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Resolution of Trade Disputes By Chapter 19 Panels: A Long-Term Solution or Interim Procedure of Dubious Constitutionality

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Abstract

Since World War II, international trade has expanded exponentially and the United States has had substantial incentives to negotiate trade agreements with a view toward lowering tariffs reciprocally. The United States has also benefited from entry into the North American Free Trade Agreement ("NAFTA") in 1992, the Canada-United States Free-Trade Agreement ("CFTA") in 1988, and the United States-Israel Free Trade Agreement in 1985. The Canadian goal had been to eliminate existing antidumping and countervailing duty rules [in the United States] and to negotiate a new set of laws modeled on competition law principles with a binational tribunal to enforce them. Chapter 19 of the CFTA provides for binational dispute settlement in antidumping and countervailing duty cases. However, Chapter 19 also retains the substantive domestic antidumping and countervailing duty laws of the United States and Canada. Article 1904 expressly recites the parties' intention to replace judicial review of antidumping and countervailing duty determinations with binational panel review. The two governments had to agree on the selection of the fifth panelist. In a dissenting opinion of a CFTA Extraordinary Challenge Committee ("ECC") review of the panel decision on *Certain Softwood Lumber Products from Canada*, retired U.S. Circuit Judge Malcolm Wilkey criticizes the limited review practices of ECCs. Canada and Chile agreed to phase out antidumping, but not countervailing duty policies for the purposes of their bilateral agreement. This address discusses the binational dispute settlement panels established by Chapter 19 of the CFTA. This address proceeds to address Chapter 19 of NAFTA which substantially replicates the binational panel mechanism established by the CFTA. This speech concludes by discussing U.S. Circuit Judge Malcolm Wilkey's dissenting opinion in *Certain Softwood Lumber Products from Canada* and remarking that the United States should be chary to expand the binational review panel system in future trade agreements.

ADDRESS

RESOLUTION OF TRADE DISPUTES BY CHAPTER 19 PANELS: A LONG-TERM SOLUTION OR INTERIM PROCEDURE OF DUBIOUS CONSTITUTIONALITY

*Gregory W. Carman**

Since World War II, international trade has expanded exponentially and the United States has had substantial incentives to negotiate trade agreements with a view toward lowering tariffs reciprocally. The benefits of these efforts have been particularly apparent in the formation and operations of the General Agreement on Tariffs and Trade[1] and the World Trade Organization.[2] The United States has also benefited from entry into the North American Free Trade Agreement[3] ("NAFTA") in 1992, the Canada-United States Free-Trade Agreement[4] ("CFTA") in 1988, and the United States-Israel Free Trade Agreement[5] in 1985. These agreements entered into by the United States reflect an international movement, particularly within regional areas, to reduce tariff barriers to trade.[6]

As treaties have reduced tariffs, interest in the remedies

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* Chief Judge, United States Court of International Trade. This Address was presented at the Annual Dinner of the Customs and International Trade Bar Association on April 16, 1997. A similar version of this Address appears at 27 STETSON L. REV. 643 (1997).

1. The Protocol of Provisional Application of the General Agreement on Tariffs & Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT].

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1143 (1994) [hereinafter WTO].

3. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

4. Canada-United States Free-Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA].

5. United States-Israel Free Trade Agreement, Apr. 22, 1985, 24 I.L.M. 623.

6. *See, e.g.*, Treaty of Asuncion, Mar. 26, 1991, 30 I.L.M. 1041 (establishing common market between Argentine Republic, Federative Republic of Brazil, Republic of Paraguay, and Republic of Uruguay); Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17, (establishing CARICOM); The Association of Southeast Asian Nations Declaration (Bangkok Declaration) Aug. 8, 1967, 6 I.L.M. 1233 (estab-

available under countervailing duties laws and antidumping duty laws seems to have increased. While the United States has wanted to ensure that its domestic companies are not subjected to unfair foreign competition, other countries have undoubtedly viewed U.S. countervailing duty laws and antidumping statutes as generally protectionist. With the sweep of these and many other considerations as a backdrop, the Reagan Administration successfully negotiated the CFTA. The negotiation and completion of the CFTA was brought about in no small measure by the motivation of the world's two largest trading partners to enjoy the fruits of a free trade area. CFTA achieved this through the reduction and elimination of barriers to trade in goods and services and to investment.[7]

Not surprisingly, each side had different objectives that it hoped to accomplish in the negotiations. In an article published in the Spring 1995 issue of *Law and Policy in International Business*,[8] Charles Gastle and Jean-G. Castel, two Canadian lawyers, discuss the "awkward compromise" that brought about the CFTA/NAFTA mechanism for settling disputes. They state:

> The Canadian goal had been to eliminate existing antidumping and countervailing duty rules [in the United States] and to negotiate a new set of laws modeled on competition law principles with a binational tribunal to enforce them. This goal proved elusive because U.S. trade officials wanted strict limits placed upon what they considered to be trade distorting practices through Canada's improper use of subsidies.[9]

While the Canadians sought to exempt or ameliorate the effect of U.S. antidumping and countervailing duty laws on its products,[10] there was strong opposition in the U.S. Congress to weakening these laws.

To resolve this conflict the parties agreed not to change U.S. or Canadian countervailing and antidumping laws, but

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lishing ASEAN); Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 11 (establishing European Economic Community).

7. *See* Canada-United States Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, § 2(3) (1988).

8. Charles M. Gastle & Jean-G. Castel, *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in Light of Softwood Lumber III?*, 26 LAW & POL'Y INT'L BUS. 823 (1995).

9. *Id.* at 829.

10. *See id.*

rather established binational panels for judicial review. While the CFTA's adoption of the binational panel dispute resolution system was designed only as an interim measure, this compromise was significant in securing approval of the treaty in both countries.

I. *BINATIONAL PANELS UNDER THE CFTA*

Chapter 19 of the CFTA provides for binational dispute settlement in antidumping and countervailing duty cases. However, Chapter 19 also retains the substantive domestic antidumping and countervailing duty laws of the United States and Canada.[11] Article 1904 expressly recites the parties' intention to replace judicial review of antidumping and countervailing duty determinations with binational panel review.[12]

Panelists were selected from a list of fifty candidates, with each side submitting the names of twenty-five candidates. All candidates were to be citizens of Canada or the United States, of good character, high standing and repute, sound judgment, and were required to have a general familiarity with trade law. Candidates were not to be affiliated with either Party and were not to take instructions from either Party. Judges were not considered affiliated with either Party.[13] A majority of the panelists on each panel were to be lawyers.[14]

In the selection of the panel, the United States and Canada each designated two panelists.[15] The United States Trade Representative was responsible for the selection of panelists from the United States.[16] Each country could exercise four peremptory challenges.[17] The two governments had to agree on the selection of the fifth panelist. If there were no consensus, the four panelists already selected would choose the fifth panelist. If they

11. *See* CFTA, *supra* note 4, art. 1902.1 ("Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party.").

12. *See id.*, art. 1904.1 ("As provided in this Article, the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.").

13. *See id.*, annex 1901.2.1.

14. *See id.*, annex 1901.2.2.

15. *See id.*

16. *See* Canada-United States Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1888, § 405(a)(2)(A) (1988).

17. *See* CFTA, *supra* note 4, annex 1901.2.2.

could not agree, the fifth panelist was selected by lottery from the roster of remaining candidates, excluding those who had already been challenged peremptorily.[18]

Panel determinations were binding[19] and both countries agreed that neither would approve domestic legislation to provide parties with an ability to appeal a panel decision in its domestic courts.[20] CFTA permitted Parties to the agreement to appeal panel decisions before an Extraordinary Challenge Committee ("ECC") by alleging:

a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
   ii) the panel seriously departed from a fundamental rule of procedure, or
   iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and
b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process.[21]

ECCs were comprised of three members who were either judges or former judges of a federal court of the United States, or a court of superior jurisdiction in Canada. The ECC members were selected from a ten-person roster of which each side submitted five candidates. Each Party to the agreement chose one member of the ECC from the roster. The third member was selected by the two members chosen by the Parties, or, if necessary, by lottery from the roster.[22]

ECC decisions were binding with respect to the particular matter between the Parties that was before the panel. Upon finding that one of the grounds referred to above had been established, the ECC had the power to vacate the panel decision or to remand it to the original panel for action not inconsistent with the ECC's decision. If the grounds were not established, it

18. *See id.*, annex 1901.2.3.

19. *See id.*, art. 1904.9 ("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.").

20. *See id.*, art. 1904.11 ("A final determination shall not be reviewed under any judicial review procedures of the importing Party . . . . Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts.").

21. *Id.*, art. 1904.13.

22. *See id.*, annex 1904.13.1.

was to affirm the panel decision. If the original decision was vacated, a new panel was to be established.[23]

It is significant that Chapter 19 was not intended to be permanent. It was to have a duration of five years, pending the development of a substitute system of rules in both countries regarding antidumping and countervailing duties as applied to their bilateral trade. If no system of rules was implemented, there was a provision to extend Chapter 19 for two years. After that, if no agreement to implement a new regime was developed, either Party to CFTA was to be permitted to terminate the agreement on six months notice.[24]

The Department of Commerce's Chief Counsel for International Trade testified before a subcommittee of the House Judiciary Committee in Congress that:

> [T]he binational panel system is not, and is not intended to be a model for future agreements between the United States and its other trading partners. Its workability stems from the similarity of the U.S. and Canadian legal systems. With that shared legal tradition as a basis, the panel procedure is simply an interim solution to a complex issue in an historic agreement with our largest trading partner.[25]

II. *CHAPTER 19 IN NAFTA*

The United States and Canada agreed to suspend CFTA upon NAFTA's enactment on January 1, 1994.[26] Nevertheless, Chapter 19 of NAFTA substantially replicates the binational panel mechanism established by the CFTA. NAFTA, however, does contain two significant changes in the binational panel dispute resolution process worth noting. First, NAFTA contains no language indicating the panel process is intended to be temporary, as was expressly stated in the CFTA. Second, NAFTA pro-

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23. *See id.*, annex 1904.13.3.

24. *See id.*, art. 1906.

25. *Canada-United States Free Trade Agreement: Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong. 73 (1988) (statement of M. Jean Anderson, Chief Counsel for International Trade, U.S. Department of Commerce).

26. *See Canada-United States Trade Under FTA and NAFTA: Hearing before the House Comm. on Small Business*, 103rd Cong. 50 (1994) (statement of Charles E. Roh, Jr., Assistant U.S. Trade Representative for North American Affairs, noting "when the NAFTA entered into force on the first of January of this year, the CFTA was suspended.").

vides the roster of individuals eligible to serve on panels shall include judges or former judges to the fullest extent practicable.[27] There is no such provision in CFTA. Further, the roster of individuals eligible to serve as panelists was expanded to seventy-five, with each party to the Agreement selecting twenty-five candidates.[28]

NAFTA made several important changes to the ECC mechanism that are worth noting. First, a party to NAFTA can mount a challenge to a determination where it believes a panel has failed to apply the appropriate standard of review.[29] There is no such language under CFTA. Further, the ECC is directed to examine the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds for vacation or remand, as set forth in Chapter 19, has been met.[30] Again, the CFTA includes no similar language. Finally, NAFTA lengthens the time ECC has to review a panel decision from thirty to ninety days.[31]

In a dissenting opinion of a CFTA ECC review of the panel decision on *Softwood Lumber Products from Canada*,[32] retired U.S. Circuit Judge Malcolm Wilkey criticizes the limited review practices of ECCs. Judge Wilkey indicates that if their review is limited to a narrow perspective of the meaning of impairment of the integrity of the binational review process, then the review may be tantamount to no review at all. Judge Wilkey clearly was upset with the concept that even if it were established that a Panel misinterpreted U.S. law, that issue would not, in the usual course, be reviewed by an ECC.[33] Judge Wilkey's dissent points out that, in testimony antecedent to the approval of the CFTA, Congress was led to believe that U.S. substantive law pertaining to dumping and countervailing duties would not change, and that if Panels strayed, appeals could be made to the ECC.[34]

Judge Wilkey's dissent also points out that the panel did not

27. *See* NAFTA, *supra* note 3, annex 1901.2.1.

28. *See id.*

29. *See id.*, art. 1904.13(a)(iii).

30. *See id.*, annex 1904.13.3.

31. *See id.*, annex 1904.13.2.

32. *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01USA (Ex. Chal. Comm. Aug. 3, 1994) (Wilkey, J., dissenting) [hereinafter *Softwood Lumber III*].

33. *See id.* at 11-17.

34. *See id.* at 7-10, 20-21.

apply the correct United States standard of review.[35] Canadian Justice Hart, also a member of the ECC in the Softwood Lumber case, noted:

> I would like to point out that in reality the replacement of court adjudication by a five-member panel of experts in international trade law may very well reduce the amount of deference to the Department in the future. When the Court of International Trade reviews determinations of Commerce, it would be expected to bow to the expertise within the Department.[36]

Additionally, Judge Wilkey's dissent discusses briefly the potential for problems that arise when panelists from countries with civil law systems are required to apply the standards of review applied by judges in common law countries and vice versa.[37] Finally, Judge Wilkey proceeded to point out that two of the Canadian panelists had serious conflicts, such as providing legal counsel to Canadian lumber interests, the Canadian Government, and other related interests.[38]

In a lawsuit recently filed in the U.S. Court of Appeals for the District of Columbia, the American Coalition for Competitive Trade challenges the constitutionality of the panel dispute settlement system established under Chapter 19 of the NAFTA and the CFTA. The lawsuit also challenges the constitutionality of the legislation and Executive Orders implementing NAFTA and CFTA.[39]

The plaintiff seeks a declaratory judgment, finding that the binational panels and Extraordinary Challenge Committees established under NAFTA and the CFTA are without authority to review, reverse, or modify the decisions of the U.S. Department of Commerce and the U.S. International Trade Commission, or any other court or agency of the United States. While it is not my purpose to report minutely on every aspect of the complaint, the plaintiff alleges that by entering NAFTA and the CFTA, Con-

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35. *See id.* at 31, 37.

36. *Id.* at 28 (Hart, J.).

37. *See id.* at 63-64 (Wilkey, J., dissenting) (noting Mexico is "proudly a *Civil Law* country" which "has no mechanism and no concept of judicial review of administrative agency action").

38. *See id.* at 71-85.

39. *American Coalition for Competitive Trade v. United States*, Civ. Action No. 97-1036 (D.C. Cir. Jan. 16, 1997) (complaint and petition for declaratory judgment).

gress and the President exceeded the authority granted to them respectively by Article I and Article II of the Constitution, by unlawfully ceding or otherwise abdicating or delegating to the binational panels the judicial powers encompassed within the sovereignty of the United States.

The plaintiff alleges further that the agreements violate Article III, Section 1 of the Constitution, which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[40]

and Article III, Section 2 of the Constitution, which provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . .[41]

The plaintiff goes on to complain of deprivation of due process and equal protection of the laws, violation of the "Appointments Clause" as set forth in Article II, Section 2, Clause 2 of the U.S. Constitution, and violation of separation of powers by impermissibly diminishing and rebalancing the constitutional authority of the Legislative, Executive, and Judicial Branches of the government.

I note that the Court of Appeals for the District of Columbia Circuit recently denied the Government's motion to dismiss the case on the basis of lack of standing, and it appears the case will go forward with oral argument, which is scheduled to take place in October.[42] It is my understanding that Canada sought to intervene in the suit,[43] and Mexico made application to appear as an *amicus*. I do not choose to give an opinion on the constitutionality of the binational panels or the Extraordinary Challenge Committees' procedures. It is obvious, nevertheless, that this challenge will create uncertainty, as does any lawsuit, until the issues it presents are ultimately resolved.

Under NAFTA, from January 1994 to December 1996, parties requested panel review to resolve twenty-four antidumping

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40. U.S. CONST. art. III, § 1.

41. *Id.*, § 2.

42. *Washington Report: Behind the Chile-Canada Deal*, JOURNAL OF COMMERCE, Apr. 7, 1997, at 6A.

43. *Id.*

or countervailing duty disputes.[44] Some matters were resolved prior to full panel review. Others resulted in the issuance of opinions on the merits. While I have not had occasion to review the various determinations, I note that there has already been a complaint in one dissenting panel opinion that the majority applied an improper standard of review.[45] This situation suggests that the concerns expressed in Judge Wilkey's dissenting opinion continue to be a problem under NAFTA.

While Chapter 19 of NAFTA contains provisions apparently designed to improve the functioning of the binational panel dispute resolution process, some may find the changes are simply inadequate to repair what may be perceived as a flawed system. Under the binational panel system, U.S. citizens effectively have no choice but to take a binational panel route where panelists decide issues as to the application of U.S. domestic law, and even the U.S. Constitution as it affects U.S. citizens. The Presidential Executive Orders implementing CFTA and NAFTA accept in advance all decisions of binational panels and Extraordinary Challenge Committees.[46] Chapter 19 expressly prohibits any Party to the agreement from establishing legislatively a procedure to challenge panel or ECC determinations in their respective domestic court systems.[47]

Was there, as the Canadian lawyers Gastle and Castel indicated, a fundamental Canadian objective to eliminate existing U.S. antidumping and countervailing laws? If so, and assuming that the United States wished to eliminate those laws, presumably Congress could have passed laws to implement that intent. Instead, a binational panel system was created that has demonstrated an ability to infringe upon the legitimate rights of citizens of the United States. If panelists in applicable cases fail to apply the United States' standard of review, or fail to apply U.S. domestic law as U.S. courts would apply such law, and ECC refuse to intervene, serious questions under the U.S. Constitution

44. *See* David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 175 (1997).

45. *See id.* at 178-79.

46. *See* Exec. Order No. 12,889, 3 C.F.R. 708 (1994), *reprinted in* 19 U.S.C. § 3311 (1994) (implementing North American Free Trade Agreement Implementation Act); Exec. Order No. 12,662, 3 C.F.R. 624 (1988), *reprinted in* 19 U.S.C. § 2112 note (1994) (implementing Canada-United States Free-Trade Agreement Implementation Act of 1988).

47. *See* NAFTA, *supra* note 3, art. 1904.11.

concerning due process and equal protection of the laws will persist. Where standing U.S. Presidential Executive Orders approve the decisions of binational panels ECCs before those decisions have been rendered, there is sure to be complaint.

Ironically, the Chapter 19 panel system may tend to impede the economic goals the Parties have so diligently sought, by injecting confusion in the marketplace. As Judge Wilkey noted, "[t]he system runs the risk not only of producing egregiously erroneous results . . . but also creating a body of law . . . which will be divergent from United States law applied to countries not members of NAFTA."[48] Apparently our current NAFTA partners have already decided that Chapter 19 is not indispensable. It is my understanding that Mexico omitted Chapter 19, as incorporated in NAFTA, from trade agreements with other Latin American countries. Canada and Chile omitted Chapter 19 from the trade agreement they signed late last year, which some believe foreshadows an expansion of NAFTA.[49] Canada and Chile agreed to phase out antidumping, but not countervailing duty policies for the purposes of their bilateral agreement.[50]

Recent developments appear to indicate that the United States' participation in NAFTA will come under increasingly sharp scrutiny. A bill with bipartisan support was recently introduced in the U.S. House of Representatives to establish benchmarks to evaluate NAFTA's impact on various sectors of the U.S. economy. The bill would prohibit NAFTA expansion unless certain targets are met, and also includes provisions for the U.S. withdrawal from NAFTA as a last resort.[51] Additionally, with the United States' 1996 trade deficit with Mexico and Canada increasing to US$16.3 billion and US$22.8 billion, respectively, NAFTA will certainly receive Congressional scrutiny.

The United States clearly wants to enjoy the fruits of a free trade area through the reduction and elimination of barriers to trade in goods and services and investment. Perhaps, however,

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48. *Softwood Lumber III*, *supra* note 32, at 57.

49. *See Eggleton Announces Bilateral Free Trade Deal Between Canada, Chile*, INSIDE U.S. TRADE, Nov. 15, 1996, at 1, 32.

50. *See id.*

51. *See, e.g.*, *Bipartisan Coalition Introduces Bill to Measure NAFTA's Performance*, 14 INT'L TRADE REP. (BNA) 482 (Mar. 12, 1997); Peter Morton, *Clinton Fights Free Trade Foes: Disgruntled Lawmakers Attempt to Scuttle Expansion of NAFTA*, FIN. POST, Mar. 6, 1997, at 5.

the United States should be chary to expand the binational review panel system in future trade agreements, particularly with the potential for negotiations on Chile's accession to NAFTA and the creation of a Free Trade Area of the Americas on the horizon. It would seem keeping Chapter 19, even if it does pass U.S. Constitutional muster, will perforce add more confusion as new parties are added; that result can be in the interest of no one.