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DISPUTE SETTLEMENT UNDER NAFTA: DO THE PARTIES HAVE THE WILL TO MAKE IT WORK?

by

Mary Jo Nicholson

1. Introduction

The Canada - United States Free Trade Agreement (CFTA)\(^1\) has now been in effect for over five years with the result that we have relevant experience to apply to the more recent North American Free Trade Agreement (NAFTA)\(^2\) which replicates many of the provisions of the CFTA. This is particularly true in the area of dispute settlement. There are three categories of dispute settlement under NAFTA. The general dispute settlement provisions are found in Chapter 20 and are available only to the contracting parties or governments.\(^3\) These provisions extend to "all disputes between the Parties regarding the interpretation or application" of the agreement or situations where "a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of the agreement or cause nullification or impairment" of the agreement.\(^4\) The antidumping (AD) and countervailing duty (CVD) dispute provisions are found in Chapter 19, and the provisions relating to investor disputes are found in Chapter 11.

This article will outline the AD and CVD dispute provisions of the NAFTA which are similar to those of the CFTA. The experience under the CFTA provisions will be reviewed paying particular attention to the cases affecting the pork and softwood lumber industries. The article will conclude with a view forward towards the operation of the provisions of Chapter 19 of NAFTA.

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\(^{1}\) Professor, Ryerson Polytechnic University, Toronto, Canada.
This is an important topic relating directly to prospects for the ultimate success of the new agreement. While the CFTA and NAFTA are largely about the reduction of tariffs, many domestic industries are affected by their provisions and will look for any means available to protect themselves from the effects of global competition. The long-term viability of NAFTA may well depend upon the willingness of the domestic governments of each Party to adhere to the spirit of the dispute settlement provisions. Manifestations of respect and acceptance by the governments of the Parties of the decisions made under the AD and CVD provisions carry a great deal of weight in the formative stages of the new relationship of the Parties. One writer has described the situation, stating: "The binational process of Chapter 19 will in many respects be the crucible of the NAFTA. As the vehicle for resolving AD and CVD cases brought in any of the three contracting countries, Chapter 19 panels will be required to deal with the types of trade conflicts that have historically generated intense, sometimes passionate controversy." 

II. Chapter 19 of NAFTA: the AD and CVD Dispute Settlement Provisions

AD and CVD dispute procedures were included in the CFTA at the insistence of Canada where there was at the time of the negotiation of that agreement, a perception that American contingent protection laws were applied subjectively. What Canada really wanted from the AD and CVD negotiations was agreement by the Parties on a set of common rules on subsidies and dumping, however the two countries were unable to agree on a bilateral regime providing for uniform provisions. It was agreed instead, that each Party would reserve the right to apply its own AD and CVD law to goods imported from the territory of any other Party. With the proviso that binding binational panel proceedings would be substituted for appeals to the courts of either country. This was an important compromise on the part of the two Parties to the CFTA and these provisions have been incorporated substantially unchanged into the NAFTA.

A. Binational Panel Review Replaces Judicial Review

Each country has promised to replace judicial review of final AD and CVD duty determinations with binational panel review. Under the GATT, and under U.S. and Canadian law AD and CVD duties cannot be imposed unless there is a finding of dumping or subsidy and a finding of material injury or threat of material injury to a domestic industry. The CFTA provides that review based upon the administrative record, a final AD or CVD determination of a competent investigating authority may be requested in order to determine whether such determination was in accordance with the AD or CVD law of the importing Party. "Competent investigating authority is defined in Canada as the Canadian International Trade Tribunal (CITT) or the Deputy Minister of National Revenue for Customs and Excise (MNR); in the United States as the International Trade Administration of the U.S. Department of Commerce (Commerce) or the U.S. International Trade Commission (ITC); and in Mexico as the designated authority within the Secretariat of Trade and Industrial Development (SCFI)." The panel appointed to review may then uphold a final determination, or remand it for action not inconsistent with the panel's decision. Panels must apply the same domestic substantive law that the administering agency in the importing country must apply. This law is defined as "relevant statutes, legislative history, regulations, administrative practice and judicial precedents." The standard of review has been defined by reference to specific legislation in each of the three countries with the intention that it be the same as would be applied by the reviewing court of the importing country.

It is interesting to note the comment by one observer, "At the time (that panels were introduced in the CFTA) some regarded them as insubstantial innovations: the Chapter 19 provisions creating panels neither adopted new substantive law nor established a right of review that would not otherwise exist. Rather, those provisions provided that Chapter 19 panels would serve simply as surrogates for reviewing courts and decide cases in accordance with the same legal standards that courts would apply." 

B. Composition of the Panels

The panels will be made up of five members, who "shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. The Parties will maintain separate rosters of potential panelists, composed of sitting or retired judges "to the fullest extent practicable." It is interesting to note that the CFTA did not include this specific preference for sitting or retired judges. Panel members must be citizens of one of the Parties but there is no requirement of proportional representation on the basis of nationality. A majority of the panelists on each panel shall be lawyers in good standing. Within 30 days of a request for a panel, each involved Party shall appoint two panelists from the roster. Within 55 days of the request for the panel, the involved Parties shall agree on the selection of a fifth panelist.

C. Individuals May Access Proceedings

Unlike Chapter 20 proceedings, Chapter 19 panels are accessible by private parties. This is consistent with Chapter 19 review as an extension of domestic proceedings and with the fact that the involvement of government is generally less
F. The Extraordinary Challenge Committee - An Exception to the Rule of Finality of Chapter 19 Panel Decisions?

The only exception to the rule of finality of Chapter 19 panel decisions is a limited one and it is found in the provision for the extraordinary challenge procedure which provides for the establishment of an extraordinary challenge committee (ECC) comprising three members which are selected from a joint roster comprised of judges or former judges. This provision reads as follows:

Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:

(a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
(ii) the panel seriously departed from a fundamental rule of procedure, or
(iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, 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, that party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

If an ECC finds that the narrow grounds for an extraordinary challenge have been established, the ECC may vacate or remand the binational panel decision. The drafters of the extraordinary challenge process expected that it would be used infrequently. There are, at present, significant tensions between the Parties with respect to the proper role of an ECC. "Thus far, these challenges have arisen solely with respect to panel reviews of U.S. cases. At least in this context the initial tension has been between a U.S. desire for broader appellate recourse in cases it believes were wrongly decided by a panel and a Canadian desire to restrict extraordinary challenges to rare instances of systemic abuse, such as gross misconduct or ultra vires action." This issue has been addressed in each of the ECC decisions to date. In the first ECC, In the Matter of Fresh Chilled, or Frozen Pork from Canada, the Committee stated: "As its name suggests, the extraordinary challenge procedure is not intended to function as a routine appeal. Rather the decision of a binational panel may be challenged and reviewed only in "extraordinary" circumstances. While the legislative
history of the extraordinary challenge committee mechanism is lacking in specifics, it is clear that the extraordinary challenge procedure is intended solely as a safeguard against an impropriety or gross panel error that could threaten the integrity of the binational panel review process. Notably, the legislative history states that an extraordinary challenge committee is intended as a review mechanism for "aberrant panel decisions" and that "the availability of an extraordinary challenge committee should act to cure aberrant behavior by panelists."

The Committee gave further reasons, "As the procedural rules state, an extraordinary challenge committee is composed of three judges or former judges of a federal court of the United States or of a court of superior jurisdiction of Canada. The challenge committee's function is to determine whether a panel or panel member violated the three-prong standard of the extraordinary challenge procedure. In contrast, a binational panel is composed of five individuals with expertise in international trade law. The panel members' function is to review the record evidence and the trade law issues that have been raised before the competent investigating authority. The committee and the panel have separate roles and different expertise; it is not the function of a committee to conduct a traditional appellate review regarding the merits of a panel decision. Another important procedural distinction and indicator of differences in review functions between the panel review mechanism and the extraordinary challenge mechanism is the disparate amount of time allotted to the two tribunals for review. Under the procedural rules, an extraordinary challenge committee typically is given only 30 days to issue a written decision, whereas a binational panel generally is given 315 days to issue a decision."

The issue was also addressed by the second ECC in the Live Swine case: "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... The ECC should address systemic problems and not mere legal issues that do not threaten the integrity of the FTA's dispute resolution mechanism itself. A systemic problem arises whenever the binational panel process itself is tainted by failure on the part of a panel or a panelist to follow their mandate under the FTA."

III. The Pork Cases

The "pork cases" actually include a number of panel determinations, the specific details of which will not be outlined in this article. These cases can be divided for our purposes into two categories, the Fresh Chilled and Frozen Pork from Canada (Fresh Pork Case), and the Live Swine from Canada (Live Swine Case). Each of these cases involved panel reviews of CVD determinations by Commerce as well as findings of material injury by the ITC. Each of the cases involved multiple rounds, and each of the cases resulted in an appeal to the ECC.

These cases have exposed possible weaknesses in the AD and CVD dispute settlement provisions, and have exerted considerable pressure on the system, severely testing the commitment of the Parties to it. They have received a great deal of publicity especially in Canada, where the analogy of the "mouse in bed with the elephant" still strikes a resonant chord. To be fair, we may attach too much significance to the events in the pork cases. It has been stated of these cases, "the issues were complicated, even for experts; the texts were lengthy; the proceedings were confusing; and the mix of economics, politics, and law are difficult to sort out."

A. The Fresh Pork Injury Case

"This case was the first in which a panel established under the CFTA had to construe a U.S. statute that had not been construed previously."

The facts of the Fresh Pork (Injury) Case may be summarized as follows:

1. The ITC determined that the U.S. industry was threatened with material injury by reason of subsidized pork imports from Canada.
2. This decision was appealed by Canadian producers and provincial governments.
3. The Chapter 19 panel unanimously found that several of the ITC's findings "rel[y] heavily or flow directly from faulty use of statistics." The Panel remanded the determination to the agency, which re-opened its record, and "attempted to strengthen the basis for its findings and then re-issued the same decision."
4. The Canadian parties requested another panel review. This panel decision stated "the ITC's record has been combed not once but twice in the search for substantial evidence of material injury." The panel found that a threat of material injury was not supported by substantial evidence. The case was once again remanded to the ITC.
5. The ITC then reversed its decision, stating that it was required to do so by the panel decision.

In the final stages of this case it became apparent that "the traditional courtesies of international dispute settlement, which had on the whole been observed in the earlier phases of the pork case and in all of the other cases under Chapter 19 were beginning to wear thin." The situation continued to deteriorate. Professor Lowenfeld describes the acrimonious tone of the Commissioners of the ITC in the remarks from the second panel decision as follows: "...And so on for more than thirty pages, full of statements referring to the panel's "preordained outcome," "counterintuitive, counterfactual, and illogical, but legally binding conclusion," "deliberate misunderstanding of the Commissioner's view," "woeful lack of knowledge", "egregious intrusion into the factual decision-making authority of the Commission"
"impermissible reweighing of the evidence etc." It must be observed, however, that these views were limited to two commissioners and for this reason may not represent an on-going problem provided that this attitude is not taken up by their fellow Commissioners. Informed observers, however, view these developments with concern. "Although the ITC reversal in the Pork (injury) case indicates that the U.S. government honoured its commitment under FTA Article 1904.9 to be bound by the decisions of Chapter 19 panels, its statements and actions suggest that it was doing so reluctantly. In the majority opinion on the second remand, Commissioners Ruhe and Newquist repeatedly criticized the "panel's decision and warned that the decision would not impact their future practice. The U.S. Government, at the urging of the ITC, requested an extraordinary challenge committee to review the panel's second remand to the ITC." 40

B. The ECC Decision in the Fresh Pork (Injury) Case

The ECC, comprising two retired Canadian judges and one retired United States judge, made a unanimous decision that the three-pronged requirement for a request "provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge is not intended to function as a routine appeal." 41 The ECC stated that "the allegations do not meet the threshold for an extraordinary challenge."

It is generally acknowledged that political pressure was a factor in the decision to bring an extraordinary challenge in this case. Consider the comments of Horlick & deBush writing in 1992: "Political pressure played a major role in the Pork Case because the deadline for the U.S. Trade Representative's decision to invoke the ECC process fell at the same time Congress was deciding whether to extend fast-track legislation for an additional two years." 42 At the relevant time, the US Trade Representative received a number of multiple signature letters from "approximately 50 members of Congress encouraging her to request an ECC. The implicit message of the letter was that support for fast-track extension was dependent on a request for an ECC." 43

A Canadian perspective is provided by Professor William Graham, who wrote, "an examination of the recent Pork cases sends out conflicting signals, some worrisome, some encouraging, about the way the system is working. Disatisfaction in the U.S. led to the use of an ECC procedure..." There are several concerns about the use of the procedure in this case. As there was no suggestion of corruption or bias or a failure to observe natural justice before the tribunal, there is a real fear in Canadian quarters that the use of the procedure in these circumstances, relying on the excess of jurisdiction test, is an attempt by Americans to have an appeal procedure introduced into the system. Lawyers familiar with arbitration will know all too well how attempts are made to challenge arbitration awards before the courts when the real motive is that one does not like the result. If there is regular recourse to such a procedure it will introduce expense, complexity and delay, which will in themselves, constitute non-tariff barriers which the agreement sought to eliminate..." It also politicians an area which was suppose to be depoliticized." 44

C. The Live Swine (Subsidy) Case

Canadians, lulled into thinking that the extraordinary challenge issue may have been settled by the Fresh Pork Case had a sudden awakening brought on by the Live Swine affair. In this case Canadian and provincial governments and producers brought a Chapter 19 appeal against a finding by Commerce of subsidies on Canadian live swine exported to the U.S. The first panel decision was released May 19, 1992 and affirmed the agency in part and remanded the case in part. The agency confirmed its prior decision and a second panel review was held. In its second decision, released October 30, 1992 the panel again affirmed Commerce's determination in part and remanded in part. In response to the second determination on remand in which Commerce continued to find subsidies, the panel issued an order on December 27, 1992 affirming its second determination on remand. In the final remand, the Commerce Department criticized the panel reviewing its final decision in the fourth administrative review of Live Swine from Canada and announced that Commerce would not adhere to it in any other cases. 45

On January 21, 1993, in the very early weeks of the Clinton administration, the USTR filed a request for an ECC. 46 Again political pressure, this time, the need to satisfy powerful critics who might impede the passage of implementing legislation for NAFTA was, certainly from the Canadian perspective, a factor in the decision to bring the challenge.

D. The Decision of the ECC in the Live Swine (Subsidy) Case

Once again, the ECC upheld the decision of the panel. The ECC stated in its reasons, "The FTA provides a three-prong test...A panel decision must reflect gross misconduct or bias, a serious departure from fundamental rules, and manifest excess of a panel's authority and jurisdiction to be over turned. The ECC cannot become an appeal forum for every frustrated participant in the binational panel process" the Committee stated. The ECC described the task before it," to determine whether the panel accurately articulated the scope of review and... whether it has been consistently applied." The ECC found that the binational panel had correctly cited
the standard of review and that the USTR had not persuaded it "that the panel failed to apply the properly articulated standard of review".47

The result of the second ECC decision was to encourage those who thought that the strongly worded decision would convince American pork producers and other like-minded industry associations that a Chapter 19 panel decision properly arrived at is final and binding upon the parties. Sanguine comments were written, e.g. "Most commentators agree that the outcome of the Pork case has strengthened the integrity of the binational panel system. In precluding the use of the extraordinary challenge procedure as a means of "routine appeal" the decision both reinforced the authority of the panels and limited the potential for political interference in the panel process. Given this strong precedent, there is no reason to suspect that the procedure will be employed any differently under NAFTA."48

IV. The Softwood Lumber Cases

Although the writer would like to echo this optimism expressed after the second pork ECC, recent developments in the trade relations between the two contracting parties to the CFTA raise serious questions. Will the dispute resolution settlement provisions receive sufficient support to ensure their efficacy at times when they are most needed? An affirmative answer is fundamental to the long-term viability of the any trade agreement. Perhaps the optimism voiced after the ECC decision in the first pork case is premature. Are we now in a period in which patience alone is required or do we also require vigilance (on the part of those familiar with the process)? Can we provide more effective education of the general public as to the so-called "arcane" intricacies of international dispute settlement? It is this writer's opinion that all three are necessary: patience to allow for the industries most affected by liberalization of trade rules to come to terms with change; vigilance to ensure that permanent damage is not inflicted on the new institutions in the interests of short-term political gains; and education of legislators, lobbyists and lay people through a wider dissemination of approachable information as to the dispute settlement provisions of the CFTA/NAFTA and their place in developing global trade agreements.

A. The History of U.S.-Canada Softwood Lumber Controversy

This has been a troublesome area for the two Parties to the CFTA for several decades, largely due to the difference in the two countries' methods of assessing timber cutting costs which in the U.S. are established in advance by bidding on timber rights and in Canada by payment of stumpage fees to the provincial governments which own the timber rights. The situation was particularly volatile in the 80's. In 1986 the two countries entered into a Memorandum of Understanding (MOU) in which Canada (under threat of countervailing duties) agreed to impose a 15% export levy on its own industry.

"In 1991, the Government of Canada in conjunction with four provincial governments, undertook a joint study of the provincial stumpage systems, applying a methodology employed in certain instances by the U.S. Forest Service. The Joint Study was said to have demonstrated that stumpage revenues in all four of these provinces exceeded the provinces' costs of administering their stumpage systems. On this basis, Canada concluded that the MOU had served its purpose and gave notice to the United States on September 3, 1991, that it intended to exercise its right to terminate the MOU effective October 4, 1991. On October 4, Canada ceased to collect the export charges provided for in the MOU." The result was the current state of softwood lumber cases, which like the Pork cases can be divided into a subsidy phase and an injury phase.

B. The Softwood Lumber (Injury) Case

A final injury determination in this case was made by the ITC on August 5, 1992. Canadian and provincial governments and Canadian producers requested a review of the determination. The panel's unanimous decision released on July 26, 1993, found fault with the ITC's conclusions and remanded the determination to the agency for further action.49

The ITC filed its second determination on October 25, 1993 and the panel having reviewed it, again remanded the matter to the ITC on January 28, 1994.50 On March 14, 1994, the ITC released its decision in which the five commissioners divided 3:2, the majority affirming that the U.S. softwood industry is materially injured by imports from Canada. Chairman Newquist and Commissioner Ruhr "levelled a critique of the binational panel's remand determination. They found the record was sufficient to conclude that the domestic industry is currently experiencing material injury, even if forced to concede that the evidence on the record did not indicate a cause and effect relationship between the Canadian imports and the prices of softwood lumber in the United States. On the basis of their conclusion that no cause other than the Canadian imports fully explains the injury to the industry, they affirmed the commission's previous material injury finding."51 This sort of reasoning in the absence of adequate supportive evidence does not bode well for the future of the Ch. 19 dispute settlement system, although once again, it is Commissioners Ruhr and Newquist who express these views so vehemently. The two dissenting members of the ITC, Commissioners Watson and Nazuma did not find sufficient evidence to support a material injury finding.52 The panel will now have up to 90 days to review the ITC's determination. The scenario is depressingly similar to that of the pork cases. This
similarity is carried still further when we observe the situation with respect to the Softwood Lumber, Subsidy Phase.

C. The Softwood Lumber (Subsidy) Case

On May 28, 1992, Commerce published its Final Determination that the stumpage systems of the four provinces in question had conferred a subsidy on softwood lumber exports...and assessed a "country-wide" weighted average rate of 6.51% on softwood lumber exports from all provinces and territories under investigation. A panel was convened pursuant to the CFTA on July 29, 1992 and on May 6, 1993 the panel unanimously issued remand instructions to the agency (Commerce). Commerce issued its Determination on Remand on September 17, 1993, in which it affirmed its previous determinations concerning both stumpage and log export restraints, and increased the applicable country wide rate from 6.51% to 11.54% ad valorem. The panel's decision of December 17, 1993 raises some interesting issues. The majority of the panel, the three Canadians, concluded the following:

1. That Commerce has failed to provide a rational basis for its conclusion that provincial stumpage programs are specific.
2. That Commerce's finding that provincial stumpage programs distort the normal competitive markets for softwood lumber is not supported by substantial evidence.
3. That Commerce's determination that the log export restraints imposed by British Columbia confer a benefit on a specific industry is unsupported by evidence on the record.

The minority, which dissented from all three conclusions, comprised the two American members of the panel. Perhaps the most important observation about this decision is that it represents the first time that the decision of a panel has split clearly along national lines. This is particularly significant given the comment of the two dissenting American panelists that, "We believe that the Majority's formulation of the standard of review is incorrect in a number of critical points and that it leads the Majority into a misconceived exercise that clearly exceeds its jurisdiction." The dissenting panelists, Pomeranz and Reisman, go further and state, "the Majority has failed to keep that second prong...viz. United States law governing this matter, in focus and as a result has conducted a defective review: the Majority has applied review standards not to U.S. law, but to what the Majority believes U.S. law should be. In our view, the governing legislation and rules in this case, the Tariff Act and the Proposed Regulations, are clear in their terms and their proper application to this case, but they have been materially misconstrued by the Majority of the Panel."

Commerce issued its determination after this remand on January 6, 1994, "grudgingly accepting a Canada-U.S. Trade Panel decision that punitive tariffs...be removed."

On April 7, 1994, the United States announced an extraordinary challenge against the ruling on the grounds that the three Canadian members of the panel had exceeded the bounds of the panel's authority by deciding that neither of the subsidy programs...at issue were countervailable, and also that two of the three Canadians failed to disclose that they worked for legal firms whose clients included lumber companies and the Canadian government.

Many Canadians have seen this action as yet another attempt to convert the extraordinary challenge provisions into a normal appellate forum. Before joining in this conclusion too hastily, there are several factors which must be considered. The first is the actual wording of the provision for the extraordinary challenge. "Where, an involved Party alleges that... that party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13. Note that the wording is not "where it can be demonstrated that", or "where there is evidence of" or other wording that would suggest an objective test as to whether the extraordinary challenge procedure is available. Instead we have a clearly subjective test, which imposes no limitation upon the circumstances in which a Party may make an allegation under these provisions. Thus Canadian observers should not be too surprised when extraordinary challenges are brought...".

Also worth noting is the fact that a private party cannot itself invoke the ECC process. It must be a Party which makes the allegations. This provision should result in some control over the frequency of extraordinary challenges as a party cannot initiate a challenge but is required to convince its own government of the appropriateness of a challenge. In the case of the Softwood Lumber (Subsidy) Case these private interests have been armed with potent ammunition in the remarks of the two American panelists.

V. Conclusion

An assessment of the success of the AD and CVD dispute settlement provisions of Chapter 19 of the CFTA provides some cause for optimism together with some misgivings. Does our experience so far augur well for the similar provisions of NAFTA? On the positive side there is considerable agreement that the panels have performed well, viz.,...CFTAs Chapter 19 panels, on the whole, have demonstrated a
high degree of conscientiousness and professionalism. Counsel appearing before
Chapter 19 panels routinely face panelists who are exceptionally well prepared. Panel
decisions frequently include detailed analyses of the relevant law of the importing
Party and careful discussion of the facts. Opinions typically reflect a diligent effort
on the part of the panelists to apply the law fairly and correctly. Indeed, some of the
most thoughtful discussions of difficult issues to appear anywhere—for example,
specificity—are found in opinions of NAFTA binational panels. These comments are
echoed by Professor Huntington. "Experience under the Canada-U.S. FTA suggests
that panels will function effectively in resolving particular disputes. The Canada-U.S.
panels have generally issued their decisions in a timely fashion, and as Professor
Lowenfeld points out, these decisions have been of high quality... Professor
Huntington restates the comments of Professor Lowenfeld, who wrote in 1991, "The
panelists have been thoughtful; their opinions have been thorough and articulate,
and their conclusions on the whole persuasive... One could not detect a bias in favor of
protectionism or unrestricted trade. While the panels have differed from one another,
no "Canadian approach" or "American approach" has emerged..."

To these hopeful comments must be added, some cautionary remarks. One
concern relates to the conclusion that there does not appear to be any bias based upon
the nationality of the panelists. Professor Lowenfeld's remarks were accurate at the
time they were made. It is only recently, in the Softwood Lumber (Subsidy) Case, that
a "national" split has been discernible. As recently as February 1993, commentators
Horlick & deBussch could state, "Moreover, there has been no correlation between
the nationality of the NAFTA panelists and the result. In the Fresh Chilled or Frozen Pork
dispute over injury, U.S. panelists sided with Canadian panelists in reaching a unanimous decision against the ITC..."

Professor Huntington echoes this opinion, stating "(e)xperience under chapter
19 of the Canada-U.S. FTA suggests that the citizenship of panelists will not pose a
problem of partiality..." He cites a study of chapter 19 cases between January 1989
and July 1991 which found no discernable correlation between the nationality of
panelists and the result. It is too early to say whether the Softwood Lumber (Subsidy) Case is an exception to the many cases which have preceded it or whether it
signifies the beginning of a new phenomenon to be reflected in Chapter 19 decisions.

The other factor which must concern the observer of the Chapter 19 process is
the possibility of too frequent resort to extraordinary challenges to prevent or
postpone acceptance of unpleasant decisions. It may be prudent in this context to
heed the remarks of Professor Lowenfeld, "I was worried that Chapter 19 of the FTA
might go the way of the World Bank Convexion on the Settlement of Investment
Disputes between States and Nationals of Other States-- which has been seriously
undermined by repeated resort to a procedure for annulment of arbitral awards that
was intended as a safety valve for gross violations of due process but has come to be
used by dissatisfied litigants as a device for delay and repeated appeals." On the
other hand, the issue may well dissipate as Chapter 19 proceedings become more
routine and the jurisprudence of extraordinary challenge committees is established.
Agency resistance to Chapter 19 panel review may prove to be an unsurprising
growing pain occasioned by a significant innovation in bilateral dispute resolution. If
such growing pains persist, however, they will present an issue that goes to the heart of
the Chapter 19 binational panel process. The same author states further, "One of
the dramas of the NAFTA will be played out on this stage of extraordinary challenge
provisions. Unlike Chapter 19 panels themselves, which must operate within the
general confines of the existing, applicable domestic law, challenge committees
constituting and applying article 1904(13) are fashioning a new jurisprudence. That
strain of case law will undoubtedly affect how the Chapter 19 panel process will
function. If extraordinary challenge committee decisions continue to limit recourse to
extraordinary challenges to truly extraordinary abuses of the Chapter 19 panel process,
then the arbitral model of nonreviewable dispute resolution will remain intact..."
The writer agrees with these remarks. This is why the upcoming decision of the ECC in
the Softwood Lumber (Subsidy) Case is so important and why a possible challenge in
the other phase of the Softwood Lumber case is of such concern to Canadians.

It is not surprising that Canadians appear to be more concerned about any
indicators that the dispute settlement provisions of Chapter 19 might breakdown. As
the much smaller Party to the CFTA, Canada viewed the Chapter 19 dispute settlement
provisions as fundamental to its participation in the agreement. It has been said of
NAFTA that there is a need for caution in assessing the pros and cons of the agreement.
Such caution should also be applied to dispute settlement under Chapter 19. The Parties have established a regime where the final say on AD and CVD duties
now lies with a supra-national body. Are the citizens of the Parties able to accept this
or have national policy makers moved too far down the path of international agreement
with its concomitant limitation of sovereignty? This can result in the Parties creating
a situation where they cannot honour their international commitments without losing too
much political support domestically. The tensions which are created and the
inconsistency of statements and actions are all too understandable in this context.

The situation will only be exacerbated under NAFTA. ...[( Panel members will
be navigating the jurisprudence of another country and possible relying on their host
country colleagues on the panel... In the case of the NAFTA panels involving Mexico,
panelists will be required to bridge even wider cultural and legal gaps. Unlike both
Canada and the United States, Mexico is a civil law country, not a common law
country. In addition, Mexico does not have the trade law history and experience of
either the United States or Canada. Language differences will present new challenges.
generally not encountered in CFTA proceeding. In these respects NAFTA panels will face new complications.\textsuperscript{24}

It is interesting to note that the Joint Working Group on Dispute Settlement established by the American Bar Association, the Canadian Bar Association and the Barra Mexicana do not appear to have any serious concerns with respect to Chapter 19 Procedures. "A major recommendation of the Joint Working Group was the maintenance of the FTA Chapter 19 procedures in relation to antidumping and countervail measures. These have, in fact, been retained and expanded to deal with the three party format. This system is well known and need not be reviewed here. The Working Group was strongly of the opinion that this mechanism be retained and is most content that this has been done."\textsuperscript{25}

In appraising the success or failure of these provisions, we should not lose sight of the fact that Chapter 19 was drafted as an interim measure for the period in which the Parties were negotiating common rules for governing dumping subsidies.\textsuperscript{26} We are also dealing with the legal systems of three different countries. It is important that we do not judge these provisions too hastily. What is most important at this stage, is that interested observers in all three Parties are convinced on balance, that the system is operating fairly and that "justice is seen to be done". If this is the case the system should survive and support the ongoing trading relationship of the Parties.

ENDNOTES


3. Id. Chapter 20.


5. The NAFTA refers to the three contracting countries as "Parties", whereas participants in a Chapter 19 panel proceeding are "parties".


7. NAFTA, supra note 2, Article 1902(1).

8. Id., Article 1904 (1).

9. Id., Article 1904(2).

10. Id., Annex 1911.

11. Id., Article 1904(3).

12. Id., Article 1904 (2).

13. Id., Article 1904(3).

14. Moyer, supra note 6, at 707.

15. NAFTA, supra note 2, Annex 1901.2.

16. CFTA, supra note 2, Annex 1901.2(1).

17. NAFTA, supra note 2, Article 1901.2(3).

18. Id., Article 1904(5).


20. NAFTA, supra NOTE 2, Article 1904(14).

21. Moyer, supra note 6 at 717, notes 46 and 47.

22. NAFTA, supra note 2, Article 1904(9).

23. Id., supra, Article 1904(11).


25. NAFTA, supra note 2, Annex 1904.17.

26. Id., Article 1904(13).

27. Id., Article 1904(13).

29. Moyer, supra note 6 at 724.

30. ECC-91-1904-01 USA.

31. Ibid. at 8.

32. Ibid. at 12.


34. Lowenfeld, supra note 24 at 599.

35. Id., at 602.

36. USA-91-1904-11.


38. Lowenfeld, supra note 24, at 617.

39. Id., at 616.

40. Horlick & deBusk, supra note 37 at 587.

41. ECC-91-1904-01 USA.

42. Horlick & deBusk, supra note 37 at 588.

43. Id., at 588.


45. Moyer, supra note 6 at 720.

46. USA-91-1904-03.

47. Id.

48. Huntington, supra note 19 at 437.

49. Alberta, British Columbia, Ontario and Quebec.


53. CCH NAFTA Watch, Vol 1, No 5, Mar. 30, 1994 at 3.

54. Id. at 3.


57. Id., at 6.

58. Specificity is one of the tests applied by the Department of Commerce. Once a determination of subsidy is made, it must then be determined whether the subsidy meets the specificity test. This occurs only where the preference is granted to a group narrower than the whole population.

59. USA 92-1904-01, Dissent at 6.

60. Id., at 7.


62. Financial Post, April 7, 1994 at 1, col. 2.

63. Id. at 12.

64. Moyer, supra note 6 at 722.

65. Huntington, supra note 19 at 435.


68. Huntington, supra note 19 at 432.

69. Id., see note 177.

70. Lowenfeld, supra note 24 at 620.

71. Moyer, supra note 6 at 721.

72. Id., at 724.


74. Moyer, supra note 6 at 714.


76. The CFTA required the Parties to establish a formal Working Group to address the issue of harmonization and provided that failure to implement a new regime within seven years would allow either Party to terminate the Agreement. (CFTA Article 1906) NAFTA is less stringent, simply requiring the Parties to consider the "potential" to develop substitute measures. (NAFTA Article 1907-2).

**RELIEF FOR MINORITY SHAREHOLDERS: THE NEW YORK SOLUTION**

by

Peter M. Edelstein**

Introduction

When teaching "corporations," have you ever felt that there was a larger than usual disparity between the subject as taught and the probable future experiences of our students? The classic features of a corporation—limited liability, perpetual duration, ease of transferability of interest, and centralized management, seem so remote from the intimate, close corporations many of our students are likely to deal with.

After graduation, A. Abbie, in the front row, B. Benny, who sits behind her and C. Cindy in the back, may form "ABC Cookie Corp.", to exploit C. Cindy's recipe for chocolate chip cookies. They will invest their life's savings, devote all of their time and efforts to the success of the venture, and dream of lifetimes of happy employment including handsome compensation packages, bonuses and benefits. They may even look forward to the day they will sell their interests, retire to Hawaii and be remembered as the latest incarnations of "Famous Amos."

They will each be shareholders, board members, and officers. They will probably not conduct regular board meetings, have annual shareholder's meetings. 

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**Professor of Law, Pace University, Pleasantville, New York.