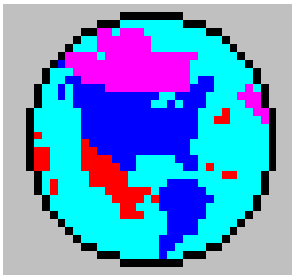
THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE



J.H.H. Weiler
University Professor, NYU
Joseph Straus Professor of Law and European Union Jean Monnet Chair,
NYU School of Law

AND

Sungjoon Cho
Assistant Professor of Law,
Chicago-Kent College of Law,

Illinois Institute of Technology

UNIT XI

Antidumping and Countervailing Measures (Ch. 19)

Table of Contents

Guiding Questions **2**

I. Introduction **3**

1-1. OAS Overview of the NAFTA Chapter 19 ..... *3*
1-2. Legal Text (Edited Version) *5*
1-3. WTO Regime on Antidumping and Subsidy *14*
1-4. An Introduction to U.S. Trade Remedies *18*

II. Antidumping (Injury) **21**

III. Antidumping (Standard of Review) **27**

IV. Anti-Dumping (Calculation) **33**

4-1. "Facts Available" / "All Others" Rate *33*
4-2. "Zeroing" *44*

V. Subsidy (Benefit) **53**

VI. Subsidy (Specificity) **57**

VII. Subsidy (Funded by Private Parties) **65**

Additional Resources and References (Optional Reading) **77**

Extraordinary Challenge Committee (Softwood Lumber / ECC-94-1904-01USA) *77*

** The footnote numbers shown in the edited reports are different from the original version.*

Guiding Questions

1. *In General*

    a. *Is the rationale (prevention of "predatory pricing") behind the antidumping law plausible? Should the antidumping law be replaced by the anti-competition law? Why should price differentiation be penalized?*

    b. *Who would win or lose as a result of the commencement and proceeding of antidumping investigations as well as the final imposition of antidumping duties?*

    c. *Would the standard of review enshrined in Article 17.6 of the WTO Antidumping Agreement be similar with the one that is found in the Chevron doctrine in the US?*

    d. *Would the government "cost" play a decisive role in determining a subsidy together with the "benefit" that recipients enjoy?*

    e. *Note both conceptual and remedial differences among the three types of subsidies (prohibited, actionable and permitted) under the WTO Subsidies Agreement.*

2. *Antidumping*

    a. *What is the "material injury"? Is there any statutory definition of this term? What if other factors than a dumping itself, such as recession, are more controlling in the manifestation of the injury?*

    b. *What should be the limit of the panel's standard of review in the antidumping case? Would it be procedural rather than substantive?*

    c. *What would be a minimum procedural obligation that a country performing an antidumping investigation should uphold vis-à-vis the target country or industries?*

3. *Subsidies*

    a. Which seems more critical in determining a subsidy, "cost" to the government or "benefit" to the recipient?

    b. How specific should a subsidy be to be a violation? Is there any reliable criteria?

    c. In which situation would a "private" funding or financing contribute to a subsidy?

I. Introduction

1-1. OAS Overview of the NAFTA Chapter 19

http://www.sice.oas.org/summary/nafta/nafta19.asp

Chapter Nineteen: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters

Chapter nineteen provides for binding binational panel review of final AD and CVD determinations involving goods of NAFTA countries and provides for binational panel review of changes to existing anti-dumping and countervailing duty laws of the Parties. NAFTA chapter nineteen makes the binational dispute settlement mechanism permanent and also includes a provision to safeguard and strengthen the binational panel process by ensuring that nothing interferes with the establishment of panels and the implementation of their decisions. The Parties further agree to consult on the potential to develop more effective rules and disciplines concerning the use of government subsidies and the potential for reliance on a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization.

Article 1901 provides that panel review of final AD and CVD determinations applies only to goods of another Party.

Article 1902 retains the right of each Party to apply its AD and CVD laws to goods imported from the other Parties. Amendments of such laws require prior notification of the Party affected by the amendment, consultation on request, and specification of the Party affected in the amending legislation. The amendments cannot be inconsistent with the GATT, its Codes or the object and purpose of the NAFTA.

Article 1903 provides for binational panel review of such amendments for conformity with the GATT, the NAFTA or prior panel decisions. A panel may recommend modifications to the amending statute to remedy a non-conformity. If corrective legislation is not enacted as a result, and no agreement is reached, the complaining Party may take comparable legislative or executive action or terminate the NAFTA on 60 days' notice.

Article 1904 provides for the replacement of domestic judicial review of final AD and CVD determinations with binding binational panel review. The process will operate bilaterally between the Parties. Panels will review final determinations based on the administrative record and will apply the same standard of review as would a domestic court. The timeframe for panel review will be 315 days from the date of request for a panel to the date of issuance of its final decision.

Article 1904 also provides for an extraordinary challenge committee (ECC) review process where a Party alleges that a panelist was guilty of gross misconduct or serious conflict of interest, or that a panel seriously departed from a fundamental rule of procedure or that a panel manifestly exceeded its powers, authority or jurisdiction (for example, by failing to apply the appropriate standard of review) and that any of these actions materially affected the panel's decision and threatened the integrity of the panel process. The timeframe for an ECC will be 90 days.

Article 1905 establishes a special committee review process which is intended to safeguard the binational panel system. This process will provide recourse in the event that the application of a Party's domestic law prevents the establishment of a panel, prevents the panel from rendering a final decision, prevents the implementation of a panel's decision, or results in a failure to provide opportunity for judicial or panel review. A special committee will be established to review any such allegation at the request of a Party. Should the special committee find affirmatively, the operation of Article 1904 may be suspended or other retaliatory action may be taken by the aggrieved Party. A special committee may be reconvened to determine if corrective action has been taken by the offending Party.

The annexes to chapter nineteen provide detail on the panel, ECC and special committee review processes (i.e., the composition of rosters and the selection of panel and committee members, and that rules of procedure will be established for each).

Article 1907 provides for consultations among the Parties to consider any problems that may arise with respect to implementation or operation of the chapter as well as the potential to develop rules on the use of government subsidies and a substitute system of rules for dealing with unfair transborder pricing practices and government subsidization. It also includes a new provision that requires regular consultations on matters related to fair and open process in the administration of anti-dumping and countervailing duty laws The remaining annexes relate to country-specific definitions and obligations that each Party has undertaken to ensure that its domestic laws will put into effect the provisions of the chapter.

Subsidies and Dumping Working Groups: In a separate understanding the three have agreed to seek solutions that reduce the possibility of disputes concerning the issues of subsidies, dumping and the operation of trade remedy laws regarding such practices. The three Parties have established a trilateral working group on subsidies and countervailing duties and another working group on dumping and antidumping duties. These groups will build, as appropriate, on the results of the Uruguay Round and on experience in regard to these issues. The working groups will continue efforts begun in 1989 by a working group convened under Article 1907 of the Canada-US FTA and are to complete their work by December 31, 1995.

1-2. Legal Text (Edited Version)

For a full text, visit http://www.sice.oas.org/trade/nafta/naftatce.asp

Chapter Nineteen: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters

Article 1901: General Provisions
Article 1902: Retenetion of Domestic Antidumping Law and Countervailing Duty Law
Article 1903: Review of Statutory Amendments
Article 1904: Review of Final Antidumping and Countervailing Duty Determinations
Article 1905: Safeguarding the Panel Review System
Article 1906: Prospective Application
Article 1907: Consultations
Article 1908: Special Secretariat Provisions
Article 1909: Code of Conduct
Article 1910: Miscellaneous
Article 1911: Definitions

Annex 1901.2: Establishment of Binational Panels
Annex 1903.2: Panel Procedures Under Article 1903
Annex 1904.13: Extraordinary Challenge Procedure
Annex 1904.15: Amendments to Domestic Laws
Annex 1905.6: Special Committee Procedures
Annex 1911: Country Specific Definitions

Article 1901: General Provisions

1. Article 1904 applies only with respect to goods that the competent investigating authority of the importing Party, applying the importing Party's antidumping or countervailing duty law to the facts of a specific case, determines are goods of another Party.

2. For purposes of Articles 1903 and 1904, panels shall be established in accordance with the provisions of Annex 1901.2.

3. Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law.

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:

(a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;

(b) the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;

(c) following notification, the amending Party, on request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and

(d) such amendment, as applicable to that other Party, is not inconsistent with

(i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, or

(ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

Article 1903: Review of Statutory Amendments

1. A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether:

(a) the amendment does not conform to the provisions of Article 1902(2)(d)(i) or (ii); or

(b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of Article 1902(2)(d)(i) or (ii).

Such declaratory opinion shall have force or effect only as provided in this Article.

2. The panel shall conduct its review in accordance with the procedures of Annex 1903.2.

3. In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:

(a) the two Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include seeking corrective legislation with respect to the statute of the amending Party;

(b) if corrective legislation is not enacted within nine months from the end of the 90day consultation period referred to in subparagraph (a) and no other mutually satisfactory solution has been reached, the Party that requested the panel may

(i) take comparable legislative or equivalent executive action, or

(ii) terminate this Agreement with regard to the amending Party on 60day written notice to that Party.

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

1. As provided in this Article, each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.

2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

4. A request for a panel shall be made in writing to the other involved Party within 30 days following the date of publication of the final determination in question in the official journal of the importing Party. In the case of final determinations that are not published in the official journal of the importing Party, the importing Party shall immediately notify the other involved Party of such final determination where it involves goods from the other involved Party, and the other involved Party may request a panel within 30 days of receipt of such notice. Where the competent investigating authority of the importing Party has imposed provisional measures in an investigation, the other involved Party may provide notice of its intention to request a panel under this Article, and the Parties shall begin to establish a panel at that time. Failure to request a panel within the time specified in this paragraph shall preclude review by a panel.

5. An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

6. The panel shall conduct its review in accordance with the procedures established by the Parties pursuant to paragraph 14. Where both involved Parties request a panel to review a final determination, a single panel shall review that determination.

7. The competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had the right to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel.

8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it.

9. The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.

10. This Agreement shall not affect:

(a) the judicial review procedures of any Party, or

(b) cases appealed under those procedures,

with respect to determinations other than final determinations.

11. A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

12. This Article shall not apply where:

(a) neither involved Party seeks panel review of a final determination;

(b) a revised final determination is issued as a direct result of judicial review of the original final determination by a court of the importing Party in cases where neither involved Party sought panel review of that original final determination; or

(c) a final determination is issued as a direct result of judicial review that was commenced in a court of the importing Party before the date of entry into force of this Agreement.

13. 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.

(…)

Article 1906: Prospective Application

This Chapter shall apply only prospectively to:

(a) final determinations of a competent investigating authority made after the date of entry into force of this Agreement; and

(b) with respect to declaratory opinions under Article 1903, amendments to antidumping or countervailing duty statutes enacted after the date of entry into force of this Agreement.

(…)

Annex 1901.2

Establishment of Binational Panels

1. On the date of entry into force of this Agreement, the Parties shall establish and thereafter maintain a roster of individuals to serve as panelists in disputes under this Chapter. The roster shall include judges or former judges to the fullest extent practicable. The Parties shall consult in developing the roster, which shall include at least 75 candidates. Each Party shall select at least 25 candidates, and all candidates shall be citizens of Canada, Mexico or the United States. Candidates 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. Candidates shall not be affiliated with a Party, and in no event shall a candidate take instructions from a Party. The Parties shall maintain the roster, and may amend it, when necessary, after consultations.

2. 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, in consultation with the other involved Party. The involved Parties normally shall appoint panelists from the roster. If a panelist is not selected from the roster, the panelist shall be chosen in accordance with and be subject to the criteria of paragraph1. Each involved Party shall have the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other involved Party. Peremptory challenges and the selection of alternative panelists shall occur within 45 days of the request for the panel. If an involved Party fails to appoint its members to a panel within 30 days or if a panelist is struck and no alternative panelist is selected within 45 days, such panelist shall be selected by lot on the 31st or 46th day, as the case may be, from that Party's candidates on the roster.

3. Within 55 days of the request for a panel, the involved Parties shall agree on the selection of a fifth panelist. If the involved Parties are unable to agree, they shall decide by lot which of them shall select, by the 61st day, the fifth panelist from the roster, excluding candidates eliminated by peremptory challenges.

4. On appointment of the fifth panelist, the panelists shall promptly appoint a chairman from among the lawyers on the panel by majority vote of the panelists. If there is no

majority vote, the chairman shall be appointed by lot from among the lawyers on the panel.

5. Decisions of the panel shall be by majority vote and based on the votes of all members of the panel. The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of panelists.

6. Panelists shall be subject to the code of conduct established pursuant to Article 1909. If an involved Party believes that a panelist is in violation of the code of conduct, the involved Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with the procedures of this Annex.

7. When a panel is convened pursuant to Article 1904 each panelist shall be required to sign:

(a) an application for protective order for information supplied by the United States or its persons covering business proprietary and other privileged information;

(b) an undertaking for information supplied by Canada or its persons covering confidential, personal, business proprietary and other privileged information; or

(c) an undertaking for information supplied by Mexico or its persons covering confidential, business proprietary and other privileged information.

8. On a panelist's acceptance of the obligations and terms of an application for protective order or disclosure undertaking, the importing Party shall grant access to the information covered by such order or disclosure undertaking. Each Party shall establish appropriate sanctions for violations of protective orders or disclosure undertakings issued by or given to any Party. Each Party shall enforce such sanctions with respect to any person within its jurisdiction. Failure by a panelist to sign an application for a protective order or disclosure undertaking shall result in disqualification of the panelist.

9. If a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist in accordance with the procedures of this Annex.

10. Subject to the code of conduct established pursuant to Article 1909, and provided that it does not interfere with the performance of the duties of such panelist, a panelist may engage in other business during the term of the panel.

11. While acting as a panelist, a panelist may not appear as counsel before another panel.

12. With the exception of violations of protective orders or disclosure undertakings, signed pursuant to paragraph 7, panelists shall be immune from suit and legal process relating to acts performed by them in their official capacity.

Annex 1903.2

Panel Procedures Under Article 1903

1. The panel shall establish its own rules of procedure unless the Parties otherwise agree prior to the establishment of that panel. The procedures shall ensure a right to at least one hearing before the panel, as well as the opportunity to provide written submissions and rebuttal arguments. The proceedings of the panel shall be confidential, unless the two Parties otherwise agree. The panel shall base its decisions solely on the arguments and submissions of the two Parties.

2. Unless the Parties to the dispute otherwise agree, the panel shall, within 90 days after its chairman is appointed, present to the two Parties an initial written declaratory opinion containing findings of fact and its determination pursuant to Article 1903.

3. If the findings of the panel are affirmative, the panel may include in its report its recommendations as to the means by which the amending statute could be brought into conformity with the provisions of Article 1902(2)(d). In determining what, if any, recommendations are appropriate, the panel shall consider the extent to which the amending statute affects interests under this Agreement. Individual panelists may provide separate opinions on matters not unanimously agreed. The initial opinion of the panel shall become the final declaratory opinion, unless a Party to the dispute requests a reconsideration of the initial opinion pursuant to paragraph 4.

4. Within 14 days of the issuance of the initial declaratory opinion, a Party to the dispute disagreeing in whole or in part with the opinion may present a written statement of its objections and the reasons for those objections to the panel. In such event, the panel shall request the views of both Parties and shall reconsider its initial opinion. The panel shall conduct any further examination that it deems appropriate, and shall issue a final written opinion, together with dissenting or concurring views of individual panelists, within 30 days of the request for reconsideration.

5. Unless the Parties to the dispute otherwise agree, the final declaratory opinion of the panel shall be made public, along with any separate opinions of individual panelists and any written views that either Party may wish to be published.

6. Unless the Parties to the dispute otherwise agree, meetings and hearings of the panel shall take place at the office of the amending Party's Section of the Secretariat.

Annex 1904.13

Extraordinary Challenge Procedure

1. The involved Parties shall establish an extraordinary challenge committee, composed of three members, within 15 days of a request pursuant to Article 1904(13). The members

shall be selected from a 15-person roster comprised of judges or former judges of a federal judicial court of the United States or a judicial court of superior jurisdiction of Canada, or a federal judicial court of Mexico. Each Party shall name five persons to this roster. Each involved Party shall select one member from this roster and the involved Parties shall decide by lot which of them shall select the third member from the roster.

2. The Parties shall establish by the date of entry into force of the Agreement rules of procedure for committees. The rules shall provide for a decision of a committee within 90 days of its establishment.

3. Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established, and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.

(…)

1-3. WTO Regime on Antidumping and Subsidy

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm

Anti-Dumping Actions

If a company exports a product at a price lower than the price it normally charges on its own home market, it is said to be "dumping" the product. Is this unfair competition? Opinions differ, but many governments take action against dumping in order to defend their domestic industries. The WTO agreement does not pass judgement. Its focus is on how governments can or cannot react to dumping — it disciplines anti-dumping actions, and it is often called the "Anti-Dumping Agreement". (This focus only on the reaction to dumping contrasts with the approach of the Subsidies and Countervailing Measures Agreement.)

The legal definitions are more precise, but broadly speaking the WTO agreement allows governments to act against dumping where there is genuine ("material") injury to the competing domestic industry. In order to do that the government has to be able to show that dumping is taking place, calculate the extent of dumping (how much lower the export price is compared to the exporter's home market price), and show that the dumping is causing injury.

GATT (Article 6) allows countries to take action against dumping. The Anti-Dumping Agreement clarifies and expands Article 6, and the two operate together. They allow countries to act in a way that would normally break the GATT principles of binding a tariff and not discriminating between trading partners — typically anti-dumping action means charging extra import duty on the particular product from the particular exporting country in order to bring its price closer to the "normal value" or to remove the injury to domestic industry in the importing country.

There are many different ways of calculating whether a particular product is being dumped heavily or only lightly. The agreement narrows down the range of possible options. It provides three methods to calculate a product's "normal value". The main one is based on the price in the exporter's domestic market. When this cannot be used, two alternatives are available — the price charged by the exporter in another country, or a calculation based on the combination of the exporter's production costs, other expenses and normal profit margins. And the agreement also specifies how a fair comparison can be made between the export price and what would be a normal price.

Calculating the extent of dumping on a product is not enough. Anti-dumping measures can only be applied if the dumping is hurting the industry in the importing country. Therefore, a detailed investigation has to be conducted according to specified rules first. The investigation must evaluate all relevant economic factors that have a bearing on the state of the industry in question. If the investigation shows dumping is taking place and domestic industry is being hurt, the exporting company can undertake to raise its price to an agreed level in order to avoid anti-dumping import duty.

The present rules revise the Tokyo Round (1973-79) code on anti-dumping measures and are a result of the Uruguay Round (1986-94) negotiations. The Tokyo Round code was

not signed by all GATT members; the Uruguay Round version is part of the WTO agreement and applies to all members.

The WTO Anti-Dumping Agreement introduced these modifications:

☒ more detailed rules for calculating the amount of dumping,
☒ more detailed procedures for initiating and conducting anti-dumping investigations,
☒ rules on the implementation and duration (normally five years) of anti-dumping measures,
particular standards for dispute settlement panels to apply in anti-dumping disputes.

Detailed procedures are set out on how anti-dumping cases are to be initiated, how the investigations are to be conducted, and the conditions for ensuring that all interested parties are given an opportunity to present evidence. Anti-dumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would lead to injury.

Anti-dumping investigations are to end immediately in cases where the authorities determine that the margin of dumping is insignificantly small (defined as less than 2% of the export price of the product). Other conditions are also set. For example, the investigations also have to end if the volume of dumped imports is negligible (i.e. if the volume from one country is less than 3% of total imports of that product — although investigations can proceed if several countries, each supplying less than 3% of the imports, together account for 7% or more of total imports).

The agreement says member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final anti-dumping actions, promptly and in detail. They must also report on all investigations twice a year. When differences arise, members are encouraged to consult each other. They can also use the WTO's dispute settlement procedure.

Subsidies and Countervailing Measures

This agreement does two things: it disciplines the use of subsidies, and it regulates the actions countries can take to counter the effects of subsidies. It says a country can use the WTO's dispute settlement procedure to seek the withdrawal of the subsidy or the removal of its adverse effects. Or the country can launch its own investigation and ultimately charge extra duty (known as "countervailing duty") on subsidized imports that are found to be hurting domestic producers.

The agreement builds on the Tokyo Round Subsidy Code. Unlike its predecessor, the present agreement contains a definition of subsidy. It also introduces the concept of a "specific" subsidy — i.e. a subsidy available only to an enterprise, industry, group of enterprises, or group of industries in the country (or state, etc) that gives the subsidy. The disciplines set out in the agreement only apply to specific subsidies. They can be domestic or export subsidies.

As with anti-dumping, the subsidy agreement is part of the package of WTO agreements that is signed by all members — the Tokyo Round "code" was only signed by some GATT members.

The agreement defines three categories of subsidies: prohibited, actionable and non-actionable. It applies to agricultural goods as well as industrial products, except when the subsidies conform with the Agriculture Agreement.

☒ **Prohibited subsidies**: subsidies that require recipients to meet certain export targets, or to use domestic goods instead of imported goods. They are prohibited because they are specifically designed to distort international trade, and are therefore likely to hurt other countries' trade. They can be challenged in the WTO dispute settlement procedure where they are handled under an accelerated timetable. If the dispute settlement procedure confirms that the subsidy is prohibited, it must be withdrawn immediately. Otherwise, the complaining country can take counter measures. If domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

☒ **Actionable subsidies**: in this category the complaining country has to show that the subsidy has an adverse effect on its interests. Otherwise the subsidy is permitted. The agreement defines three types of damage they can cause. One country's subsidies can hurt a domestic industry in an importing country. They can hurt rival exporters from another country when the two compete in third markets. And domestic subsidies in one country can hurt exporters trying to compete in the subsidizing country's domestic market. If the Dispute Settlement Body rules that the subsidy does have an adverse effect, the subsidy must be withdrawn or its adverse effect must be removed. Again, if domestic producers are hurt by imports of subsidized products, countervailing duty can be imposed.

☒ **Non-actionable subsidies**: these can either be non-specific subsidies, or specific subsidies for industrial research and pre-competitive development activity, assistance to disadvantaged regions, or certain types of assistance for adapting existing facilities to new environmental laws or regulations. Non-actionable subsidies cannot be challenged in the WTO's dispute settlement procedure, and countervailing duty cannot be used on subsidized imports. But the subsidies have to meet strict conditions.

Some of the disciplines are similar to those of the Anti-Dumping Agreement. Countervailing duty (the parallel of anti-dumping duty) can only be charged after the importing country has conducted a detailed investigation similar to that required for anti-dumping action. There are detailed rules for deciding whether a product is being subsidized (not always an easy calculation), criteria for determining whether imports of subsidized products are hurting ("causing injury to") domestic industry, procedures for initiating and conducting investigations, and rules on the implementation and duration (normally five years) of countervailing measures. The subsidized exporter can also agree to raise its export prices as an alternative to its exports being charged countervailing duty.

Subsidies may play an important role in developing countries and in the transformation of centrally-planned economies to market economies. Least-developed countries and developing countries with less than $1,000 per capita GNP are exempted from disciplines on prohibited export subsidies. Other developing countries are given until 2003 to get rid of their export subsidies. Least-developed countries must eliminate import-substitution subsidies (i.e. subsidies designed to help domestic production and avoid importing) by 2003 — for other developing countries the deadline is 2000. Developing countries also receive preferential treatment if their exports are subject to countervailing duty

investigations. For transition economies, prohibited subsidies must be phased out by 2002.

1-4. An Introduction to U.S. Trade Remedies

From the U.S. Department of Commerce <http://ia.ita.doc.gov/intro/>

Unfair foreign pricing and government subsidies distort the free flow of goods and adversely affect American business in the global marketplace. Import Administration, within the International Trade Administration of the Department of Commerce, enforces laws and agreements to protect U.S. businesses from unfair competition within the U.S. resulting from unfair pricing by foreign companies and unfair subsidies to foreign companies by their governments.

What is Dumping?

Dumping occurs when a foreign producer sells a product in the United States at a price that is below that producer's sales price in the country of origin ("home market"), or at a price that is lower than the cost of production. The difference between the price (or cost) in the foreign market and the price in the U.S. market is called the dumping margin. Unless the conduct falls within the legal definition of dumping as specified in U.S. law, a foreign producer selling imports at prices below those of American products is not necessarily dumping.

What is a Countervailable Subsidy?

Foreign governments subsidize industries when they provide financial assistance to benefit the production, manufacture or exportation of goods. Subsidies can take many forms, such as direct cash payments, credits against taxes, and loans at terms that do not reflect market conditions. The statute and regulations establish standards for determining when an unfair subsidy has been conferred. The amount of subsidies the foreign producer receives from the government is the basis for the subsidy rate by which the subsidy is offset, or "countervailed," through higher import duties.

How is Dumping or Subsidization Remedied?

If a U.S. industry believes that it is being injured by unfair competition through dumping or subsidization of a foreign product, it may request the imposition of antidumping or countervailing duties by filing a petition with both Import Administration and the United States International Trade Commission. Import Administration investigates foreign producers and governments to determine whether dumping or subsidization has occurred and calculates the amount of dumping or subsidies.

What is the role of the International Trade Commission

The International Trade Commission determines whether the domestic industry is suffering material injury as a result of the imports of the dumped or subsidized products.

The International Trade Commission considers all relevant economic factors, including the domestic industry's output, sales, market share, employment, and profits. For further information on the International Trade Commission's injury investigation, see http://www.usitc.gov. Both the International Trade Commission and Import Administration must make affirmative preliminary determinations for an investigation to go forward.

What relief is the end result of an Antidumping or Countervailing Duty Investigation?

If both Commerce and the International Trade Commission make affirmative findings of dumping and injury, Commerce instructs the U.S. Customs Service to assess duties against imports of that product into the United States. The duties are assessed as a percentage of the value of the imports and are equivalent to the dumping and subsidy margins, described above. For example, if Commerce finds a dumping margin of 35%, the U.S. Customs Service will collect a 35% duty on the product at the time of importation into the United States in order to offset the amount of dumping. Information on the U.S. Customs Service may be found at http://www.customs.ustreas.gov.

How long does it take for Antidumping or Countervailing Duty Orders to be issued?

If both the International Trade Commission and Import Administration make affirmative preliminary determinations (within 190 days of initiation of the antidumping investigation, or 130 days for countervailing duty investigation) importers are required to post a bond or cash to cover an estimated amount for the duties which would be collected in the event that an AD or CVD order is issued upon the completion of the investigations. Typically, the final phases of the investigations by Import Administration and the International Trade Commission are completed within 12 to 18 months of initiation.

What are the requirements for filing an Antidumping or Countervailing Duty Petition?

Petitions may be filed by a domestic interested party, including a manufacturer or a union within the domestic industry producing the product which competes with the imports to be investigated. To ensure that there is sufficient support by domestic industry for the investigation, the law requires that the petitioners must represent at least 25% of domestic production. The statute requires the petition to contain certain information, including data about conditions of the U.S. market and the domestic industry, as well as evidence of dumping or unfair subsidization.

Antidumping and countervailing duty trade remedies have been successfully pursued by a variety of domestic industries, including producers of steel, industrial equipment, computer chips, agricultural products, textiles, chemicals, and consumer products. Both the Import Administration and the International Trade Commission have staff available to assist domestic industries in deciding whether there is sufficient evidence to file a petition

for antidumping or countervailing duty investigations. The staff may also assist eligible small businesses with the filing process.

How can I learn more about filing a petition?

Contact the Import Administration, Office of Policy at (202) 482-4412 or by e-mail at Petitioners_Support@ita.doc.gov Additional information can also be found at the Import Administration web site: ia.ita.doc.gov

Note: This document is for general information purposes only. When interpreting and applying the law, readers should refer to the Tariff Act of 1930, as amended, (19 U.S.C. 1671-1671h, 1673-1673h) and the related regulations in Title 19 of the Code of Federal Regulations.

II. Antidumping (Injury)

http://www.sice.oas.org/DISPUTE/nafdispe.stm#Canada

ARTICLE 1904
BI-NATIONAL PANEL REVIEW PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:

CERTAIN CONCRETE PANELS, REINFORCED WITH FIBERGLASS MESH, ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA AND PRODUCED BY OR ON BEHALF OF CUSTOM BUILDING PRODUCTS, ITS SUCCESSORS AND ASSIGNS, FOR USE OR CONSUMPTION IN THE PROVINCE OF BRITISH COLUMBIA OR ALBERTA (Injury)	CDA-97-1904-01

DECISION OF THE PANEL ON REVIEW OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL FINDING

August 26, 1998

(…)

I. INTRODUCTION

This bi-national panel (the "Panel") was convened pursuant to Article 1904(2) of the *North American Free Trade Agreement* ("NAFTA") to review a finding of the Canadian International Trade Tribunal (the "CITT"). The Panel was constituted in response to the complaint filed with the NAFTA Secretariat (Canadian Section) on August 19, 1997, pursuant to Rule 39 of the NAFTA Article 1904 Panel Rules by Custom Building Products, Inc., a U.S. exporter of subject goods to Canada (the "Complainant"). In its complaint, it was submitted by the Complainant that the CITT had committed errors of jurisdiction, law and fact in its finding issued June 27, 1997, that the dumping of subject goods has caused material injury to the production in Canada of like goods.

(…)

II. ADMINISTRATIVE HISTORY AND PANEL PROCEEDINGS

Pursuant to a complaint filed by Bed-Roc Industries Limited, a domestic producer of subject goods ("Bed-Roc"), Revenue Canada commenced an investigation into alleged dumping on November 29, 1996. On February 27, 1997, Revenue Canada issued a preliminary determination of dumping with respect to the subject goods pursuant to subsection 38(1) of the *Special Import Measures Act* ("SIMA"),[1] which determination was confirmed by a final determination issued by Revenue Canada on May 27, 1997, pursuant to SIMA paragraph 41(1)(a). Revenue Canada determined that the subject goods exported to the regional market of British Columbia and Alberta by the Complainant were dumped by a weighted average margin of 35.72% based on export prices calculated under SIMA section 24. Revenue Canada further found that the margin of dumping on the subject goods was not insignificant and the actual volume of dumped subject goods was not negligible. (…)

III. STANDARD OF REVIEW

(…) In conducting the review, the Panel is to use the general legal principles that a Canadian court would apply to a CITT determination and the standard of review set out in section18.1(4) of the *Federal Court Act*.[2]

The Panel's role is to apply domestic law including relevant administrative law and act as Canadian courts would within the limits set by NAFTA. As indicated by NAFTA, the panel process is to be conducted under the same principles as a domestic application for judicial review of a decision of an administrative agency. The statutory standard of review of the *Federal Court Act*[3] ("FCA") is incorporated into NAFTA and made applicable to the Panel. (…)

IV THE CAUSATION STANDARD

The Complainant's grounds for review are based primarily on the CITT's conclusions related to causation. The Complainant claims that the CITT applied a legally incorrect standard of

---

1 R.S.C. 1985 c.S-15, as amended.

2 NAFTA, Art. 1904(3), Annex 1911.

3 R.S.C. 1985, c.F-7, as amended.

causation, and alleges a number of specific errors related to the identification or application of the appropriate standard of causation.

The requirement that the Tribunal undertake a causation analysis flows from the terms of SIMA, section 42(1) which provides in relevant part as follows:

> 42(1) The Tribunal...shall make enquiry with respect to such of the following matters as is appropriate in the circumstances:
>
> (a) in the case of any goods to which the preliminary determination applies, as to whether the dumping or subsidizing of the goods
>
> (1) has caused injury or retardation or is threatening to cause injury.
>
> (…)

Thus, the legislation establishes three requirements for a finding of material injury: material injury; injury caused by the dumping; and a consideration of other factors to ensure that injury caused by those factors is not attributed to the dumping.

The international obligation which provides the basis for the causation requirement in SIMA section 42(1) is found in Article VI:6 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), as elaborated upon by *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "WTO Anti-Dumping Agreement"), and in particular Article 3 of the WTO Anti-Dumping Agreement.

GATT 1994 Article VI:6 provides that:

> No Member shall levy any anti-dumping...duty on the importation of any product...unless it determines that the effect of the dumping...is such as to cause...material injury to an established domestic industry....

The relevant parts of Article 3 of the WTO Anti-Dumping Agreement which elaborate on this requirement provide:

> 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.
>
> 3.2 With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree....
>
> 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are

> injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports....

In considering the effect of GATT 1994, Article VI:6 and Article 3 of the WTO Anti-Dumping Agreement, it is important to remember that the CITT applies these obligations to the extent that they are incorporated into SIMA and its Regulations[4]. In interpreting legislation which has been enacted with a view towards implementing international obligations, it is reasonable for a tribunal to examine the domestic law in the context of the international obligation. An effort should be made to arrive at an interpretation consonant with a relevant international obligation.[5] This is the case here; the Panel's review of the relevant provisions of SIMA and its Regulations indicates that they are substantially similar to the comparable provisions of the GATT 1994 and the WTO Anti-dumping Agreement.

(…)

With respect to the material injury component of the test under SIMA section 42(1), it is clear that injury may take a number of forms. Material injury can be shown by loss of sales, price suppression, or price erosion. (…) What is required is a showing that the dumped imports contribute, at a sufficient level, to price erosion, price suppression or lost sales.[6]

In evaluating the issue of causation, a distinction must be made between the effects of dumping and the mere presence of dumped goods in the market. In order to express this distinction, a number of authorities have used the expression that the dumping must "in and of itself" have caused material injury. In the Panel's view, this expression is only one way of expressing the requirement that dumping be an effective cause of material injury. It is another way of expressing the requirement for a causal nexus or a rational connection between the dumped goods and material injury. Previous bi-national panel decisions under NAFTA have utilized these various expressions to convey the same meaning.[7]

With respect to the degree to which dumping must cause material injury, it is clear from decisions of the Courts and of previous bi-national panels that dumping must only be "a" cause of injury. (…)

While dumping need not be the sole cause of material injury, it must be distinguished from other causes in order to ensure that injury caused by those factors is not attributed to the dumping. It is the function of the CITT, within its expertise, to weigh and balance other factors or causes of injury.[8] However, the CITT is not required to quantify precisely and "account for" the impact of all other potential causes in determining whether material injury has been caused by dumped goods.[9]

---

4 *Synthetic Baler Twine with a Knot Strength of 200 LBS or Less Originating In or Exported From the United States of America*, CDA-94-1904-02 (April 10, 1995), at 16-18.

5 *National Corn Growers*, *supra*, at 1371.

6 *Synthetic Baler Twine*, *supra*, at 28.

7 *Machine-Tufted Carpeting Originating in or Exported from the United States of America (Injury)*, CDA-92-1904-02 (April 7, 1993), at 20; *Hot-Rolled Carbon Steel Products Originating in or Exported from the United States of America (Injury)*, CDA-93-1904-07 (May 18, 1994), at 30-32.

8 *Sacilor Aciéries*, *supra*, at 374.

9 *Synthetic Baler Twine*, *supra*, at 20.

The important remaining element in the determination of causation is the nature and extent of evidence required. In its brief, the Complainant relied on a passage from *Machine-Tufted Carpeting* which states that the use of the term "demonstrated" in the WTO Anti-Dumping Agreement and its predecessor, "seems to require a showing, or analysis, beyond conclusory findings by an expert tribunal."[10] In the Panel's view, this formulation is consistent with that used by other bi-national panels.

(…)

Issue (c)

The Complainant submitted that:

> In concluding that Bed-Roc's allegations of price erosion and lost sales at specific accounts were largely borne out, the Tribunal applied a legally incorrect standard of causation and thereby exceeded its jurisdiction. (…)

The CITT stated that it examined Bed-Roc's price erosion and lost sale allegations and determined that those allegations were "largely borne out". The CITT concluded that Bed-Roc's "total sales losses" occasioned by price erosion and lost sales "contributed significantly" to Bed-Roc's injury even though the total sales losses were not large. The CITT next stated that the more important point was that Custom Canada's sales of dumped merchandise to a distributor, CanWel, allowed CanWel to lower its prices to certain accounts that it was able to acquire from Bed-Roc, and that this had an adverse impact on Bed-Roc's overall prices and caused Bed-Roc to lower its prices to other customers.[11] (…)

According to the Complainant, Bed-Roc lost certain accounts notwithstanding its pricing.[12] In light of this allegation, the Complainant argues that the CITT committed an error in jurisdiction by ignoring pricing of these accounts in making its causation determination, because the CITT allegedly analyzed the effects of dumped imports, rather than the effects of "dumping" by Custom Canada.[13] (…)

Counsel asserts that the CITT properly concluded that the resulting price erosion and suppression caused by sales of the dumped merchandise materially injured Bed-Roc because it was forced to further lower prices in an attempt to maintain and regain market share.[14]

(…)

With respect to errors of fact, the patent unreasonableness standard requires the Panel to affirm the CITT's decision if it can be sustained on any reasonable interpretation of the facts. Based upon this standard, the Panel finds that the CITT's analysis of Bed-Roc's lost sales and price erosion allegations and its resulting conclusion that Bed-Roc's total sales losses contributed to the material injury which it suffered as a result of the dumped imports is not patently unreasonable.

(…)

---

10 Complainant's Brief at 18.
11 Tribunal Decision at 11.
12 Complainant's Brief at 26-27.
13 Complainant's Brief at 27.
14 CITT Brief at 29.

Second, the Complainant failed to sustain its allegations with respect to the seven selected accounts. CanWel's pricing was not consistently greater than Bed-Roc's and, in addition, CanWel lowered its prices for a significant number of the examined accounts.[15] Custom Canada's sale to CanWel of merchandise that was imported from the Complainant at dumped prices certainly contributed to CanWel's ability to lower its prices to those accounts.

Third, the Complainant has no rebuttal to the evidence showing that Bed-Roc's prices were eroded over time.[16] Bed-Roc's hearing testimony amply linked this erosion to price competition from Custom Canada and its distributor, CanWel. Fourth, the Complainant's focus on specific lost sales allegations overlooks all of the other price erosion evidence in the record.[17] Although the CITT's decision could have been clearer regarding whether the CITT considered Bed-Roc's lost sales alone or these lost sales together with allegations of erosion of Bed-Roc's prices, the CITT's use of the term "total sales losses"[18] shows that the CITT's analysis considered both indicia of injury. It was not patently unreasonable for the CITT, therefore, to rely on all of this evidence to conclude that Bed-Roc's lost sales and price erosion allegations were "largely borne out."

(…)

Disposition

For the reasons set forth above, the Panel hereby affirms the decision of the CITT.

(…)

---

15 Tribunal Decision at 12 and also Tribunal Exhibit NQ-96-004-28.1 (protected), Administrative Record, Vol. 6.3 at 18-19.

16 Tribunal Decision at 12 and also see, e.g. Tribunal Exhibit NQ-96-004-7 (protected) at Figure 1 and related text, Administrative Record, Vol. 2 at 25-26. See also Schedule 1 to that Exhibit.

17 See Tribunal Decision at 12 and Tribunal Exhibit NQ-96-004-A-2 (protected), Administrative Record, Vol. 14.

18 Tribunal Decision at 11.

III. Antidumping (Standard of Review)

http://www.sice.oas.org/DISPUTE/nafdispe.stm - United States of America

NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW

USA-97-1904-3

IN THE MATTER OF

CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTION FROM CANADA

DECISION OF THE PANEL ON
THE DETERMINATION ON REMAND

(…)

II. BACKGROUND

On August 19, 1993, Commerce issued an antidumping duty order to Stelco, a Canadian manufacturer and exporter of corrosion-resistant carbon steel products.[19] On September 9, 1995, Commerce initiated its second administrative review of the antidumping duty order. (…) A central element of this review was to compare transfer prices between Stelco and Baycoat (a firm which is 50% owned by Stelco) with Baycoat's actual costs of painting.

Based on Commerce's review, Commerce determined that Stelco reported Baycoat's actual costs rather than the transfer price between Baycoat and Stelco as evidenced by two individual painting order invoices.[20] In Commerce's preliminary determination, it rejected Stelco's submitted costs of production and replaced it with a recalculated value for Baycoat's services. In response, Stelco argued that there was no legal or factual justification for Commerce to reject Baycoat's submitted actual costs of painting and that Commerce's methodology was inconsistent with Commerce's determinations in the original investigation and the first administrative review. (…)

Commerce issued its final determination for the second administrative review on April 15, 1997.[21] In it, Commerce upheld its preliminary determination on all points. On May 12, 1997, Stelco submitted its request for this Panel to review Commerce's final determination. This Panel submitted its Decision on June 4, 1998. In the Decision, the Panel remanded this matter to the Department instructing the Department, among other things, to reconsider and explain the calculation of the transfer price for the Baycoat inputs, and consider Stelco's argument that the transfer price of the Baycoat inputs should be recalculated to take account of Stelco's actual costs with regards to these inputs.

The Department issued its Final Remand Determination on September 4, 1998, in response to the Panel Decision. In it, the Department summarily concluded that an adjustment to transfer price would be inappropriate. Stelco filed comments objecting to this Determination on September 28, 1998, and requesting the Panel to review the Department's Final Remand Determination.

III. THE STANDARD OF REVIEW

In reviewing the Commerce Department's Final Remand Determination, this Panel is to apply the same standard of review that the Panel applied to Commerce's Final Determination. The NAFTA requires that this Panel apply the standard of review that a U.S. court would apply, referring to the standard of review set forth in 19 U.S.C. § 1516A(b)(1)(B); Article 1904(3), Annex 1911. Under 19 U.S.C. § 1516A(b)(1)(B), the Panel must "hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in

[19] Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 58 Fed. Reg. 4162 (August 19, 1993).

[20] Commerce Department's Cost Verification Report, Non-Pub. R. Doc. 78, at 15.

[21] 62 Fed. Reg. 18449 (April 15, 1997).

accordance with law." In the Statement of Administrative Action, which is the official explanation of the NAFTA provisions to the U.S. Congress, the executive branch admonished, "Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process." Therefore, the standard of review warrants close analysis. (…)

The overarching question of the second part of the standard, "otherwise not in accordance with law," is the degree of deference this Panel must pay Commerce. The landmark decision discussing an agency's interpretation of the law is *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[22] The Supreme Court in *Chevron* enunciated a two-pronged test. If Congress addressed a question directly in a statute, and the intent of Congress is clear, [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[23] (…)

In reviewing antidumping determinations of the Department of Commerce, courts have shown considerable deference, referring to Commerce as "the 'master' of antidumping law,"[24] and observing that "it is a cardinal principle that the Secretary's interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable."[25] This avowal of deference does not mean, however, that the reviewing body relinquishes all judgment to the administrative agency. The Supreme Court has held, "'...If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States v. Shimer*, 367 U.S.374, 382 (1961)."[26] The Court has also noted that "a reviewing court need not accept an interpretation which is unreasonable."[27]

The situation this Panel addresses is one of those where the statute, while not silent, nonetheless does not unambiguously address the precise issue in review, thus shifting the analysis toward the second prong of *Chevron*. The Panel must afford Commerce's Determination considerable deference unless Commerce's Determination is unreasonable or is one which Congress would not have sanctioned. While the Panel cannot reject Commerce's determination and remand again unless it has "compelling reasons so to do,"[28] our reading of the statute coupled with its legislative history provides such reasons.

---

[22]467 U.S. 837 (1984).

[23]*Id.* at 842-43.

[24]*Daewoo Electronics v. Int'l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

[25]*Consumer Prod. Div., SCM Corp. v. Silver Reed America*, 753 F.2d 1033 (1985).

[26]*Chevron, supra*, at 845.

[27]*National R.R. Passenger Corp. v. Boston & Maine Corp., supra* at 418.

[28]*PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197 (Ct. Int'l Trade 1989).

IV. DISCUSSION

A. THE PANEL'S INITIAL DECISION

This Panel was called upon to review a decision by the Department treating a factual situation that was outside the normal pattern of its experience. The record here indicates that the invoice prices for painting were artificially high. The invoice prices between Baycoat and Stelco (the "transfer price") that the Department used to establish cost of production (COP) are higher than actual production costs for Stelco. This is because Baycoat is a joint venture 50% owned by Stelco and Stelco receives 50% of Baycoat's "profits", those being proceeds in excess of the costs of painting. The Department justified its use of the invoice price based on its administrative precedent[29] and its proposed regulations that called for it to use (or "normally" to use, under the regulations)[30] the higher of transfer price, the affiliated supplier's production cost, and market price. The rationale for this, found in the statute, is to allow the Department to calculate costs that "reasonably reflect the costs associated with the production . . . of the merchandise" in determining the existence of dumping and the calculation of dumping margins.[31] As most commonly applied, this "highest" standard justifies using production costs when stated transfer prices are artificially low, usually between affiliated parties. This application would be consistent with the statute's intent, being to find as nearly as possible the actual costs, and with the reasons for sections (f)(2) and (f)(3) of the act.

When the transfer price is artificially high between affiliated parties, as in this case, application of the "highest" standard yields a result at odds with the "actual cost" object of the statute. This Panel invited the Department to revisit this application of its rule, in particular by taking into account the return to Stelco of a portion of its payments to Baycoat for the painting services. The Department declined to do this for reasons, discussed below, that are at odds with its own practices as well as judicially-directed practices. Thus the Department's inability or unwillingness to go beyond its simplistic "highest" test on this unusual factual scenario has resulted in a decision that this Panel finds is not in accordance with the appropriate rules of law.

In our initial decision, the Panel told the Department that it had the discretion to use transfer price rather than Baycoat's costs of providing the painting service.[32] We did not, however, address the question of the Department's discretion not to consider the return of a portion of Baycoat's proceeds for this painting to Stelco because the Department requested that we remand the matter to it for consideration of this issue.

(…)

---

[29] Final Remand Determination at 4.

[30] 19 C.F.R. § 351.407 (1997).

[31] 19 U.S.C.S. § 1677b(f)(1)(A).

[32] "The first issue presented to the Panel is whether the Department of Commerce has the discretion to use, as Complainant Stelco Inc.'s cost of production for painting steel coils, an average of sample invoice prices ("transfer price")between Stelco and its affiliated painting supplier, Baycoat, **rather than using Baycoat's costs.** The Panel finds that the Department does have that discretion." (emphasis added) Panel Decision at 5-6.

B. THE DEPARTMENT'S DETERMINATION ON REMAND

As mentioned above, the Department itself requested remand for purposes of considering adjustments to the transfer price based on the specific circumstances of the Stelco-Baycoat relationship. However, in its Final Remand Determination, the Department summarily dealt with Stelco's argument that remission of profits from Baycoat be considered to adjust the transfer price downward. In one short paragraph, the Department seized upon our observation that the profits were not directly related to particular transactions and concluded that "no adjustment to transfer price is appropriate."[33] This summary treatment of such a critical point looms very large in our review of this decision. Commerce's assertion that consideration of profits as an adjustment to the transfer price is not appropriate because the profits are not directly linked to a particular transaction is delivered without authority or support.

For the more general question of the Department's use of the invoice price (transfer price) alone, the Department offers a lengthier explanation. However, this explanation relies on the assertion that no adjustment was necessary, without further explanation. Our remand instructed the Department to reconsider and explain the calculation of transfer price for Baycoat's inputs. The Department's decision reflects no reconsideration, and virtually no explanation. (…)

C. THE DECISION IS NOT IN ACCORDANCE WITH LAW

The Panel is not second-guessing the Department on its view of the evidence and it is not seeking to substitute its own interpretation for that of the Department. The Panel concludes, however, that the Department's uncritical embracing of the methodology expressly rejected by the Panel and its failure to go beyond the recitation of its earlier position has resulted in a determination that is not in accordance with law.

Further, the Panel concludes that the failure of the Department to consider profits to Stelco from Baycoat's activities is not a discretionary interpretation of the statute and that failure to consider profits is contrary to the statutory requirement.[34] This decision is grounded on two elements:

1. The objective of the statute is to arrive at a cost figure that is an accurate reflection of the producer's costs, using the records of the producer, in accordance with §1677b(f)(1)(A). The Department declined to do that in this case.

2. The Department's explanation and justification for its decision not to consider profits in determining costs is contrary to its own practices with no rational explanation.

(…)

V. CONCLUSION

[33] Final Remand Determination at 3.

[34] The Department's dismissal of an adjustment for these proceeds "because these remissions were not in the nature of a price adjustment" Remand Determination at 12, is not sufficient an explanation given the Department's treatment of other adjustments discussed *infra.*

(…)

On remand, the Department has failed to offer any rational explanation for its decision to use the transfer price of the painting services and not consider an adjustment for profits. The Department has substantial discretion in its application and interpretation of the antidumping statute and regulations, but that discretion reaches its limits when the Department's actions are those that Congress would not have sanctioned or are otherwise unreasonable.[35] In this case, the Department cannot assert a position that, on its face, ignores the purpose of the statute, does not take in to account all of the evidence on the record, and is supported only by the most simplistic reading of the Department's own regulatory interpretation of the statute.

Commerce's position in its Remand Determination is inconsistent with its own treatment of other issues in this same matter, inconsistent with its reasoning in other cases it relies upon and inconsistent with the clear objective of the statute. Therefore, this Panel finds that the Department's decision to base its calculations on the unadjusted transfer price of the painting services is "otherwise not in accordance with law" under the antidumping statute and the matter must be remanded for the Department to reconsider these costs in a manner not inconsistent with this opinion.

VI. DISPOSITION AND PANEL ORDER

The Panel remands this matter to the Department of Commerce with the following instructions:

1. That the Department reconsider the costs associated with Baycoat's painting services to Stelco in a manner not inconsistent with this opinion.

2. That the Department will return a determination on remand within 60 days of the issuance of this Order.

(…)

[35] *See* Section III STANDARD OF REVIEW *supra*.

IV. Anti-Dumping (Calculation)

4-1. "Facts Available" / "All Others" Rate

WORLD TRADE ORGANIZATION

WT/DS184/AB/R
24 July 2001

(01-3642)

Original: English

http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members3_e.htm

UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

Report of the Appellate Body

(…)

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan	AB-2001-2
United States, *Appellant/Appellee* Japan, *Appellant/Appellee* Brazil, *Third Participant* Canada, *Third Participant* Chile, *Third Participant* European Communities, *Third Participant* Korea, *Third Participant*	Present: Taniguchi, Presiding Member Feliciano, Member Lacarte-Muró, Member

I.Introduction

(…)

2On 15 October 1998, the United States Department of Commerce ("USDOC") initiated an anti-dumping investigation into imports of hot-rolled steel from, among others, Japan. [36] USDOC determined that it was not practicable to examine all known Japanese producers and exporters and, therefore, conducted its investigation on the basis of a sample of Japanese producers. USDOC selected Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") for individual investigation. [37] USDOC calculated an individual

[36]Panel Report, para. 2.3. The United States International Trade Commission had already instituted an injury investigation. (Panel Report, para. 2.2)

[37]These three companies accounted for more than 90 per cent of all known exports of hot-rolled steel from

dumping margin for each of these companies. USDOC also established a single rate of anti-dumping duty applicable to all those Japanese producers and exporters not individually investigated (the "all others" rate). The "all others" rate was calculated as the weighted average of the individual dumping margins calculated for KSC, NSC and NKK. [38] On 6 May 1999, USDOC published its final affirmative dumping determination. [39] On 23 June 1999, the United States International Trade Commission (the "USITC") published its final affirmative determination of injury to the United States' hot-rolled steel industry. [40] On 29 June 1999, USDOC published an anti-dumping duty order imposing anti-dumping duties on imports of hot-rolled steel from Japan. [41] (…)

4In its Report, circulated to Members of the World Trade Organization (the "WTO") on 28 February 2001, the Panel concluded:

> (a) that the United States acted inconsistently with Articles 6.8 and Annex II of the AD Agreement in its application of "facts available" to Kawasaki Steel Corporation (KSC), Nippon Steel Corporation (NSC) and NKK Corporation;
>
> (b) that section 735(c)(5)(A) of the Tariff Act of 1930, as amended, which mandates that USDOC exclude only margins based entirely on facts available in determining an all others rate, is inconsistent with Article 9.4 of the AD Agreement, and that therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement; and

(…)

V.Article 6.8 of the Anti-Dumping Agreement: the Use of "Facts Available"

*A.*Application of "Facts Available" to NSC and NKK

63Before the Panel, Japan claimed that USDOC's application of "facts available" in the calculation of the dumping margins for Nippon Steel Corporation ("NSC") and NKK Corporation ("NKK") was inconsistent with the United States' obligations under Article 6.8 of the *Anti-Dumping Agreement*. Japan argued that, under that provision, USDOC was not entitled to reject certain information – namely "weight conversion factors", supplied by NSC and NKK to USDOC

Japan during the period of investigation. (Panel Report, para. 2.3)

[38]Panel Report, para. 2.6.

[39]USDOC established the following margins of dumping: 67.14% for KSC; 19.65% for NSC; and 17.86% for NKK. The "all others" rate was 29.30%. (Panel Report, para. 2.7; Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan ("USDOC Final Determination"), United States Federal Register, 6 May 1999 (Volume 64, Number 87), Exhibit JP-12 submitted by Japan to the Panel, p. 24329 at 24370)

[40]Panel Report, para. 2.8.

[41]*Ibid*., para. 2.9.

– for the sole reason that this information was provided after the deadlines for responses to USDOC's questionnaires, and to use instead facts available in respect of the transactions concerned. (…)

67In its preliminary dumping determination, issued on 19 February 1999, USDOC applied "facts available" to the small number of NSC and NKK transactions made on a theoretical weight basis because the actual weight conversion factor had not been submitted. As USDOC chose "adverse" facts available, this led to larger dumping margins for NSC and NKK than would have been the case if the weight conversion factors subsequently submitted by those companies had been used. [42]

68NSC submitted a weight conversion factor on 23 February 1999, 14 days before verification. (…) On the same day, and nine days before verification, NKK also submitted a weight conversion factor. (…)

69(…)On 12 April and 15 April 1999, respectively, USDOC wrote to NSC and NKK informing them that the weight conversion factors submitted had been rejected as untimely. USDOC returned one copy of their respective weight conversion factor submissions to each of NSC and NKK, informed NSC and NKK that all other copies of that information would be expunged from the record, and requested NSC and NKK to revise and resubmit all submissions that referred to the weight conversion factors that had been submitted. [43]

70The Panel examined Article 6.8 and Annex II of the *Anti-Dumping Agreement* and, on the basis of that examination, found that, with respect to the weight conversion factors submitted by both NSC and NKK, and given the evidence before USDOC, "an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that [NSC and NKK] had failed to provide necessary information within a reasonable period." [44] The Panel, therefore, found that the application of facts available by USDOC in determining NSC's and NKK's dumping margins was inconsistent with United States' obligations under Article 6.8 of the *Anti-Dumping Agreement*. [45]

71The United States appeals these findings and argues that USDOC was entitled to reject NSC's and NKK's weight conversion factors because they were submitted after the deadlines for

---

[42]The term "adverse" does not appear in the *Anti-Dumping Agreement* in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available. Pursuant to 19 U.S.C. § 1677e(b), if the investigating authorities find that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information", then they may, in reaching their determination, "use an inference that is *adverse* to the interests of that party in selecting from among the facts otherwise available". (emphasis added) The United States explained to us at the oral hearing that, in practice, an "adverse inference" is used because it is assumed that the information that a non-cooperative party did not provide would have been adverse to its interests. In this appeal, we do *not* address the issue of whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities *consciously* to choose facts available that are *adverse* to the interests of the party concerned. Rather, we use the term "adverse" facts available simply to denote that the facts available used by USDOC, in this case, with respect to NSC and NKK's sales on a theoretical weight basis, and KSC's sales to CSI, increased the respective dumping margins of these companies, that is, they had an "adverse" impact on those margins from the point of view of the companies concerned.

[43]Exhibits JP-29(f) and JP-45(i) submitted by Japan to the Panel.

[44]Panel Report, paras. 7.57 and 7.59.

[45]*Ibid*.

questionnaire responses. The United States interprets Article 6.8 as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data. (…)

72We begin with Article 6.1.1, which provides:

> Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

(…)

74While the United States stresses the significance of the *first* sentence of Article 6.1.1, we believe that importance must also be attached to the *second* sentence of that provision. According to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires "upon *cause shown* ", where granting such an extension is "*practicable* ". (emphasis added) This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable.

75In sum, Article 6.1.1 establishes that investigating authorities may impose time-limits for questionnaire responses, and that in appropriate circumstances these time-limits must be extended. However, Article 6.1.1 does not, on its own, resolve the issue of when investigating authorities are entitled to *reject* information submitted, and instead resort to facts available, as USDOC did in this case. We consider that this issue is to be resolved by reading Article 6.1.1 together with Article 6.8 of the *Anti-Dumping Agreement,* and Annex II of that Agreement, which is incorporated by reference into Article 6.8.

76Article 6.8 of the *Anti-Dumping Agreement* provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

(…)

78Article 6.8 requires that the provisions of Annex II of the *Anti-Dumping Agreement* be observed in the use of facts available. Paragraph 1 of Annex II provides, in relevant part, that:

> The authorities should also ensure that the party is aware that if information is *not* supplied *within a reasonable time,* the authorities will be free to make determinations on the basis of the facts available … (emphasis added)

(…)

80Neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to *reject* information submitted by interested parties, as USDOC did in this case. In our view, paragraph 3 of Annex II of the *Anti-Dumping Agreement* bears on this issue. Paragraph 3 of Annex II states, in relevant part:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation *without undue difficulties*, *which is supplied in a timely fashion*, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. (emphasis added)

(…)

83That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, "in a timely fashion", in paragraph 3 of Annex II as a reference to a "reasonable period" or a "reasonable time". This reading of "timely" contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines "upon cause shown", if "practicable". In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information.

(…)

85In sum, a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.

(…)

87In this case, the Panel found that USDOC had rejected the weight conversion factors submitted by NSC and NKK *for the sole reason* that they were submitted after the deadline for submission of the questionnaire responses. According to the Panel, USDOC made no effort to determine whether, notwithstanding the fact that the weight conversion factors were received after the applicable deadlines, they were nevertheless submitted "within a reasonable period". [46] Instead, USDOC relied *exclusively* on the fact that the deadline had expired, even though NSC and NKK had requested that USDOC accept the information as a *correction* to the information submitted in the questionnaire. USDOC did not consider any other facts and circumstances – even though several were raised [47] – which indicated that the information might have been submitted within a

[46]Panel Report, para. 7.55.

[47]NSC and NKK argued, for example, that they were unable to provide the information at an earlier date, and that the weight conversion factors were verifiable (and, in the case of NKK, actually verified) and usable. See, *supra*, paras. 68 and 69.

reasonable period of time. Moreover, in the case of NKK, USDOC in fact verified the information, before subsequently rejecting it as out of time.

88The approach taken by the United States in this case excludes the very *possibility*, recognized by Articles 6.1.1 and 6.8 and Annex II of the *Anti-Dumping Agreement*, that USDOC might be required, by these provisions, to extend the time-limits and accept the information submitted, as requested by NSC and NKK.

89We are, therefore, of the view that USDOC acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by NSC and NKK were submitted within a reasonable period of time. In reaching this conclusion, we are *not* finding that USDOC *could not*, consistently with the *Anti-Dumping Agreement*, have rejected the weight conversion factors submitted by NSC and NKK. Rather, we conclude simply that, under Article 6.8, USDOC was not entitled to reject this information *for the sole reason* that it was submitted beyond the deadlines for responses to the questionnaires. Accordingly, we find that USDOC's action does not rest upon a permissible interpretation of Article 6.8 of the *Anti-Dumping Agreement*.

90For all of the above reasons, we, therefore, uphold, albeit for different reasons, the Panel's findings that the United States acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* in applying facts available to the theoretical weight transactions made by NSC and NKK. [48]

*B.*Application of "Adverse" Facts Available to KSC

91During the period of investigation, KSC made a significant proportion of its export sales to the United States to California Steel Industries Inc. ("CSI"), a joint venture company which is owned 50 percent by KSC and 50 percent by a Brazilian company, Companhia Vale de Rio Doce ("CVRD"). In the proceedings before USDOC, CSI participated as one of the group of petitioners for the United States' hot-rolled steel industry.

92In order to construct an export price for KSC's United States export sales, USDOC requested KSC to provide information concerning the prices at which CSI resold products it had purchased from KSC, as well as information concerning CSI's further manufacturing costs. (…)

98We begin our examination of this issue with the last sentence of paragraph 7 of Annex II of that Agreement, which provides:

> It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is *less favourable to the party than if the party did cooperate*. (emphasis added)

(…)

100Paragraph 7 of Annex II does not indicate what *degree* of "cooperation" investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a "less favourable" outcome. To resolve this question we scrutinize the context found in

[48]Panel Report, paras. 7.57 and 7.59.

Annex II. In this regard, we consider it relevant that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is "not ideal in all respects" if the interested party that supplied the information has, nevertheless, acted "to the *best* of its ability". (emphasis added) This provision suggests to us that the level of cooperation required of interested parties is a high one – interested parties must act to the "best" of their abilities.

101We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be "maintained" if complying with that request would impose an "*unreasonable extra burden* " on the interested party, that is, would "entail *unreasonable additional cost and trouble* ". (emphasis added) This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements. [49] This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable. [50]
(…)
105Bearing in mind our interpretation of the requirements of "cooperation", we recall the approach taken by USDOC and made of record in this case. It is uncontested that the information requested by USDOC: was not known to, nor in the possession of, KSC; related to the prices and costs of CSI; resulted from CSI's own operations and not KSC's; and was known only to, and in the possession only of, CSI. We observe, also, that, as set forth above, KSC made several attempts to obtain the requested information from CSI. [51] Indeed, USDOC itself acknowledged that KSC "has provided a great deal of information and has substantially cooperated with respect to other issues" and that, with respect to the missing information, KSC "[has made] some effort to obtain the data and […] CSI's management rebuffed these efforts". [52]

106KSC also repeatedly reported to USDOC its difficulties in obtaining information from CSI. [53] However, USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied. USDOC declined to allow KSC to attend a meeting with petitioners' counsel to discuss the issue. Although USDOC met with KSC to discuss the issue, it appears that USDOC did not provide any specific guidance or assistance to KSC – USDOC simply repeated that KSC should obtain the requested information from CSI. [54] USDOC did not take any steps to secure the necessary information by requesting it directly from CSI. [55] We find nothing in the *Anti-Dumping Agreement* which would have prevented USDOC from asking CSI directly for the information. To the contrary, Articles 6.1 and 6.11 of the Agreement contemplate precisely such an approach. [56]

---

[49]Appellate Body Report, *United States – Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 158; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.
[50]See, *infra*, para. 193 and footnotes 141 and 142 thereto.
[51]See, *supra*, para. 92.
[52]USDOC Final Determination, *supra*, footnote 5 at 24368.
[53]Exhibit JP-42 submitted by Japan to the Panel details all of the efforts made by KSC to obtain the data and to inform USDOC of the problems it encountered, as well as the reactions from CSI and from USDOC.
[54]Letter of 18 December 1998 from KSC to USDOC. (Exhibit JP-42 submitted by Japan to the Panel)
[55]Exhibit JP-42(n) submitted by Japan to the Panel.
[56]We recall that, in their investigation, investigating authorities deal with *all* interested parties, which are

(…)

109Against this background, the Panel found that the interpretation of "cooperate" applied by USDOC "went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II." [57] The Panel stated that, in "the absence of a justified conclusion that there was a lack of cooperation", there was no basis, pursuant to that provision, for a result "less favourable" than would have been the case had KSC cooperated. [58] In effect, the Panel held that USDOC's conclusion that KSC failed to "cooperate" in the investigation did not rest on a permissible interpretation of that word. In the light of our own interpretation of the word "cooperate", and taking account of the circumstances of this case, we agree with the Panel's finding on this issue.

110We, therefore, uphold the Panel's finding, in paragraph 8.1(a) of its Report, that the United States acted inconsistently with Article 6.8 and Annex II of the *Anti-Dumping Agreement* in applying "adverse" facts available to KSC's sales to CSI.

VI.Article 9.4 of the Anti-Dumping Agreement: Calculation of the "All Others" Rate

111Before the Panel, Japan claimed that the United States' statutory method for calculating a rate of anti-dumping duty for those exporters and producers who were *not* individually investigated, as well as USDOC's application of that method in this case, were inconsistent with Article 9.4 of the *Anti-Dumping Agreement*.

112The Panel concluded that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is, *on its face*, inconsistent with Article 9.4 of the *Anti-Dumping Agreement* "insofar as it requires the consideration of margins based in part on facts available in the calculation of the all others rate"; and that, in maintaining section 735(c)(5)(A) following the entry into force of the *Anti-Dumping Agreement*, the United States acted inconsistently with Article 18.4 of that Agreement as well as with Article XVI:4 of the *WTO Agreement*. [59] The Panel also concluded that the *application* by the United States of section 735(c)(5)(A) of the Tariff Act of 1930, as amended, in this case was inconsistent with United States' obligations under Article 9.4 of the *Anti-Dumping Agreement*. [60]

(…)

114Article 9.4 of the *Anti-Dumping Agreement* provides, in pertinent part:

---

defined under Article 6.11 of the *Anti-Dumping Agreement*, to include, *inter alia*, exporters, domestic producers of the like product, and trade associations representing such domestic producers. Moreover, we observe that Article 6.1 requires investigating authorities to give notice to "[a]ll interested parties" of the information required from them.

[57]Panel Report, para. 7.73.

[58]*Ibid.*

[59]Panel Report, para. 7.90. Article 18.4 of the *Anti-Dumping Agreement* provides:

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

Article XVI:4 of the *WTO Agreement* provides:

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

[60]Panel Report, para. 7.90.

> When the authorities have limited their examination [to a sample of exporters or producers], any anti-dumping duty applied to imports from exporters or producers not included in the examination *shall not exceed*:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers
>
> …
>
> *provided that the authorities shall disregard for the purpose of this paragraph* any zero and *de minimis* margins and *margins established under the circumstances referred to in paragraph 8 of Article 6*. (emphasis added)

115We observe, first, that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have, in accordance with Article 6.10 of the *Anti-Dumping Agreement*, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping duty rate to be applied to those exporters and producers who were *not* included in the investigated sample. The rate so established is referred to as the "all others" rate.

116Article 9.4 does not prescribe any method that WTO Members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "*shall not exceed* " in establishing an "all others" rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a "weighted average margin of dumping established" with respect to those exporters or producers who *were* investigated. However, the clause beginning with "provided that", which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, "for the purpose of this paragraph", investigating authorities "*shall disregard* ", first, zero and *de minimis* margins and, second, "margins established under the circumstances referred to in paragraph 8 of Article 6." Thus, in determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two *prohibitions*. The first prevents investigating authorities from calculating the "all others" ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using "margins established under the circumstances referred to" in Article 6.8.

117The United States' appeal on this point concerns only the second type of "margins" that are to be disregarded in the calculation of the maximum "all others" rate, namely "margins established under the circumstances referred to in paragraph 8 of Article 6." The United States' appeal is founded on the contention that this phrase should be interpreted to cover only those margins which are calculated *entirely* on the basis of the facts available, that is, where *both* components of the calculation of a dumping margin – normal value and export price – are determined *exclusively* using facts available. By contrast, the Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the "all others" rate, any margins which are calculated, *even in part*, using facts available.
(…)
122(…) Article 6.8 applies even in situations where only limited use is made of facts available. To read Article 9.4 in the way the United States does is to overlook the many situations where

Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet, the text of Article 9.4 simply refers, in an open-ended fashion, to "margins established under the circumstances" in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word "entirely" as suggested by the United States. In our view, a margin does not cease to be "established under the circumstances referred to" in Article 6.8 simply because not every aspect of the calculation involved the use of "facts available".

123Our reading of Article 9.4 is consistent with the purpose of the provision. Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created, in essence, as a result of deficiencies in, or a lack of, information supplied by the investigated exporters. Indeed, in some circumstances, as set forth in paragraph 7 of Annex II of the *Anti-Dumping Agreement*, "if an interested party *does not cooperate* and thus relevant information is being withheld from the authorities, this situation could lead to a result which is *less favourable* to the party than if the party did cooperate." (emphasis added) Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins "established" even in part on the basis of the facts available.
(…)

127The method used by the United States to calculate an "all others" rate is set forth in section 735(c)(5) of the United States Tariff Act of 1930, as amended, which provides:

> (A) General rule
>
> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rate *shall be* an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined *entirely* under section 1677e of this title. (emphasis added)
>
> (B) Exception
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined *entirely* under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated. [61] (emphasis added)

[61]Section 735(c)(5)(B) of the United States Tariff Act of 1930, as amended, is contained in Title 19 of the United States Code at 19 U.S.C. § 1673d(c)(5). We note that section 1673b(d) refers to the establishment of an "all others" rate in preliminary determinations, while section 1677e refers to determinations on the

128Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, sets forth a mandatory method for calculating the *actual* "all others" rate. This provision requires that the "all others" rate be equal to a weighted average of margins, unless those margins are zero, *de minimis*, or are determined "*entirely* " on the basis of the facts available. Thus, this provision requires the *inclusion* of *all* margins calculated using facts available, unless the margin is calculated *entirely* on the basis of the facts available. Accordingly, in calculating the "all others" rate, section 735(c)(5)(A) requires the *inclusion* of margins calculated *in part* using facts available. However, as we have said, Article 9.4 of the *Anti-Dumping Agreement* requires the *exclusion* of all such margins from the calculation of the maximum "all others" rate. In consequence, in cases where margins established *in part* on the basis of facts available are used to calculate the "all others" rate, the "all others" rate calculated pursuant to section 735(c)(5)(A) may well exceed the maximum allowable "all others" rate under Article 9.4 of the *Anti-Dumping Agreement*.

129As section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, requires the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4, we uphold the Panel's finding that section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, is inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. We also uphold the Panel's consequent findings that the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the *WTO Agreement*. [62] We further uphold the Panel's finding that the United States' *application* of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the *Anti-Dumping Agreement* because it was based on a method that included, in the calculation of the "all others" rate, margins established, in part, using facts available. [63] (…)

---

basis of facts available.

[62]Panel Report, para. 7.90.

[63]We recall that the United States calculated the "all others" rate in this case based on a weighted average of the individual margins it determined for NSC, NKK, and KSC, even though all of those margins were calculated, in part, based on facts available. Since, for each company, the use of facts available increased, in one case significantly, the respective dumping margins, the use of those dumping margins to calculate the "all others" rate inevitably increased that rate.

4-2. "Zeroing"

4-2-1. EC – Bed Linen (2001)

EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA
WT/DS141/AB/R, 1 March 2001

Report of the Appellate Body

(…)
III.Issues Raised in this Appeal

45.This appeal raises the following issues:

(a) Whether the Panel erred in finding that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement; (…)

IV.Article 2.4.2 of the Anti-Dumping Agreement
(…)

47.The practice of "zeroing", as applied in this dispute, can briefly be described as follows 64: first, the European Communities identified with respect to the product under investigation – cotton-type bed linen – a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a weighted average normal value and a weighted average export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was higher than export price; by subtracting export price from normal value for these models, the European Communities established a "positive dumping margin" for each model. For other models, normal value was lower than export price; by subtracting export price from normal value for these other models, the European Communities established a "negative dumping margin" for each model.65 Thus, there is a "positive dumping margin" where there is dumping, and a "negative dumping margin" where there is not. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely how much the export price is above or below the normal value. Having made this calculation, the European Communities then added up the amounts it had calculated as "dumping margins" for each model of the product in order to determine an overall dumping margin for the product as a whole. However, in doing so, the European Communities treated any "negative dumping margin" as zero – hence the use of

[64]For a more detailed description, see Panel Report, para. 6.102.

[65]For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48.With respect to this first issue appealed, the Panel found that:

> … the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.66

49.The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all comparable export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of all export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides no guidance as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. (…)

50.As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the Anti-Dumping Agreement states:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be

[66]Panel Report, para. 6.119.

> taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

51.Article 2.4.2 of the Anti-Dumping Agreement explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there is dumping. Toward this end, Article 2.1 states:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

From the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a product, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a product.

52.We observe that, in this case, the European Communities defined the product at issue in its anti-dumping investigation as follows:

> The proceeding covers bed linen of cotton–type fibres, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.
> …
> Notwithstanding the different possible product types due to different weaving construction, finish of the fabric, presentation and size, packing, etc., all of them constitute a single product for the purpose of this proceeding because they have the same physical characteristics and essentially the same use.67 (emphasis added)

53.Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the product under investigation in this case. This is undisputed in this appeal. Having defined the product as it did, the European Communities was bound to treat that product consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the product – cotton-type bed linen – and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the Anti-Dumping Agreement that provides for the establishment of "the existence of margins of dumping" for types or models of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the product that is subject of the investigation.

[67]Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the Anti-Dumping Agreement, nor to justify the distinctions the European Communities contends can be made among types or models of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an overall margin of dumping for the product under investigation.

54.With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must be established:

> … on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions …

55.Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value."[68] By "zeroing" the "negative dumping margins", the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions – that is, for all transactions involving all models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.
(…)

[68]Panel Report, para. 6.115.

57.(…) The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".69 However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the product under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the different possible product types … constitute a single product for the purpose of this proceeding because they have the same physical characteristics and essentially the same use".70 (emphasis added) (…)

61.In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation.71 With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62.This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the Anti-Dumping Agreement intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed

---

[69]European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.

[70]Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10.

[71]European Communities' appellant's submission, paras. 46-49.

linen, it could have defined, or redefined, the product under investigation in a narrower way.72
(…)

[72]The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

4-2-2. Timken Co. v. United States, Fed. Cir., No. 03-1098, -1238, 1/16/04

International Trade Reporter (Vol. 21, No. 5, Jan. 29, 2004)

Commerce 'Zeroing' Practice Is Reasonable, Appeals Court Says

"The U.S. Court of Appeals for the Federal Circuit has found that the Commerce Department's practice of "zeroing" is a reasonable interpretation of the antidumping statute."

4-2-3. US – Zeroing (2004)

United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")

Request for the Establishment of a Panel by the European Communities

Revision

The following communication, dated 16 February 2004, from the delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

---

1. Consultations

On 12 June 2003 and 8 September 2003, the European Communities requested consultations with the United States of America (the "United States") under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*AD Agreement*") with regard to the laws, regulations and methodologies for calculating dumping margins including zeroing practices[73]. Consultations were held on 17 July 2003 and 6 October 2003. They have allowed a better understanding of the respective positions of the parties, but have not led to a satisfactory resolution of the matter.

2. Summary of facts

In anti-dumping proceedings the United States uses the following methodologies to establish the dumping margin.

In original investigations, the United States identifies sub-groups of products within the product under investigation ("averaging groups") on a per model basis as well as on the basis of other criteria such as the level of trade. Within each of the averaging groups, a weighted average export price is established and compared to the corresponding weighted average normal value. The results of these comparisons on an "averaging group" basis are added up to establish the dumping margin of the product under investigation as a whole; however, in this process, any negative margins or amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices on an "averaging group" basis are put at zero. As a result,

[73] WT/DS294/1 of 19 June 2003 and WT/DS294/1/Add.1 of 15 September 2003.

the United States calculates a margin and amount of dumping in excess of the actual dumping practised by the companies concerned.

In administrative review investigations, the United States determines the margin of dumping on the basis of a comparison of a weighted average normal value for each "averaging group" and individual export prices (the United States does not establish weighted average export prices in administrative review investigations). Here again, when adding up the results of the comparisons to determine the total amount or margin of dumping of the product under investigation, the United States puts at zero any negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual dumping practised by the companies concerned. The United States uses this methodology systematically in all reviews including so-called newcomer review investigations (Article 9.5 of the *AD Agreement*), changed circumstances review investigations (Article 11.2 of the *AD Agreement*) and sunset review investigations (Article 11.3 of the *AD Agreement*).

These calculation methodologies are applied pursuant, in particular, to the following United States laws, regulations, administrative procedures and measures:

– the Tariff Act of 1930, as amended (the "Act"), including the Statement of Administrative Action (the "SAA"), in particular Title VII and sections 731, 751, 771(35)(A), 771(35)(B) and 777(A)(d);

– the implementing regulation[74] of the United States Department of Commerce (the "DOC"), in particular section 351.414(c)(2); and

– the Import Administration Antidumping Manual (1997 edition) (the "IA AD Manual") including the computer program(s) to which it refers.

The calculation methodologies described above were respectively applied in the determinations of dumping by the DOC in the original investigations listed in annex I and in the final results of the anti-dumping administrative review investigations listed in annex II.

(…)

[74] 19 CFR Section 351.

V. Subsidy (Benefit)

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

WORLD TRADE ORGANIZATION

WT/DS70/AB/R
2 August 1999
(99-3221)

Original: English

CANADA - MEASURES AFFECTING THE EXPORT OF CIVILIAN AIRCRAFT

AB-1999-2

Report of the Appellate Body

(…)

V. Interpretation of "Benefit" In Article 1.1(b) of the *SCM Agreement*

149. In interpreting the term "benefit" in Article 1.1(b) of the *SCM Agreement*, the Panel found that:

> … the ordinary meaning of "benefit" clearly encompasses some form of advantage. … In order to determine whether a financial contribution (in the sense of Article 1.1(a)(i)) confers a "benefit", *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the *recipient* in a *more advantageous position than would have been the case but for the financial contribution*. In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the *market*. Accordingly, a financial contribution will only confer a "benefit", *i.e.*, an advantage, if it is *provided on terms that are more advantageous than those that would have been available to the recipient on the market.*[75] (emphasis added)

150. The Panel concluded that the notion of "cost to government" is not relevant to the interpretation and application of the term "benefit", within the meaning of Article 1.1(b) of the *SCM Agreement*.[76] The Panel found contextual support for this reading of "benefit" in Article 14 of the *SCM Agreement*. It also found that Annex IV of that Agreement does not form part of the relevant context of "benefit" in Article 1.1(b).

151.Canada appeals the Panel's legal interpretation of the term "benefit" in Article 1.1(b) of the *SCM Agreement*. In Canada's view, the Panel erred in its interpretation of "benefit" by focusing on the commercial benchmarks in Article 14 "to the exclusion of cost to government", and by rejecting Annex IV as relevant context.[77] Canada maintains that Annex IV of the *SCM Agreement* supports the view that "cost to government", which is mentioned in Annex IV, is a legitimate interpretation of the term "benefit". In its appellee's submission, Brazil agrees fully with the Panel's interpretation.

152.Under the heading "*Definition of a Subsidy*", Article 1.1 of the *SCM Agreement* provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") …

[75]Panel Report, para. 9.112. The Panel confirmed its interpretation in similar terms in its conclusion at para. 9.120 of the Panel Report.

[76]*Ibid*., para. 9.112.

[77]Canada's appellant's submission, paras. 98 and 102.

…

and

(b) *a benefit is thereby conferred*. (emphasis added)

153.In addressing this issue, we start with the ordinary meaning of "benefit". The dictionary meaning of "benefit" is "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance".[78] Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[79] Clearly, however, dictionary meanings leave many interpretive questions open.

154.A "benefit" does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient. This provides textual support for the view that the focus of the inquiry under Article 1.1(b) of the *SCM Agreement* should be on the recipient and not on the granting authority. The ordinary meaning of the word "confer", as used in Article 1.1(b), bears this out. "Confer" means, *inter alia*, "give", "grant" or "bestow".[80] The use of the past participle "conferred" in the passive form, in conjunction with the word "thereby", naturally calls for an inquiry into *what was conferred on the recipient*. Accordingly, we believe that Canada's argument that "cost to government" is one way of conceiving of "benefit" is at odds with the ordinary meaning of Article 1.1(b), which focuses on the *recipient* and not on the *government* providing the "financial contribution".

155.We find support for this reading of "benefit" in the context of Article 1.1(b) of the *SCM Agreement*. Article 14 sets forth guidelines for calculating the amount of a subsidy in terms of "the benefit to the recipient". Although the opening words of Article 14 state that the guidelines it establishes apply "[f]or the purposes of Part V" of the *SCM Agreement*, which relates to "countervailing measures", our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of "benefit" in Article 1.1(b). The guidelines set forth in Article 14 apply to the calculation of the "benefit *to the recipient* conferred *pursuant to paragraph 1 of Article 1*". (emphasis added) This explicit textual reference to Article 1.1 in Article 14 indicates to us that "benefit" is used in the same sense in Article 14 as it is in Article 1.1. Therefore, the reference to "benefit *to the recipient*" in Article 14 also implies that the word "benefit", *as used in Article 1.1*, is concerned with the "benefit *to the recipient*" and not with the "cost to government", as Canada contends.

156.The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned

---

[78]*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 214; *The Concise Oxford Dictionary*, (Clarendon Press, 1995), p. 120; *Webster's Third New International Dictionary* (unabridged), (William Benton, 1966), Vol. I, p. 204.

[79]Panel Report, para. 9.112.

[80]*The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993) Vol. I, p. 474; *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 278; *Webster's Third New International Dictionary*, (William Benton, 1966), Vol. I, p. 475.

with the "benefit" to the recipient, and not with the "cost to government". The definition of "subsidy" in Article 1.1 has two discrete elements: "a financial contribution by a government or any public body" and "a benefit is thereby conferred". The first element of this definition is concerned with whether the *government* made a "financial contribution", as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the "financial contribution". That being so, it seems to us logical that the second element in Article 1.1 is concerned with the "benefit… conferred" on the *recipient* by that governmental action. Thus, subparagraphs (a) and (b) of Article 1.1 define a "subsidy" by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that "cost to *government*" is relevant to the question of whether there is a "benefit" to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1.

157.We also believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

158.Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A "benefit" arises under each of the guidelines if the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

159.Canada has argued that the Panel erred in failing to take account of paragraph 1 of Annex IV as part of the relevant context of the term "benefit". We fail to see the relevance of this provision to the interpretation of "benefit" in Article 1.1(b) of the *SCM Agreement*. Annex IV provides a method for calculating the total *ad valorem* subsidization of a product under the "serious prejudice" provisions of Article 6 of the *SCM Agreement*, with a view to determining whether a subsidy is used in such a manner as to have "adverse effects". Annex IV, therefore, has nothing to do with whether a "*benefit*" has been conferred, nor with whether a measure constitutes a subsidy within the meaning of Article 1.1. We agree with the Panel that Annex IV is not useful context for interpreting Article 1.1(b) of the *SCM Agreement*.

160.Canada insists that the concept of "cost to government" is relevant in the interpretation of "benefit". We note that this interpretation of "benefit" would exclude from the scope of that term those situations where a "benefit" is conferred by a private body under the direction of government. These situations cannot be *excluded* from the definition of "benefit" in Article 1.1(b), given that they are specifically *included* in the definition of "financial contribution" in Article 1.1(a)(iv). We are, therefore, not persuaded by this argument of Canada.

161.In light of the foregoing, we find that the Panel has not erred in its interpretation of the word "benefit", as used in Article 1.1(b) of the *SCM Agreement*.

(…)

VI. Subsidy (Specificity)

http://www.sice.oas.org/DISPUTE/nafdispe.stm - United States of America

UNITED STATES-CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
U.S.A.-92-1904-01

IN THE MATTER OF
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

DECISION OF THE PANEL ON REMAND
(December 17, 1993)

(…)

I. INTRODUCTION

HISTORY OF THE PROCEEDINGS

This Panel is reviewing the third countervail ("cvd") investigation by the Department of Commerce of Canadian softwood lumber imports.

Commerce commenced its first cvd investigation of Canadian softwood lumber on October 27, 1982. Commerce issued a final negative determination on May 31, 1983 ("Lumber I"), concluding *inter alia* that stumpage rights were not provided to a "specific enterprise or industry, or group of enterprises or industries" within the meaning of the cvd statute nor under the agency's specificity test.[81] Commerce also concluded that stumpage was not provided at "preferential" rates within the meaning of the *Tariff Act of 1930*.

On May 19, 1986, Commerce received a second cvd petition from the Coalition for Fair Lumber Imports,[82] which claimed *inter alia* to have new evidence that government policies limited the use of stumpage programs, and alleged a change of law since Lumber I. Commerce commenced a second cvd investigation ("Lumber II"),[83] and later published an affirmative preliminary determination.[84] Commerce found that stumpage was both "specific" and "preferential" within the meaning of the cvd statute, conferring a benefit on Canadian softwood lumber products.[85] Commerce set the benefit conferred by the stumpage programs at 14.5% *ad valorem*.

Prior to the issuance of a Final Determination in Lumber II, the United States and Canada entered into a Memorandum of Understanding ("*MOU*") concerning softwood lumber, pursuant to which the Government of Canada agreed to collect a 15% charge on softwood lumber exports to the United States, which charge could be reduced or eliminated for provinces that instituted replacement measures, *e.g.* increasing their stumpage fees. As a result, the Coalition's petition was withdrawn and Commerce's investigation terminated.[86]

---

[81] 48 Fed. Reg. 24,159 (1983).
[82] 51 Fed. Reg. 21,205 (1986).
[83] 51 Fed. Reg. 21,205 at 21,207.
[84] Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (1986).
[85] 51 Fed. Reg. 37,453 at 37,456.
[86] Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 315, amended, Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 2,751 (1987).

In 1991, the Government of Canada and a number of the provincial governments undertook a joint study of four provincial stumpage programs, which study was said to have demonstrated that stumpage revenues in all four provinces exceeded the provinces' costs of administering the stumpage programs. On this basis, Canada concluded that the *MOU* had served its purpose and gave notice to the United States that it intended to exercise its right to terminate the *MOU* effective October 4, 1991.

Commerce self-initiated a third countervailing duty investigation into provincial stumpage programs on October 31, 1991 ("Lumber III"),[87] determining that Canada's unilateral termination of the *MOU* constituted the "special circumstances" necessary to self-initiate a cvd investigation.[88] At Commerce's invitation, the Coalition filed submissions in December, 1991, that argued that log export restrictions (hereinafter "LERs") in B.C., Alberta, Ontario and Québec constituted countervailable subsidies, and requested that Commerce include the export restrictions in its investigation.[89] Commerce complied.[90]

Commerce issued an affirmative preliminary countervailing duty determination ("*Preliminary Determination*") in Lumber III on March 5, 1992, which concluded that the stumpage programs in Alberta, B.C., Ontario and Québec conferred a weighted average subsidy of 6.25%, and that the LERs in B.C. conferred a weighted average subsidy of 8.23%. The combined weighted average rate of 14.48% was applied to softwood lumber exports from all provinces save the Atlantic provinces.[91] On May 28, 1992, Commerce published its *Final Determination*,[92] confirming that the stumpage programs of Alberta, B.C., Ontario and Québec conferred a weighted average subsidy of 2.91% on softwood lumber exports, and that B.C.'s LERs conferred a subsidy of 4.65% on softwood lumber producers in that province, yielding a weighted average subsidy of 3.60%. Commerce assessed a "country-wide" weighted average rate of 6.51% on softwood lumber exports from all provinces and territories under investigation, as a result.

This Panel was convened on July 29, 1992, pursuant to Article 1904 of the *United States - Canada Free Trade Agreement* ("*FTA*") to review Commerce's *Final Determination*. On May 6, 1993, the Panel unanimously issued the following remand instructions:

[87] 56 Fed. Reg. 56,055 (1991).

[88] As required by Article 2.1 of the *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII on the General Agreement on Tariffs and Trade* (the *"GATT Subsidies Code"*). See 56 Fed. Reg. 56,055 (1991).

[89] Pub. Doc. Nos. 80 and 104.

[90] Pub. Doc. No. 121.

[91] Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 8,800 (1992).

[92] Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (1992).

1. On stumpage specificity, the Panel unanimously found that: "[t]he evidence on the record shows that the number of users and the range of products produced by Canadian stumpage users are not so few as to render unreasonable a finding of non-specificity. Factors other than the number of users should therefore be taken into account. There was evidence on the record regarding factors such as the lack of dominant or disproportionate use of stumpage by the softwood lumber industry, as well as evidence both for and against the exercise of government discretion in these programs. This evidence could reasonably have informed Commerce's analysis and assisted it in making its determination. This evidence, although not necessarily controlling, is nonetheless legally relevant and we direct Commerce to consider this and all other relevant record evidence in reconsidering the specificity of Canadian stumpage programs on remand." On this basis, the Panel remanded "the Final Determination to Commerce for an express evaluation and weighing of all four factors enunciated in its Proposed Regulations, as well as any other factors relevant to *de facto* specificity."[93]

(…)

Commerce issued its *Determination on Remand* on September 17, 1993,[94] in which it affirmed its previous affirmative determinations concerning (…) stumpage (…) and increased the applicable country wide rate from 6.51% to 11.54% *ad valorem.*

(…)

III. STUMPAGE

A. SPECIFICITY

(…)

1. Number of Actual Users

In its analysis of the number of users in the *Determination on Remand*, Commerce found that stumpage users constituted one group of two or three industries and that this was too few to be non-specific.[95] Even accepting the Canadian complainants' evidence that stumpage users participate in twenty-seven industries based upon the end-products produced, Commerce found this number to be too small and the users to comprise too small a portion of the Canadian economy to be non-specific.[96]

As the Panel noted in its Decision, the CIT recognized in Roses I that the factors in the Proposed Regulations cannot be applied mechanically:

> "The appropriateness of such a test is not directly before the court, and such a test may or may not answer the concerns raised here, depending on how it is applied. If the test is applied mechanically, it may fail to address the relevant issues. In deciding whether a countervailable domestic subsidy has been provided ITA must always focus on whether an advantage in international commerce has been

[93] United States - Canada Free Trade Agreement Article 1904 Binational Panel Review, USA92-1904-01, Softwood Lumber Products from Canada (May 6, 1993), at 44 [hereinafter "Panel Decision"].

[94] Dept. of Commerce, International Trade Admin., Determination Pursuant to Binational Panel Remand (Sept. 17, 1993) [hereafter "*Determination on Remand*"]

[95] *Determination on Remand*, at 25.

[96] *Determination on Remand*, at 19.

> bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or "industries"."[97]

The concerns raised by the CIT in Roses I included not only the size of the recipient sector in relation to the Mexican economy, but also the diversity of enterprises involved, the exercise of discretion by the Mexican government, the effect of the FIRA program on international commerce, and possible artificiality of the program grouping.[98]

The Proposed Regulations themselves recognize that "...the specificity test cannot be reduced to a precise mathematical formula. Instead the Department must exercise judgment and balance the various factors in analysing the facts of a particular case".[99]

(…)

In analysing the number of actual users in the *Determination on Remand*, Commerce first examined the number of enterprises which actually use the provincial stumpage programs in question. Commerce accepted the record evidence that there were 3,600 enterprises using stumpage, and that, despite the fact that this group was only 0.41% of all enterprises in Canada, "this number does not appear to be so small as to dispositively indicate specificity".[100]

Commerce then went on to analyze the number of industries. Abstracting for the moment from the question of the manner in which Commerce defined the industries in question, at the heart of a consideration of the number of users must be a rational assessment of that number in light of the facts and circumstances of the case.[101] As noted above, Commerce must not apply a mathematical formula or apply the test mechanically. Indeed, Commerce's own counsel stated at the oral hearing that "no country in the world which administers the CVD law, including Canada, applies such fixed and numerical rules in applying the specificity test."[102] Only moments later, however, that same counsel admitted that Commerce's analysis of the number of users in this case "does come down to numbers because again intent is not dispositive."[103] Furthermore, Commerce contends that its finding that users comprise one group of two or three industries alone is sufficient to support a determination of specificity.[104]

(…)

Without further analysis, Commerce then concluded that these numbers fell "at the too few users end of the specificity spectrum"; they were "small" and therefore "too few" not to be considered specific.[105] In its Brief, Commerce stated that the spectrum ranged between a Cabot-type situation (involving one or two companies producing a single commodity) and the entire economy.[106]

---

[97] Roses, Inc. v. United States, 743 F. Supp. 870, 881 (CIT 1990).
[98] *Ibid.*, 879-81.
[99] 54 Fed. Reg. 23366, at 23368.
[100] *Determination on Remand*, at 14.
[101] PPG Industries, Inc. v. United States, 662 F. Supp. 258, 266 (CIT 1987).
[102] Transcript (November 19, 1993), Pub. Doc. 331 at 104.
[103] *Ibid*., at 106.
[104] "Despite the large absolute number of individual enterprises and individuals using stumpage programs, there is only one group of only two or three industries which use stumpage. As such, Commerce determines that the limited number of industries using stumpage is sufficient in and of itself to render the stumpage program specific on a de facto basis within the meaning of the statute." (*Determination on Remand*, at 25.)
[105] *Determination on Remand*, at 11 and 25.
[106] Commerce Response Brief, at 18.

The sum total of the reasoning which Commerce asks the Panel to endorse in this case amounts to the observation that the group of industries in question, the users of stumpage, was "small", or "small" compared to the entire economy. (…)

The view that programs with a limited group of users are not necessarily specific has been expressed by both the Court of International Trade and the Court of Appeals for the Federal Circuit. (…) The CIT reiterated that non-universal programs are not necessarily specific in PPG I ("...the mere fact that a program contains eligibility requirements for participation does not transform the program into one which has provided a countervailable benefit...There may, of course, be situations in which narrowly drawn eligibility requirements *de facto* render the benefit one which is provided to a specific enterprise or industry or group of enterprises or industries.").[107] (…)

It is clear, therefore, that the statute, as interpreted by U.S. courts requires more than a mere conclusion that a group of users is "small". Whether or not the Panel, if deciding the issue itself in place of Commerce, would find stumpage users to be specific is not the question before us. The question is whether Commerce has undertaken analysis which rationally supports its conclusion. To require rational analysis is not to impose a "methodology" on Commerce.

(…)

(d) Number of Actual Users: Conclusion

In the Majority's view, Commerce's analysis of the record evidence regarding the number of industries using stumpage programs is not in accordance with law. Its analysis of the record evidence in deriving the number of industries represented by enterprises using stumpage is circular, depending upon the identification and labelling of the group of stumpage users rather than upon a reasoned analysis of the actual businesses in which those users were engaged. Dispositive for the Majority, however, is our conclusion that the lack of reasoned analysis of the number of industrial users in finding them to be "too few" reveals a mechanical and arbitrary exercise which is not supportable under U.S. law.

2. Dominant or Disproportionate Use

Commerce did not consider evidence relating to dominant or disproportionate use or the lack thereof in the *Preliminary Determination* or *Final Determination*, taking the view that such evidence was of "little, if any, guidance".[108] The Panel instructed Commerce to consider such evidence and we find that Commerce has done that.

Commerce did so in two different ways. The first way was to analyze whether the "primary timber processing industries", a label applied by Commerce to the users of stumpage, were the dominant users of stumpage. The Panel was not surprised by the result: between 84.6% and 99.8% of timber harvested from provincial stumpage is used by the primary timber processing industries (*i.e.*, the users of stumpage). In fact, given the definition of the group of industries in question, the only surprise is that the group comprising all of the users of stumpage was not found to use 100% of the stumpage. The circularity of this analysis was initially clear to Commerce, who went on to look within the group of potential users to see if the producers of the product under investigation, softwood lumber, were dominant or disproportionate beneficiaries of the program.

[107] 662 F.Supp. 258, 265 (CIT 1987).
[108] *Preliminary Determination*, at 8804.

(…)

In our view, it is unreasonable for Commerce to ignore the fact that, while actual use by sawmills for the production of lumber is between 28% and 37%, actual use by the other "industry" in the group, pulp and paper producers, is in the range of 40% to 50%.[109] This fact indicates that sawmills, even if considered to be stand-alone beneficiaries, are neither the largest users of softwood stumpage, nor disproportionate users.

(…)

The Majority finds that while Commerce has looked at the record evidence on dominant and disproportionate use, it has not done so in a reasonable manner. Commerce has accepted that the users of stumpage are inherently limited, and has indeed found as an empirical fact that stumpage holders use virtually 100% of stumpage. (…) This, it would seem, conflicts with Congress's rejection of a proposed amendment to render *per se* countervailable all natural resource subsidies with dominant users, regardless of specificity[110].

Looking within the universe of potential users to see if the subset including the products under investigation are dominant or disproportionate users of the program, the statistics cited by Commerce do not reasonably support the conclusion that softwood lumber producers are the dominant or disproportionate beneficiaries of the program. Moreover, Commerce has failed to provide any reasoned analysis, as required by U.S. courts, as to why the numbers it cited are relevant to a finding of specificity in this case, much less dispositive.[111]

(…)

6. Stumpage Specificity Conclusion.

The Majority of the Panel has found that the analysis by Commerce of the evidence regarding specificity of provincial stumpage programs is legally flawed. The complete lack of reasoned analysis regarding whether or not the number of industries using stumpage is too few, and the mechanical, mathematical way in which Commerce decided that the users of stumpage are too few to be non-specific, is contrary to law and contrary to precedent. Similarly, the analysis of dominant or disproportionate use which compares all stumpage users to the entire economy, rather than comparing a subset including softwood lumber producers to the universe of potential users, is either irrelevant or perverse. The use of the statistics relating to whether sawmills account for a dominant or disproportionate share of stumpage use is similarly mechanistic, conclusory or, in some cases, misleading. (…)

While we acknowledge that it is not the function of this Panel to reconsider the evidence on the record and come to a conclusion on specificity *de novo*, this is the second occasion on which Commerce has failed to provide a rational explanation of how the evidence before it leads logically to the conclusion that the provincial stumpage programs are specific under U.S. law. Its examination

[109]Commerce notes that if the 37% figure for the softwood lumber share of wood fibre use is correct, then the shares for other uses must be correspondingly reduced. Even assuming the entire difference comes off the pulp and paper categories, these operations use about 40% of the harvest.

[110] PPG III, 928 F.2d 1568 (USCA, Fec. Cir. 1991), at 1576.

[111] See also PPG Industries, Inc. v. U.S., 978 F.2d 1232 (Fed. Cir. 1992), at 1241.

of the evidence on this occasion, while not according to law, has been detailed, and in the Majority's view there is little to gain from putting the parties to the time and expense of another remand. Since Commerce has been unable to provide a rational legal basis for a finding that the provincial stumpage programs are specific and in light of the efficiency with which the Panel review is intended to resolve these disputes, we therefore remand this issue to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries.

(…)

VII. Subsidy (Funded by Private Parties)

http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

WORLD TRADE ORGANIZATION

WT/DS103/AB/RW2
WT/DS113/AB/RW2
20 December 2002
(02-7032)

Original: English

Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products

Second Recourse to Article 21.5 of the DSU by New Zealand and the United States

AB-2002-6

Report of the Appellate Body

(…)

WORLD TRADE ORGANIZATION
APPELLATE BODY

Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products

Second Recourse to Article 21.5 of the DSU by New Zealand and the United States

Canada, *Appellant*
New Zealand, *Appellee*
United States, *Appellee*
Argentina, *Third Participant*
Australia, *Third Participant*
European Communities, *Third Participant*

AB-2002-6

Present:

Baptista, Presiding Member
Sacerdoti, Member
Taniguchi, Member

(…)

II.Background

12.The original panel found, *inter alia*, and the Appellate Body upheld, that Canada provided, through Special Milk Classes 5(d) and 5(e), "export subsidies" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. It was also found that these subsidies were being provided for quantities of exports that exceeded the quantity commitment level specified in Canada's Schedule. The original panel concluded, and the Appellate Body upheld, that Canada, therefore, had acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*.[112]

13.By way of implementation, Canada abolished Special Milk Class 5(e) and restricted export subsidies under Special Milk Class 5(d) to its commitment levels.[113] At the same time, Canada established a new class of milk, Class 4(m), under which over-quota milk can be sold as domestic animal feed. Canada otherwise left unchanged its domestic milk supply management system, under which domestic milk supply is controlled through the allocation of quota to individual milk producers by government agencies.[114] Generally, a producer can sell milk domestically only within the limits of its quota. The only exception is that a producer can sell over-quota milk in the new Class 4(m) as domestic animal feed, but for a much lower price.[115] Moreover, the price

[112]Panel Report, *Canada – Dairy*, para. 8.1(a); Appellate Body Report, *Canada – Dairy*, para. 144(b).
[113]Canada's quantity commitment levels, as contained in Part IV, Section II, of its Schedule, are: 3,500 tonnes for butter; 44,953 tonnes for skim milk powder; 9,076 tonnes for cheese; and 30,282 tonnes for other milk products.
[114]In response to questioning at the oral hearing, Canada stated that, when the milk supply management system was created, quota was allocated among existing farmers. Canada also indicated that quota is a transferable right and that an active market for quota has developed. The price of quota on this market is currently in the range of C$15,000-C$30,000/kg of butterfat per day.
[115]The administered price for Class 4(m) milk is C$10 per hectolitre ("hl"), as opposed to C$49.48/hl and C$56.06/hl, which is the price range for domestic industrial milk. Canada does not dispute these figures.

of domestic milk is fixed by government agencies. Government agencies also market domestic milk, collect the sales proceeds and distribute these proceeds among producers. [116]

14.Canada also introduced a new category of milk for export processing, known as "commercial export milk" ("CEM"). Sales of CEM are made by Canadian producers to Canadian processors, for processing of that milk into various dairy products for export. These sales are made pursuant to "pre-commitment" contracts, that is, contracts concluded in advance of milk production. [117] Canadian producers may sell any quantity of CEM to processors on terms and conditions freely negotiated between the producer and the processor. Sales of CEM do not require a quota or any other form of permit from the Canadian government or its agencies. Revenues derived from sales of CEM are collected directly by producers, without government involvement. However, if a dairy product derived from CEM is sold on the domestic market, the processor is liable to financial penalties for diverting the dairy product into the domestic market. The factual aspects of the new scheme are set out in greater detail in the Panel Report. [118]
(…)

VI.Article 9.1(c) of the *Agreement on Agriculture*—"Payments Financed by Virtue of Governmental Action"

78.The second issue appealed by Canada is whether the Panel erred in its interpretation and application of Article 9.1(c) of the *Agreement on Agriculture*. This issue raises two separate questions: (a) whether the Panel erred in finding that CEM involves "*payments*" under Article 9.1(c); and (b) having found that CEM involves "payments", whether the Panel erred in finding that these "payments" are "*financed by virtue of governmental action*". We will examine these questions in turn.

79.Before turning to the question of "payments", we note that Canada does not appeal, and we will not address, the Panel's finding that the alleged CEM payments are made "*on the export*" of agricultural products, as required by Article 9.1(c) of the *Agreement on Agriculture*. [119]

A."*Payments*"

80.The Panel began its reasoning by recalling that "payments" under Article 9.1(c) of the *Agreement on Agriculture* include "payments-in-kind" made through the supply of goods or services. [120] The Panel noted that we held, in the first Article 21.5 proceedings, that the existence of payments-in-kind, for purposes of CEM, should be determined by comparing CEM prices with "some objective standard … reflect[ing] the proper value" of milk to the producer. [121] The Panel also observed that we held that "the *average total cost of production* represents the appropriate

---

(Panel Report, footnote 410 to para. 5.116)
[116]For a more detailed description of the pre-existing milk supply management system see Appellate Body Report, *Canada – Dairy*, paras. 6-16; and Panel Report, *Canada – Dairy*, paras. 2.1-2.66.
[117]At the oral hearing, Canada informed the Appellate Body that, generally, producers pre-commit to sell CEM at least 30 days in advance of the sale.
[118]Panel Report, paras. 2.2-2.4. See also Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 3.1-3.9. The average CEM price is approximately C$29/hl. (Panel Report, para. 5.60)
[119]See *ibid.*, para. 5.23.
[120]*Ibid.*, para. 5.26, referring to Appellate Body Report, *Canada – Dairy*, para. 112; and to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 71 and 76.
[121]*Ibid.*, para. 5.27, referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 74-75, 96, and 104.

standard" in these proceedings. [122]

81.Before the Panel, the parties disagreed as to how the average total cost of production standard (the "COP standard") should be determined. The Panel "doubted" that Canada was correct to argue that the standard should be each *individual* producer's costs of production, rather than a single *industry-wide* average figure, as proposed by the complaining Members. [123] The Panel also found that Canada did not demonstrate why imputed costs for family labour and management, and for owner's equity, as well as quota, transport, marketing, and administrative costs, should not be included in calculating the COP standard, as suggested by the complaining Members. [124]

82.Despite these doubts regarding Canada's position, the Panel made two distinct findings on the existence of "payments"; one based on Canada's interpretation of the COP standard and the other based on the complaining Members' interpretation. The Panel ruled that, *even assuming Canada's interpretation of the standard were correct*, the evidence submitted by Canada did *not* support Canada's position that payments were not made. [125] The Panel also considered that the complaining Members' evidence was sufficient to establish a *prima facie* case that payments were made, on the basis of their interpretation of the COP standard. [126]

83.As the Panel came to an identical conclusion under both interpretations of the COP standard, it concluded that it was "unnecessary [for it] to decide *in this case* which of these two interpretations is the correct one." [127] Therefore, the Panel did *not* express any definitive views on the proper application of the COP standard.

84.In its appeal, Canada makes four primary arguments on the question of "payments". Canada contends: first, that the Panel erred in considering that the COP standard should be applied on an industry-wide basis; second, that the Panel erred in finding that the COP standard includes "non-monetary costs", such as the costs of family labour and management, and of owner's equity, that do not represent actual cash costs incurred by the producer; third, that the Panel erred in finding that the COP standard extends to costs associated with selling milk, such as quota, transport, marketing, and administrative costs, whereas Canada submits that it covers only the on-farm costs of producing milk; and fourth, that the Panel erred in its assessment of the evidence by placing a burden on Canada that it "cannot possibly be expected to meet". [128] Before examining these four arguments, we provide general observations relating to Article 9.1(c).

1.General Remarks on Article 9.1(c) of the *Agreement on Agriculture*

85.The word "payment", in Article 9.1(c) of the *Agreement on Agriculture*, denotes a "transfer

---

[122]*Ibid.*, para. 5.28, referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87. (emphasis added) See also Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 96.
[123]Panel Report, paras. 5.50-5.51.
[124]*Ibid.*, para. 5.85.
[125]*Ibid.*, paras. 5.65 and 5.87.
[126]*Ibid.*, paras. 5.34 and 5.86.
[127]*Ibid.*, para. 5.90. (original italics; underlining added) We note, however, that the Panel also stated, in paragraph 5.126 of the Panel Report, that "imputed costs of family labour, return to management, return to equity, and production quota, as well as transport, marketing and administrative costs … are properly to be included in a calculation of the average total cost of production."
[128]Canada's appellant's submission, para. 47.

of economic resources".[129] Although a monetary payment certainly involves such a transfer, the same is equally true where goods or services are transferred for less than full value. Recognizing this, we upheld the original panel's finding that the ordinary meaning of the word "payment", in Article 9.1(c) of the *Agreement on Agriculture*, "encompasses 'payments' made in forms other than money".[130]

86.In these second Article 21.5 proceedings, New Zealand and the United States assert that non-monetary "payments" are effected through the supply of goods—CEM. The issue is, therefore, whether supplies of CEM, by Canadian producers, involve a transfer of economic resources to processors.

87.In examining this question in the first Article 21.5 proceedings, we took into account that Article 9.1(c) of the *Agreement on Agriculture* describes an unusual form of subsidy in that "payments" can be made by private parties, and need not be made by government.[131] Moreover, "payments" need not be funded from government resources, provided they are "financed by virtue of governmental action".[132] Article 9.1(c), therefore, contemplates that "payments" may be made and funded by private parties, without the type of governmental involvement ordinarily associated with a subsidy. Furthermore, the notion of payments encompasses a diverse range of practices involving monetary transfers, or transfers-in-kind. We, therefore, determined that, in identifying whether "payments" are made, it is necessary to consider the particular features of the alleged "payments", by whom they are made, and in what circumstances. Thus, we found that the standard for determining the existence of "payments" under Article 9.1(c) must be identified after careful scrutiny of the factual and regulatory setting of the measure.[133]

88.In the case of CEM, we took into account the fact that the alleged "payments" are made by private parties through the supply of milk. Moreover, subject to the requirement to pre-commit sales of CEM, the private parties are entirely free to produce milk for sale as CEM, and it is for them to agree the price, volume, and timing of the sale with the buyers.[134] In these particular circumstances, we considered that the determination of whether "payments" are made depends on a comparison between the price of CEM and an "objective standard or benchmark which reflects the proper value of the [milk] to [its] provider".[135] We found that, in the circumstances of this dispute, the standard for determining the proper value of CEM is the average total cost of production of the milk (the COP standard), as this standard represents the economic resources the producer invests in the milk. If CEM is sold at less than its proper value, "payments" are made, because there is a transfer of the portion of economic resources not reflected in the selling price.

---

[129]Appellate Body Report, *Canada – Dairy*, para. 107.

[130]*Ibid.*, para. 112.

[131]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 113 and 115.

[132]*Ibid.*, para. 114.

[133]*Ibid.*, para. 76.

[134]In response to questioning at the oral hearing, Canada affirmed us that pre-commitment of CEM sales must be made at least 30 days in advance of the sale date.

[135]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 74.

89.We also provided certain guidance on the determination of the COP standard:

> The average total cost of production would be determined by dividing the fixed and variable costs of producing *all* milk, whether destined for domestic or export markets, by the total number of units of milk produced for both these markets. [136] (original italics)

90.With these general observations in mind, we turn to Canada's four primary arguments on "payments".

2.Individual Producer's Costs of Production or Industry-wide Average

(…) 94.For purposes of resolving this question, it is relevant to consider the *nature* of the obligations imposed under the *Agreement on Agriculture*. That Agreement, which is annexed to the *Marrakesh Agreement Establishing the World Trade Organization*, is an international agreement to which Canada is a party, as a sovereign State. Pursuant to this Agreement, Canada has undertaken a number of different obligations. Among these are the obligations in Articles 3.3 and 8 of the *Agreement on Agriculture* not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule. Accordingly, under Article 3.3, Canada has undertaken not to provide the export subsidies listed in Article 9.1 "in excess of … [its] quantity commitment levels".

95.However, under Article 9.1(c) of the *Agreement on Agriculture*, it is not solely the conduct of WTO Members that is relevant. We have noted that Article 9.1(c) describes an unusual form of export subsidy in that "payments" can be made and funded by private parties, and not just by government. [137] The conduct of private parties, therefore, may play an important role in applying Article 9.1(c). Yet, irrespective of the role of private parties under Article 9.1(c), the obligations imposed in relation to Article 9.1(c) remain obligations imposed on Canada. It is Canada, and not private parties, which is responsible for ensuring that it respects its export subsidy commitments under the covered agreements. Thus, under the *Agreement on Agriculture*, any "export subsidies" provided through private party action in Canada are deemed to be provided by Canada, and count towards Canada's export subsidy commitment levels.

96.We believe that the standard for determining the existence of "payments", under Article 9.1(c), should reflect the fact that the obligation at issue is an international obligation imposed on Canada. The question is not whether one or more individual milk producers, efficient or not, are selling CEM at a price above or below their individual costs of production. The issue is whether Canada, on a national basis, has respected its WTO obligations and, in particular, its commitment levels. It, therefore, seems to us that the benchmark should be a single, industry-wide cost of production figure, rather than an indefinite number of cost of production figures for each individual producer. The industry-wide figure enables cost of production data for producers, as a whole, to be aggregated into a single, national standard that can be used to assess Canada's compliance with its international obligations. (…)

3.Imputed Costs

(…) 101.In examining this issue, we recall that the notion of "payment", in Article 9.1(c), covers

---

[136] *Ibid.*, para. 96.
[137] *Supra*, para. 0.

transfers of economic resources, irrespective of the means by which the resources are transferred. Thus, the transfer may be effected in monetary form or equally by a transfer of goods or services for less than full value. [138]

102.In these proceedings, the purpose of the COP standard is precisely to determine whether supplies of CEM involve payments-in-kind that are made in a form other than money. If the COP standard were confined solely to cash costs, as Canada argues, this would overlook the possibility of "payments" being made in the form of non-cash resources invested in the production of milk. Thus, the COP standard must cover *all* of the economic resources invested in the production of milk and which may be transferred, irrespective of whether the resources involve an actual cash cost.

103.We are satisfied that any labour or management services provided by the farmer's family to the dairy enterprise are relevant economic resources invested in the production of milk and must be included in the COP standard. (…) We observe that both the United States and New Zealand submitted evidence to the Panel in support of the view that, from the perspective of economic theory, any labour and management services provided to an enterprise involve such an economic "opportunity" cost. [139] (…)

104.The same is also true of any equity the owner invests in the dairy enterprise. The allocation of such capital is, clearly, an investment of economic resources and carries an economic opportunity cost to the owner because the capital cannot simultaneously be invested elsewhere. [140] Again, the profits of the dairy enterprise are the proceeds after all costs, including the cost of equity, have been accounted for. (…)

106.Accordingly, we find that any failure to include in the COP standard the costs of family labour and management, or of owner's equity, would understate the costs of milk production, and may lead to a non-monetary "payment" going undetected. (…)

4.Selling Costs

(…) 113.We recall that the COP standard represents the producer's investment of economic resources in milk and, hence, in these proceedings, the proper value of the milk to the producer. [141] In our view, costs incurred by the producer in selling milk are as much a part of the economic resources the producer invests in the milk as are farm-based production costs. Indeed, the costs incurred to make sales are a vital part of the process by which the producer earns revenues through producing milk. If the producer sells milk at a price sufficient to cover only the farm-based production costs, it transfers to the processor any resources invested in selling the milk, such as the value of transport, marketing, and administration. There would, in such circumstances, be a "payment" of the value of these additional selling costs. Accordingly, these costs must be included in the COP standard in the comparison with the sales price of CEM. (…)

6.Conclusion on "Payments" under Article 9.1(c)

---

[138]Appellate Body Report, *Canada – Dairy*, paras. 107-112.

[139]Exhibit NZ-23 submitted by New Zealand to the Panel; Exhibit US-35 submitted by the United States to the Panel.

[140]The documentary evidence submitted by New Zealand and the United States is equally supportive of the view that, in economic theory, investment of equity involves an economic opportunity cost. (*Ibid.*)

[141]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 96.

121.For all these reasons, we uphold the Panel's finding, in paragraph 5.89 of the Panel Report, that the supply of CEM, by producers to processors, involves "payments" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

B."Financed by Virtue of Governmental Action"

(…) 123.The Panel recalled that that there must be a "demonstrable link" between governmental action and the financing of "payments".[142] The Panel proceeded to examine several actions of the Canadian government in regulating the supply of domestic milk and CEM. It concluded that New Zealand and the United States had made out a *prima facie* case that a demonstrable link exists between these Canadian governmental actions and the financing of CEM payments. Further, the Panel found that Canada had failed to establish, pursuant to Article 10.3 of the *Agreement on Agriculture*, that these governmental actions were not demonstrably linked to the financing of the payments.[143]

124.On appeal, Canada argues that the Panel erred under Article 9.1(c) of the *Agreement on Agriculture*, in particular by finding that a "demonstrable link" exists between Canadian governmental action and the financing of CEM payments. Canada claims that it has removed government action from "every stage of the export transaction" and that producers and processors "freely choose to enter into export transactions".[144] Therefore, Canada argues that no demonstrable link exists between governmental action and financing of CEM payments.

125.Article 9.1(c) of the *Agreement on Agriculture* provides:

> *Export Subsidy Commitments*
>
> 1. The following export subsidies are subject to reduction commitments under this Agreement:
>
> …
>
> (c) payments on the export of an agricultural product that are *financed by virtue of governmental action*, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived; (emphasis added)

(…)

128.We observe that Article 9.1(c) does not require that payments be financed by virtue of government "*mandate*", or other "*direction*". Although the word "action" certainly covers situations where government mandates or directs that payments be made, it also covers other situations where no such compulsion is involved.[145]

---

[142]Panel Report, para 5.106, referring to Appellate Body Report, *Canada – Dairy*, para. 113.
[143]*Ibid.*, paras. 5.133-5.135.
[144]Canada's appellant's submission, paras. 74 and 101.
[145]Article 9.1(c) of the *Agreement on Agriculture* may be contrasted with Article 9.1(e) of the *Agreement on Agriculture*, as well as with Article 1.1(a)(1)(iv) of the *SCM Agreement*, and items (c), (d), (j), and (k) of the Illustrative List of Export Subsidies (the "Illustrative List") of the *SCM Agreement*. In these provisions, some kind of government mandate, direction, or control is an element of a subsidy provided

129.Although the term "governmental action", when read in isolation, is somewhat open-ended, perhaps even abstract, the words "by virtue of " clarify further the meaning of this term. In the first Article 21.5 proceedings, we opined:

> The words "by virtue of " indicate that there must be a demonstrable link between the *governmental action* at issue and the *financing* of the payments, whereby the payments are, in some way, financed as a result of, or as a consequence of, the governmental action. [146] (original italics)

(…)

131.Thus, although Article 9.1(c) extends, in principle, to *any* "governmental action", not every governmental action will have the requisite nexus to the financing of payments. In the first Article 21.5 proceedings, we observed that "[g]overnments are constantly engaged in regulation of different kinds in pursuit of a variety of objectives." [147] Yet, we went on to say that regulation that merely *enables* payments to occur will not suffice for those payments to be regarded as "financed by virtue of governmental action". We stated:

> [Where regulation merely enables payments to occur], the link between the governmental action and the financing of the payments is too tenuous for the "payments" to be regarded as "*financed* by virtue of governmental action" … within the meaning of Article 9.1(c). Rather, there must be a tighter nexus between the mechanism or process by which the payments are *financed* … [148] (original italics)

132.This brings us to the meaning of the word "financing". The word refers generally to the mechanism or process by which financial resources are provided to enable "payments" to be made. The word could, therefore, be read to mean that government itself must provide the resources for producers to make payments. However, Article 9.1(c) expressly precludes such a reading, as it states that "payments" need *not* involve "a charge on the public account". This is borne out by the fact that the text indicates that "financing" need only be "by virtue of governmental action", rather than "by government" itself. Article 9.1(c), therefore, contemplates that "payments may be financed by virtue of governmental action even though significant aspects of the financing might not involve government." [149] Indeed, as we have said, payments may be made, and funded, by private parties. [150]

133.The word "financing" must, nonetheless, be given meaning. Accordingly, even if government does not fund the payments itself, it must play a sufficiently important part in the process by which a private party funds "payments", such that the requisite nexus exists between "governmental action" and "financing". (…)

136.We have also upheld the Panel's finding that producers make "payments", under Article 9.1(c) of the *Agreement on Agriculture*, to processors through sales of CEM at prices that are below the COP standard. As a result, producers' sales revenues do not recoup all of the costs

---

through a third party.

[146]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113.

[147]*Ibid.*, para. 115.

[148]*Ibid.*

[149]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 114.

[150]*Supra*, para. 0.

associated with producing and selling CEM. As this short-fall in revenues must be "financed" from some other source, sales of CEM necessarily involve the "financing" of "payments". The crucial question is the *source* of that financing and, in particular, whether the financing occurs "by virtue of governmental action".

137.The Panel considered that "a significant percentage" of Canadian milk producers are able to cover the entirety of fixed and variable costs of production through in-quota sales of domestic milk. As a result, the Panel opined, these producers can afford to make export sales at marginal cost.[151] The Panel found that governmental action regulating the domestic milk market "cross-subsidizes many sales that otherwise would not be made or would at least constitute sales at a loss."[152]

138.We note that CEM is produced almost exclusively by the same producers who supply milk to the domestic market.[153] It is not contested that these producers use the same production facilities to produce domestic and export milk—that is, the same land, cattle, buildings, machinery, milking facilities, and so on. Indeed, in some provinces, even after production, both regulatory classes of milk have common storage and transportation facilities.[154] There is, in other words, a single line of production for all milk, whatever its destination market.

139.Where fungible goods, such as milk, are produced using a single line of production, but sold in two different markets, the fixed costs of production are, in principle, shared between sales revenues from both markets. However, in the event that one of the two markets offers much higher revenues, a disproportionately large part, possibly even all, of the shared fixed costs may be borne by sales made in the more remunerative market.

140.Where sales in the more remunerative market bear more than their relative proportion of shared fixed costs, sales in the other market do not need to cover their relative proportion of the shared fixed costs in order to be profitable.[155] Rather, these sales can be made profitably *below* the average total cost of production. If the more remunerative sales cover *all* fixed costs, sales in the other market can be made profitably at any price above marginal cost. In these situations, the higher revenue sales effectively "*finance*" a part of the lower revenue sales by funding the portion of the shared fixed costs attributable to the lower priced products.

141.In Canada, the domestic price of milk is fixed by a government agency—the CDC—on the basis of an annual survey of producers' costs of production. The CDC has a statutory mandate to

---

[151]*Ibid.*, para. 5.128.
[152]*Ibid.*, para. 5.127.
[153]According to Canada, approximately 100 milk producers produce CEM without, at the same time, holding a domestic quota. (Canada's response to Question 2(c) posed by the Panel during the Panel proceedings, confirmed by Canada's response to questioning at the oral hearing) These 100 producers represent approximately 0.5% of all 19,000 Canadian milk producers and 1.25% of all 8000 CEM producers. (Panel Report, paras. 3.70 and 5.55) Moreover, the export market represents only 3.62 percent, by volume, of the total Canadian milk production. (Canada's response to questioning at the oral hearing)
[154]See, for instance, the Agreement on Commercial Milk Export between the British Columbia Milk Producers Association, the Mainland Dairymen's Association, and the British Columbia Dairy Council, p. 2, Exhibit US-21 submitted by the United States to the Panel.
[155]Even if sales in the more remunerative market do not cover *all* of the shared fixed costs, they may bear a higher relative proportion of those costs, such that sales in the less remunerative market can be made at a price below the average total cost of production, because these sales do not need to cover their entire relative proportion of shared fixed costs.

ensure that, through the administered price, a "fair return" is secured for "efficient producers". The CDC sets this administered price on the basis of data covering 70 percent of producers, such that these 70 percent of producers can, on average, cover *all* of their costs of production, including *all fixed costs*, through domestic sales of milk.[156] Moreover, for other producers, domestic sales will cover a significant part, if not all, of the fixed costs. This suggests, to us, that a large proportion of producers can finance the sale of CEM at a price that is below the COP standard *as a result of participation in the domestic market*.[157] In that respect, we note also that the domestic milk market represents 96.4 percent, by volume, of total Canadian milk production, with export production representing only 3.6 percent, by volume.[158]

(…) 144.It falls now to consider the role of the Canadian government in financing payments made on the sale of CEM. We have agreed with the Panel that a significant percentage of producers are likely to finance sales of CEM at below the costs of production as a result of participation in the domestic market. Canadian "governmental action" controls virtually every aspect of domestic milk supply and management.[159] In particular, government agencies fix the price of domestic milk that renders it highly remunerative to producers. Government action also controls the supply of domestic milk through quota, thereby protecting the administered price. The imposition by government of financial penalties on processors that divert CEM into the domestic market is another element of governmental control over the supply of milk. Further, the degree of government control over the domestic market is emphasized by the fact that government pools, allocates, and distributes revenues to producers from all domestic sales. Finally, governmental action also protects the domestic market from import competition through tariffs.[160]

(…) 146.Accordingly, we agree with the Panel that "governmental action" in the domestic market plays a critical part in the "financing" of payments made by a significant percentage of producers on the sale of CEM. As such, we agree with the Panel that payments made through the supply of CEM at below the COP standard are financed by virtue of this governmental action.[161] We also agree with the Panel that Canada failed to establish the contrary, pursuant to Article 10.3 of the *Agreement on Agriculture*. (…)

---

[156]Panel Report, para. 5.128.

[157]In addition to the *CDC Handbook*, the Panel also referred to newspaper articles submitted by New Zealand to support its view that a significant proportion of producers covers their fixed costs through domestic sales. (Panel Report, para. 5.128; Exhibit NZ-7 submitted by New Zealand to the Panel) In the two newspaper articles, the President of Dairy Farmers Canada and the Chairman of Dairy Farmers Ontario asserted, respectively, that only 25 percent and 39 percent of producers would cover all their costs at the price fixed by the CDC. At the oral hearing, Canada cautioned that such newspaper opinions should be treated "carefully". In any event, we note that even these figures tend to indicate that a large proportion of producers covers most, if not all, of their fixed costs through in-quota domestic sales.

[158]Canada's response to questioning at the oral hearing.

[159]We recall that certain aspects of the supply and management of milk in Canada were examined in the original proceedings in this dispute. In those proceedings, we found that the agencies managing the supply of milk were "government" agencies. (Appellate Body Report, *Canada – Dairy*, para. 118)

[160]For instance, in its Schedule, Canada has established a tariff quota of 64,500 tonnes for fluid milk (tariff headings 0401.10.10 and 0401.20.10) for cross-border purchases imported by Canadian consumers, with an in-quota tariff rate of 7.5 percent since 2001; outside this tariff quota, since 2001, Canada's bound tariff is 241.3 percent, but not less than C$34.5/hl. For yogurt (tariff heading 0403.10), the tariff quota is 332 tonnes and is limited to yogurt in retail-sized containers only; outside this quota, since 2001, the applicable bound tariff rate is 237.5 percent, but not less than 46.6¢/kg. "Fresh (unripened or uncured) cheese" (tariff heading 0406.10) falls under a tariff quota of 20,411,866 tonnes; outside this quota, since 2001, the applicable bound tariff rate is 245.6 percent, but not less than 451.1¢/kg.

[161]Panel Report, paras. 5.133-5.135.

C.Conclusion on Article 9.1(c) of the Agreement on Agriculture

155.We have upheld the Panel's finding that the supply of CEM involves "payments" on the export of dairy products and also its finding that these payments are "financed by virtue of governmental action". Accordingly, we uphold the Panel's finding, in paragraph 5.136 of the Panel Report, that the supply of CEM involves export subsidies under Article 9.1(c) of the *Agreement on Agriculture*.

156.In consequence, we also uphold the Panel's conclusion, in paragraph 6.1 of the Panel Report, that, through the combination of the supply of CEM and the operation of Special Milk Class 5(d), Canada has acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*. (…)

Additional Resources and References (Optional Reading)

Extraordinary Challenge Committee (Softwood Lumber / ECC-94-1904-01USA)

Introductory Note

The U.S.-Canada Free Trade Agreement, and now NAFTA (the Agreement), provide that each party to the Agreement may apply its anti-dumping laws to goods imported from the territory of the other parties. The Agreement, however, substitutes judicial review of a domestic agency determination that a countervailing duty should be imposed with binational panel review. The Agreement directs the binational panel to apply the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority. The Agreement specifies that the law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that the court of the importing Party would rely on such materials.

The dispute that culminated in the Extraordinary Challenge Committee proceedings in this case arose out of a challenge by the United States Department of Commerce ("Commerce") to (i) the grant by certain Canadian provinces to Canadian lumber producers of stumpage rights (that is, the right to cut standing lumber on public land) below cost, and (ii) the restriction by the Province of British Columbia of log exports to protect local industry (which practice the United States claimed artificially depressed the price of logs, thereby giving a competitive advantage to domestic lumber producers). The dispute spanned over a 12-year period during which, among other things, the parties entered into a memorandum of understanding whereby Canada agreed to charge a compensatory export tax of 15% on all lumber exported to the United States, Canada unilaterally terminated the memorandum of understanding, Commerce twice determined that a countervailing duty should be imposed and the binational panel vacated Commerce's decision in each instance. The Extraordinary Challenge Committee was asked to review the last decision by the binational panel reversing Commerce's determination.

The relevant provisions of United States law require Commerce to impose a countervailing duty if a country party to the Agreement provides directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise that is or may be imported into the United States, and an industry in the United States is materially injured or threatened with material injury by reason of the actual or potential imports of such merchandise. The term subsidy is defined to include, among other things, the provisions of goods or services at preferential rates if provided to a specific enterprise or industry, or group of enterprises or industries.

The principal interpretive questions that arose in this case (and which you should be aware of only insofar as they provide the context for the relevant dispute resolution issues) were the following. The first issue was whether the grant of stumpage rights by the Canadian provinces to domestic producers was preferential within the meaning of the statute and, specifically, whether Commerce was required by law to establish that the practice created an actual market distortion (i.e.,, had an effect on the price of the goods). Commerce made no specific findings of market distortion, and the binational panel held that that was error. The next issue was whether, in determining whether the challenged practices were specific within the meaning of the statute, Commerce was required to base its determination on four factors articulated in the case law and administrative practice. With respect to the challenged stumpage rights and log export restrictions, Commerce determined that it could find specificity if any one of the factors is met. The binational panel also held that that was error.

Note that, through the Extraordinary Challenge Committee's opinions, you are glancing at two separate levels of analysis. First, the opinions describe the standard of review applied by the binational panel in its review of Commerce's determination. Second, the Committee is applying its own standard in reviewing the decision of the binational panel. You should familiarize yourself with these separate standards of review before you go through the questions set forth below.

Questions for Class Discussion

Justice Hart's opinion states, among other things, that the substitution of the binational panel system for judicial review is likely to lower the amount of deference that the reviewing body gives to determinations by Commerce. He argues that when the parties to the FTA agreed to replace court review 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. Judge Wilkey, dissenting, insists that the parties to the Agreement expressly bargained for preserving the standard of appellate review of the importing country. Which is the better view? What did the parties to the Agreement seek to achieve when they replaced national judges with experts?

Judge Wilkey goes on to state that the Canadian panelists misapplied U.S. administrative law not because they acted in bad faith but because the relevant standard can only be understood by a jurist who developed sensitivity to the manner in which the U.S. courts interpreted the standard, through teaching, practicing or judging under U.S. law. Does Judge Wilkey's reasoning mean that the binational panel review system, which he says requires jurists who cannot sufficiently understand U.S. law to apply it, is doomed to fail?

Justice Morgan argues that the binational panel, not the Committee, should be deciding what weight should be given any decided case as against another. Isn't this Commerce's prerogative under the U.S. standard of review? What does this tell you about whom Justices Morgan and Hart trust most as interpreters of the law? Compare their view with Judge Wilkey's derisive comments on experts who know best.

With respect to the standard of review of the binational panel decision, Justice Hart states that the extraordinary challenge committee does not serve as an ordinary appellate court, should be perceived as a safety valve, is only intended to correct aberrant behavior, and should address only systemic problems and not mere legal issues that do not threaten the integrity of the dispute resolution mechanism. Justice Hart adds that the Committee should not determine whether the law applied is absolutely correct but merely whether the panel conscientiously attempted to apply the appropriate law as they understood it. Is an opinion which shows real effort but some misconceptions of the law adequate? What difference, if any, should there be between an ordinary appellate court and the Extraordinary Challenge Committee? Contrast Judge Wilkey's view of the matter with Justice Hart's.

As can be seen in the languages of Article 1904.13 of the Agreement, the requirement for establishing the Extraordinary Challenge Committee (the Committee) seems, on the one hand, "extraordinary" but, on the other hand, quite "nebulous". How does the Committee interpret "gross misconduct", "serious conflict", "seriously departed" , "manifestly exceeded", or "materially affected" ? Would it be necessary for the Committee to nail down some guidelines for this kind of interpretation ? Or would it be more desirable to leave this matter entirely to the discretion of the Committee ? Or would it be much wiser to wait until sufficient precedents will have accumulated ? Which approach do you think would be more compatible to the intention of the drafters ? Could this "extraordinary" procedure evolve (or devolve) into "ordinary" procedure ?

Note also that two thirds of the members of the U.S. Senate expressed their view that the binational panel erroneously applied U.S. law in this case. It is fair to say that, absent extraordinary circumstances, a United States court would defer to the clearly expressed view of a group of Senators sufficient in number to override a presidential veto. How much more should it take to convince an Extraordinary Challenge Committee that the binational panel erred in its interpretation of the law?

Note that the votes in the binational panel and committee were divided along nationality lines. Does this have any significance? Specifically, does this mean that entrusting review of administrative decisions to experts does not take the partisan sting out of the review system?

Note the varying degrees of strictness with which the majority and the dissent would construe the disclosure obligations imposed on members of the binational panels. What do the different approaches tell you about the level of trust that each Committee members has *vis a vis* the expert panelists. How does this relate to their respective views of the dispute resolution system?

You have studied a detailed dispute resolution scheme. Extract from it the substantive issues that you would look for when studying other systems on your own.

Note that you are looking here at two levels of review. The first one is the review by the Panel of the agency's determination. The second one is the review by the Committee of the Panel's decision.

The standard of review for the first one is whether Commerce's decision was supported by substantial evidence on the record, and (ii) otherwise in accordance with the applicable law.

Panel Report

http://www.nafta-sec-alena.org/english/index.htm

IN THE MATTER OF:
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

THE UNITED STATES TRADE REPRESENTATIVE
ON BEHALF OF THE UNITED STATES GOVERNMENT
Requestor and THE COALITION FOR FAIR LUMBER IMPORTS U.S Non-Party Participant
v.
THE GOVERNMENT OF CANADA Respondent and
THE GOVERNMENT OF BRITISH COLUMBIA; THE GOVERNMENT OF ALBERTA; THE GOUVERNEMENT DU QUEBEC; THE GOVERNMENT OF ONTARIO;THE QUEBEC LUMBER MANUFACTURERS ASSOCIATION; THE CANADIAN FOREST INDUSTRIES COUNCIL AND AFFILIATED COMPANIES Canadian Non-Party Participants

Panel No. ECC-94-1904-01USA

UNITED STATES - CANADA FREE TRADE AGREEMENT
BINATIONAL PANEL REVIEW

August 3, 1994

PANEL: Malcolm Wilkey, Chairman, Gordon L.S. Hart, Herbert, B. Morgan.

OPINION BY: Gordon L.S. Hart, Justice; Herbert B. Morgan, Justice

Opinion of Justice Hart:

* * *

The request for the extraordinary challenge committee states:

1. Pursuant to Article 1904 of the United States - Canada Free Trade Agreement (FTA), the United States requests the convening of an Extraordinary Challenge Committee ("ECC") to review the underlying Panel decision in the above-captioned matter. Two members of the Panel materially violated the FTA Rules of Conduct by failing to disclose information that revealed at least the appearance of partiality or bias and, with regard to one of the Panelists, a serious conflict of interest. Moreover, the Panel (and the three-person majority in the December 17, 1993 decision (the "Majority") manifestly exceeded its powers, authority and jurisdiction by ignoring the Chapter 19 standard of review, including substantive law and the facts in overturning the Department of Commerce's ("Commerce's") finding that the subsidies at issue in the case were provided to a specific industry or group of industries and inventing a legal requirement [*18] that Commerce examine whether the subsidies distort the market. These actions materially affected the Panel's decision and threaten the integrity of the binational panel review process.

The allegation of breach of the rules of conduct arose after the final decision of the panel at the instigation of the Coalition and it would only be appropriate to deal with this issue if the decision of the panel on review should be upheld. The allegation of a breach of the standard of review will therefore be dealt with now but before entering a discussion of this matter it is well to set forth the jurisdiction of this committee.

II. THE ROLE OF AN EXTRAORDINARY CHALLENGE COMMITTEE

The Constitution and authority of an extraordinary challenge committee is derived solely from the United States-Canada Free Trade Agreement. It is an international committee intended to be the ultimate vehicle in a dispute resolution system agreed to by the parties to the FTA. It was not intended to be an appellate court but rather a committee of limited jurisdiction to protect the integrity of the system. Its role is declared in s. 1904.13 of the Agreement which is as follows:

13. Where, within a reasonable [*19] time after the panel decision is issued, a 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 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,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

* * *

There have been only two previous extraordinary challenge committees appointed by the parties to the FTA and in each case the role of the committee has been extensively discussed. In "Live Swine from Canada" ECC-93-1904-01 USA the unanimous decision of the committee stated:

An Extraordinary Challenge Committee ("ECC") does not serve as an ordinary [*21] appellate court. Article 1904.13 provides that a Party may avail itself of the extraordinary challenge procedure only if it satisfies each prong of a three-part threshold test. If the USTR fails to meet its burden, we must affirm the Panel's decision. As pointed out by the first ECC in its June 14, 1994 Decision:

(…) 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 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 resolution mechanism itself. (…)

The committee further recognized that under the authority of Chevron, U.S.A. v. Natural Res. Def Council, 467 U.S. 837 (1984), when the statutory provision is silent as to the meaning of a words like 'specific' or 'subsidies' proper deference must be given to Commerce's statutory interpretation. Binational panels were not entitled to engage in a de novo review or simply impose their construction of the statute upon Commerce. Panels must follow and apply the law, not create it. However, panels were entitled to be guided by the overall intent of the legislation being interpreted.

The role of [*25] a party requesting an extraordinary challenge committee is therefore a very difficult one. In this case, not only must it be shown that 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 or that the panel manifestly exceeded its powers, authority or jurisdiction by failing to apply the appropriate standard of review but that these actions had materially affected the panel's decision and also threatened the integrity of the binational panel review process.

III. ALLEGATIONS OF ERROR

The United States alleges

(i) that the panel in its May 1993 determination and the majority in the December 1993 determination manifestly exceeded its power, authority and jurisdiction by failing to apply the appropriate standard of review and general legal principles that a Court of the United States would apply when it held that the determination of Commerce regarding preferentiality of provincial stumpage programmes was not supported by substantial evidence or in accordance with the law. Although the panel repeated the standard of review formulations from U.S. case law it did not conscientiously apply [*26] them. They failed to determine whether the statutory interpretation of Commerce as the administering agency was precluded by statute and failed to follow U.S. law when it reversed long standing United States administrative practice by requiring Commerce to undertake an additional analysis of the economic effects of subsidies. It created

new law not supported by the plain words of the statute, congressional intent, administrative practice nor judicial precedent.

(ii) The panel in its first decision and later the majority panel manifestly exceeded its power, authority or jurisdiction in its analysis of Commerce's determination that provincial stumpage programmes, in fact, benefit a specific industry or group of industries by failing to apply the appropriate standard of review and by seriously misapprehending U.S. substantive law. Instead of determining whether Commerce's finding was a permissible exercise of its discretion under U.S. law the majority substituted its own judgment for that of Commerce and its decision was ultra vires. In view of the lack of explicit guidance in the statute Commerce possesses an extremely wide degree of discretion to interpret the meaning of this [*27] specificity standard and its application to the particular facts the majority should have deferred to Commerce's reasonable judgment. (…)

It is suggested by the U.S. that these failures by the panel automatically materially affected the panel's decision and threaten the integrity of the binational panel review process.

The position taken by Canada is that the panel in its May 1993 decision and the majority in the December 1993 decision observed the appropriate standard of review and conscientiously applied the proper United States law to its review. Canada further takes the position that, even if it had not done so, the United States has failed to prove that the decision was materially affected thereby or that the integrity of the binational panel review process has in [*28] any way been threatened.

IV. THE STANDARD OF REVIEW OF A BINATIONAL PANEL

There is no doubt concerning the standard of review of a binational panel. It is set forth in the FTA as follows:

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

1. As provided in this Article, the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review. (…)

The binational panel in its first decision which was unanimous purported to follow the appropriate standard of review. [*32] In the final decision the majority reaffirmed that its decision was based upon appropriate United States law while the minority claimed that the majority had, in fact, ignored the intent of Congress and thereby failed to apply the appropriate standard of review as required under the FTA.

V. THE LEGAL ARGUMENT

A. PREFERENTIALITY

The United States' position is that s. 771.(5) of the Tariff Act could not be clearer. The stumpage provisions amounted to "the provision of goods or services at preferential rates" and were therefore a subsidy which Commerce was required to countervail. Under U.S. law Commerce has never been required to conduct an effects test which has been consistently rejected by judicial precedent. *A.S.G. Industries v. United States 610 F.2d 770 (C.C.P.A. 1979); British Steel v. United States 605 F. Supp. 286 (Ct. Int'l Trade 1985).*

The U.S. says further that long standing administrative practice does not require the Department to make a finding of output or price effects and that the panel created new law when it required Commerce to do so and relied upon *Wire Rod from Poland, 49 Fed. Reg. 19374 (Dept. Comm. 1984).*

* * *

The U.S. says that as a result of these errors the panel failed to apply the review standard of simply determining whether or not the Agency's determination was in accord with substantial evidence and the law.

The Canadian position is that the panel's market distortion requirement did not create any new law but was firmly grounded in the United States Supreme Court and Federal Circuit precedent.

Canada further suggests that in [*36] conformity with Zenith U.S. Courts and Commerce have construed the term subsidy as requiring that a government programme confer a competitive advantage or, in economic terms, lead to market distortion. In the absence of market distortion, that is if the foreign government had not changed the competitive market so as to give the foreign company an advantage in competition it would have otherwise not have had, there is simply nothing that needs to be offset by a countervailing duty.

In its final determination in Carbon Steel Wire Rod from Poland, 49 Fed. Reg. 19374, 19375 (Dept. of Comm. 1984) the Department of Commerce itself stated:

We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.

The dissenters in the second panel decision urged that an intervening Federal Circuit decision in Daewoo Electrics Co. v. International Union of Electric 6 F. 3d 1511 (Fed. Cir. 1993), required deference to Commerce's recently adopted position that market distortion is not a required element. For this reason they deserted the unanimous opinion to which they had previously agreed. Canada argues that this reading of Daewoo is unsupportable. The case deals with an antidumping problem where the court merely held that the Department need not undertake an econometric tax incidence analysis in accounting for foreign taxes in antidumping cases. It does nothing more than set forth U.S. law on the standard of review of administrative agencies as it existed at the time the five members of the panel rendered their initial decisions and contains nothing new to justify a change in the opinion of the two dissenting members.

[Justice Hart reviews here the case law and administrative decisions adduced by Canada in support of its argument.]

In summary, the Canadian position is that the intention of Congress and the case law require consideration of the element of market disruption or competitive advantage in some cases such as the one here where that element is not self-evident. The reason for this is that this is the first time that Commerce ever tried to countervail a system of access to government owned natural resources. In this situation one cannot expect to find a precedent exactly on point but must be guided by the overall intention of the law and the general principles of its interpretation.

Having considered the positions of both parties I must determine whether or not the panel applied the appropriate standard of review in reaching its conclusions.

There can be no doubt that as a matter of fact there was no market distortion established by Commerce as a result of the stumpage systems or the LERs. All five panelists, both in the majority and in the dissent, have agreed to that.

[Justice Hart reviews a case of the Court of International Trade (*Saarstahal, A.G. v. United States and Inland Steel Bar Co., Court No. 93-04-00219*) which he states support the position of Canada.]

On the assumption that this recent pronouncement by the CIT represents the law of the United States it is difficult to say that the panel majority did not apply the appropriate standard of review when reaching its conclusions. (…)

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 [*43] 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 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.

In my opinion the panel followed an appropriate standard of review and properly interpreted United States law when it ruled that Commerce in this unique situation was required to assess whether or not there was any competitive advantage or market distortion created by the Canadian stumpage systems or the British Columbia LERs before determining whether or not a countervailable subsidy existed. Furthermore, having determined that there was no such distortion according to the [*44] evidence there was nothing to countervail. The panel was correct in directing Commerce to remove the countervailing duties which they had imposed.

Although this determination would be sufficient to complete this matter I consider it appropriate to discuss as well the other controversial legal ruling by the panel.

B. SPECIFICITY

The U.S. alleges that the majority of the panel failed to apply the proper review standard and imposed invented legal requirements in reversing Commerce's specificity findings. They say that the Statute contains only two general specificity directives. First, Commerce must determine whether a subsidy benefits a "specific enterprise or industry, or a group of enterprises or industries". Second, in making that determination, Commerce must countervail benefits provided

to a group of enterprises or industries pursuant to law even when the benefits are nominally available economy-wide but, in fact, benefit only a group of enterprises or industries within that economy. This is the extent of the specificity test. Within these two broad statutory directives Commerce has broad discretion to fashion its own methodologies and to make findings.

* * *

The United States says that the statutory provisions and the legislative history described above constitute almost all of the congressional guidance on the specificity test and in view of this U.S. courts have acknowledged that Commerce has tremendous discretion in applying the test. The courts have recognized that Congress intended to "provide a wide latitude with which (Commerce) may determine the existence or non existence" of a subsidy. PPG Indus. Inc. v. United States, 928 F. 2d 1568, 1572 (Fed. Cir. 1991). Indeed the courts have stated that the burden faced by a party challenging the Commerce determination "is a difficult one, for it must convince us that the interpretation of [subsidy] adopted by [Commerce] is effectively precluded by the statute." (…)

The U.S. claims that the methodology used by Commerce is proper. They use a sequential approach when considering the four matters that they are directed to investigate by their proposed regulations. If they are satisfied that one of the factors is met Commerce need not consider the other factors. They will not, however, make a negative finding of non specificity until all factors have been considered. (…)

The Canadian position is that the unanimous panel ruling of May 1993 and the majority panel decision of December 1993 on Commerce's stumpage specificity determination has two parts. The first concerns whether Commerce could consider evidence regarding only a single factor that it asserted pointed towards and finding of specificity or whether, as the panel held, U.S. law required Commerce to consider evidence regarding all four factors listed in its own regulations as well as any other relevant factors. The second aspect of the panel's ruling concerns whether Commerce's determination that the stumpage systems were specific was supported by substantial evidence. Nothing about either aspect of the ruling it is argued even remotely approaches the "manifestly exceeded its authority" standard required to sustain an extraordinary challenge.

[Justice Hart reviews Canada’s argument that the panel properly required Commerce to base its specificity determination on a consideration of all four of the following factors, and not on a determination that one factor only has been met:

> (i) The extent to which a government acts to limit the availability of a program;
>
> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
>
> (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.]

* * *

As has been stated earlier, the role of the extraordinary challenge committee is to determine whether the panel manifestly exceeded its powers, authority or jurisdiction when reviewing Commerce's determinations, that is, whether they could find that the agency was unsupported by substantial evidence on the record or otherwise not in accordance with the law and if the panel had failed to abide by these restrictions whether that failure materially affected the panel's decision or threatens the integrity of the binational panel review process. We are not an appellate court and should not substitute our view of the evidentiary record for that of the panel nor should we determine whether the law applied is absolutely correct but merely whether the panel conscientiously attempted to apply the appropriate law as they understood [*61] it.

Everyone has agreed that this is a case of first instance and that the law in this field is very difficult. The intention of the parties is to remove trade disputes from the courts and the normal delays involved and have them settled by a panel of experts in international trade law. Matters are to be dealt with expeditiously and with sincerity by the qualified panel experts.

It is apparent that the panelists articulated the proper standard of review and in my opinion the entire panel in its May decision and the majority in its December decision conscientiously applied the appropriate law. There can be differences in view concerning that law but there is nothing in the record which appears to me to be an attempt to avoid the standard of review required by law. Both sides make persuasive arguments as is expected by lawyers of their competence but in my opinion it cannot be said that the majority decision was clearly wrong.

In any event I am satisfied that there is nothing arising out of this dispute settlement proceeding that would justify the committee in concluding that the panel in its unanimous and majority decisions exceeded its powers, authority or jurisdiction in such [*62] a manner as to materially affect the panel's decision or in such a way that the integrity of the binational panel review process is threatened. It is obvious that all members of the panel wish to make the process work. Although they differed in their opinion on some aspects of the law in the final decision these were apparently honest differences of opinion which can be expected in international disputes of this type. If an equal amount of energy and expertise is applied to future panels by the various roster members the dispute system which the authorities have chosen should continue to be effective.

For all of these reasons I would determine that the United States' request for an extraordinary challenge committee's review of the binational dispute panel in this matter be rejected.

We turn now to a consideration of the matter of bias and conflict of interest raised by the United States Government at the instance of the Coalition after the final decision of the panel had been made.

VI. ALLEGATION OF GROSS MISCONDUCT, BIAS OR A SERIOUS CONFLICT OF INTEREST

The United States, at the instigation of the Coalition, alleges that two members of the panel materially violated the [*63] FTA rules of conduct by failing to disclose information that revealed, at least the appearance of partiality or bias, and with regard to one of the panelists a serious conflict of interest. This allegation is made pursuant to Article 19.04(13) of the FTA which states:

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

(a)(i) a member of the panel is guilty of gross misconduct, bias or a serious conflict of interest, or otherwise materially violated the rules of conduct; 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 procedures set out in Annex 19.04.13.

* * *

Before participating in a panel each member is required to submit a disclosure statement under the Code of Conduct which states:

III. DISCLOSURE OBLIGATIONS

[Introductory Note:

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.

These disclosure obligations, however, should not be interpreted so that the burden of detailed disclosure makes it impractical for persons in the legal or business community to service as members, thereby depriving the Parties and participants of the services of those [*67] who might be best qualified to service as members. Thus, a candidate or member should not be called upon to disclose interests or relationships whose bearing on their role in the proceeding would be trivial, but should be aware of the continuing obligation to disclose relationships or interests that may bear on the impartiality or the integrity of the process.

This Code does not determine whether or under what circumstances the Parties will exclude a candidate or member from membership on a panel or committee on the basis of disclosures made. Moreover, this Code does not preclude the Parties with knowledge of a candidate's or member's interests and relationships from waiving any objection to that candidate's or member's service. Therefore, a candidate or member who has made the disclosures required by this Code, may be selected or may be permitted to continue to service as a member.]

A candidate shall disclose to the appointing Party any interests or relationships that are likely to affect the candidate's independence and impartiality or might reasonably create the appearance of bias in a particular appointment. To this end, a candidate shall make a reasonable effort to become [*68] aware of and shall disclose any such interests and relationships including:

(1) any direct or indirect financial or personal interest in the outcome of the proceeding;

(2) any existing or past financial, business, professional, family, or social relationship, or any such relationship involving family member, current employer, partner or business associate; and

(3) public advocacy of a position on an issue in dispute in the proceeding that was not in the normal course of legal or other representation;

Once appointed, a member shall continue to make a reasonable effort to become aware of and to disclose any interests or relationships included in the previous paragraph. The obligation to disclose is a continuing duty which requires a member to disclose any such interests or relationships that may arise during any stage of the proceeding.

* * *

As the agreement requires, panelists must be experienced in international trade law and are expected to be highly competent in their field. Most panelists, like these two men, work with large law firms, some with offices in different cities and it is difficult to know always what work is being conducted by their partners and associates. They each made reasonable efforts to make sure that there was no work being conducted by their [*78] firms that would in any way interfere with their impartiality in the matter before the panel. Firms like theirs, both in Canada and the United States, are regularly employed by various government agencies and unless the employment relates to the matter in dispute it should not be used to bar a roster member from serving on a panel. Otherwise it would be very difficult to get competent people to serve.

It was known here that both Mr. Dearden and Mr. Hunter worked with law firms that represented the various governments in Canada on unrelated matters and it was also known that one of the American members of this panel was associated with a firm that billed over $3,800,000 to an American government agency during 1992-93. Neither party considered it necessary to treat these facts as an indication of bias on the part of any of the panelists and did not do so. It was only when the final decision was in that the matter was raised.

In my opinion all panelists must always be aware of the code of conduct and the high standards which are expected from them while acting under the FTA. They should reveal any connection which might possibly result in an apprehension of bias so that the opposite [*79] party can exercise a peremptory challenge or take other proceedings under the agreement. They should be prepared to step aside if any matter comes to their attention which would reasonably cause them to be biased in their deliberations. A wilful failure to disclose information which would have a bearing on their ability to treat the parties in a fair and unbiased manner should be dealt with severely by an extraordinary challenge committee. Such a situation would be sufficient not only to materially affect the panel decision but also to threaten the integrity of the entire binational panel review process.

In this case it is my view 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 U.S. government for an extraordinary challenge should be rejected.

VII. CONCLUSION

For the reasons stated above I would dismiss the request for an extraordinary challenge on the substantial issues as well as the bias issue since the United States has failed to establish that a

member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated [*80] the rules of conduct or that the panel manifestly exceeded its powers, authority or jurisdiction by failing to apply the appropriate standard of review and that any allegation so made has materially affected the panel's decision or threatened the integrity of the binational panel review process under FTA Article 1904.13. Accordingly, I would direct that the binational panel's decision of December 17, 1993, shall remain in effect and the binational panel's order affirming the determination on remand should be affirmed.

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. We are however all judges of long experience and since the issue before us is one of first impression a sincere difference of opinion should not be unexpected.

I have had the opportunity to read the dissenting opinion of my American colleague and its presents very well his concerns. He worries that not enough deference is paid to the Commerce Department as he believes it must be under United [*81] States law. In my opinion, however, he is demanding almost absolute deference leaving almost no breathing space for a reviewing tribunal. If this is the correct law to apply then there is no need for a binational panel under the FTA.

I am of opinion that the panel was justified in reaching the conclusion that no countervailing duty is authorized by American law when it has been established that no competitive advantage had flowed to any Canadian lumber producers from the stumpage systems of the provinces and log export regulations of B.C.

For all of these reasons I would uphold their determinations.

Issued on this 3rd day of August, 1994

OPINION OF THE HONORABLE HERBERT B. MORGAN

AUGUST 3, 1994

MEMORANDUM OPINION REGARDING BINATIONAL PANEL REMAND DECISION AND ORDER

INTRODUCTION

[Justice Morgan reviews the history of the dispute.]

THE ROLE OF AN EXTRAORDINARY CHALLENGE COMMITTEE

(…) Both governments evidenced a strong desire for business certainty and the concomitant need to resolve trade disputes quickly and with finality. They accordingly devised a special mechanism for the settlement of all trade disputes between the respective parties. The FTA provides for panels comprised of five international trade experts from the United States and

Canada to replace the otherwise U.S. or Canadian reviewing Courts. (FTA Annex 1901.2(1)-(2)). The decision of the Panel is [*90] final and binding. The panels are mandated to apply the law of the importing country. Thus, a panel reviewing a determination by Commerce must apply the standard of review and legal principles that the Court of International trade would apply. (FTA ART. 1904(2-3)). In this regard, the law consists of "the relevant statutes, legislative history, regulations administrative practice and judicial precedents to the extent that a court of the importing party would rely on such materials. . . ." (FTA Article 1904(2)). Additionally, the FTA provided an Extraordinary Challenge Committee mechanism to review binational panel decisions in extraordinary circumstances. Annex 1904.13 provides for the parties to establish a ten-person roster composed of Judges or former Judges of the Federal Court of the United States of America or a Court of superior jurisdiction of Canada, each party to name five persons to this roster. An Extraordinary Challenge Committee, consisting of three members, is established by each party selecting one member from the roster of Judges and the third selected by the two appointed Judges and, if necessary, by lot from the roster. The role of the Committee is restricted [*91] by the terms of the FTA. Article 1904.13 provides:
(…)

This three-prong requirement provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge [*92] 'is not intended to function as a routine appeal.' Statement of Administrative Action, United States - Canada Free-Trade Agreement at 116, reprinted in H.R. Doc. No. 216, 10th Cong., 2d Sess., 163. 278 (1988). Indeed, the Committee's only function is to ascertain whether each of the three requirements set forth in article 1904.13 has been established, that is compliance with any one of the Article 1904.13 (a) (i-iii) criteria and both requirements of subparagraph (b). (…)

(…) In short, as the name implies and as the FTA provisions and procedural rules suggest, the role of the Extraordinary Challenge Committee is to review Binational Panel decisions only in exceptional circumstances and to vacate those decisions where it is established that (a) the Panel or member thereof was guilty of the conduct prescribed in section (1) of Article 1904.13 or that the panel was in breach of sections (II) or (III) and that such actions materially affected the panel's decision and threatens the integrity of the binational panel system.

ALLEGATIONS OF ERROR

The USTR, on behalf of the Government of the United States, argues that the Panel Majority in Decision II manifestly exceeded its jurisdiction and authority by failing to apply the appropriate standard of judicial review and in particular by (a) reversing Commerce's determination regarding preferentiality of provincial stumpage programs and [*94] substituting an effects test that is not required by U.S. law and (b) by reversing Commerce's specificity determination without a proper analysis of the Department's findings as required under the appropriate standard of review and imposing new requirements on Commerce that went beyond the Panel's mandate. The USTR asserts that such errors materially affect the panel's decision and thereby threaten the integrity of the binational panel process.

PREFERENTIALITY

[Justice Morgan reviews the case law and administrative practice on the issue of preferentiality. He notes that the issue of government fees for access to public lands presents a case of first impression, and concludes as follows:]

Based on the record before us, and the particular circumstances of this case, I am unable to conclude that the Majority did not conscientiously apply U.S. law in requiring Commerce to consider market distortion nor in its conclusion that Commerce's finding of market distortion in its Redetermination was not supported by substantial evidence on the record.

SPECIFICITY

(…) Since the United States is the importing country in this proceeding, Article 1911 of the FTA directs the Panel to apply the standard of review of 19 U.S.C. § 1516 A (b) (1) (B). Under that provision, the Panel must "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law." This standard has been applied and discussed in previous binational panel decisions.

The standard of review requires that Commerce's decision: (1) be supported by substantial evidence on the record; and, (2) be otherwise in accordance with the applicable law.

Substantial evidence is more than a mere scintilla. (…) Substantial evidence has been held to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence.

Binational panels, as the reviewing body, may not engage in de novo review. Panels must limit their review to the evidence on the record.

The decision of the U.S. Supreme Court in Chevron U.S.A. Inc. v. Natural Resource Defence Council is widely recognized as the locus classicus of judicial review of administrative action, particularly as regards an agency's interpretation of the law it is mandated to apply. Chevron stands for the proposition that in determining whether an agency's application and interpretation of a statute is in accordance with law, a court need not conclude that "the agency's interpretation [is] the only reasonable [*104] construction or the one this court would adopt had the question initially arisen in a judicial proceeding." (…)

It is not within this Committee's jurisdiction to determine whether the court decisions relied on by the Panel are in strict accord with established U.S. law. Our duty is solely to determine whether the Panel acted within its mandate. In my opinion, in requiring Commerce, in the circumstances of this particular case, to consider all the factors set out in its Proposed Regulations, it cannot be said, as alleged by [*108] the USTR, that the panel did not conscientiously apply U.S. law. (…)

FAILURE TO DISCLOSE

The USTR also alleges that two members of the Panel materially violated the FTA Rules of Conduct by failing to disclose information that revealed at least the appearance of partiality or bias and, with regard to one of the Panelists, a serious conflict of interest. It contends that the violations of the Code of Conduct and the serious conflict of interest tainted the Panel's decision in this case. This taint undermines the decision's validity as well as public confidence in the panel process and as such these actions have materially affected the Panel's decisions (U.S. Brief at 49). The two members of the Panel against whom allegations are made are the Chairman Richard G. Dearden ("Mr. Dearden") and Panelist Lawson A. W. Hunter ("Mr. Hunter"). (…)

Article 1904.13 provides that action by an Extraordinary Challenge Committee is warranted if:

> (a) 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. . . .
>
> and (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threaten the integrity of the binational panel review system. (Emphasis added).

There are no allegations of gross misconduct or of bias in this case, nor in my opinion should there be. The USTR, however, contends that the failure of the panelists to make full disclosure constituted a violation of the Code of Conduct that impaired the integrity of the binational panel process and materially affected the Panel's decision. (U.S. Brief at 38)

To satisfy the standard of review envisaged by Article 1904(13)(a)(1) it must be established that a member of the panel materially violated the [*117] rules of conduct and that such violation has materially affected the panel's decision and threatens the integrity of the binational panel review system. Although the Word "Material" connotes a lower standard than such modifiers as "Gross", "Serious" and "Fundamental", in context, it is a strong indication that not every violation of the Code of Conduct would satisfy the criteria set forth in Article 1904.13.

Violations that can be taken to have materially affected the panel's decision and threaten the integrity of the binational panel system are those that are "material". I give that word its ordinary dictionary meaning "of substantial impact" or "of much consequence", or in the legal sense, "relevant to the proceedings".

I do not propose to particularize the interests and relationships that were not disclosed by the two panelists as they have been itemized by my two colleagues in their respective opinions. Suffice it to say at this stage that none of them related to the specific issue before the panel nor did they differ in any material respect from those initially disclosed and found acceptable to the United States Government. (…)

Both Parties to the FTA were cognizant of the fact that the persons most suited to be members [*122] of a panel were, in most part, members of large firms which did work for one or both governments and, in a number of cases, would have acted for companies trading with the other country. They accordingly required prospective panelists to disclose the existence of any interests or relationship that was likely to effect his or her independence and impartiality or might reasonably create the appearance of bias. Panelists should be constantly aware of the important role they play in the successful implementation of the FTA and they should take all reasonable precautions of ensuring that they make a full disclosure as required by the Code of Conduct. They can then perform their duties free in the knowledge that their impartiality cannot be questioned.

Since I am not persuaded that the USTR has met the test of establishing a breach of either FTA Article 1904.13 (a) (I) or (a) (II), I need not address the second or third prongs of our test as set forth in Article 1904.13 (b).

CONCLUSION

For the reasons stated above, I would dismiss the request for an extraordinary challenge. In keeping with the decision of Mr. Justice Hart filed herein, the Binational Panel's Memorandum

Opinion and [*123] Order, dated December 17, 1993, shall remain in effect and the Binational Panel's Order Affirming the Determination on Remand, dated February 23, 1994, is affirmed.

Issued this 3rd day of August, 1994

DISSENT BY: WILKEY

DISSENT:

Dissenting Opinion of United States Circuit Judge (Ret.) Malcolm Wilkey

It will not be the purpose of this opinion to redefine and rehash the intricacies of trade law which are set forth in great detail in the 192 pages of the Commerce Department's Redetermination Pursuant to Binational Panel Remand and the [*125] 190 pages of the two opinions of the Binational Panel on Remand. No one asserts this to be the proper role of an Extraordinary Challenge Committee. My concern is with the proper definition of that role; indeed, my concern is that an Extraordinary Challenge Committee will have no role at all.

I shall first consider the Panel's alleged failure to apply the correct United States standard of review to the Commerce Department's Redetermination, and then turn to allegations of violations of the Code of Conduct and the existence of a serious conflict of interest.

I. THE SUBSTITUTE APPELLATE SCHEME SET UP BY THE AGREEMENT AND BY THE UNITED STATES CONGRESS

Competing economic interests within and across national borders being what they are, it would seem inevitable that trade disputes between the two countries would arise. A novel system was devised to settle these disputes, in the hopes of its creators to settle more expertly and more swiftly than through the national court system of either country. Elaborate assurances were given in both Congress and Parliament that the [*126] domestic laws of each country, both substantive and procedural, would be applied by the two tiers of the new system just as rigorously as in the federal court systems which it superseded.

Under long established administrative law in the United States, the action of an administrative agency (which includes the International Trade Administration of the Commerce Department in this case), whether rulemaking or adjudication, can be reviewed by a United States Court of Appeals for one of the circuits. Almost all agency determinations are reviewable by the Court of Appeals for the D.C: Circuit, some also by other circuits. There also exists a parallel route to review an agency by filing an original case in the United States District Court seeking an injunction, mandamus, or some other prerogative writ. From the District Court a direct appeal can be taken to the Court of Appeals for the appropriate circuit. From the Circuit Courts with either type action there is a possible review by certiorari in the Supreme Court, but this has been limited in the Supreme Court's discretion to the interpretation and operation of important substantive laws or important questions of judicial procedure, [*127] such as due process.

Where trade matters are concerned, the U.S. path of review has been from the ITA in the Commerce Department to the Court of International Trade, a multi-judge court from which one judge is selected to review each ITA administrative agency action appealed. From the CIT review is had in the Federal Circuit Court of Appeals.

In the Free Trade Agreement the parties sought to replicate this by creating a five member Binational Panel which sits to review the administrative actions of the ITA in the Commerce Department. From this five member Binational Panel, further review is had before a three member Extraordinary Challenge Committee. The ratio of national membership in each reviewing body is three to two and two to one, determined either by agreement or by lot.

The initial review of agency action by the five person Binational Panel is thus comparable to that of a Court of Appeals in most U.S. administrative review cases or the Court of International Trade in the special instance of trade determinations by the ITA of the Commerce Department. Likewise, the role of the Extraordinary Challenge Committee might be roughly comparable to that of the Supreme Court in [*128] the administrative review process, for two reasons: first the decision of both bodies is final and unappealable; and second, the review is limited to important questions of substantive and procedural law. Comparing review of trade determinations of the ITA, the case formerly went initially to the CIT, then next to the Federal Circuit, whose decision was not final and which exercised a standard of review more comparable to that of the other Courts of Appeals.

One of the most important features of the negotiations gaining approval of the Free Trade Agreement was the promise that the domestic law of the party whose administrative determination was challenged would apply. This included the substantive law, the procedural law, and the standard of review. (…)

Thus our task as an ECC is to look at how the Binational Panel did its job, i.e., carried out its review of an administrative agency action under the standard of review prescribed in the statute, which is the equivalent of the well understood standard of judicial review in effect in the United States for many years. We look first at what the Panel did in its review, not only what standard it purportedly applied, but how it applied the standard, and then we look at the agency action as expressed in its Redetermination on Remand to see if the Panel's appraisal of that action was correct under the Panel's reviewing standard. "If: . . . the panel manifestly exceeded [*133] its powers, authority or jurisdiction set forth in this article, and" the additional two prongs of the tests are met, then the Panel action must be set aside.

Turning briefly to the other two prongs of the test authorizing an ECC to take corrective action, if any of the Panel's actions exceeding its powers, authority or jurisdiction "has materially affected the panel's decision and threatens the integrity of the binational panel review process", then the ECC is required to set aside the Panel action. It is this part of the three prong test which makes ECC review of Binational Panel action somewhat different from U.S. Court of Appeals direct review of agency action.

Remember that the ECC is the second step removed from review of agency action, which places it in the same place as the Federal Circuit in the hierarchy of trade matters review and in the same position as the Supreme Court in the normal review of other administrative agency action. "Materially affect[ing] a panel's decision" and "threaten[ing] the integrity of the binational panel review process" smacks of the standards which the Supreme Court employs in granting certiorari, i.e., the Supreme Court only grants certiorari [*134] when there is at stake the interpretation or operation of an important substantive law or an important violation of judicial procedure, such as due process under the criminal law. ECC jurisdiction under the FTA is in part an optional jurisdiction like the Supreme Court certiorari jurisdiction, i.e., aggrieved private parties have no power to invoke the ECC procedure, only the two sovereignties have the power to invoke ECC jurisdiction for the review of important matters. (…)

A previous Extraordinary Challenge Committee in Live Swine From Canada stated: "The North American Free Trade Agreement ("NAFTA") makes explicit what was implicit in the FTA, that if a panel fails to apply the appropriate standard of review, it manifestly exceeds its powers, authority or jurisdiction, the first prong of our three part test, FTA Article 1904.13 (a) (iii). (…)

Certainly the United States Congress made the interpretation noted by Live Swine and anticipated by Dearden. The negotiation of the North American Free Trade Agreement, i.e., the inclusion of Mexico, gave the Congress an opportunity to review the Binational Panel process as it operated under the CFTA. The Senate produced an extraordinary Joint Report of six Committees on the North American Free Trade Agreement Implementation Act in which it stated: "At the outset, the Committee [*137] emphasizes that NAFTA, just as the CFTA, requires binational panels to apply the same standard of review and general legal principles that domestic courts would apply. This requirement is the foundation of the binational system." n5

n5 Senate Report 103-189, 18 November 1993, at pp. 41-42

The Committee later commented that ". . . the extraordinary challenge procedures set forth in . . . Paragraph 13 of Article 1904 specifically provides that extraordinary 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 a 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" n6 My two colleagues prefer to ignore U.S. Senate views (more fully discussed under V below) and Justice Hart uses language to diminish the role of an ECC: "It was not intended to be [*138] an appellate court but rather a committee of limited jurisdiction to protect the integrity of the system" (p.13) Technically true; neither "Panel" nor "Committee" is called a "Court", but they are the complete and only substitute for the U.S. appellate system. If this substitute appellate system had not been intended to achieve similar results in applying U.S. law, the United States would have never agreed to it. The United States never contemplated that, United States law would be changed by a binational body. If the substitute appellate system does not achieve similar results in applying U.S. law, it may not be long continued.

n6 Id. at 43-44.

The statement by the combined Senate Committee and the Live Swine ECC are clear recognition of the duty of an ECC to set aside Panel action if it fails to apply the U.S. statutory standard of review of ITA administrative agency action. Now let us see the powers of an ECC as viewed by Canadian Counsel.

II THE CANADIAN STANDARD OF REVIEW OF ADMINISTRATIVE AGENCY ACTION

Given this background as to how and on what terms the United States usual two-tier (three-tier in the case of trade dispute matters) judicial review was replaced [*139] by a two-tier Binational Panel-Committee system, it was somewhat startling to read and hear the sweeping assertions of Canadian counsel as to what the Extraordinary Challenge Committee could - and particularly could not - do. "The Canadian parties position is that all the United States challenges

to the Panel's rulings are disputes over questions of law or evidence that are beyond the scope of this Committee's review." Canadian Brief (CB) 34. "The FTA makes clear that an FTA challenge, as the name suggests, is appropriate only in truly extraordinary circumstances." CB p. 39. "likewise, the Committee is not empowered to review the Panel's rulings on whether the agency's determinations were supported by substantial evidence." (CB pp. 41-42.)

The present Canadian view on the substitute two-tier appellate system set up to replace the United States court system was well stated by the Canadian counsel in oral argument before the Committee.

Consequently, one of Canada's primary objectives in negotiating the FTA was to devise the new trade rule for the Free Trade area. The goal couldn't be achieved, and when it wasn't, the two governments agreed to keep their own countervailing duty [*140] laws. But to insure that those laws would be evenly administered, the parties created the Binational Panel system.

The goals are reflected in the process itself. Well, it's patterned on judicial review and applying the standards of review and the law of the importing country. The Panel process provided for in depth review by five international trade law experts, rather than by a single sort of international trade judge constrained by a heavy docket.

The Panel selection emphasized good character, objectivity, trade expertise, and the very fact that there are five panelists meant that the review would reflect the collective judgment from the outset. In the interest of business, certainly the Panel decisions were to be expeditious, and they were to be definitive. Panel decisions were expressly not to be subject to appeal, but were to be final and binding.

The parties agreed to further review only on exceedingly narrow grounds, as a safeguard against the unanticipated and virtually unimaginable case of a Panel flagrantly failing to carry out its FTA mandate. That's where the Committee comes in. The Committee serves the critical function of insuring that the Binational Panel [*141] process proceeds in accordance with the FTA, but this Committee is not an Appellate Court. (Tr. 78-79)

However, even if the United States persuaded this Committee that the Panel misinterpreted U.S. law, the challenge still could not be sustained. This Committee's function is far more limited. (…)

To summarize Canadian counsel's examples of situations in which the Extraordinary Challenge Committee would have a duty, power and authority to act are: first, "if the panel had failed to apply the standard of review"; second, "if the panel simply affirmed or reversed the decision before them without explanation and without really giving reasons"; and third "if a panel simply said, 'Well, I believe that the panel doesn't have the right [*144] to question what the agency did. We owe the agency the kind of absolute deference the U.S. is asking for here." Canadian counsel later gave a fourth example: if a panel simply concluded in its decision that controlling U.S. precedents in point, Supreme Court cases, Court of Appeals cases in point, were wrong in their view." (Tr. 86) (…)

Canadian counsel obviously thought they were addressing, in brief and orally, three judicial [*149] eunuchs, powerless to change the outcome of any Panel decision. I am not willing to assume that status, nor do I think the Congress of the United States intended it. And, as a matter of fact, some of the most convincing testimony refuting the argument of the Canadian counsel in the case was given by one of those two counsel, Ms. Jean Anderson, before Senate and House

Committees in 1988 in order to secure adoption of the substitute appellate system of Panels and Committees.

III. THE UNITED STATES STANDARD OF REVIEW OF ADMINISTRATIVE AGENCY ACTION

A. Testimony of Ms. Jean Anderson Before Senate and House Committees in 1988.

For the background of this testimony, let us look first at the words of President Reagan in transmitting the proposed Canadian Free Trade Agreement to Congress:

> Summary of FTA Provisions
>
> . . . Under Article 1904, in AD or CVD cases involving a product from either country, panel review will in effect substitute for judicial review by national courts . . . The panels will apply exclusively the national law and standards of judicial review of the country whose AD or CVD decision is under review
>
> . . . panels will review final AD/CVD determinations solely [*150] to determine whether the relevant administrative agency applied its national AD/CVD law correctly. National AD/CVD law would include the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents. Panels will apply the same standard of review and the same general legal principals as would a domestic court.

And now, the House Judiciary Committee Report on the Canadian Free Trade Agreement:

> It is important to keep in mind the origins of the binational dispute resolution process. According to some accounts, the Canadian negotiators had sought substantive changes in the antidumping and countervailing duty laws of the United States. Both countries had expressed concerns about the consistency of decisions made under the other country's [*151] trade laws. The Canadians were apparently motivated by a desire to avoid what they perceived as politically motivated protectionist decisions concerning the application of U.S. trade laws. Of particular concern to Canada was a pair of apparently inconsistent decision concerning softwood lumber. On the other hand, the U.S. negotiators were unwilling to exempt Canada from our countervailing duty law without ensuring stronger, enforceable discipline over Canadian subsidies. When the negotiators were unable to agree on substantive changes, they focused on improvements to the process of resolving these trade disputes. Thus, the FTA does not have any effect on the existing antidumping or countervailing duty laws of either country. The binational panel system is the result of those compromises. n8
>
> n8 COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES REPORT 100-816, PART 4, August 4, 1988, at p.4. (emphasis added)

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 U.S. 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. n11

n11 Id, p. 5

* * *

Under article 1904. , a panel would review . . . a final AD or CVD determination to determine whether the agency applied its law correctly to the facts of the particular case. The panel would apply the same standard of review and the general legal principles, incorporated by reference in the FTA, as would a domestic court . . . The panel could not conduct a trial or substitute its judgment for that of the Commerce Department. Moreover, under the FTA, the panel -- much like the courts under our present system -- could either affirm the Commerce determination or remand it for a new determination not inconsistent with the panel's decision. A panel could not issue its own AD or CVD determination. n21

n21 House Judiciary Hearing, 28 April 1998, supra, at pp. 73-74 (emphasis added)

* * *

B THE FEDERAL CIRCUIT'S MOST RECENT BINDING PRECEDENT

We review [the Panel determination] under the standard of review enunciated by the

Federal Circuit in PPG V:

> To determine whether the Court of International Trade correctly applied that standard in reaching its decision, this court must apply anew the statute's express standard of review to the agency's determination. (citation) Therefore, we must affirm the Court of International Trade unless we conclude that the ITA's determination is not supported by substantial evidence or is otherwise not in accordance with law. n28
>
> n28 *PPG Industries Inc. v. U.S., 978 F. 2d 1232, at 1236 (Fed. Cir. 1992) (PPG V)*

* * *

As stated in Daewoo:

"On review of this issue, like the trial court, we look to see whether substantial evidence supports the decision [*163] of the ITA on this issue." n29

n29 Daewoo Electronics v. International Union, 6 F.3d 1511, at 1520 (Fed. Cir. 1993)

* * *

[W]hen there is a gap in the statute, it is the agency, not a reviewing court, which is authorized by Congress to fill it. In our case, it is the ITA, not the Binational Panel, which is authorized to say how many factors it will consider on specificity, and whether a finding of market distortion is necessary. [*169] The statute is silent. The Panel majority usurped the function of the ITA.(…)

IV. THE COMMERCE DEPARTMENT REDETERMINATION PURSUANT TO REMAND AND PANEL 3-2 DECISION AFTER REMAND

* * *

The statement above, that the [*173] Commerce Redetermination findings and conclusions were in conformity with and were in no way violative of the statute and normal administrative procedure, highlights a significant - perhaps decisive - fact in evaluating the Panel majority opinion: there is not a word in any statute which Commerce is accused of violating. There is no administrative action here which is "precluded by statute." To anyone who has had even a casual introduction to United States administrative law, this is a clear signal that only a totally irrational exercise by the agency of the discretion entrusted to it by Congress (extremely broad when trade law is concerned, as the Federal Circuit has held n40) would justify setting aside its action. (…)

I then turned to the Panel majority opinion, which had been made the subject of such harsh comments in one of the briefs of the parties. The Panel started, of course, by giving us the litany of the standard of review of administrative agency action as enunciated in United States law, all thoroughly familiar. The Panel then proceeded to violate almost every one of those canons of review of agency action. The caustic comments of the brief to which I had first turned and then laid aside were justified.

Basically, the Panel opinion attempts to redo, to reevaluate the evidence, to redetermine the technical issues before the administrative agency. The Panel places its own interpretation and makes its own evaluation of the weight of the evidence. In addition, the Panel insists upon its own methodology, thus violating the principle that where there is a gap in the statute, because the Congress has not prescribed precisely the methodology to be used, this is confided to the Agency's expertise and discretion.

One of my colleagues here inadvertently, unintentionally provides a stronger condemnation of the Panel majority's failure to defer to agency expertise. Like Canadian Counsel he [*175] argues "this is a case of first impression" n41 and that "[i]n this situation one cannot expect to find a precedent exactly on point. . . . n42 This is precisely the situation when deference to administrative agency discretion and expertise should be at its highest. Confronted with a comparatively new economic situation to be addressed, it is the ITA of the Commerce Department -- not the courts (or the substitute Panel) -- to whom Congress has given discretion to formulate policy and methodology adequate to the circumstance... Unless the Panel majority or my two colleagues can show that Commerce acted contrary to a specific provision of the governing statute -- and neither has even pretended to assert this -- Commerce's Redetermination must prevail.

V. THE SENATE AND HOUSE EXTRAORDINARY COMMITTEE REPORTS ON NAFTA

On 15 November 1993, House Report 103-361, and on 18 November 1993, Senate Report 103-189, on the North American Free Trade Agreement Implementation Act, were published. Putting it frankly, bluntly and perhaps impolitely, the basic problem on accepting these Reports in this case is that the English Courts accept no legislative history at all and the Canadians follow closely in their footsteps.

A. Timing

The first thing to note is the timing. These Reports came out in November while the Panel was engaged in its consideration of the Commerce Department's Redetermination on Remand. The Panel Decision was published 17 December. Apparently these Reports were not called to the attention of the Panel, they are not discussed, although they certainly would have had an impact on the Panel and been mentioned at least by the dissenters had the Panel become aware of them.

B. Extraordinary Composition of the Congressional Committees.

The six Senate Committees represented on the Special Joint Committee -- Finance, Agriculture, Commerce, Governmental Affairs, Judiciary, and Foreign Relations -- along with the Defense [*182] Committee probably represent the most powerful committees in the Senate. The membership of this extraordinary Joint Committee was composed of seventy-five Senators excluding duplications. This is more than a constitutional two-thirds majority of the Senate. This two-thirds majority can override any presidential veto, can approve treaties, etc.

In the House the North American Free Trade Agreement Implementation Act was referred to nine Committees -- Ways and Means, Agriculture, Banking, Finance, Energy, Foreign Affairs, Government Operations, Judiciary, and Public Works.

C. Identical Chairmen of Committees and Majority of Identical Members

In the Senate five of the six Committee Chairmen represented were the same as when the Canadian Free Trade Agreement was approved, Moynihan having replaced Bentsen. Fifty-two of the individual members were members of these committees when the Canadian Free Trade Agreement was approved in September 1988.

It truly can be said that this Joint Committee Report was expressing the will of the entire U.S. Senate as of November 1993. It simply cannot be ignored, legally or practically. It is not some subsequent legislative body desiring to put [*183] its spin on language passed by other legislators many years earlier.

The House Committee Chairman of Ways and Means was the same in 1988 and 1993, and so was the principal sponsor of the measure, Rep. Sam M. Gibbons, of Florida.

D. Identical Language on the Substitute Scheme for Judicial Review of Agency Action

[Judge Wilkey reviews here the unequivocal language in the Senate Reports to the effect that the binational panel review system was not intended to change the judicial standard of review of the importing country.]

F. Practical Effect.

Nonacceptance by this Extraordinary Challenge Committee of the unusually strong, precise, and specific language of these Reports would produce a dangerous adverse reaction in the Senate and the House, imperilling the whole substitute system of appellate review by the binational panels and the Extraordinary Challenge Committees. Seventy-five United States Senators are accustomed to having their words taken seriously [*188] by the courts where statutory

construction is concerned. So is the Ways and Means Committee of the House. The next Extraordinary Challenge Committee will be bound by the Senate and House view of the meaning of the language in NAFTA as part of its concurrent contemporary legislative history. If this ECC does not agree with this interpretation, our decision will be an anomaly, an aberrant decision in the jurisprudence of review of administrative agency action.

G. What the Senate Said.

[Judge Wilkey reviews here several Senate pronouncements disagreeing with the interpretation of U.S. law adopted by the binational panel in this case. The following is an excerpt from the Joint Report:]

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 [*192] believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.

H. What the House Said

(…) One significant change to Article 1904 in the NAFTA as compared to the predecessor U.S.-Canada FTA provision is the extraordinary challenge committee provision at Article 1904.13 clarifying and emphasizing that failure by a binational panel to apply the appropriate standard of review would qualify as a ground for ECC review under Article 1904.13(a) (iii). In negotiating the NAFTA, the Parties decided to make explicit in Article 1904.13(a)(iii) of the NAFTA what was clearly implied in Article 1904.13(a)(iii) of the U.S.-Canada [*194] FTA, namely that a binational panel that failed to apply the appropriate standard of review would per se be considered to have manifestly exceeded its powers, authority or jurisdiction.

This amendment affirms the central importance to the functioning of the binational panel system of strict adherence by panels to the proper application of the judicial standard of review of the importing country. The Committee strongly shares the Parties' and Administration's view that strict adherence by panels to the proper application of the judicial standard of review is critical to the functioning of the binational panel process. (…)

In light of the central importance of this requirement, it is the Committee's view that any failure by a binational panel to apply the appropriate standard of review, if such failure materially affected the outcome of the panel process and threatened the integrity of the binational panel review process, would be grounds for an ECC to vacate or remand a panel decision.

[Judge Wilkey reviews additional portions of the House Report which, like the Senate Report, specifically disagrees with the binational panel's result in the Softwood case.]

Two additional important changes from U.S.-Canada FTA procedures for ECCs are found in Annex 1904.13 of the NAFTA. Under the NAFTA, ECCs, if convened, must examine the legal and factual analysis underlying the findings and conclusions of the panel's decision. Annex 1904.13 of the NAFTA also triples the length of time available to the ECC to undertake its

review. The United States sought the changes in Annex 1904.13 based on its experience under the U.S.-Canada FTA. By expanding the period of review and requiring ECCs to look at the panel's underlying legal and factual analysis, the changes to Annex 1904 clarifiy that an ECC's responsibilities do not end with simply ensuring that the panel articulated the correct standard of review. Rather, ECCs are also to examine whether the panel correctly analyzed the substantive and underlying facts. n52

n52 North American Free Trade Implementation Act, Report of the Committee on Ways and Means, H. Rept. 103-361, 103d Cong., 1st Sess. 74-76 (1993) [*198]

I. The Legal Effect

[Judge Wilkey reviews the principles of American law regarding the weight to be accorded to legislative history and concludes as follows:].

My view is that to ignore the clearly expressed views of seventy-five members of the United States Senate and the House Ways and Means Committee (speaking for eight other Committees), expressed at the time it was repassing virtually the identical language of the CFTA in the NAFTA legislation, is not only to misinterpret United States law but to imperil the whole binational review scheme. My colleagues treat the Senate and House views [*205] as of no consequence, which is reminiscent of an episode in the life of Mr. Justice Holmes. In the heat of an argument counsel expostulated, "But, Mr. Justice, that statement of the Court is pure dicta." The great Holmes leaned over the bench and said quietly, "But WE said it, didn't we?"

My position is that any United States Court would feel compelled to accept the views of the seventy-five members of the Senate Joint Committees and the House Ways and Means Committee as they spoke to the language of both CFTA and NAFTA. Hence, my colleagues refusal to accept this legislative history may be good Canadian law but it is violative of their obligation to apply United States law in this case. To ignore these two extraordinarily powerful congressional Reports may not be "unjudicial" by Canadian standards, but it may be highly injudicious.

VI. FAILURE OF THE SUBSTITUTE APPELLATE REVIEW SYSTEM

(…) Now turning to the role and composition of the Extraordinary Challenge Committees, in contrast to Panel members, the members of an ECC are not supposed to be specialists in trade law. Like members of a reviewing court in the United States, they are supposed to be generalists. And, the members of this particular Committee are exactly that. [*209]

However, in the implementing of administrative law in the United States, the generalists on all of the reviewing courts are supposed to be experts in the field of reviewing administrative agency action, whether it is trade law or nuclear energy or environmental protection. Since under this substitute system an ECC replaces in the hierarchy review by the Federal Circuit, perhaps better analogies would be references to patents, customs, claims against the United States, and other varied matters which the members of the Federal Circuit handle; each member certainly is not a specialist in all of the varied diet of cases which come to their attention.

The point in that since an Extraordinary Challenge Committee replaces in the hierarchy a Court of Appeals composed of generalists on substantive matters but experts on judicial review of administrative agency action, and since it was specified that an ECC should be composed of

former judges, there is no way for Canadian members of these ECCs to have become immersed in the standards of judicial review of agency action in the United States. Canadian administrative law is different, Canadian review standards are different, and Canadian members [*210] necessarily do not have the same familiarity with U.S. standards of review that U.S. members do. And yet, it is U.S. law that must be applied here.

We always lose something by resorting to ad hoc Tribunals. A court, whether one or multi-judge, always must think of deciding tomorrow's cases and in so doing look back at yesterday's. The incentive to be consistent with principle, on varied fact situations and legal issues, is compelling. The court knows it will likely revisit any given problem many times, and strives to be intellectually honest and consistent to build a body of coherent law. The same is true -- although the Panel and my two colleagues apparently do not recognize this -- of administrative agencies such as the International Trade Administration of the Commerce Department. This is why the Panel -- and we -- owe deference to the decision of the Commerce Department, not only because of their "expertise" gained in handling a volume of cases, but because they alone are in a position to see the whole "picture" as an ad hoc group never can.

I do not think that any Canadian members of this or previous ECCs have arrived with any particular animosity against the U.S. Commerce [*211] Department, and I certainly do not suggest in the slightest any bad faith on the part of my Canadian colleagues -- indeed, they have been most assiduous in striving to understand and discuss rationally U.S. law -- but it is a fact that out of six votes cast on the three ECC Committees, not one of the Canadian votes has been in support of a United States Commerce Department decision. The same has been true at the Panel level in the three cases which have gone to Extraordinary Challenge Committees. And in the instant case, the total vote to sustain the Department of Commerce on the issues which are in litigation here has been two Americans on the Panel and the one American on the Committee.

Again, I put this down not to any prejudice on the part of the Canadian members, but, I suggest, based on my analysis above and particularly the Panel's dissent by the two Americans in this particular case, simply to the lack of understanding of the principles of judicial review of administrative agency action under United States law.

And I see no way to remedy that under the present substitute appellate review system.

On the question as to whether United States law was accurately applied by [*212] the Panel majority, the delicate matter of the split along U.S./Canadian lines assumes some importance. The two Americans in very strong language voted to sustain the Commerce Department's Redetermination as being in accordance with United States law, particularly after the Federal Circuit in Daewoo illuminated (and mandated) their path; the three Canadians purported not to understand the clear (to me) application of Daewoo to this case: Question: if you were a corporate chief executive seeking an opinion on United States law on which to rely, would you prefer to receive it from three Canadian or two American lawyers? And if you did get it from a foreign law firm, what would your board of directors say? This illustrates that the problem here is not one of good faith, but of competence and experience in the jurisprudence of a particular jurisdiction. (…)

Let us see how workable, how effective an ECC could be in its role as my colleague, Justice Hart, defines it:

> We are not an appellate court and should not substitute our view of the evidentiary record for that of the panel nor should we determine whether the law applied is absolutely

correct but merely whether the panel conscientiously attempted to apply the [*215] law as they understood it. (p. 41)

"We are not an appellate court . . ."

- True, but we are the substitute in the hierarchy of review of agency action for both the Federal Circuit and the Supreme Court, with a duty under the CFTA and the U.S. implementing statutes to keep the U.S. law as it has been understood.

"should not substitute our view of the evidentiary record for that of the panel" . . .

- Wrong focus. Our task is to find out if the Panel substituted its view of the evidence for that of the ITA, and if so, to set the Panel Decision aside and affirm the agency.

"nor should we determine whether the law applied is absolutely correct . . ." What is the difference between "absolutely correct" and "correct"?

- What we are concerned with is the solemn pledge, fundamental to the whole CFTA, that the domestic law of the importing country will be applied. By "domestic law", surely we mean the correct domestic law.

"but merely whether the panel conscientiously attempted to apply the law as they understood it."

- What standard, what test is this? Can the Panel simply say "We tried. We really tried. We may be wrong on the U.S. law but we did apply it as we [mis]understood [*216] it"? And expect an Extraordinary Challenge Committee to say "Well done. That's all we can expect"?

* * *

MATERIAL VIOLATIONS OF THE CODE OF CONDUCT AND A SERIOUS CONFLICT OF INTERESTS

This part of my opinion is much shorter than the first. Do not think that the issue addressed is one whit less important. Indeed, it may well be the more important of the two, the greater threat to the integrity of the whole process. The reason the issue can be treated in comparatively short [*224] compass is because the facts are simple and undenied, and their pertinence to the plain words of the Free Trade Agreement and the Code of Conduct is so obvious.

* * *

II. EXTENT OF THE VIOLATIONS

B. The Unrestricted Right Of a Party To Accept Or Reject Any Prospective Panelist For Any Reason Or No Reason At All.

(…) It is absolutely impossible to say with total certainty, whether, if the United States had known the full extent of Hunter and Dearden's personal and firm affiliations and representations of not only the timber industry but the Canadian Federal and Provincial Governments, the United States would have accepted or rejected Hunter and Dearden. I have my own opinion which I will

elucidate later. Whether we can say precisely what the United States would have done in July 1992, if all of this had been revealed, the fact is that the United States immediately did ask for the disqualification of both Hunter and Dearden and the vacating of the Panel opinion to which their two votes was essential -- when it finally learned the full truth.

The key is -- the United States had the absolute right to accept or to reject Hunter and Dearden. Corollary to this, the United States had the absolute right to know the complete truth as to their and their firm's affiliations, on which to base its decision. The United States was denied those rights guaranteed under the FTA. The United States has no recourse except to ask for the vacating of the Panel judgment and opinion to which [*231] the votes of Hunter and Dearden were essential.

* * *

III CONSIDERATION OF "MATERIALLY AFFECTED THE PANEL'S DECISION AND THREATENS THE INTEGRITY OF THE BINATIONAL PANEL'S REVIEW PROCESS"

If the above analysis of the failures to disclose of Dearden and Hunter is taken as establishing a serious Conflict of Interest and materially violating the rules of conduct, then it seems to me that it could not be clearer that the conflict of interest and the violations of the Code of Conduct certainly materially affected the Panel's decision and also threatens the integrity of the whole process.

I cannot think of anything that could more materially affect a Panel's decision then to have two of the necessary votes cast by members who have failed to disclose matters which would affect their impartiality. Likewise, [*243] to tolerate such failure to disclose would constitute the most obvious and dangerous threat to the integrity of the Binational Panel review process, because the selection of these members rests entirely on the voluntary, complete and continuing disclosure of any possible affiliations casting doubts on the members' impartiality. If we want to sabotage the entire Panel Review process, we can do it by tolerating these clear and unmistakable violations and declining to vacate the Panel's opinion in this case.

Assuming no other point is decided by the Extraordinary Challenge Committee, then a Remand to the Panel for decision after the two vacancies just created have been filled would be in order.

NB: Before filing this opinion, Judge Wilkey reviewed the opinion of Justice Hart, but not the opinion of Justice Morgan.

Issued on this 3rd day of August, 1994

ORDER AFFIRMING BINATIONAL PANEL DECISIONS

Pursuant to the United States-Canada Free Trade Agreement, and for the reasons stated in the Opinions, the Extraordinary Challenge Committee hereby dismisses the request for Extraordinary Challenge for failure to meet the standards of an extraordinary challenge set forth under FTA Article [*244] 1904.13. The Binational Panel's May 6, 1993 and December 17, 1993 Decisions shall remain in effect, and the Binational Panel's Order Affirming the Determination on Remand dated February 23, 1994 is affirmed.

ISSUED AUGUST 3, 1994