IN THE MATTER OF:

Certain Softwood Lumber
Products from Canada

ECC-94-1904-01USA

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ARTICLE 1904.13
EXTRAORDINARY CHALLENGE COMMITTEE
UNITED STATES-CANADA FREE-TRADE AGREEMENT

IN THE MATTER OF: CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA	)	ECC-94-1904-01USA

MEMORANDUM OPINIONS AND ORDER

AUGUST 3, 1994

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

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

APPEARANCES: Ira S. Shapiro, William T. Kane, Alicia D. Greenidge, Stephen J. Powell, Jeanne E. Davidson, William D. Hunter, Joan MacKenzie for the Government of the United States. Alan Wm. Wolff, John A. Ragosta, Harry L. Clark, Robert H. Griffen, Linda C. Menghetti, Evan Y. Chuck for the Coalition for Fair Lumber Imports.

M. Jean Anderson, Bruce H. Turnbull, Richard Ben-Veniste, Peter D. Isakoff for the Government of Canada. Homer E. Moyer, Alan L. Horowitz, Grant D. Aldonas, James B. Altman, Philip J. Ferneau, Daniel M. Flores, John E. Davis for the Government of British Columbia. Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, Matthew Frumin for the Government of Alberta. Patrick F.J. Macrory, Spencer S. Griffith, Shannon S. S. Herzfeld, Margaret L. H. Png for the Gouvernement du Quebec. Mark S. McConnell, T. Clark Weymouth, Lynn G. Kamarck, Paul A. Minorini for the Government of Ontario. Randolph J. Stayin, Mark J. Andrews, David Lubitz for the Quebec Lumber Manufacturers' Association. W. George Grandison, John R. Labovitz, Richard Diamond, Peter Lichtenbaum for the Canadian Forest Industries Council and Affiliated Members.

UNITED STATES-CANADA FREE TRADE AGREEMENT
ARTICLE 1904.13
EXTRAORDINARY CHALLENGE PROCEEDING

IN THE MATTER OF:	)	
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA	)	Secretariat File No. ECC-94-1904-01 USA

OPINION OF MR. JUSTICE GORDON L.S. HART

AUGUST 3, 1994

I. INTRODUCTION

This opinion is the result of an extraordinary challenge proceeding conducted pursuant to Article 1904.13 and Annex 1904.13 of the United States - Canada Free Trade Agreement. The proceeding followed a request for an Extraordinary Challenge Committee filed by the Government of the United States on April 6th, 1994, FOR a review of the underlying binational panel decision in "Certain Softwood Lumber Products from Canada".

A dispute over softwood lumber being imported from Canada into the United States has been festering for the last 12 years. In 1983 in response to a petition filed by a coalition of U.S. lumber producers (the Coalition) the Department of Commerce of the United States (Commerce) made an investigation of the Canadian-provincial practice of disposing of lumber growing on provincial Crown lands under stumpage agreements and determined that the advantage of such stumpage systems was not provided to any specific industry or group of industries in Canada and did not provide goods at preferential rates. They therefore concluded that imports of Canadian lumber were not countervailable. This negative determination by Commerce is referred to as Lumber I.

The United States statutory law under which Commerce made its negative decision is found in the **Tariff Act of 1930**, as amended, at 19 U.S.C. § 1671(a) which states:

> **§ 1671.Countervailing duties imposed**
>
> **(a) General rule**
>
> If--
>
> (1) the administering authority determines that -

(A) a country under the Agreement, or
(B) a person who is a citizen or national of such a county, or a corporation, association, or other organization organized in such a country,

is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) the Commission determines that --

(A) an industry in the United States --

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

Not every subsidy is countervailable however unless it can be brought within § 1677(5) which states:

§ 1677(5) Subsidy

(A) In general

The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title and includes, but is not limited to, the following:

> (ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
>
> (II) The provision of goods or services at preferential rates.
>
> (III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (IV) The assumption of any costs or expenses of manufacture, production, or distribution.

After completing its investigation in Lumber I Commerce concluded that the Canadian stumpage systems were not provided only to a specific enterprise or industry, or group of enterprises or industries and that the stumpage systems did not provide goods at preferential rates. In so ruling Commerce determined that the evidence in the record established that stumpage was used by thousands of companies operating within three groups of industries consisting of 27 separate industries.

In 1986, with no intervening change in the nature or number of industries using provincial stumpage or the provinces' forestry management systems the Coalition again petitioned the Department seeking to reverse the finding in Lumber I. Commerce

complied by reversing its earlier specificity ruling and issued a preliminary determination in Lumber II finding a countervailable subsidy based upon a purported comparison between revenues from stumpage charges and the provincial government's costs of administering their stumpage systems.

Given the magnitude of the trade involved Canada and the United States then entered into a Memorandum of Understanding (MOU) based upon the kind of cost/revenue comparison used by Commerce in Lumber II.

The Department thereupon terminated its investigation and declared its preliminary determination to be without legal force and effect. Under the MOU Canada agreed to charge an export tax of 15% on all lumber exported to the U.S. to offset any advantage Canadian lumber producers gained from obtaining stumpage at below cost of the stumpage systems' administration by the various governments. During the next few years, pursuant to the MOU, the various stumpage systems were re-arranged and in 1991, after careful review by the Canadian government, it was determined that there was no longer any basis for saying that Canadian softwood lumber was subsidized. Canada thereupon exercised its right to terminate the MOU effective October 4th, 1991.

Immediately upon termination of the MOU Commerce alleged anew that Canadian softwood lumber was subsidized. They abandoned the cost/revenue comparison methodology on which Lumber II and the MOU had been based and claimed that stumpage prices were below market giving a subsidy which was passed to the lumber producers.

They also determined that stumpage programmes were, in fact, limited to a group of industries, the primary, timber processing industries comprising two basic manufacturing industries: solid wood products (which include logs) and pulp and paper products. They concluded that the stumpage programmes were therefore specific and preferential under the statute. At the instigation of the Coalition they also added a new allegation that British Columbia's log export restrictions (LERs) were countervailable subsidies as well.

For almost 100 years the Province of British Columbia had restricted export of logs in order to protect and build up its own lumber industry.

The Coalition argued that this restriction artificially depressed the price of logs thus giving an advantage to the lumber producers.

Canada argued that Commerce had failed to show any market distortion caused by the Canadian stumpage systems or the LERs as no advantage was passed on to the lumber producers who later exported their product to the United States. Expert evidence was adduced to support this position. Canada further argued that the Log Export Regulations (LERs) could not come within the definition of subsidies since they were not directly received by the lumber producers.

Commerce took the position that it was not required by United States law to look into market distortion in order to determine that a subsidy existed with regard to the stumpage systems but strangely resorted to a market distortion argument to determine that the (LERs) were, in fact, subsidies.

On May 28., 1992, Commerce issued a final affirmative countervailing duty determination based upon findings that the stumpage pricing practices of each of the four major lumber producing provinces, that is, British Columbia, Alberta, Ontario and Quebec, were specific and that the provinces provided stumpage to lumber producers at "preferential rates". This final determination is know as Lumber III. Commerce specifically rejected Canada's argument that stumpage pricing practices did not result in a market distortion and that no advantage was passed to the lumber producers. Commerce ruled that it was precluded from considering evidence to that effect.

Commerce also determined that British Columbia's log export restrictions were *de jure* specific and in contrast to its ruling that it could not consider whether stumpage led to market distortion expressly predicated its determination that log export restrictions could be a subsidy on a market distortion analysis. Based upon its stumpage and log export restriction determinations Commerce imposed a countervailing duty on all imports of softwood lumber from all Canadian provinces and territories except the Atlantic Provinces.

By this time the United States-Canada Free Trade Agreement (FTA) had been negotiated and brought into force. Before the FTA Canada would have taken its grievance against Commerce to the American judicial system by applying for a review of the decision by the Court of International Trade (CIT). If not satisfied with the results it could then have gone on appeal through the U.S. Appellate Court system. The FTA, however, replaced court procedures in both Canada and the United States with binational

panels of five experts in law and international trade for the review of Commerce determinations. Under the agreement there is no appeal from a majority decision of a panel and their decision becomes binding upon the parties.

The decision of a binational panel can only be disturbed under the FTA. if circumstances exist that would justify an extraordinary challenge committee interfering with that decision to preserve the system upon which the FTA is based.

After the final determination was made in Lumber III Canada requested binational panel review.

A panel was convened on July 29, 1992, and after preliminary matters were dealt with an oral hearing took place on February 11th and 12th, 1993. On May 6, 1993 the panel delivered its first decision.

The panel was unanimous in its decision and reached the following conclusion: (i) Commerce had erred in determining specificity under the stumpage programmes. Instead of considering the four elements suggested in their proposed regulation governing such a determination they simply held that the number of users of the programmes was too small to be non-specific. The panel found that Commerce is required, as a matter of law, to consider all relevant evidence in determining whether the actual recipients of a particular programme are a "specific group of industries" and cannot base its decision solely on evidence of the number of industries represented by the programme recipients. That relevant evidence includes the four elements set forth in the proposed regulations which Commerce itself has proclaimed, namely, government action, number of users,

dominant or disproportionate use and government discretion. Commerce claimed that these elements only had to be considered in a sequential fashion and that their decision could be based upon any one but the panel found that this approach was not reasonable and resulted in the failure of Commerce to consider all relevant evidence in the record before it. In the opinion of the panel it would be simply impossible to make any kind of reasonable specificity finding whether *de jure* or *de facto* without considering the number of enterprises or industries either actually receiving or entitled to receive the benefits in question. The matter was remanded to Commerce for an express evaluation and weighing of all four factors enunciated in the proposed regulations as well as any other factors relevant to *de facto* specificity.

(ii) The panel next dealt with the question of whether or not the government's pricing policies for access to a natural resource such as trees can amount to a subsidy in law or in fact if it has no effect on the output or price of the products generated from the natural resource. In its final determination Commerce had found that these cutting rights to timber on publicly owned lands were preferential when measured against benchmark prices charged in alternative markets. As such they amounted to a subsidy requiring the imposition of countervailing duties on the various softwood lumber products generated from those logs and exported to the United States. Commerce claimed it was precluded from considering whether any advantage accrued to the lumber producers from this arrangement before determining whether, in fact, a subsidy existed.

The panel concluded that it was necessary under U.S. law to consider whether or

not the alleged advantage from the stumpage scheme did, in fact, distort the market so as to give a competitive advantage to the lumber producers and remanded the matter to Commerce for such a consideration. They further directed Commerce to review the economic evidence that claimed there would be no market distortion before determining whether or not a countervailable subsidy had been established.

The panel pointed out that in the present case Commerce had, in fact, used the market distortion test to determine that the British Columbia LERs amounted to a subsidy that was countervailable. This seemed strange in light of the Department's argument that they were not entitled under the law to look at market distortion to determine whether an actual subsidy existed.

(iii) The panel dealt next with the British Columbia LERs. Commerce had found them to be *de jure* specific but the panel determined that this was contrary to U.S. law and remanded the matter to Commerce for reconsideration.

The panel further considered whether the LERs could be *de facto* specific and reached the conclusion that they could not. In doing so a majority of the panel held that log export restrictions or border measures as they are sometimes called could be held by Commerce to be subsidies and countervailable although earlier United States law had determined such measures to be non-countervailable. The majority held that it was reasonable for Commerce to change their previous practice although the minority of the panel, including one Canadian and one American national, held that they were bound by the earlier law and that the Department could not interpret the word "subsidy" to include

border restrictions. Since Congress had not defined this word Commerce had the right to create that definition and deference must be given to their decision to do so according to the panel majority. There is nothing in any statute which explicitly or implicitly precluded Commerce from defining "subsidy" to include benefits indirectly bestowed by the government.

Once the panel majority had reached the conclusion that the decision of Commerce finding that the LERs amounted to a subsidy should not be disturbed they looked at Commerce's consideration of whether B.C. log export restrictions conferred a benefit upon B.C. producers of softwood products, that is, whether there was market distortion which entitled the United States to countervail the lumber imports. According to the Department they sought to determine whether there was a proximate causal relationship or co-relation (i.e., regression analysis) between the B.C. export restrictions and the domestic price of B.C. logs. This was later formulated as whether these restrictions had a direct and discernible effect within the meaning of the case law upon the price of B.C. logs.

The unanimous panel held that Commerce was confused in this exercise and that its conclusions were unsupported by substantial evidence. There was no study submitted by the Coalition and no analysis performed by the Department which was designed to address the issue of whether the LERs caused the price for logs by British Columbia lumber mills to be lower than otherwise would be the case.

In light of the confusion caused by the final determination on this issue the panel

remanded the matter to Commerce for clarification of the meaning of the applicable legal standard and a demonstration that the standard was met by substantial evidence on the record.

On September 17, 1993, the Department issued its remand determination.

Commerce agreed that the panel was correct in finding that the LERs were not *de jure* specific but after reconsideration found that they were *de facto* specific. They repeated their original arguments in Lumber III and refused to change their conclusions. They did, in fact, increase the amount of the countervailable duty.

In its second decision issued on December 17, 1993, the panel split three to two on the issue of specificity of the stumpage programmes and the requirement for the establishment of market distortion before countervailing with the two American members of the panel changing their original views. The majority found that the Department's determination was unsupported by substantial evidence and otherwise not in accordance with the law and the countervailing subsidies could not be maintained. They took the position that a subsidy cannot be countervailed unless a competitive advantage was conferred upon the object of the subsidy or in other words in economic terms the subsidy leads to market distortion and that Commerce had failed to establish any such market distortion flowing from the Canadian stumpage systems or the British Columbia LERs. The two dissenting members joined with the majority in holding that Commerce had not, in fact, established by substantial evidence any market distortion but would have returned this matter to Commerce for further review. They said:

> "Were we not strongly persuaded that Daewoo trumps our earlier instruction on market distortion, we would concur in most of the Majority's reasoning on stumpage preferentiality in the present opinion. For the purposes of a complete analysis, but strictly as obiter dictum, we discuss below the Majority's review of Commerce's market distortion analysis. While we find the Majority's critique persuasive, assuming arguendo a market distortion requirement, unlike the Majority, we would have instructed Commerce on remand to provide explanations for the assumptions it makes in recalculating the Nordhaus Study's regression analysis, as discussed below."

It is a review of these binational panel decisions that the United States government now seeks from this extraordinary challenge committee.

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 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 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.
>
> Annex 1904.13 is as follows:
>
> 1. The Parties shall establish an extraordinary challenge committee, comprised of three members, within fifteen days of a request pursuant to paragraph 13 of Article 1904. The members shall be selected from a ten-person roster comprised of judges or former judges of a federal court of

> the United States of America or a court of superior jurisdiction of Canada. Each Party shall name five persons to this roster. Each Party shall select one member from this roster and the third shall be selected from the roster by the two members chosen by the Parties or, if necessary, by lot from the roster.
>
> 2. The Parties shall establish by January 1, 1989 rules of procedure for committees. The rule shall provide for a decision of a committee typically within 30 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. Upon finding that one of the grounds set out in paragraph 13 of Article 1904 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 affirm the original panel decision. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.

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 appellate court. Article 1904.13 provides that a Party may avail itself of the extraordinary challenge procedure only if it satisfies <u>each</u> 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:
>
> > 'This three-prong requirement provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge 'is not intended to function as a routine appeal.' Statement of Administrative Action, United States - Canada Free-Trade Agreement at 116, <u>reprinted in</u> H.R. Doc. No. 216, 100th 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 the Matter of Fresh, Chilled, or Frozen Pork from Canada, ECC 91-1904-01USA ("ECC I) at 10.

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. See, e.g. *United States-Canada Free Trade Agreement Hearing before the Subcomm. on Courts, Civil Liberties*, and the *Administration of Justice of the Comm. on the Judiciary, House of Representatives*, H. Serial No. 60, 100th Cong., 2d Sess. 69, 75-76 (1988) (Prepared Testimony of M. Jean Anderson, Chief U.S. Negotiator of Binational Panel Provisions), ("Anderson House Testimony"). An ECC corrects "aberrant Panel decisions" and "aberrant behaviour by panelists." See ECC I at 9 quoting (H.R. Rep. No. 816, 100th Cong., 2d Sess., pt. 4, at 5 and 12 (1988)). 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. A systemic problem arises whenever the binational panel process itself is tainted by failure on the part of a panel or a panelist to follow their mandate under the FTA. See, e.g., *United States-Canada Free Trade Agreement Hearing before the Comm. on the Judiciary, United States Senate, on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, S. Serial No. J-100-62 (S. Hrg. 1081), 100th Cong., 2d Sess. 95 (1988) (Testimony of M. Jean Anderson) ("Anderson Senate Testimony").

The Canadian government argues that the ECC's scope of review should be analogous to the restrictive judicial review of a private commercial arbitration under U.S. law, and therefore that the Panel's decision should not be disturbed. The Government of Canada's Brief to the ECC ("Canada Brief") at 25-27, 33-40. Such an analogy is inappropriate. Unlike a court reviewing a commercial arbitration, the ECC is a participant in an innovative exercise under the FTA entailing integration of two separate trading communities. The Preamble to the FTA accentuates the lofty purpose of the treaty, e.g. "TO CONTRIBUTE to the harmonious development and expansion of world trade and to provide a catalyst to broader international cooperation." Such an

> experiment requires a mechanism to correct aberrant panel behaviour when it materially affects a decision and threatens the integrity of the binational panel process. At the same time, the ECC can not become an appeal forum for every frustrated participant in the binational panel process."

The decision goes on to state that if a panel failed to apply the appropriate standard of review it would manifestly exceed "its powers, authority or jurisdiction" and would be guilty of one prong of the test. The committee must assess whether the panel accurately articulated the standard of review and whether it had been conscientiously applied. To state the standard only and not to conscientiously apply it would equally be a breach of the agreement. 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 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 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 specificity standard and its application to the particular facts the majority should have deferred to Commerce's reasonable judgment. Instead they (a) rejected Commerce's sequential approach; (b) ignored the underlying nature of the specificity test; (c) misconstrued its task with regard to the factor of dominant or disproportionate use. (iii) For the same reasons as in (ii) the majority manifestly exceeded its powers, authority and jurisdiction in its finding that B.C. log export restrictions were not specific under U.S. countervailing duty law.

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 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.

2. Either Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of either 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 this Agreement.

3. The panel shall apply the standard of review described in Article 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.

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 facts 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 investigation authority on remand is needed, such review shall be before the same panel, which shall 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 Parties with respect to the particular matter between the Parties that is before the panel.

A recent statement of the standard of review of a final determination of Commerce under United States law can be found in **Saarstahl, AG, v. United States and Inland Steel Bar Co.** CIT No. 93-04-00219 where Judge Carman stated:

> The appropriate standard for the Court's review of a final determination by Commerce is whether the agency's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).
>
> The Court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). While Commerce has discretion in choosing one methodology over another, "[t]he traditional deference courts pay to agency interpretations is not to be applied to alter the clearly expressed intent of Congress." *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986), *cited in British Steel Corp. v. United States*, 10 CIT 224, 235, 632 F. Supp. 59, 68 (1986); *see also Ceramica Regiomontana*, 10 CIT at 405, 636 F. Supp. at 966 (The agency must not "contravene or

ignore the intent of the legislature or the guiding purpose of the statute.") (citations omitted).

The binational panel in its first decision which was unanimous purported to follow the appropriate standard of review. 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. further argues that **s. 1677-1** of the **Tariff Act** provides for a competitive benefit test to be applied to the determination of countervailing duties when

an upstream subsidy exists. Since this test was not included in **s. 771(5)** it must have been the intention of Congress to exclude such an effects test there.

Finally, the U.S. says that the panel erred when it stated that Commerce's position on stumpage was inconsistent with its treatment of B.C. LERs. Since this was an indirect subsidy Commerce had to determine whether a suppression of the price of logs resulted in a benefit to lumber producers in the form of lower log prices.

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. Although the word "subsidy" is not defined in the **Tariff Act** it has to be given a meaning when placed in the context of trade law. Indeed such a meaning was assigned to it by Commerce itself in the preamble to its proposed regulations which state:

> Conceptually, the regulations are based upon the economic model articulated by the Department in its final determinations in Carbon Steel Wire Rod from Czechoslovakia and Carbon Steel Wire Rod from Poland [. . .] and sustained by the court in Georgetown Steel Corp. v. United States [. . .]. This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, underlies the Department's entire CVD methodology.

The statutory purpose of countervailing duty law was recognized by the Supreme Court of the United States in a unanimous opinion in **Zenith Radio Corp. v. United**

States, 437 U.S. 443, 455 - 56 (1978):

> Regardless of whether this legislative history absolutely compelled the Secretary to interpret "bounty or grant" so as not to encompass any nonexcessive remission of an indirect tax, there can be no doubt that such a construction was reasonable in light of the statutory purpose. *Cf. Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 374 (1973). This purpose is relatively clear from the face of the statute and is confirmed by the congressional debates: The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments. See, *e.g.*, 30 Cong. Rec. 1674 (remarks of Sen. Allison), 2205 (Sen. Caffery), 2225 (Sen. Lindsay) (1897). The Treasury Department was well positioned to establish rules of decision that would accurately carry out this purpose, particularly since it had contributed the very figures relied upon by Congress in enacting the statute. See *Zuber v. Allen*, 396 U.S. 168, 192 (1969).
>
> In deciding in 1898 that a nonexcessive remission of indirect taxes did not result in the type of competitive advantage that Congress intended to counteract, the Department was clearly acting in accordance with the shared assumptions of the day as to the fairness and economic effect of that practice. The theory underlying the Department's position was that a foreign country's remission of indirect taxes did not constitute subsidization of that country's exports. Rather, such remission was viewed as a reasonable measure for avoiding double taxation of exports - once by the foreign country and once upon sale in this country.

Canada further suggests that in 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.
>
> * * * * *
>
> To identify subsidies in [a] pure market economy, we would look to the treatment a firm or sector would receive absent government action. In the absence of the bounty or grant, the firm would experience market-determined costs for its inputs and receive a market-determined price for its output. The subsidy received by the firm would be the difference between the special treatment and the market treatment. Thus, the market provides the necessary reference point for identifying and calculating the amount of the bounty.
>
> * * * * *
>
> A countervailable action in a market economy is a distortion.

The Federal Circuit in **Georgetown Steel Corp. v. United States**, 801 F. 2d 1308, 1315-16 (Fed. Cir. 1986) upheld the reasoning of Commerce in **Wire Rod from Poland.**

Canada suggests further that Commerce found that the restraint of log exports from B.C. was a subsidy precisely because of its alleged distorting effect on the market economy and had nothing to do with whether or not the subsidy was direct or indirect.

Canada argues that Commerce had made a fundamental legal mistake when considering itself precluded from undertaking an analysis of whether Canadian provincial stumpage and LERs are market distorting. While Commerce usually may presume

market distortion there may be circumstances where this presumption will not apply because of the special characteristics of the market in question. In these exceptional cases, the economic theory that underlines countervailability is inoperable and therefore, as a matter of U.S. law, no countervailable subsidy exists.

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. Moreover, in **Daewoo** the Federal Circuit relied in part on the fact that Commerce had interpreted the statutory antidumping provisions consistently since they were enacted in 1974 and that Congress had declined to overturn that interpretation. The Department was therefore entitled to additional deference. The present case, however, is just the opposite where Commerce has done a complete about face purporting to reject its entire market distortion approach to identifying countervailing subsidies. Secondly, after **Georgetown Steel** which held

that the countervailing duty law could not be applied to countries having non market based economies where, by definition, there could be no market distortion congress expressly rejected a statutory amendment aimed at overturning that decision. After Congress rejected that amendment Commerce proposed regulations to codify its practices which recognize that market distortion "underlies the Department's entire CVD methodology", 54 Fed. Reg. at 23367.

Canada therefore argues that **Daewoo** which considered deference to consistent longstanding statutory interpretation by an agency does not apply here where Commerce relied on a statutory interpretation that flatly contradicted its own prior interpretation.

Canada argued further the U.S. position that it need not consider evidence of market distortion to determine whether an actual subsidy existed would create an irrebutable presumption and this would be contrary to U.S. law.

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.

The only other issue is whether the panel in its May decision and the majority of the panel in its December decision conscientiously applied the law to their review. At the hearing of this committee in Washington we were presented with a June 7, 1994, decision of the United States Court of International Trade. **Saarstahal, A.G. v. United States and Inland Steel Bar Co.**, Court No. 93-04-00219 which we have referred to earlier for a recent statement on the standard of review. In this case Judge Carman rejected Commerce's argument that it was not required to look at subsequent events once it had determined that a subsidy had been bestowed. He rejected the methodology used by Congress and went on to state:

> Where a determination is made a given transaction is at arm's length, one must conclude that the buyer and seller have negotiated in their respective self-interests, the buyer has taken into consideration all relevant facts, and the buyer has paid an amount which represents the market value of all it is to receive. Because the countervailable benefit does not survive the arm's length transaction, there is no benefit conferred to the purchaser and, therefore, no countervailable subsidy within the meaning of 19 U.S.C. § 1677(5). The purchaser, thus, will not realize any competitive countervailable benefit and any countervailable duty assigned it amounts to a penalty. *See, e.g., Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (The statutory "purpose is relatively clear from the face of the statute and is confirmed by the congressional debates: The countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments.") (From a unanimous decision of the U.S. Supreme Court)

On the assumption that this recent pronouncement by the CIT represents the law 0of the United States it is difficult to say that the panel majority did not apply the appropriate standard of review when reaching its conclusions. Because this is a case of first impression I cannot say that an appellate court in the United States could not reach the same conclusion as the unanimous panel of May 1993 and the majority panel of December 1993. The arguments made on both sides had a solid foundation in court precedents and the amount of deference extended to the agency was in tune with the novelty of the exercise.

I would like to point out that in reality the replacement of court adjudication by a five member panel of experts in international trade law may very well reduce the amount of deference to the Department in the future. When the Court of International Trade reviews the determinations of Commerce it would be expected to bow to the expertise within the Department. When the parties to the FTA agreed to replace that court with this type of panel they must have realized and intended that a review of the actions of Commerce or of the Canadian agency would be more intense. The panels have 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 property 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 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.

When dealing with Commerce practice the U.S. justifies the 1983 decision which found that the stumpage subsidies were not specific by a change in the law. Commerce

had previously followed the doctrine of "inherent characteristics" of timber as being the factor which limited the use of logs to a specific industry rather than limitation by government targeting. The U.S. argues that this test was changed by the CIT in 1985 which required Commerce to assess whether subsidies were, in fact, given to a discreet portion of the economy regardless of whether the government targeted certain users and that this was codified in a 1988 amendment to the statute. If the *de facto* standard is applied the U.S. argues that it cannot be unreasonable for Commerce to find that programmes benefiting a group of industries accounting for fewer than 1% of enterprises in Canada, fewer than 4% of industries in Canada, and less than 4% of the Canadian economy are, in fact, specific. Having found that the subsidies benefit only a small number of Canadian industries, that is, the lumber processing industry and the pulp and paper industry, Commerce was justified in making a finding of specificity.

In support of this position the U.S. refers to the Legislative history to the NAFTA where Congress disapproved of the reasoning of the panel in Lumber III.

The U.S. refers as well to the reasoning of an FTA panel in the case involving magnesium which found that the very specificity methodology rejected by the majority panel here was a permissible construction of the statute.

The United States argues that the basic purpose of the specificity test was explained in **Carlisle Tire & Rubber Co. v. United States**, 564 F. Supp. 834 (CIT 1983) where it was recognized that all governments including the United States intervened in their economies to one extent or another. To take the view that all such

interventions constitute countervailable subsidies would produce absurd results. The judgment in that cases stated:

> Thus, included in Carlisle's category of countervailable benefits would be such things as public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sectors . . . To suggest, as Carlisle implicitly does here, that almost every import entering the stream of American commerce be countervailed simply defies reason.

Thus, the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where the competitive benefit of a foreign government's actions is spread throughout the economy. It was not intended to be a loophole through which narrowly focused subsidies, such as those in this case, could escape the purview of the countervailing duty law.

The U.S. position is that the panel's review task was merely to determine whether Commerce's interpretation of the statutory specificity provision was "effectively precluded by statute" or was an interpretation that "Congress would not have sanctioned".

In 1988 Congress modified the specificity test to codify the holding in **Cabot Corp. v. United States**, 620 F. Supp. 722 (Ct. Int'l Trade 1983), where it was held that Commerce had previously relied upon nominal general availability of subsidies as a justification for a finding of non countervailability. The new rule was added to **s. 1677(5)** of the **Tariff Act** and is as follows:

> **(B) Special rule** - In applying subparagraph (A), [Commerce], in each investigation, shall determine whether the . . . subsidy in law or in fact

> is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a ... subsidy, or the benefits thereunder is not a basis for determining that the . . . subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

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."

In reversing Commerce's determination on specificity the majority failed to apply conscientiously the standard of review which required it to judge Commerce's actions in light of the purpose of the specificity test, the amendments thereto and the tremendous deference due to Commerce's conclusions in the area of specificity. The majority did not ask whether Commerce's analysis of the facts and law was reasonable, the approach called for by U.S. administrative law. Instead, the majority held Commerce to some higher standard of proof and according to the dissent the majority superimposed its own

methodology on Commerce.

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.

Applying this approach Commerce found that Factor 1 in its proposed regulations was not satisfied with regard to stumpage; the Canadian government did not act to limit the availability of stumpage subsidies. However, Commerce found that Factor 2 was satisfied; stumpage subsidies were used by only a single group of industries, the primary timber processing industries. The majority rejected this analysis and in doing so imposed the unjustified and more onerous requirement that Commerce examine and weigh all possible specificity factors although there is nothing in the proposed regulations to require this. The panel's finding could not, therefore, have possibly been the result of the proper application of the review standard of U.S. law. The U.S. claims that the panel exceeded its proper role in this issue and that the panel made this clear in its May 1993 decision where it was seeking a finding that non specificity was possible rather than whether a finding of specificity was reasonable.

The U.S. objects to the majority's reversal of Commerce's finding that the users of stumpage were sufficiently few so as to constitute a specific group; that the primary timber processing industries constituted a group of industries; that the lumber industry

was a dominant and disproportionate user of stumpage; and that B.C. log export restrictions were *de facto* specific. According to the U.S. all of these findings of the panel resulted from its failure to apply the standard of review and therefore materially affected the panel's decision and threatened the integrity of the binational panel review process.

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 a 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.

In its first decision the panel unanimously rejected Commerce's position as contrary to U.S. case law and contrary to the general practice of Commerce itself in this and prior cases. In the second decision the panel majority adhered to this position. The two dissenting members, however, reversed their position asserting that the intervening decision of **Daewoo**, supra, required deference to Commerce's specificity analysis

methodology. Canada supports the majority's argument that U.S. case law regarding specificity requires a non-mathematical, non-mechanical reasoned weighing of several specificity factors. In its brief it was stated:

> The Federal Circuit in PPG IV stated:
>
> > At least three factors must be considered on a case-by-case basis to determine whether a program is specific in its application. First, the ITA [International Trade Administration of the Department of Commerce] must consider the extent to which the foreign government acted to limit availability of the program. Second, the ITA must consider the number of enterprises or industries which actually use the program. Third, the ITA must consider the extent to which the foreign government exercises discretion in making the program available.
>
> 978 F. 2d at 1239-40. See also, e.g., Roses, Inc. v. United States, 743 F. Supp. 870, 881 (Ct. Int'l Trade 1990) ("Roses I"), Cabot, supra.
>
> Indeed, these factors have been stated by Commerce itself in its Proposed Regulations:
>
> > In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:
> >
> > (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.
>
> Proposed Regulations, 54 Fed. Reg. at 23, 379 (to be codified at § 355.43(b)(2)). As the Department has previously conceded: "'The Department must consider all of these factors in light of the evidence on the record in determining the specificity in a given case.'" PPG III, 928 F. 2d at 1576-77 (quoting Commerce's Preliminary Determination in Lumber II, 51 Fed. Reg. at 37, 456).

It is hardly surprising, therefore, that the Panel viewed Commerce's single factor analysis as contrary to law. Indeed, the rulings in PPG IV, Roses I, and Cabot flow directly from the principle of U.S. administrative law that agencies must consider all relevant evidence in the administrative record and must take into account evidence that detracts from, as well as supports, the agency's conclusion.

Canada states firmly that the **Daewoo** case upon which the dissenters relied for changing their view has no bearing on this issue. It was based upon U.S. antidumping law and the court did nothing other than state that the particular circumstances of that case obliged it to defer to Commerce's longstanding practice with respect to the application of the governing statute. **Daewoo** did not purport in any manner to change any of the basic principles governing a court review of agency decision-making much less discuss the countervailing duty law generally or specificity analysis in particular. Further **Daewoo** emphasized that the deference to be attributed to Commerce is based upon consistency whereas Commerce from the start of this lumber dispute between Canada and the United States has changed its position on several occasions rendering it entitled to

considerably less deference.

Canada alleges further that the dispute over the meaning of **Daewoo** is undeniably no more than a debate concerning the proper interpretation of U.S. law and thus it falls outside the scope of an ECC. The same is true with respect to the dispute over whether specificity analysis requires consideration of multiple factors. Commerce itself recognized that the specificity test was a legal dispute on which reasonable minds could differ stating that it could "appreciate why the panel would accord considerable weight to statements by the appellate court" but adhered remarkably to its view that the federal circuit "is simply incorrect".

Canada argues that the panel in following the binding interpretation of U.S. law propounded by the federal circuit and the CIT rather than the one propounded by Commerce the panel did no more than conscientiously determine whether Commerce's ruling was contrary to law. The panel was therefore exercising, not exceeding, the powers conferred upon it by the FTA.

Canada states that although the Department resisted employing a multi factor analysis on remand it nonetheless purported to use it in the remand determination to reach the same result that it reached before. The Department's determination, however, was based neither on substantial evidence nor on the reasoned analysis required by law.

Canada supports the view of the panel that Commerce had not analyzed the "number of users" factor as required by law. The panel had noted that U.S. case law unambiguously condemned any mechanistic approach in this area. i.d. citing Roses 1,

743 F. Supp. at 881, (CIT 1990). 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 bestowed on a discreet class of grantees despite nominal availability of the programme. The panel viewed Commerce's approach labelling thousands of stumpage users producing numerous different types of end products as merely two industries forming a single group of industries and then stating that the number of industries was "too few" - to be "circular " and therefore unlawfully "mechanical and arbitrary".

Canada referred to the United States claim that the decision in **Carlisle Tire & Rubber Co. v. United States**, supra, suggests that any government programme that provides benefits other than "generalized public benefits " can be found sufficiently specific for countervailing duty purposes. Canada argues, however, that this goes well beyond the **Carlisle** decision which merely states in general terms that the specificity test seeks to distinguish between universal and non-universal programmes. As is clear from **Carlisle** as well as numerous other cases, non-universality is a precondition for a specificity finding but non-universality and specificity are not synonymous. Many non-universal programmes have been found not to be specific. See for example **PPG IV** (upholding Commerce finding that a Mexican government programme was non-specific even though it was used by only 3.5% of all Mexican companies); **Carbon Steel Wire Rod from Malaysia**, 56 Fed. Reg. 14927, 14928-9 (Dep't Comm. 1991)

(Programme held not specific under multi factor analysis even though available only to companies producing items (i) not then produced in Malaysia; (ii) that were favourable for further development or export; and (iii) that were suitable to the public interest for economic development. Accordingly, the majority had a substantial legal basis for determining that Commerce's mechanical analysis of the number of users factor was insufficient and, therefore, contrary to law.

When dealing with the "dominant or disproportionate use" factor Canada supports the panel in its finding that Commerce failed to establish substantial evidence to support its conclusion. Canada states that the record refutes Commerce's conclusion that softwood lumber producers were dominant or disproportionate beneficiaries of the stumpage system. Commerce apparently ignored the fact that actual wood fibre used by sawmills for the production of lumber is between 28% and 37% whereas actual use by pulp and paper producers is in the range of 40% to 50%. Accordingly the panel was more than amply justified in rejecting as unsupported by substantial evidence Commerce's conclusion that lumber producers were the dominant users of stumpage.

Canada takes the position with regard to log export restrictions that the panel was fully justified in rejecting Commerce's determination that the LERs conferred a countervailable subsidy on a specific industry or group of industries. After Commerce abandoned its *de jure* specificity rationale regarding log export restrictions it conducted a cursory *de facto* specificity analysis that hinged almost entirely on its defective stumpage specificity analysis. Inasmuch as Commerce's log export restriction specificity

determination was tied to its inadequate stumpage analysis the panel was well within its powers, authority and jurisdiction in refusing to sustain Commerce's determination.

Furthermore, Canada points out that the panel was correct in stating that there was ample evidence on the record to suggest that enterprises using stumpage and those that might benefit from British Columbia's log export restrictions are not co-extensive. There is no reason to believe that all stumpage users purchase logs and are, therefore, potential beneficiaries of the lower prices allegedly engendered by the log export restrictions.

Canada finally says that there is no merit to the United States current complaint that "the majority disregarded the law, the facts and the review standard" when it ignored "powerful evidence of government action" regarding differential export tax rates in its review of the Commerce's ruling on the specificity of British Columbia log export restrictions. While the remand determination cited the differences between the export tax structures of saw logs and pulp logs it failed to explain how these differences limited the benefits at issue (lower log prices) to lumber producers. The panel concluded that the Department's analysis has not been applied in a logical manner to the facts as they relate to the log export restrictions and thus could not legally support an affirmative finding of specificity.

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 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 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 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.

The binational panels are established under Annex 1901.2 of the FTA which states:

1. Prior to the entry into force of this Agreement, the Parties shall develop a roster of individuals to serve as panelists in disputes under this Chapter. The Parties shall consult in developing the roster, which shall include 50 candidates. Each Party shall select 25 candidates, and all candidates shall be citizens of Canada or the United States of America. 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 either Party, and in no event shall a candidate take instructions from either Party. Judges shall not be considered to be affiliated with either 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 Party shall appoint two panelists, in consultation with the other Party. The 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 paragraph 1. Each 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 Party. Peremptory challenges and the selection of alternative panelists shall occur within 45 days of the request for the panel. If a 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 Parties shall agree on the selection of a fifth panelist. If the Parties are unable to agree, the four appointed panelists shall select, by agreement, from the roster the fifth panelist within 60 days of the request for a panel. If there is no agreement among the four appointed panelists, the fifth panelist shall be selected by lot on the 61st day from the roster, excluding candidates eliminated by peremptory challenges.

4. Upon 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 be based upon 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 1910. If a Party believes that a panelist is in violation of the code of conduct, the Parties shall consult and if the Parties agree, the panelist shall be removed and a new panelist shall be selected in accordance with the procedures of this Annex.

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 serve as members, thereby depriving the Parties and participants of the services of those who might be best qualified to serve 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 serve 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 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.

The two members of the panel against whom allegations are made under the code of conduct are the Chairman, Richard G. Dearden and Lawson Hunter. They, along with J. Robert S. Prichard are the three Canadian members of the panel who represented the majority in the final decision. No allegation was raised against Mr. Dearden and Mr. Hunter until after the panel had twice decided the issue against the position of the United States although there was ample opportunity to do so. When the U.S. did make a formal application to have the two panelists removed well after the matter had been finalized an investigation was conducted by the Canadian government who were satisfied that there was no merit to the allegations of misconduct and were not prepared to abandon the two years of effort which had been put into the resolution of this trade dispute.

Shortly after the panel was established in May of 1992 Messrs. Dearden and Hunter filed disclosure statements with the Secretary of the Canadian Secretariat who forwarded them to the United States Government:

> Candidate Dearden stated that his law firm, Gowling, Strathy & Henderson, had not provided any legal advice with respect to the countervailing duty action that was the subject of this proceeding to the governments or companies on the interested party list, or to any company in the forestry and softwood lumber, pulp and paper, or lumber processing industries. He disclosed, however, that his firm represented the Government of Canada and provincial governments; the United Brotherhood of Carpenters and Joiners of America, a U.S. interested party to this proceeding; Leggett & Platt, Inc. (another interested party), a U.S. importer of Canadian softwood lumber products that actively opposed Commerce's imposition of countervailing duties on its imports; and a number of other identified pulp and paper and other forest products companies, all in a variety of specified unrelated matters. . . .
>
> Candidate Hunter similarly disclosed that while neither he nor his law firm, Fraser & Beatty, had any conflict of interest, the firm

> represented several identified forest products and paper companies in unrelated matters. . . .
>
> The United States raised no objections to Dearden's or Hunter's participation on the Panel, and on July 29, 1992, the Panel was convened, with Mr. Dearden (C) selected as Chairman, and Messrs. Hunter (C), Weiler (C), Barry E. Carter (US) and Morton Pomeranz (US) as the other Panelists. Mr. Weiler was later replaced by Mr. Pritchard and Mr. Carter was replaced by Mr. Reisman.

On January 1, 1993, Panelist Hunter changed law firms from Fraser & Beatty to Stikeman, Elliott. Shortly thereafter, on January 12, 1993, in accordance with the general practice for disclosures by sitting panelists, Hunter telephoned James R. Holbein, the United States Secretary of the Binational Secretariat, to inform him that he had joined Stikeman, Elliott and to make appropriate disclosure. During that conversation, Hunter informed Mr. Holbein that { }, another Stikeman, Elliott partner, had provided a disclosure statement to the Canadian Secretariat on June 18, 1992 in connection with this proceeding, and that he would be pleased to provide a copy of that disclosure statement to Secretary Holbein if the Parties requested. Apparently Mr. Holbein suggested that this information be confirmed in writing but Mr. Hunter inadvertently failed to do so.

On May 6, 1993, the Panel issued a decision in which it unanimously remanded several Commerce determinations for further consideration, but ruled by a 3-to-2 vote that the British Columbia log export restrictions could be deemed a countervailable subsidy as a legal matter, assuming that the other requirements such as specificity were met. Panelist Hunter voted with the two United States panelists in ruling against the

Canadian parties on this issue.

On December 17, 1993, the Panel issued its second decision, ruling by majority vote that Commerce's subsidy determinations on remand were not supported by substantial evidence or were otherwise contrary to law. Panelists Dearden, Hunter and Prichard voted in the majority, while Panelists Pomeranz and Reisman dissented.

On December 30, 1993, in the wake of the Panel's final decision, the Coalition for Fair Lumber Imports filed a public letter with Secretary Holbein that for the first time raised purported concerns about Chairman Dearden's firm's representation of Canadian lumber industry companies. Although the letter stated that the allegations were based upon "information recently received by the Coalition," all of the allegations concerned matters of public record, dated from 1965 to 1985, with no explanation as to why this issue had not been raised earlier. The Canadian's brief states:

> Even a cursory examination reveals that the allegations are without merit:
>
> * The Coalition alleged that Chairman Dearden's law firm represented Abitibi Price in an unrelated antidumping proceeding in 1981. However, Chairman Dearden had revealed in his disclosure form that Gowling, Strathy represented Abitibi Price, and the unrelated proceeding was over ten years earlier.
>
> * The Coalition alleged that Yvan Morin, a partner of the Chairman, represented Commonwealth Plywood Co. in a 1985 proceeding. In fact, Mr. Morin worked on this matter while an articling student (i.e., a law clerk) at a different law firm. Commonwealth Plywood is not now and never has been a client of Gowling, Strathy.

* The Coalition alleged that Mr. Y.A. Hynna, a Gowling, Strathy partner, represented Weldwood of Canada Sales Ltd. in a 1981 proceeding, some thirteen years ago. Mr. Hynna has not represented Weldwood since the termination of that proceeding, and Weldwood is not currently (and was not at any time during the panel proceeding) a client of Gowling, Strathy.

* The Coalition alleged that Mr. G.F. Henderson, another Gowling, Strathy partner, represented MacMillan & Bloedel (Alberni) Ltd. Mr. Henderson is deceased and the representation occurred in 1965, almost 30 years ago. Moreover, Dearden's firm has not represented MacMillan Bloedel since the 1965 matter.

* The Coalition alleged that Chairman Dearden's law firm, Gowling, Strathy received fees from the Government of Canada. However, Chairman Dearden had already disclosed that his firm had represented the Government of Canada and a number of provincial governments. There was no allegation that the representations were related to this matter, and in fact they were not.

* The Coalition made similar meritless allegations concerning representations of the Government of Canada by Panelist Hunter's former firm, Fraser & Beatty, and his current firm, Stikeman, Elliott, and that Stikeman, Elliott had represented several lumber-related companies. These representations, all in entirely unrelated matters, were no different in kind or degree from the disclosures previously made by Chairman Dearden and Panelist Hunter, and which had drawn no objection from the United States.

By letters dated January 14 and February 8, 1994 from Secretary Holbein, the Parties requested that Chairman Dearden and Panelist Hunter respond tothe Coalition's allegations.

Chairman Dearden responded in detail with respect to each matter raised by the Coalition, demonstrating their triviality:

> As I previously disclosed, this firm has acted for various pulp and paper forest industry companies with respect to non-trade remedy issues (see my confidential disclosure statement of July 15, 1992). As stated in my disclosure statement, I can again confirm that Gowling, Strathy & Henderson has not provided any legal advise to the governments or companies listed in the interested party list, nor to any company in the forestry and softwood lumber industry, the pulp and paper industry, or lumber processing industry with respect to the countervailing duty action which is the subject matter of this panel proceeding. He added that, far from appearing to be partisan toward Canada, he had represented the Office of the United States Trade Representative in the past, he had worked closely with the United States Department of Commerce in connection with the negotiation of the FTA itself, and several members of his firm have represented and currently represent the United States Government in various matters unrelated to this proceeding.

Panelist Hunter likewise provided detailed responses to the requests for information, stating, inter alia, that he had performed

> a thorough check of work undertaken by Stikeman, Elliott and I can confirm that Stikeman, Elliott has not provided any legal advice to any Canadian softwood lumber or forest product producers with respect to the countervailing duty action which is the subject matter of this panel proceeding.

However, without even waiting for all the facts, and before the Parties had consulted on the issue as required by FTA Annex 1901.2(6), the United States publicly announced its intention to bring this extraordinary challenge based upon misconduct allegations.

The additional allegation of serious conflict of interest against Mr. Hunter arose because, for a short time in 1992, he had been engaged by the Department of Transport as an authority in Canadian competition law in connection with an economic analysis of a proposed merger between Air Canada and Canadian Airlines. He was to present a

seminar on the **Competition Act** and related regulatory issues for a relatively insignificant fee.

Mr. Hunter had for years been a member of the Canadian Civil Service and was one of the leading experts in the field of competition law. His advise to the Canadian Department of Transport in this instance had absolutely nothing to do with the matter before the binational panel and was concluded before the panel was hardly underway.

All of the other allegations raised by the Coalition are to the effect that Messrs. Dearden and Hunter failed to reveal some of the matters in which their partners had been engaged. These were, however, matters which had no connection at all with the work of the panel and usually related to very technical expertise of their firm in the copyright, patent, taxation and other specialized fields. Both of these men were well known to the United States Government and, particularly, the Department of Commerce and no objection was ever raised about their independence and ability to make an unbiased decision in relation to trade issues. In fact, the United States Government states categorically that it does not wish in any way to distract from the excellent reputation both of these gentlemen have in the field of international law. There is, in fact, no allegations of bias.

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 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 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 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 it 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 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.

Signed in the original by:

JUSTICE GORDON L.S. HART

JUSTICE GORDON L.S. HART

Issued on this 3rd day of August, 1994

UNITED STATES-CANADA FREE TRADE AGREEMENT
ARTICLE 1904.13
EXTRAORDINARY CHALLENGE PROCEEDING

IN THE MATTER OF:	)	
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA	)	Secretariat File No. ECC-94-1904-01 USA

OPINION OF THE HONORABLE HERBERT B. MORGAN

AUGUST 3, 1994

MEMORANDUM OPINION REGARDING
BINATIONAL PANEL REMAND DECISION AND ORDER

INTRODUCTION

This memorandum opinion and order arises from the extraordinary challenge proceeding conducted pursuant to Article 1904.13 and Annex 1904.13 of the United States-Canada Free Trade Agreement ("FTA") in the matter of Certain Softwood Lumber Products from Canada. The proceeding followed a request for an Extraordinary challenge Committee filed by the office of the United Stated Trade Representative ("USTR") on behalf of the United States requesting a review of the December 17, 1993 Decision of the Panel on Remand issued by the Binational Panel ("Decision II"). The events leading up to and giving rise to the request were as follows:

In 1983 in response to a petition filed by the U.S. lumber producers "the Coalition", the International Trade Administration of the Department of Commerce ("Commerce") made an investigation of the Canadian-Provincial practice of disposing of lumber growing on Crown lands under stumpage agreements and determined that the stumpage were not provided to an industry or group of industries and did not provide goods at preferential rates. Commerce accordingly held that imports of Canadian lumber were not subject to a countervailing duty. ("Lumber I"). In reaching that conclusion Commerce found that the record evidence established that

stumpage were used by a large number of companies operating within three groups of industries comprising some 27 enterprises.

In 1986, with little or no intervening change in the number of industries or enterprises involved in the stumpage programs, Commerce, at the request of the Coalition, conducted a second investigation and issued a preliminary affirmative countervailing duty determination (Lumber II). At that time, the United States and Canada entered into a Memorandum of Understanding ("MOU") under which Canada agreed to impose an export tax of 15% on all lumber exported to the United States to offset any advantage that might accrue to Canadian lumber producers as the result of the then existing stumpage programs. Commerce thereupon terminated its investigation and declared its preliminary determination to be "without legal force and effect". During the following years, the Canadian provinces made significant changes to their stumpage programs to the extent that the Canadian Government determined that there was no longer any basis for holding that Canadian softwood lumber programs could be deemed countervailable subsidies. Canada accordingly exercised its right to terminate the MOU effective October 4, 1991.

Upon termination of the MOU, Commerce instigated its third investigation of the provincial stumpage programs. At that time, the Coalition requested Commerce to include in its investigation the log export restrictions (LERs) imposed by British Columbia on the export of logs from that province. The Coalition contended that these restrictions artificially depressed the price of logs

thus giving an advantage to lumber producers. On May 28, 1992, Commerce issued the final results of its administrative review of its countervailing duty order on certain softwood lumber (See, Softwood Lumber Products from Canada 57 Fed. Reg. 22,570 (Dep't Comm. (1992))("Lumber III"). Commerce found that the Canadian provinces of British Columbia, ("B.C."), Alberta and Ontario provide timber to Canadian companies at preferential rates through their stumpage programs and that the benefits from the provincial stumpage subsidies are, within the meaning of the statute, *de facto* provided to the "specific group of industries" that purchase and process timber. Commerce also found that B.C. subsidizes Canadian lumber production through its prohibition on log exports which artificially reduces the price of logs. Commerce's conclusion of specificity with respect to stumpage was based on its finding that the number of industries benefitting from stumpage was "too few". It held that it was precluded from analyzing whether the benefits conferred by the stumpage program distorted the market by affecting lumber production volume or price. With regard to the LERs, Commerce found that the accruing benefit was *de jure* specific.

That decision was challenged by the Government of Canada and other Canadian participants before a binational panel (the "Panel") established under the provisions of the United States-Canada Free Trade Agreement ("FTA"). The Decision of the Panel was published on May 6, 1993 ("Decision I") and therein unanimously remanded certain questions back, three of which are relevant to this challenge. Certain Softwood Lumber Products from Canada File No.

USA-92-1904-01 slip on. (FTA Panel May 6, 1992).

First, the Panel remanded Commerce's specificity determination concerning stumpage on the grounds that Commerce is required to articulate an analysis under all four illustrative specificity factors, as well as any other relevant factor, identified in Commerce's proposed regulations. Second, the Panel remanded the B.C. log export ban on the basis that the specificity analysis was inadequate. It invited Commerce to present a *de facto* analysis of the export ban. Third, as a second basis for remanding the finding that the stumpage programs were countervailable, the Panel directed Commerce to evaluate whether the programs could and did have a distorting effect on the operation of normal competitive markets. Pursuant to the remand, Commerce produced its Redetermination Pursuant to Binational Panel Remand ("Redetermination") on September 17, 1993.

As requested by the Panel, Commerce analyzed the four factors identified in its Proposed Regulations relating to specificity, and analyzed as well the inherent characteristics factor. It then reaffirmed it's prior determination that the stumpage programs were countervailable for the reason that the recipients of these benefits were "too few" in number. Commerce agreed with the Panel that the LERs are not *de jure* specific but determined that they are *de facto* specific for substantially the same reasons given with respect to the stumpage program. Commerce adhered to its original position that it was not required to do an analysis of "market distortion". However, in accordance with the Panel's instructions,

Commerce reviewed the record evidence and concluded that the provincial programs had the effect of distorting the market.

In "Decision II", the Panel, by a majority of three to two, held that Commerce's Redetermination was unsupported by substantial evidence on the record and otherwise not in accordance with law. They accordingly found that an affirmative determination could not be sustained and remanded with instructions to issue negative determinations. The two panelists in the Dissent stated that they would have affirmed the findings of Commerce with respect to specificity and preferentiality made on remand. On January 6, 1994, Commerce issued its second Redetermination reaffirming its original position concerning issues raised in the Majority in Decision II. In accordance with the Majority's instructions, however, Commerce determined that neither provincial stumpage programs nor the B.C. LERs constituted a countervailable subsidy under U.S. law. On February 23, 1994 the Panel signed an Order affirming that Redetermination.

The request of the USTR for an Extraordinary Challenge Committee states:

> 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 that Commerce examine whether the subsidies distort the market. These actions materially affected the Majority's decision and threaten the integrity of the binational panel review process.

The USTR now requests that the Committee vacate the decisions of the Panel or, in the alternative, remand the Majority's decision to the Panel for action not inconsistent with the Committee's decision.

THE ROLE OF AN EXTRAORDINARY CHALLENGE COMMITTEE

After extensive negotiations, the United States and Canada entered FTA, effective January 1, 1989. The preamble to that historic document accentuates its high purpose (i.e. "To contribute to the harmonious development and expansion of world trade and to provide a catalyst to broader cooperation"). As a further example of the purpose and intent of that Agreement, Section 2 of the American implementing legislation (United States-Canada Free Trade Agreement Act, P.L. 100-449, as amended § 405) provides that the purpose of that act was, inter alia, "to strengthen and develop economic relations between the United States and Canada for their mutual benefit" and "to establish a free-trade area between the two nations through the reduction and elimination of barriers to trade in goods and services and to investment".

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 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 by the terms of the FTA. Article 1904.13 provides:

> Where, within a reasonable 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. (Emphasis added)

That Article provides a three pronged test for the establishment of a successful extraordinary challenge. As was pointed out In the Matter of Fresh, Chilled or Frozen Pork from Canada ECC 91-1904-01USA ("ECC I") and quoted with approval In the Matter of Live Swine from Canada ECC 93-1904-01USA ("ECC II"):

> This three-prong requirement provides explicit, narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge '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).}

The Extraordinary Challenge Committee function is to determine whether a panel or panel member violated the three-prong standard of the extraordinary challenge procedure (ECC I). It is not an appellate court nor is it endowed with that court's extensive

jurisdiction. Its jurisdiction is restricted to the correction of an "aberrant panel decision" and any "aberrant behavior of panelists" that would threaten the integrity of the binational panel system when such action, is unwarranted. (See, ECC I at 9 and ECC II at 7) 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, whereas normally any participant affected by a decision may appeal to the appropriate court for redress. Furthermore, unlike the courts, a time limitation of 30 days is placed on the committee's proceedings in keeping with the Parties desire to have trade disputes settled quickly and with finality. 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 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

The USTR contends that, the Panel Majority in Decision II ("Majority") failed to follow the plain language of the statute or to follow judicial precedent which had rejected an effects test, in concluding that Commerce was required to determine whether the provincial stumpage programs distorted the market.

In concluding that Commerce's finding of market distortion was not supported by substantial evidence on the record (Decision II), the Majority referred back to the unanimous opinion in Decision I in which the Panel had given detailed reasons for its conclusion that market distortion is a fundamental assumption of countervailability under the statute. In Decision I, the Panel dealt at some length with the legal requirements of a countervailable subsidy and cited 19 U.S.C. 1677(5) which reads in part:

(5) Subsidy.

(A) In general. The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this Act [19 U.S.C. § 1303], and includes, but is not limited to, the following:

***

(ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or a group of enterprises or industries, whether publicly or privately owned, and whether paid and bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

***

(II) The provision of goods or services at preferential rates.

The Panel posed the question as to "whether a government's pricing policies for access to a "natural resource" can amount to a countervailable subsidy if it has no effect on the output or price of the products generated from the natural resource". (Decision II at 45) In addressing that question, the Panel referred to a line of U.S. authorities that held that the countervailing duty law was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from subsidies paid by their governments. In most cases, provision of a government benefit will distort the usual supply and demand market forces and there will be no dispute over the matter. However, this is the first time that Commerce has attempted to apply the countervailing law to fees charged for access to a government-owned natural resource.

The Panel also referred to the introduction of the recently

Proposed Regulations for making CVD assessments which reads:

> Conceptually, the regulations are based upon the economic model articulated by the Department in its final determinations in Carbon Steel Wire Rod from Czechoslovakia and Carbon Steel Wire Rod from Poland {...} and sustained by the Court in Georgetown Steel Corp. v. United States {...} This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, underlies the Department's entire methodology. (emphasis added)

Although Commerce had disagreed with the "contention that the countervailing duty law requires a market distortion test (See, 57 Fed. Reg. 22,570 at 22.587) the Panel noted that Commerce had used the "market distortion" approach in deciding that the restraint of log exports was a subsidy for the very reason that it had a distorting effect on the market economy. The Panel concluded that Commerce should have considered whether or not these provincial programs could and did have a distorting effect on the operation of the normal competitive markets before concluding that these governmental policies involve the type of "preferential" pricing that constitute a countervailable subsidy within the meaning of the Tariff Act. (See, Decision II at 59 -60)

Although the dissenting Panelists ("Dissent") in Decision II had initially agreed that a finding of market distortion was a prerequisite to a determination of a countervailable subsidy in this case (Decision I), they felt impelled to change their position in that regard in light of the recent decision of Daewoo Elecs. Co. v. International Union of Elec.,6 F.3.d 1511 (Fed. Cir. 1993), petition for Cert. filed, 62 U.S. L.W. 3662 (U.S. Feb. 16, 1994) No. 93-1328 ("Daewoo") and would have confirmed Commerce's finding

of preferentiality in stumpage programs. They stated:

> "Were we not strongly persuaded that Daewoo trumps our earlier instruction on market distortion, we would concur in most of the Majority's reasoning on stumpage preferentiality in the present opinion.... While we find the Majority's critique persuasive, assuming arguendo a market distortion requirement, unlike the Majority, we would have instructed Commerce on remand to provide explanations for the assumptions it makes in recalculating the Nordhaus Study's regression analysis..." (Decision II, Dissent at 50).

Although Daewoo is an anti-dumping case, the standard of review as stated therein is equally applicable in countervailing duty cases and is the most recent authority enunciating the U.S. standard of review. However, in that regard, it does not add to what was laid down by the Supreme Court in Chevron U.S.A. Inc. v. National Resources Defence Council, Inc., 467 U.S. 837 (1984) ("Chevron") and its progenies, relied on by the Majority in their decision. The issue in Daewoo was whether the ITA was required to make an econometric tax analysis of home market consumers to determine the amount of the Korean tax on television sets, forgiven upon export, to be added to the U.S. price. In accordance with its long standing accounting methodology the ITA determined that the full tax had to be added to the U.S. price. On appeal to the Court of International Trade that court disagreed with the ITA's accounting methodology and directed the ITA to make an econometric analysis of tax incidence on home market consumers. After several remands the amount of tax to be added to the U.S. price was greatly reduced. On further appeal, the Court of Appeal of the Federal Circuit held that the ITA reasonably interpreted the antidumping

statute, in using accounting methodology to add all commodity taxes assessed on home market sales but forgiven upon export, and that the ITA was not required to make an econometric analysis on tax incidence on home market consumers. The Court further held that the ITA's determination was supported by substantial evidence.

In that case, it was accepted that the tax imposed on consumers, but forgiven on export, gave the exporting television manufacturers a competitive advantage, the question was to what extent. The argument in the instant case is that the stumpage programs do not confer any competitive advantage and are thus not countervailable. Daewoo did not deal with this issue.

As I have earlier stated, the Panel relied on a line of U.S. authorities supporting their conclusion that, in the particular circumstances of this case, Commerce was required to consider whether the stumpage programs created a competitive advantage or in economic terms "market distortion".

Although Commerce did not accept that it was required to make a determination of market distortion, it made an analysis in this case as requested by the Panel and concluded that the stumpage programs did in fact distort the market. Decision II analyzed Commerce's reasons and the Majority held, for the reasons given, that they were not supported by substantial evidence on the record. The Dissent would have concurred, in the main, with the reasoning of the Majority on that issue, but for Daewoo. Unlike the Majority, however, the Dissent would have remanded the matter back to Commerce for further analysis.

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

The USTR on behalf of the United States government contends that the Majority manifestly exceeded its jurisdiction and authority by reversing Commerce's specificity determinations with respect to both the stumpage programs and the LERs. USTR alleges that the Majority failed to perform a proper analysis of the Department's findings as required under the appropriate standard of review and imposed new requirements on Commerce that went beyond the panel's mandate.

In (Decision I), the panel dealt at length with the appropriate standard of review under U.S. law. In (Decision II), it adopted, by reference its earlier remarks and stated:

> Article 1904(3) of the FTA requires this Panel to "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing country otherwise would apply to a review of a determination of the competent investigating authority." While the scope of this Panel's review is limited to the Administrative Record before the agency, the Panel may also consider, as provided under Article 1904(2):
>
> > 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.

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. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. However, [a] reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view. 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 construction or the one this

court would adopt had the question initially arisen in a judicial proceeding."

...

It is common ground that the Tariff Act 19 U.S.C. § 1677(5) applies to the underlying dispute. This provision requires that Commerce determine whether "a bounty, grant or subsidy" was provided to "a specific enterprise or industry, or a group of enterprises or industries" but is silent as to how Commerce should do so. Because this statutory provision is silent, the Majority properly recognized that they were required to give deference to Commerce's statutory interpretation. In their reference to the appropriate standard of review (Decision II at 13), the majority referred to American Lamb Co. v United States 785 F.2d 944 1001 (Fed. Cir. 1986 citing Chevron USA Inc. v National Res. Def. Council 467 US 837 (1984) as well to Georgetown Steel Corp. v U.S. 801 F. ed 1308, 1314-18, and stated:

> "Where there is an absence of clearly discernible legislative intent, binational panels must limit their inquiry to the question of whether Commerce's statutory interpretations are "sufficiently" reasonable". An agency's interpretation is "sufficiently" reasonable if it has a rational basis which comports with the object and purpose of the statute. Reviewing courts have rejected Commerce's "exercise of administrative discretion if it contravenes statutory objectives".

The Panel's decision is replete with instances in which it deferred to Commerce's determination, although it might not have come to the same conclusions had it been a hearing de novo. For example, the Panel affirmed Commerce's ruling that LERs can yield a countervailable subsidy if found specific, despite strong

argument by Canada against that determination.

The Majority reviewed Commerce's Redetermination on Remand and concluded that its new specificity finding was still "legally flawed" and that it was "unable to provide a rational legal basis" for its conclusion. (Decision II at 47-48) They held that its finding that the number of users of the stumpage program was "too few" was conclusory with no reasoned analysis, as required by U.S. Courts, as to why the numbers it cited were relevant to a finding of specificity in this case, much less dispositive. (Decision II at 42) The Majority agreed that Commerce had sufficiently analyzed the two factors of government discretion and government action and had reasonably found that they were not determinative of specificity in this case. They concluded however, that the record did not reasonably support the conclusion of Commerce regarding dominant and disproportionate use. As to the LERs, the Majority overruled Commerce's specificity finding essentially because it was based on what the Majority had found to be its flawed analysis of stumpage specificity.

I find it passing strange that any administrative tribunal can state that a decision of a court of appeal of the Federal Circuit or indeed of any Federal Court is wrongly decided, and that it did not propose to follow it, as in this case. (Redetermination at 6) I refer to the case of PPG Indus., Inc. v. United States, 978 F.2d 1232 (Fed. Cir. 1992) ("PPG IV"), one of the authorities on which the Panel relied, in requiring Commerce to consider all of the factors on which a determination of specificity is based, in

accordance with their Proposed Regulations which provide:

> In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:
>
> (i) The extent to which a government act 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;
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.

It is not the role of this committee to determine what weight should be given any decided case as against another. That is for the Binational Panel to decide. Our role is not to address mere legal issues that do not affect the integrity of the FTA dispute resolution mechanism, but to ensure that the panel's decision is in accordance with its mandate as prescribed by the FTA.

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 the USTR, that the panel did not conscientiously apply U.S. law.

After a careful review of the record, both written and oral, I am not persuaded, for the reasons set forth above, that the alleged errors by the Panel meet the test for a successful Extraordinary Challenge set forth in Article 1904.13.

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").

These allegations resulted from letters from the Coalition to the U.S. Secretariat subsequent to the Panel's final determination (Decision II). The correspondence raised purported concerns over Messrs. Dearden's and Hunter's firms representation of Canadian and Provincial Governments and of certain Canadian lumber companies that may not have been disclosed. By letters dated January 14 and February 8, 1994, the U.S. Secretariat requested that Mr. Dearden and Mr. Hunter respond to the matters raised by the Coalition.

Both Panelists provided detailed responses to the requests for further information. On February 18, 1994, the United States sought Canada's agreement to the removal of the two Panelists and that the newly appointed Panel be advised to vacate the initial Panel's decisions of May 6, 1993 and December 17, 1993. Canada refused to agree on the grounds "that none of the allegedly prejudicial relationships would, under U.S. law, create the appearance of bias". (Letter of Ambassador Raymond Chretien to Ambassador Rufus Yerxa dated February 22, 1994.).

On July 15, 1992, prior to his acceptance as a Panelist, Mr. Dearden signed a Disclosure Statement in which he indicated that his law firm, Gowling, Strathy & Henderson had represented the Governments of Canada, Manitoba, Alberta and Saskatchewan on unrelated matters. He also provided a client list of Canadian pulp and paper and forestry companies to which his firm provided advise. By letter dated July 17, 1992, he further disclosed that his firm had also done some work for Leggett Platt Inc., a U.S. importer of Canadian softwood lumber products that actively opposed the imposition of countervailing duties on its products. His attached biography revealed that he had also worked under contract with the Office of the United States Trade Representative. The United States raised no objection to Mr. Dearden's appointment to the Panel.

In his detailed response to the matters of concern raised by the Coalition, Mr. Dearden enumerated a number of other parties that his firm had represented and explained in detail the nature

and type of advice given. He stated:

> "As I previously disclosed, this firm has acted for various pulp and paper forest industry companies with respect to non-trade remedy issues (see my confidential disclosure statement of July 15, 1992). As stated in my disclosure statement, I can again confirm that Gowling, Strathy & Henderson has not provided any legal advice to the governments or companies listed in the interested party list, nor to any company in the forestry and softwood lumber industry, the pulp and paper industry, or lumber processing industry with respect to the countervailing duty action which is the subject matter of this panel proceeding."

He further stated that far from appearing to be partisan toward Canada, he had represented the Office of the United States Trade Representative in the past, he had worked closely with the United States Department of Commerce in connection with the negotiation of the FTA itself, and several members of his firm have represented and currently represent the United States Government in various matters, unrelated to this proceeding.

On June 24, 1992, Mr. Hunter provided a Disclosure Statement in which he disclosed that his law firm of Fraser & Beatty did work for Domtar Inc., Scott Paper Limited and Diashowa Forest Products Ltd. on unrelated matters. On January 1, 1993, he joined the firm of Stikeman, Elliott. He advised the U.S. Secretariat by telephone of his change of firms and informed the Secretary that a member of his new firm had already filed a Disclosure Statement with the Canadian Secretariat. That statement disclosed that although the firm represented certain forest product companies on unrelated matters, it was not giving advice with respect to trade law on matters relating to issues before the Panel. He was advised by the

U.S. Secretariat to provide that information in writing for transmittal to the Parties but failed to do so.

He, too, provided a detailed response to the matters of concern raised by the Coalition. After a thorough check of work performed by Stikeman, Elliott he added a list of other Canadian companies, not previously disclosed, to which his firm had given advice on unrelated matters and confirmed that this law firm had not provided any legal advice to any Canadian softwood lumber on forest product producers with respect to the countervailing duty action which is the subject matter of this proceeding. As to the request for further information regarding work done for Stone Consolidated, Mr. Hunter replied:

> "As I mentioned to you in my letter of January 24, 1994, Stikeman, Elliott does non-trade related work for Stone Consolidated. The Guay action involves a commercial dispute between Stone and the defendant regarding damages to a piece of machinery. It is in no way related to the issued before the softwood lumber panel.
>
> The Dewey Ballantine letter also states that Stone Consolidated is one of many Canadian softwood lumber producers currently seeking a company-specific administrative review before the Department of Commerce. I am totally unaware of whether this is true or not, and Stikeman, Elliott is not involved in or representing Stone Consolidated with respect to any such review should it be ongoing. I certainly was not made aware that such a review was being undertaken by Stone Consolidated, or any other Canadian forest product producer for that matter, by the record before the panel."(Letter to James R. Holbein dated January 27, 1994.)

In addition to its allegation that Mr. Hunter had failed to make full disclosure, the USTR alleges that Mr. Hunter was in a serious conflict of interest by entering into a contractual relationship with the Canadian Government while serving as a member

of the Panel. Mr. Hunter is a former Assistant Deputy Minister of Canada's Bureau of Competition Policy and Director of Investigation and Research. (Letter to Cathy Beehan, Canadian Secretariat from Lawson A.W. Hunter dated June 24, 1992.) Due to his unique expertise in competition law, Lexenomics Inc., a company of which Mr. Hunter was president, was retained by the Canadian Government, for a relatively insignificant fee, to present a seminar on the Competition Act and related regulatory issues in connection with the proposed merger of Air Canada and Canadian Airlines .

The Introductory Note to the Disclosure Obligations set forth in the Code of Conduct for proceedings under Chapters 18 and 19 of the FTA reads:

> "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 serve as members, thereby depriving the Parties and participants of the services of those who might be best qualified to serve 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."

Once appointed, a member must continue to make a reasonable effort to become aware of and to disclose any interests or relationships that are likely to affect his or her independence or impartiality or might reasonably create the appearance of bias.

Annex 1901.2(6) requires that every panelist comply with the Code of Conduct. Under the Code wide ranging disclosure is required both before and during a panel proceeding. Several provisions emphasize the fact that candidates and members must avoid the appearance of impropriety, partiality or bias. Indeed the Code of Conduct is replete with provisions aimed at ensuring and maintaining the integrity and impartiality of the panel system.

In the formal request for the establishment of an Extraordinary Challenge Committee, count one of the allegations of grounds for relief is "Material breach of the Code of Conduct and Serious Conflict of Interest". As I have earlier stated, the first allegation applies to both Messrs. Dearden and Hunter. The second, to Mr. Hunter only. The request of the USTR on behalf of the United States Government is that, pursuant to Annex 1904.13(3) the Committee vacate the decisions of the Panel to enable the Parties to establish a new Panel, in the event that its appeal on the substantive issues is unsuccessful.

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 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.

Mr. Dearden made a conscious effort to list all interests and

relationships that were likely to be construed as affecting his impartiality, including, most importantly his firms association with an American company that imported Canadian lumber products and that actively opposed the imposition of countervailing duties.

His subsequent disclosures of work performed for other provincial governments and various companies in respect of unrelated matters were similar to those disclosed prior to his acceptance as a panelist and there is no reason to conclude that he would not have been accepted had he made a complete disclosure.

The record discloses that other panelists that had made lengthy disclosures containing information similar to those now disclosed by Mr. Dearden, were accepted as panelists.

Nonetheless, in strict compliance with the Code of Conduct and the obligations imposed on him by that Code, Mr. Dearden should have included the matters now complained of in his initial Disclosure Statement. It was the United States prerogative, not his, to determine the relevancy of that information to the proceedings in question and to determine whether it was of such a nature as might reasonably affect his impartiality or create an appearance of bias. In light of the nature of the undisclosed information, however, and the explanation tendered by him regarding its omission from his initial Disclosure Statement, I am not persuaded that the non disclosure in this case constitutes a "Material" breach within the meaning of the Code of Conduct. The undisclosed information of advice given and services rendered to various governments and companies were in relation to unrelated

matters and were similar to disclosures that both Parties had accepted on a number of occasion as would not give rise to an appearance of impartiality or bias. Had that information been in respect of advice given relating to an issue before the Panel I would have decided otherwise.

After careful consideration of the written and oral record of the parties and participants I have reached the same conclusion with respect to the allegations against Mr. Hunter. Unquestionably Mr. Hunter was remiss in his duties by failing to file an updated Disclosure Statement when he joined a new law firm. His statement to the Secretary of the U.S. Secretariat that a member of his new firm had already filed a Disclosure Statement did not relieve him of his duty to file a personal statement. However, the record discloses that the undisclosed information concerned work done by his firm for interested parties in unrelated matters and was similar to the interest disclosed by a number of other candidates that had been accepted as members of a panel.

Furthermore Mr. Hunter should have disclosed his contractual relationship with the Government of Canada, while serving on the panel, in connection with the proposed merger of Air Canada and Canadian Airlines. Albeit that work bore no relationship to the proceedings before the panel, it was nonetheless incumbent on Mr. Hunter to disclose it to enable the United States Government to exercise its prerogative of requesting his removal from the panel, if it thought fit. In my opinion, however, the United States Government would not have exercised its prerogative at that time.

I base my opinion on the fact that a member of the Panel was known by the Parties to be a sitting member of the Advisory Committee on International Law of the United States Department of State with no objection taken to his being a panelist.

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

If a candidate makes full disclosure of the existence of interests or relationships that are likely to affect his or her independence and impartiality or that might reasonably create the appearance of bias and is accepted by the two Governments as a panelist, he or she should be immune from any allegation of partiality or bias. Such, however, is not necessarily the case. The information contained in the Disclosure Statements is confidential and the other participants and affected parties are unaware of the disclosures made. A great deal of the information disclosed, however, are matters of public record and based on that record, interested parties may be left with the impression that some members of the panel were impartial.

That, however, should not detract from the importance of the Binational Panel System which is vital to the implementation of the Free Trade Agreement if its stated aims and objects are to be attained.

Both Parties to the FTA were cognizant of the fact that the persons most suited to be members 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 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.

SIGNED IN THE ORIGINAL BY:

HERBERT B. MORGAN
HON. HERBERT B. MORGAN

Issued this 3rd day of August, 1994

Extraordinary Challenge Committee
Review Under
Unites States-Canada Free Trade Agreement

Softwood Lumber
Products from Canada **ECC-94-1904-01USA**

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

OUTLINE

THE COMMERCE DEPARTMENT'S REDETERMINATION AND THE BINATIONAL PANEL'S REVIEW OF THE ADMINISTRATIVE AGENCY ACTION

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

II THE CANADIAN STANDARD OF REVIEW OF ADMINISTRATIVE AGENCY ACTION

III THE UNITED STATES STANDARD OF REVIEW OF ADMINISTRATIVE AGENCY ACTION

- A. Testimony of Ms. Jean Anderson Before Senate and House Committees in 1988
- B. The Federal Circuit's Most Recent Binding Precedent

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

V THE SENATE AND HOUSE EXTRAORDINARY COMMITTEE REPORTS ON NAFTA

- A. Timing
- B. Extraordinary Composition of the Congressional Committees
- C. Identical Chairmen of Committees and Majority of Identical Members
- D. Identical Language on the Substitute Scheme for Judicial Review of Agency Action
- E. No Change in Previous Statutory Language Needed
- F. Practical Effect
- G. What the Senate Said
- H. What the House Said
- I. The Legal Effect

VI FAILURE OF THE SUBSTITUTE APPELLATE REVIEW SYSTEM

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

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 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.

THE COMMERCE DEPARTMENT'S REDETERMINATION AND THE BINATIONAL PANEL'S REVIEW OF THE ADMINISTRATIVE AGENCY ACTION

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 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, 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 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.

Article 1911 of the Canada-U.S. Free Trade Agreement defined the standard of review for the Binational Panels as:

> "In the case of the United States of America, the standards set forth in Section 516A (b)(1)(B)of the Tariff Act of 1930, as amended, ..."

That section of the Tariff Act sets forth the standard of review for the Court of International Trade, and now for U.S.-Canada Binational Panels, which is that: the court shall hold unlawful any determination, finding, or conclusion found - ...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

Article 1904.3 of the Agreement provides:

> The panel shall apply the standard of review described in article 1911 and the general legal principles that a court of an importing party otherwise would apply to the review of a determination of the competent investigating authority.

The standard of review for the Extraordinary Challenge Committee is found in Section 1904.13 of the Agreement. The Extraordinary Challenge Committee is to take corrective action if "the panel manifestly exceeds its power, 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 ..."

Now let us relate these Binational Panel and Extraordinary Challenge Committee review standards to the time honored precepts of U.S. law. As quoted above, the Free Trade Agreement establishes a three prong test for determining when decisions by Binational Panels are in error. The first of these requirements for the Extraordinary Challenge Committee to find, if it is to prescribe corrective action, is "if: ...the panel manifestly exceeded its powers, authority or jurisdiction set forth in this article, ..." This is intended to require the employment of all United States law correctly, including the administrative law standard of review. That standard of review for the Binational Panel to apply, as quoted above is: "The court [Binational Panel] shall hold unlawful any determination, finding, or conclusion found - ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."

To those accustomed to judicial review of U.S. administrative agency action, the latter quoted standard of review made applicable to the Binational Panel can easily be seen to be directly derived from the Administrative Procedure Act of 1946. 5 USC Section 705, *Scope of Review* provides:

> The reviewing court shall - ...
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be:
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> ...
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> ...
> (E) unsupported by substantial evidence in a case [involving adjudication on the record].

Thus 19 USC Section 1516A (b)(1)(B) - "to be supported by substantial evidence on the record, or otherwise not in accordance with law." - is nothing more or less than a shortened version of the two principal elements of the judicial review standard of the Administrative Procedure Act. In the domestic APA those review standards are commonly applied by a U.S. Circuit Court of Appeals in considering the validity of the administrative agency action; under the FTA with slightly different language those standards are to be applied by the Binational Panels in reviewing the action of a U.S. administrative agency. As pointed out above, that standard for the Binational Panel was originally enunciated in the statute for review by the Court of International Trade.

Turning back now to the role of the Extraordinary Challenge Committee, this occupies the same place in the review hierarchy in regard to binational trade matters as did previously the Federal Circuit Court of Appeals. In *Daewoo Electronics vs. International Union* it described its role thusly:

> On review of the issue, like the trial court (CIT), we look to see whether substantial evidence supports the decision of the ITA on this issue ... The question is whether the record adequately supports the decision of the ITA, not whether some other opinion could reasonably have been formed. As frequently stated, 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence'.[1]

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

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[1] 6 Fed. 2d 1511, at 150. (Fed. Cir. 1993)

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 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 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.[2]

As indicated at the outset, the United States-Canada Free Trade Agreement was sold to the Congress and to the Parliament by its sponsors in both countries on the representation that the domestic law, substantive and procedural, would continue to apply unchanged (except those minor changes necessary to conform to the Agreement), and that, particularly, the standard of judicial review would be maintained by the two tier (Panel and ECC) appellate

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[2] One of my two colleagues describes the substitute appellate system in language which favours the Canadian contentions. "Under the agreement there is no appeal from a majority decision of a panel and their decison becomes binding upon the parties." (p.7) If there is "no appeal", How and Why are we, the ECC, here? There is no appeal by <u>private</u> parties, true. As stated above, this is to ensure that only important matters "materially affect[ing] the panel's decision" and "threaten[ing] the integrity of the binational panel review process" are reviewed at a second level, the ECC. The two governments are given an unquestioned right to invoke this second tier review, as was done by the United States in its <u>Request for an Extraordinary Challenge Committee</u>, which defines the issues before us. The private litigants are now termed "Participants"; only the two sovereignties are "Parties."

substitute for the domestic courts of each country.

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).[3]

Strangely enough, none other than Richard Dearden, Chairman of the Panel whose decision we are reviewing, anticipated this. In a

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[3] "Live Swine From Canada", ECC - 93 - 1904-01 U.S.A., slip op. at 10 (8 April 1993)
In spite of this clear language *specifically applicable* to our case, my colleague quotes other language from *Live Swine* to sustain the Canadian position. Let us analyze some of this language:

"An Extraordinary Challenge Committee ("ECC") does not serve as an *ordinary* appellate court." (p.14)(emphasis supplied)
- True, the implication being that it serves as an *extraordinary* appellate court.
"'This three-prong requirement provides explicit narrow grounds for extraordinary challenges and makes clear that an extraordinary challenge is not intended to function as a *routine* appeal'" (p.14)(emphasis added)
- True, and there is nothing *routine* about *this* appeal. The losing private parties had no right to appeal, the United States government has requested the ECC because it believes that the panel majority significantly failed to apply the U.S. statutory standard of judicial review and the United States categorically asserts in its *Request* that it would have sought the removal of the two Canadian panelists had it known of their conflicts of interest in timely fashion.
"The ECC should address systemic problems ... A systemic problem arises whenever the binational process itself is tainted by failure on the part of a panel or panelist to follow their mandate under the FTA." (p.16)
- It is hard to imagine a more pernicious *taint* more materially affecting a panel decision or more threatening to the integrity of the whole system than the two basic charges brought by the United States here.

speech 22 January 1988, later submitted to the House Committee on the Judiciary and printed in the Hearings 28 April 1988, Dearden remarked: "It is expected that the extraordinary challenge procedure will be invoked sparingly. This may not be so if a broad interpretation is given to the allegation that the panel manifestly exceeded its powers, authority or jurisdiction."[4]

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 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."[5]

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*

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[4] Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House Representatives, 100th Cong., 2d Session, April 28, 1988 at page 718.

[5] Senate Report 103-189, 18 November 1993, at pp. 41-42

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*"[6] 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 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.

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.

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[6] Id. at 43-44.

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 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 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 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.

CHAIRMAN WILKEY: Excuse me. Would you repeat that statement again?

MS. ANDERSON: Even if the United States persuaded this Committee that the Panel misinterpreted U.S. law, the challenge could still not be sustained. And what I mean by that, and I think its important that I make clear what I mean, is that this Committee isn't here to review claims of legal error. (Tr. 80)

CHAIRMAN WILKEY: You've just told us that no matter how egregious the misapplication on United States law, this Committee has no power to correct such egregious error. Is that correct?

MS. ANDERSON: There might be some circumstance in some other case where --

CHAIRMAN WILKEY: Give me -- all right. Give me a specific example of a case in which this Committee would have the power to do anything.

MS. ANDERSON: I can think of a few. Frankly, they're hard to think of because --

CHAIRMAN WILKEY: Name one.

MS ANDERSON: One would certainly be if the Panel had failed to apply the standard of review, in the sense that they

said, "We don't think that's a tough enough standard of review, or we think it's too tough. Maybe we'll apply an arbitrary and capricious standard and not a substantial evidence --

CHAIRMAN WILKEY: If the Panel validly openly refused to apply the accepted standard of review, that would warrant Committee action?

MS. ANDERSON: Well, that would certainly meet prong one of the three prong ECC standard. (Tr. pp 81-82)

CHAIRMAN WILKEY: But if the -- if the Panel stated the standard of review correctly, and then failed, totally failed to apply it, this Committee has no power to correct the error?

MS. ANDERSON: The line drawing in the abstract is a very difficult thing because we --. (Tr. p. 82)

CHAIRMAN WILKEY: All right. Give me one more example of where this Committee would have power to do anything.

MS. ANDERSON: For example, if a Panel simply affirmed or reversed the decision before them without explanation and without really giving reasons and explaining how we've analyzed the U.S. standard of review and the U.S. law, that would not be providing the kind of quasi judicial review to replace CIT or CAFC review that the FTA mandated Panels to provide.

Or, for example, if the Panel simply said, "Well, I believe that a panel doesn't have the right to question what the agency did. We owe the Agency the kind of absolute deference the U.S. is asking for here." That would be an abdication of their responsibility to review the decision before them on the substantial evidence, and otherwise, in accordance with law standards.

The review that a Panel provides is to be the same as what the parties would have received in the U.S. court, if it's a U.S. case. And it's that -- (Tr. pp. 83-84)

CHAIRMAN WILKEY: Well, examples you've given me here of where we would have a duty and a power and authority to do anything are:" (Tr p. 84)

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 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)

After Canadian counsel had detailed the Canadian position on examples of what might be reviewed by an Extraordinary Challenge Committee, the Committee Chairman made this comment:

> Now, a law student taking administrative law could look at those situations and say. "This is reversible error, and obviously, any kind of a review panel or committee is going to have to reverse this. They certainly did it wrong."
>
> It doesn't take three retired judges who served years on the bench to figure those out. Now, there must be some other cases that are less clear that we are supposed to take responsibility for figuring out whether they --
>
> MS. ANDERSON: Well, indeed if you'll forgive me Judge Wilkey, what you just described as being something anybody could see was wrong, is precisely the sort of situation that would meet the standard of 1904-13(a)(iii) of the ECC standards.
>
> CHAIRMAN WILKEY: I just wanted to get your position.
>
> MS. ANDERSON: I certainly don't take the position that the Panel would have to declare in its decision that it was doing the wrong thing, that it would have to declare that it was going to apply the standard of review of the United States. That's certainly not my position.
>
> CHAIRMAN WILKEY: Well, I don't want to --
>
> MS. ANDERSON: But there -- but there would be -- it would have to be extremely egregious to meet the first prong of the standard. (Tr. 85-86)

One of the Canadian Members of the Committee illuminated the Canadian position further:

> JUSTICE HART: If the law of the United States in sum don't on the particular issue, and the Panel addressed that law, and there were two different views put forward, would an Extraordinary Challenge Committee such as this be able to set aside simply on the basis of the fact that there is a preferable selection of the law?
>
> MS. ANDERSON: No My Lord, this Committee would not. That would not be within this Committee's jurisdiction. A Panel has exactly the same kind of responsibility to review an Agency decision as the U.S. court would have. (Tr. 87)

The five members Binational Panel's responsibility is very clear: "The review that a panel provides is to be the same as what the parties would have received in a U.S. court, if it is a U.S. case." (Tr. 84) This corresponds with the way the matter was presented to the Congress and the Parliament and with the statements of the legislators on both countries as to what they were creating in the substitute appellate process.

The Canadian position on the role of the Extraordinary Challenge Committee is - well, extraordinary. The only four examples which Canadian counsel could think of as permitting any action whatsoever by the ECC were examples of such flagrant error that a law student who had completed an administrative law course could have easily decided these, and in fact, so flagrant that probably the two countries involved would feel morally, if not legally, obligated to take remedial action.

Canada considers other matters, normally thought of as the grist for court decisions, none of an ECC's business. "Canada alleges further that the dispute over the meaning of *Daewoo* is undeniably no more than a debate concerning the proper interpretation of U.S. law and thus it falls outside the scope of an ECC. The same is true with respect to the dispute over whether

specificity analysis requires consideration of multiple factors." (Tr. 38) (This latter was a major issue in both Panel decisions) If disagreement on U.S. law, issues which formed the principal grounds of the Panel decisions, is no issue for an Extraordinary Challenge Committee, what are we waiting for? A case in which the litigants are in perfect agreement on the law??

Three examples taken from the colloquy with Canadian counsel delineate the Canadian position even more sharply.

> 1. JUSTICE HART: Would this panel have to go so far as to say that the majority in this particular case was intellectually dishonest in coming to the conclusions that they did in order for us to reject the findings? (Tr. 95)
>
> MS. ANDERSON: But we don't have that case here. I mean, there is just no issue of somebody's intellectual dishonesty.
>
> CHAIRMAN WILKEY: Counsel, I don't think you answered my colleague's question,... I understand Justice Hart to ask would it be necessary here, as a standard of our powers, to find that the panel intellectually - was intellectually dishonest in making its decision. Is that the fair statement of your question? ...[looking at Justice Hart for agreement]
>
> MS. ANDERSON: I would say, yes. You would have to find that, because otherwise,... (Tr. 96)

> 2. MS. ANDERSON: But the FTA certainly does contemplate that a Panel, like a court, can make mistakes, it can make mistakes in applying the standard of review, and it can make mistakes in applying substantive law at least what someone would think was a mistake.
>
> And the ECC still cannot set aside the Panel's ruling, unless it also finds that the Panel had essentially abandoned its responsibility under the FTA, and that's plainly not the case here (Tr. 119-120)

> 3. Canadian counsel referred to the fact that one panel decision is not a binding precedent for another panel. From that counsel argued that the panel decision here, even if erroneous, could not threaten the integrity of the substitute appellate process under the FTA. On this line of reasoning, no Extraordinary Challenge Committee would ever have power to correct a grossly erroneous Panel decision, because as a non-precedent it could never threaten the integrity of the process. (Tr. 137)

Canadian counsel obviously thought they were addressing, in brief and orally, three judicial 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:

> A. 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 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*

principles as would a domestic court.[7]

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 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.[8]
>
> The panels will apply the law of the country whose antidumping countervailing duty determination is being reviewed.[9]
>
> The binational panels would be required to apply to the law of the country whose agency decision is being

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[7] United States - Canada Free Trade Agreement: Communication from the President of the United States transmitting the Final Legal Text of the U.S. Canada Free Trade Agreement, the Proposed U.S. - Canada Free Trade Agreement Implementation Act of 1988, and a Statement of Administrative Action. Pursuant to 19 U.S.C. 2112(e)(2), 2212(a), H.R. Doc. No. 216, 100th Cong., 2d Sess. 258 (1988). (emphasis added)

[8] COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES REPORT 100-816, PART 4, August 4, 1988, at p.4. (emphasis added)

[9] Id, p. 1.

> reviewed...First, the panels will apply the same standard of review as a court.[10]
>
> 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.[11]

Now let us see the contribution of Ms. Anderson to the Congress' understanding. In the case before us she appeared as Counsel for the Canadian Party, but in 1988 she was then Chief Counsel for the International Trade Administration of the Commerce Department. First, to the House:

> ...Indeed, the FTA panel process is designed to retain as many attributes of national judicial review as possible.[12]
>
> Equally important is what the FTA's binational panel review does <u>not</u> do. *First it does not create either a new source of U.S. law or a new (and potentially divergent) interpretation of U.S. AD/CVD law in cases on Canadian products.*[13]

She confirmed this before the Senate:

> Despite very intense negotiations, it proved impossible to agree on subsidies discipline and new approaches to

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10 Id, p. 3

11 Id, p. 5

12 Hearing Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary House Representatives, 100th Cong., 2d Session, April 28, 1988. Testimony of Jean Anderson, Chief Counsel for International Trade Administration, U.S. Department of Commerce, at p. 72.

13 Id, p.76 (emphasis added for second sentence)

> unfair trade practices in the short time frame of the FTA negotiations. The two governments agreed instead to retain the existing national AD/CVD laws and procedures.[14]
>
> ...the FTA binational panel system does not create a new source of United States law or a divergent interpretation of United States law in Canadian cases. Given the criteria for selecting panelists and the fact that panels will apply U.S. law in U.S cases, we would expect panel and court decisions to be consistent.[15]
>
> Panel review is not, of course, court review. But we negotiated a panel process patterned as closely as possible on review by the Court of International Trade...In a U.S. case, the panel will apply U.S. AD/CVD law which has been incorporated into the FTA for this purpose, including the *statute, the legislative history*, regulations, administrative practice, and U.S. judicial precedent. The panel would apply the same standard of judicial review as the CIT would apply.[16]

Following the Committee's Hearing of 20 May 1988, questions had been posed by individual Senators, which were answered by Ms. Anderson in representation of the Commerce Department and submitted to the General Counsel Committee on the Judiciary of the United States Senate on 23 May 1988.

In response to Question 1 by Senator DeConcini, Commerce's response is:

> The U.S. countervailing duty law is absolutely unchanged by the U.S. Canada Free Trade Agreement...
>
> We expect panel decisions taken under the terms of the FTA to be fully consistent with decisions that would have been reached by the Court of International Trade...Under

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14 Hearing before the Committee on the Judiciary United States Senate, S. Hrg. 100-1081, 100th Cong. 2d Session, May 20, 1988, at pp. 63-64

15 Id, p. 65.

16 Id., at 64 (emphasis added)

> the FTA, [the members of Binational Panels] must apply by reference U.S. CVD law--including the *statute, the legislative history,* regulations, administrative practice, and judicial precedent--and the U.S. standard of judicial review in reviewing decisions of U.S. agencies. *If a panel were to depart from that strict mandate, its decision would be subject to the review by three member committee of judges or former judges.*
>
> The countervailing duty law is a highly nondiscretionary law. It does not allow the administrative agencies--or a court or binational panel--to take into account foreign policy or other extraneous considerations. If subsidies and injury are demonstrated, countervailing duties must be imposed. The Free Trade Agreement does not permit a different result.[17]

In response to Question 2 by Senator DeConcini, Commerce's response is:

> We think the FTA will create no inequality between importers of merchandise from Canada and importers of similar merchandise from other countries. Importers of Canadian merchandise will receive quasi-judicial review by an independent binational panel which, under the terms of the FTA, must apply U.S. law and U.S. judicial standards just as would a U.S. court. *Any failure of a panel to adhere to its mandate--in effect, to review a determination in a U.S. case just as the Court of International Trade would review that determination -- will result in an appeal to an Extraordinary Challenge Committee of judges or former judges.*[18]
>
> Question 9 (not indicated which Senator posed the question) asks, inter alia, **"What happens if the panel clearly misapplied the applicable law? Is there any appeal?**
>
> *Commerce's response is Yes, under the FTA, a panel's "power, authority or jurisdiction" is strictly limited, in a U.S. case, to applying U.S. law, including the statute, the legislative history, regulations, administrative practice, and judicial precedent. The panel must also apply the U.S. standard of judicial review and general legal principles that would be applied by a U.S. court. If a panel chose to ignore U.S. law in*

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[17] Id, at 243 (emphasis added)

[18] Id, at 245 (emphasis added)

> *a U.S. case or opted to apply principles or concepts not a part of U.S. law, the panel decision would be subject to review by an Extraordinary Challenge Committee.*[19]

Turning from the appeal process under the FTA, including the ECC, Ms. Anderson drew the precise parallel between the Court of International Trade and the Panels, emphasizing the limited power of either reviewing body to set aside Commerce's determinations:

> The panel cannot substitute its judgment for the agencies, either. It can affirm the decision, or can conclude that the agency made a mistake, and in the latter case, Commerce or the ITC would make a new determination just as they do on remand from the CIT.[20]

> 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.*[21]

Before the Senate, talking about the Court of International Trade ruling or a Commerce ITC determination. Ms. Anderson stated: "It does not tell Commerce or the ITC what the new determination must be or what method the agency must use to reach it"[22]

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19 Id, at 257 (emphasis added)

20 Id, at p. 64

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

22 Senate Judiciary Hearing, supra p. 63

And before the House: "It (the CIT) does not tell the agency what the new determination must be, or *what method* the agency must use to reach a new determination.[23] In response to a question from Mr. Berman asking "So we don't change laws?" Ms. Anderson responded: "*No. Our subsidy law and our dumping law remain absolutely unchanged.*"[24]

"Despite intense negotiations, it proved impossible to reach agreement on subsidies discipline and new approaches to unfair trade practices in the short time frame of the FTA negotiations. The two governments agreed instead to retain existing national AD/CVD laws and procedures..."[25]

I want to highlight these consistent themes which her testimony emphasizes:

First, the *sameness* of what is offered to the United States Congress as a substitute for the long-established system of judicial review of administrative agency action. Unquestionably our U.S. AD/CVD laws to be applied, unquestionably the Binational Panel will apply U.S. law just as the Court of International Trade has been doing, and if the Panel errs in its understanding of U.S. law (as the CIT sometimes has) there will be the Extraordinary Challenge Committee in place of the Federal Circuit to correct the error.

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[23] House Judiciary Hearing, 28 April 1988, supra pp. 71-72 (emphasis added)

[24] Id, p. 84 (emphasis added)

[25] Id, p. 72 (emphasis added)

Second, as part of that sameness, but specifically, to both Senate and House Ms. Anderson emphasized that the Panel (like the CIT) *will not* tell Commerce "What the new determination must be or what method the agency must use to reach it." *Isn't that exactly what the Panel majority did in our case?* Isn't that exactly what the Panel dissent accuses the majority of doing? What else did the Panel majority do but tell Commerce what result to reach, prescribe the methodology Commerce must use to reach it, substitute its judgment on technical matters for the discretion entrusted by Congress to the agency not the courts? Isn't this exactly what Ms. Anderson told Congress is *not* supposed to happen under the FTA substitute scheme of appellate review?

Third, The repeated reference to *"AD/CVD"* or *Antidumping/Countervailing Duty Laws* as being treated *equivalently* in the whole scheme. As then General Counsel of the International Trade Administration (ITA) of the Commerce Department, Ms. Anderson was accustomed to dealing with these laws as equivalents for the purposes of procedure and the standards of judicial review applicable. Hence she instinctively treated them in her testimony as equivalents in the new substitute scheme.

Her own testimony thus totally refutes her efforts in brief and at oral argument (and my two Canadian colleagues position) to dismiss *Daewoo*[26] as an antidumping case not applicable to our

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[26] See pp. 25 and 36 of Opinion of Mr. Justice Gordon L.S. Hart. See Part III B., *infra* for a full discussion of *Daewoo* and *Federal Circuit* cases holding squarely that the ITA of the Commerce Department is given extraordinary - and equal - deference in *both* antidumping and

countervailing duty case here.

Fourth, the repeated reference to "statutes, *legislative history*, as the sources of the United States law which the Panels and ECCs will apply. As Counsel for the Commerce Department testifying before Congress, Ms. Anderson was well aware of the importance of legislative history, always listing if second after statutes themselves. As Counsel for the Canadian parties she has forgotten the use of legislative history. My Canadian colleagues, following Canadian but not United States law, do not deign to consider it here. The full implications of this are discussed fully under Part V, *infra*.

B THE FEDERAL CIRCUIT'S MOST RECENT BINDING PRECEDENT

In September 1993 there were two important documents which affected the final action and opinion of the Binational Panel in this case. One which is fundamental here, was the ITA Commerce Department *Redetermination Opinion on Remand*, issued 17 September. The other was the Federal Circuit opinion in *Daewoo v. Electronics International Union*,[27] issued 30 September 1993.

What we are reviewing here is the *Redetermination* of the *International Trade Administration of the Department of Commerce on Remand*. Issues important in the first ITA *Determination* and the first Panel opinion have been mooted. Commerce asserts it has

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countervailing duty cases. Those decisions are binding U.S. law in our case here. Daewoo Electronics v. International Union, 6 F. 3d 1511 (Fed. Cir. 1993).

[27] 6 F.3d 1511 (Fed. Cir.) 1993.

complied with the directions by the Panel remanding the case to it, and the test now is whether Commerce has done its job under administrative law standards in its *Redetermination*.

We review that 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.[28]

As stated in *Daewoo*:

> "On review of this issue, like the trial court, we look to see whether substantial evidence supports the decision of the ITA on this issue."[29]

My view is that the Panel Dissenting Opinion exhaustively examines the ITA *Redetermination* and concludes correctly that Commerce did its job as mandated by United States statutes, by long established United States administrative law practice, and by the specific directions of the Binational Panel. It is my view that we need not analyze further the intricacies of trade law, since the dissenting opinion has described the whole picture correctly.

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[28] *PPG Industries Inc. v. U.S.*, 978 F . 2d 1232, at 1236 (Fed. Cir. 1992) (PPG V)
The other *PPG* cases, all with the same title, are found at: 928 F.2d 1568 (Fed. Cir. 1991) (*PPG* IV)
746 F.Supp. 199 (CIT 1990) (*PPG* III)
712 F.Supp. 195 (CIT 1989) (*PPG* II)
662 F:Supp. 258 (CIT 1987) (*PPG* I)

[29] *Daewoo Electronics v. International Union*, 6 F.3d 1511, at 1520 (Fed. Cir. 1993)

Daewoo is a Federal Circuit decision which contains no new elements of the U.S. standard on review of administrative agency action, but it is an exceptionally well organized and well thought out analysis of issues in an anti-dumping case which are similar to issues in our case. In the course of developing this analysis, it became necessary for the Federal Circuit to mention nearly all of the standards of judicial review of administrative action, and the opinion does so in a very clear and effective way. There is nothing new, Justice Steven's opinion in *Chevron*[30] for the Supreme Court nine years earlier had said it all, but *Daewoo* said it again as applied to a countervailing duty case. And, it said it on 30 September 1993, just thirteen days after Commerce had published its *Redetermination on Remand*.

Therefore, the combination of the five Panel members reviewing again a Commerce *Redetermination* supporting the imposition of countervailing duties, with the guidance of *Daewoo* from the Federal Circuit immediately in front of them, produced a change in the views of two members of the Panel, resulting in the lengthy, analytical dissenting opinion. In other words, *Daewoo* "woke up" the Panel members, or at least two of them, as to what the U.S. law on judicial review of administrative action, is, was and always had been, and they were in position to apply this to the *Redetermination* of the Commerce Department just received.

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30 *Chevron USA, Inc. v. National Resources Defence Council, Inc.*, 467 U.S. 837 (1984)

There are several relevant points to be made about *Daewoo*: First, it is a countervailing duty case like ours, based on the anti-dumping laws rather than the anti-subsidy laws. This makes absolutely no difference in the standard of review we apply. The Federal Circuit has made crystal clear that the same high deference by the reviewing authority should be given to the Commerce's *Determination* in both subsidy and dumping cases.

> Moreover, the Secretary of Commerce through the ITA has been given great discretion in administering the countervailing duty laws. As we noted in *Smith Corona Group v. the United States*[31] in discussing the Secretary's comparable authority under the anti-dumping laws: ...
>
> > The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the anti-dumping law a difficult and supremely delicate endeavour. ... the Secretary has broad discretion in executing the law.
> >
> > These considerations are equally applicable to administration of the countervailing duty statute. As this court's predecessor has repeatedly opined, countervailing duty determinations involve complex economic and foreign policy decisions of a delicate nature, for which the courts are woefully ill-equipped." (Citations)[32]

Second, the initial issue before the Federal Circuit was whether the CIT, the first court reviewing the propriety of the Commerce Department actions, could compel the Commerce Department to abandon its practice of resting upon its examination of the customary business records of exporters and go farther to undertake an econometric study of the Korean market to determine the tax

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[31] 713 F.2d 1568, 1571 (Fed. Cir. 1983)

[32] *PPG* IV, Supra., at 1571-72.

incidence, or "pass through", of the commodity taxes upon consumers. The CIT remanded to the ITA, holding that its methodology was not in accordance with the law. This is comparable in our case to the Panel majority insistence that Commerce go farther and apply an effects test. The Federal Circuit in *Daewoo* considered this a matter of statutory interpretation, noting that

> "the Supreme Court has instructed that 'a court may not substitute its own construction of the statutory provision for a reasonable interpretation made by the administrator of an agency. This court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." (Citing *Chevron*)[33]

The Federal Circuit summed up: "These tenets extend to their limits when the ITA interprets the anti-dumping laws. This court has recognized the ITA as the "master" of antidumping law, (citation), worthy of considerable deference."[34]

> "... We conclude that this interpretation of the statute was reasonable. The statute does not speak to tax incidence, shifting burdens, or pass-through, nor does it contain any hint that an econometric analysis must be performed. The statutory language does not mandate that ITA look at the effect of the tax on consumers rather than on the Korean company."[35]

Third, the *Daewoo* court next looked at the tax basis used by Commerce and decided that

> "... The question is whether the record adequately supports the decision of the ITA, not whether some other inference could reasonably have been drawn. As frequently stated, 'the possibility of drawing two inconsistent conclusions from the

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[33] 6 F.3d at 1516.

[34] Ibid.

[35] Id. at 1517.

> evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'... Substantial evidence supports the ITA's choice, and that is all the statute requires."[36]

Fourth, on the last issue of the cap on duties, the *Daewoo* court cited its previous decisions to the effect

> "When the issue is the validity of the regulation issued under a statute that an agency is charged with administering, it is well established that the agency's construction is entitled to great weight. Similarly, agency regulations are to be sustained unless unreasonable and plainly inconsistent with the statute, and are to be held valid unless weighty reasons require otherwise." The *Daewoo* court opinion continued: "With these standards guiding us, we again must hold that the Court of International Trade erred by substituting its interpretation for that of the ITA. Section 1673 f(a) does not prohibit the application of the cap to bonds. This provision simply does not speak to whether estimated duty bonds cap anti-dumping duties. Given this silence ... we cannot say that the ITA's allowance of a duty ceiling for bonds is contrary to the statute."[37]

In other words, when 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. The statute is silent. The Panel majority usurped the function of the ITA.

Again, the points made by the Federal Circuit in *Daewoo* are merely a recital of longstanding administrative law in that Circuit and in the Supreme Court. The impact on two of the Panel members was no doubt produced by its timeliness, thirteen days after the

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[36] Id. at 1520

[37] Id. at 1522.

Redetermination by Commerce, by the similarity of the issues in this countervailing duty case, and by the clarity and extent by which the *Daewoo* court expressed these long held standards of judicial review. [38]

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

After defining the United States standard of review, it would be wise to restate what it is which we as an Extraordinary Challenge Committee are reviewing. We are reviewing the last Panel Decision (two Opinions) and the *Redetermination*. We are not reviewing the original Panel Decision nor the original ITA *Determination*. They are relevant only as history throwing light on the *Redetermination* and the last Panel Decision.

We are the second tier of review, as is the Federal Circuit. The Federal Circuit has defined its role very clearly in *PPG* V, 978 F. 2d at 1236, and in *Daewoo*, 6 F.3d at 1520. We look both at the Panel's rationale to see how they did their job, applying U.S. standards of judicial review (deference to agency expertise, etc., all criteria which the Panel majority recited *ad nauseam* but signally failed to apply), *and* to how the Commerce Department did its job on *Redetermination*, applying the same statutory standard as the CIT and the *Panel* is supposed to, as laid down by the Federal Circuit in *PPG* V and *Daewoo*.

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[38] The Panel Dissent gives a detailed analysis of *Daewoo's* applicability to the instant case, slightly different from that which I have worked out above, I also agree completely with the Dissent's analysis.

On Remand Commerce purported to follow faithfully the mandate of the Panel. The question before us - at least initially - is: Did it?

Since Commerce purported to apply the four factor test on Specificity, for example, we do not need to get into whether *in the future* the ITA will look at all four or find only one factor in a particular case sufficient. All we need to decide is whether, *in this cases*, Commerce analyzed the four factors reasonably. If it did, as the two dissenters believed,[39] then Commerce must be sustained and that is the end of the matter. There are other issues to which the above also applies.

Our role is not to decide the correct methodology or policy for Commerce, either in the past or in the future. Our role is to decide whether ITA correctly decided this case, following the directions of the Panel on Remand.

My two colleagues have decided that the Commerce Department did NOT analyze the matter correctly in its *Redetermination*. This brings into play the "fall back" argument of the United States: The original Panel Decision prescribing consideration of all four factors on Specificity, mandating a finding on the question of Market Distortion, and on other issues, was clearly erroneous because such directions by the Panel as to methodology and policy were flatly in excess of "its powers, authority and jurisdiction" under long established United States standards for review of agency actions. The dissent also took this position.

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[39] Panel Dissent, at 43

Now let us turn to the *Redetermination on Remand* and the Panel review of that *Redetermination*.

One way for me to evaluate here the Commerce Department's *Redetermination*, the Panel majority opinion, and the Panel dissent is to describe my reaction as I read them. I first undertook to read one of the briefs, but after some pages put it aside as too pejorative and critical in tone of the Panel majority opinion and decided to read the foundation piece, i.e., the *Commerce Department Redetermination* on Remand. As I absorbed the 192 page *Redetermination* I was impressed by the thorough, complete, and workmanlike way in which the ITA of Commerce had handled the Remand. The ITA had done in each instance what the Panel original Decision specified. In one or more instances the ITA protested that this was not normal Commerce methodology or practice, but since the Binational Panel had decreed it, the ITA would follow the method specified by the Panel. I do not need to recite specific issues treated by the Redetermination, to say that the findings and conclusions met the standard of reasonableness, were sustained by substantial proof, were in conformity with and were in no way violative of the statute and normal administrative procedure. They were, and fortunately the dissenting opinion makes clear in detail what I have just stated in general.

The statement above, that the 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[40]) 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

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[40] "These tenets [standards of deference to the agency's discretion in interpreting its mandate, which the Fed. Cir. had just quoted from the Supreme Court in *Chevron*] extend to their limits when the ITA interprets the anti-dumping laws. [citing *Smith-Corona*, Fed. Cir. 1983] ... The Court has recognized the ITA as the master of anti-dumping law, [citing *Consumer Products*, Fed. Cir. 1985]..." *Daewoo Electronics v. International Union*, 6 F. 3d 1511, 1516 (Fed. Cir. 1993)
The Federal Circuit has made crystal clear that the great discretion under anti-dumping applies equally to countervailing duty laws. *PPG Industries Inc. v. U.S.* 928 F. 2d 1568, 1571-72 (Fed. Cir. 1991); *Smith Corona Group v. U.S.* 713 F.2d 1561, 1571 (Fed. Cir. 1983). See my discussion above under III at p. 28.

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 argues "this is a case of first impression"[41] and that "[i]n this situation one cannot expect to find a precedent exactly on point...."[42] 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.

I shall not attempt a detailed analysis of the 106 page majority opinion, for that has been done in admirable fashion by

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[41] Justice Hart's Opinion at 26-27

[42] Id. at 28

the Panel dissent. But I shall state some of the issues and the action of the Panel. On Specificity the Panel majority found a lack of reasoned analysis of the numbers and classes, and accused the ITA of a mechanical way in using the numbers. Further on Specificity, in regard to dominant or disproportionate use, the majority concluded there was no substantial evidence and no reasoned analysis by Commerce. In sum, on Specificity the majority concluded that there was no rational legal basis for Specificity.

On Preferentiality the majority first engaged in a five page analysis of *Daewoo*, which to my mind missed the main points of similarity and applicability of the *Daewoo* opinion rationale to the instant case.[43] They then engaged in a derogation of the Commerce economic theory of marginal cost relied upon by the ITA versus rent as applied to natural resources. To my mind Commerce had made the case for the application of the marginal cost theory much more strongly than had the majority for its theory of rent. But even if it had not, with a choice of methodologies, possibly either one valid, the choice is the responsibility of the administrative agency, not that of a reviewing court (which the Binational Panel replaces, with the obligation to apply the same standard of review). The conclusion on Preferentiality by the majority was that Commerce's *Redetermination* was not supported by substantial evidence. This conclusion rests, of course, on the use of the majority's economic theories in preference to those of Commerce.

In regard to Log Export Restrictions my conclusion after

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[43] See my analysis of *Daewoo* under III above.

reading that section was that the majority's position could be boiled down to an assertion that the agency did not know what it was talking about, but the majority *knows*. This illustrates the danger of placing review of administrative agency action in the hands of a Panel of "experts" in a particular field, instead of having a review of administrative agency action by generalists who are willing to defer to agency expertise. The majority's final conclusion was that there was no *de facto* analysis. Really, on these points, the Commerce opinion on *Redetermination* and the Panel Majority opinion seemed to be talking past each other.

The majority did agree with Commerce that a subsidy on log exports did exist, but insisted on the "direct and discernable effects" test. Since Commerce did not subscribe to this, the majority had no difficulty in finding no substantial evidence.

In summary, I believe that this Binational Panel Majority opinion may violate more principles of appellate review of agency action that any opinion by a reviewing body which I have ever read.

I am spared further detailed analysis because this was done in such a competent professional manner by the dissenting opinion. The two dissenters likewise are "experts" in the field of trade law and their analysis, which supported in every major detail that of Commerce, was persuasive. To see how review of administrative action should be done, in this case it is necessary to read the 83 page opinion of the two dissenters, particularly pages 5-38 and 43-50. They were sensible of their position, i.e., that their responsibility was *not* to redo the whole analysis which had been

done by Commerce, but to find any major flaws in Commerce's evidence or reasoning which, if established, would negate the substance of the Department's findings. The dissent recognized that, where reasonable minds might differ and Commerce had a point supported by substantial evidence, then the result achieved by Commerce should be sustained. Even if another reasonable conclusion could be reached on the same evidence, the agency is entitled to have its interpretation validated. This is a fundamental point reiterated in literally decades of United States law, but it is a point lost upon the Panel majority, and I fear, on my two Canadian colleagues.

The dissent, like the majority opinion for the Panel, recited the same litany of the well established uncontroverted United States standards of review of administrative agency action, but the dissent, unlike the Panel majority, really applied those standards in evaluating the Commerce Department's 192 page *Redetermination*.

The Panel dissenters approach - which I maintain is well-understood *United States law* on judicial review of agency action - is best stated by them:

"But the gravamen of our dispute with the majority here is its conception of United States law on review.

"When Congress specifies a methodology in a statute, the agency implementing the statute must comply with that methodology, and it is incumbent on the court engaged in administrative review to assure itself that Congress' intentions were fulfilled and to check that the methodology was followed. When Congress does not

specify methodology, it is understood that it is instructing and empowering the implementing agency to devise and apply what it deems an appropriate methodology. A court engaged in administrative review may not superimpose its own methodology, as we explained in our section on standards of review above. We believe that this is precisely what the majority is doing. The appropriate question, of which the majority has lost sight, is whether given the Statute, the Regulations and the evidence, the decision taken by Commerce was not unreasonable.

"The relevant Statute is, of course, 19 U.S.C. § 1677(5)....(quoting) The provision does not prescribe a methodology, but gives a broad discretion to the agency implementing it. It does not provide grounds for review other than the assessment by the reviewing authority of whether the application of the special rule in sub-section 5 was reasonable in context."[44]

With the Panel dissent in front of us, this Extraordinary Challenge Committee has no obligation to redo the logical review of the administrative agency's action given by that dissent. It is not necessary for us to rehash what has been written by Commerce, by the three-man majority, and by the two dissenters. Just read the dissent. I would affirm the Commerce Department *Redetermination* based on that opinion.

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[44] Panel Dissenting Opinion, at 33-34

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 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 *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

No language in Article 1904.13 of the CFTA, which set out the standard for invoking an Extraordinary Challenge Committee, was deleted. For clarity to subsection (a)(iii) "the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article," was added "*for example by failing to apply the appropriate standard of review,*"...

Similarly, no language in Annex 1904.13, "Extraordinary Challenge Procedures" was deleted. For clarity to paragraph 3 there was inserted "*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,...*"

The Canadian Parties before us made no argument that these two insertions for clarity created the slightest difference in the meaning of the sections of NAFTA and the CFTA with which we are concerned here.

Indeed, the Canadian Parties could never so argue, because the Canadian Government *itself* made this official statement on the meaning of the inserts above:

> Annex 1904.13(3) would make it *explicit* that an ECC must examine the *legal* and *factual* analysis underlying a binational panel's decision in order to determine whether one of the grounds for resorting to the extraordinary challenge procedure has been established. In Canada's

view, *this was implicit in Chapter 19 of the FTA.*[45]

And the United States Government officially stated:

> [F]ailure 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 CFTA, 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.
>
> [T]he changes to Annex 1904 clarify that an ECC's responsibilities do not end with simply ensuring that the panel articulated the correct standard of review. Rather, ECCs are to examine whether the panel analyzed the substantive law and underlying facts.[46]

The ECC in Live Swine summarized:

> 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).

Therefore, the Senate and House Reports deal with the same, identical statutory language on judicial review and the substitute scheme of the Binational Panel and the Extraordinary Challenge

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45 Government of Canada, Statement of Administrative Action to the NAFTA, reprinted in Canada Gazette, Part I, p.204 (1 January 1994)

46 Government of the United States of America, Statement of Administrative Action to the North American Free Trade Agreement 195-97 (1993)

Committees. When the Senate Joint Committee Report and the House Ways and Means Committee give their interpretation of the language of the statute which they were currently considering and did enact, the NAFTA, they are also giving their interpretation of exactly the same words in the CFTA.

Second, the interpretation given by the seventy-five Senators and the House Ways and Means Committee is prompted by five years experience with this language. The Senators and Representatives are asserting that they *know* what they *meant* five years earlier, and that the interpretations in some cases have not been consistent with the established meaning of long used words characterizing standards of judicial review in the United States.

E. No Change in Previous Statutory Language Needed.

With respect to ECC and panel review, the Senate and the House made no change in the language used in the CFTA and reiterated in NAFTA, except for the two insertions noted. They made no change in the language because:

First, the language used in both the CFTA and NAFTA reflects the long established and well understood standard of judicial review in the United States, which is to be applied by the binational panels and, with the qualification of the comparative importance of the issues, by the Extraordinary Challenge Committees. To change the language here would reflect upon and confuse the standard of judicial review in the entire United States. The Congress reiterated only what the CFTA says, that the

Panels and the Committees will apply the law of the United States and Canada.

Second, the Senate and House are saying that the *words* are *right*, the *actions* by some of the binational panels have been *wrong*. After all, these binational panels are composed of five alleged experts on trade law; they are not supposed to be experts on review of administrative agency action. And the Congress is saying that they have proved they are <u>not</u> experts on the United States standards of judicial review.

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 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.

In four full pages of its report the Senators did not mince words in regard to what the Act requires in the way of appellate review. The United States and Canada had gone so far as to prohibit the customary judicial review by their courts, but only on the clear commitment... "that the NAFTA, just as the CFTA, *requires* binational panels to apply the same standards of review and general legal principles that domestic courts would apply. This requirement is the foundation of the binational panel system. ... [failure] to apply the appropriate standard of review, potentially undermine[es] the integrity of the binational panel process."(emphasis by Senate)

The Senate Joint Report continues:

> ... Some binational panels have not afforded the appropriate deference to U.S. agency determinations required by the United States Supreme Court in the Chevron decision. ... [P]anels ... are restricted to examining whether the agency's view is a permissible construction of the statute. ... [I]t is the function of the courts, and thus panels, to determine whether the agency has correctly applied the law, not to make the ultimate decision that Congress has reserved to the agency.
>
> Second, ... in several cases, binational panels have misinterpreted U.S. law and practice in two key substantive areas of U.S. countervailing duty law - regarding the so-called "effects test" and regarding the requirement that the subsidy must be "specific" to an industry.
>
> In [Softwood Lumber, Panel 6 May 1993] the binational panel misinterpreted U.S. law to require that, even after the Department of Commerce has determined that the subsidy has been provided, the Department must further demonstrate that the subsidy has the effect of lowering the price or increasing the output of the good before duty can be imposed.
>
> Such an "effects" test for subsidies has never been mandated by the law and is inconsistent with the effective enforcement of the countervailing duty law. ...

> ... Congress had explicitly rejected the use of "effects" tests in the Trade Agreements Act of 1979. ...
>
> From a policy perspective, the Committee believes an "effects" analysis should not be required.[47]

Turning from the effects test to specificity, the Senate Report said:

> "the Committee agrees with current Department of Commerce practice with respect to specificity ... the Department set forth four factors that *may* be considered whether specificity exists. Under its current practice ... Commerce may base the finding that a subsidy is specifically provided on one or more relevant factors.[48] (emphasis by Senate)

The Joint Committee went on to say that the *Live Swine* panel of 26 August 1993 misinterpreted U.S. law and practice but that the *Magnesium* panel of 16 August 1993 "correctly concluded that current Department practice is proper on the question of specificity."[49]

> It has been, and remains the intent of Congress that the Department has wide discretion to determine whether specificity exists in any particular case ... A finding that benefits are limited by law to a particular industry is sufficient to support a specificity finding. Furthermore, in conducting a specificity analysis, the Department correctly will find *de facto* specificity where one or more of the four factors typically considered by the Department supports a finding of specificity. One factor alone could be sufficient for a *de facto* specificity finding.
>
> 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

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[47] "Senate Joint Committee Report 103-189", North American Free Trade Agreement Implementation Act, 18 Nov. 1993, p. 42.

[48] Id, p. 43

[49] Ibid.

> standard of review, where such action has materially affected the panel's decision and threatens the integrity of the binational panel process. Because the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces, the Committee believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.[50]
>
> ... [I]f a binational panel has based its decision on a material misinterpretation of U.S. law or has failed to apply the appropriate standard of review, [t]he Committee believes that the mere fact that a Panel claims to have applied U.S. law and the proper standard of review is not a sufficient basis for an Extraordinary Challenge Committee to uphold a panel decision ...
>
> ... The Committee intends, as was the case under the CFTA, that a binational panel decision will be binding only with the respect to the particular matter before the panel ... A U.S. court should view panel decisions in the same fashion as it would view statements of respected commentators on the application of U.S. law.[51]

H. What the House Said

The House Committee on Ways and Means, lead Committee of the nine to which the NAFTA legislation had been referred, was somewhat briefer but in complete accord with the Senate - and just as specific as to the duty of binational panels and ECC's to apply *United States* law, and just which part of that law they had precisely in mind.

> Section 403. Testimony and production of papers in extraordinary challenges
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> Section 403 of H.R. 3450, relating to the powers of extraordinary challenge committees to secure testimony and document production, parallels the language of the U.S.-Canada FTA Implementation Act. This authority is necessary because

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[50] Id, pp. 43-44

[51] Id, pp. 44-45

Article 1904.13(a)(i) of the NAFTA unchanged from the U.S.-Canada FTA, provides in certain circumstances for an ECC if a NAFTA country alleges that a panelist has engaged in gross misconduct, is biased, or has a serious conflict of interest. In such circumstances, an ECC might need to compel production of evidence.

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 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.

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 panels process. Scholars have noted the potential within the system for lack of uniformity of panel decisions with each other and established U.S. law. See A.F. Lowenfeld, "Binational Panel Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal" 81 (December 1990). In order to ensure that such lack of uniformity does not develop through panel decisions under the NAFTA, *binational panels must take care to apply properly the importing country's law and standard of judicial review.*

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.*

The decisions of a few binational panels convened under the U.S.-Canada FTA have underscored the importance of the NAFTA's emphasis on the proper application of the judicial standard of review. *In specific, these decisions have raised the question of whether these panels have correctly applied the standard of review.* Where, in the view of a Party, panel decisions have failed to apply the appropriate standard of review or they have otherwise manifestly exceeded their powers, authority or jurisdiction, there could be recourse to the extraordinary challenge procedure under Article 1904.13.

The Committee believes that a panel could manifestly exceed its powers where it failed to apply U.S. law in accordance with Article 1904. In two recent decisions, a panel was called upon to address a determination by the Department of Commerce that a subsidy is provided to a specific industry or group of industries, 19 U.S.C. 1677(5). The Administration argued before these panels that U.S. law, including the decisions of U.S. courts, provides that the Department of Commerce may find that a subsidy *is specific based on one or more relevant factors*, rather than be required to weigh and consider all possible factors.

One case also involved a question of whether the Department of Commerce must measure the *price and output effects* of a subsidy before countervailing that subsidy. In this regard, the Administration argued that U.S. law, including the decisions of U.S. courts, provides that once the Department of Commerce has found that a subsidy has been provided, it does not have to show that the subsidy affected the price or output of the product.

In these circumstances, the United States could seek recourse to the extraordinary challenge procedure. If that procedure were not successful in correcting the misapplication of law, Article 1902 describes notification and consultation requirements attendant to each NAFTA Party's rights to change or modify its law. It is the Committee's understanding that the Administration would carefully adhere to these procedures in supporting legislation to correct the problem.

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 clarify 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.[52]

I. The Legal Effect

Most scholars and judges have no doubt that committee reports are authoritative legislative history and should be given great weight.[53] A statistical analysis has shown that over a 40 year period 60 per cent of the Supreme Court's citations to legislative history were to committee reports.[54] Persuasive, but in decreasing order of merit, are the committee chairman's comments, leading sponsors of the bill, members of the leadership. Of practically no value are the interpretations by individual members, for or against.

All this is in regard to contemporaneous legislative history, concurrent with the measures being voted on. Subsequent legislative history has always been more controversial, although used by the Supreme Court and elsewhere when the circumstances appeared to justify it. Obviously subsequent declarations can reflect

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52 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)

53 Estridge and Fridley, Legislation Statutes and the Creation of Public Policy (1987) at 709.

54 Carro and Brawn, "The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis", 22 Jurimeterics J. 294, 304 (1982)

afterthoughts never previously considered, wishful thinking which was originally even implicitly rejected, and be the product of manipulation (so can contemporaneous declarations).

What we have in the Senate and House Committee Reports is *both contemporaneous and subsequent legislative history* from the recognized most authoritative source, the responsible Committee. It is *contemporaneous* with the NAFTA Act, it is *subsequent* to the CFTA - and other than the two changes clarifying ECC review by making explicit in NAFTA what was implicit in the CFTA, the relevant language we are considering is identical in each piece of legislation. *Since fifty-two* members of the Senate Joint Committee in 1993 are identical with those in 1988, since the interpretation set forth in both Reports is based on the experience of five years with this language, and since no one has argued that the language in the 1993 Reports is in any way inconsistent with anything said by the same Committees in 1988 - all this adds up to the most powerful and convincing piece of legislative history imaginable.

Much, much less powerful legislative history has been found to be thoroughly persuasive. Judge Patricia Wald (formerly Chief Judge of the D.C. Circuit) surveyed the 1981-82 Supreme Court term in regard to the High Court's use of legislative history. She found that "The Supreme Court increasingly is using legislative history in construing and applying federal statutes.... [A]lthough the Court still refers to the 'plain meaning' rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will <u>not</u> look at the

legislative history."[55] "Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language *not* to double check its meaning with the legislative history"[56]

She points out that "As Congress increasingly evolves policy through a succession of statutes or amendments on a single subject, or on a variety of subjects clustering around a common objective, *the intent in one statute may be inferred from what the legislators have done or said on related legislation*[57]" (emphasis added) The applicability of this comment, based on Judge Wald's own observations and others cited, to our case here is obvious.

Judge Wald discusses several cases in which the Supreme Court relied on post-enactment legislative history. *North Haven Board of Education v. Bell,* 102 S Ct. 1912 (1982)(The Court cited Senator Bayh's "prepared" remarks during debate that never went to committee and were made on the same day the amendment was passed; The Court also cited a summary of the amendment Sen. Bayh *introduced into the record after its passage*, and the Court relied on Congress' subsequent unwillingness to pass legislation as indicative of Congress' intent). *FEC v. Democratic Senatorial Campaign Committee* 454 U.S. 27 (1982) (The Court cited post-enactment actions of a *different* Congress in support of its

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[55] "Some Observations in the Use of Legislative History in the 1981 Supreme Court Term", 68 Iowa Law Review 195 (1982). (emphasis Wald's)

[56] Id, at 197.(emphasis Wald's)

[57] Id, at 202. (emphasis added)

decision). *Patsy v. Board of Regents*, 102 S. Ct 2557 (1982) (Justice Marshall relying on the legislative history of the 1980 Civil Rights of Institutionalized Persons Act to show congressional perception in 1980 that the Civil Rights Act of 1871 did not require exhaustion of state remedies.), *Baldridge v. Shapiro,* 102 S. Ct 1103 (1982) (Chief Justice Burger, writing for a unanimous Court, relied on the 1977 congressional rejection of proposals to allow local officials limited access to census data to show that the 1929 Congress intended the data to be kept confidential.)

Judge Wald points out that "[u]nder English law, with a few exceptions, judges do not consult legislative materials. ... and **the Canadians** came to joke that the American rule was "whenever the legislative history is ambiguous it is permissible to refer to the statute."[58]

Chief Justice Marshall was of a different view: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived."[59] Justice Frankfurter warned: "The notion that because the words of the statute are plain, its meaning is also plain, is merely a pernicious over simplification."[60]

Almost two centuries later the Supreme Court was still finding useful Chief Justice Marshall's principle. In 1980 it stated:

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[58] Id., at 197

[59] *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805).

[60] *United States v. Monia*, 317 U.S. 424, 431 (1943)

> While arguments predicated upon subsequent congressional actions may be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.[61]

And in another case the same term, the Court adopted the interpretation of a 1936 statute set forth in a 1971 House committee report based on the theory that, "While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one...such views are entitled to significant weight,...and particularly so when the precise intent of the enacting Congress is obscure.[62]

Bear in mind that the CFTA and NAFTA statutes are completely devoid of instruction on the particular issues involved here: the method of proving "specificity", the necessity - or lack thereof - of finding "market distortion", etc. So the seventy-five members of the Joint Committees are not trying to put an interpretation inconsistent with any statutory language; indeed, there is an admitted gap, which the agency has attempted to fill but has been frustrated by the binational panel.

One more Supreme Court pronouncement should be noted. In *Sioux Tribe of Indians* v. *United States*[63] the Senate Committee Report was *made within five years of the prior Act's passage*, and, the *Committee in question was the very one which had reported the bill*

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[61] *Andous* v. *Shell Oil Co.*, 446 U.S. 657,666 n.8 (1980)

[62] *Seatrain Shipbuilding Corp.* v. *Shell Oil Company*, 444 U.S. 572, 596 (1980).

[63] 316 U.S. 317 (1942)

on which the statute was based. The Court concluded that the Committee's statement was "virtually conclusive as to the significance of the Act."[64] This is our case precisely.

In order to provide guidance for the future, it was necessary for the Senate Joint Committees and the House Ways and Means Committee to review and critique the past, otherwise panels and Committees would have been authorized to be guided by these erroneous panel decisions. If the Congress had not spoken to, the errors of these panels would have been left unrefuted on the record for consideration by NAFTA panels.

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 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

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[64] Id., at 329-330.

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

Reflecting on all the above, I submit that the well intentioned system of Extraordinary Challenge Committees, as a substitute for the standard appellate review under United States law, has failed. It has failed both at the Panel and the Committee level to apply United States law, substantively, and most clearly in regard to the United States standard of review of administrative agency actions. The system runs the risk, not only of producing egregiously erroneous results as in the instant three to two Panel decision, but also of creating a body of law - even though formally without precedential value - which will be divergent from United States law applied to countries not members of NAFTA.

I believe that I have demonstrated that this is so in this particular case, and I suggest that analysis demonstrates that this should be no surprise.

Consider the position of the Binational Panels. The members are to be experts, distinguished practitioners in the esoteric field of trade law. Surely, a better mechanism for review of agency

action than a single judge from the Court of International Trade or a three judge panel of a Circuit Court of Appeals? Not necessarily. The record shows that five (or in this case three) distinguished "experts" have shown no deference whatsoever to the "experts" in the ITA of the Commerce Department.

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

Why do these distinguished Panel experts make this type of error? The answer is, I suggest, that they are experts in *trade law*; they are *not* experts in the field of judicial review of agency action; they do not necessarily have any familiarity whatsoever with the standards of judicial review under United States law. This would particularly be true of the Canadian members. Thus the five member Binational Panel of experts has been thrust into the role of a generalist judge reviewing the work of an administrative agency,

to whose expertise he has been accustomed to giving deference - because over many years Congress has told him by the United States statutes to do this.

I suggest that under the present scheme, the five member Binational Panels are not likely to consider themselves less "expert" in the future, and that we have no way to educate such persons on the U.S. standards of judicial review of agency action, particularly the Canadian members. So we are likely to continue to get a usurpation of the administrative agency functions by well intentioned experts in the field of trade law. I suggest that there are only three ways to become an expert in the matter of judicial review of administrative agency action, and that is to spend some years either arguing cases before a reviewing court, teaching courses in administrative law, or sitting on one of those reviewing courts itself.

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.

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 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 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 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.

If one has a solid background in principles of United States judicial review of agency action, it is not even necessary to have read the *Redetermination* to see how far astray the Panel majority went. But for the clincher, read the Panel dissent, particularly pages 5-38 and 43-50.

One of my colleagues, Justice Hart, has reached the somewhat astonishing conclusion that this whole substitute appellate review system of Panels and ECCs " ... may very well reduce the amount of deference which *can* be paid to the Department in the future." And,

that this was "*intended*." (p. 28) (emphasis added) I submit that this totally violates the fundamental agreed concept that the standard of appellate review in each country would remain the same.

This will be news to the Commerce Department, that their agency discretion and deference to their expertise, mandated by United States statutes and time-honored in practice, has been *diminished exclusively* by the votes of the Canadians on the Panel and on this ECC.

This also is a frank admission that the vigorous denial by the Canadian parties that *two different* bodies of *U.S.* law, in both substance and procedure, would inevitably emerge from their proposed standard of appellate review is false. It is clear that a new body of *United States* law, fathered by Binational Panels and ECCs under the CFTA (soon NAFTA), will be created, while long-established U.S. law will continue to be applied to imports from all other countries.

All of this has occurred in the operation of this innovative scheme of appellate review between Canada and the United States, two common law countries with similar legal traditions and antecedents. Now we have Mexico as a third member of NAFTA, and in the near future perhaps Chile and other Ibero-American countries. Mexico has no legal system or traditions in common with the United States whatsoever; it is proudly a *Civil Law* country. It has no mechanism and no concept of judicial review of administrative agency action; it has only the much abused and discredited "amparo", or flat prohibition against an official act being carried

out. If Canadians on the Panels and ECCs have failed - as in my judgement here they have - to comprehend the United States standards of judicial review of administrative agency action, what can we expect from lawyers and judges schooled in the Civil Law?

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 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 it"? And expect an Extraordinary Challenge Committee to say "Well done. That's all we can expect"?

This Standard of Review by an ECC could never possibly have been intended by the two parties to the CFTA.

The failure of the substitute appellate review system in place of customary United States judicial review of administrative action confronts us with two dangers. The first is that egregiously wrong results will be achieved in individual cases, of which I believe this is a prime example. The second and most threatening to the integrity of the whole system is that a lack of appreciation of the standards of judicial review under U.S. law will create a dangerous divergence in United States trade law as applied to relations with Canada and Mexico, parties to the NAFTA agreements, compared to relations with other nations, such as Japan, South America and the European Union.

For example, let us suppose that next year we have imports of lumber from Guatemala, Honduras or El Salvador which cause a subsidy and countervailing duty problem. The Department of Commerce

will adhere to its position as stated in this case: it will not follow the decision of the Panel or this ECC, because it is not bound in future cases by Panel decisions under the CFTA or NAFTA - and because it has the legal and practical acumen to pay attention to the views of seventy-five senators and the most powerful Committees in the House. So the Commerce Department will apply its own rule on imports,subsidies and countervailing duties in regard to imports from those three countries, thus achieving a result different from this case.

That Commerce determination would of course be subject to appeal, first to the Court of International Trade and then to the Federal Circuit. Based on the logic of Commerce's position expressed in its Redetermination on Remand in this case, the dissent in the Binational Panel, and the strongly expressed views of the Senate Committees, I would think that the result in the normal course of the United States judicial review of Commerce's action would be to uphold the agency. If so, we would have a complete divergence of trade law on subsidies and countervailing duties between those countries involved in NAFTA and those countries under GATT or elsewhere.

Canadian counsel gave two answers to this problem. First, it was argued that there was no difference in this situation from that of having two or four different Circuit Courts analyze similar identical issues and come to different conclusions under the law. Yet, in the domestic scheme of things, those divergences between Circuits will quickly be straightened out by the Supreme Court.

There is no such possibility under the NAFTA or CFTA. Under these Agreements Congressional action requires special notice under Article 1902.2 and is otherwise limited.

The second alleged explanation as to why this divergence would not persist, future CFTA (now NAFTA) Panels would not be bound by these erroneous or divergent decisions as precedents, and would in future cases bring the CFTA and NAFTA all back in conformity with the rest of the United States law. That assumes that the future Binational Panels and ECCs do a more accurate job in interpreting U.S. law than has been done in this case. With an increasing body of erroneous CFTA or NAFTA law, a correction is increasingly unlikely to happen in the substitute system. It is only if we can get out of the system that a correction will be likely to be made.

Regrettably, we have the action of this ECC and the two opinions of my colleagues explaining that action. To my mind those opinions reveal another failure to appreciate and apply United States law. Specifically:

1. The failure to appreciate that the two-tier substitute system of review is designed to replace the U.S. judicial review system manned by judges holding life tenure. (See Part I above) And that an ECC manned by judges dispossessed of all power is no substitute at all. (See Part II above)
2. The failure to apply the Federal Circuit's highly relevant and therefore mandatory holding in *Daewoo* to this case. (See Part III B. above)

3. The failure to consider at all the legislative history, the highly specific and relevant Reports of the Senate and House extraordinary committees, dealing with the legislation in identical language of *both* 1988 and 1993. I have read that *Canadian* courts would not consider this, but I *know* that United States court would feel *compelled* to weigh the words of both these Committee Reports.

Thus is United States law ignored by the majority decision of this ECC.

This brings up a point so large that it cannot be dealt with here, only noted. Early in the negotiations a United States constitutional problem was identified: Could litigants in the United States be deprived of their right to appeal from administrative action to a hierarchy of life-time Article III judges, i.e., to the Court of International Trade, then as of right to the Federal Circuit, and then possibly to seek certiorari in the Supreme Court, by the device of a Binational Panel composed of *ad hoc* non-judges, and then a special review of Panel decisions by another binational tribunal (Extraordinary Challenge Committee) composed of *ad hoc* judges?

What about due process and other rights? Could these be constitutionally preserved by a system staffed by foreigners unfamiliar with United States law? The answer was to make as certain as possible that United States law would be applied. So Public Law 100-449, 28 September 1988, provided:

> TITLE 1 - APPROVAL OF UNITED STATES-CANADA FREE-TRADE AGREEMENT AND RELATIONSHIP OF AGREEMENT TO UNITED STATES LAW
>
> SEC. 102 RELATIONSHIP OF THE AGREEMENT TO UNITED STATES LAW
>
> (a) United States Law to Prevail in Conflict - No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is in conflict with any law of the United States shall have effect.

On this basis the House Committee on the Judiciary concluded that the Free Trade Agreement is constitutional. Specifically, the Committee determined that the substitution of Binational Panel review for the then current system of judicial review was constitutional.[65] The Committee concluded that substitution of Panel review for the preexisting system of judicial review would not deprive anyone of due process, because the panelists are mandated the following duties:

> They must apply the law and precedent of the relevant country.
>
> They must use the basic rules of appellate procedure as they exist in the appropriate country.
>
> They will be subject to a strict code of ethics and will be subject to peremptory challenges by each government.
>
> Aberrant panel decisions will be subject to a review mechanism through the use of extraordinary challenge committees.

Therefore the Committee stated: "Thus the binational panel process meets any requirements for a fundamentally fair process. To the extent that the Constitution requires a judicial forum for the adjudication of constitutional claims--both facial and as applied--the implementing legislation accomplishes that goal."[66]

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[65] House of Representatives Report from the Committee on the Judiciary, 100-816 Part 4, 4 August 1988

[66] H.R. 100-816, supra at 5

The age-old sad truth is that the strictest laws are subject to being nullified and the noblest hopes dashed by human error and ignorance in their application. Have the requirements for a fundamentally fair process been nullified by this ECC majority's overly restrictive view of the role of an ECC? (See my three points above) Here the majority agrees with the Canadian Parties' argument that virtually no case except a "smoking gun" situation may be entertained by an ECC. Does this conflict with United States law?

My Canadian colleagues conclude, in the words of Justice Hart, "... 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." (p. 55) Aside from the fact that this statement seem to fly in the face of market economics common sense, what was "established" by the Panel was accomplished only by a complete redoing of the work and usurpation of the role of the administrative agency.

Has the United States been deprived of its right to make a peremptory challenge to panelists in our situation, where it was not given in the first place enough information on which to make a decision, in spite of the clear requirements of the FTA's Code of Conduct? Is this consonant with due process or fundamental fairness?

My two colleagues have quoted the *Live Swine* ECC Decision to this effect:

> 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." (p.15) (emphasis added)

Given the obvious errors on the merits in our Binational Panel 3-2 Decision and the unfortunate violations of the Code of Conduct, I fear that my colleagues, by this Decision, have tied down the safety valve.

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 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.

I. THE RULES AND THE CHARGED VIOLATIONS.

Article 1904 (13) states that action by an Extraordinary Challenge Committee is warranted if:

> "(a)(i) a member of the panel was guilty of ... 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 threatened the integrity of the binational review process ..."

Under the Free Trade Agreement Code of Conduct, panelists have an original and also a continuing obligation to disclose "any

interests or relationships that are likely to affect the candidate's independence or impartiality or might reasonably create the appearance of bias ..." The Code of Conduct lists specific disclosure obligations:

> (1) a candidate has the duty to make a reasonable effort to become aware of ... and disclose any such interests and relationships including ... any direct or indirect financial or personal interest in the proceeding [and] any existing or past financial, business, [or] professional relationship involving a family member, current employer, partner, or business associate;
>
> (2) the duty is continuing, the panelist must "continue to make a reasonable effort to become aware of and to disclose [such] interests or relationships;" and
>
> (3) the continuing duty is also "to disclose any such interests or relationships that may arise during any stage of the proceeding."
>
> (4) In addition to the duty to disclose possibly pernicious relationships, the panelist has the duty to avoid appearances of impropriety and partiality.

President Reagan's Transmittal message to Congress stressed this feature:

> It is important that there be no conflict of interest, *whether actual or perceived*, on the part of any panelist... It [code of conduct] will include a requirement that any potential roster candidate or panelist disclose to both governments, *in advance* of appointment, *current and past affiliations and financial interests*...[67]

This was one of the selling points urged by Ms. Jean Anderson in her testimony before both Senate and House:

> Panelists must also be independent, unaffiliated with either government and free of any interests or affiliations that might create even the appearance of conflict and interest. They will be subject to a code of conduct based on existing

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[67] "President's Reagan's Message", Supra., p. 227.

codes of conduct for judges and arbitrators.[68]

In response to Question 1 by Senator Hatch, Commerce's response is:

> It is anticipated that service on a panel will normally be only a part-time responsibility for panelists. Consequently, the FTA provides that a panelist may engage in other business during the term of the panel, but *only if such other business comports with the Code of Conduct for panelists... Ensuring that both Canadian and U.S. panelists have no conflict of interest with respect to the cases they hear is fundamental to the integrity and effectiveness of the panel process.*[69]
>
> The selection of able and *impartial* panelists will be *key* to the effectiveness and the *credibility* of the process, To ensure the *integrity* and efficiency of the process, the FTA establishes detailed *criteria*, procedures, and time limits for panel selection.[70]
>
> Because the panel review process will closely resemble judicial review in the two countries... To guard against bias or conflict of interest, panelists will be subject to a *code of conduct based upon existing codes of conduct for judges and arbitrators*. Violation of the code of conduct *would result* in removal of the panelist and the selection of a new panelist.[71]

On 6 April 1994 the United States filed a formal Request for an Extraordinary Challenge Committee. Count One of the allegations of grounds for relief is "Material breach of the Code of Conduct and Serious Conflict of Interest". The allegation of material breach of the Code of Conduct applies to both Chairman Dearden and Panelist Hunter, the serious conflict of interest only to Panelist Hunter.

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[68] Senate Judiciary Hearing, Supra, p. 65

[69] Senate Judiciary Hearing, Supra, p. 249

[70] House Judiciary Hearing, Supra, p. 74

[71] House Judiciary Hearing, Supra, p. 75.

II. EXTENT OF THE VIOLATIONS

A. Disclosure Is The Basis For The Entire Panel Selection System.

There is an obligation for a prospective panelist, at the time he is originally placed on a general list and at the time he is queried as to his willingness and his capacity to serve on a specific Panel, to disclose any and everything which might affect his impartial performance of his duties on the Panel, or affect the judgment of the contending parties as to whether to accept the particular panelist or reject him. The two governments do not send their investigative agencies to pry into the details of the prospective panelist's business and personal affiliations. There is no subpoena of the records of the panelist or his law firm, no review of his business contacts, public or private records to determine his sources of income for past years. The two governments rely exclusively on the honesty - and just as importantly, the diligence - of the prospective panelist to reveal any and everything which could seemingly have an impact on his being chosen to serve or not.

This obligation of disclosure, *properly fulfilled* by prospective panelists, leaves them free from worry of future embarrassment. The argument made in this case that the enforcement of the disclosure of this information will discourage qualified panelists from serving is totally fallacious. The problem in this case arose because of a lack of disclosure. If a panelist is honest and diligent in disclosing *everything*, then he may or may not be selected. Being rejected because of his legitimate business

affiliations is no disgrace. Serving on the Panel after full and complete disclosure means that neither side will have any cause whatsoever to challenge his impartiality. To repeat, the problem in this and in future cases comes and will come from a failure to meet the disclosure obligations; the prospective panelist who meets his disclosure obligations has nothing to worry about.[72]

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

When the exchange of nominees for a specific Panel is made between the two parties, Canada and the United States, either party has the right of a "peremptory challenge" to any name submitted. No reason need be given. In this case the firms to which Hunter and Dearden belonged had a few affiliations with companies or with the timber industry involved. Discounting these few connections, the United States accepted Hunter and Dearden.

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

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[72] Justice Hart chides the United States for not raising the disqualification issue earlier (p. 49), then for acting too swiftly once it was aware (p. 51), and defends the two panelists because facts requiring disqualification are so hard to come by. (p. 57)

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 the votes of Hunter and Dearden were essential.

It is not possible to argue now that these relationships were harmless. They were not revealed initially when the United States was making its decision to accept or reject the two panelists. The information was obtained from the panelists much later, after specific requests made by the United States at the instigation of interested participants. Only the United States has the power to make the decision on the suitability of the panelists, and it was denied that power by the failure to make the initial disclosures in July 1992 and in a few instances as the work of the Panel progressed. Disclosures made later could not restore that right to its pristine power.

The only remedy now is to set aside the Panel majority judgment and opinion.

C. Nature Of The Panelist Relations With Interested Parties.

Panelist Lawson Hunter materially breached the Code of Conduct by failing to disclose initially and during the course of the Panel proceeding the following:

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

Mr. Hunter not only failed to disclose, but he failed to make reasonable efforts to become aware of his firm's relationships. The above failings add up to a failure to avoid an appearance of partiality, another violation of the Code of Conduct, and to a failure to maintain his independence, still another violation of the Code.

Lawson Hunter's undisclosed interests and relationships were not insignificant, nor were they irrelevant to the issues to be decided by the Panel in this case.

First, he failed to disclose legal work his former firm did for the Government of Canada while he was a member of the firm and on the Panel.

Secondly, while serving on the Panel he failed to disclose that members of his new firm were registered lobbyists for two Canadian lumber companies, exporters to the United States.

Third, after joining his new firm, Hunter failed to disclose that the firm provided legal services to nine other Canadian and non-Canadian lumber or forest product companies. Seven of these nine companies either themselves exported lumber from Canada to the United States or were affiliated with companies which did.

These relationships of Hunter were through the two firms in which he was a partner during the relevant period of his work on the Binational Panel.

Last, and somewhat incredible, while he served on the Binational Panel, in the fall of 1992, he himself *personally* did work for an agency of the Canadian Government. Hunter's services sought by the Canadian Government were in the nature of advice and consultation in a field in which he had a rather unique experience. Whatever the nature or value of his services to the Canadian Government, Hunter was an employee of the Canadian Government at the same time he was deciding as a member of the Panel the claims put forth by that Government as one of the two principal litigants.

The lumber companies which Hunter's two firms represented had a direct financial interest in the outcome of the Panel proceedings. These companies were the original subjects of the Commerce Department's investigation on subsidies. As members of associations, the companies were actively interested in and participated in Panel proceedings. These particular companies and

their industry stood to gain directly from the decision. As a partner in his two firms, Hunter stood to gain financially from the representation of the lumber companies and the Canadian Government.

Chairman Richard Dearden materially violated the code of conduct by failing to disclose:

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

Dearden failed to make reasonable efforts to become aware of these relationships. In so failing, both to disclose and to make reasonable efforts to acquire the information and disclose, he created a situation giving rise to the appearance of partiality in his judgments as a member of the Panel.

For Chairman Dearden the nature of these relationships of his firms (not his personally) were heavy on the governmental side. Both initially and in response to the parties' enquiries, he ultimately disclosed that his firm had provided and was providing legal advice to three Provincial Governments and to the Canadian Federal Government, both before and during the Panel proceedings. The Provinces involved, Saskatchewan, Manitoba and Alberta, and most significantly, British Columbia and Ontario, were interested

parties to the Panel proceeding. Together they account for over eighty (80) percent of the lumber exports from Canada to the United States. One of the lumber companies filed a separate notice of appearance in the lumber Panel proceeding.

D. Chronological Analysis Of The Two Panelists' Affiliations And The Impact Of These On Their Acceptance/Rejection As Panelists By The United States.

The position of the Canadian Government and the Canadian interested private parties is that these relationships are trivial and unimportant, that the United States accepted both Hunter and Dearden after disclosure of a *few* of these relationships in July 1992, that there is no reason to suppose that the United States would object to other relationships of like nature. My two colleagues endorse these arguments.

The answer to that is that No One can say precisely what the United States *would have done* had it known of these relationships; the undisputed fact is that the United States *did protest immediately* after knowledge of this was gained, that the assertion relationships are claimed to have been trivial and unimportant *ignores totally any cumulative effect*, and the position of the Canadian parties *ignores totally the personal employment* of Hunter by the Canadian Government during the time he was serving as a panelist, a *type* relationship which was *never* disclosed to the United States Government when it accepted Hunter in July 1992.

In trying to evaluate whether the United States had in truth been deprived of any substantial right, I found it helpful to

examine the *chronology* of the disclosures made over a period of two and a half years by the two challenged panelists. Reproduced as an annex to this opinion is an annex to one of the United States participant's briefs, which is the clearest and most unargumentative account as to what disclosures were made, when and why.

Looking at the Conflict of Interest summary for panelist Hunter, from June 1992 to 12 January 1993 is the extent of Hunter's voluntary and timely disclosure, which consists of previous representation by his original law firm of three Canadian companies on the interested party list. There is no further disclosure until January 1994, and this comes in response to the inquiries by the Coalition for Fair Lumber Imports, a Participant in these proceedings.

Look at Hunter's disclosure of 24 January 1994. Bear in mind that Hunter was obligated to disclose this information shortly after 1 January 1993 when he joined his new firm. He was actively engaged in the work of the Panel at that time. Evaluating the new disclosure with that already furnished, my opinion would be that since Hunter was already on the Panel and that the affiliations disclosed were those of other members of his firm, and not his personally, the United States Government would *probably* continue to accept Hunter as a member of the Binational Panel.

However, look at the disclosure of 27 January 1994. One of these companies, a client of Hunter's law firm, represented in this matter by other counsel, is currently seeking a company specific

administrative review from the United State Department of Commerce. At this point I would say the United States Government would begin to have doubts about the advisability of Hunter remaining on the Panel. Certainly the appearance of impartiality has been damaged.

Now look at the disclosure of 14 February 1994. Hunter *personally* was retained by the Canadian Department of Transport on an unrelated matter for *four months in the fall of 1992*. Hunter became a member of the Panel in July 1992. This, in my judgment, was an employment which he could not have accepted and remained on the Binational Panel; and if he did accept it, he certainly was obligated immediately in the fall of 1992 to make that employment and relationship with the Canadian Government known to both parties.

At this point, the fall of 1992, I am quite satisfied that the United States Government would have vigorously protested Hunter remaining on the Binational Panel. There are other items revealed, that his new law firm had been retained by the Attorney General of Canada and that his new law firm had provided services to two companies in the forest products industry. These relationships *should have* been disclosed *immediately in 1993* or whenever the relationship was initiated.

In addition, belatedly, on 21 February 1994 Hunter reveals that his first law firm had been retained by the Attorney General of Canada. This should have been provided to the interested parties either in June 1992, when he was first being considered, or at some time from there until the end of 1992 when he was still a member of

that law firm.

In sum, on the disclosure by Lawson Hunter: it is inconceivable to me that the United States Government would have acquiesced in Lawson Hunter remaining on the Panel after this information had been timely revealed, even if in June 1992 the U.S. Government had accepted him. Under the Code of Conduct and all the rules of accepted judicial and arbitral ethical behaviour, Hunter was under a continuing duty to reveal any affiliation of himself personally or of his law firm which might relate to his performance on the Binational Panel. Hunter's duty was to disclose; the United States Government's right was to make its own judgment of the complete and timely disclosure of Hunter. Since that disclosure was not made, the United States Government was thrown to the only recourse it now has, to ask the Extraordinary Challenge Committee to vacate the Panel's majority decision, to which Hunter's vote was decisive.

I now turn to the Conflict of Interest summary of Chairman Dearden. Using the same analysis, Chairman Dearden's voluntary and timely disclosure ends on 17 July 1992. After that disclosures made in January 1994 are in response to questions raised by the Coalition for Fair Lumber Imports, the American industry group, Participant in these proceedings. In contrast in part to Hunter, the affiliations that Chairman Dearden disclosed are not those of himself personally in any instance, but entirely those of his law firm, and indeed appear to be past representations, not concurrently with Chairman Dearden's performance of his duties on

the Binational Panel.

Considering all of Chairman Dearden's disclosures up until 14 February 1994, taking into account that most of these should have been disclosed in June of 1992, in my opinion, giving Chairman Dearden the benefit of every doubt the United States Government would have accepted him on the Panel.

However, when we look at the disclosure of 14 February 1994, revealing that several of his partners have represented the Attorney General of Canada and that his firm currently represents the Attorney General of Ontario, of British Columbia, and also two lumber products companies, Georgia Pacific and Miranda Inc., then it becomes highly questionable that the United States, knowing all of this, would have accepted Chairman Dearden.

Two factors are important. First, this information should have been revealed to the United States much, *much earlier* than 14 February 1994, either in June 1992 or during the course of the Panel's work when the representations occurred and Dearden either knew or was obligated to know about it. Secondly, there is a *cumulative effect* here which must be taken into account now, and certainly *would have been* taken into account by the United States in evaluating Chairman Deaden's initial selection and his continuance on the Binational Panel.

Both Chairman Richard Dearden and Lawson Hunter are highly respected attorneys affiliated with distinguished law firms. There is no charge of bad faith by either the U.S. Government or the private parties participating. There does seem to be, though, an

unfortunate inattention, a disinterest in the obligations of disclosure initially and the continuing obligations of the Panel work, all of which obligations are set forth clearly in the Code of Conduct.

In addition to the material breach of the Code of Conduct, there appears to be a serious conflict of interest in the personal representation of Hunter during the time he was active on the Panel. All of this gives the United States Government unquestioned right to demand the vacating of the Panel majority opinion, since the two of the three votes for the majority were cast by Dearden and Hunter.

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, 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.

SIGNED BY IN THE ORIGINAL:

MALCOLM WILKEY
MALCOLM WILKEY

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

ANNEX 1

CONFLICT OF INTEREST SUMMARY: PANELIST HUNTER

June 1992	Canadian Secretariat requests disclosure from panelists. Hunter discloses that his law firm, Fraser & Beatty, has represented three Canadian companies on the interested party list: - Domtar, Inc. - Scott Paper Limited, and - Daishowa Forest Products Ltd.
1 January 1993	Hunter leaves Fraser & Beatty to join Stikeman, Elliot.
12 January 1993	Hunter informs the U.S. Secretariat of this change and is advised to submit relevant information in writing. Hunter fails to do so.
7 January 1994	The Coalition for Fair Lumber Imports ("Coalition") presents information suggesting that members of Stikeman, Elliot serve as registered lobbyists for a Canadian lumber company.
14 January 1994	The Coalition inquires about Stikeman, Elliot's representation of Stone Consolidated Inc.
24 January 1994	Hunter responds that other members of Stikeman, Elliot: 1) were registered lobbyists for - Repap Enterprises Inc. and - Stone Container Corp., and 2) performed legal services on behalf of: - Canadian Pacific Forest Products, - Abitibi-Price Inc., - Quno Corporation, - Industries James MacLaren Inc., - Normick Perron Inc., - Rolland Inc., - Daishowa Forest Products Inc., and - Jefferson, Smurfit.

27 January 1994	Hunter responds that Stikeman, Elliot does non-trade related work for Stone Consolidated and that he was unaware that Stone Consolidated was seeking a company-specific administrative review.
2 February 1994	Coalition cites Canadian Federal Court records showing that Stikeman, Elliot represented several Canadian lumber producers.
3 February 1994	Coalition inquires about both Fraser & Beatty and Stikeman, Elliot's legal work on behalf of the Canadian Federal Government.
14 February 1994	Hunter responds that: 1) He was retained by the Canadian Department of Transport on an unrelated matter for four months in the fall of 1992, 2) Stikeman, Elliot lawyers had been retained by the Attorney General of Canada, and 3) Stikeman, Elliot lawyers had provided services on behalf of: - Industries James MacLaren (the Quebec division of Noranda); - Dubreuil Forest Products Ltd.
21 February 1994	Hunter responds that Fraser & Beatty attorneys were retained by the Attorney General of Canada

CONFLICT OF INTEREST SUMMARY: CHAIRMAN DEARDEN

June 1992	Canadian Secretariat requests disclosure from panelists. Dearden discloses that his law firm, Gowling, Strathy & Henderson has represented several Canadian companies and governments on the interested party list, including: - Abitibi-Price, - E.B. Eddy, - Canadian Pacific Forest Products, - Independent Lumber Producers Cooperative, - United Brotherhood of Carpenters and Joiners of America, - Governments of Alberta, Saskatchewan, and Manitoba, and - Government of Canada.
17 July 1992	Dearden discloses that Gowling, Strathy & Henderson has represented: - Leggett Platt Inc.
7 January 1994	The Coalition for Fair Lumber Imports ("Coalition") presents information suggesting that members of Gowling, Strathy & Henderson have represented Canadian forest products companies in trade matters, including: - Abitibi-Price Inc., - Commonwealth Plywood Co. Ltd., - Weldwood of Canada Sales Ltd., and - MacMillan Bloedel.
17 January 1994	Dearden explains that Gowling, Strathy represented the said firms and few were clients when he was a panelist, including: - Abitibi-Price (current trademark and patent, forgot to report previous trade representation), - Commonwealth Plywood (Gowling partner had worked for Commonwealth at a different firm), - Weldwood of Canada (previous trade representation), and - MacMillan Bloedel (previous trade representation).
2 February 1994	Coalition cites public records showing that Gowling, Strathy represented Daishowa Seiko Co.

3 February 1994 — Coalition inquires about Gowling, Strathy's legal fees from the Canadian Federal Government.

14 February 1994 — Dearden responds that:

1) Several of Gowling, Strathy attorneys have represented the Attorney General of Canada,

2) He has no knowledge that Daishowa Seiko was (or is) related to the forest products industry,

3) Gowling, Strathy attorneys have represented various U.S. agencies, including the Department of Commerce, and

4) Gowling, Strathy attorneys also represent:
- Attorney General of Ontario,
- Attorney General of British Columbia,
- Georgia-Pacific, and
- Noranda Inc.

ANNEX 2

Miscellaneous Legal Arguments

A. Saarstahl

On *Preferentiality* my two colleagues dismiss *Daewoo* and rely on *Saarstahl, AG v. United States*.[1] On the surface an odd choice. *Daewoo* is by three judges of the Federal Circuit, whose authority on the United States trade law is superior to all but the Supreme Court; *Daewoo* was thought so highly relevant to the case before us that two members of the Panel, influenced also no doubt by the Commerce Department's *Redetermination*, changed their views in part and voted to sustain Commerce's position.

Below the surface, an odd choice also. *Saarstahl* is a perfectly logical exposition by Judge Carman of the CIT of a simple fact situation with a straight-forward application of the relevant law. The result is unfavorable to Commerce; the rationale based on clearly different facts is hardly persuasive of anything in our case.

The key to the decision is found in the portion of Judge Carman's opinion quoted by my colleagues:

> ... a given transaction is at arms length,... the buyer has paid an amount which represents the market value of all it is to receive. Because the countervailable benefit does not survive the arm's length transaction, there is no subsidy within the meaning of 19 U.S.C. §1677 (5). The purchaser, thus, will not realize any competitive countervailable benefit

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[1] Court of International Trade, 93-04-00219 (7 June 1994), cited in Justice Hart's Opinion at pp. 28-29.

and any countervailable duty assigned to it amounts to a penalty.[2]

In *Saarstahl*, "There is no dispute that a subsidy within the meaning of 19 U.S.C. §1677 (5) (1988) was bestowed upon *Saarstahl*,"[3] before it apparently became nothing but a shell when its effective owner, the Saarland government, contributed all its assets in exchange for 27.5% ownership in a new corporation, DHS. The question in *Saarstahl* was whether the previously existing "subsidy" (actually a forgiveness of several type debts) was "passed on" to the purchaser of the assets, DHS.

Judge Carman answered in this fashion.

> While the Court agrees with Commerce that the *CVD law 'embodies the irrebuttable presumption that subsidies confer a countervailable benefit upon goods produced by their recipients,'* such a presumption ceases to exist where the new owner has paid fair market value for the *productive unit* and is therefore not a 'recipient.' The Court is not requiring Commerce to determine the actual use to which recipients put the subsidies or the subsidies' effect on the company's subsequent performance.[4] (emphasis added)

If Judge Carman's language has any relevance to our case, I point out his comment that "the CVD law 'embodies the irrebuttable presumption that subsidies confer a countervailable benefit upon goods produced by their recipient', quoted above. This sounds very apropos of the situation in the Canadian lumber industry. However, in *Saarstahl* the judge was dealing with a sale of a "productive unit" i.e., all the assets of the original company, hence a

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[2] Id. at 12, quoted in Justice Hart's Opinion pp. 28-29.

[3] Id. at 8.

[4] Id, at 13.

different result from that called for here. In our case we are dealing with the sale of timber, not sawmills, so there is an "irrebuttable presumption" under the CVD laws that the timber produced with a subsidy is countervailable.

Judge Carman's rationale continues:

> ... Because the countervailable benefit does not survive the arm's length transaction, there is no benefit conferred on the purchaser and, therefore, no countervailable subsidy within the meaning of 19 U.S.C. § 1677 (5). The purchaser, thus will not realize any competitive countervailable benefit and any countervailable duty assigned it amounts to a penalty.[5]

Judge Carman gave an example which clearly distinguishes the sale of productive assets involved in *Saarstahl* from our case:

> A simple example will illustrate the faulty reasoning behind Commerce's travelling subsidy theory. A government gives X [Saarstahl here] a productive unit, a printing press operation, and X subsequently sells that printing press operation to Y [DHS here] in an arm's length transaction. Instead of owning the printing press operation, X will now have the cash value of that operation. According to Commerce, at least a portion, if not all, of the original subsidy will travel with the printing press operation to Y. When both X and Y export their goods to the U.S., Y will have to pay a countervailable duty while X will have to pay either no countervailable duty or a reduced duty (depending on what portion of the subsidy Commerce determines travelled with the productive unit). X will have eventually evaded the CVD laws and be in a position to export to the U.S. on an uneven playing field.
>
> Where the productive unit which previously received subsidies is sold in an arm's length transaction, the subsidy is not extinguished, it remains with the seller. ... Where the sole shareholder is the government and the company is completely sold in an arm's length transaction the subsidy reverts to the state.[6] [this was the situation in *Saarstahl*]

Judge Carman's reasoning appears sound. His language approving

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[5] Id., at 12.

[6] Id., at 14.

Commerce's claim that the CVD law embodies an irrebuttable presumption is certainly applicable to our case. But the fundamental facts in *Saarstahl* and our case are totally different: *Saarstahl* was a sale of *productive assets*, when the subsidy was extinguished; our case is a sale of *goods*, where the subsidy inevitably - and irrebuttably, according to the *Saarstahl* opinion - affects the price of the goods sold all down the line.

In *Saarstahl* the court wisely looked to the legislative intent of the CVD laws and found that, with respect to calculation of the ad valorem effect of nonrecurring subsidy grants or loans, Congress required whatever methods which Commerce chooses to employ to relate the benefit of the commercial advantage to the recipient. See H.R. No 317, 96th Cong. 1st Sess. 75 (1979). See also S.Rep No. 249, 96th Cong. 1st Sess. 86-86 (1979) Methods for allocating the value of nonrecurring subsidy grants or loans must be "based on the commercial and competitive benefit to the recipient as a result of the subsidy."[7]

In essence, although Congress provided no guidance to Commerce in assessing privatization issues, Congressional intent with respect to nonrecurring subsidy grants or loans was clearly evident from the legislative history. Since Commerce was mandated in this particular type of situation to find a commercial advantage bestowed to DHS and in fact could not do so because if found the transaction to be an arms length deal, the Court properly found that Commerce's privatization methodology *to the extent it states*

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[7] Id., at 13-14

previously bestowed subsidies are passed through to a successor company sold in an arms length transaction is unlawful.[8]

The distinguishing factors on this point between *Saarstahl* and our case are readily observable. First, *Saarstahl* involved a nonrecurring subsidy or grant; our case involves alleged subsides that are very much of a recurring character. Second, in *Saarstahl*, Congress mandated the methodology at least in part, which Commerce was to employ with respect to nonrecurring subsidies or grants. In our case, there is no mandate regarding Commerce's methodology on specificity or so-called "effects test" for a finding of a subsidy. Instead, Congress has made it clear that proof of "effects" or market distortion is *not* required, and there is a gap left as to methodology in applying the countervailing duty law on these items. Third, as confirmed by Sen.Rep. 103-189 and House Report 103-361 which support the methodology of Commerce on these items, in our case Commerce did not contravene or ignore the clear intent of the legislature, which was found to be the case in *Saarstahl*.

B. Magnesium

While *Saarstahl* correctly articulates the standard of review, as I have discussed above, it does so in a brief manner. In contrast, *In the Matter of Pure and Alloy Magnesium From Canada*, USA-92-1904-03, dated 16 August 1993, devotes six pages of text to

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[8] Id., at 19 (emphasis added)

the articulation of the standard of review, and does so in an extremely organized and clear fashion.

The *Magnesium* Panel defines the standard of review, i.e. "The court shall hold unlawful any determination, finding or conclusion found... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A. Section 1516a(b)(1)(B), and thereafter breaks down its analysis of this standard into two parts, the "substantial evidence" test and "the otherwise not in accordance with law" test.

Expanding on the definition quoted in *Saarstahl*, that "substantial evidence is something more than a 'mere scintilla and must be enough to reasonable support a conclusion' (citations omitted), the *Magnesium* Panel quotes both lower federal court and Supreme Court cases.

Substantial evidence... "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Electric Industrial Co., Ltd.* v. *United States*, 750 F.2d 927, 933 (Fed. Cir. 1984), also *Atlantic Sugar Ltd.* v. *United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). A plethora of case law is cited in footnote 9 of *Magnesium* for this proposition.

"The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita*, supra at 933 quoting *Consolo v. Federal Maritime Commission*, 383 U.S. at 6191-20 (1966) and *PPG Industries, Inc. v. United States*, 978 F.2d at 1237 (Fed. Cir. 1992), as well as other cases cited in footnote

10 of *Magnesium*.

It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Koyo Seiko Co. Ltd. v. United States*, 810 F. Supp. 1287, 1289 (CIT 1988) quoting other citations omitted here.

"The Court of Appeals for the Federal Circuit or the Court of International Trade ("CIT") 'may not substitute its judgment for that of the [agency] when the choice is' between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Tehnoiimportexport, UCF America Inc. v. United States*, 783 F. Supp. 1401, 1404 (CIT 1992) quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) and other cases.

Taken together these constitute an irrefutable statement of authority, and any miscellaneous inferior court or *ad hoc* panel language ostensibly to the contrary simply must be ignored.

Expanding on the second prong of the applicable standard of review, i.e., whether the administrative determination is "in accordance with law," the *Magnesium* Panel tells us that the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. The Panel tells us that Commerce has [been] accorded great discretion in administering the countervailing duty laws, and that "given these circumstances, appellant's burden on appeal is a difficult one, for it **must convince us that the interpretation of... adopted by the ITA**

[Commerce] is effectively precluded by the statute." [emphasis added] quoting *PPG Industries*, 928 F. 2d at 1571-73.

Applying this standard of review to Commerce's *Redetermination on Remand* dated 17 September 1993, rather than simply giving it lip service, reinforces my conclusion that the panel 3-2 majority in our case violated wholesale the time-honored American precepts of judicial review of agency action.

Magnesium is important for another point strenuously argued by the Canadian Parties and dealt with at some length by my colleagues' Opinions here - the issued of specificity. Given the importance apparently attached to the issue of specificity, it is unfortunate that my colleagues here have completely disregarded the *Magnesium* panel decision. Instead, citing *PPG IV, Roses I*, and *Cabot*, Justice Hart concludes: "It is hardly surprising therefore that the Panel viewed Commerce's single factor analysis as contrary to law." If however he had paid any attention to *Magnesium*, a more recent decision which has parallel authority with *Roses I* and *Cabot*, they might have obtained some good insight into the distinction between analysis of *all evidence* versus analysis of *all factors*, which are two separate undertakings. As the *Magnesium* Panel astutely observed: "the doctrine that agencies must consider *all evidence* before them does not mandate that they must therefore *a fortiori* consider *all criteria* before them." *Magnesium* at 34.

In short, the *Magnesium* Panel articulates that where an agency is given several options in a statute or regulation it does *not* have to employ *all* of the *options* in order to consider *all* of the

evidence. It found that Commerce's interpretation was consistent with long standing administrative practice, giving as a example two cases where Commerce's determination rested exclusively on one factor, i.e., the limited coverage of the program. The Panel concluded its analysis by distinguishing *PPG IV* and *Roses I* from *Magnesium*, based upon the fact that they involved appeals of negative determinations and *Magnesium* involved an affirmative decision. To find NO specificity, ALL factors must be considered; to find specificity exists, one relevant factor is sufficient.

Similarly our case involves an affirmative decision. Considering the rational proof of the validity of Commerce's methodology to employ a sequential approach in making its specificity analysis, and harkening back to the principles of deference to agency decisionmaking articulated in *Chevron* and its progeny, if we scrutinize the agency according to established United States statutory law found at 19 USCA Section 1516a (b)(1)(B), to second guess Commerce on its methodology is a breach of an undisputed principle of judicial review of agency action - to which even the Panel majority gave lip service - a breach which my two colleagues have ratified.

C.The PPG Case

On the issue of Specificity, my two Canadian colleagues and the three Canadians of the Panel majority say they rely on United

States case law - principally the *PPG* cases[9] - to support the claim that the Commerce Department is *compelled* to use the methodology prescribed by the Panel in the first opinion, i.e., the ITA *must* use all four factors it listed in the proposed regulations, irrespective of whether in this or any other case the ITA analysis finds one factor sufficient, i.e., the Commerce Department "sequential analysis."

This brings into play what I have termed the United States "fall back" position, i.e., irrespective of whether the ITA performed a satisfactory four factor analysis on Remand, the Panel had no authority to *mandate* that methodology, in the first place. Under U.S. law, Congress had left that choice to the agency. None other than Ms. Jean Anderson assured both the Senate and the House that " It does not tell Commerce or the ITC what the new determination must be or what method the agency must use to reach it." (See part III A., Supra, p. 22)

Since in *PPG III,IV and V* the courts *sustained* the determination of the Commerce Department in all three cases, the Canadian side must be seeking solace in the *language* of the opinions and *not* in the *holdings*. But under U.S. law that language must be necessary to the holding, or it does not mandate or compel anything to or for anybody.

In *PPG III*[10] the court supported Commerce on every point, including Commerce's own request for recalculation. The court also

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[9] For a listing of all five PPG cases, see note 28, supra.

[10] 746 F. Supp. 119, CIT (1990)

used language greatly supportive of Commerce authority in choosing the methodology which it would employ.

> Here, the choice of allocation methodology was within the sound discretion of Commerce and *PPG* has failed to show Commerce's choice was unreasonable or unsupported by substantial evidence on the record or otherwise not in accordance with law.[11]

There is also other strong language on the same page supportive of Commerce's discretion.

> Absent a compelling argument in fact or law that Commerce's choice of methodology was unreasonable, without support on the record, or an abuse of its discretion, this Court must uphold the agency.[12]

Justice Hart's opinion attempts to use *PPG IV*[13] to condemn Commerce's sequential analysis. "... the Panel viewed Commerce's single factor analysis as contrary to law," (p. 36) and "the panel in following the binding interpretation of U.S. law propounded by the federal circuit." (p. 37) In *PPG IV* the *Federal Circuit* made "no binding interpretation" of anything. There was no *Federal Circuit* opinion, a refinement that has throughout our case seemed lost on both Canadian counsel and my two Canadian colleagues.

PPG IV would seem to be one of the weakest legal reeds imaginable for either side. There is a *decision* by the court supported by two judges, another judge dissenting, but *there is no opinion for the court*. Chief Judge Nies wrote an opinion supporting the decision, but her colleague Judge Smith (who concurred in the

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[11] Id., at 129.

[12] Id., at 132.

[13] 928 F. 2d 1568 Fed. Cir. (1991)

decision) declined to concur in any way in the opinion. Circuit Judge Michel filed a dissenting opinion disagreeing with both the result and Judge Nies' opinion. In this situation, nothing said in Judge Nies' opinion has any precedential value whatsoever. It is not the opinion of the Federal Circuit, and indeed, from the fact that both Circuit Judge Smith and Circuit Judge Michel declined to concur in any aspect of Judge Nies' opinion, it may be inferred that the vote on this particular panel was two-to-one against the language used by Judge Nies. And also 2-1 against language used by Judge Michel.

Such a legal muddle is pregnant with the possibility of subsequent confusion, which seems to have occurred with Canadian counsel, as Judge Michel very foresightedly pointed out in his dissent.

> ... my greater concern is that this affirmance threatens to unsettle the law. Since this is our first decision in an appeal on the question, its unsettling effect may be compounded. Nor is concern lessened because there is no opinion of the court and hence no opinion with precedential force. Since Senior Judge Smith, while voting to affirm the CIT result, did not join in Chief Judge Nies' opinion, she speaks only for herself, just as I speak only for myself. This jurisprudential truth, however, likely will be lost when the bar reads and cites that opinion. [14]

Even though Chief Judge Nies' opinion has no precedential value, it is rife with statements helpful to the United States and not the Canadian case. For example, the section on standard of review at pages 1571-73.

> Moreover, the Secretary of Commerce through the ITA has been given great discretion in administering the countervailing duty laws. As we noted (citation) *in discussing the*

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[14] Id., at 1580.

> *Secretary's comparable authority under the anti-dumping law.* : ... The number of factors involved, complicated by the difficulty in quantification of these factors and the foreign policy repercussions of a dumping determination, makes the enforcement of the anti-dumping law a difficult and supremely delicate endeavour.[15] (emphasis supplied) ... the Secretary has broad discretion in executing the law. *These considerations are equally applicable to administration of the countervailing duty statute.*[16] (emphasis supplied).

Judge Nies sets up a tough standard indeed for upsetting an agency determination:

> '... 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' (citation)
>
> This particular discretion applies equally to resolving what constitutes a 'bounty or grant'.[17] And, given these circumstances, appellants' burden on appeal is a difficult one, for it must convince us that the interpretation of 'bounty or grant' adopted by the ITA *is effectively precluded by the statute.*[18]

Dissenting Judge Michel was apparently unhappy with both the court's decision and Judge Nies' opinion. Apparently, he is saying that the court's result here in *PPG IV* will weaken the rulings in *Cabot, Roses*, and *Armco* upholding a multi-factor test. And yet Judge Michel himself summarizes the total confusion among the ITA, Judge Carman of the CIT, Judge Nies and himself of the Federal Circuit on page 1582. Look at the first full paragraph, and what follows, and see the extent of confusion which Judge Michel points

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[15] Id., at 1571.

[16] Id., at 1572.

[17] Id., at 1572.

[18] Id., at 1573.

out.

My understanding is that Canadian counsel and my colleagues[19] rely upon the language on page 1576 of *PPG IV* and on pages 1239-40 of *PPG V* discussing the multi-factor test. Let us examine that. In *PPG IV* Judge Nies quoted the Commerce Department's statement:

> Based on our six years of experience administering the law, we have found thus far that *the specificity test cannot be reduced to a precise mathematical formula*. Instead, *we must exercise judgement* and *balance various factors* in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place.
>
> "Among the factors we consider are: (1) the extent to which a foreign government acts to limit the availability of a program; (2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and (3) the extent to which the government exercises discretion in making the program available. The Department must consider all of these factors in light of the evidence on the record to determine the specificity in a given case.[20]
> (emphasis added)

Note the flexibility of the factors to be considered which the ITA and Chief Judge Nies enunciate in the Specificity test methodology: there is no "precise mathematical formula"; in contrast it is necessary to "balance various factors"; the list of factors is NOT precise, "*among* the factors we consider"; in conclusion, "Department must consider all of these factors in light of the evidence on the record" - with presumably other factors which may be relevant in a given case.

In *PPG V* Judge Michel found himself with two other judges in a position to use more *mandatory* language in discussing these

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[19] Justice Hart's Opinion, at 35-36

[20] P. 1576-77

factors. He started off with "*at least* three factors *must* be considered on a case by case basis to determine whether a program is specific in its application. [21] (emphasis added) He then enumerated the three Commerce factors, throwing in the word "must" in regard to each.

In *PPG IV and V*, apparently the Commerce Department did apply these three factors which it had enunciated as "among" "various factors" that it would apply. Judge Michel examined the methodology of Commerce in applying these three factors and agreed that it had done so correctly.

However, and this is very important in United States administrative law, the fact that Commerce had *chosen* to apply these three factors in the *PPG* case does not mean that Commerce is *obliged* to apply them in *every* case. Further, nothing that Judge Michel said in *PPG V* or Judge Nies in *PPG IV* in regard to the applicability of these factors can *compel* Commerce to apply them in other cases.

The assertion by a court that application of these factors is *compulsory* when the court in each case is sustaining the action of Commerce is simply dicta. It was not necessary for the reviewing court to say that these factors are *compulsory* in every case, it was only necessary for the reviewing court to say that in this specific case Commerce had applied relevant and logical factors, and that its methodology in doing so was logical and sustained by

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[21] 78 F. 2d at 1239-40

substantial evidence.

The court in *PPG V* and Judge Nies in *PPG IV* said this, and more too, i.e., Judge Michel in *PPG V* wrote an implication of a mandatory requirement. To the extent that *PPG V* attempted to impose a mandatory requirement, this was dicta in that case, and the court was assuming the role of the agency and the United States Congress. It is for the Congress to determine the factors which an agency *must* apply or leave it up to the agency to select the relevant factors. When affirming the action of the agency, a reviewing court can only say that *in this particular case* the relevant and logical factors were applied, not gratuitously lay down an overall rule that will be applicable in every case. Again, this is a usurpation of either the role of the agency or the role of the Congress, or a usurpation of the roles of both. If the reviewing court finds it necessary to set aside the agency action as "not in accordance with law", then what the court says about the agency's procedure should be followed subsequently , because the agency *erred legally* and it was *necessary* for the court to say so. In *PPG* the agency did *not* err legally and the court necessarily approved the methodology used as in accordance with law.

Contrary to arguments that the *PPG* decisions go against Commerce in our case, because they include language which indicates that more than one factor must be looked at in a specificity analysis, *an argument can be made that the PPG decisions support Commerce*. The Court in upholding the ITA's specificity analysis was only reiterating Commerce's policy at the time, *and never addressed*

the sequential approach to the specificity analysis which Commerce has chosen to employ in conjunction with the factor(s) to be considered. Since by law Commerce's methodology may evolve with time, as long as its interpretation of the law is a reasonable one, and its determination is supported by the evidence, it follows that the Court cannot "freeze" the interpretive process of the law which Congress has charged Commerce with administering. Furthermore, any argument that the *PPG* cases "freeze" Commerce's methodology is destroyed by the Joint Senate Committee and the House Ways and Means Committee Reports which evidence *Congress' clear intention to allow Commerce wide discretion on the question of specificity,* including the authority to base its specificity analysis on as little as only one factor.

D. Wire Rod and Georgetown Steel

And now a word about *Carbon Steel Wire Rod from Poland*, 49 FR 19374 ("*Wire Rod*") and *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed Cir. 1986) ("*Georgetown Steel*").

The issue presented in *Wire Rod* was whether government activities in a *non*market economy confer a "bounty or grant" within the meaning of Section 303 of the Tariff Act of 1930. *Wire Rod* at 19375.

Similarly, the issue presented in *Georgetown Steel* was whether the countervailing duty provisions of Section 303 apply to alleged

subsidies granted by countries with so-called *non*market economies for goods exported to the United States. *Georgetown Steel* at 1309.

In both cases the International Trade Administration of the Commerce Department ("ITA") held that Section 303 does not apply to *non*market economies.

In *Wire Rod* the reasoning was based upon investigations conducted into the characteristics of *non*market economies ("NME'S"), which are quite dissimilar from free market economies. Some of the conclusions made about *non*market economies were that

- Resources are not allocated by a market.
- Allocation is achieved by central planning.
- In an NME there is no market process to distort or subvert.
- In a NME system the government supplants entirely rather than interferes with the market process.
- Resource misallocation results from central planning, not subsidies.
- By market standards, a nonmarket environment is riddled with distortions.
- Most NME systems are characterized by centrally administered prices, thus such prices do not reflect scarcity, nor can they be equated with supply and demand.
- Administered profits in a NME play a different role from profits in a market economy.
- Incentives or bonuses used in a NME are means of controlling the enterprise which are different from

incentives or subsidies in a market sense.

In essence, because central planning is based upon a system that is not economically rational by market standards, the ITA found that the "economic mechanisms" for rewarding over-fulfillment of targets, for rationalizing the use of imports and for promoting exports, which the Polish Government introduced, do not operate as subsidies in a NME. The ITA supported its determination by reference to legislative history which revealed that the countervailing duty law was never intended by Congress to be applied to NME'S.

Thus *Wire Rod* stands for the proposition that *NME'S* are an *exception* to the *presumption* of market distortion. This exception is clearly limited to NME'S; there is absolutely no language in this holding or in U.S. countervailing duty law which indicates otherwise.

In *Georgetown*, the court concluded that economic incentives and benefits from the Soviet Union and the German Democratic Republic do not constitute bounties or grants under Section 303, based upon a similar analysis of NME's and Congressional intent.

As we already know, the United States position has always been (and will continue to be, no matter how we decide this case - see Part V, supra) that the Department of Commerce is not required to make a finding of output or price effects in order to make a finding of a subsidy. The Canadian argument is that evidence of market distortion is a requirement, alleging that this requirement was assigned to it by Commerce itself in the preamble to its

proposed regulations which state:

> Conceptually, the regulations are based upon the economic model articulated by the Department in its final determinations in *Carbon Steel Wire Rod from Czechoslovakia* and *Carbon Steel Wire Rod from Poland* [...] and sustained by the court in *Georgetown Steel Corp.* v. *United States* [...]. This model, which generally defines a subsidy as a distortion of the market process for allocating an economy's resources, underlies the Department's entire CVD methodology.

The Canadian argument, *inter alia*, extracts language from *Wire Rod* wherein Commerce 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.

and implies that this means that proof of market distorting effect is a prerequisite to a finding of a subsidy.

I submit that both in interpreting the case law and the language of Commerce's proposed regulations the Canadian Parties have twisted the context in which the phrase "market distortion" was meant to be interpreted, and this is made clear in *Georgetown*.

In *Georgetown*, the court explained that the United States Congress through the countervailing duty law "sought to protect American firms from what it viewed as the unfair competitive advantage a foreign producer would have in selling in the American market *if that producer's government in effect assumed part of the producer's expenses of selling here*." [emphasis added] (*Georgetown* at 1315). The court then went on to say that "A government subsidy on sales to the United States, however, enables a foreign producer to sell in the American market *in a situation in which otherwise it would not be in the seller's best economic interest to do*

so."[emphasis added] The court added that "This apparently was what the Administration had in mind when it stated in the Polish wire rod case that '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.'" *It was this kind of "unfair" competition, resulting from subsidies to foreign producers that gave them a competitive advantage they otherwise would not have,* against which Congress sought to protect in their countervailing duty law. [emphasis added] (*Georgetown* at 1315).

In essence, the point is that "unfair competition", "market distortion" or "unfair competitive advantage", however you label it semantically, is the *theory* or *concept* underlying the countervailing trade laws in the United States. This is demonstrated by Commerce's use of the word "conceptually" in its preamble to its proposed regulations, and the word "definitionally" in *Wire Rod*. It is also a *theme* in the General Agreement on Tariffs and Trade ("GATT"). One might say that Commerce's statement in Wire Rod that "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,* is nothing more than another way of saying that the theory of international trade is based on the principle of comparative advantage. If supply and demand in a market economy is manipulated by government intervention albeit through trade distorting

subsidies or other barriers to international trade, then this frustrates the principle of comparative advantage.

After explaining the argument that market distortion is a theory and not a specific requirement to be demonstrated, I now add that this is not the issue to be determined by this ECC because we are only concerned with Commerce's *Redetermination on Remand*. And, while Commerce vigorously objected to the Panel's *Remand* instructions to demonstrate distortion, Commerce argues that in its *Remand Redetermination* it did in fact proffer expert evidence to show that stumpage fees can be lowered to a point where output will exceed the competitive norm and thereby *does* create a market distortion. In doing so Commerce argues it did in fact proffer expert evidence to support its position that the principles of economic rent do not apply, and that the general economic theory applies which *inter alia* supports the conclusion that a reduction in price will result in an increase in demand.

Thus our role, in analyzing whether the Panel correctly applied the proper standard of review, necessitates an analysis of whether Commerce's *Redetermination* is unsupported by substantial evidence on the record, or otherwise not in accordance with law. Only if we find Commerce's conclusion to be unsupported, are we then required to consider the United States "fall back" (really initial) position that the Panel was legally wrong in calling for a finding of market distortion in the first place.

I submit that if the prior Panel had conscientiously applied the U.S. standard of review as it was obliged to do, it could not

have possibly concluded that Commerce's *Redetermination* was not supported by substantial evidence on the record. Rather, it appears to me abundantly clear that the Panel substituted its judgment for that of the agency when it apparently made a choice between the conflicting views of the Canadian and United States Parties. It doing so it is clear to me that the Panel manifestly exceeded its powers, authority or jurisdiction set forth in FTA Art. 1904.13(a) (iii).

ARTICLE 1904 EXTRAORDINARY CHALLENGE COMMITTEE
PURSUANT TO THE
UNITED STATES-CANADA FREE TRADE AGREEMENT

In The Matter Of:	
CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA	**SECRETARIAT FILE NO. ECC-94-1904-01USA**

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 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

SIGNED IN THE ORIGINAL BY:

Gordon L. S. Hart
Gordon L. S. Hart

Herbert B. Morgan
Herbert B. Morgan

Malcolm R. Wilkey
Malcolm R. Wilkey, Chairman