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Dispute Resolution Provisions of the Canada-United States Free Trade Agreement

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DISPUTE RESOLUTION PROVISIONS OF THE CANADA-UNITED STATES FREE TRADE AGREEMENT

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Dispute resolution is a major focus of the recently signed Canada-United States Free Trade Agreement.[1] This focus was heavily influenced by two factors. The first is a significant continuing concern about the dispute resolution procedures and mechanisms under the General Agreement on Tariffs and Trade (GATT). The second factor is the general Canadian perception that trade proceedings under United States law are substantially influenced by political concerns and that under a trade agreement, Canadian businesses would need some protection from United States trade regulation.[2]

The general dispute resolution provisions of the Free Trade Agreement, which are found primarily in Chapter 18, embody elements which have worked well in the past in resolving disputes between the United States and Canada.[3] A much more detailed dispute resolution approach is found in Chapter 19 of the Agreement. This Chapter establishes a procedure for binational review of determinations by government agencies in the United States and Canada on dumping and subsidy complaints under domestic law. As Chapter 19 does not undertake to deal with underlying issues, particularly differences on national approaches to trade policy and subsidization of domestic industry, Chapter 19 is only an interim measure. The long-term success of the Free Trade Agreement may well depend on the commitment of the United States and Canada to resolve these important underlying questions.

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1. Canada-United States Free Trade Agreement, Jan. 2, 1988, *reprinted in* 27 INT'L LEGAL MATERIALS 281 (1988) [hereinafter Free Trade Agreement]. For the Canadian publication of the Free Trade Agreement, see CAN. DEP'T OF EXTERNAL AFFAIRS, THE CANADA-U.S. FREE TRADE AGREEMENT (1988).

2. *See, e.g.*, Legault, *The Free Trade Negotiations: Canadian and U.S. Perspectives*, 12 CAN.-U.S. L.J. 7, 9-10 (1987); Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 MAINE L. REV. 305 (1988); Smith, *A Canadian Perspective*, in PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT 31, 39-41 (1987).

3. *See, e.g.*, Wang, *Adjudication of Canada-United States Disputes*, 19 CAN. Y.B. INT'L L. 158, 165-67 (1981) (experience of the Canada-United States International Joint Commission). *See also* Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L L. 254-55 (1986).

I. Summary of Dispute Resolution Provisions

A. Chapter 18.

Chapter 18 of the Free Trade Agreement generally applies to all disputes regarding the interpretation or application of the Agreement.[4] It also governs actions or proposed actions by either party which would be inconsistent with the Agreement or the obligations under the Agreement or would nullify or impair any benefit reasonably expected by either party under the Agreement.[5] The Agreement explicitly provides that a complaining party may choose to proceed under Chapter 18 of this Agreement or the GATT and that the dispute resolution forum chosen shall be used to the exclusion of the other.[6]

The process provided in Chapter 18 requires prompt written notice of any measure which might materially affect the operation of the Agreement.[7] The parties commit themselves to consult each other, upon the request of either party, regarding the measure or any matter that affects the Agreement.[8] Should such consultations fail to resolve a matter within thirty days of the request for consultations, either party may request a meeting of the Canada-United States Trade Commission to consider the matter.[9]

The Canada-United States Trade Commission, which is to be created under the terms of the Agreement, is essentially a political body composed of representatives of each nation headed by the cabinet-level official primarily responsible for international trade.[10] Although there is nothing in Chapter 18 about creating a permanent office or presence of the Canadian-United States Trade Commission, the Secretariat, which is to be established pursuant to article 1909, may also serve to provide support for the Canada-United States Trade Commission.[11]

If a matter in dispute is referred to the Commission, the Commission is required to convene within ten days to undertake to resolve the dispute and has substantial flexibility in facilitating the resolution of the matter.[12] If the Commission is unable to resolve the dispute within a period of thirty days after a matter is referred to the Commission, the Commission has the authority to refer the matter

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4. Free Trade Agreement, *supra* note 1, art. 1801.1.
5. *Id.*
6. *Id.* art. 1801, paras. 2, 3.
7. *Id.* art. 1803, para. 1.
8. *Id.* art. 1804.
9. *Id.* art. 1805, para. 1.
10. *Id.* art. 1802.
11. *Id.* art. 1909, para. 7. This article provides that the Secretariat may provide support "if so directed by the Commission." *Id.*
12. *Id.* art. 1805, para. 2. This article authorizes the use of technical advisors or a mediator to facilitate settlement.

to binding arbitration.[13] It is required to refer a dispute to binding arbitration if the dispute arises from safeguard actions taken by either party.[14] Agreement by both parties is required for any other dispute arising under Chapter 18 to be referred to binding arbitration.

If the Commission does not refer a dispute to binding arbitration, either party may request the establishment of a panel of experts to consider and to report on the matter.[15] Members of arbitration panels and panels of experts will be selected from a roster maintained by the Commission consisting of highly qualified individuals willing and able to serve as panelists.[16] A panel must be composed of five members, two of whom are citizens of Canada and two of whom are citizens of the United States. These appointments are made by the respective governments in consultation with each other.[17] In the first instance, the Commission must undertake to agree on the fifth member of a panel. If this is not possible, the four appointed panelists must undertake to agree on the fifth panel member. If no agreement is possible among the panelists, the fifth panelist must be selected by lot from the roster maintained by the Commission.[18]

The panel is empowered to establish its own procedures unless the Commission has established procedures for the panel.[19] The procedures must provide for at least one oral hearing and the opportunity to submit written argument and rebuttal.[20]

While there are apparently no explicit time limits provided in the Agreement for the report of an arbitration panel to the parties, a panel of experts must, within three months after its chairperson is appointed, issue an initial report to the parties.[21] The panel of experts is required, where feasible, to provide the parties with an opportunity to comment on the panel's preliminary findings of fact prior to the submission of the report, and either party is given an opportunity to file a statement disagreeing with the report of the panel within fourteen days of the issuance of the panel's initial report.[22] The panel is free to reconsider its report upon the filing of

13. *Id.* art. 1806, para. 1.
14. *Id.* art. 1806, para. 1(a).
15. *Id.* art. 1807, para. 2.
16. *Id.* art. 1807, para. 1.
17. *Id.* art. 1807, para. 3.
18. *Id.*
19. *Id.* art. 1807, para. 4.
20. *Id.*
21. *Id.* art. 1807, para. 5. The provisions relating to arbitration in article 1806 provide only that the arbitration panel act consistently with the provisions of paragraphs 1, 3, and 4 of article 1807. Paragraph 1 of article 1806 does provide that the Commission define the terms under which a matter is referred to binding arbitration. Presumably, the Commission will set a time table for report of the arbitration panel at the time the matter is referred to binding arbitration.
22. *Id.* art. 1807, para. 6.

any such written statement.[23]

Presumably, the decision of a binding arbitration panel is final. The Agreement specifically provides that if a party fails to implement an arbitration decision and if the parties are unable to agree on any other remedy, then the party harmed "shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party."[24]

In the case of a report by a panel of experts, the Commission is required to undertake to resolve the dispute in a manner "which normally shall conform with the recommendation of the panel."[25] In the event that resolution of the dispute is not possible within thirty days of receiving the report of the panel, the party harmed "shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."[26]

B. Chapter 19.

The dispute resolution provisions of Chapter 19 are substantially tighter than those of Chapter 18. These provisions reflect the serious Canadian concern with the application of American trade regulation provisions to trade disputes between the United States and Canada.[27] Whether the provisions of Chapter 19 will actually change the manner in which United States antidumping and countervailing duty laws are applied remains problematic.[28]

According to the terms of the Canada-United States Free Trade Agreement, both countries remain free to apply their antidumping and countervailing duty laws to goods coming from the other country.[29] Chapter 19 does, however, substantially change the manner in which determinations by government agencies of each country on dumping and subsidy complaints will be reviewed.[30] Chapter 19 also provides a procedure for review of any proposed amendments to existing antidumping or countervailing duty statutes.[31]

It is the clear intent of the drafters of the Agreement that Canada

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23. *Id.*

24. *Id.* art. 1806, para. 3.

25. *Id.* art. 1807, para. 8.

26. *Id.* art. 1807, para. 9.

27. *See supra* note 2.

28. The basic antidumping provisions of U.S. law are found at 19 U.S.C. §§ 1673-1675, 1677-1677h (1982 & Supp. IV 1986). The countervailing duty provisions are found at 19 U.S.C. §§ 1671-1671h, 1675-1677h (1982 & Supp. IV 1986). *See also id.* § 1303. For brief but generally accurate summaries of these provisions, see Gillen, Hunter, Rosenthal & Miller, *Canadian and U.S. Antitrust-Law Areas of Overlap between Antitrust and Import Relief Laws*, 12 CAN.-U.S. L.J. 39, 61-65, 69-70 (1987).

29. Free Trade Agreement, *supra* note 3, art. 1902, para. 1.

30. *Id.* art. 1904.

31. *Id.* arts. 1902, 1903.

and the United States work closely together to develop "more effective rules and disciplines concerning the use of government subsidies" and "a substitute system of rules for dealing with unfair pricing and government subsidization . . . ."[32] The Agreement explicitly provides that the provisions of Chapter 19 are to be effective initially for five years. If at the end of that time no new system of rules for dumping and subsidy complaints has been developed, Chapter 19 is extended for a further two years. If at the end of that two-year period, there is no agreement to implement a new system, either party is given the right to terminate the Agreement on a six-month notice.[33]

Under the scheme of Chapter 19, decisions on dumping and subsidy complaints will continue to be made by the appropriate Canadian and American government agencies.[34] The unique feature of Chapter 19 is found in article 1904, which undertakes to displace judicial review of such administrative determinations and replace it with review by a binational panel.[35] Either party may request that a binational panel be created to review a final antidumping or countervailing duty determination. If a private person would have standing under domestic law to commence judicial review of such a determination and requests a party to request that there be a review of that determination by a panel, the party must make such a request on that person's behalf.[36]

The establishment of the binational panels is governed by Annex 1901.2 to Chapter 19. The parties are required to develop a roster of individuals to serve as panelists with each party selecting twenty-five candidates. All candidates must be citizens of either Canada or the United States.[37] Each panel is to be composed of five members and a majority of the members on each panel must be lawyers in good standing in either the United States or Canada.[38] In order to ensure that the members of the panel are highly objective and qualified, each party is given the right to exercise peremptory challenges to disqualify from appointment to the panel up to four candidates proposed by the other party.[39] Each party selects two members of the panel and, as with the process under Chapter 18, the parties must first undertake to agree on the fifth panelist. If they are unable

32. *Id.* art. 1907, para. 1.
33. *Id.* art. 1906.
34. *Id.* art. 1902, para. 1. These agencies include the United States International Trade Commission, the International Trade Administration of the United States Department of Commerce, the Canadian Import Tribunal, and the Canadian Deputy Minister of National Revenue for Customs and Excise.
35. *Id.* art. 1904, para. 1.
36. *Id.* art. 1904, paras. 2, 5.
37. *Id.* Annex 1901.2, para. 1.
38. *Id.* Annex 1901.2, para. 2.
39. *Id.*

to agree, the four appointed panelists must undertake to select the fifth panelist. If there is still no agreement, the fifth panelist is selected by lot from the roster.[40] The chairperson of the panel must be a lawyer selected by a majority vote of the panelists.[41] The panel acts on majority vote and must issue a written decision with reasons for its decision.[42]

The Agreement requires the parties to adopt rules of procedure for the binational panels no later than January 1, 1989.[43] It is suggested that the rules of procedure may be based upon judicial rules of appellate procedure.[44] In addition, it is anticipated that the parties will establish a code of conduct for panelists.[45]

In undertaking a review of a final antidumping or countervailing duty determination, the binational panel is required to review whether the final determination was in accordance with the law of the party whose administrative agency has made the determination.[46] Law is broadly defined to include "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents . . . ."[47] The panel is required to base its review on the administrative record, which is broadly defined as all information submitted to the administrative agency, all transcripts of conferences or hearings, all published notices, and a copy of the final determination of the administrative agency.[48]

The standard of review used by the panel must be the standard of review currently set forth in the appropriate domestic law.[49] Under the law of the United States, those standards are found at title 19, section 1516a(b)(1) of the United States Code.[50] Any antidumping or countervailing duty determination must be held unlawful upon review if it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[51] In a determination by the United States International Trade Commission not to

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40. *Id.* Annex 1901.2, para. 3.

41. *Id.* Annex 1901.2, para. 4. If there is no majority vote, the chairperson is selected by lot from among the lawyers on the panel.

42. *Id.* Annex 1901.2, para. 5.

43. *Id.* art. 1904, para. 14.

44. *Id.* Chapter 19 requires, however, that there be rules on specific topics and explicitly sets forth the time frame for panel determinations to be made. Rules must be structured in order to ensure that final decisions are made within 315 days from the date on which the request for a panel is made.

45. *Id.* art. 1910, Annex 1901.2, para. 6.

46. *Id.* art. 1904, para. 2.

47. *Id.*

48. *Id.* arts. 1904, para. 2, 1911.

49. *Id.* arts. 1904, para. 3, 1911.

50. 19 U.S.C. § 1516a(b)(1)(A), (B) (1982); Free Trade Agreement, *supra* note 1, art. 1911.

51. 19 U.S.C. § 1516a(b)(1)(B) (1982); Free Trade Agreement, *supra* note 1, art. 1911.

initiate a review pursuant to section 751(b) of the Tariff Act of 1930, the standard of review is whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[52] The standard of review of determinations under Canadian law is set forth in section 28(1) of the Federal Court Act.[53]

The binational panel reviewing the antidumping or countervailing duty determination may uphold that determination or remand it to the administrative agency for action not inconsistent with the panel's decision.[54] The administrative agency must act on the remand within the time provided for initially making a final determination on a matter. Pursuant to the Free Trade Agreement, the decision of the panel is binding on the parties with respect to the matter which is before the panel.[55]

The Free Trade Agreement goes to great lengths to ensure the objectivity and integrity of the panel process by providing for an extraordinary challenge procedure when a party alleges misconduct, bias, serious conflict of interest, violation of a fundamental rule of procedure, or that a panel has acted outside the scope of its authority.[56] This extraordinary challenge procedure is set out in Annex 1904.13 to Chapter 19 and provides for a challenge committee of three members selected from a ten-person roster of judges or former judges of a federal court of the United States or a court of superior jurisdiction of Canada.[57]

Chapter 19 explicitly provides for the establishment of a Secretariat for the purpose of managing dispute resolution under that Chapter.[58] The Secretariat will maintain permanent offices in Washington, D.C., and in the "national capital region" of Canada. The Secretariat is required to provide support for the work of the panels, maintain all documents submitted to a panel or committee, and prepare a record of all panel proceedings.[59] The Secretariat may also

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52. 19 U.S.C. § 1516a(b)(1)(A) (1982); Free Trade Agreement, *supra* note 1, art. 1911.

53. This section authorizes review and the setting aside of administrative determinations if the administrative agency:

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

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

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

Federal Court Act, Act of Dec. 3, 1970, ch. 1, § 28; 1970-1972 Can. Stat. 17.

54. Free Trade Agreement, *supra* note 1, art. 1904, para. 8.

55. *Id.* art. 1904, paras. 8, 9.

56. *Id.* art. 1904, para. 13.

57. *Id.* Annex 1904.13.

58. *Id.* art. 1909.

59. *Id.* art. 1909, paras. 1, 8, 9.

provide support to the Canada-United States Trade Commission if so directed by the Commission.[60]

II. Issues Raised by the Dispute Resolution Mechanisms

A. Implementation of Chapters 18 and 19.

It is anticipated that the Free Trade Agreement will be implemented by the enactment of implementing statutes by the United States Congress using the so-called fast track process.[61] In Canada, the Free Trade Agreement will presumably be implemented by federal statute. There remains uncertainty as to the effect of a decision by a Canadian province not to pass legislation to implement the Agreement.[62] Should both countries implement the Agreement, the statutory language of the implementation provisions will bear close study, and this is particularly true in regard to the dispute resolution provisions. It should be noted that Chapter 19 explicitly requires the parties to amend certain named statutory provisions to implement the dispute resolution provisions of that Chapter.[63]

While the fast track implementation process provided for in statutes of the United States does not permit an amendment once a trade bill has been submitted to Congress, as a practical matter, substantial negotiation on the language of the bill occurs between representatives of the executive branch and members of Congress and committee staff persons prior to the time the bill is submitted to Congress. Similarly, one may anticipate that there will be substantial negotiation in Canada in an attempt to assure the acceptability of the Free Trade Agreement to provincial political leaders.

B. Composition of Panels.

The panels envisioned under Chapter 18 appear to be somewhat different from the panels which would be created under Chapter 19. There is no reference to lawyer panelists in Chapter 18 and the presumption appears to be that the roster of individuals willing to serve as panelists under Chapter 18 will include a number of persons with very specific expertise useful in resolving very specific trade disputes. In at least one portion of Chapter 18, there is a specific reference to one form of a panel as "a panel of experts."[64] Hence, one would anticipate the development and maintenance of two separate rosters for panels under the two chapters.

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60. *Id.* art. 1909, para. 7.

61. *See* 19 U.S.C. §§ 2191, 2112 (1982 & Supp. IV 1986). For a discussion of current United States ratification procedures, see Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 Yale J. Int'l L. 193, 208-10 (1987).

62. *See* Koh, *supra* note 61, at 224 n.114.

63. Free Trade Agreement, *supra* note 1, art. 1904, para. 15.

64. *See id.* art. 1807, para. 2.

The provision for a roster of prospective panelists under Chapter 18 also differs from the equivalent provision in Chapter 19 in that there is no requirement in Chapter 18 that members of the roster be citizens of a party. Chapter 18 requires that at least two members of a panel be citizens of Canada and two members be citizens of the United States.[65] This suggests the possibility that the fifth member of any panel under Chapter 18 could be a citizen of a third country, perhaps serving as a neutral chairperson of such a panel.[66]

The roster of panelists under Chapter 19 will be limited to a total of fifty, with twenty-five selected by each party.[67] Since each panel must be composed of a majority of lawyers, it is anticipated that lawyers and perhaps judges will predominate on this roster of fifty.[68] As all members of the roster must be citizens of either the United States or Canada,[69] and panelists will normally be selected from the roster,[70] it is very unlikely that a citizen of a third country will ever sit on a panel created under Chapter 19.

It was clearly the intention of the drafters of the Free Trade Agreement to ensure that any person sitting on a panel under either Chapter 18 or Chapter 19 would be objective, unbiased, and free from control by either party.[71] The parties appear to have clearly understood that the success of the dispute resolution mechanisms may well depend upon the workability of the panel process. In Chapter 19, this concern with ensuring objectivity and lack of bias on the part of the panel members is so serious that each of the parties is given four peremptory challenges to appointments by the other party to a panel.[72] In addition, the extraordinary challenge procedure to a committee of judges or former judges represents an extreme measure to guarantee the integrity of the panel process.[73]

It will be in the interest of both parties to ensure that the rosters under both chapters are made up with great care to ensure that only men and women of the highest ability and integrity are placed on the rosters. This will do much to ensure the success of the panel process and avoid the need to invoke the extreme protections provided, in particular, in Chapter 19, to protect the integrity of panels.

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65. *Id.* art. 1907, para. 3.

66. The panels created under the GATT process differ in that citizens of a party to a dispute may not sit on the panel. *See generally* Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987).

67. Free Trade Agreement, *supra* note 1, Annex 1901.2, para. 1.

68. *Id.* Annex 1901.2, para. 2.

69. *Id.* Annex 1901.2, para. 1.

70. *Id.* Annex 1901.2, para. 2.

71. *See id.* arts. 1806, para. 2, 1807, para. 1, Annex 1901.2.

72. *Id.* Annex 1901.2, para. 2.

73. *See id.* Annex 1904.13.

C. *Issues Around the Process: Who May Raise Disputes Under the Agreement?*

Chapter 18 provides that disputes relating to the interpretation or application of the Free Trade Agreement may be raised only by the parties to the Agreement.[74] This is a common feature of international agreements.[75] Hence, a private person who believes that it has been harmed under the Agreement must resort either to domestic legislation where such legislation may provide a remedy to the private person or to the political process to convince its government that the matter in question is one appropriate to be raised under the dispute resolution processes of Chapter 18.

Chapter 19 provides explicitly that a private person who would be entitled under domestic law to seek review of a countervailing duty or antidumping determination by a government administrative agency may insist that its government invoke the panel review procedures of the Chapter.[76] Because Chapter 19 undertakes to replace domestic judicial review of agency action, it must, at least arguably under American law, guarantee to a private person access to review that is similar to that to which the private person would have access in a countervailing duty or antidumping determination involving a country other than Canada.[77] In addition to a right to demand the initiation of a panel procedure under Chapter 19, a private person with an appropriate interest would have the right to appear and be represented by counsel before a panel.[78] There is no similar right for a private person to appear before a panel convened pursuant to Chapter 18.

D. *Issues Around the Process: In What Time Frame Will the Panel Process Work?*

The parties to the Free Trade Agreement were very concerned that the panel process function in a timely manner under both Chapter 18 and Chapter 19. In Chapter 18, specific limits are placed on: the time for consultations;[79] the time within which the Commission must convene after request;[80] the time during which the Commission may consider a matter before it may be referred to a panel;[81] the time periods for the selection of the members of a

74. *See, e.g., id.* art. 1805, para. 1.

75. To allow private parties to raise disputes concerning the interpretation of an international agreement would expose the parties to frivolous disputes and would be generally unworkable.

76. Free Trade Agreement, *supra* note 1, art. 1904, para. 5.

77. U.S. CONST. amend. XIV.

78. Free Trade Agreement, *supra* note 1, art. 1904, para. 7.

79. *Id.* art. 1805, para. 1 (30 days).

80. *Id.* (10 days).

81. *Id.* arts. 1806, para. 1, 1807, para. 2 (30 days).

panel,[82] for the return of the initial report of the panel,[83] for filing of a memorandum of disagreement with the initial report of the panel,[84] and for filing a final report by the panel;[85] and the time for the Commission to resolve the dispute after receiving the report of the panel.[86] The time limits provided in Chapter 19 are even more specific than those provided in Chapter 18. A request for a panel must be made in writing within thirty days after the date of publication of a final determination.[87] There are time limits for the appointment of panelists[88] and there are very specific time limits provided for a panel to consider and to decide a matter.[89] The focus of the Agreement on very specific time limits for the dispute resolution process under both Chapter 18 and Chapter 19 makes clear that the parties to the Agreement intended to ensure that the dispute resolution process would not fail or be seriously undermined by delay.

E. The Impact of the Dispute Resolution Mechanisms of the Free Trade Agreement.

The design of the dispute resolution process under Chapter 18 is similar to the process utilized in the context of other international trade agreements, particularly the GATT. The mechanism of Chapter 18 represents an improvement over the GATT dispute settlement system in protecting against bias and eliminating excessive delays in the processing of complaints.[90] There is no reason to believe the mechanisms established under Chapter 18 cannot be used effectively to resolve disputes between the parties on the interpretation and application of the Free Trade Agreement.

The subject matter of the disputes with which Chapter 19 is concerned, i.e., antidumping and countervailing duty determinations, is a major area of trade dispute between Canada and the United States. Chapter 19 does nothing to alter the underlying substantive basis for these disputes. It does undertake to alter the process by which domestic trade law determinations in these matters are reviewed. The substantive law of each country on antidumping and

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82. *Id.* art. 1807, para. 3.
83. *Id.* art. 1807, para. 5 (3 months).
84. *Id.* art. 1807, para. 6 (14 days).
85. *Id.* (30 days after issuance of initial report).
86. *Id.* art. 1807, para. 9.
87. *Id.* art. 1904, para. 4.
88. *Id.* Annex 1901.2, paras. 2, 3.
89. *Id.* art. 1904, para. 14. Paragraph 14 provides that the procedural rules of panels under Chapter 19 must provide 30 days for the filing of a complaint, 30 days for designation or certification of the administrative record, 60 days for the complainant to file its brief, 60 days for the respondent to file its brief, 15 days for the filing of reply briefs, 15 to 30 days for the panel to hear oral argument, and 90 days for the panel to issue its written decision.
90. *See generally* Davey, *supra* note 66.

countervailing duty determinations remains precisely the same, and each country remains free to apply those provisions.[91] While the change in the process of review of these determinations may affect some public perceptions of the fairness of the application of these trade laws by domestic agencies, it seems quite unlikely that the binational review process will lead to a different result than would be obtained under traditional judicial review in any case.[92]

Currently, under American law, antidumping and countervailing duty determinations are subject to appeal to the Court of International Trade.[93] A decision by the Court of International Trade on an antidumping or countervailing duty matter is, in turn, appealable to the United States Court of Appeals for the Federal Circuit.[94] The provisions of Chapter 19 would displace judicial review of these determinations and replace it with review by a binational panel charged with applying the law of the United States and the standard of review currently used by these courts in review of antidumping and countervailing duty determinations.[95]

Despite this change in the review process, the substantive law which will be applied by the binational panels remains the same,[96]

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91. Free Trade Agreement, *supra* note 1, art. 1902, para. 1.

92. Professor Alan M. Rugman has raised a number of concerns about the nature and administration of current U.S. antidumping and countervailing duty laws. Rugman, *supra* note 2. He criticizes the existing law for failing to analyze net subsidies and for not requiring linkage between subsidies and domestic injury in countervail actions. *Id.* at 318. He also contends that too many countervailing duty and antidumping cases are brought in the United States, *id.* at 315-18, that the International Trade Commission is too heavily influenced by political considerations, *id.* at 320, and that actions under United States trade laws cost foreign industry a great deal in direct expense and the time of senior executives, *id.* at 320-21. Unfortunately, Chapter 19 of the Agreement is unlikely to lead to any significant change on any of Professor Rugman's criticisms. There may be some marginal impact on the costs of such actions and the strict timetable of the Agreement should reduce delay. However, as already noted, there will be no change in substantive United States law. I see no basis for speculation that the binational review process will reduce the number of complaints filed under United States trade laws. Nor it is likely to change the results in matters before the International Trade Commission, another suggestion of Professor Rugman. *Id.* at 322 n.56. A five member panel composed of a majority of lawyers applying United States substantive law, and a deferential standard of review, will neither intimidate the members of the International Trade Commission nor lead to the reversal of any significant number of United States trade law actions.

93. *See* 28 U.S.C. §§ 1581-1583, 1585 (1973 & Supp. VI 1988).

94. *Id.* § 1295(a)(5) (1982 & Supp. IV 1986).

95. Free Trade Agreement, *supra* note 1, art. 1904, para. 1.

96. The task of the panel is to determine whether the administrative determination on antidumping or countervailing duty was "in accordance with the antidumping or countervailing duty law of the importing Party." *Id.* art. 1904, para. 2.

Antidumping or countervailing duty laws are broadly defined to include the relevant statutes, legislative history, regulations, administrative practice, and judicial precedent to the extent that a court of the importing party would rely on such materials in reviewing a final determination. *Id.*

and the panel is charged with using the standard of review which courts in the United States currently utilize.[97] It is to be anticipated that a panel composed of at least a majority of lawyers will accord substantial deference to the findings of the administrative agency.[98] There is simply no reason to anticipate that a binational panel composed of a majority of lawyers will be any less deferential to the determination of an administrative agency than a court would be under the same standard of review. In these circumstances, it is difficult to conclude that a binational panel will reach a different result from that which the Court of International Trade or the Court of Appeals for the Federal Circuit would reach in reviewing determinations of the International Trade Commission and the Commerce Department under United States trade laws.

To the extent that the provisions of Chapter 19 on the review of agency determinations are an effort to protect parties from the delay, expense, and uncertainty of being exposed to judicial review in another country, it is not at all certain, at least in the United States, that it will be possible to deny to a private person access to courts should that person choose to challenge a determination of an administrative agency. In general, courts in the United States are reluctant to deny a private person access to the court system if the person alleges that some action of government has infringed the constitutional rights of the person. This is so even when Congress has by statute attempted to preclude judicial review of administrative de-

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The review is to be based upon "the administrative record." *Id.* The administrative record is broadly defined in article 1911.

97. The standards currently utilized by courts in the United States to review antidumping or countervailing duty determinations are found at 19 U.S.C. § 1516a(b)(1) (1982). For determinations that an antidumping or countervailing duty is appropriate, the standard is whether the action is supported "by substantial evidence on the record." *Id.* § 1516a(b)(1)(B). For a determination by the International Trade Commission not to initiate a review pursuant to 19 U.S.C. § 1675(b) (1982 & Supp. IV 1986), the standard of review is whether the determination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 1516a(b)(1)(A) (1982).

98. Even with the qualification added in *Universal Camera*, the substantial evidence test accords considerable deference to agency findings of fact. The state of the evidentiary record concerning a disputed fact often is such that it would permit a reasonable person to reach more than one conclusion. In such cases, the agency's finding will be affirmed as long as it reaches any of those conclusions. Judicial deference to agency findings of fact is particularly appropriate. Agencies have a substantial comparative advantage over reviewing courts in finding facts because of their greater familiarity with the record and their specialized expertise in the areas in which they are required to resolve factual disputes.

R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 358 (1985). *See also* B. SCHWARTZ, ADMINISTRATIVE LAW 601-602 (1984). For comment on the arbitrary and capricious standard, see R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra*, at 360-63.

terminations.[99] Similarly, there has been some suggestion that courts will not deny access, despite the efforts of Congress to preclude judicial review, when a person alleges that an administrative agency has acted ultra vires.[100] So long as the person can frame an allegation that the person's constitutional rights have been violated by the action of the administrative agency or that the agency has acted outside the scope of its statutory authority, it is likely that the person could gain initial access to the federal courts for the litigation of that issue. Although the allegations might ultimately fail in the courts, the parties involved would be subject to the delay, expense, and uncertainty of litigation in United States courts.

III. CONCLUSION

The dispute resolution provisions of Chapters 18 and 19 of the Canada-United States Free Trade Agreement are a thoughtful attempt to assure that the Agreement will work. Chapter 18 is a limited advance over the dispute resolution process utilized under the GATT. Chapter 19 undertakes to respond to the perception that trade laws are currently administered in a biased and unfair manner on occasion. In the area of dumping and subsidy disputes, however, the parties will do well to address vigorously and promptly the underlying differences in national policies that otherwise fuel trade disputes between the two countries. Unless some progress is made on reconciling these underlying differences, it may be anticipated, even under the provisions of Chapter 19, that domestic trade regulation will continue to be applied in a manner that will raise substantial concerns, particularly in Canada.

99. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 98, at 128-30; B. SCHWARTZ, *supra* note 98, at 444-48.

100. *See* R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 98, at 128-30; B. SCHWARTZ, *supra* note 98, at 444-48.