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NAFTA BINATIONAL PANEL REVIEW: SHOULD IT BE CONTINUED, ELIMINATED OR SUBSTANTIALLY CHANGED?

Robert E. Burke
*Brian F. Walsh**

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 . . . Apparently each government felt that this system was more satisfactory than the one which was replaced.¹

I. INTRODUCTION

Nearly five years ago the United States and Canada entered into the landmark trade agreement known as the Canada-United States Free Trade Agreement (CFTA).² The CFTA and each country's respective implementing legislation and regulations established a functioning series of binational panels to review and adjudicate specific trade disputes arising out of the respective nation's local antidumping and countervailing duty laws.³ These binational panels fully supplanted judicial review both in Canada and the United States for eligible determinations for which such review is requested.⁴ Effective January 1, 1994, the former CFTA provisions relating to binational

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1. *In re* Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01 USA, at 28 (Extraordinary Challenge Comm. Proceeding, Aug. 3, 1994) (Wilkey, J., dissenting) (unpublished).

2. Dec. 22, 1987 - Jan. 2, 1988, 27 I.L.M. 281.

3. *Id.* chap. 19; *see also*, United States and Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851, 1879-1898 (1988) (amending 19 U.S.C. 1516(a) (1988)).

4. CFTA, *supra* note 2, art. 1904(1).

panel review were rolled into the new North American Free Trade Agreement (NAFTA)⁵ with some modifications.

The purpose of this article is to comment on the serious question as to whether the panel system has met the expectations of the trading partners, of private businesses that are bound by the procedures and determinations of the panels, and of practitioners appearing before the panels.

In 1988, the Court of International Trade Bar Association (CITBA) expressed its view, both in writing and at testimony before the Senate Judiciary Committee, that serious and fundamental issues existed relating to whether the panel system should be adopted and, if so, how it should be implemented.⁶ The experience of the past five years has borne out the legitimate concerns of the CITBA. While the authors are not in any way representing the CITBA in this article, it is our belief that the endemic problems and difficulties predicted by the CITBA have, in fact, been borne out in actual practice.

The following article attempts to survey the pros and cons of the panel system and presents ultimate recommendations relative to the continuation of that system.

II. BINATIONAL PANEL REVIEW—SHOULD IT BE CONTINUED?

A. *Points in Favor of Continuation of Panel Review*

1. Expeditious Review

One of the primary benefits of panel review under the CFTA is expeditious review. The CFTA established specific time limits to which all parties and panel members were required to adhere. These time limits, which were adopted in NAFTA,⁷ include the following:

- (1) Notice of intent to commence judicial review must be filed within 20 days of the final determination to be challenged;⁸

5. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, Dec. 17, 1992, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

6. *United States - Canada Free-Trade Agreement: Hearings Before the Senate Comm. of the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. 163 [hereinafter *CITBA Statement*].

7. NAFTA, *supra* note 5, art. 1904(14).

8. Rules of Procedure for the North American Free Trade Agreement: Article

(2) Complaints must be filed within 30 days of the filing of a first request for panel review;⁹

(3) Notices of appearance for those parties who chose to participate, but who do not file a complaint, must be filed within 45 days of the filing of the first request for panel review;¹⁰

(4) Complainants must file briefs within 60 days after the deadline for the filing of the administrative record;¹¹

(5) Parties responding to complainant's briefs must file such briefs within 60 days of the expiration of the time within which complainant's briefs must be filed;¹²

(6) Reply brief may be filed within 15 days of the expiration of the time within which response briefs must be filed;¹³

(7) Oral argument shall commence no later than 30 days after the filing of reply briefs;¹⁴

(8) The panel shall issue its decision within 90 days of the completion of oral argument.¹⁵

Despite the fact that these time limits generously provide a sixty day briefing period for parties, the deadlines mandate the issuance of final decisions within 315 days from the filing of a request for panel review.¹⁶ Most innovative among the deadlines at the time of the establishment of the panel system were the requirement that oral argument be held within thirty days of the filing of the briefs and the requirement that the panels issue their opinions within ninety days of oral argument. Thus, protracted delays which can occur when such cases are judicially reviewed are eliminated.¹⁷

It should be noted, however, that the advantages of the above-cited time limits as compared to the procedures of the

1904 Panel Rules, Rule 33, NORTH AMERICAN FREE TRADE AGREEMENTS—DISPUTE SETTLEMENT 15 (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet A.6, Release 94-1, Feb. 1994) [hereinafter Article 1904 Panel Rules].

9. *Id.* Rule 39, at 18.

10. *Id.* Rule 40, at 19.

11. *Id.* Rule 57, at 27.

12. *Id.*

13. *Id.* at 28.

14. *Id.* Rule 67, at 32.

15. *Id.* Rule 72, at 33.

16. NAFTA, *supra* note 5, art. 1904(14).

17. See Leonard M. Shambon, Accomplishing the Legislative Goals for the Court of International Trade: More Speed! More Speed! (Nov. 3, 1989) (paper presented at the Proceedings of the Sixth Annual Judicial Conference of the United States Court of International Trade (1989)).

Court of International Trade (CIT) have been significantly undercut as a result of changes which have been made to the Rules of the Court of International Trade. Rule 56.2 of the Rules of The Court of International Trade, which became effective on January 1, 1993, incorporates into the CIT rules time limits similar to many of the time limits established in the CFTA and continued in NAFTA. While, of course, no time limit has been imposed on a judge's consideration of a matter, oral argument, if requested, is to be held not more than thirty days after the close of the briefing schedule, proposed judicial protective orders and motions to enjoin liquidation must be filed within thirty days of the service of the complaint. Rule 56.2 also provides for detailed judicial management of the progress of a matter, including the issuance of briefing schedules and the required filing of status reports with the court.

Also tending to undercut the speed advantage which panels may have over the court is the fact that panels do not have the authority to reverse agency decisions but may only uphold a final determination or "remand it for action not inconsistent with the panel's decision." Thus, time consuming remands are to be expected and multiple remands are not unusual. As of the fall of 1993 the record stood as follows:

CFTA panels have remanded to the agency in nine of the twenty-one cases they have decided. Five of the nine have involved multiple remands. In those cases the elapsed time from request for a panel to a final decision was not the 315 days established in the CFTA, but ranged from 383 to 927 days. The longest—927 days—involved three remands.¹⁸

The most significant method by which the panel system has decreased the time spent pursuing a final decision is the fact that no right of appeal exists with regard to panel decisions.¹⁹ Thus, with the exception of those few issues which may be the subject of review by an extraordinary challenge committee (ECC), review of disputes ends with the issuance of the panel's decision less than a year (at least in cases involving no remands) after the filing of the request for panel review in the matter.

18. Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Court of Last Resort*, 27 INT'L LAW. 707, 718 (1993).

19. NAFTA, *supra* note 5, art. 1904(11).

2. Consideration by a Panel in the First Instance of Review

A review of the decisions issued by the panels makes it apparent that, in most cases, the panels have conscientiously attempted to address all of the issues placed before them. The decisions issued by the panels are often voluminous and often contain thorough discussions of the legal issues which have been presented to the panel. It may be that some benefit is derived from the fact that issues are reviewed, in the first instance, by a panel rather than by a single individual. It may also be that the practice experience of the panel members and their interest in the area of international trade law serves panel members well. Several commentators have noted the high quality of panel decisions.²⁰

3. Simplification of Procedures

The CFTA Rules of Procedure incorporated a number of innovative procedural simplifications which have been preserved in NAFTA. As stated above, in some respects the Court of International Trade has taken similar steps.

Parties wishing to participate in panel review of a given determination need not file a motion for intervention or an answer. Rather, the Rules of Procedure simply provide for the filing of a Notice of Appearance by interested parties.²¹ The recent amendment of the Rules of the Court of International Trade also eliminated the requirement for an answer for actions described in 28 U.S.C. § 1581(c).²²

Further, antidumping or countervailing duty determinations may result in only one proceeding before a panel.²³ Thus, for instance, in a case where a Canadian exporter wishes

20. Judith H. Bello et al., *U.S. Trade Law and Policy Series No. 18: Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreements*, 25 INT'L LAW. 489, 516 (1991); Andreas F. Lowenfeld, *Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269 (1991); Moyer, *supra* note 18, at 722.

21. Article 1904 Panel Rules, *supra* note 3, Rule 40, at 19.

22. R. U.S. CT. INT'L TRADE 7.

23. James R. Cannon, *International Trade Disputes — Non-Judicial Remedies or Judicial Review: What Do You Get? What Do You Give Up?*, Remarks Before the Proceedings of the Seventh Annual Judicial Conference of the United States Court of International Trade, (Oct. 15, 1990), in 137 F.R.D. 509, 615.

to challenge a determination issued by the Department of Commerce and a domestic party wishes to challenge certain aspects of the determination, but also support the aspects of the determination challenged by the foreign exporter, all issues can be dealt with in one panel proceeding. It is not necessary for the Canadian exporter and the domestic party to bring separate panel actions.²⁴

As a result of the fact that panels are not courts and have no equitable powers, it was necessary when developing the panel system under the CFTA to provide for a method by which the liquidation of entries subject to a case would be suspended.²⁵ 19 U.S.C. § 1516a was amended to require the Department of Commerce to order the continued suspension of liquidation of entries covered by a determination which was the subject of panel review. Such suspension is automatic and the provision was drafted with the intention of reflecting the court's willingness to grant injunctions suspending liquidation with regard to annual reviews of antidumping duty orders²⁶ but not with regard to challenges regarding initial investigations.²⁷ As a result, no motion to suspend liquidation is necessary in cases before a panel.

4. Necessary for CFTA and NAFTA

The final and most compelling point in favor of the continued existence of the panels is the fact that they were necessary components of the CFTA and NAFTA: since Canada and Mexico would not have become parties to these trade agreements without the inclusion of these dispute settlement procedures, a powerful incentive was provided for the establishment of the panels and, presently, for their continuance. The economic benefits which have been received and which are expected to be received by the United States under these agreements are substantial. As a quid pro quo for receiving these benefits and

24. See Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, No. USA 89-1904-03, (Memorandum Opinion and Order Regarding Motions to Dismiss Reviews), NORTH AMERICAN FREE TRADE AGREEMENTS—UNITED STATES-CANADA FREE TRADE AGREEMENT: BINATIONAL PANEL DECISIONS AND REPORTS (Oceana Publications, Release 92-1, June 1992) (Mar. 7, 1990).

25. See Cannon, *supra* note 23, at 13-15.

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

27. American Spring Wire Corp. v. United States, 578 F. Supp. 1405 (Ct. Int'l Trade 1984).

for the completion of these agreements, the panel system of review was first established under the CFTA and has been continued under NAFTA.

B. Points Opposed to Continuation of Panel Review

1. A Fundamental Existential Conflict

Article 1904(3) of the CFTA requires panels to "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing country would apply to a review of a determination of the competent investigating authority."²⁸ Article 1904 of NAFTA states:

The panel will apply the standard of review for the importing party established in Annex 1911 (country specific definitions) and legal principles applied by a court of the importing Party to such a review.²⁹

The legislative history of both the CFTA and NAFTA are replete with statements that panels should not restrict the right of an industry to seek redress from unfair trading practices:

Nothing in Article 1904 or any other provision of Chapter Nineteen restricts in any way the right of a domestic industry to seek redress from unfair trading practices through national AD [antidumping] and CVD [countervailing duty] laws.³⁰

28. Article 1911 of NAFTA refers to Annex 1911 for definitions of the relevant standards of review. See NAFTA, *supra* note 5, art. 1911. Annex 1911 instructs that panels must apply the standard of review contained in 19 U.S.C. § 1516a(b)(1)(B). Further, Article 1911 defines "general legal principles" to be "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies." *Id.* art. 1911.

29. Annex 1911 defines the standard of review, in the case of the United states as follows:

(i) the standard set out in section 516A(b)(1)(B) of the *Tariff Act of 1930*, as amended, with the exception of a determination referred to in (ii), and

(ii) the standard set out in section 516A(b)(1)(A) of the *Tariff Act of 1930*, as amended, with respect to a determination by the United States International Trade Commission not to initiate a review pursuant to section 751(b) of the *Tariff Act of 1930*, as amended

Id., annex 1911.

30. Statement of Administrative Action, NORTH AMERICAN FREE TRADE AGREEMENTS—TREATY MATERIALS 177 (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet 8, Release 94-1, Feb. 1994).

The legislative history makes clear that the standard of review to be applied by the panels is the same standard of review as that to be applied by United States courts. The legislative history also shows that the panels are to review the matters within their jurisdiction "precisely" as would a court in the United States:

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.³¹

The importance of these principles to the panel system was expressed in the Senate Joint Report on NAFTA which stated "that the NAFTA, just as the CFTA, *requires* binational panels to apply the same standards of review and general legal principles that domestic courts would apply. This requirement is the foundation of the binational panel system . . . [F]ailure to apply the appropriate standard of review, potentially undermine[s] the integrity of the binational panel process."³²

The Senate further elaborated its expectations as follows:

It is the Committee's expectation that, in the future, binational panels will properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the ITC . . . [E]xtraordinary challenge procedures may be invoked where a panel has manifestly exceeded its powers, authority or jurisdiction by failing, for example, to apply the appropriate standard of review, where such action has materially affected the panel's decision and threatens the integrity of the binational panel process. *Because the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces*, the Committee believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.³³

31. *Id.* at 178 (emphasis added).

32. SENATE JOINT COMMITTEE REPORT, NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT, S. REP. NO. 183, 103d Cong., 1st Sess. 42 (1993).

33. *Id.* at 43-44 (emphasis added).

Finally, the ECC opinion in the *Live Swine* case stated:

Panels must follow and apply the law, not create it. Although panels substitute for the Court of International Trade in reviewing Commerce's determinations, they are not appellate courts. Because the Committee's scope of review is so limited, most panel decisions will never be reviewed. Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law and then depart from it in a clandestine attempt to change the law. (citations omitted).³⁴

Given the fact that panels are to apply the principles of United States law in the manner in which a court in the United States would apply such principles, the question which must be asked is "what is the reason for the existence of the panel system?" It is clear, as discussed above, that the panel system may, in many cases, offer the benefit of speed over judicial review and that the panel rules of procedures offer some innovations. Were these the sole reasons for the establishment of the panel system? If speed and innovative procedures were the goals, then it was not necessary to include Canadians on the panels reviewing decisions of United States government agencies in the case of the CFTA or Canadians and Mexicans on panels in the case of NAFTA. Dissatisfaction with judicial review of another sort appears to have also been a motivation behind the establishment of the system. The recent *Softwood Lumber*³⁵ ECC opinion makes formal and explicit what had previously been unstated³⁶ by the panels and

34. *In re Live Swine from Canada*, No. ECC-93-1904-01 USA NORTH AMERICAN FREE TRADE AGREEMENTS—DISPUTE SETTLEMENT (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet Series No. B.13C, Release 93-2, Nov. 1993) (Extraordinary Challenge Comm. Proceeding, Apr. 8, 1993).

35. *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, (Extraordinary Challenge Comm. Proceeding, August 3, 1994).

36. Other commentators, however, have expressed this view. For instance: There is one other factor to keep in mind in assessing the validity of the panel review procedures. This is not a case where the elimination of judicial review was primarily intended to benefit the parties by speeding up the process . . . there is little doubt that the driving force behind the change was the Canadian dissatisfaction with the outcome of the proceedings in the United States, even after judicial review was completed. In

ECCs. Thus, in *Softwood Lumber*, Justice Gordon L.S. Hart, writing for the majority stated:

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 the determinations of Commerce, it would be expected to bow to the expertise within the Department. When the parties to the FTA agreed to replace that court with this type of panel they must have realized and intended that a review of the actions of Commerce or of the Canadian agency would be more intense. The panels have

other words, when the parties were unwilling or unable to negotiate substantive changes in the United States law, they created bilateral panels to do indirectly that which they could not, or would not, do directly.

Alan B. Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement* 49 WASH. & LEE L. REV. 1279, 1307 (1992).

Though congressional approval has quelled the policy controversy, hidden in the constitutional question is distrust over a perceived protectionist bias of the International Trade Court and the Court of Appeals for the Federal Circuit in their present judicial review function. Some of the fears of the Canadians and United States free traders are well-known in the subsidy and dumping cases, and judicial review of agency orders in the United States has gone both ways. Nonetheless, for as much disinterestedness and impartiality in reviewing orders as possible under the FTA, including as much insulation as possible from unilateral statutory changes, the Canadians insisted and the United States negotiators agreed to Party election to have binding review of these orders in a binational forum outside domestic judicial control.

Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 400, 402 (1989).

The Canadian business community perceived that relief available to U.S. producers under U.S. antidumping and countervailing duty laws posed a major obstacle to a stable economic environment. Recent growth in trade law actions against Canadian exporters heightened this concern. Canadian business managers claimed that unpredictable application of AD and CVD laws significantly deterred them from exporting their goods to the United States. To avoid AD and CVD actions, Canadian firms selling in the U.S. market had to modify their pricing and marketing strategies. The significant costs associated with defending against AD and CVD actions also affected their business decisions. Canadian negotiators contended that continuation of such a system would be incompatible with the goals of the FTA and proposed that the two parties clarify what type of subsidies would be appropriately actionable in the context of a free-trade relationship.

Dave Resnicoff, *The United States-Canada Free-Trade Agreement and the U.S. Constitution: Does Article III allow Binational Panel Review of Antidumping and Countervailing Duty Determinations?*, 13 B.C. INT'L & COMP. L. REV. 237, 246 (1990).

been given the right to make a final determination of the matters in dispute between the two countries in a relatively short period of time without any judicial review. Apparently each government felt that this system was more satisfactory than the one which was replaced.³⁷

Given the clear language of Article 1904 that the legal principles which would be applied by a court of the importing party should be applied, the language specifying the standard of review, and the legislative history cited above, statements such as those by Justice Hart call into question whether there was a meeting of the minds between the parties to the agreement which resulted in Article 1904 of the CFTA and subsequently NAFTA. It is clear that Congress thought it was establishing a system which would decide cases as a court would in the U.S. The conflict lies herein: if panels are to decide issues as would a U.S. court, why are panels necessary when a U.S. court with jurisdiction over the issues is in existence? If the governments of Canada and Mexico felt they would receive a duplication of Court of International Trade review, would they have been pressed for inclusion of Article 19 in the CFTA and NAFTA?

2. No Appeal

If one solely considers the question of speed in reaching finality, the fact that no review is generally available regarding panel decisions can be seen as a benefit. If one chooses to look any deeper than the simple issue of speed, however, the elimination of routes to appeal is clearly troublesome.

As stated, no right to appeal exists with regard to matters decided by the panels. A party dissatisfied with a panel decision has the opportunity to file a request for an extraordinary challenge committee alleging the following:

- 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

37. *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, at 28 (Extraordinary Challenge Comm. Proceeding, August 3, 1994) (Hart, J.).

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.³⁸

Thus, the agreements do not provide for review of allegations of error.³⁹ Participants to panel proceedings who are dissatisfied with the results of panel review must file a request with the Office of the United States Trade Representative alleging grounds for an ECC as indicated in the above language. It is then within the discretion of the United States Trade Representative whether to file a request for an extraordinary challenge.⁴⁰ Such a request cannot be filed by a private party.⁴¹

Just how narrow the role played by an ECC was explained in *Live Swine*:

The ECC should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process. An ECC corrects "aberrant panel decisions" and "aberrant behaviour by panelists." The exceptional nature of an extraordinary challenge was accentuated by the drafters of the FTA by limiting extraordinary challenges to the United States and Canadian governments, and not to other Participants in the panel's proceedings. The ECC should address systemic problems and not mere legal issues that do not threaten the integrity of the FTA's dispute mechanism itself. A systemic problem arises whenever the binational panel process itself is tainted by the failure on the part of a panel

38. NAFTA, *supra* note 5, art. 1904(13).

39. Pursuant to Rule 76 of the NAFTA Article 1904 Rules, participants to panel review may file a motion within ten days after a panel issues its decision requesting that the panel re-examine its decision in order to correct "an accidental oversight, inaccuracy or omission." The grounds for the motion are limited to the following: (a) that the decision does not accord with the reasons therefor; or (b) that some matter has been accidentally overlooked, stated inaccurately or omitted by the panel. Article 1904 Panel Rules, *supra* note 8, Rule 76, at 35.

40. Rules of Procedure for The North American Free Trade Agreement, Extraordinary Challenge Committee Rules, Rule 37(1), NORTH AMERICAN FREE TRADE AGREEMENTS—DISPUTE SETTLEMENT 17 (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet A.7, Release 94-1, Feb. 1994) [hereinafter ECC Rules].

41. *Id.*

or a panelist to follow their mandate under the FTA. (citations omitted)⁴²

Thus, in virtually all cases, the decision of the panel is final and dissatisfied participants to panel review have no right to recourse. This degree of finality is particularly extraordinary given the highly complex nature of the disputes which the panels review, and the fact that two or three out of five panelists upon whom this substantial responsibility rests will not be United States lawyers.

3. Different Standards of Review and Different Levels of Deference

Even in cases in which panel members cite to the applicable United States standard of review, and make a good faith effort to apply the proper standard and applicable precedent, differences can arise in the manner in which the standard of review would be applied as compared to a court and a panel based upon the background of the panelists as trained in foreign legal systems or as "experts" in international trade. The granting of a differing level of deference to the agency whose action is the subject of review can, of course, have just as dramatic an impact on the outcome of a case.

a. Differing Canadian and Mexican Standards of Review

To an American lawyer practicing in the area of international trade, the standards of review to be applied to review of agency action on the record have been familiar since administrative law class in law school and have been a part of every antidumping or countervailing duty opinion which we have read, a part of every brief we have written and every oral argument in which we have participated. These standards, which are so familiar to us, can appear completely alien and unfamiliar to a Canadian or Mexican lawyer or jurist.

The relevant standard of review for Canada is contained in Section 28(1) of the Canadian Federal Court Act and is as

42. *In re Live Swine from Canada*, No. ECC-93-1904-01 USA, NORTH AMERICAN FREE TRADE AGREEMENTS—DISPUTE SETTLEMENT (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet Series No. B.13C, Release 93-2, Nov. 1993) (Extraordinary Challenge Comm. Proceeding, Apr. 8, 1993).

follows:

Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, on the ground that the board, commission or tribunal:

(a) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.⁴³

With regard to the Canadian standard of review, many questions immediately spring to mind concerning, for instance, the definition of the legal concepts "natural justice," "judicial or quasi-judicial basis," and "perverse or capricious manner." Each of these concepts likely has a long line of precedent interpreting the precise meaning of the term. Further, specific rules and traditions no doubt govern the manner in which such interpretation is to take place.⁴⁴

Differences such as these occur between the United States and Canada, two countries with common law traditions. An American lawyer would be further at sea dealing with the application of the standard of review in Mexico, a civil law country. A reviewing court in Mexico would apply Article 238 of the Federal Tax Code, which would require it to overturn a final antidumping or countervailing duty determination when:

(1) evidentiary defects exist in the relevant final deter-

43. Federal Court Act, R.S.C. ch. F-7, §28(1) (1985) (Can.).

44. For instance, the Canadian legal tradition does not take the same view of the usefulness of legislative history as the United States legal tradition. An American lawyer might well turn to a committee or conference report to attempt to determine what was meant by the term "natural justice." Judge Wilkey suggests that the Canadian view of legislative history is quite different than the American view. *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, at 57 (Extraordinary Challenge Comm. Proceeding, August 3, 1994) (Wilkey, J. dissenting).

mination, such as the absence of a reasoned explanation based upon probative evidence contained in the administrative record;

(2) the alleged facts cited by the competent Mexican investigating authority did not occur (or the facts were otherwise irrelevant or inapplicable to the legal standard); or

(3) the final SECOFI determination does not satisfy the principles of congruency, logical development and concept and reach between the arguments of the parties and the final determination.⁴⁵

Where the above standard discusses "principles of congruency, logical development and concept and reach between the arguments of the parties and the final determination," the standard betrays the fact that the differences between the United States and Mexico with regard to such matters are not simple differences in the wording of the standard of review but differences between entire legal systems as this language refers to methods of statutory interpretation used in a civil law system. In fact, one commentator has suggested that "... United States and Mexican legal traditions (private law), constitutions (public law), and political systems are so markedly different that legal training and law practice in one country is more likely to hinder rather than aid United States and Mexican lawyers in understanding their neighbor's legal system."⁴⁶

45. Craig R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as Well as Practical Business Risks and Realities, for United States Exporters to Mexico in the Era of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 855, 1020 n.568 (1994).

46. James F. Smith, *Confronting Differences in the United States and Mexican Legal Systems in the Era of NAFTA*, 1 U.S.-MEX. L.J. 85, 86-87 (1993).

This problem has also been the source of discussion specifically in the context of NAFTA panels:

The final major problem area between Chapter Nineteen of the NAFTA and the Mexican legal tradition relates to the Mexican standard of review codified in Article 238 of the Federal Tax code. The plain language of the Mexican standard of review notwithstanding, American and Canadian panelists trained in the U.S. and Canadian common-law systems may misinterpret certain clauses of this legal standard, because it is grounded in civil-law principles, including civil-law rules of statutory construction. Unless future American and Canadian NAFTA panelists fully grasp the exact legal contours of Mexico's standard of review, these individuals will be unable to perform effective panel review of final SECOFI determinations.

Giesze, *supra* note 45, at 1036.

While an American lawyer may come to a certain understanding and appreciation of the Canadian or Mexican standard of review through study, how much exposure would be required before the American lawyer's competence in these areas rose to that which would parallel that of a Canadian or Mexican judge? Is it realistically possible to perform such a feat for the purposes of participating in an ad hoc dispute resolution tribunal? This seemingly impossible request is the mirror image of what is, in effect, requested of those Canadian or Mexican lawyers or jurists who serve on a NAFTA panel. If the standard of review and principles of law are not applied by such individuals in a manner as they would by a United States court, this should come as no surprise.

b. International Trade Experts

Judge Wilkey suggested in his dissenting opinion in the *Softwood Lumber* ECC that the background of panel members who are not members of the judiciary but rather are international trade experts may affect the deference which such panel members are able to provide to agency decisions:

Psychologically, why should they be expected to show the deference to administrative agency action which is required as a fundamental tenet of U.S. judicial review of agency action? The panel members are *experts*; they know better than the lowly paid "experts" over in the Commerce Department, and they have felt inclined to say so. Repeatedly, most vividly in this particular case, they seem to have substituted their judgment for that of the agency. They have not hesitated to say that the agency was wrong on its methodology, wrong in the choice of alternate economic analyses, wrong in its conclusions, and that the panel of five experts knows far better how to do it. All of this of course is directly contrary to long-standing United States law concepts of review of agency action.⁴⁷

Others have drawn similar conclusions; for example, Smith has noted that "the binational panel of experts has not been as deferential to administrative decisions as the Ameri-

47. *In re Certain Softwood Lumber Products from Canada*, No. ECC-94-1904-01 USA, at 58 (Extraordinary Challenge Comm. Proceeding, Aug. 3, 1994) (Wilkey, J.).

can courts given their considerable technical competence.⁴⁸ Such comments have also been made in Canada:

Kazanjian, a Canadian trade lawyer argues that the Canadian "federal court will generally defer" to administrative trade authorities. He also argues that it is more likely that "both the United States and Canadian panel members would take their own expertise into account and could be less deferential than the federal court to the expertise of the trade regulators."⁴⁹

Whether the effect cited occurs explicitly or even consciously or not, an unwillingness to grant the same level of deference to the agency as the court will result in differing results as surely as the application of a different standard of review.

4. Divergent Body of Law

The potential for the development of a divergent body of law developed and applied by the panels has existed since the implementation of the CFTA. The likelihood that such a body of divergent case law will develop has increased dramatically with the addition of another country to the panel system under NAFTA.

There are several ways in which divergent case law could develop under the panel system. For instance, many antidumping proceedings involve exports from multiple countries. If exports from Canada or Mexico are involved in such a case and determinations regarding sales from those countries are subject to panel review, it is possible that a panel would reach a different result. Even with regard to issues common to different exporters from the same country, if one opted for panel review and another did not, differing law could govern imports from the same countries.

Further, panels do cite to previous panel decisions. While such decisions do not have the effect of precedent, panel members may view previous panel decisions as persuasive on a

48. Smith, *supra* note 46, at 86 n.6 (citing Fresh, Chilled or Frozen Pork from Canada, No. USA 89-1904-06, NORTH AMERICAN FREE TRADE AGREEMENTS—UNITED STATES-CANADA FREE TRADE AGREEMENT: BINATIONAL PANEL REVIEWS (Oceana Publications, Release 92-2, June 1992) (Extraordinary Challenge Comm. Proceeding, Sept. 28, 1990).

49. *Id.*

particular matter. A panel would be placed in a curious position if a previous panel has spoken on an issue which the court has not yet had the opportunity to address. Panels are also placed in a difficult position when faced with issues upon which there is disagreement on the court.⁵⁰

Finally, the mere fact that issues are being resolved by the panels in a non-binding manner, rather than through the issuance of judicial precedent, has a stunting effect on the development of the law. The court is deprived of opportunities to settle issues and to speak clearly in a precedential manner on matters which may be of concern to more parties than simply those before the panel.

5. Constitutional Concerns

As the binational panel system has divested the Court of International Trade, the Court of Appeals for the Federal Circuit and the United States Supreme Court of jurisdiction to review certain antidumping and countervailing duty determinations, the system naturally has raised a number of constitutional concerns.⁵¹ These concerns were serious enough to justify the addition of special statutory jurisdictional provisions which deal with the manner in which constitutional challenges are to be handled.

These substantive constitutional concerns were presented to Congress by the Customs and International Trade Bar Association through its "Statement in Opposition to Withdrawal of Jurisdiction in the United States Court of International Trade and its Appellate Tribunals to Review Antidumping and Countervailing Duty Decisions of Federal Agencies Involving Cana-

50. See Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, No. USA 89-1904-03 (Memorandum Opinion and Order Regarding Motions to Dismiss Reviews), NORTH AMERICAN FREE TRADE AGREEMENTS—UNITED STATES-CANADA FREE TRADE AGREEMENT: BINATIONAL PANEL DECISIONS AND REPORTS (Oceana Publications, Release 92-1, June 1992) (Mar. 7, 1990).

51. Parties in the United States are not alone in such concerns: Specifically, a few Mexican legal scholars have suggested, based upon a cold and strict parsing of the relevant provisions of the Mexican constitution - Articles 14 and 16, to be exact - that the Article 1904 dispute resolution scheme may be unconstitutional. Consequently, the attempted implementation of a future NAFTA binational panel decision by SECOFI could trigger not only a Mexican constitutional challenge (juicio de Amparo) but also an adverse ruling by the Mexican Supreme Court. Giesze, *supra* note 45, at 1032-33.

dian Merchandise" which was submitted during its consideration of the CFTA. Subsequent to the establishment of the CFTA panel system but prior to NAFTA, a suit was filed by the National Council for Industrial Defense, Inc. (NCID) and the American Engineering Association challenging the constitutionality of the panel system which was dismissed on jurisdictional grounds. Another case is currently pending which challenges the decision of the *Softwood Lumber* ECC on constitutional grounds. Finally, these issues have been the subject of much speculation in various law journals.⁵²

a. The Statutory Jurisdictional Provisions

The CFTA implementing legislation created a "fast-track" procedure for constitutional challenges to the CFTA binational panel system. Pursuant to 19 U.S.C. § 1516a(g) such constitutional challenges are to be heard by a three judge panel of the United States Court of Appeals for the District of Columbia Circuit.⁵³ Decisions are appealable *within ten days* to the Supreme Court.⁵⁴

Constitutional issues arising out of the underlying administrative determination are also provided for in § 1516a. Such issues are to be heard by a three-judge panel of the CIT and the party bringing the action is required to post security to compensate the parties affected for any loss or damages incurred. The provision also entitles the prevailing party to the award of fees, expenses, and costs in cases in which the constitutionality of the system is upheld unless special circumstances make such award unjust.

Finally, an extraordinary statutory provision, 19 U.S.C. § 1516a(g)(7), appears to take the benefit away from a party which succeeds in such a constitutional challenge. This provision authorizes the President, on behalf of the United States,

52. Christenson & Gambrel, *supra* note 36; Peter Huston, *Antidumping and Countervailing Duty Dispute Settlement Under the United States-Canada Free Trade Agreement: Is the Process Constitutional?*, 23 CORNELL INT'L L.J. 529, 546-49 (1990); Moyer, *supra* note 18; Gilad Y. Ohana, *The Constitutionality of Chapter Nineteen of the United States-Canada Free-Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897 (1989); Resnicoff, *supra* note 36.

53. 19 U.S.C.A. § 1516a(g)(4)(A) (West Supp. 1994).

54. 19 U.S.C.A. § 1516a(g)(4)(H) (West Supp. 1994).

to accept, as a whole, any decision of a binational panel or ECC which has been declared unconstitutional and direct the agency involved to take action consistent with the decision in question after the President has accepted the decision.⁵⁵ The provision declares that the action of the President in accepting the decision, and the actions of the agencies pursuant to such direction, shall not be reviewable by any court of the United States.

b. The CITBA Statement

The Customs and International Trade Bar Association (CITBA) did not oppose the Free Trade Agreement with Canada. CITBA did oppose, on both constitutional and policy grounds, the establishment of the panel system which was contained in the CFTA.⁵⁶ The first constitutional concern which CITBA raised was a potential conflict with Article III Section one 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.⁵⁷

CITBA interpreted this language as providing Congress with the authority to define the jurisdiction of the federal courts and the authority to withhold jurisdiction from them. The judicial power of the United States, however, is vested in "one Supreme Court, and in such inferior Courts" as Congress may establish. If judicial power was to be vested at all, then,

55. In Executive Order 12,662 of December 31, 1988, the President accepted, generally, such decisions:

In accordance with subsection 401(c) of the FTA Implementation Act, in the event that the provisions of subparagraph 516A(g)(7)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. section 1516a(g)(7)(B), take effect, I accept, as a whole, all decisions of binational panels and extraordinary challenge committees.

Exec. Order No. 12,662, 3 C.F.R. 624 (1989).

56. *CITBA Statement*, *supra* note 6.

57. *Id.* at 5; see also U.S. CONST. art. III, § 1.

CITBA reasoned it must be vested with a federal court.⁵⁸ Since binational panels are not courts, Congress exceeded its authority in vesting judicial power in them.

CITBA also cited to a line of Supreme Court precedent holding that international agreements must conform to the Constitution and that it is impermissible for such agreements to modify the basic character of the government.⁵⁹ CITBA stated that Articles I, II, and III of the Constitution place the powers of government exclusively in the legislative, judicial, and executive branches of government and that the CFTA modified this alignment by vesting government power in the panels.

CITBA also argued that the establishment of the panels deprived individuals of "property" interests within the meaning of the Fifth and Fourteenth Amendments. CITBA cited to Supreme Court authority holding that a cause of action has been held to be "a species of property protected by the fourteenth amendment's Due Process Clause,"⁶⁰ and that while "the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards"⁶¹ and suggested that the denial of a hearing before a court constituted a taking of an importer's property without due process of law.

Finally, CITBA expressed equal protection concerns as to the fourteenth amendment's guarantee implied in the Due Process Clause of the Fifth Amendment. The potentially unequal nature of the panels was demonstrated with the following example:

A simple illustration of this is as follows: A and B are both in the business of importing product C. A imports product C from Canada. B imports product C from France. If B has any grievances over product C in reference to antidumping or countervailing duties, he will be able to seek redress for his

58. CITBA Statement, *supra* note 6, at 5-6.

59. *Id.* at 3 (citing *Reid v. Covert*, 354 U.S. 1, 16-17 (1957); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *The Cherokee Tobacco*, 78 U.S. 616, 620-21 (1871)).

60. *Id.* at 10 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (citing *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950))).

61. *Id.* at 11 (citing *Logan*, 455 U.S. at 432 (quoting *Vitek v. Jones*, 445 U.S. 480, 490-91 n.6 (1980))).

grievances in the Court of International Trade simply because he imported product C from France. Since A imported product C from Canada, A will be precluded from asserting any similar claims in the Court of International Trade. Except for the origin of where they import product C from A and B should be considered similarly situated.⁶²

The House Judiciary Committee in the end concluded that the CFTA was constitutional.⁶³ The Committee determined, with regard to Article III concerns, that because the CFTA was the result of cooperation between the legislative and executive branches the combination of the authority of these two branches over the regulation of commerce and foreign affairs placed the CFTA "on strong constitutional ground."⁶⁴ The Committee stated that the rights removed from judicial review under the CFTA were of a class of "public rights" which would be subject to review by "an international body applying international law."⁶⁵ The Committee also stated that the panels would not deprive any parties of due process based upon the following:

The panelists are charged with a duty to apply the law and precedent of the relevant country. The panels will use the basic rules of appellate procedure as they exist in the United States and Canada, respectively. In addition, the panelists will be subject to a strict code of ethics and will be subject to peremptory challenges by each government. Finally, the FTA provides for a review mechanism of aberrant panel decisions through the use of extraordinary challenge committees.⁶⁶

With regard to Appointments Clause concerns, the Committee concluded that the Constitution did not prevent the United States from participating in review of government action by international tribunals and cited to the long history of the use of such tribunals starting with the Jay Treaty of 1794.⁶⁷

62. *Id.* at 14 n.21.

63. Rodino, UNITED STATES-CANADA FREE-TRADE AGREEMENT IMPLEMENTATION ACT OF 1988, H.R. REP. NO. 816, 100th Cong., 2d Sess. 1 (1988).

64. *Id.* at 4.

65. *Id.* at 5.

66. *Id.*

67. *Id.* at 15.

c. *National Council for Industrial Defense v. United States*⁶⁸

In March of 1992, the United States District Court for the District of Columbia heard arguments on behalf of the National Council for Industrial Defense⁶⁹ and the American Engineering Association, Inc.⁷⁰ challenging the binational panel system.⁷¹ The complaint alleged that the President and Congress had exceeded the authority granted to them under Articles I, II, and III of the Constitution by delegating judicial powers to the binational panels.⁷² The complaint also alleged that the CFTA violated Article II, Section 1 of the Constitution by vesting judicial powers of the United States in the panels and alleged that the plaintiffs had been deprived of their Fifth Amendment rights.

The complaint also alleged that the agreement violated the Appointments Clause contained in Article II Section 2 of the Constitution. This clause provides that the President:

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President also, in the Courts of Law, or in the Heads of Departments.⁷³

In *Buckley v. Valeo*,⁷⁴ the Court held that all persons "exercising significant authority pursuant to the laws of the United States" are officers of the United States.⁷⁵

68. 827 F. Supp. 794 (D.D.C. 1993).

69. "[A] non-profit organization that fosters 'the strengthening of those endangered American production facilities and work forces which contribute to the industrial capacity of the United States.'" *Id.* at 796 (quoting Complaint at 1).

70. "[A] non-profit organization that works to 'enhance the status of the American engineering profession and related occupations and to support activities for the employment of Americans in the engineering profession.'" *Id.* (quoting Complaint at 2).

71. *Id.*

72. *Id.* at 797.

73. U.S. CONST. art. II, § 2.

74. 424 U.S. 1 (1976).

75. *National Council for Indus. Defense v. United States*, 827 F. Supp. 794, 797 (D.D.C. 1993).

The government filed a motion to dismiss on the grounds that the court lacked jurisdiction and the plaintiffs lacked standing.⁷⁶ As stated above, the CFTA implementing legislation had placed jurisdiction for constitutional challenges to the panel system in the Court of Appeals for the District of Columbia Circuit.⁷⁷ The subject case was filed in the United States District Court for the District of Columbia alleging alternative grounds for jurisdiction with the apparent goal of avoiding the workings of Executive Order 12662, which would be effective only if the binational panel provision was attacked in the Court of Appeals for the District of Columbia Circuit.⁷⁸ The court granted the government's motion to dismiss on jurisdictional grounds and, thus, the case was not heard on the merits.⁷⁹

d. Coalition for Fair Lumber v. United States

On September 14, 1994 a case challenging the constitutionality of the panel system was filed in the United States Court of Appeals for the District of Columbia Circuit by the Coalition for Fair Lumber Imports.⁸⁰ This case, which is a result of the *Softwood Lumber* panel and ECC decisions, challenges the implementation of those decisions on the grounds that review by the panel and ECC violated the plaintiff's Fifth Amendment Due Process rights and that the panel system violates the Appointments Clause and the separation of powers requirements of Articles I, II, and III of the Constitution.⁸¹ The complaint further alleges that the provision authorizing the "acceptance" by the President of a decision declared unconstitutional violates the due process requirement of the Fifth Amendment and the Constitution's guarantees of equal protection.⁸²

At the time of this writing, the government had not yet filed an answer to the Coalition for Fair Lumber Imports' com-

76. *Id.*

77. *Id.* (citing 19 U.S.C. §1516a(g)(4)(A)).

78. *Id.* at 797-800.

79. *Id.* at 800.

80. Complaint and Petition for Review for Declaratory and Injunctive Relief, Coalition For Fair Lumber v. United States of America, No. 94-1627 (D.C. Cir. filed Sept. 14, 1994).

81. *Id.* at 2-3.

82. *Id.* at 15, 16.

plaint. It must be stated, however, that it appears that the complaint places the government in an awkward position. By defending this case, the government will be defending the constitutionality of the dispute settlement mechanism which it negotiated. The government will also be defending against an attempt to overturn a panel decision which reversed the government's administrative determination.

6. Ethical Considerations

The fact that the binational panels under the CFTA consist exclusively of non-judges raises a number of potential ethical problems. In order to deal with these problems a Code of Conduct (Panel Code)⁸³ was established for panel members.

Particularly significant among the requirements of the Code of Conduct are the requirements relating to "Responsibility to the Process" and "Independence and Impartiality," which are as follows:

I. RESPONSIBILITY TO THE PROCESS

A candidate or member shall avoid impropriety and the appearance of impropriety and shall observe high standards of conduct so that the integrity, fairness, and independence of the dispute settlement process will be preserved.

II. INDEPENDENCE AND IMPARTIALITY

A member shall be independent and impartial. A member shall act in a fair manner and avoid the appearance of partiality.

A member shall not be influenced by self-interest, outside pressure, public clamor, loyalty to a Party, or fear of criticism.

A member shall not incur any obligation or accept a benefit of any kind, directly or indirectly, which would in any way interfere or appear to interfere with the proper discharge of the member's functions.

While sitting on a panel or committee, a member shall not use the power of membership to advance any personal or private interests. A member shall not act in a manner that

83. United States-Canada Free Trade Agreement, Code of Conduct for Proceedings Under Chapter 18 & 19, NORTH AMERICAN FREE TRADE AGREEMENTS—TREATY MATERIALS (James R. Holbein & Donald J. Musch eds., Oceana Publications Booklet A.5, Release 93-2, Nov. 1993).

would create the impression that others are in a special position to influence the member. A member should make every effort to prevent or discourage others from presenting themselves as being in such a position.

A member shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence the member's conduct or judgment. A member shall avoid entering into any such relationship, or acquiring any financial or personal interest, that is likely to affect the member's impartiality or that might reasonably create the appearance of bias. For a period of one year after completion of a Chapter 19 proceeding, a former member shall not personally advise or represent any participant in the proceeding with regard to antidumping or countervailing duty matters. A former member shall otherwise avoid impropriety or actions that may reasonably give the appearance that the member was biased in his or her functions as a member by the expectation of benefiting therefrom.

In the case of a proceeding conducted under Article 1904, a member or former member shall not represent a participant either in a domestic court proceeding involving the same goods from third countries whose imports were cumulated with those from a Party for the purpose of an injury determination or any court proceeding attempting to challenge the proceeding.⁸⁴

The Code specifically states that "The governing principle of this Code is that a candidate or member must disclose the existence of any interests or relationships that are likely to affect the candidate's or member's independence and impartiality or that might reasonably create the appearance of bias."⁸⁵ Thus, in order for the code to be effective it is incumbent on panel members and potential panel members to fully disclose the matters touching upon the above quoted Code language.

The Code does not place the same demands on panel members as the ABA Model Code of Judicial Ethics (Judicial Code)⁸⁶ places upon members of the judiciary. The language of the Panel Code is simply not as exacting as the language of the Judicial Code. Compare, for instance, the Panel Code language quoted above under "I. Responsibility to the Process" to Canon

84. *Id.* at 1-2.

85. *Id.* at 2.

86. MODEL CODE OF JUDICIAL CONDUCT (1990).

1 and Canon 2 of the Judicial Code: "A Judge shall uphold the integrity and independence of the judiciary. A Judge shall avoid impropriety and the appearance of impropriety in all of the Judge's activities."⁸⁷ While the Panel Code states that the panel member shall "avoid impropriety," the Judicial Code places an affirmative duty on the judge to uphold the integrity of the judiciary and mandates that the judge shall avoid impropriety and the appearance of impropriety not only with regard to the matters before the judge in court but in all of the judge's activities.

Canon 4 of the Judicial Code is as follows: "A Judge shall so conduct the Judge's extrajudicial activities as to minimize the risk of conflict with judicial obligations."⁸⁸ It would be virtually impossible for the Panel Code to contain a provision analogous to Canon 4 as the nature of the system presumes that panel members will be engaged in the practice of international trade law and, thus, will be conducting their affairs outside of their panel activities in such a manner as will maximize the risk of conflicts with potential panel obligations. Panelists engage in the practice of international trade law both before and after their involvement as panelists. Given the repetitive nature of many issues which arise in the context of antidumping and countervailing duty disputes, it is possible that panelists could find themselves deciding issues with which they have had involvement in private practice or with which they will one day have involvement in private practice.

Further, the panel system places panel members in the position of reviewing decisions of an agency before which they may practice. A panelist may review a decision made by an analyst at the ITA and then later represent a party before the same analyst. It is even possible that, in such a situation, the same issues would arise as those which were the subject of the panel dispute, since by their terms panel decisions are binding only upon the parties before the panel.

The possibilities for such occurrences, which may or may not violate the Panel Code, certainly complicate the relationships between the parties to such disputes and tend to increase, rather than decrease, the possibility of ethical problems

87. *Id.*

88. *Id.* Canon 4.

arising.

These concerns may diminish somewhat under NAFTA. Annex 1901.2 of NAFTA provides that binational panels "shall include judges and former judges to the fullest extent practicable."⁸⁹ The potential for problems to arise, however, will not disappear unless the panels are wholly drawn from the judiciary.⁹⁰

The potential for problems is illustrated by the *Softwood Lumber* case. Two panel members in that case were subject to allegations of conflicts of interests after the issuance of the panel determination. The professional relationships which were the basis of the alleged conflicts had not been disclosed by the panelists involved. In its brief before the ECC reviewing the matter, the government described the importance of the issue as follows:

More than anything else, faith in the integrity and independence of panelist is the key to the perceived legitimacy of the binational panel process. In light of this reality, the United States and Canada developed a Code of Conduct containing strict—and continuing—requirements that panelists and potential panelists disclose all business and professional relationships with parties having an interest in the proceedings. This system of self-disclosure is effectively the only means for the Parties to become aware of and, if necessary, take corrective action concerning panelist conduct that weakens the legitimacy of the system. In addition to disclosure, the Code also requires the panelist affirmatively to avoid relationships that could suggest even the appearance of impropriety or bias. Judges in both the United States and Canada are subject to essentially the same requirement, and its importance to the safeguarding of confidence in the panel system is obvious.

By maintaining relationships that create the appearance of partiality, and in one case, that constitutes a serious conflict of interest, and by failing to disclose these relationships to the Parties for their consideration, two of the panelists in this case failed in substantial respects to comply with their obligations under the Code. Even more importantly for the Chapter 19 system of dispute resolution, these failings effec-

89. NAFTA, *supra* note 5, annex 1901.2.

90. To do so would, again, cause an observer to ask if the panels are to be drawn entirely from the judiciary, are such panels necessary?

tively taint the decision reached by the panel such that intervention by this Committee under the standards of Article 1904 is imperative. These failings represent the kind of aberrant behavior by panelists that the ECC process is intended to address.⁹¹

In his dissent to the *Softwood Lumber* ECC decision, Judge Malcolm Wilkey described the conflicts of the two panelists. Judge Wilkey determined that the first panelist failed to disclose the following:

1. Legal services he *personally* provided to an agency of the Canadian Government, one of the two parties in this proceeding, during the course of this proceeding itself;
2. His law firm's relationships with eleven Canadian lumber and forest product companies continuing during the proceedings in this case; and
3. His and his firm's relationships with the Canadian Government during the course of these proceedings.⁹²

Judge Wilkey stated that the second panelist involved violated the Code by failing to disclose:

1. His firms' financial interests and relationships with the Governments of Canada, Ontario, British Columbia and the Government of the United States, all of which were parties to the panel proceedings;
2. His and his law firms' existing and past relationships with three Canadian lumber and forest product companies;
3. His firms' relationship with Miranda Inc. and Georgia Pacific, both interested in the lumber panel proceeding.⁹³

Despite the apparent conflicts, the ECC determined that there was "no intentional refusal to reveal any matter that would justify the opposite party in removing either panelist and the request by the United States government for an extraordinary challenge should be rejected."

91. Brief filed on May 3, 1994 by the Office of the United States Trade Representative at 21-22, *In re* Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01 USA, (Extraordinary Challenge Comm. Proceeding, Aug. 3, 1994).

92. *In re* Certain Softwood Lumber Products From Canada, No. ECC-94-1904-01 USA, at 77 (Extraordinary Challenge Comm. Proceeding, Aug. 3, 1994) (Wilkey, J., dissenting).

93. *Id.* at 79.

On the basis of this decision it appears as though panelists are being held to even lower ethical standards than arbitrators. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*,⁹⁴ the Supreme Court examined a case in which an arbitrator had failed to disclose that one of his customers was a party to the arbitration proceedings. The Court reversed a decision upholding the arbitrator's decision stating that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."⁹⁵ The Court emphasized the importance of disclosure given the fact that arbitral decisions, like panel decisions, are not subject to appellate review:

it is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.⁹⁶

Based upon this rule, arbitral decisions have been overturned in cases in which an arbitrator has represented a party to the arbitration proceeding,⁹⁷ or where the law firm with which an arbitrator practiced has represented a party to the arbitral proceeding, even when that representation was stated to have been unknown to the arbitrator at the time of the proceedings.⁹⁸ Similarly, a Justice of the Peace who is acting as an attorney for one of the parties to the proceedings must be disqualified.⁹⁹

Thus, courts have held those who sit in place of judges, such as arbitrators and justices of the peace, to an ethical standard at least as high, if not higher, than that applied to

94. 393 U.S. 145, *reh'g denied*, 393 U.S. 1112 (1968).

95. *Id.* at 150.

96. *Id.* at 149.

97. *Bole v. Nationwide Ins. Co.*, 379 A.2d 1346 (Pa. 1977).

98. *Close v. Motorists Mut. Ins. Co.*, 486 N.E.2d 1275 (Ohio Ct. App. 1985).

99. *Chicago & A.R. v. Summers*, 14 N.E. 733 (Ind. 1887).

the judges themselves. Members of Article 1904 panels should not be exceptions to this rule.

7. Public Confidence

Both members of the majority in *Softwood Lumber* ECC emphasized the fragility of public confidence in the binational panel system in the course of reaching a decision which they apparently anticipated would be controversial.

The inherent weakness in the panel system, if such there be, is the difficulty of inculcating in the minds of interested parties and other members of the general public the same confidence in the impartiality of panel members as they have in the judiciary.¹⁰⁰

It is unfortunate that the decision in this matter has not been unanimous because there is always a chance that it will be interpreted as a decision based on national interest when the two Canadian members of the Committee form a majority and the American member files a dissent.¹⁰¹

As a result of the *Softwood Lumber* decision the binational panel system is now undergoing its second constitutional challenge. A number of members of Congress have written to the President asking that the decision not be implemented, and questions linger about the ethical concerns raised by such panels, why such panels are necessary, and whether they are performing adequately. The fact that this topic is, once again, being discussed at this judicial conference indicates that these questions have not been resolved in the minds of many but, rather, are very much alive. At this late date, after the inclusion of Mexico in the binational panel system, the fact that these questions are still unresolved indicates a low level of confidence in the system.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Serious Consideration Should be Given to Eliminating the Panels

100. *In re* Certain Softwood Lumber Products from Canada, No. ECC-94-1904-01 USA, at 29 (Extraordinary Challenge Comm. Proceeding Aug. 3, 1994) (Morgan, J.).

101. *Id.* at 53-54 (Hart, J.).

The authors share the opinion that the binational panel system set up to review antidumping and countervailing duty determinations is not an effective substitute for national judicial review. From a business point of view, the outcome of panel review offers far less certainty or predictability than determinations by the national courts. The reasons for this are several. A review of panel determinations indicates that panels have varied widely over the standard and scope of administrative review. Moreover, panelists tend to substitute their judgment for the judgment of the administrative agency in establishing a determination. To do so in a United States case is clearly contrary to statute and judicial authority. Further, the fact that decisions issued by the panels are not precedential adds greatly to this lack of predictability.

It must also be noted that Congress established the CIT as a court of specialized jurisdiction in order that litigants would have the benefit of a specialized bench expert in review of the very issues which the panels review. Removal of jurisdiction from the CIT is inconsistent with the original concept of establishment of such a court with special subject matter jurisdiction.

The concept of deference to administrative authority, which exists not only in the United States but also in different forms and degrees in Canada and Mexico, has not been uniformly applied by the panelists over the past five years. Further, the lack of an appeal of right is often frustrating to a business appearing before a panel either as a domestic interested party or a respondent. There may be a lack of ability to have an opinion of the panel clarified, in terms of basis for determination, or reviewed by a higher authority or even serve as legal precedent for the future. Also, there is no right to an appeal. In fact, in those few cases where an ECC has been established by a determination of the United States Trade Representative, only those cases that have been politically electric have made it to that level. Other cases, which are inherently less dramatic or less newsworthy, involving petitioners and respondents with only limited financial resources, must accept the determination of three individuals. These persons may carry unidentifiable biases induced by years of "going to battle" on behalf of private parties before the same agency that issued the determination they are expected to now rule upon and of having to return (or continue) practicing before that

agency.¹⁰²

As mentioned previously, a private party who does not agree with a panel result ordinarily is not even in a position to challenge the constitutionality of any aspect of the proceeding or the panel itself. The United States implementing legislation requires that a litigant who challenges the constitutionality of the panel system and loses must bear the *entire* costs of the government in defending the matter. We are aware of no other legislation that sets up such a potential obstacle to a constitutional challenge. No normal business, responsible to shareholders, would likely engage in a constitutional challenge under those conditions and, to that extent, the device inserted by the drafters of the implementing legislation has been successful. A current challenge, brought about by a trade association, may have some success, assuming the association has standing to bring the action in view of this legislative requirement.

United States manufacturers, labor unions, importers and distributors who are a party to an antidumping or countervailing duty proceeding have lost the constitutional right to have impartial judicial review of a determination of which they are aggrieved. Moreover, they have lost the right to an appeal. These are fundamental rights that should not be subservient to the agency's findings of fact and conclusions of law.

B. If the Binational Panel System is to Continue, Improvements in the System Should Be Made

On the assumption that, as a practical matter, the panels will continue to be involved in adjudicating trade disputes within their jurisdiction as between the United States, Canada, and Mexico, and recognizing the possibility that such binational panel review may extend to numerous other countries, the following observations are in order.

1. The negotiators, and our Congress, should consider removing all impediments to constitutional challenge. The extraordinary imposition of ominous and unknown costs, as imposed by United States law, is pernicious and contrary to the Constitution itself.

2. Congress should consider limiting panel membership to

102. The authors readily acknowledge that the roll of panelists include outstanding members of the bar.

judges or retired judges either from the federal or state systems. Judges understand and adhere to the strict code of judicial conduct which governs their lives and guarantees fair and impartial judication. There is no legitimate reason why issues of law and fact arising out of antidumping and countervailing duty matters reviewed by a panel should not be reviewed by individuals who already have the public trust by reason of their judicial position. International trade attorneys appearing before the agency as counsel for private parties and also serving as panelists in other simultaneous cases represent an inherent opportunity for bias.

3. Moreover, the current code of ethics utilized in the binational panel system is inadequate, as demonstrated by the serious questions left behind in the *Softwood Lumber* case. Instead, an entirely new set of ethics should be drafted based fully on the judicial canons. The code should specifically deal with the professional consequences and the disposition of cases where a panelist is found to have breached the code.

4. Another possibility is to establish a core of full time panel members consisting of persons who are capable of carrying on judicative activities but who are prohibited from appearing before any United States or foreign government agency that deals with trade in order to guarantee impartiality.

5. New legislation or a new agreement should be adopted to provide for an absolute right to appeal thus giving interested parties an opportunity to have an impartial review of a panel decision. A panel would be more inclined to adhere to the scope and standards of review knowing that appeal could, for example, be made directly to a court of appeals such as the United States Court of Appeals for the Federal Circuit.

In the final analysis, the Canadian and United States, and most recently Mexican, governments have established systems of panel review that have substantial imperfections. Most significantly, the panels in the United States do not afford private businesses with sufficient protections to guarantee due process in the disposition of the respective business interests relating to the application of the antidumping and countervailing duty laws. Therefore, we suggest that the Congress and the trade negotiators consider the elimination of the panel system or, at the very least, require judicial standards of selection and ethics for panelists.