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Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?

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EXPANDING THE NAFTA CHAPTER 19 DISPUTE SETTLEMENT SYSTEM: A WAY TO DECLAW TRADE REMEDY LAWS IN A FREE TRADE AREA OF THE AMERICAS?

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ABSTRACT

Chapter 19 of the NAFTA transfers judicial review of U.S., Canadian, and Mexican government investigations under the controversial anti-dumping and countervailing duty (AD/CVD) laws from national courts to binational panels of private international law experts. The system stands as a unique surrender of judicial sovereignty to an international body, a hybrid of national courts and international dispute settlement with as yet no parallel in the world of international trade or other international law regimes. Binational panel decisions have been controversial because agencies chafe at their intimate examination of agency findings and supporting evidence. Panels also are viewed as substantially more likely to overturn agency conclusions than national courts. Given the record of chapter 19 NAFTA panels, the author examines whether the system created to fill a unique need among the NAFTA parties may have broader utility, albeit one perhaps less true to its original purpose.

We will recall that U.S. recalcitrance on proposed changes to its AD/CVD laws (and its agricultural subsidies) were the principal reasons that Brazil forced Free Trade Area of the Americas (FTAA) talks onto the back burner to await the Doha Round results on these issues. The United States is unlikely to condone major changes to the WTO Anti-Dumping and Subsidies Agreements, which will become the final sticking point for reaching agreement after members resolve the agriculture issues now blocking conclusion of the Doha Round of multilateral trade negotiations. Thus, trade remedies will again surface as major issues once FTAA talks resume. Studies indicate that binational panels reverse agency decisions at a greater rate than national courts and that existence of the system has reduced the rate of filing of industry requests for AD/CVD investigations. Rather than finding an elusive set of substantive revisions to these laws, might changing the method of review of agency determinations furnish a missing piece in the

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puzzle of FTAA negotiations? Although Brazil's (and other FTAA countries') officials may at first glance see nothing in a Chapter 19 process that fails to address their substantive AD/CVD conflicts with the United States as to orange juice, steel, and other Brazilian exports, further reflection may reveal that Chapter 19 has demonstrated yet again what good lawyers have always known, that procedure can become substance in the twinkle of an eye. In short, more than one way exists to reduce the effect of U.S. AD/CVD investigations. Improvements would have to be made, including introduction of an automatic and effective right of appeal whose absence arguably undercuts the credibility of the process by awarding enormous power to panels.

Adoption of a system such as NAFTA's chapter 19 on a 34-nation basis not only may ameliorate long-intractable conflicts over trade remedy laws, implementation of such a system will have substantial positive effects for civil society in general. Dispute settlement systems promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process. They improve governmental accountability on several levels. By improving participation of all levels of society in their governance, international trade dispute settlement systems strongly promote the rule of law.

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I. INTRODUCTION

MANY commentators have analyzed the innovative approach designed by Canada and the United States in their 1988 free trade pact for review of anti-dumping and countervailing duty determinations, improved in 1994 when Mexico joined in the creation of the North American Free Trade Agreement.[2] NAFTA in fact contains a different dispute resolution structure for virtually every kind of commercial conflict.

Chapter 11 permits private investors to take the NAFTA Party hosting its investment before an arbitral tribunal for issuance of a binding award if the host has failed to provide fair and equitable treatment or has taken regulatory measures "tantamount" to expropriation of its reasonable investor expectations.[3] The financial services chapter interposes additional procedures for investor disputes that involve financial services, including mandatory referral to a committee of the Parties' financial ministers for a ruling on the validity of financial policy defenses.[4] Side agreements addressing the intersection of NAFTA's trade provisions with the rights of workers and with efforts of the Parties to protect the environment contain dispute resolution systems special to these subjects.[5] These systems have become ever-strengthening models for ameliorating trade's effects on these important policies in later U.S. free trade agreements with Chile, Peru, Colombia, the Central American Common Market, and the Dominican Republic.

Chapter 20 provides a general dispute settlement scheme for controversies not addressed by these special procedures. Parties may use Chapter 20 for interpretation, application, or breach of the Agreement, although they have invoked its procedures only three times in the 12 years of NAFTA's operation.[6] Parties initiated general dispute settle-

2. *See, e.g.*, Stephen J. Powell & Mark A. Barnett, *The Role of United States Trade Laws in Resolving the Florida-Mexico Tomato Conflict*, 11 FLA. L. REV. 319, 355 (1997), and Edward D. Re, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law*, 40 ST. LOUIS U. L.J. 1091 (1996); and David A.Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297, 298 (1998).
3. Henri Alvarez, *Guided by an Invisible Hand: Public Policy under Chapter 11 of the North American Free Trade Agreement* 21 (*Guiado por una Mano Invisible: El Orden Publico al Amparo del Capitulo 11 del Tratado de Libre Comercio de América del Norte (TLCAN)*, Revista Peruana de Arbitraje No 1 (2005).
4. NAFTA arts. 1414 & 1415.
5. Chapter 11 has created substantial controversy regarding the potentially conflicting policies of protecting foreign investment and protecting the environment. *See, e.g.*, Ethyl Corp. v. Canada, UNCITRAL Jun. 24, 1998, *available at* http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf and Metalclad Corp. v. United Mexican States, ICSID Add'l Fac. No. Arb(AF)/97/1, Sept 2, 2000, *available at* http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf (both visited Aug. 12, 2008).
6. Marc Sheer, *Chapter 20 Dispute Resolution under NAFTA: Fact or Fiction?*, 35 GEO. WASH. INT'L L. REV. 1001 (2003).

ment about as often in the pre-NAFTA days of the U.S.-Canada Free Trade Agreement (USCFTA). Each of these systems deserves fuller exploration, but the specific device this essay treats is NAFTA's means for resolving anti-dumping and countervailing duty disputes. After briefly describing Chapter 19's procedures, the essay will discuss the chapter's effects on the rates of initiation of new AD/CVD investigations and of review of the resulting agency determinations, problems with the system that deserve further consideration by the Parties, and the viability of some version of Chapter 19 as a model for a Hemispheric trade agreement.

II. UNIQUE FEATURES OF NAFTA CHAPTER 19

A. ORIGINS

Other negotiators of Chapter 19 have confirmed the useful background note that the system arose from Canada's desire to eliminate application to its imports of U.S. trade remedy law, that is, anti-dumping and countervailing duty determinations.[7] To this end, negotiators inserted a special "expiration" date for Chapter 19 of five years after its entry into force within which time a working group would "seek to develop a substitute system of rules dealing with unfair pricing and government subsidization" and report to the parties as to its efforts.[8] If Canadian negotiators genuinely expected that a special trade remedy regime for their exports would result from this language, any such hope soon was dashed. The working group issued no report and, in fact, held no substantive meeting during those five years. At the end, NAFTA's special procedures for review of AD/CVD determinations replaced those of the USCFTA.[9] The working group's deliberations, such as they were, terminated in favor of a general consultations provision without even the encouragement of a hortatory expiration period.[10]

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7. "Trade remedy," "trade defense," and "contingency protection" laws, as they are called by everyone but the U. S. Government, also refer to escape clause actions under the WTO Safeguards Agreement or regional trade agreements. NAFTA Chapter 8, not Chapter 19, addresses safeguards actions. Anti-dumping and countervailing duty (anti-subsidy) laws are controversial exceptions to the WTO's fundamental principle of non-discrimination in government measures affecting trade. Although the WTO Agreements that impose disciplines on imposition of extra tariffs for the "unfair" trade actions of dumping (the sale of goods for export at a price lower than the price for like goods in the home market, or below the cost of producing the goods) and government subsidies that target certain industries are detailed, sufficient discretion remains to inspire endless litigation in national courts and in NAFTA and WTO dispute settlement. Hundreds of books and article explain these laws. A useful new text is Simon Lester & Bryan Mercurio, WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY chs. 11-12 (Hart 2008).

8. USCFTA, arts. 1906 & 1907.

9. Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution* 15 (C.D. Howe Institute No. 168 Sept. 2002) (on file with author).

10. *See* NAFTA art. 1907.

B. Replacement of National Courts, But Not National Law

Thus did Chapter 19 become a permanent fixture on the landscape of Northern Hemispheric trade relations. Indeed, it is a unique surrender of judicial sovereignty to an international body, a hybrid of national courts and international dispute settlement with as yet no parallel in the world of international trade or other international law regimes.[11] Chapter 19's uniqueness stems both: from its replacement of national courts in the review of AD/CVD determinations of the Parties, and its retention of national law as the basis for review of such determinations. On one hand, private companies with standing to challenge an AD/CVD determination in the national courts may entirely bypass judicial review by selecting Chapter 19's binational panel system.[12] In fact, either side in the agency determination—domestic industry or foreign producers and importers—is empowered to divest national courts of jurisdiction. Either as "winners" or "losers" in the agency proceedings, Canadian producers, for example, can force binational panel review whether they find themselves as exporters in a U.S. determination or the domestic industry in a Canadian proceeding.

On the other hand, although election of Chapter 19 triggers formation of an international dispute settlement panel, the panel does not apply the substantive AD/CVD law created by the international treaty provisions of Chapter 19, because the treaty creates no such law.[13] Chapter 19 expressly eschews any hand in changing the laws of the Parties governing investigation and issuance of AD/CVD determinations.[14] Panel review extends only to the question "whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party."[15] The Panel explicitly stands in the shoes of the national courts of the importing Party, even to the point of applying the same standard of review of the agency's AD/CVD determination that such courts would have applied to the case.[16]

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11. *See* Macrory, *supra* note 9, at 16.
12. *Id.*
13. To protect against a challenge that foreign panelists not appointed by the President would be exercising "significant authority pursuant to the laws of the United States," *Buckley v. Valeo,* 424 U.S. 1, 126, 140-141 (1976), in violation of the Appointments Clause of the U.S. Constitution, art. II, sec. 2, cl. 2, the NAFTA incorporates national AD/CVD laws of the Parties, present and future. The U.S. position in the case of such a challenge would be that binational panels are implementing international law. *See* art. 1904.2 and Statement of Administrative Action, H.R. 3450, 103rd Cong., Sec. 101, (1993).
14. Parties reserve the right to retain their existing AD/CVD laws or to change them, subject to a notice process if the revisions are to apply to investigations involving goods of other Parties, art. 1902. The Parties have not always observed this requirement, resulting in one case in the embarrassing need to enact special legislation to apply an amendment to a NAFTA Party and, in another, in one Party's ignoring an especially egregious revision that excludes sunset reviews from binational panel challenge. *See* NAFTA, *In the Matter of Caustic Soda from Mexico,* NAFTA *Secretariat No.* MEX-USA-2003-1904-1.
15. NAFTA art. 1904.2; *see also,* NAFTA art. 1902.
16. NAFTA art. 1904.3 and Annex 1911.

C. Panel Decisions Directly Binding on Agencies

Like national courts and, unlike other international dispute settlement systems, decisions of Chapter 19 panels are directly binding on the national agencies that issued the determination under review.[17] There is no intermediate step in which the Government of the Party whose determination is found wanting must approve the binational panel decision before it may be implemented, as is the case, for example, in WTO dispute settlement[18] or in the general dispute settlement procedures of NAFTA Chapter 20.

To ensure the separation of binational panel decisions from national judicial jurisdiction, parties to Chapter 19 dispute panel decisions may not appeal to the national courts, nor may national legislatures enact legislation to overturn those decisions.[19] The only other international dispute settlement system to approach this degree of surrender of final judicial sovereignty is the transnational Court of Justice of the Andean Community.[20] Even that Court's decisions are obligatory for the Member Countries only after approval by the Commission of the Andean Community or its Council of Ministers of Foreign Relations.[21] Certainly, the WTO procedure carries no such automatic feature, as shown by delay and, in some cases, defiance by its largest Members.[22]

III. CHAPTER 19'S EFFECT ON FILING WITHIN NAFTA OF AD/CVD CASES

With this background, the issue we consider first is whether the dispute settlement process under Chapter 19 has affected the rate of initiation by NAFTA Parties of antidumping and countervailing duty cases against imports from other NAFTA member nations. Some researchers have found that Chapter19 has significantly affected U.S. antidumping and countervailing duty activity among its NAFTA partners.[23] One study suggests that binational panel review may reduce the likelihood that a panel will uphold an agency finding of material injury and thus indirectly discourages filing of AD/CVD petitions. This study finds data supporting the view that the early Chapter 19 under USCFTA had an impact on AD

17. NAFTA art. 1904.9.
18. David Palmeter & Petros C. Mavroidis, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION 236 (Cambridge 2004).
19. NAFTA arts. 1904.11 & 1903.1(b).
20. Treaty Creating the Court of Justice of the Andean Community, as amended by the Cochabamba Protocol, entered into force, 25 Aug 1999, art. 2.
21. *Id.*
22. For example, the European Union has not even pretended to comply with WTO dispute settlement rulings that its ban of beef from cattle raised with growth hormones violates the WTO Agreement on Application of Sanitary and Phytosanitary Measures. *See* EC-Measures Concerning Meat and Meat Products (Hormones) WT/DS26/R/USA, WT/DS48/R/CAN (Aug. 18, 1977). *See* also Chris Wold, Sanford Gaines & Greg Block, TRADE AND THE ENVIRONMENT: LAW AND POLICY 467 (Carolina Academic Press 2005).
23. *See* Macrory, *supra* note 9, at 22.

filings.[24] Specifically, from 1980 to 1988 U.S. industries filed an average of 2.8 AD cases per year. That figure dropped to 1.6 cases per year after from 1989 to 1997 under the early Chapter 19.[25] The reduction of filings since the NAFTA took effect may relate to the binational panel review system's faster review—at least in the early days of the NAFTA. This swiftness may have decreased any advantage to a domestic petitioner of filing a case in order to chill trade.[26]

Further, binational panels have tended to be less deferential to U.S. government agencies than the federal courts had been. Many studies have found that binational panels overturn U.S. agency rulings substantially more often than federal courts.[27] In addition, the panels apply a high standard of scrutiny to agency decisions favorable to U.S. petitioners seeking trade relief, while according almost unchecked deference to agency decisions adverse to U.S. petitioners.[28] In contrast, binational panels have shown great deference to Canadian agency determinations, whichever side prevails,[29] admittedly no doubt in part because of Canada's less onerous standard of review. This disparity may be a reason that U.S. industries over time have sought fewer AD/CVD trade remedies against Canadian imports.[30]

Other researchers have found that Chapter 19 has had little effect on antidumping and countervailing duty activity. A study based on data from 1989 to 2000 finds little evidence that NAFTA Chapter 19 dispute settlement activity affected the frequency of U.S. AD/CVD filings or affirmative determinations against Canada or Mexico.[31] However, this study does find evidence that cumulative remands by Chapter 19 dispute panels to review U.S. decisions against Canadian imports have led to

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24. *Id.*
25. Kent Jones, *Does NAFTA Chapter 19 Make a Difference? Dispute Settlement and the Incentive Structure of U.S./Canada Unfair Trade Petitions,* 18 CONTEMP. ECON. POL'Y 145, 152 & 158 (2000).
26. *Id.* at 150. In my experience, U.S. petitioners, while not above intimidation tactics altogether (such as the occasional press release grumbling about below-cost pricing by import rivals), are unlikely actually to file a petition seeking trade remedies solely to chill trade. Not only is gathering the required data expensive, but they are likely to find themselves the subject of a Sherman or Clayton Act antitrust investigation by the Department of Justice. Under the *Noerr-Pennington* doctrine, petitioning one's government for relief is an exception to antitrust prohibitions of conspiracies and combinations to restrain trade, but the exception does not apply in the case of a "sham petition." *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961).
27. Juscelino F. Colares, *Alternative Methods of Appellate Review in Trade Remedy Cases: Examining Results of U.S. Judicial and NAFTA Binational Review of U.S. Agency Decisions from 1989 to 2005* 17 (Syracuse Univ. College of Law, Aug. 18, 2006), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=920144) (visited Aug. 12, 2008).
28. Juscelino F. Colares & John W. Bohn, *NAFTA's Double Standards of Review*, 42 WAKE FOREST L. REV. 199, 202 (2007).
29. *Id.* at 202.
30. Colares & Bohn, *supra* note 28, at 203.
31. Bruce A. Blonigen, *The Effects of NAFTA on Antidumping and Countervailing Duty Activity,* 19 WORLD BANK ECON. REV. 407, 422 (2005).

fewer new affirmative AD and CVD decisions.[32] Further, the study's econometric analysis notes that both Canada and Mexico experience about six fewer U.S. trade remedy cases each year than the rest of the world.[33]

The data displayed in Figure 1 shows that AD/CVD initiations between NAFTA Parties have decreased from the commencement of NAFTA until the present day. Since 1994, the year NAFTA became effective; there has been a large reduction in all AD/CVD initiations brought by one NAFTA Party against another. For instance, Canadian industries initiated 51 AD/CVD investigations against their U.S. and Mexican competitors from 1985 to 1994, but only initiated 18 from 1995 to 2006. Further, Mexican industries initiated approximately 65 AD/CVD investigations against companies of its NAFTA partners from 1985 to 1994, but only initiated 21 investigations from 1995 to 2006. Similarly, U.S. petitions resulted in 72 AD/CVD investigations against Canadian and Mexican sectors from 1985 to 1994, but only 43 investigations from 1995 to 2006.

Furthermore, the data in Figure 2 reflect a reduction in the number of cases brought to review for the agency determinations under NAFTA Chapter 19. During the time of the USCFTA, Canadian industries brought nineteen challenges against AD/CVD determinations issued by U.S. authorities, and U.S. industries filed thirty complaints against Canadian agency determinations. These numbers become seventeen and nineteen respectively within the NAFTA's first seven years. In addition, this reduction is especially apparent in the last three years, in which U.S industries filed thirteen petitions against merchandise from NAFTA countries and experienced five filings against U.S. imports. In contrast, U.S. industries in the three years from 1998 to 2000 filed twenty-three cases against goods from its NAFTA partners and had eleven cases filed against their exports. In summary, NAFTA Chapter 19, to a measurable degree, has reduced the number of investigations of AD/CVD, initiated by NAFTA members industries, involving NAFTA merchandise.

Next, we compare the data in Figure 1 with those in Figure 2 to discern whether Chapter 19 review has reduced AD/CVD investigation request by NAFTA members industries against one another. The United States, Canada, and Mexico initiated 115 AD/CVD investigations from 1989 to 1993, of products from one of the other countries. During this same time, there were 49 Chapter 19 cases brought under USCFTA (Mexico of course had not yet joined its North American neighbors in the FTA). From 1994 to 2000, NAFTA members initiated fifty-six AD/CVD investigations against each other's goods and brought sixty-nine Chapter 19 cases. Lastly, from 2000 to 2006, NAFTA members initiated thirty-eight AD/CVD investigations of one of the other NAFTA Party's goods and sought forty-five reviews under Chapter 19. The initiation of AD/CVD cases by NAFTA members against one another has decreased over time.

32. *Id.*
33. *See* Blonigen, *supra* note 31, at 416.

FIGURE 1

	Antidumping and Countervailing Duty Initiations					
Initiation Date	Canada against US	Canada against Mexico	Mexico against US	Mexico against Canada	US against Canada	US against Mexico
1985	7	0	N/A	N/A	8	1
1986	7	0	N/A	N/A	4	7
1987	3	1	10	0	2	1
1988	6	0	4	0	5	0
1989	2	1	2	0	8	2
1990	3	0	8	0	0	1
1991	4	0	8	0	7	2
1992	10	0	6	0	7	9
1993	5	0	17	4	1	3
'85-'93 TOTAL	47	2	55	4	42	26
1994	2	0	5	1	0	4
1995	4	0	2	0	0	1
1996	2	0	1	0	1	1
1997	1	0	3	0	3	0
1998	0	0	4	0	2	2
1999	2	0	2	0	4	5
2000	2	0	1	0	1	0
'94-'00 TOTAL	13	0	18	1	11	13
2001	1	0	2	0	6	3
2002	0	0	0	0	5	0
2003	1	1	5	0	0	2
2004	1	0	1	0	3	2
2005	1	0	N/A	N/A	1	0
2006	2	0	N/A	N/A	0	1
"01-'06 TOTAL	6	1	8	0	15	8
TOTAL	**66**	**3**	**81**	**5**	**68**	**47**

Sources:

(1) Canadian Services Border Agency, *Historical Listing*, *at* http://www.cbsa-asfc.gc.ca/sima-lmsi/historic-eng.html (visited Aug. 12, 2008).

(2) Chad P. Bown, *Global Antidumping Database*, Version 1.0 (Working paper No. 3737, The World Bank 2005), *available at* http://econ.worldbank.org/external/default/main?pagePK=64165259&piPK=64165421&theSitePK=469372&menuPK=64166093&entityID=000016406_20050930115032 (visited Aug. 12, 2008).

(3) U.S. International Trade Commission, Office of Investigations, *Import Injury Case Statistics (FY 1980-2006)*, *at* http://www.usitc.gov/trade_remedy/Report-10-06-PUB.pdf (Oct. 2006) (visited Aug. 12, 2008).

FIGURE 2

	NAFTA Chapter 19 Cases Reviewing Agency Determinations					
Date Filed	Canada against US	Canada against Mexico	Mexico against US	Mexico against Canada	US against Canada	US against Mexico
1989	1	N/A	N/A	N/A	11	N/A
1990	1	N/A	N/A	N/A	3	N/A
1991	2	N/A	N/A	N/A	5	N/A
1992	2	N/A	N/A	N/A	6	N/A
1993	13	N/A	N/A	N/A	5	N/A
'89-'93 TOTAL	19	N/A	N/A	N/A	30	N/A
1994	4	0	3	0	1	1
1995	4	0	1	0	1	4
1996	1	0	0	3	0	1
1997	1	1	1	0	3	5
1998	3	0	1	0	2	3
1999	0	1	0	0	5	2
2000	4	0	2	0	7	4
'94-00 TOTAL	17	2	8	3	19	20
2001	0	0	0	0	1	5
2002	0	0	1	0	7	3
2003	0	0	2	0	4	2
2004	0	1	0	0	2	1
2005	0	0	1	0	4	2
2006	1	0	2	0	4	2
2007	0	1	0	0	0	1
'01-'07 TOTAL	1	2	6	0	22	16
TOTAL	**37**	**4**	**14**	**3**	**71**	**36**

Sources:
(1) NAFTA Secretariat, *Status Report of Panel Proceedings, Completed NAFTA Panel Reviews, available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=10 (accessed June 11, 2007).
(2) NAFTA Secretariat, *Status Report of Panel Proceedings, Active NAFTA Panel Reviews, available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=11 (accessed June 11, 2007).

IV. CHAPTER 19 DEFECTS

A. Inability to Appeal Panel Decisions

Chapter 19 has a number of serious defects that negotiators must address if we are seriously to consider its expansion. Most commentators identify the lack of true appellate review as a serious defect in the system.[34] Initial panels exercise overwhelming power as a result of this omission and, although their decisions are not, as with any international dispute settlement system, binding on any issues or parties not before them, the amounts at stake even in a single case can be quite large. Panels are composed of *ad hoc* individuals who, by design, have limited panel experience and it is common that a panelist is not expert in the complex AD/CVD laws and regulations[35]. This possibility is enhanced

34. David A. Gantz, *The United States and NAFTA Dispute Settlement: Ambivalence, Frustration, and Occasional Defiance*, Univ. of Ariz. Leg. Studies Discussion Paper No. 06-26, at 19 (on file with author).
35. *Id.* at 18.

when two or three of the panelists are reviewing the result of a legal system unfamiliar to them (a U.S. panelist reviewing a Mexican determination, for example).[36] Because Chapter 19 provides no corrective mechanism and general guidance from an appellate system, the results can be devastating to the parties. Similar difficulty with the investor-state dispute settlement system in NAFTA Chapter 11 has led the Parties to the Central America-Dominican Republic-U.S. Free Trade Agreement to anticipate creation of an appellate review system.[37]

Since negotiation of the NAFTA, the United States has seen in the WTO the value of a second chance when the initial panel simply has misunderstood the issues or stubbornly stuck to a position that bodes ill for future international trade relations.[38] Even with a steady stream of criticism of the reasoning of the WTO Appellate Body, the U. S. Government has begun to anticipate creation of appellate review systems for trade and investment disputes. Presented, in other words, with the necessity of providing U.S. transnational investors with the protection of binding arbitral tribunals, the U.S. Trade Representative recognizes the legally questionable, inconsistent record that has characterized Chapter 11 arbitration. A permanent appeal mechanism will smooth that record out quickly.

B. Unconscionable Delays

Cases involving the United States and Canada, for the most part, have escaped the interminable delays that have come to characterize U.S.-Mexico reviews of AD/CVD determinations.[39] Despite a panel deadline of 315 days, inserted into the treaty itself for maximum effect[40], delays literally of years in formation of requested panels have become the norm. Some of the delays are the result of the lack of available panelists in the Mexican legal system[41], which has come to the AD/CVD laws substantially later than its NAFTA partners.[42]

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36. Even though it is true that a panelist may hire a law clerk with experience in both civilian and common law systems, few lawyers truly understand both systems. *See* Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage over the Civil Law*, 22 Temple Int'l & Comp. L.J. 87 (1998).
37. Central America-Dominican Republic-U. S. Free Trade Agreement, art. 10.20.10, Aug. 5, 2004, *available at* U.S. Trade Rep. http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html (accessed Aug. 12, 2008).
38. In addition, an appeal under Chapter 19 is limited to the question of whether the agency decision complies with the applicable domestic law; while a WTO appeal involves the question of whether a domestic law meets WTO requirements. *See, e.g.*, U.S.–Canadian Softwood Lumber, *supra* note 58).
39. In the Fructose Case (MEX-USA-98-1904-01), the U.S. industry's request for a panel made a month after Mexico acted, in February 1998, was delayed for a variety of unusual trade reasons, with the result that the NAFTA panel was not even formed until August 2000, several months after the first WTO panel to address the issue had already issued its report finding against Mexico.
40. NAFTA art. 1904.14.
41. *See* Gantz, *supra* note 2.
42. Another difficult issue is picking panelists who do not have an issue conflict. Most potential panelists are practicing trade lawyers, and they may not of course serve if they have other cases pending before the agencies with the same or similar issues.

By far the largest cause of the delays is one Party or the other taking the Chapter 19 process hostage to trade demands it makes of the other Party that are unrelated to the issues involved in the NAFTA review. Without betraying confidences, I can only note that this kind of folly has no place whatever in a rule-based dispute settlement system. The Governments of Mexico and the United States have not loudly condemned the practice, but have instead condemned the merits of the other Party's substantive position. This failure to vilify the practice of linking Chapter 19 review to other trade conflicts bespeaks a lack of respect for the process these Governments created and a cynical view in general of the nature of trade dispute settlement. In fact, one can accurately characterize this posture as a return to the pre-WTO days when dispute settlement was about which GATT Party had the most trade muscle, not which Party had the superior legal argument.[43]

The system needs to be fixed by putting time limits on formation of a panel by the Parties, with a default of appointment of panelists from the Roster at random by the Secretariat. This approach is similar to the system used by the WTO.[44]

C. Has Chapter 19 Created Its Own Body of AD/CVD Law?

Former Chief Judge Edward Re of the U.S. Court of International Trade (CIT), whose Court lost jurisdiction over NAFTA Party AD/CVD challenges through Chapter 19, observed that, "[a]lthough not bound to follow panel decisions as precedent, national courts are encouraged by national implementing legislation to view panel decisions as persuasive authority".[45] Perhaps the reality someday will reach that objective. To this date, at least, Judges do not cite Chapter 19 panel decisions in AD/CVD cases. Panels have reached the position, left undecided in implementing legislation, that they occupy the same litigation review level as the CIT and thus are not bound by its prior reasoning on point. As to the federal appellate level, panels uniformly concede the obligation to follow the law of the federal circuit court to which interested parties may appeal CIT (but not NAFTA panel) decisions, the U.S. Court of Appeals for the Federal Circuit.

My own view is that the system has not fashioned a separate body of substantive AD/CVD law, but instead that Chapter 19 panels have created a different standard of review, at least for review of U.S. agency action.[46] U.S. agency decisions under the AD/CVD laws are subject to

43. Steven Suranovic, *A Three-Year Review of the WTO*, Elliott School of International Affairs MA Policy Capstone Exercise *at* http://internationalecon.com/WTO/wto-toc.php (visited July 12, 2008).
44. WTO Dispute Settlement Procedures art. 8. *See* World Trade Organization, THE WTO DISPUTE SETTLEMENT PROCEDURES: A COLLECTION OF THE RELEVANT LEGAL TEXTS, at 8-9 (Cambridge 2001).
45. Edward D. Re, *supra* note 2, at 1092.
46. In the Magnesium case (USA-CDA-00-1904-06), the Panel followed the two-stage approach adopted by the Supreme Court in the Chevron case, 467 U.S. 873 (1984),

the "substantial evidence" standard, that is, judicial reviewers will hold them to be unlawful if "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[47] The substantial evidence standard falls between the most deferential standard in U.S. law (the agency decision will be upheld unless it is "arbitrary or capricious") and the least deferential ("*de novo*" review, where the court examines the evidence anew rather than reviewing the propriety of the agency or lower court findings and conclusions).[48]

We could describe the CIT's application of the substantial evidence standard as the willingness to defer to the agency in close calls. Binational panels in general have applied a *de novo* standard, that is, they have substituted their judgment for that of the agency when the panel would have reached different results as to the facts or law of the case.[49] This is not, of course, the "substantial evidence" standard of review that applies to agency action in U.S. federal courts. Civilian lawyers may not appreciate the importance of this difference, because they do not appear to rely to any significant extent on standards of review. With their greater reliance on a literal interpretation of the text under review, civil law panelists rarely find the need to look to the purpose or intent of the drafters, they analyze the laws in deductive methodology (logical reasoning), and the judicial precedents carry less weight for them than Common Law lawyers.[50]

Nonetheless, the CIT likely would have reached a different result in about one-third of the cases that Court decided prior to the NAFTA if the standard had been the one most Chapter 19 panels are applying *sub rosa* today.[51]

Is there a solution to this defect, if indeed one views it as a defect? We tried to change the mindset of panelists when the NAFTA subsumed the U.S.-Canada Free Trade Agreement by addition of language that encouraged the Parties to choose sitting or retired judges as panelists.[52] The

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requiring that the reviewer evaluate whether the Department's statutory interpretations are "sufficiently reasonable". The Panel held that the agency's antidumping determinations are entitled to judicial deference. *See also* Lawrence L. Herman, *Making NAFTA Better: Comments on the Evolution of Chapter 19*, Center for Trade Policy and Law No 57 (2005), *available at* http://www.carleton.ca/ctpl/pdf/papers/Herman_Making_NAFTA_Better_Mar_2005.pdf (visited July 12, 2008).

47. 19 U.S.C. § 1516(b)(1)(B)(i) (2006).
48. *Id.*
49. NAFTA, *In the Matter of Gray Portland Cement and Clinker from Mexico*, Secretariat File No. ECC-2000-1904-01USA—the U.S. agency argued that the Binational Panel should not conduct a *de novo* review of the evidence. The Extraordinary Challenge Committee disagreed.
50. *See* Cappali, *supra* note 36, at 90.
51. Colares, Juscelino F., *An Empirical Examination of Product and Litigant-Specific Theories for the Divergence between NAFTA Chapter 19 and U.S. Judicial Review*, 2d Ann. Conf. on Empirical Legal Studies Paper, *available at* http://ssrn.com/abstract=997949 (visited July 12, 2008).
52. NAFTA Annex 1901.2.1 ("The roster shall include judges and former judges to the fullest extent practicable.").

rationale was that judges know how to apply standards of review, that is, to be judges.[53] That preference for judges was unrequited. CIT judges in particular were unwilling to moonlight as panelists for a system that threatened to eliminate their day jobs. Even the U.S. Supreme Court was unwilling to encourage federal judges to participate or even clearly to rule that doing so while still sitting would not constitute an activity inconsistent with their U.S. Constitution Article III judicial function. Under these circumstances, the new language lay as a dead letter. A permanent body of panelists would quickly gain the judicial perspective needed properly to apply the treaty's mandated standards of review.

D. Agency Defiance of Panel Decisions

Agencies in all parties over time have found creative ways to avoid the effect of national court decisions. The U.S. Customs and Border Protection Service (Customs Service) may have taken these tactics to the cliff's edge with the policy that federal district court decisions with which it disagrees do not bind the Service. The rationale is that the Customs Service is a national agency that cannot change its policy when only one of the 66 federal district courts interprets a provision. That approach did not have particular success for the Department of Commerce. During my tenure as Chief Counsel at that agency, a CIT Judge became frustrated with having to remand to my clients the same ruling on the same issue in case after case. He ordered me to appear before the Court to inform me that if my agency did not either follow the teachings of his decisions when the same issue arises in future cases, or promptly appeal his rulings, my agency head should pack his toothbrush and be ready for a stay in jail for contempt of court.

Agencies often issue decisions on remand that follow the court's orders, but indicate respectful disagreement with the court's interpretation. In such cases, an appeal of that interpretation normally follows.[54] I have not, however, witnessed the degree of defiance seen with some Chapter 19 remands. In one case, the agency publicly announced that, although it would obey the direction given in the Panel's fifth remand, it had no intention of revoking the order, even though the results of the remand

53. *See*, in the case of the United States, Statement of Administrative Action, The North American Free Trade Agreement Implementation Act, 103d Cong., 1st Sess. 644, House Doc. No. 103-159 (1993) ("There are several advantages to having judges and former judges serve as panelists. For example, the participation of panelists with judicial experience would help to ensure that, in accordance with the requirement of Article 1904, panels review determinations of the administering authorities precisely as would a court of the importing country by applying exclusively that country's AD and CVD law and its standard of review. In addition, the involvement of judges and former judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law."). At least as to the standard of review, these words proved to be wishful thinking.

54. The facts of a particular case may make the case inappropriate for appeal, for example, if the rule preferred by the agency would not have changed the result under the circumstances presented, a situation the CIT Judge to whom I referred earlier well understood.

would be a *de minimis* countervailing duty margin.[55]

Part of the explanation for this level of rancor is the unappealable nature of NAFTA panel decisions. The more direct cause stems from the typical agency view that Chapter 19 panelists are patently unschooled in the work of judging compliance with national law of the agency's work product. The *ad hoc* ("panelist for a day") nature of AD/CVD review sought by negotiators is the culprit here, because a permanent tribunal likely would become in short order beneficiary only of the tension that is typical between agencies and courts, the natural and planned result of the constitutional separation of powers between the executive and the judicial branches that is a foundation of the laws of all three NAFTA Parties.

My friend Charlene Barshefsky[56] stated in a speech shortly before the end of her tenure that trade dispute settlement (she was speaking specifically about the WTO) was not suited for the most important of cases. At the time, I found the comment oddly disrespectful of systems to which her superiors had pledged allegiance through implementing legislation. In addition, the remark hardly could have been consoling to developing nations, because Ambassador Barshefsky had in essence announced that one should not expect Europe and the United States to follow WTO dispute panel decisions in financially massive or otherwise critically important cases. In other words, trade dispute settlement exists primarily to discipline the Third World's violations of the rules.

With the benefit of time and further contemplation, I believe what Ambassador Barshefsky meant was that in cases of truly national importance, neither side can afford to lose ground on major positions, regardless of what a dispute settlement panel decides. This does not condone ignoring panel findings. The thought does lead to an expectation that Members in such circumstances must find politically acceptable paths to implementation of panel findings. This need may translate into substantially longer periods for implementation in order carefully to inure constituents and legislative bodies to the consequences of the necessary changes. The *US—FSC/DSC* export tax subsidy cases are an example involving an exceptionally long period of time in which successively less WTO-inconsistent legislation ultimately led to full U.S. compliance. The European *Bananas* import license regime[57] and its pushing aside of the 1998 *Hormones*[58] result also would fit as examples of the willingness to endure retaliation, at least for a time, because the ruling's consequences take

55. In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination from Canada, File USA-CDA-2002-1904-03, at 8 (17 Mar 2006), *available at* NAFTA Secretariat website, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380#USA-02-1904-03.

56. United States Trade Representative 1997-2001.

57. This regime is a 2-step process toward a tariff-only system as a solution for the international dispute over bananas. *See* Charles E. Hanarahan, *The U.S.-European Banana Dispute*, CRS Report to Congress, December 9, 1999.

58. *Supra* note 22.

time to become acceptable (in the case of *Hormones,* perhaps that time will not come).

The defiance in *Softwood Lumber*[59] is not unrelated to the political reality invoked by Ambassador Barshefsky. The solution for these actions assumes that WTO and NAFTA signatories have ceded judicial sovereignty to dispute settlement panels. In the case of the WTO, despite the never-ending monitoring by the Dispute Settlement Body of cases in which the losing Member has not brought its laws into compliance, regardless of what compensation or retaliation has occurred,[60] the Dispute Settlement Understanding clearly leaves the ultimate decision on compliance to the Member, not to the Dispute Settlement Body, unless Members adopt a binding interpretation of or revision to the WTO Agreement at issue.

As to NAFTA Chapter 19, while it appears that Parties indeed ceded ultimate judicial sovereignty as to AD/CVD determinations involving goods of the Parties to binational panels (except for most interpretations of the Constitutions of the Parties), Parties did not give such panels the equity powers that would be necessary to enforce their own decisions.[61] I would not want to envision the prospect, in any event, of a Chapter 19 Marshals Service taking a Minister of Commerce into custody for her failure to implement a panel ruling. Neither the judicial nor the WTO model seems apt for the Chapter 19 crossbreed of the two systems to prevent agency defiance of panel decisions.[62]

V. EFFECTS OF FTA DISPUTE SETTLEMENT ON CIVIL SOCIETY IN GENERAL

I have written elsewhere[63] that dispute settlement systems in FTAs promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process.

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59. The United States–Canada softwood lumber dispute is one of the most significant and enduring trade disputes in modern history. The dispute has had its biggest effect on British Columbia, the major Canadian exporter of softwood lumber to the United States. Softwood Lumber I (USA-CDA-2002-1904-02), Softwood Lumber II (USA-CDA-2002-1904-03), Softwood Lumber III (USA-CDA-2002-1904-03), Softwood Lumber IV (USA-CDA-2002-1904-03), Softwood Lumber V (USA-CDA-2002-1904-03),

60. WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 21.6, 33 I.L.M. 1144 (1994).

61. *See* Blonigen, *supra* note 31, at 411.

62. Some authors believe that after the lessons learned in cases as "Softwood Lumber", some changes should be made in the NAFTA's chapter 19. For instance, some people believe that establishing a permanent commission, an independent secretariat, or even a permanent NAFTA panel would be a good idea. There are other authors that go beyond and believe that an amendment of art. 1904.8 is necessary, extending to the panel the power not only to remand but also to enforce their own decisions. *See* Hermans, *supra* note 46.

63. Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements,* 17 FLA. J. INT'L L. 59, 63 (2005).

> The fact that decisions made by national authorities affecting importers and investors will often be subject to dispute settlement under an FTA may work a substantial change in the government's decision making process. For example, the responding Government normally will want the dispute settlement panel to have access to the "administrative record" upon which the decision was based in order to show compliance with the treaty provisions the complaining Government has alleged were violated.
>
> The fate of the agency decision will rely on the completeness of this record in setting out the evidence relied upon and its relation to the trade agreement's obligations. When effective dispute settlement is available in a trade agreement, national authorities may have strong incentives to follow a very different decisional process than previously may have been required by domestic law to implement the agreement's obligations.
>
> Creation of an administrative record anticipates, for example, that evidence upon which the decision is based will be explicitly identified and placed in the file of the measure, and mandates in addition that the analysis made by the agency be committed to paper and assigned to the file. It is easily seen that these steps transform the decision process into a rules-based mechanism, rather than one that flows from the opinions of agency officials alone, an approach that inevitably ensures greater openness in the decision process for all affected interests, both foreign and domestic.

The customs procedures of both MERCOSUR and the Andean Pact provide similar encouragement for maintenance of a document retention system by permitting challenge of an origin decision made by another Party. Other examples abound of the benefits of dispute settlement systems to civil society in general, not only to trade interests among the agreement's parties.

In particular, NAFTA Chapter 19 dispute settlement system benefits civil society by facilitating accountability on several levels.

> First, the review mechanism itself represents an accountability-ensuring principle at the highest level, because it holds governments directly accountable to dispute settlement panels. Chapter 19 also mandates creation of an administrative record, which directly reflects the importance of documentation and promotes accountability. And by requiring that decisions of dispute panels be based on the administrative record, chapter 19 exemplifies the necessity for objectivity and accountability. Although there is no right to appeal the ruling of a binational panel, another layer of accountability is provided. If actions of a party prevent a panel decision from being implemented, a special committee may be formed to safeguard the integrity of the panel process by allowing the aggrieved party to suspend operation of the binational panel system as to the offending party. NAFTA chapter 19 promotes accountability through an additional review mechanism, one that allows parties to test through dispute settlement whether an amendment to the anti-dumping or countervailing

duty laws is consistent with WTO rules governing this trade field.[64]

In addition, NAFTA Chapter 19's dispute settlement system has benefited civil society by increasing transparency in Mexico's AD/CVD practices.[65] In effect, Mexico improved its standards of transparency to the level of its NAFTA partners in three major ways. First, the dispute settlement system has allowed interested parties full participation in the administrative process, including by requiring explicit timetables by Mexico for its actions; requiring that the administering authority, the Secretariat of Trade and Industrial Development (SECOFI), maintain a complete administrative record; allowing counsel to have access to everything in the record, including business proprietary information; and giving interested parties the opportunity to present facts and arguments in support of their positions before decisions are made.[66] Second, the dispute settlement system has required Mexico to give a full explanation of its decisions, including by requiring disclosure meetings with interested parties within seven days after preliminary and final determinations; detailed statements of reasons and legal basis for final determinations adequate to permit an informed decision whether to sue; and timely preparation of summaries of ex parte meetings and of recommendations of advisory bodies, such as the Committee on Foreign Trade Tariffs and Controls (CACCE).[67] Finally, Chapter 19 creates full judicial review of all administrative determinations.[68] Therefore, NAFTA Chapter 19's dispute settlement system has made Mexico's AD/CVD practices more transparent.

In general, the NAFTA Chapter 19 dispute settlement system has benefited civil society by promoting accountability and transparency toward more effective participation of the people in their own governance.

VI. VIABILITY OF CHAPTER 19 AS MODEL FOR FUTURE TRADE AGREEMENTS

A. Do Anti-Dumping Laws Have Any Place in an FTA?

Perhaps the first question ought to be whether AD/CVD laws themselves, or at least the more-often maligned anti-dumping laws—quite apart from any system for their review—can be justified for use within a free trade agreement.[69] Leaving aside the question of their economic jus-

64. *Id.* at 83.
65. Stephen J. Powell, *Increased Transparency and Due Process in Mexico's Antidumping and Countervailing Duty Practices Under NAFTA*, 653 Practising Law Institute/Commercial Law and Practice Course Handbook Series 403, 420 (Mar. 8-9, 1993).
66. *Id.* at 411.
67. *Id.* at 411-412.
68. *Id.* at 412.
69. Since NAFTA was negotiated in 1994, the United States has concluded free trade agreements with: Jordan, Singapore, Chile, Australia, Morocco, The Central American Nations and Dominican Republic, Peru, and Colombia. None of these incorporates a Chapter 19 or similar mechanism. *See* USTR, Bilateral Trade Agreements, *at* http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (visited Aug. 24, 2009).

tification, competition policy officials have argued that their existence is antithetical to the objectives of a free trade agreement because they treat price discrimination differently when practiced by some firms within the free trade area (those selling into the territory of another Party) than when practiced by other firms within the free trade area (those selling to customers within the territory of one Party).[70]

Without reminding our anti-trust friends that the Robinson-Patman Act[71] to this day prohibits price discrimination within the United States under certain circumstances, I recall noting during negotiation of the U.S.-Canada Free Trade Agreement and soon thereafter that if the FTA succeeded in eliminating trade barriers between the two countries, arbitrage soon would make dumping unprofitable, with the result that the dumping laws would wither away from disuse much as would the state in the early Marxian view of society's transition from capitalism to socialism. My assumption was the classic one that a protected home market is a necessary predicate to dumping, because selling a product back into the home market of the dumper to reap the rewards of higher pricing there requires that no, or few, government-imposed trade barriers exist in the dumper's home market,[72] particularly when transportation costs are unlikely to serve as barriers for geographically-adjacent trading partners.

Even without noting the other purposes served by trade remedy laws (escape valve for continuing trade liberalization, interface mechanism for vastly-differing economies, and so forth), we believe this statement misunderstands the difference in a trade agreement such as the NAFTA and a customs union information such as the Central American Common Market. We need not trot out the European Union to identify important differences between an agreement whose sole purpose is the economic one of strengthening trade among the Parties (admittedly, meeting this objective accomplishes a political goal of making the Southernmost NAFTA Party substantially less subject to the great instability of sharp currency devaluations) and an integration agreement that aims for harmonization of external tariffs, immigration policies, treatment of workers, financial services, and other policies, whether or not tied to trade relations.

With regard to an integration agreement that seeks goals no loftier than reducing trade barriers and trade conflict, I would posit that there is

70. Address by Calvin S. Goldman, then Assistant Deputy Minister for Canada's Bureau of Competition Policy, in Canada/United States Law Inst. of Case Western U. School of L., at 6 (1987).

71. 15 U.S.C. § 13. The Robinson-Patman Act of 1936 is a U. S. law that prohibits anticompetitive practices by producers, specifically price discrimination. The Act provides for criminal penalties, but grants a specific exemption for "cooperative associations.

72. Jacob Viner, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 146 (Kelley 1966). *See* Stephen J. Powell, *Antidumping Law and the United States-Canada Free Trade Agreement: Possible Next Steps,* ABA Nat'l Inst. on United States/Canada Free Trade Agreement: The Economic and Legal Implications, at 15 (Jan. 29, 1988).

nothing "antithetical" to maintaining lawfully applied AD/CVD laws, other than the fact that trade remedy laws are not particularly "neighborly." If a company is dumping, and the WTO permits a remedy under the circumstances of that dumping, the fact that the company is dumping inside an economic-only free trade area rather than from outside such a free trade area is of no moment.[73] The difficulty, of course, is in ensuring that the "lawfully applied" aspect of my test is met by the importing country.

We have all witnessed such blatant politicization of dumping that some of us may be permanently cynical of those who claim to be following the WTO rules. I have seen a WTO Member A openly threaten to impose an AD duty on an imported product from Member B if B did not open its market further to a product from Member A. I have seen dumping margins that coincidentally matched the level of an offered price settlement agreement that was not accepted. I have seen affirmative injury determinations that read more like a summary of foregone conclusions than an analysis of injury indicators and trends.

Dispute settlement is available under the WTO and under regional trade agreements, such as the NAFTA and the Andean Pact, to seek redress against such outrageous abuse of AD laws. Despite the serious limitation presented by the fact that these remedies are costly and time-consuming, and their relief cannot in any event restore the parties to the status quo ante, we believe that dispute settlement systems have substantial value in preventing future flouting of WTO rules. As a participant on both sides of the dispute panel table, I believe that claimants receive more thorough review of their issues than they would before the typical national court. Courts are almost universally burdened with overcrowded dockets that markedly limit the time available and, except at the appellate level, are normally without benefit of fellow judges to help think through the complex issues.

B. HAS NAFTA CHAPTER 19 SURVIVED THE TEST OF TIME?

Should we view Chapter 19 as a one-time solution to Canada's insistence on special treatment under the AD/CVD laws that the United States simply could not avoid extending to Mexico? Certainly, the U.S. Trade Representative—in fact, a series of them—has insisted emphatically that Chapter 19 is ill suited for future agreements, and has prevented its extension in the face of strong attempts by Chile and other Latin American countries to join the special club of Chapter 19 beneficiaries.[74] Much scholarly opinion has passed judgment on Chapter 19's benefits and failings. I will add here my own view, aided by my perspective as both a former government official involved in Chapter 19's crea-

73. Joseph E. Stiglitz, *Dumping on Free Trade: The U.S. Import Trade Laws*, 64 S. ECON. J. 402, 408 (1997).

74. *See Supra* note 68.

tion, implementation, and litigation, as well as being a Chapter 19 panelist and a student of its effects.

1. More Frequent Reversal of Agency Action

For an obvious start, as would be expected with the more searching review of an agency's record typical of any trade dispute panel, econometric analysis shows that findings of error are more frequent than with judicial review and some data suggest that the number of affirmative determinations that survive the Chapter 19 process are also lower than in the courts.[75]

The perception that binational panel review will be less forgiving of agency error accounts for the well-known fact that virtually every review of an AD/CVD determination issued by one of the NAFTA Parties as to merchandise of another NAFTA Party is carried out before a Chapter 19 tribunal, not in a national court.[76] In other words, if Canada's goal was to receive special treatment under the trade remedy laws of its largest trading partner, it has resoundingly succeeded.

We may ask whether the fact that the margin of error for NAFTA AD/CVD agencies has become so much narrower in Chapter 19 dispute settlement cases than before national courts necessarily demonstrates that these NAFTA panels could not possibly be accurately applying the Party's statutory standard of review of agency action. The Parties have made this claim in every challenge of Chapter 19 panel review taken before an Extraordinary Challenge Committee (ECC), which is Chapter 19's pitifully inadequate version of a mechanism to prevent outlaw panel decisions. The ECC is not an appeal, but rather a safeguard on the integrity of the panel process.[77] Under NAFTA Article 1904.13(a), either Party to a binational panel decision may appeal the decision if the Party alleges that a member of the panel materially violated the rules of conduct; the panel seriously departed from a fundamental rule of procedure; or the panel manifestly exceeded its powers, authority, or jurisdiction. In addition, the Party must allege that these violations materially affected the panel's decision and threaten the integrity of the binational panel review process.[78] It is also important to note that, although an industry may invoke binational panel review, only a NAFTA government may trigger an ECC.[79] Of the six challenges filed with the ECC, three under

75. Bruce A. Blonigen, *supra* note 31, at 421.
76. The author is aware that at least one law firm involved in defending U.S. exporters against AD determinations by the Mexican Ministry of Commerce decided for a time than *amparo* challenges of agency action in Mexican federal courts presented an even higher rate of reversal of agency action and in a substantially shorter time frame.
77. NAFTA Secretariat, *Dispute Settlement, Overview of the Dispute Settlement Provisions of the North American Free Trade Agreement (NAFTA), Extraordinary Challenge Procedure, at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=8 (accessed Aug. 12, 2008).
78. NAFTA art. 1904.13(b).
79. NAFTA art. 1905.3

USCFTA and three under NAFTA, all have been unsuccessful.[80]

In the first case filed under NAFTA of *Gray Portland Cement*, the ECC rejected a request by the United States to convene to review one of 14 determinations made by the binational panel regarding an AD order gray Portland cement and clinker from Mexico.[81] In the subsequent case of *Pure Magnesium*, the ECC rejected the challenge because the action by the binational panel did not threaten the integrity of the binational panel review process, even though the binational panel exceeded its power by failing to apply the correct standard of review and such action did materially affect the panel's decision.[82] Lastly, in *Certain Softwood Lumber Products*, the ECC rejected arguments made by the United States that the binational panel committed errors and held that the panel did not manifestly exceed its powers, authority, or jurisdiction.[83] Further, the ECC held that the panel did exceed its powers, authority, or jurisdiction by failing to apply the appropriate standard of review on the issue of export orientation, but the panel's failure was not material.[84]

Although the claim of exceeding panel authority by failing to follow the appropriate standard of review of agency action has been found without merit by every ECC, one must wonder whether more searching scrutiny of the record alone possibly can account for the data on the greater frequency of panel remands to correct error.

2. *Ad Hoc Panel Membership*

In addition to the expanded time for typical trade dispute settlement as compared with that available to judges in national courts, another important contributor to the greater reversal rate is the *ad hoc* nature of panel membership. Primarily because of the U.S. position that permanent trade tribunals would become isolated islands of trade law interpretation uninformed by the real trade world of negotiating compromise and practical solutions, panelists are *ad hoc,* appointed only for the time needed to complete their work on the panel to which appointed, then they are sent back to their day job to soak up even more of that practical approach to

80. NAFTA, *In Matter of Certain Softwood Lumber Products from Canada*, Secretariat File No. ECC-2004-1904-01USA, at 67-68 (Aug. 10, 2005); NAFTA, *In Matter of Pure Magnesium from Canada*, Secretariat File No. ECC-2003-1904-01USA, at 11 (Oct. 5, 2004); NAFTA, *In Matter of Gray Portland, Cement and Clinker from Mexico*, Secretariat File No. ECC-2000-1904-01USA, at 7 (Oct. 30, 2003); USCFTA, *In the Matter of Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA, at 51-52 (Aug. 3, 1994); USCFTA, *In the Matter of Live Swine from Canada*, ECC No. 1993-1904-01USA, at 18 (Apr. 8, 1993); USCFTA, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada*, ECC No. 1991-1904-01USA, at 19 (June 14, 1991).

81. *Parallel Proceeding at the WTO and Under NAFTA Chapter 19: Whither the Doctrine of Exhaustion of Local Remedies in DSU Reform?*, 39 GEO. WASH. INT'L L. REV 47 (2007).

82. NAFTA, *In the Matter of Pure Magnesium from Canada*, at 11, ECC No. 2003-1904-01USA (Oct. 5, 2004).

83. NAFTA, *In the Matter of Certain Softwood Lumber Products from Canada*, at 67, ECC No. 2004-1904-01USA (Aug. 10, 2005).

84. *Id.* at 67-68.

solving problems in the real world.[85] In my experience, the effect has been that the very rarity of panel service virtually ensures that panelists will not view their panel duties simply as another day at the office—as would a national court judge—but as a singular event in which they have been chosen to participate by reason of their special expertise. With the expanded time to delve into the record and, in the case of NAFTA Chapter 19, your very own research assistant, this view translates into an obligation to ensure to a high level of certainty that the proper interpretation of applicable law has been reached. Very few agency records will avoid sunburn under this kind of blistering light.

3. Majority Rule?

NAFTA dispute settlement in one way is similar to commercial arbitration in that each of the Parties selects two of its five judges, with the chair chosen normally by the Party that wins a coin toss. Because Parties have to date always selected their own citizens from the Roster of Chapter 19 Panelists, this procedure for establishing a panel results in a five-person panel with a majority from one Party.[86] In the early days, my unofficial counts found that the victorious Party was predictable simply by noting which Party had a majority. Early panelists "voted the flag," and in the most contentious of cases, for example, *Softwood Lumber,* one could almost remark that a panelist need not come home if she did not vote with her Government's position.

Because Chapter 19 cases have become, if not routine, at least common, Parties no longer may rely on the votes of their nationals if the position of the Party will not withstand scrutiny. For example, in both of the NAFTA Panels on which I have served, the majority has been of mixed nationality, in one case unanimous. I recognize that the Governments of the Parties do not always have a position in particular cases, for example, when producers of one Party are challenging a determination by another Party, but I believe my observation remains valid that nationality of a panelist will not be a deciding factor in all but the closest of legal arguments. Even the massive cases such as *Softwood Lumber* bear out this observation.

C. On Balance, Perhaps Chapter 19 Does Have a Future

Every free trade agreement negotiated by the United States, beginning with the Israel-U.S. FTA in 1985 and extending to the Colombia-U.S. FTA in 2006, as well as MERCOSUR, the Andean Pact, the Caribbean Community, the Central American Common Market, and many other trade agreements in the Hemisphere, provide for interpretation of the agreements and resolution of conflicts by dispute panel bodies. In the United States, this plethora of dispute settlement bodies likely will lead

85. Gantz, *supra* note 34, *at* 18.
86. *Id.*

to establishment of a single roster of eligible experts from all nations for service on any panel established.

The cost of these systems will be substantial. Even in the case of the NAFTA, governments sometimes have delayed payment of panelists for years because of failure of the Parties to allocate sufficient funds to the process. Expanding the system to the thirty-four democratic countries in the Hemisphere would require funds far beyond present plans of any of these nations. If the Parties can succeed in a practical funding arrangement, I see nothing antithetical to the trade agreements involved to have a single dispute settlement system, operating under a common set of rules to reach the decision called for by the particular agreement, using the laws and the standard of review there provided. In fact, a common dispute settlement system would actually be the easiest part of a Free Trade Area of the Americas to conclude.

This does not address whether AD/CVD determinations of other Hemispheric countries should be subject to dispute settlement in the manner envisioned by NAFTA Chapter 19. I was not while a Government employee much of a fan of NAFTA panels. Start-up problems were major, and we had in place a perfectly useful system of judicial review that, in my view, did not need fixing. Having now served on NAFTA panels, and observed the decisions reached in the variety of situations presented over the past twenty-two years of Chapter 19's existence in the U.S-Canada and NAFTA agreements, I believe the system has been no better, and no worse, than the national courts it replaced.

If the United States, as is likely, will not condone major substantive changes to its AD/CVD laws, which will, once agriculture issues are solved in the Doha Round, become the final sticking point for reaching agreement, then changing the method of review of AD/CVD determinations may furnish a missing piece in the puzzle of FTAA negotiations. Although Brazil's officials may at first glance see nothing in a Chapter 19 process that addresses their substantive AD/CVD conflicts with the United States as orange juice, steel, and other Brazilian exports, further reflection may reveal that Chapter 19 has demonstrated yet again what good lawyers already know, that procedure can become substance in the twinkle of an eye.