the *U.S.-Canada Free Trade Agreement*: The First Two and One-Half Years

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The authors present an in-depth analysis of the Chapter 18 and Chapter 19 panels of the *Canada-U.S. Free Trade Agreement* (*FTA*) and explore their integral role in the *FTA*. They conclude that the panels have been successful in achieving the *FTA*'s goals of timely and impartial decisions. The authors also examine the administrative feasibility of the panels as well as the binding nature of their decisions. The process underlying the Extraordinary Challenge Committee is canvassed in light of the recent jurisprudence and strict criteria established for its use. Finally, the authors investigate how the *FTA* panels operate as a model for other negotiations, using the U.S.-EC steel consensus arrangements of 1989 and the GATT as case studies.

Les auteurs font une analyse approfondie du fonctionnement et de l'importance des mécanismes de règlement des différends prévus par les Chapitres 18 et 19 de l'*Accord de libre échange* entre le Canada et les États-Unis. Leur analyse les amène à conclure que ces mécanismes ont atteint leur objectif de rendre justice avec célérité et impartialité. Les auteurs examinent également la nature des contraintes administratives qui affectent ces mécanismes et la force obligatoire de leurs décisions. Ils étudient les possibilités de recours à la procédure de contestation extraordinaire à la lumière de la jurisprudence récente qui tend à en restreindre l'accès. Les auteurs évaluent enfin l'impact de l'*Accord* en tant que modèle de mécanisme de règlement des différends relatifs aux échanges commerciaux internationaux dans la négociation d'ententes semblables telles l'entente de 1989 entre les États-Unis et la CEE sur le fer, et le *GATT*.

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Synopsis

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Introduction

The dispute resolution panels are an integral part of the *Canada-U.S. Free Trade Agreement*.[1] During the negotiation of the *FTA*, Canada and the United States (the Parties) sought to negotiate common rules for dealing with subsidies and dumping. However, they confronted political obstacles and a very short time period for negotiations. Most importantly, the United States could not agree to discipline its domestic subsidies on a bilateral basis. As a consequence, the Parties were unable to reach an agreement on subsidy and dumping rules. The dispute resolution mechanism of Chapter 19 represents the resulting compromise. Under Chapter 19, trade disputes concerning anti-dumping and countervailing duty investigations may be resolved by a panel of experts from both nations as a substitute for judicial review.[2]

In addition to providing a dispute resolution mechanism for anti-dumping and countervailing duty cases, the *FTA* provides in Chapter 18 a binding means

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

[2]See 19 U.S.C. § 1516a(g) (1988) concerning the review of countervailing duty and anti-dumping duty determinations involving Canadian merchandise; see also *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 77.11(2), as amended in *Canada-United States Free Trade Agreement Implementation Act, ibid.*, s. 42, concerning the review of countervailing duty and anti-dumping duty determinations involving U.S. merchandise.

for resolving disputes involving "safeguard" import relief. Chapter 18 also covers other types of disputes under the *FTA* and permits Canada and the United States to use Chapter 18 as a substitute for dispute resolution under the *General Agreement on Tariffs and Trade*.[3] The Chapter 18 panels have broad jurisdiction[4] to consider disputes with two exceptions: they cannot be invoked for either financial services issues (which are governed by Chapter 17 of the *FTA*) or for final decisions in anti-dumping and countervailing duty cases (which are governed by Chapter 19 of the *FTA*).

This article explores how the Chapter 18 and Chapter 19 panel systems have functioned over their first two and one-half years of operation.[5] It concludes that the panels have been quite successful in achieving the *FTA* goals of timely and impartial decisions.[6] Overall, the panel decisions have been well written and thoughtful. The process for establishing the panels has functioned smoothly, and both countries have given binding effect to the decisions. There has been only one challenge of a Chapter 19 panel decision to date, and the decision issued in that case reinforces the conclusion that challenges should be truly extraordinary. The Extraordinary Challenge Committee is functioning as the Parties intended.

The *FTA* panels' admirable performance makes them a model for other types of dispute resolution. They provided the inspiration for the creation of the binding arbitration panels established in the 1989 steel consensus agreements, and could serve as a model for reform of the GATT panels.

A. Chapter 19 Panels

The volume of trade affected by Chapter 19 panels in the first two and one-half years is quite large, totalling over $700 million (Cdn).[7] Twenty cases have

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[3]*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*].

[4]Specifically, art. 1801(1) specifies that Chapter 18 panels have jurisdiction over "the avoidance or settlement of all disputes regarding the interpretation or application of [the *FTA*] or whenever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the obligations of [the *FTA*] or cause nullification or impairment in the sense of art. 2011, unless the Parties agree to use another procedure in any particular case." Art. 2011 provides that if any measure causes nullification or impairment of any benefit reasonably expected to accrue to Canada or the United States, either country can invoke the Chapter 18 dispute resolution process even though the measure does not directly conflict with obligations under the *FTA*.

[5]There are other dispute resolution mechanisms in the *FTA* as well, such as those in Chapter 7 concerning agricultural disputes; but this article is limited to Chapters 18 and 19.

[6]*Binational Panel Reviews and Extraordinary Challenge Committees*[:] *United States-Canada Free-Trade Agreement*, 53 Fed. Reg. 53212 (1988); see also House Comm. on the Judiciary, *United States-Canada Free-Trade Agreement Implementation Act of 1988*, H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 3 (1988) (the arbitral system's advantages of quickness and low cost will help the parties calculate the economic costs and benefits involved in appealing a case); testimony of Charles F. Doran, Director, Centre of Canadian Studies, John Hopkins University, House Comm. on Small Business, 100th Cong., 1st Sess., United States-Canada Free-Trade Agreement 9 (Comm. Print 1987) (discussing the need to resolve disputes "in a quicker fashion" and "in a less expensive way").

[7]See Appendix I to this article.

been docketed under Chapter 19, although some have been consolidated and others terminated prior to issuance of a decision. Seventeen of the cases have been appeals of U.S. government agency action; three have been appeals of Canadian government agency action.

There are at least two reasons why more U.S. decisions have been challenged than Canadian decisions even though there are about the same number of new cases in both countries.[8] First, a government has a strong incentive to challenge a countervailing duty decision, and the United States uses countervailing duties far more often than Canada.[9] A determination of countervailability of a given subsidy program on one product could well affect investigations of other products which might be involved in the same program. If the appeal is successful, it will preclude the use of that subsidy finding against exports of other products.

Second, concerning anti-dumping duty determinations, the U.S. system of retrospective review creates an incentive for appeals not present under the Canadian system of prospective duty collection. In somewhat over-simplified terms, the U.S. requires cash deposits once an anti-dumping or countervailing duty order has been issued. After collecting the deposits for a year, either party can request a review to determine if the amount of the deposit was correct.[10] Under this system, the importer must make cash deposits, and then go through the review to get the deposits back, even if the dumping has ceased. This serves as a catalyst for appealing the initial determination; if the challenge is successful, no more deposits need be made, and, as was the case in *In the Matter of Red Raspberries from Canada*,[11] there is a chance to get some of the money back.

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[8]During the period 1989-1990, the United States initiated two new anti-dumping cases, *Fed. Track Guide to Anti-Dumping Findings and Orders* (Washington: Fed. Track Publications, 1991), and three new countervailing duty cases against Canada, *Fed. Track Guide to Countervailing Duty Cases* (Washington: Fed. Track Publications, 1991). This compares to four new anti-dumping cases and no countervailing duty cases brought in Canada against the U.S. during the same period ("International Trade: Use of the GATT Anti-Dumping Code" in *Report of the U.S. General Accounting Office*, GAO/NSIAD-90-238FS (July 1990) at 26 [hereinafter *GAO Report*]). The four anti-dumping cases involved liquid polyvinyl chloride dispersion, landing nets, transit concrete mixers and small motors (*ibid.*).

[9]Five of the panels were appeals of U.S. countervailing duty determinations. Those five were *Live Swine from Canada*, USA-91-1904-03 (Ch. 19 Panel) (decision pending at time of writing); *In the Matter of Fresh, Chilled or Frozen Pork from Canada* (injury) (22 January 1991), 4 T.C.T. 7014 (Ch. 19 Panel) [hereinafter *Pork* (injury)]; *In the Matter of Fresh, Chilled and Frozen Pork from Canada* (subsidies) (5 July 1991), USA-89-1904-06 (Ch. 19 Panel) [hereinafter *Pork* (subsidies)]; *New Steel Rails from Canada* (injury) (13 August 1990), 3 T.T.R. 161 (Ch. 19 Panel) [hereinafter *New Steel Rails* (injury)]; *New Steel Rails from Canada* (subsidies) (30 August 1990), 3 T.T.R. 316 (Ch. 19 Panel) [hereinafter *New Steel Rails* (subsidies)]. Only one panel request concerned a subsidy finding by the Canadian International Trade Tribunal (CITT) (see *Polyphase Induction Motors Exceeding 200 HP*, CDA-89-1904-01 (Ch. 19 Panel); panel review terminated because of a later finding of negative injury by the CITT, 10 January 1990, reported in 3 T.C.T. 2362). See also G. Horlick & D. Steger, "Subsidies and Countervailing Duties" in P. Morici, ed., *Making Free Trade Work: The Canada-U.S. Agreement* (New York: Council on Foreign Relations Press, 1990) n. 10.

[10]G. Horlick, "The United States Anti-Dumping System" in J. Jackson & E. Vermulst, eds, *Anti-Dumping Law and Practice: A Comparative Study* (Ann Arbor: U. of Michigan Press, 1989).

[11]*Remand Opinion* (2 April 1990), 3 T.C.T. 8175, 2 T.T.R. 214 (Ch. 19 Panel) [hereinafter *Red Raspberries*].

By contrast, Canada allows the importation of goods previously found to be dumped without the payment of a deposit or a duty, as long as the prices of the goods have been raised above the "normal value" determined in the investigation.[12] While the normal value can be changed based on reviews, the new normal value usually applies only to future entries.[13] As a result, most exporters simply raise their prices above the normal value, and pay no duty. Consequently, there is no pool of money to be fought over on review, although there remains the possibility of reducing future duty levels.

Chapter 19 panels have dealt quite effectively with a heavy load of anti-dumping and countervailing duty cases. The involvement of the Canadian and U.S. governments with Chapter 19 panel review is much less extensive than their involvement with Chapter 18 panels. *FTA* article 1904(2) provides for the two governments to request Chapter 19 review and they, in turn, permit private parties to make requests.

The Chapter 19 panels must apply the same test that a reviewing court of the country whose decision is challenged would apply.[14] In the United States, the test is whether the decision is unsupported by substantial evidence on the record, or otherwise not in accordance with law.[15] In Canada, the test is whether the agency (a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it.

Although the U.S. and Canadian tests appear similar, the Canadian test is considerably more difficult to meet.[16] In *American Farm Bureau Federation* v. *Canadian Import Tribunal*,[17] the Supreme Court of Canada upheld a decision of the Canadian Import Tribunal, stating that it would not interfere if there was "any evidence" on which the Tribunal's judgment could be based. On account of the extraordinarily high standard used by Canadian courts, it is possible that there will be more appeals of U.S. decisions than of Canadian decisions. It is odd that the U.S. negotiators insisted on imposing a more onerous standard on U.S. parties seeking to appeal a Canadian decision than on Canadian parties seeking to appeal a U.S. decision. Just as judicial interpretations of the standard of review are always evolving, perhaps *FTA* panel interpretations of the standard of review can be instrumental in bringing the U.S. and Canadian standards closer to concordance. The statutes themselves are similar enough to permit this. In addition, the working group established under *FTA* article 1907 might

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[12]P. Magnus, "The Canadian Anti-Dumping System" in Jackson & Vermulst, *supra*, note 10.

[13]*Ibid.*

[14]*Supra*, note 1, art. 1904(3).

[15]See *ibid.* art. 1911 (definition of standard of review), which adopts the standard of s. 516A(b)(1)(B) of the *Tariff Act of 1930*.

[16]*In the Matter of Certain Dumped Integral Horsepower Induction Motors* (injury) (11 September 1991), 4 T.C.T. 7065 (Ch. 19 Panel) [hereinafter *Induction Motors*]. See *supra*, note 1, art. 1911 (definition of standard of review), which adopts the standard of s. 28(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7.

[17][1990] 2 S.C.R. 1324, 3 T.C.T. 5303.

consider creating an *FTA* standard of review to be imposed in lieu of the standard of each Party.

Both Canada and the United States have adopted procedural rules governing the panel review process.[18] Panel requests must be made within 30 days following the date of publication of the final determination in question.[19] The *FTA* provides strict deadlines for the review process, usually leading to a final decision within 315 days after a request for panel review.[20] The tight timetable reflects the *FTA*'s objective of speedy decision-making.[21] Parties submit briefs to the panel, and the panels allow oral argument.[22]

B. Chapter 18 Panels

There have been far fewer Chapter 18[23] panels than Chapter 19 panels. Whereas nineteen Chapter 19 cases have been docketed, only two Chapter 18 panels have been formed.[24]

Chapter 18 panels operate similarly to Chapter 19 panels, although there are some important distinctions. While the United States and Canada have delegated to private parties the right to request Chapter 19 reviews, only the two national governments can request Chapter 18 reviews.[25] In addition, under Chapter 18, the Parties have considerable input into the panel process through the Canada-United States Trade Commission (Commission).[26] The principal

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[18]See *Rules of Procedure for Article 1904 Binational Panel Reviews*, C. Gaz. 1989.I.103, as amended in C. Gaz. 1989.I.5398; *Rules of Procedure for Article 1904 Binational Panel Reviews*, 53 Fed. Reg. 53212 (1988) [hereinafter *Rules of Procedure*].

[19]*FTA*, *supra*, note 1, art. 1904(4).

[20]*Ibid.* art. 1904(14); see Appendix II, Table 1.

[21]See *supra*, note 6.

[22]See *FTA*, *supra*, note 1, art. 1904(7). Interestingly, the panel rules only provide for French translation where the case arises from a final determination made in Canada (Rule 28, *Rules of Procedure*, *supra*, note 18). Participants may use either English or French in any document or oral proceeding (Rule 29, *ibid.*). An opinion or order of the panel will only be translated (either from English or from French) if the panel determines that the issue is of general interest or importance or the proceedings which led to the order or opinion were conducted in whole or in part in English or French (Rule 30, *ibid.*). Oral proceedings will be simultaneously interpreted upon request of a party or if the panel chairman determines that there is a public interest in the panel review (Rule 31, *ibid.*).

[23]Chapter 18 panels draw from various elements of Chapter 19 of the *Israel-United States Free Trade Agreement* (22 April 1985, 24 I.L.M. 653). The U.S.-Israel Free Trade dispute resolution mechanism has been used only once, in a dispute involving machine tools from Israel (R. Berry, "Panel Rules in Favour of Israeli FTA in Machine Tool Dispute Over VRA" 9 *Inside U.S. Trade*, No. 17 (3 May 1991) at 8). Israel claimed that the United States interfered with the *FTA* when Taiwan ceased shipments of machine tool components to Israel after the United States counted the completed machine tools against the quota established in the voluntary restraint agreement between the United States and Taiwan on machine tools (Berry, *ibid.*). The Panel's ruling has not yet been made public, and there are conflicting claims whether the Panel ruled in favour of Israel (Berry, *ibid.*).

[24]Those two cases are: *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring* (1989), 2 T.C.T. 7162, 1 T.T.R. 237 (Ch. 18 Panel) [hereinafter *Salmon*]; *In the Matter of Lobsters from Canada* (1990), 3 T.C.T. 8182, 2 T.T.R. 72 (Ch. 18 Panel) [hereinafter *Lobsters*].

[25]*FTA*, *supra*, note 1, art. 1803.

[26]*Ibid.* art. 1802(1). For instance, each Chapter 18 panel may establish its own rules of procedure unless the Commission has agreed otherwise (*ibid.* art. 1807(4)).

representative of each government on the Commission is the cabinet-level officer or Minister primarily responsible for international trade, or their designees.[27] There is no equivalent to the Commission under Chapter 19.

In contrast to Chapter 19 panels that issue a single binding decision, Chapter 18 panels produce an initial report, which includes recommendations for resolution of the dispute.[28] If the United States or Canada disagrees with the report, it may present a written statement of its objections within 14 days after the report is issued.[29] The panel may reconsider the report and issue a final report.[30] The final report is due within 30 days of issuance of the initial report.[31]

Whereas the Chapter 19 panel's decision is binding, and must be enforced absent an extraordinary challenge, the Commission can override a Chapter 18 panel's report.[32] If it fails to do so, the panel report, plus any separate opinions and any written views of the Parties, are published unless the Commission agrees otherwise.[33] Upon receipt of the report, the Commission "shall agree" on resolution of the dispute, which "normally" will conform with the panel's recommendation.[34] These provisions give the panel considerable "moral" influence over resolution of the dispute.[35]

While the Chapter 19 panels may only affirm or remand agency decisions, Chapter 18 provides for broader discretion in finding a remedy. The *FTA* expansively defines potential remedies as the "non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of article 2011 or, failing such a resolution, compensation."[36] The *FTA* does not limit dispute resolution to these broadly defined remedies. Rather, it provides that they are to be used "[w]here possible."[37]

Chapter 18 explicitly authorizes retaliation. *FTA* article 1807(9) provides that if the Commission "has not reached agreement or a mutually satisfactory resolution ... within 30 days of receiving the final report of the panel," a wronged party can "suspend the application to the other party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."[38]

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[27]*Ibid.* art. 1802(2).

[28]*Ibid.* art. 1807(5).

[29]*Ibid.* art. 1807(6).

[30]*Ibid.* The panel may reconsider its report on its own motion, at the request of the Commission, or at the request of either government. Reconsideration under Chapter 19 is limited to technical errors (Rule 76 of the *Rules of Procedure*, *supra*, note 18).

[31]*Ibid.*

[32]*Supra*, note 1, art. 1807(7) provides that "[u]nless the Commission agrees otherwise," the final report of the panel is to be published. Safeguard decisions by Chapter 18 panels are binding (*ibid.* art. 1806(1)).

[33]*Ibid.*

[34]*Ibid.* art. 1807(8).

[35]*Ibid.*

[36]*Ibid.*

[37]*Ibid.*

[38]*Ibid.* art. 1807(9).

Both Canada and the United States have adopted model rules for Chapter 18 proceedings.[39]

I. Performance of the *FTA* Panels

A. *Timeliness of Panel Decisions*[40]

FTA dispute resolution is more than twice as fast as U.S. judicial review.[41] Whereas all but three *FTA* panels have met the *FTA*'s deadline of 315 days (about 10½ months),[42] judicial review to the Court of International Trade (CIT) typically takes about 27 months.[43] Even considering the delays in two *FTA* panels, since some panels have made their decisions before the deadline, the median time for a panel decision is 10½ months.[44]

The reason why the panels issue such prompt decisions is that the *FTA* provides a tight timetable for filings and oral argument.[45] While the language in the *FTA* is worded broadly enough to permit a panel to exceed the 315 day deadline,[46] the panels have not abused this discretion.

In addition to providing speedier initial decisions than the CIT, the *FTA* panels also are faster than the CIT on remands. The median length of time for a first remand to a binational panel is a little over 4 months[47] compared to 6 months for a first CIT remand.[48] For a second remand, the median length of time for a binational panel is 2½ months[49] whereas a second remand to the CIT takes 5 months.[50]

Another reason why *FTA* dispute resolution is faster than judicial review is because *FTA* decisions are less likely to be reviewed than are CIT decisions.

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[39]See *Model Rules of Procedures for Chapter 18 Panels*, C. Gaz. 1989.I.100, 54 Fed. Reg. 14372 (1989).

[40]The research on the timeliness of panel decisions spans from January 1989 through July 1991.

[41]Canadian judicial review is apparently faster than U.S. judicial review. L. Holland, "Statement" in *Transcript of Administrative Conference of the United States Forum on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement* (23 April 1991) at 67 [hereinafter *Administrative Conference Transcript*].

[42]See Appendix II, Table 1 at the end of this article. The failure to meet the deadlines occurred in cases where a panelist had to be replaced, and where the U.S. Department of Commerce experienced technical difficulties with regard to its trade analysis.

[43]An examination of 131 CIT decisions showed that the median time from the date of docketing to the date of court action was approximately 27 months and the mean time was 32 months. Source: Lexis search of dumping and countervailing duty cases decided by the CIT from January 1989 – July 1991. Decisions on what appeared to be technical, non-dispositive motions (such as administrative protective order issues) were excluded. Decisions on other motions were included.

[44]*Supra*, note 42.

[45]*FTA*, *supra*, note 1, art. 1904(14).

[46]*Ibid.* art. 1904(14) states that "rules *shall be designed* to result in final decisions within 315 days of the date on which a request for a panel is made." [emphasis added]

[47]See Appendix II, Table 2 at the end of this article. The median time for the first remand is 130 days.

[48]L. Shambon, "Accomplishing the Legislative Goals for the Court of International Trade: More speed! More speed!" (1990) 14 Fordham Int'l L.J. 31.

[49]*Supra*, note 47. The median time for a second remand is 77 days.

[50]Shambon, *supra*, note 48 at 19.

FTA panel decisions can only be challenged by the Canadian or U.S. government[51] whereas any party can appeal a CIT decision as of right.[52] Further, whereas the Court of Appeals for the Federal Circuit (CAFC) conducts a *de novo* review,[53] the Extraordinary Challenge Committee's standard of review is very narrow.[54] If a binational panel's decision is challenged, it appears that the time for a decision will be much quicker than for a CAFC decision. While there has only been one extraordinary challenge to date,[55] the entire challenge process took only 2½ months.[56] By comparison an appeal to the CAFC typically takes over 10 months.[57]

B. Impartiality

Each panel has five members consisting of either three Canadians and two Americans or two Canadians and three Americans.[58]

A concern existed that panels would split along the lines of nationality, whereby panels with a Canadian majority would favour the Canadian position and panels with a U.S. majority would favour the U.S. position. However, this has not occurred. There have been eight cases that resulted in written decisions and in five of those cases, decisions of the Chapter 19 panels have been unanimous.[59]

There is no correlation between the nationality of the panelists and the result. In *Pork* (injury),[60] U.S. panelists sided with Canadian panelists in reaching a unanimous decision against the U.S. International Trade Commission (ITC). In *Red Raspberries*,[61] two U.S. panelists sided with the Canadian majority against the U.S. Department of Commerce (Commerce). Conversely, in *New*

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[51]*Supra*, note 1, art. 1904(13).

[52]19 U.S.C. § 1516a(9) (1988).

[53]*Matsushita Electric Indus. Co.* v. *United States*, 929 F.2d 1577 at 1578 (Fed. Cir. 1991); *American Permac, Inc.* v. *United States*, 831 F.2d 269 at 273 (Fed. Cir. 1987) cert. dismissed, 485 U.S. 901 (1988).

[54]The standard is discussed below in section II.

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

[56]The process took 76 days from docketing to decision.

[57]More detailed information on the length of appeals to the CIT has been compiled by, and is on file with the authors.

[58]Under Chapter 18, each panel must have two Canadian and two U.S. citizens who are appointed by the Government of Canada and the Government of the United States, respectively. The Commission appoints the fifth panelist. If the Commission cannot agree on the fifth panelist, the four appointed panelists may select the fifth panelist. If the four appointed panelists cannot agree, the fifth panelist is selected by lot from the roster of panelists (*supra*, note 1, art. 1807(3)).

Under Chapter 19, the two governments select the five panelists in consultation with each other. If they cannot agree on the fifth panelist, the selection procedures are the same as under Chapter 18 except that candidates eliminated by peremptory challenge are excluded from the roster from which the fifth panelist is selected by lot (*ibid.* annex 1901.2(2), annex 1901.2(3)).

[59]The three decisions that were not unanimous are *Induction Motors*, *supra*, note 16 (1 dissent); *New Steel Rails* (injury), *supra*, note 9 (1 dissent) and *New Steel Rails* (subsidies), *supra*, note 9 (1 dissent).

[60]*Supra*, note 9.

[61]*Supra*, note 11.

Steel Rails (injury),[62] the Panel had a Canadian majority but it supported the position of the ITC. In that case, the ITC found that Canadian rails did not presently injure U.S. rail producers, but that they threatened to do so in the future. The ITC's affirmative decision was based on a 3-3 split,[63] the weakest possible agency decision. Even so, the Canadian majority panel gave great deference to the three-commissioner ITC "plurality" and upheld the decision.[64]

The results of the Chapter 18 panels have been different. There have been only two panels, one with a Canadian majority, the other with a U.S. majority. Both decisions were resolved in favour of the United States. However, the panelists in *Lobsters*[65] split on national lines. In *Salmon*,[66] some panelists dissented on certain issues but it is unclear from the opinion whether the panelists' decisions correlate with nationality.

C. Quality of Decisions

Commentators agree that the quality of *FTA* panel decisions is quite high. Professor Andreas F. Lowenfeld undertook an in-depth analysis of panel decisions under the *FTA*. He concluded:

> [T]he consideration given by panel members to the issues and the contentions of the parties has been careful, and ... the opinions have been well thought through and well crafted. Though no one can be expected to agree with all of the opinions in every detail ..., as a whole the opinions are of high quality, and should leave even losing parties — including the government agencies concerned — confident that they received a full and fair hearing.[67]

The Commerce Department's legal advisor for the U.S. Secretariat also commented on the high quality of panel decisions at a recent forum.[68] She noted that "consensus reigns among ... both private participants and [those] in government, that panel decisions are of a relatively high calibre compared to CIT decisions."[69]

At oral argument, the panelists generally have been knowledgeable and well prepared.[70] Overall, the Canadian panelists have adeptly grasped U.S. trade law issues and shown no hesitancy in quizzing counsel on their positions. The questions of U.S. panelists have reflected their "informed experience."[71]

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[62]*Supra*, note 9.

[63]Tie votes by the ITC in U.S. AD/CVD cases are resolved in favour of the U.S. petitioning industry (19 U.S.C. § 1677(ii) (1988)).

[64]One of the three Canadian panelists dissented (*supra*, note 9 at 235).

[65]*Supra*, note 24.

[66]*Ibid.*

[67]A.F. Lowenfeld, "Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal" (Dec. 1990) (report prepared for the consideration of the Administrative Conference of the United States). A.F. Lowenfeld is the Charles L. Denison Professor of Law at the New York University School of Law.

[68]L. Koteen, "Statement" in *Administrative Conference Transcript, supra*, note 41 at 56.

[69]*Ibid.*

[70]W.K. Ince & M.C. Sherman, "Binational Panel Reviews under Article [*sic*] 19 of the U.S.-Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution" (1990) 37 Fed. Bar News & J. 136 at 139.

[71]*Ibid.*

D. Administrative Feasibility

The administrative functioning of the dispute panels has been remarkably smooth.[72]

The panelist selection process is handled by the Office of the United States Trade Representative (USTR) and the Canadian Ministry of External Affairs and International Trade (Ministry). Under Chapter 19, the United States and Canada must develop a roster of U.S. and Canadian citizens qualified to be selected as panelists in individual cases. Within 30 days of a request for panel review, the United States and Canada must each appoint two panelists, normally from that roster.[73]

In the United States, USTR reviews the roster and eliminates candidates with potential conflicts. USTR then instructs the U.S. Secretariat to contact candidates selected by USTR to determine availability and any conflicts of interest.[74] The Secretariat reports the results of its search to USTR which makes the final selection of panelists.

Because of the significant number of panels established pursuant to Chapter 19 since 1989 and the increasing number of instances in which candidates have been unable to be appointed to panels due to potential conflicts of interest, the United States recently announced that it will be preparing a new roster. In October 1991, it invited U.S. citizens wishing to be included on the roster to apply with USTR.[75]

In Canada, the panelist selection process is initiated by the Canadian Secretariat. The Secretariat provides *all* roster members with detailed lists of interested parties (to determine conflicts of interest) and a timetable. Interested roster members submit a statement of availability to the Secretariat, which then compiles a list of potential panelists and forwards it to the Ministry. The Canadian Members of Panels Regulations provide for the appointment of panelists by a board consisting of the Minister of Finance and other members designated by the Prime Minister.[76]

Each country is allowed four peremptory challenges to be exercised simultaneously and in confidence.[77] Officials from the Canadian and U.S. governments confirm that peremptory challenges are frequently exercised by both governments mainly on the grounds of conflict of interest — although a

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[72]The focus of this section is on Chapter 19 panels because the administrative functioning of Chapter 19 panels is more transparent than that of Chapter 18 panels. This is largely attributable to the active participation of private parties in the Chapter 19 binational panel review process whereas the opportunity for private parties to have input into the Chapter 18 binational panel review process is more limited.

[73]*Supra*, note 1, annex 1901.2(2).

[74]All potential panelists (Canadian and U.S.) must submit a statement disclosing conflicts of interest.

[75]56 Fed. Reg. 51682 (1991).

[76]*Rules of Procedure for Article 1904 Extraordinary Challenge Committees*, C. Gaz. 1989.I.132 at 134.

[77]*Ibid.*

government need not provide a reason for its challenge. The fifth panelist is jointly chosen by both countries.[78] If the countries cannot agree on a fifth panelist, the four previously selected panelists choose the fifth panelist from the roster.[79] If the panelists cannot agree, the fifth panelist is chosen by lot from the roster.[80]

By all reports, the process of selecting the fifth panelist has been fairly amicable. An informal practice has evolved whereby the nationality of the fifth panelist alternates between an American and a Canadian. To date, there have been no reported challenges to panelists by parties to the proceedings.

Both the United States and Canada have established Secretariats pursuant to *FTA* article 1909. The Secretariats receive and file all requests, briefs and other papers.[81] They assist the panel members in coordinating schedules and making the necessary arrangements for hearings. They have been extremely helpful in providing guidance to the parties concerning panel rules and procedures.

Chapter 18 provides for the "settlement of all disputes regarding the interpretation or application of this Agreement" except for financial services covered in Chapter 17 and anti-dumping and countervailing duty cases as discussed above.[82] A dispute panel is established only after failed attempts to negotiate the differences at a more informal level. The procedures for establishing a panel are similar to that described above for Chapter 19. However, there is no Extraordinary Challenge Committee for Chapter 18 panels. If the two Parties' international trade ministers do not agree with the recommendation of a panel and cannot come to a resolution of a dispute, then the final recourse for the Party that considers its rights or benefits to be impaired is "to suspend the application to the other Party of benefits of equivalent effect."[83]

E. Binding Nature of the Panel Decisions

Not all decisions of Chapter 18 panels are binding, whereas by the terms of the *FTA* every Chapter 19 decision is binding.[84] Article 1904(9) provides: "The decision of a panel under this article shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel."[85]

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[78]*Supra*, note 1, annex 1901.2(3).

[79]*Ibid.*

[80]*Ibid.*

[81]*Ibid.* art. 1909(9).

[82]*Ibid.* art. 1801(1). See above, section entitled "Introduction. A."

[83]*Ibid.* art. 1807(9).

[84]*Ibid.* art. 1806(1) provides that reviews of safeguard actions are binding and that Canada and the United States may agree to make other Chapter 18 reviews binding.

[85]When the *FTA* was being negotiated, there was considerable debate as to whether art. III of the *U.S. Constitution* required judicial review of anti-dumping and countervailing duty cases, making *FTA* panel review unconstitutional. In our opinion, the preponderance of legal scholarship suggests that this is not the case. However, to ensure that the binational panel review system would withstand a constitutional challenge, the U.S. implementing legislation amended s. 516A of the *Tariff Act of 1930* to provide for a fast-track procedure (albeit with potentially discouraging bonding requirements) for the U.S. Court of Appeals to consider any challenge to the constitutionality

The binding effect of a panel's decision has been tested twice already. In the very first case appealed to a Chapter 19 panel, *Red Raspberries from Canada*,[86] the Panel analyzed the Commerce Department's methodology for calculating a dumping margin. As the Panel observed, under 19 U.S.C. section 1677b(a), Commerce can calculate a dumping margin by comparing U.S. sales to, in order of priority, home market sales, third country sales and constructed value.[87] Commerce did not use home market sales.[88] The Panel held defective and remanded Commerce's findings that the home market sales of the two companies were inadequate to use as a basis for foreign market value.[89] On remand, Commerce simply gave a better explanation for its decision.[90] The parties again asked for panel review and, this time, the Panel directed Commerce to use home market sales as a basis for comparison.[91] On the second remand, Commerce complied with the Panel's directive and calculated the margins based on the home market prices of the two companies.[92] The dumping margins vanished. The Panel was able to change the result of the case because the U.S. government was bound by the Panel's decision.

The second occasion on which the binding nature of a panel's decision was tested involved *Pork* (injury).[93] In that case, the Panel reviewed the ITC's decision that the U.S. industry was threatened with material injury by reason of subsidized pork imports from Canada. The Panel found that several of the ITC's findings "rely heavily or flow directly from faulty use of statistics."[94] It remanded for the ITC to reconsider its findings.[95]

The ITC, realizing the weakness of its position on remand, reopened the record.[96] It attempted to strengthen the basis for its findings and then reissued the same decision.[97] The Canadian parties asked the Panel to consider the ITC's

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of Chapter 19 binational panel review (H.R. Doc. No. 216, 100th Cong., 2d Sess. 264 (1988)). Also, the implementing legislation created an exception for binational panel review for any constitutional challenges of the anti-dumping or countervailing duty laws (*ibid.*)

[86]USA-89-1904-01 (Ch. 19 Panel) (on file with authors).

[87]*Ibid.* at 15-16.

[88]*Ibid.* at 2.

[89]*Ibid.* at 25.

[90]*Department of Commerce Determination on Remand, Red Raspberries from Canada* (26 January 1990), USA-89-1904-01.

[91]*Red Raspberries from Canada, supra*, note 86.

[92]*Red Raspberries from Canada: Amended Final Results of Antidumping Duty Administrative Review in accordance with Decision upon Remand*, 55 Fed. Reg. 28074 (1990).

[93]*Supra*, note 9.

[94]*Ibid.*

[95]*Ibid.* Specifically, the Panel stated "that the ITC's findings on the nature of Canadian subsidies, the likelihood of increased Canadian pork exports, the likelihood of an increase in market penetration ratios, price suppression, distribution channels, the imminence of threat of material injury due to the counter-cyclical nature of the pork cycle and the vulnerability of the U.S. domestic industry are all coloured by the questionable finding of greatly increased Canadian pork production."

[96]*Fresh, Chilled, or Frozen Pork from Canada*, 55 Fed. Reg. 39073 (1990).

[97]*Fresh, Chilled, or Frozen Pork from Canada*, Inv. No. 701-TA-298, USITC Pub. 2330 (October 1990).

decision on remand, and the Panel did so.[98] This time, the Panel was explicit. It noted that "the ITC's record has been combed not once but twice in the search for substantial evidence of material injury."[99] It found none, stating "that the majority Commissioners' findings of a threat of imminent material injury are not supported by substantial evidence."[100] The ITC then reversed its finding of threat of injury, declaring that it was required to do so by the Panel's directive.[101]

Although the ITC reversal in the *Pork* (injury) case indicates that the U.S. government honoured its commitment under *FTA* article 1904.9 to be bound by the decisions of Chapter 19 panels, its statements and actions suggest that it was doing so reluctantly. In the majority opinion on second remand, Commissioners Rohr and Newquist repeatedly criticized the Panel's decision and warned that the decision would not impact their future practice.[102] The U.S. Government, at the urging of the ITC, requested an extraordinary challenge committee (ECC or Committee) to review the Panel's second remand to the ITC. The ECC upheld the Panel decision. The United States then revoked the countervailing duty order and refunded the duties deposited.[103]

II. The Extraordinary Challenge Committee

FTA article 1904.13 allows a Party to challenge the decision of a binational Panel in the following limited circumstances:

a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

ii) the panel seriously departed from a fundamental rule of procedure, *or*

iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article. [emphasis added][104]

In addition, the Party must show that the situation is so serious that at least one of the actions in subparagraph (a) materially affected the panel's decision *and* poses a continued threat to the integrity of the binational panel review process should the decision be allowed to stand.[105] If an ECC finds that the narrow grounds for an extraordinary challenge have been established, the ECC may vacate or remand the binational panel decision.[106]

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[98]*Pork* (injury), supra, note 9 at 7016-17.

[99]*Ibid.* at 7017.

[100]*Ibid.* at 7025-26.

[101]*Fresh, Chilled or Frozen Pork from Canada: Second Remand*, Inv. No. 701-TA-298, USITC Pub. 2362 (February 1991).

[102]*Ibid.*

[103]*Fresh, Chilled and Frozen Pork from Canada: Revocation of Countervailing Duty Order and Terminating of Administrative Review*, 56 Fed. Reg. 29464 (1991). A separate Chapter 19 Panel had overruled the Department of Commerce on several aspects of the subsidy finding, but the revocation of the order made further compliance unnecessary.

[104]*Supra*, note 1, art. 1904.13.

[105]*Ibid.* art. 1904.13(b).

[106]*Ibid.* annex 1904.13.

The drafters of the extraordinary challenge process expected that it would be used infrequently,[107] and, in fact, it has been invoked in only one case: the *Pork* case.[108] The Committee's decision makes it likely that challenges will continue to be infrequent.

On 29 March 1991, the Government of the United States, at the urging of the petitioner, requested the formation of an ECC to review the issues raised by the Panel's second remand decision. The ECC consisted of two retired Canadian justices and one retired United States judge.[109] Although *FTA* annex 1904.13(2) provides that decisions should typically be rendered within 30 days, the ECC announced that it would require 60 days to make its decision. It also arranged to hear oral arguments in the case although *FTA* Annex 1904.13 contains no express provision for oral argument.

Those challenging the Panel's decision argued, *inter alia*, that the Panel failed to apply U.S. law because it relied on *FTA* — rather than U.S. — principles of due process and issued a more restrictive remand than would be allowed under U.S. law.[110] Respondents argued that the Panel correctly applied the *FTA* and U.S. law, and that the panel review process would be threatened if appeals became politicized and routine.[111]

Political pressure played a major role in the *Pork* case because the deadline for the USTR's decision to invoke the ECC process fell at the same time Congress was deciding whether to extend fast-track legislation[112] for an additional two years. In light of its ambitious trade agenda, including the North American Free Trade Agreement and Uruguay Round negotiations, the Administration was anxious for Congress to extend fast-track authority. The National Pork Producers Council (NPPC) filed its petition urging an extraordinary challenge on 11 March 1991, and between 11 March and 29 March, United States Trade Representative Carla Hills received a series of multiple signature letters from approximately 90 Members of Congress encouraging her to request an ECC.[113] The implicit message of the letters was that support for fast-track extension was dependent on a request for an ECC. Although Ambassador Hills had stated at a House Agriculture hearing on 13 March 1991 her belief that the Extraordinary

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[107]Testimony of M. J. Anderson, Chief Counsel for International Trade, U.S. Dept. of Commerce Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, U.S. H.R., 100th Cong., 2d Sess. 69 at 75-76 (1988).

[108]*Supra*, note 55.

[109]Sitting U.S. judges cannot serve as arbitrators, so retired judges sit on the ECCs (*Code of Judicial Conduct*, Canon 4F (1991)).

[110]See Brief of the International Trade Commission before the ECC (19 April 1991) at 72 [hereinafter ITC Brief].

[111]See Brief of the Government of Canada before the ECC (19 April 1991) at 57.

[112]Under the *U.S. Constitution*, the President of the United States has the power to negotiate trade agreements, but Congressional legislation is required to implement them. Congress' power of amendment encourages special interest groups to tinker with negotiated agreements and thereby undermines the President's credibility at the bargaining table. Therefore, Congress approved, in the *Trade Act of 1974*, an alternative method of approval: the fast-track process. With fast-track, the House and Senate have limited periods of time during which they may approve or reject legislation implementing a negotiated trade agreement. The legislation cannot be amended (19 U.S.C. § 2191 (1988)).

[113]Brief of the Government of Canada, *supra*, note 111 at 11.

Challenge Procedure was aimed at improprieties,[114] she succumbed to the political pressure (specifically, a promise of three Senate votes in favour of fast-track) on 29 March 1991 and requested formation of an ECC based on the less serious ground of failure to correctly apply United States law.

On 14 June 1991, the ECC issued a unanimous decision in favour of the Canadian interests.[115] In doing so, the Committee upheld the binational Panel's decision. The Panel had found that a decision by the ITC was unsupported.[116] As a consequence of the Committee's ruling, countervailing duties on Canadian pork imports were refunded and no further duties can be imposed.

The Committee's decision strengthens the *FTA*'s binational panel review process. The Committee emphasized the extremely narrow three-prong standard of review for challenges.[117] It stated that the three-prong requirement "provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge is not intended to function as a routine appeal."[118] The Committee noted that words "such as 'gross,' 'serious,' 'fundamental,' 'materially,' 'manifestly,' and 'threatens,' which appear in the statute, highlight the Committee's formidable standard of review.[119] Further, the Committee opined that an ECC was not like an appellate court[120] and that the short 30-day "typical" period for a challenge makes it "clear that a committee is not intended to conduct an in-depth review regarding the merits of the investigation within such a short time frame."[121]

The Committee came close to reprimanding the USTR for bringing the challenge. In dismissing the challenge, the Committee stated that "the allegations do not meet the threshold for an extraordinary challenge."[122]

The Committee's decision also affirms that binational panels have broad authority. The ITC had argued that the panels could only give open-ended remands and that the Panel went too far in creating a rule of finality.[123] The Committee disagreed. It held that "there are no restrictions on the Panel's power to remand with or without instructions to the competent investigating authority."[124] By upholding the Panel's authority to limit remands, the Committee re-

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[114]See statement of Ambassador Carla Hills, United States Trade Representative, Hearing on Fast Track Trade Negotiation Authority before the House Committee on Agriculture, 102d Cong., 1st Sess. (13 March 1991).

[115]*Pork, supra*, note 55.

[116] *Ibid.* at 7041.

[117] *Ibid.* The criteria for invoking an ECC are the same as those for a decision on the merits (*supra*, note 1, art. 1904(13)).

[118]*Pork, ibid.* at 7041 (citing statement of Administrative Action, United States-Canada Free Trade Agreement at 116, reprinted in H.R. Doc. No. 216, 100th Cong., 2d Sess. at 163, 278 (1988)).

[119]*Ibid.*

[120]*Ibid.*

[121]*Ibid.* at 7042.

[122]*Ibid.* at 7038-39.

[123]The ITC and the petitioner both argued that an infinite number of remands are required (ITC Brief, *supra*, note 110); see also Brief of the National Pork Producers Council (19 april 1991) at 32, 34.

[124]*Pork, supra*, note 55 at 7043.

cognized the *FTA*'s goals of speedy and inexpensive review, which it cited in the decision.[125]

In sum, the Committee's decision should have the effect of making challenges to panel decisions very infrequent. The challenge process is functioning as intended by both countries.

III. The *FTA* Dispute Resolutiou Panels as a Model for Other Negotiations

The *FTA* binational panels have been one of the most successful components of the *FTA*. They already have served as an impetus for other agreements, specifically the steel consensus agreements of 1989. It is possible that some elements of the panels could be adopted by the GATT.

A. *Steel Consensus Arrangements of 1989*

In 1989, the United States entered into steel consensus agreements with the major exporters of steel to the United States.[126]

The purpose of the agreements was to eliminate or restrict subsidies and reduce both tariff and non-tariff barriers affecting steel trade. As part of each of those agreements there is a dispute settlement agreement that draws on the *FTA* panels (as well as the World Bank's International Centre for the Settlement of Investment Disputes)[127] as a model.

The steel consensus agreements all adopt the basic dispute resolution structure of the *FTA* panels. It is useful to compare the *U.S.-European Economic Community Consensus Agreement*[128] (*U.S.-EC Agreement*), which is typical of the steel consensus arrangements, with the *FTA*.

The *U.S.-EC Agreement* mirrors the *FTA* in establishing firm dates by which various types of action must occur. The time period for the United States and the EC to settle a dispute under the *U.S.-EC Agreement* by consultation is 15 days compared to the 30 days allowed by Chapter 18.[129] Thereafter, as under Chapter 18, either party can refer a matter to arbitration and appoint an arbitrator.[130] The other party then has 15 days to appoint its arbitrator. Thus, within 15 days of the request for arbitration, two of the three arbitrators are appointed. Similarly, under Chapter 18, four of the five panelists are appointed by day 15.[131] In contrast, Chapter 19 of the *FTA* provides for the appointment of four panelists within 30 days.[132]

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[125]*Ibid.* at 7042.

[126]Specifically, the United States concluded steel agreements with Australia, Austria, Brazil, Czechoslovakia, the European Community, Finland, Hungary, Japan, Mexico, the People's Republic of China, Poland, the Republic of Korea, Romania, Sweden, Trinidad and Tobago, Venezuela, and Yugoslavia.

[127]As established under the *Convention on the Settlement of Investment Disputes*, 18 March 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (in force 14 October 1966), art. 1.

[128]EC, O.J. Legislation (1989) No. L/368 at 139 [hereinafter *U.S.-EC Agreement*].

[129]*Supra*, note 1, art. 1807(1).

[130]Compare *U.S.-EC Agreement*, *supra*, note 128, art. 5(2) with *FTA*, *ibid.* art. 1807(2).

[131]*FTA*, *ibid.* art. 1807(3).

[132]*Ibid.* annex 1901.2(2).

The length of time for selection of the third arbitrator is shorter than for the selection of the fifth *FTA* panelist. The two arbitrators have 15 days to appoint a third arbitrator,[133] whereas under Chapter 19 of the *FTA* Parties have an additional 25 days to select the fifth panelist,[134] and under Chapter 18 of the *FTA*, if the Parties fail to agree on the fifth panelist, the other panelists must select the fifth panelist within 30 days of the establishment of the panel.[135]

The *U.S.-EC Agreement* follows Chapter 19 of the *FTA* in providing for a random selection process in the event there is no agreement on the swing vote arbitrator.[136] One major distinction between the *FTA* and the *U.S.-EC Agreement* is that under the former, the swing vote is a national of either Canada or the United States,[137] whereas under the latter, the swing vote is not a national of either party.[138]

Both the *FTA* and the *U.S.-EC Agreement* provide that the panelists (or arbitrators) cannot "take instructions" from either Party.[139] While the *FTA* merely points out that the panelists shall be objective, the *U.S.-EC Agreement* goes a step further and directs that the arbitrators "shall not have a financial interest in the dispute."[140] However, the *FTA* does provide for the establishment of a code of conduct,[141] and that code provides that a panelist shall not have a financial interest in the case.[142]

The *U.S.-EC Agreement* follows Chapter 18 of the *FTA* in the method for appointing a chairman. The *U.S.-EC Agreement* provides that the neutral person shall be the chairman.[143] The *FTA* provides in Chapter 18 that the fifth panelist shall chair the panel.[144] In contrast, Chapter 19 of the *FTA* provides that the panelists shall elect a chairman from among the lawyers on the panel.[145]

While Chapter 19 of the *FTA* requires that a majority of the panelists on each panel be lawyers,[146] the *U.S.-EC Agreement* mirrors Chapter 18 of the *FTA* and does not specify that any arbitrators need be lawyers. Since Chapter 18 panelists and the *U.S.-EC Agreement* arbitrators do not have to grapple with the intricate anti-dumping and countervailing duty laws, they may have less of a need for a legal background than Chapter 19 panelists.[147]

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[133]*Supra*, note 128, art. 5(2).

[134]*Supra*, note 1, annex 1901.2(3).

[135]*Ibid.* art. 1807(3).

[136]*Supra*, note 128, art. 5; *FTA*, *ibid.* annex 1901.2(3).

[137]The fifth panelist is selected from the roster of panelists. *FTA*, *ibid.*, annex 1901.2(1). Each of the candidates on the roster must be a citizen of Canada or the United States.

[138]*Supra*, note 128, art. 5.

[139]*FTA*, *supra*, note 1, art. 1807(1), annex 1901.2(1); *U.S.-EC Agreement*, *supra*, note 128, art. 5(2).

[140]*Ibid.*

[141]*Supra*, note 1, art. 1910, annex 1901.2(6).

[142]*Code of Conduct for Proceedings under Chapters 18 and 19 of the United States-Canada Free-Trade Agreement*, 54 Fed. Reg. 14371 (1989), C. Gaz. 1989.I.96.

[143]*Supra*, note 128, art. 5.

[144]*Supra*, note 1, art. 1807(4).

[145]*Ibid.* annex 1901.2(4).

[146]*Ibid.* annex 1901.2(2).

[147]Interestingly, only three of the six present ITC commissioners, whose decisions the Chapter 19 panelists examine, are lawyers.

The *U.S.-EC Agreement* also follows the *FTA* in that it provides for the establishment of rules of procedure.[148] Similarly, both the *U.S.-EC Agreement* and the *FTA* provide for written submissions and oral argument.[149] The *U.S.-EC Agreement* follows Chapter 18 in leaving the time frame for written submissions and oral argument to the rules of procedure.[150] In contrast, Chapter 19 sets explicit guidelines.[151]

The *U.S.-EC Agreement* differs from the *FTA* concerning costs associated with the panels. Chapter 19 of the *FTA* provides that the costs of panelists are to be borne equally by the Parties,[152] and Chapter 18 is silent as to the costs. In comparison, under the *U.S.-EC Agreement*, each party bears the cost of its own arbitrator and the parties split the Chairperson's costs and remaining costs.[153] The *FTA*'s approach seems more even-handed. By providing that the costs are divided equally for all panelists, the *FTA* makes it less likely that the panelists consider themselves U.S. panelists and more likely that they consider themselves panelists for the Parties.[154] In any event, one party should not be allowed to pay "its" arbitrator more than the other party's arbitrator.

The *U.S.-EC Agreement*, like Chapter 19 of the *FTA*, provides a deadline for the decision and requires that decisions be made by majority vote.[155] Only Chapter 18 specifies that panelists may furnish separate opinions on matters not unanimously agreed upon.[156] The deadline for the arbitrators' decision (three months from the appointment of the chairperson), is identical for the *U.S.-EC Agreement* and Chapter 18 of the *FTA*.[157] This deadline is much shorter than that for the panelists' decision under Chapter 19 (315 days after the request for panel review is filed).[158]

The *U.S.-EC Agreement* provides for a preliminary remedy to offset the effects of a violation of the agreement.[159] Similarly, Chapter 18 provides for the issuance of an initial report.[160]

Both the *U.S.-EC Agreement* and Chapter 19 of the *FTA* require that the panel's decision be binding.[161] However, the *U.S.-EC Agreement*, like Chapter 18, provides for situations where the parties do not implement the panel's decision. The *U.S.-EC Agreement* provides that if the United States or the EC fails

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[148]*U.S.-EC Agreement, supra*, note 128, art. 5; *FTA, supra*, note 1, art. 1807(4), art. 1904(14).

[149]*U.S.-EC Agreement, ibid.*; *FTA, ibid.*

[150]*U.S.-EC Agreement, ibid.*; *FTA, ibid.* art. 1807(4).

[151]*Ibid.* art. 1904(14).

[152]*Ibid.* annex 1901.2(13).

[153]*Supra*, note 128, art. 5.

[154]In addition, since most Chapter 19 panels have been convened in the United States, requiring each Party to bear expenses for its selections could disadvantage Canada. Its panelists have to travel to Washington, D.C. whereas most of the U.S. panelists reside in the Washington, D.C. area.

[155]*Supra*, note 128, art. 5; *FTA, supra*, note 1, art. 1904(14), annex 1901.2(5).

[156]*Ibid.* art. 1807(5).

[157]Compare *U.S.-EC Agreement, supra*, note 128, art. 5(4) with *FTA, ibid.* art. 1807(5).

[158]Art. 5 of the *U.S.-EC Agreement, ibid.*, permits the 30-day deadline to be extended if "extraordinary circumstances" prevent the panel from meeting the deadline.

[159]*Ibid.* art. 5.

[160]*Supra*, note 1, art. 1807(6).

[161]*FTA, ibid.* art. 1904(9); *U.S.-EC Agreement, supra*, note 128, art. 5(7).

to implement the panel's decision and the two parties are unable to agree on appropriate compensation or other remedial action, "then the other party may propose to the panel suspension of equivalent benefits under the Agreement to the non-complying party."[162] Likewise, Chapter 18 provides that if the matter is not satisfactorily resolved, a Party "shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."[163] Thus, under both the *U.S.-EC Agreement* and Chapter 18, if the parties do not implement the panel's decision, they can agree on compensation or some other remedy. If this fails, the injured party can retaliate.[164]

B. GATT

GATT panel dispute resolution could be improved by incorporating some aspects of *FTA* panels into the GATT system.

One of the past criticisms made against GATT dispute resolution was that the process was too lengthy. The *Montreal Understanding of 1989*[165] provided for firm deadlines, but proceedings can still be longer than under Chapter 19. To cure this problem of delay, GATT could adopt time limits such as those in the *FTA*.

Another major weakness of the GATT panels is that a member State can block the decision.[166] The *FTA* panels have shown that member States can accept binding dispute resolution and not suffer dreadful consequences when agreeing to be bound by a panel's decision. GATT members, too, could agree to give binding effect in a timely manner to panel decisions.[167]

Conclusion

FTA panels deserve high marks for their successful performance to date. They have issued timely, well crafted, and impartial decisions. The panelist selection process has been amicable, and the Parties have given the panel decisions binding effect. The ECC process is working well. There has been only one challenge, and the decision in that case (upholding the Panel's decision) establishes that challenges should be infrequent.

The efficiency of the *FTA* panels is widely acknowledged in the international legal community. They have already served as an inspiration for other agreements. They also provide useful precedents for reform of the GATT dispute resolution processes.

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[162]*U.S.-EC Agreement, ibid.*

[163]*Supra*, note 1, art. 1807(9).

[164]*Ibid.*

[165]GATT C.P. Dec. L/6489, 45th sess., 36th supp. B.I.S.D. (1990) 61.

[166]See, for example, *Canada – Imposition of Countervailing Duties on Inputs of Manufacturing Beef from the EEC* (13 October 1987) (blocked by the Government of Canada); *United States – Definition of Industry Concerning Wine and Grape Products* (24 March 1986) (blocked by the United States).

[167]See *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/35 at 296-97 (26 November 1990).

APPENDIX ONE

Value of U.S./Canada Trade Affected by the Dispute Panel Appeals
(US$ 1,000 Dollars)

Product	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Last Year Reported
Dried Salted Codfish		35,115	32,917	26,370	27,798							27,798
Fresh, Chilled or Frozen Pork							364,216	428,000	352,510			352,510
New Steel Rails						1,800	2,228	7,009				7,009
Oil Country Tubular Goods			117,000	22,000	104,000							104,000
Red Raspberries (1)	4,136	7,548	9,535	5,382								5,382
Steel Piling	980											980
Integral Horsepower Induction Motors (2)						8,398	8,398	8,398	8,398	8,398		8,398
Polyphase Induction Motors (2)										1,427		1,427
Iron Construction Castings					5,916	9,732						9,732
Live Swine			14,747	18,790	66,101	52,137						52,137
Beer											29,243	29,243

Source: 1) USITC Publications 1212, 1565, 1711, 1747, 2135, 2518, 1811, 1733. Since the information is drawn from the ITC Reports, it does not include data from years not reviewed by the ITC. The information does not account for inflation.
Value of the trade affected by the panel decision, *Parts for Self-Propelled Bituminous Paving Equipment from Canada*, is not included. The necessary information is confidential and not available to the public.
2) Report EM-545, "US Exports of Domestic & Foreign Merchandise"

Total Last Year Reported in US Dollars: 632,208

Total Last Year Reported in Canadian Dollars (Exchange Rate = 0.8398): 752,808

Note (1): Import value is the product of the quantity of U.S. imported red raspberries for consumption from Canada and the average U.S. market price for frozen red raspberries.

(2): Figures are approximate values collected through informal discussions with Canadian government officials.

APPENDIX TWO

Table 1

LENGTH OF CHAPTER 19 PANEL REVIEW — JANUARY 1989-JULY 1991

Case	Date of Panel Request	Date of Panel Action	Days from Panel Request to Panel Action
USA-89-1904-01 Red Raspberries from Canada	3/15/89	12/15/89 (r)	275
USA-89-1904-02 Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada	3/16/89	1/24/90 (a)	314
USA-89-1904-03 Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada	4/26/89	3/07/90 (a)	315
USA-89-1904-04 Dried, Heavy, Salted Codfish from Canada	4/26/89	12/15/89 (t)	233
USA-89-1904-05 Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada	6/07/89	3/07/90 (a)	273
USA-89-1904-06 Fresh, Chilled and Frozen Pork from Canada	8/22/89	9/28/90 (r)	402*
USA-89-1904-07 New Steel Rail, Except Light Rail, from Canada	9/01/89	6/08/90 (r)	281
USA-89-1904-08 New Steel Rail, Except Light Rail, from Canada	9/01/89	8/30/90 (a)	363*
USA-89-1904-09 New Steel Rail, Except Light Rail, from Canada	10/02/89	8/13/90 (a)	315
USA-89-1904-10 New Steel Rails from Canada	10/02/89	8/13/90 (a)	315
USA-89-1904-11 Fresh, Chilled or Frozen Pork from Canada	10/13/89	8/24/90 (r)	315
CDA-89-1904-01 Polyphase Induction Motors from the U.S.	5/01/89	3/12/90 (t)	315
USA-90-1904-02 Oil Country Tubular Goods from Canada	11/05/90	1/22/91 (t)	79
USA-90-1904-01 Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada	6/14/90	5/24/91 (r)	344*

(r) = remand; (a) = affirmed; (t) = terminated.

Mean time to panel action = 319 days.
Median time to panel action = 315 days.
– Terminated cases not included in calculation of mean and median.

* Two cases were delayed due to the replacement of a panelist. A conflict of interest was cited in each of these two cases. The third case was delayed due to technical problems the U.S. Department of Commerce experienced with regard to its trade analysis.

Source: United States-Canada FTA Binational Secretariat Caseload Report, June 1991.

APPENDIX TWO

Table 2
LENGTH OF BINATIONAL PANEL REMANDS
JANUARY 1989-JULY 1991

Completion of Case	Date of Panel Remand	Date of First Decision	Date of Second Panel Decision	Days from First Remand to Second Panel Review	Days from Second Remand to Date of Completion Review
89-1904-01 Red Raspberries from Canada	12/15/89	4/2/90	108	6/18/90	77
89-1904-06 Fresh, Chilled and Frozen Pork from Canada	9/28/90	3/7/91	158	7/5/91	120
89-1904-11 Fresh, Chilled and Frozen Pork from Canada	8/24/90	1/22/91	152	3/29/91*	66
89-1904-07 New Steel Rail, Except Light Rail, from Canada	6/8/90	8/27/90	80	N/A	N/A

Source: United States-Canada FTA Binational Secretariat Caseload Report, June 1991.

Mean time for first remand = 125 days.
Median time for first remand = 130 days.

Mean time for second remand = 88 days.
Median time for second remand = 77 days.
* USTR requested that the Extraordinary Challenge Committee review the case on this date.