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Continental Conversations: Remand of Binational Panel Decisions under NAFTA Ch. 19

By Chi Carmody¹

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1. Introduction

Anniversaries are often occasions to look back and consider results. In law we are most directly concerned with results in the realm of remedies, remedies being that branch of the law that deals with “the means of enforcing a right or preventing or redressing a wrong.”² So it is entirely appropriate that at this conference - a conference devoted to assessing the legal record of the North American Free Trade Agreement³ (NAFTA) on its tenth anniversary – we should spend at least some time thinking about NAFTA’s remedies and results. In short, what have they achieved?

This question is particularly relevant in relation to NAFTA Chapter 19, a chapter of the treaty entitled “Review and Dispute Settlement in Antidumping and Countervailing Duty Matters”, since NAFTA created a system of binational panels to review national anti-dumping (AD) and countervailing duty (CVD) determinations and endowed panels with remedies. Among other things, NAFTA Art. 1904(8) says that “The panel may uphold a final determination, or remand it for action not inconsistent with the panel’s decision”. This provision may appear unexceptional on its own, but applied in the

¹ Assistant Professor, Faculty of Law, University of Western Ontario, London, Ontario, Canada. The writer would like to thank Robert Druzeta, Articling Student, Davies Ward Phillips & Vineberg, Toronto, and Jim Dakin, Third Year Student at the University of Western Ontario Faculty of Law, for their research and other assistance with this manuscript. Any errors are those of the writer.

² See entry for “Remedy”, BLACKS’ LAW DICTIONARY (7th ed.) 1296 (Bryan A. Garner ed., 1999).

³ 32 I.L.M. 289 (1993).

sometimes politicized context of NAFTA it has become a focal point of adjudicative creativity and conflict. The principal issue is the tension between what a binational panel can do and what a national agency must do in response. By and large it appears that national agencies *have* complied with binational panel remand orders, but they have not always done so in what might be called the “full spirit” of the law and in two recent cases – *High Fructose* and *Pure Magnesium* - the extent of agency resistance to panel orders has been remarkable. The record reveals something profound about NAFTA Ch. 19, something which ultimately reflects upon the validity of the treaty itself.

Having said this I want to make clear that I am not so much concerned with the outcome of any single Ch. 19 case as I am with the general pattern of practice and with the question of what *could* possibly be done under binational panel review. This is because if we are thinking prospectively – and I take both retrospective *and* prospective thinking to be one of the principal tasks of this conference - our primary interest must be with remedial limits. The law of remedies is more than a collection of rules and principles. It is constantly shaped by the broader context.⁴ Consequently, a number of questions arise. If international oversight of national determinations is to involve more than deference, how far can it be taken? What sorts of boundaries must be respected? What others might be legitimately traversed? Binational panels under Ch. 19 have suggested some answers to these questions.

This article therefore examines the jurisprudence that has developed from binational panel review of national AD/CVD determinations. That is already a subset of Ch. 19 decisions since a number of cases have settled without reasons, and of the

⁴ In domestic law it must also conform to certain fundamental arrangements that are the result of specific historic compromises. In relation to anti-dumping and countervailing duties it comes up against the institution of designated agencies whose decisions are presumed to be legitimate.

remainder, we are only interested in those cases where the panel has actually remanded with instructions. In January 2004 that amounted to about 18 cases, although several of these have involved two or more remands apiece.⁵ My immediate concern is with the extent and tone of adjudicative dialogue that has emerged. By “dialogue” I mean a concept of interpretation that has arisen as cases have made their way back and forth between panels and national agencies in the process of remand.⁶ It is a metaphor well-known in domestic law and one increasingly encountered in international law as the number of international tribunals proliferates and the challenge of conflict and coordination among them becomes acute.⁷ One might be tempted to think of this dialogue as involving a single pronouncement – “uphold” or “remand” – but experience under Ch. 19 reveals considerably more than a simple bipolar reaction at work. As I point out below, a reflexive method has arisen in which the panels and national agencies interact to reach a solution. The law does not dictate an answer so much as supply a process for getting there.

⁵ NAFTA Chapter 19 cases involving remands are *Synthetic Baler Twine*, CDA-94-1904-02 (Final order affirming determination on remand July 31, 1995); *Corrosion-Resistant Steel Sheet Products*, CDA-94-1904-03; *Refined Sugar, Refined from Sugar Cane or Sugar Beets*, CDA-95-1904-03 (Final order affirming determination on remand Jan. 30, 1997); *Certain Hot-Rolled Carbon Steel Plate*, CDA-97-1904-02; *Certain Iodinated Contrast Media*, CDA-USA-2000-1904-02 (Remand determination July 10, 2003); *Live Swine from Canada*, USA-94-1904-01 (Final order affirming determination on remand Sept. 27, 1995); *Porcelain-on-Steel Cookware*, USA-95-1904-01 (Final order affirming determination on remand July 19, 1996); *Oil Tubular Goods*, USA-95-1904-04 (Final order affirming determination on remand Dec. 2, 1996); *Corrosion-Resistant Carbon Steel Flat Products*, USA-97-1904-03 (Final order affirming determination on remand Sept. 13, 1999); *Porcelain-on-Steel Cookware (Administrative Review)*, USA-97-1904-07 (Final order affirming determination on remand July 9, 1999); *Corrosion-Resistant Carbon Steel Flat Products (Administrative Review)*, USA-CDA-98-1904-01 (Final order affirming determination on remand Aug. 24, 2001); *Brass Sheet and Strip from Canada (Administrative Review)*, USA-CDA-98-1904-03 (Final order affirming determination on remand Nov. 5, 1999); *Pure Magnesium and Alloy Magnesium from Canada (CVD Sunset Reviews)*, USA-CDA-2000-1904-07 (Final determination on remand January 10, 2003); *Flat Coated Steel Products*, MEX-94-1904-01 (Final order affirming determination on remand April 13, 1998); *Cut-to-Length Plate*, MEX-94-1904-02 (Final order affirming determination on remand Oct. 30, 1995); *Rolled Steel Plate*, MEX-96-1904-02 (Final order affirming determination on remand Dec. 18, 1998); *Hot-Rolled Steel Sheet*, MEX-96-1904-03 (Final order affirming determination on remand Sept. 15, 1997); *High Fructose Corn Syrup*, MEX-USA-98-1904-01 (in progress).

⁶ Remand is defined as “to send (a case or claim) back to the court or tribunal from which it came for some further action”: see definition of “Remand”, BLACKS’ LAW DICTIONARY (7th ed.) 1296 (Bryan A. Garner ed., 1999).

⁷ See Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994) (setting out a typology of transjudicial communication according to form, function and reciprocal engagement); for some recent questioning of this in the U.S. domestic context see Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409 (2003) (the rejection of foreign law by the U.S. Supreme Court is justified, at least partially, by reasons that also help explain its concerns about authority within the American legal system.).

All of this is fascinating - and it is fascinating precisely because it affords us the rare opportunity to see the full “panorama” of the law. So often we are concerned with what the law *is* rather than with what the law *does*. Here, however, we have a chance to assess both cause and effect and to remind ourselves *why* we are doing what we are doing. This is important because as time goes on and more and more decisions under Ch. 19 accumulate, the record of what is done is being forgotten. Agency determinations on remand are obscure things.⁸ They are hard to find, and even if they are found, understanding their outcomes and assessing whether they fulfill the aim of binational panel procedures is difficult. There is an inevitable tendency to look to the system in general and to believe in it without always questioning what it accomplishes.

To fully appreciate the situation, however, some background is necessary. Part Two is therefore a review of the binational panel process. It examines the panels’ remedies within the operation of the Ch. 19 process. Part Three proceeds to describe the greater context of compliance. It identifies six factors that shape what panels do. Part Four surveys the case law, noting trends and the comparison and contrast of panel determinations from the three NAFTA jurisdictions. It also makes observations about the abiding influence of national law on the extent of remedial activism, something which is widely credited with making Ch. 19 decisions politically palatable. Part Five goes on to examine binational panel decisions and national agency determinations in *High Fructose* and *Pure Magnesium* as examples where the system has been taken to its logical limits and where dialogue has effectively come to an end. Finally, Part Six offers some

⁸ Agency decisions on remand under NAFTA Ch. 19 are not yet collected or catalogued in any systematic or centralized way. Canadian agency decisions are available at the website of the respective Canadian agency responsible for the decision, this being either the Canadian International Trade Tribunal or the Canadian Customs and Revenue Agency. In the U.S. some – but not all – remand decisions are available at the Department of Commerce website and some are published in the U.S. *Federal Register*. In Mexico agency decisions are published in the *Diario Oficial de la Federación*, which can be accessed through WESTLAW (database mx-diario). It would be useful for *all* NAFTA Ch. 19 agency decisions on remand to be available on the NAFTA Secretariat website.

conclusions about the extent to which the process established under NAFTA Ch. 19 continues to be valid.

2. Chapter 19 Binational Panel Review

It is an accepted part of negotiating lore that the binational panel system that now appears in NAFTA Ch. 19 was originally created at the eleventh hour of the original Canada-U.S. Free Trade negotiations in 1987 to respond to Canadian concerns about the formidable U.S. antidumping and countervailing duty regime.⁹ Canada, as the U.S.'s largest trading partner, had the most to fear from the assertive use of U.S. antidumping and countervailing duties. Its original hope was to convince the U.S. to entirely abolish the AD/CVD regime with respect to Canadian products and replace it with a supposedly more objective antitrust or competition regime. Canada ultimately failed in this effort and had to content itself with a binational panel system of the Canada-U.S. Free Trade Agreement (CUSFTA). The system was carried over with minor modifications into NAFTA and was subsequently extended to Mexico when it joined NAFTA in 1994.

Antidumping involves the imposition of duties beyond conventional tariffs on imports that are being sold in a market at less than normal value.¹⁰ The adjustment is meant to counter the anti-competitive effect of this dumping. Likewise, countervailing duties involve the imposition of similar duties on subsidized imports.¹¹ The classic distinction between the two kinds of action is that antidumping responds to the behaviour

⁹ MICHAEL HART AT AL., *DECISION AT MIDNIGHT: INSIDE THE CANADA-US FREE TRADE NEGOTIATIONS* (1994) ("Canada's interest was to establish a new regime which would eliminate or reduce the scope for U.S. industry to use U.S. trade remedy legislation to harass Canadian competitors.") (171) ("The result on trade remedies can be described as a qualified success. Canada was prepared to enter into far-reaching commitments that would have put the rules covering so-called unfair trade on a much more equitable and predictable footing. This objective proved too rich for the United States, at least in 1987.") (379).

¹⁰ Article VI:2 of GATT 1994 provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."

¹¹ Article VI:3 of GATT 1994 provides that "No countervailing duty shall be levied on any product ... in excess of an amount equal to the estimated bounty or subsidy determined to have been granted ...".

of a *private producer* whereas countervailing duties are meant to counteract the subsidization of goods by a *foreign government*. If dumping or subsidization is found to occur, then national authorities must determine whether that activity is causing or threatening to cause “material injury” to a domestic industry.

Antidumping and countervailing action therefore involve three key determinations:

- 1) a finding of either dumping, subsidization, or the threat of either of these,
- 2) material injury to a domestic industry, and
- 3) a causal link between the activity and the injury.¹²

Traditionally, it is only after an affirmative finding on all three points that an order for the imposition of duties may be made by a national authority. For this reason an extensive body of law and jurisprudence on these points has arisen in NAFTA jurisdictions. It is supplemented by a complex, and at times highly peculiar, corpus of administrative practice.¹³ In Canada the Canadian Customs and Revenue Agency (CCRA), an affiliate of the Department of National Revenue, makes determinations of dumping and subsidization while the Canadian International Trade Tribunal (CITT) makes findings of injury and causal linkage. In the United States these same functions are performed by the U.S. Department of Commerce (“Commerce”) and the U.S. International Trade Commission (ITC), respectively. In Mexico all determinations are made by a single agency, which until December 2000 was known as the Ministry of Commerce and

¹² Article VI:1 of GATT 1994 provides that “The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of the other country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry ... or materially retards the establishment of a domestic industry.”

¹³ See, for instance, the Canada Regulations under the *Special Import Measures Act*, Directives, Guidelines and Customs Notices. In the U.S. see U.S. Department of Commerce Import Administration Antidumping Manual, which contains procedural and technical information from the U.S. Statement of Administrative Act as well as the Administration’s Antidumping Regulations (19 C.F.R. 351). In Mexico see regulations issued under the *Foreign Trade Act* and published in the *Diario Oficial de la Federación*, Annex II (Dec. 30, 1993).

Industrial Development (SECOFI) when its name was changed to the Ministry of the Economy.

The binational panel review system of NAFTA Ch. 19 applies to any one of the three final determinations listed above and is meant to replace judicial review in national courts. The greatest advantage it offers is a significantly reduced period of review.¹⁴ Under NAFTA Art. 1904(3) a panel's task is defined as being to assess whether a given determination is "in accordance with *the law of the importing Party*". The panel is to conduct its assessment by applying the domestic standard of review and "the general legal principles that a court of the importing Party would apply."¹⁵ The implicit metric of NAFTA Ch. 19 review is therefore domestic law, a law which in theory is supposed to remain the same as if it were being interpreted and applied by a domestic court. There is no recourse to foreign or international law to resolve issues because Ch. 19 envisages none.¹⁶ The principal innovation of Ch. 19 is the novelty of having nationals *and* foreigners compose the tribunal of final review¹⁷, something that presents the possibility of an erroneous interpretation of domestic law or adds an extra degree of confirmation to the proceedings. Most commentators have seen the binational character of panels in the latter sense, suggesting that they enjoy something of the added legitimacy that motivates the appointment of judges *ad hoc* to the bench of the International Court of Justice.¹⁸

¹⁴ Binational panels generally adhere to a 315-day time limit concerning their own decisions. Time limits on further action are also significantly reduced, with panels requiring return from national agencies within as little as 15 days. This is compared with appeal periods of several months or even years in the domestic court system.

¹⁵ NAFTA Art. 1904(3).

¹⁶ Except, of course, to the extent that foreign or international law already applies within domestic law by virtue of existing domestic law principles.

¹⁷ NAFTA Art. 1904(11) provides that "A final determination shall not be reviewed under any judicial review procedures of the importing Party No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."

¹⁸ Under Art. 31(1) of the ICJ Statute parties before the Court are entitled to appoint a judge to the bench where there is no judge of their nationality already sitting. Shabtai Rosenne has observed that this practice allows appointees to "represent their countries' interests in the whole process through which a decision is produced and the reasons formulated" and is ultimately "a concession to diplomatic susceptibilities." See SHABTAI ROSENNE, *THE LAW AND PRACTICE*

Proceedings under Ch. 19 must begin with 30 days of the publication of a final agency determination.¹⁹ Panels are composed of “judges and former judges to the fullest extent practicable”, although this has not prevented the appointment of other individuals chosen “on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law.”²⁰ Panels then conduct proceedings modeled on appellate process within a 315-day time limit.²¹

At the end of binational proceedings the panel will normally issue a remedy. The remedies that may be granted are now set out in Art. 1904(8), as follows:

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

This is supplemented by the largely procedural requirements of *Rules 73-74* and *77-80* concerning panel review of action by investigating authorities on remand.²² Apart from

OF THE INTERNATIONAL COURT 204 (1985).

¹⁹ NAFTA Art. 1904(4).

²⁰ NAFTA Annex 1901.2(1).

²¹ The NAFTA Ch. 19 *Panel Rules* are reprinted at 69 Fed. Reg. 8686 (1994).

²² Rules 73-74 and 77-80 provide as follows:

73. (1) An investigating authority shall give notice of the action taken pursuant to a remand of the panel by filing with the responsible Secretariat a Determination on Remand within the time specified by the panel.

(2) If, on remand, the investigating authority has supplemented the administrative record,

(a) the investigating authority shall file with the responsible Secretariat an Index listing each item in the supplementary remand record, and a copy of each non-privileged item listed in that Index, within five days after the date on which the investigating authority filed the Determination on Remand with the panel;

(b) any participant who intends to challenge the Determination on Remand shall file a written

submission with respect to the Determination on Remand within 20 days after the date on which the investigating authority filed the Index and supplementary remand record; and
 (c) any response to the written submissions referred to in subrule (b) shall be filed by the investigating authority, and by any participant supporting the investigating authority, within 20 days after the last day on which written submissions in opposition to the Determination on Remand may be filed.

(3) If, on remand, the investigating authority has not supplemented the record,

(a) any participant who intends to challenge the Determination on Remand shall file a written submission within 20 days after the date on which the investigating authority filed the Determination on Remand with the panel; and
 (b) any response to the written submissions referred to in subrule (a) shall be filed by the investigating authority, and by any participant filing in support of the investigating authority, within 20 days after the last day on which such written submissions may be filed.

(4) In the case of a panel review of a final determination made in Mexico, where a participant who fails to file a brief under rule 57 files a written submission pursuant to subrule (2) or (3), the submission shall be disregarded by the panel.

(5) If no written submissions are filed under subrule (2)(b) or (3)(a) within the time periods established by these rules, and if no motion pursuant to rule 20 is pending, the panel shall, within 10 days after the later of the due date for such written submissions and the date of the denial of a motion pursuant to rule 20, issue an order affirming the investigating authority's Determination on Remand.

(6) Where a Determination on Remand is challenged, the panel shall issue a written decision pursuant to rule 72, either affirming the Determination on Remand or remanding it to the investigating authority, no later than 90 days after the Determination on Remand is filed.

74. In setting the date by which a Determination on Remand shall be due from the investigating authority, the panel shall take into account, among other factors,

(a) the date that any Determination on Remand with respect to the same goods is due from the other investigating authority; and
 (b) the effect the Determination on Remand from the other investigating authority might have on the deliberations of the investigating authority with respect to the making of a final Determination on Remand.

77. (1) Subject to subrule (2), when a panel issues:

(a) an order dismissing a panel review under subrule 58(3) or 71(1),
 (b) a decision under rule 72 or subrule 73(6) that is the final action in the panel review, or
 (c) an order under subrule 73(5),

the panel shall direct the responsible Secretary to issue a Notice of Final Panel Action (model form provided in the Schedule) on the eleventh day thereafter.

(2) Where a motion is filed pursuant to subrule 76(1) regarding a decision referred to in subrule (1)(b), the responsible Secretary shall issue the Notice of Final Panel Action on the day on which the panel

(a) issues a ruling finally disposing of the motion; or
 (b) directs the responsible Secretary to issue the Notice of Final Panel Action, the issuance of which shall constitute a denial of the motion.

78. If no Request for an Extraordinary Challenge Committee is filed, the responsible Secretary shall publish a Notice of Completion of Panel Review in the official publications of the involved Parties, effective

(a) on the day on which a panel is terminated pursuant to subrule 71(2); or
 (b) in any other case, on the 31st day following the date on which the responsible Secretary issues a Notice of Final Panel Action.

79. Where a Request for an Extraordinary Challenge Committee has been filed, the responsible Secretary shall publish a Notice of Completion of Panel Review in the official publications of the involved Parties, effective on the day after the day referred to in rule 64 or subrule 65(a) of the *NAFTA Extraordinary Challenge Committee Rules*.

80. Panelists are discharged from their duties on the day on which a Notice of Completion of Panel Review is effective, or on the day on which an Extraordinary Challenge Committee vacates a panel review pursuant to subrule 65(b) of the *NAFTA Extraordinary Challenge Committee Rules*.

these provisions there is little else to define what binational panels can do or conversely, what national agencies must do in response once a remand order is received. Panels have therefore taken it upon themselves to fill the void creatively through the use of a body of “instructions”. In doing so they have situated themselves at different points along the appellate spectrum between deference and de novo review. Their specific position is prompted by a number of factors.

3. Binational Panels and the Context of Compliance

In reviewing the factors that lead binational panels to issue instructions on remand and, in turn, national agencies to respond, it is important to begin with what is obvious. The most evident factor influencing the remedial role of panels is use of the term “may” in the initial sentence of Art. 1904(8). Use of the permissive leads to the question of what beyond upholding a final determination or remand could a panel possibly do? The answer to this question rests in the panels’ appreciation of their powers. The most likely option would be to quash the original determination. This would have the legal effect of voiding the original finding and requiring the petitioners to recommence proceedings *ab initio* before the domestic agency.

This issue arose in one early Mexican determination where the panel held that it *did* have the power to quash given the applicable Mexican legislation, principally because the panel interpreted underlying Mexican law to permit a declaration of nullity.²³

²³ The question of the appropriate remedy in the Mexican context first arose in *Imports of Cut-To-Length Plate Products*, MEX-94-1904-2. The panel was the first to render a decision regarding a Mexican finding, and took considerable care in defining the exact standard of review and the remedy flowing from it. Article 238 of the *Federal Fiscal Code* was originally drafted to deal with appeals of income tax determinations. It establishes out five grounds for declaring an administrative determination invalid. In applying these grounds, however, two adjacent provisions must be considered. Article 237 defines the administrative tribunal’s procedural and substantive jurisdiction. Article 239 sets out the three remedies available, these being upholding the initial determination, remand, or a *declaration of nullity*. Evidently the power to declare a nullity exceeds the power articulated in NAFTA Art. 1904(8) to merely “uphold or remand”, and it was this issue that motivated the panel majority in *Cut Length Plate* to comment extensively on the remedial options available. The majority decision emphasized the direct application of NAFTA “into the corpus of Mexican law without the necessity of enabling legislation or judicial action.” While direct applicability provides an express standard of review, this principle had to be reconciled with the requirement that a NAFTA panel steps into the shoes of the relevant domestic decision-maker

Subsequent binational panels reviewing Mexican determinations have retreated from this position, insisting instead that no such power can be found or that it cannot be invoked in the circumstances.²⁴ In the Mexican constitutional scheme rules that grant jurisdiction to an authority are strictly applied.²⁵ For this reason later panels in the Mexican decisions have held that the power to quash is beyond the terminology of Art. 1904(8) since this only refers to the power to “uphold” or “remand”, nothing more. While the equivalent Mexican court, the Federal Fiscal Tribunal, *does* have the power to declare the decision of an agency a nullity by virtue of Art. 239 of the Mexican Federal Fiscal Code, the prevailing view appears to be that the exercise of such a power by binational panels

and presumably possesses all the remedies of the domestic body replaced. In coming to its conclusion, the majority reasoned that the standard of review consists of the contents of Annex 1911 and “general legal principles that a court of the importing Party otherwise would apply to a review of the determination of the competent investigating authority.” Annex 1911 might spell out an explicit standard, but this did not foreclose the possibility of looking to Arts. 237 or 239 as “general legal principles”. The majority indicated that it felt “compelled to include Articles 237 and 239 within the Mexican standard of review” because failure to do so would lead to a serious distortion of standard of review as actually practiced by the Fiscal Tribunal.” In other words, to sever the wrongs defined under Art. 238 from the remedies under Art. 239, and to impose only the options contained in NAFTA Art. 1904(8), would violate the legislative scheme.

²⁴ Subsequent cases have been decided differently. Some have referred only to Art. 238 and NAFTA Art. 1904(8), implicitly denying the application of Art. 239. Others have been clearer in their preference for NAFTA Art. 1904(8)’s exclusivity. In *Antidumping Investigation of the Government of Mexico into Imports of Flat Coated Steel Products*, MEX-94-1904-01, the panel mentioned the origins in arbitral practice of Ch. 19 procedures and observed that “[l]ike any international arbitral panel, the jurisdiction of a binational panel is limited.”²⁴ From this central premise it went on to emphasize the importance of consent to international jurisdiction, which in Mexico had been expressly restricted to Art. 238. Though Art. 238 might be ill-suited to the task, the panel stated that it lacked jurisdiction “to declare a challenged resolution to be a nullity. ... Jurisdiction to declare a “nullity” does not exist under NAFTA Art. 1904(8).” It continued:

We fully appreciate the desirability of having panels and national courts decide cases in a similar manner, as a means of promoting consistency and uniformity in decisions. We understand that the Federal Fiscal Tribunal would apply Articles 238 and 239 together, and in appropriate circumstances might nullify a Final Determination. However, if the Parties to NAFTA wished this panel to have the authority to grant the same remedies to the parties before it that the Federal Fiscal Tribunal may grant under Art. 239, they presumably would have included Article 239 in the standard of review, and would have written NAFTA Article 1904(8) differently, so as to avoid conflict between Article 1904(8) and Article 239.

... In other words, we are convinced that under the current text of NAFTA this panel does not have the same jurisdiction and the same powers as have been conferred on the Federal Fiscal Tribunal. We must act within, and only within, the express limits of jurisdiction and powers conferred on us.

Therefore, instead of remanding the case to the Mexican administrative agency, SECOFI, with a direction to terminate the proceeding, the panel declared “illegal, under Article 238, Section I of the Fiscal Code, all administrative determinations within the Final Determination that concern Inland, declare[d] that those administrative determinations may not be given any legal effect” and ordered SECOFI to observe certain conditions in future determinations regarding the case. Subsequent panels have held in a like manner. See *Imports of Polystyrene and Impact Crystal from the U.S.*, MEX-94-1904-03; *Imports of Hot-Rolled Steel from Canada*, MEX-96-1904-03; and *Imports of Rolled Steel Plate from Canada*, MEX-96-1904-02.

²⁵ *Review of the Final Determination of the Antidumping Investigation in High Fructose Corn Syrup*, MEX-USA-98-1904-01, para. 286 (Aug. 3, 2001).

“would constitute an undue expansion of ... the Panel’s jurisdiction and powers.”²⁶ That interpretation may appear to be a narrow reading, particularly when use of the permissive and the absence of any other exclusive language in Art. 1904(8) are considered, but it must be balanced against the fact that the other NAFTA parties likewise circumscribed panels’ remedial jurisdiction. Under NAFTA Art. 1904(1) binational panels are said to replace domestic courts, yet they have not been granted the full remedial powers of equivalent domestic tribunals. In Canada the Federal Court’s full powers of redress were not made available.²⁷ Likewise, they do not have the equitable powers of American courts.²⁸ Moreover, binational panels were not conferred the power to review their own decisions except in cases of accidental oversight, inaccuracy or omission.²⁹

Notwithstanding these limits, panels have occasionally gone beyond the strict wording of NAFTA Art. 1904(8) and done more than simply confirm or remand agency decisions. This practice – a practice dictated by circumstances of agency recalcitrance and by the binational panel’s overarching appreciation of the need for effectiveness in its process – was evident under the Canada-U.S. FTA where several commentators observed that by not permitting domestic agencies to adduce new evidence and re-open the administrative record, FTA binational panels in some cases “in effect used the remand process to terminate review by “instructing” the agency to overturn “unsustainable”

²⁶ *Ibid.*, para. 287.

²⁷ For instance, under s. 18 of the Canadian *Federal Court Act* the Trial Division of the Federal Court has the power “to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal” and under s. 18.1 it may also “(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.”

²⁸ Under 28 U.S.C. 1585 (1994), for instance, the U.S. Court of International Trade is given “all the powers in law *and equity*” of a U.S. District Court. One example of such equitable jurisdiction is the compulsion of a government officer or employee to perform a duty (28 U.S.C. 1361 (1994)).

²⁹ NAFTA Panel Rules 75-76.

conclusions.”³⁰ For instance, in *Softwood Lumber I* the binational panel issued a second remand with the following directions:

Since Commerce has been unable to provide a rational legal basis for a finding that the provincial stumpage programs are specific and in light of the efficiency with which the Panel review is intended to resolve these disputes, we therefore remand this issue to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries.³¹

Here the binational panel dictated a specific result to the national agency – a finding that the scheme under scrutiny lacked specificity, a necessary component to any determination that there is a “subsidy”³² – and therefore effectively terminated the proceeding. As will be seen, similar pronouncements have also been made under NAFTA.

A second indication that binational panels have been left to develop a responsive remedial role, and therefore to locate themselves more centrally along the spectrum of appellate activism, is intimated by the remaining terminology and structure of Art. 1904(8). The article contemplates, for instance, that national agencies will take “action not inconsistent with the panel’s decision”, that they will actively comply with the decision taking into account “the nature of the panel’s decision”, and that the decision on remand may be subject to further review. Further support for this position comes from comes from reference in Art. 1904(3) to panels’ application of “the general legal principles that a court of the importing Party otherwise would apply” in such a review and from mention in Art. 1904(15) that each party shall amend its law so as to “give

³⁰ DENIS LEMIEUX & ANA STUHEC, REVIEW OF ADMINISTRATIVE ACTION UNDER NAFTA 13 (1998).

³¹ *Certain Softwood Lumber Products from Canada (Countervailing Duty)*, USA-92-1904-01, p. 51 (Dec. 17, 1993).

³² A subsidy is defined under Art. I of the WTO Subsidies Agreement as involving a financial contribution of a government, or income or price support, and the existence of some benefit to the recipient. In addition, by virtue of Subsidies Agreement Arts. I:2 and II the subsidy may only be challenged under WTO rules where it meets certain criteria for specificity set out in Art. II (where, for instance, it is limited to a certain enterprise or is being used by a limited number of enterprises).

effect to a final panel decision that a refund is due”. All of these references, both subtle and apparent, suggest that far from being a “yes-or-no” review, there is readily foreseen in the treaty some degree of substantive content to the panel’s decision-making.

A third factor that must be taken into account is the six years of experience with remediation and remand under Ch. XIX of the Canada-U.S. FTA.³³ While it remains true that decisions under both Ch. XIX and 19 are binding only on the parties to the dispute, there is the inevitable tendency for panels to look back and consider remedial behaviour in prior instances.³⁴ The very fact that a vigorous pattern of panel practice had already arisen under the FTA evidently motivates and helps to confirm the remedial conclusions of panels under NAFTA.

To the above factors must be added elements that constrain and limit panel behaviour. At a domestic level there is the pre-existing relationship between national agencies and courts of review. This is not always a harmonious one. Agencies in all three NAFTA countries have something of a history of antagonism with the courts, courts

³³ Cases under the Canada-U.S. FTA involving remand were: *Beer*, CDA-91-1904-01, CDA-91-1904-02; *Certain Machine Tufted Carpeting*, CDA-92-1904-01 (dumping), CDA-92-1904-02 (injury) (Final order affirming determination on remand April 21, 1994); *Gypsum Board*, CDA-93-1904-01 (Final order affirming determination on remand March 24, 1994); *Cold-Rolled Steel Sheet*, CDA-93-1904-08; *Red Raspberries from Canada*, USA-89-1904-01; *Fresh, Chilled and Frozen Pork*, USA-89-1904-06; *New Steel Rail*, USA-89-1904-07; *Fresh, Chilled or Frozen Pork*, USA-89-1904-11; *Self-Propelled Bituminous Paving Equipment*, USA-90-1904-01 (Final order affirming determination on remand Dec. 27, 1992); *Live Swine from Canada*, USA-91-1904-03 (CVD Review 88-89), USA-91-1904-04 (CVD Review 89-90) (Final order affirming determination on remand July 16, 1993); *Softwood Lumber*, USA-92-1904-01, USA-92-1904-02 (Panel dismissed panel review Jan. 27, 1995); *Pure and Alloy Magnesium*, USA-92-1904-03; *Magnesium from Canada*, USA-92-1904-05/06; *Corrosion-Resistant Carbon Steel Flat Products*, USA-93-1904-03 (Final order affirming determination on remand July 11, 1995); *Cut-to-Length Steel Plate*, USA-93-1904-04 (Final order affirming determination on remand July 11, 1995).

³⁴ A good example is the panel’s pronouncement I concerning the extent of its remedial jurisdiction in *High Fructose Corn Syrup*, MEX-USA-98-1904-01, para. 287 (Aug. 3, 2001), where it referred to past practice and the behaviour of panels in U.S. and Canadian cases:

The Complainants have argued, however, that this Panel must consider Article 239 of the FFC as an integral part of the standard of review. It is noteworthy that a binational panel in a previous case accepted this standard of review, and four other rejected it. This Panel finds that reasoning concerning the standard of review of the majority of the panels shall prevail the inclusion of Article 239 in the standard of review would constitute an undue expansion of it’s the Panel’s jurisdiction and powers. Further, panels in the United States and Canada do not have the authority to annul a resolution of an IA. This Panel is subject to the jurisdiction and powers established by NAFTA Article 1904.8, which empowers it to affirm SECOFI’s final determination, or to remand it for action not inconsistent with its decision, to continue the procedure, but does not confer the power to annul such determination.

being institutions with arguably greater powers but lesser specialized expertise. It is not surprising that this attitude should reassert itself in a new setting. National agencies have reacted to panel decisions in most instances the way they might to a domestic court, which does not necessarily mean deference. Rather, there is often a tone of jealous pride in further explanations or in detailing reasoning that fundamentally will not change. Agencies seem acutely aware of the expertise they possess and of the traditional deference *shown to them* by domestic courts. Read carefully, some agency re-determinations appear almost to be a review of the panel decision itself. In other words, a subtle inversion of function seems to occur.

This happens, in part, because under each system of domestic law there *are* functions that are exclusive to one level of decision-maker versus another. In all three NAFTA countries judicial review is supposed to be primarily a law-driven as opposed to a fact-driven exercise. The aim is to ensure that national agencies have properly identified the law and applied that law to the facts. This stance is driven by the panel's lack of means to test the facts and also by consciousness of its appellate function. Any attempt to go beyond that to, say, make a new finding of fact would exceed its mandate.

There are also remedial principles that limit what panels can do by way of follow-up. Again, in all three NAFTA countries there are constitutional doctrines which suggest that a tribunal purporting to retain jurisdiction to oversee the implementation of a remedy after an order has been issued may be acting inappropriately in two respects. First, repeated invocation of its powers may extend the tribunal's jurisdiction beyond its proper role, thereby breaching the separation of powers. Second, by acting after it has exhausted

its jurisdiction a tribunal will breach the *functus officio* doctrine.³⁵ Although it is open to question whether such constitutional doctrines might be transposed *mutatis mutandi* into NAFTA Ch. 19, a context which more accurately approximates administrative review, it is arguable that they inform what a panel believes it is empowered to do, particularly since panels are supposed to “step into the shoes” of domestic courts.

Yet another factor influencing, and to some extent limiting, the context of compliance is the standard of review. Obviously the degree to which panels will act is influenced by their appreciation of the law and facts. The general standard is set out in NAFTA Art. 1904(3) which requires that:

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

Annex 1911 further specifies the particular standard of review for each country.³⁶ These statutory provisions obscure to some degree the exact standard applicable in certain situations due to the accretion of precedent around statutory wording. In Canada, for instance, the relevant standard of review varies depending on whether the matter under review is an issue of jurisdiction, in which case the relevant standard is “correctness”, versus on an issue of law, where it is “patent unreasonableness”, or one of fact, in which case it is one of “no evidence” or the “wrong principle”.³⁷ In the U.S. final determinations of antidumping or countervailing duty determinations are subject to review if they are “unsupported by substantial evidence on the record or otherwise not in accordance with

³⁵ In Canada see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, Supreme Court of Canada File No. 28807 (Nov. 6, 2003).

³⁶ This is ss. 18.1(4) of the *Federal Court Act* for Canada, Article 238 of the *Federal Fiscal Code* for Mexico, and ss. 516(A)(1)(A)-(B) of the *Tariff Act of 1930* for the United States.

³⁷ For a discussion of the Canadian standards see DENIS LEMIEUX & ANA STUHEC, *REVIEW OF ADMINISTRATIVE ACTION UNDER NAFTA* 35-39 (1998).

the law.”³⁸ Finally, the standard of review in Mexico permits review or nullification of a decision where it is made “in excess of jurisdiction.”³⁹ Regardless of these complexities, issues involving the standard of review in remediation have been rare.

A final factor which bears on the remedial jurisdiction of binational panels is the issue of enforceability and the lack of any formal precedential effect. NAFTA Art. 1904(9) expressly states that “The decision of a panel under this Article *shall be binding on the involved Parties ...*”, and this statement, combined with the functional observation that binational panels are supposed to replace judicial review, should suggest that panels’ decisions are indeed of legal force. That conclusion is undercut, however, by the fact that no NAFTA party has made binational panel decisions directly enforceable in domestic courts in the same way that decisions under NAFTA Art. 1136(4) are and by the existence of a separate state-to-state enforcement mechanism under NAFTA Art. 1905.⁴⁰ National agencies have shown themselves to be conscious of this fact.⁴¹

Each of the above factors – the pre-existing legal context, permissiveness and a certain liberalism in panel practice, restrictive doctrines, the standard of review and the

³⁸ In the case of the United States the standard of review requires a binational panel to “hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.” The term “substantial evidence” has been defined by the U.S. Supreme Court as “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). . For discussion of the U.S. standard see DENIS LEMIEUX & ANA STUHEC, *REVIEW OF ADMINISTRATIVE ACTION UNDER NAFTA* 39-41 (1998).

³⁹ The Mexican standard is set out in Art. 238 of the Mexican *Federal Fiscal Code* and includes general principles of Mexican law. Thus, the failure of the relevant Mexican agency to comply with general constitutional and legal principles would take the agency beyond its jurisdiction. For discussion of the Mexican standard see DENIS LEMIEUX & ANA STUHEC, *REVIEW OF ADMINISTRATIVE ACTION UNDER NAFTA* 41-43 (1998).

⁴⁰ Under Art. 1905, which is entitled “Safeguarding the Panel Review System”, NAFTA parties may seek to suspend the application of binational panel procedures where a NAFTA country’s domestic law prevents the establishment of a panel, prevents the panel from rendering a final decision, prevents implementation of the decision, or results in a failure to provide opportunity to review a final determination by a panel or court.

⁴¹ For instance, in its remand determination in *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, USA-CDA-98-1904-01, 66 Fed. Reg. 52095-03 (Oct. 12, 2001) the U.S. Department of Commerce observed:

We note that the NAFTA Panel’s ruling does not establish binding precedent and that the Department believes its interpretation of these statutory rules is reasonable and consistent with the intent of Congress. We also note that, in future reviews, the Department intends to pursue an examination of market price more fully to ensure appropriate application of the test, consistent with subsections 773(f)(2) and (f)(3) of the Act.

lack of enforceability – together contribute to the particular position of panels on the spectrum of judicial review. Initially it is a limited one. As the process of remand proceeds, however, it can become more involved. What is noteworthy about Ch. 19 remediation in general is the way in which it focuses on correct *procedures* to be followed, not the particular result to be achieved. The overwhelming impression is one of a commitment to ensuring fair *methods* for arriving at a decision instead of at a particular decision itself. Nevertheless, in practice panel prescriptions can be of a more positive nature and, when combined with the power of sequential remand, can require terms that effectively produce a specific conclusion. An examination of several Ch. 19 cases gives some idea of how this occurs.

4. Binational Panels and Agency Practice on Remand

A number of cases remanded under Ch. 19 have involved what amounts to clarification of decision-making. Remand effectively serves as an opportunity for the national agency to elaborate upon reasoning that it previously failed or omitted to provide, without changing the result in any significant way. One might legitimately object to agencies having a second chance to get things right, but it has to be recalled that Ch. 19 is an administrative context, not a criminal one. Agencies have the right to err in minor ways so long as this does not impugn the essential integrity of their decisions. Consequently panel instructions may indirectly suggest modification of the outcome, but without any possible alternatives to base itself upon, a panel is effectively confined to questioning the agency's reasoning and to confirming its result.

This was evident, for instance, in *Synthetic Baler Twine*⁴² where the panel remanded a Canadian Customs and Revenue Agency finding that dumping was likely to

⁴² CDA-94-1904-02 (April 10, 1995).

cause material injury to the production in Canada of like goods, with instructions to identify evidence in the record that established the likelihood of injury or, failing that, to reopen the administrative record to obtain the required evidence necessary to support such a finding. After concluding its re-determination the CCRA was able to observe that “this additional evidence confirms the Tribunal’s finding ... that the dumping of synthetic baler twine, originating in or exported from the United States, was likely to continue and to cause material injury to the production in Canada of like goods.”⁴³ The panel subsequently confirmed the re-determination.

Another example of explanation and precision is *Contrast Media*⁴⁴, where the panel sought an indication as to why certain movement costs and profits were not deducted from a substitute export price of goods from the U.S.. The substitute goods were moved from a warehouse in Memphis to Puerto Rico prior to being exported to Canada. The agency’s response to the panel on remand was unexceptional: the CCRA explained that such costs are simply “part of the costs of the goods sold and impacts on the normal value and on the profitability of the goods sold in the domestic market.” Likewise on the issue of profits, the CCRA stated that “[i]n view of the fact that the profit is an integral part of the normal value of any goods, [the agency] is of the view that it is not appropriate to deduct the profit earned [by the exporter].”⁴⁵ Again, the panel confirmed the agency’s re-determination.⁴⁶

⁴³ *Synthetic Baler Twine With a Knot Strength of 200 lbs or Less, originating in or Exported from the United States of America*, CCRA No. NQ-93-003 (June 9, 1995).

⁴⁴ *Certain Iodinated Contrast Media*, CDA-USA-2000-1904-01 (May 26, 2003).

⁴⁵ *Certain Iodinated Contrast Media*, Determination on Remand, p. 26 (June 25, 2003).

⁴⁶ In the process of remand binational panels have also occasionally identified additional issues for further agency review. In *Hot-Rolled Carbon Steel Plate*⁴⁶, for example, the panel remanded to the Canadian International Trade Tribunal the issue of whether separate findings and reasons in antidumping investigations were required for Mexican products by virtue of NAFTA. There are also cases where the national agency itself recognizes its error or failure in proceedings before the panel and itself requests remand in order to address its mistakes.⁴⁶ This is where errors can be caught. The relative speed and simplicity of proceeding before binational panels as opposed to judicial review makes them attractive in this respect.

At times, however, remand results can be specific because binational panel decisions are themselves specific. Specificity leaves a national agency with limited alternatives if it wants to be seen to be in compliance with a panel report. In *Porcelain-on-Steel Cookware from Mexico*⁴⁷, for instance, the original Department of Commerce determination was issued in August 1997 and several producers covered by the order challenged the results before a binational panel. The panel confirmed the Department's findings but remanded in one respect: whether the Department should utilize the indirect selling expense ratio submitted by Yamaka China in determining Yamaka's indirect selling expenses on its sales of porcelain-on-steel cookware produced by ENASA. In particular, the panel directed the Department:

- (1) to determine whether the Department did make a "ministerial error", that is, a minor error of a clerical nature;
- (2) if it did, to correct the error; and
- (3) in making the correction, to consider comments from the parties based on the proper calculation, specifically address those comments in its remand determination, and explain the basis for the correction in detail.

The specificity of the pronouncement is striking. The Department subsequently determined that its use of an indirect selling expense ratio for an affiliated importer, Global Imports, rather than one from an affiliate *and* reseller, Yamaka, was in fact in error and proceeded to correct it.⁴⁸

In some instances more than one remand is necessary to get things right. Here it appears that panels can become somewhat more assertive in their remedial jurisdiction. In *Circular Welded Non-Alloy Steel Pipe from Mexico*⁴⁹, for instance, the issue was what products from a single manufacturer, Galvak, were covered by a Department of

⁴⁷ USA-97-1904-07 (May 3, 1999).

⁴⁸ 64 Fed. Reg. 42916-01 (Aug. 6, 1999).

⁴⁹ USA-MEX-98-1904-05 (may 16, 2002).

Commerce finding of dumping. This question had been left ambiguous in the original form of the finding, where the Department had endeavoured to articulate a broad rule concerning all mechanical tubing.⁵⁰ Upon remand the Department did further specify the subject of the order, but not enough.⁵¹ In a second decision the binational panel observed that “[t]he Department, through its Remand Results, addressed the lack of clear dividing lines by finding that only certain products possessing specific characteristics are included in the scope of the order.” It also observed, however, that “the Redetermination fails to answer the fundamental question: Do the products that Galvak intends to export meet the dimension and characteristics of ATSM-53 fence tubing?” In its second re-determination the Department was able to conclude:

Given this instruction, it is necessary for the Department first to define what is and what is not mechanical tubing. The Department has attempted to do so on a reasonable basis, supported by the facts of the case ... Based on the evidence on the record, and in conformity with the Panel’s instructions, the Department determines that Galvak’s tubing, stencilled as ASTM A-787, which is not manufactured to the same standard diameters, wall thicknesses, and lengths of pipe manufactured to ASTM A-53 or fence tubing, is mechanical tubing, and therefore excluded from the Order. However, Galvak’s tubing, stencilled as ASTM A-787, but manufactured to the standard diameters, wall thickness, and length of pipe manufactured to ASTM-A-53 or fence tubing, is not mechanical tubing, and therefore is included in the Order.⁵²

Circular Welded Non-Alloy Steel Pipe from Mexico raises the question of how far panels are willing to go to undertake more positive relief, that is, to create or identify something new? One example is *Live Swine from Canada*⁵³ which involved review of a U.S. Department of Commerce countervailing duty order on live swine from Canada. The

⁵⁰ Scope Ruling Memorandum to Joseph A. Spetrini (DAS, Enforcement Group III) from Richard Weible (Office Director, AD/CVD Enforcement Group III) (Nov. 19, 1998). NAFTA Secretariat, Adm. Record Pub. Doc. 9.

⁵¹ In its original re-determination of March 7, 2003, the Department determined that “some tubing produced by Galvak to ASTM A-787 may be within the scope of the Order. Specifically, tubing which conforms to the dimension and characteristics of ASTM A-53 and fence tubing is included within the scope of the Order.”

⁵² *Final Scope Ruling on Galvak, S.A. de C.V. Merchandise, Antidumping Order on Circular Welded Non-Alloy Steel Pipe from Mexico*, p. 8 (Jun 16, 2003).

⁵³ USA-94-1904-01 (May 30, 1995).

petitioners challenged Commerce's denial of separate treatment for old and heavy swine, known as "sows and boars", and for a category of young swine known as "weanlings". Previous Commerce determinations had, in fact, allowed the creation of a product-specific duty rate for sows and boars, as well as for weanlings, but these rates had later been either revoked or rescinded by the Department. The *Live Swine* binational panel ruled that Commerce did not adduce any new evidence to sustain its change of position and, moreover, had conducted a flawed legal analysis. The panel therefore remanded, with directions to:

I. Reinstate the Sows and Boars subclass and determine a separate CVD rate for it; and;

II. Consider Pryme's application for a subclass for Weanlings, employing the same criteria used in creating the Sows and Boars subclass, and as appropriate calculate a CVD rate for such subclass, explaining in detail any reasons that may be found to preclude the establishment of a Weanling subclass or the calculation of a separate CVD rate for such subclass.⁵⁴

On remand the Department did this.⁵⁵ What is important to observe is what the panel chose to do. It directed the re-instatement of a *pre-existing* category found to have been wrongly revoked and the creation of a new one that had lapsed but that should have properly existed. There was no question about the technical feasibility of either class, and therefore no question of the panel's *ability* to appreciate technical data in order to fashion a new class, so the direction simply required, in a sense, a return to some pre-existing situation. *Live Swine from Canada* illustrates just how panels are circumscribed by their powers as to the positive relief they can offer.

There are also situations where the panel decision's ultimate effect is to terminate

⁵⁴ *Ibid.*, p. 15.

⁵⁵ A final order affirming the agency's determination on remand was issued by the binational panel on Sept. 27, 1995.

the proceedings. In *Machine Tufted Carpets* the panel on remand directed the CITT to determine whether dumping, in and of itself, had caused material injury in the past or was likely to do so in future and to demonstrate the rational basis for such a determination by detailed analysis, including specific analysis requested by the panel. In conducting its first re-determination the Tribunal considered that a comparison of actual price movements of imported and domestic carpet could be derived by focusing on specific companies that were comparable rather than the full range of companies included in the original examination. Having chosen two companies to focus its attention on the Tribunal then concluded that conditions promoting antidumping were likely to persist some time into the future in the absence of antidumping duties. Upon return to the panel, however, this reasoning was evidently insufficient. Focusing on a small number of companies was flawed. This was because information from one of the two companies focused upon had not been tested by cross-examination or any other means during the Tribunal's inquiry. The Tribunal therefore concluded, on further remand, that neither of the two sets of figures was sufficiently reliable to support a determination of past or present material injury. This led to revocation of the antidumping duty order in that case in toto.

What appears important from a remedial point of view is the judicious mix of positive and negative relief, or as seen in *Live Swine from Canada*, for action that has the characteristics of both. Even more important, perhaps, is the existence of a mechanism by which to measure final determinations, namely in the form of binational panel confirmation. The perspective of outside observers injects a further degree of objectivity into the determination when existing interpretations are insufficient. While panels maintain a hands-off approach to implementation, they remain ready to correct should a

complainant believe it is aggrieved by action taken on remand.

Nevertheless, panel-agency relationships are not always so unexceptional or harmonious. There are instances where national agencies appear to be at odds with panels and where they are able to bury issues through qualification of findings and skilful presentation of the evidence. Their re-interpretation of panel decisions, in particular, appears emblematic of the quiet skirmishing that can go on under NAFTA Ch. 19. In *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada* the issues arose out of administrative reviews of antidumping orders originally made in 1993. One case went before a binational panel concerning review for the period August 1, 1994 – July 31, 1995 (*Carbon Steel I*)⁵⁶, the other concerning review for the period August 1, 1995 – July 31, 1996 (*Carbon Steel II*).⁵⁷ Both cases involved common elements that are most conveniently discussed at the outset. It will be recalled that in determining whether goods are being sold at less than fair value, and therefore “dumped”, a comparison is made between the export price and the “normal value”. This normal value is ordinarily the price at which the foreign product is first sold for consumption in the exporting country in normal commercial quantities. Occasionally, however, no normal value is available due to the lack of ordinary sales or to some other anomaly. In such circumstances national laws now permit the use of substitute measures of normal value through the use of cost of production figures, constructed values or other composite calculations.

In U.S. law cost of production figures and constructed values are normally calculated on the basis of records of the exporter or producer of the merchandise, but the Department of Commerce must consider “all available evidence on the proper allocation

⁵⁶ USA-97-1904-3 (Sept. 13, 1999).

⁵⁷ USA-CDA-98-1904-01 (March 20, 2001).

of costs ...”. This is provided for by s. 773(f)(1) of the *Tariff Act of 1930*. In addition, calculations made on these bases are subject to “transactions disregard” and “major input” rules. The first of these rules, set out in s. 773(f)(2) of the *Tariff Act of 1930*, allows transactions between affiliates to be disregarded for the purposes of calculation if the amount representing any element of value does not fairly reflect the amount usually reflected in sales of merchandise. The second rule, set out in s. 773(f)(3) of the *Tariff Act of 1930*, allows transactions to be disregarded and substitutes based on the cost of production to be used where the Department of Commerce has reasonable grounds to believe or suspect that an amount represented as the value of a major input is less than the cost of producing such an input.

In *Carbon Steel I*, Stelco alleged that the value of certain coating services performed by a Stelco affiliate, Baycoat, had to be fully accounted for in the antidumping investigation. The problem, as Stelco saw it, was that the Department attributed certain Baycoat profits to Stelco without properly deducting costs arising from the making of those profits. The binational panel agreed and instructed the Department to reconsider Stelco’s costs under the statutory standard for the cost of production.⁵⁸ At the same time it also ruled that the major input and transaction disregard rules were inapplicable in the case.⁵⁹

The Department therefore issued a re-determination in which it decided not to adjust for the transfer of profits. Stelco again challenged this and in January 1999 the panel again remanded the review to the Department for the second time to reconsider the calculation of the transfer price, and to take account of all the evidence on the record. On

⁵⁸ This is provided for by s. 773(f)(1) of the U.S. *Tariff Act of 1930*, as discussed in the text.

⁵⁹ See ss. 773(f)(2) and (f)(3) of the *Tariff Act of 1930*.

this second examination the Department reopened the record and verified the new information submitted by Stelco to ensure that the record contained all of the information necessary. In the second remand determination, the Department explained that there was a difference between Baycoat remitted and recorded profits as well as Baycoat profits on amounts charged to Stelco. Because remitted profits could not be tied to any specific invoiced transactions, the Department was in the habit of deeming *all* Baycoat profits as belonging to Stelco rather than dividing them between Stelco and Baycoat's other owner. On the second remand the Department therefore made adjustments to the transfer price based on an allocated amount of the profits earned by Baycoat on Stelco job orders. In September 1999 the panel upheld the Department's second remand determination.

In *Carbon Steel II*, the central issue was the valuation to be given to certain coating and painting services supplied to Stelco by partly owned affiliates, Baycoat and Z-Line, pursuant to major input and transaction disregard rules. Under the Department's practice the valuation was conducted at the highest of the three valuations: (1) the transfer price between unaffiliated parties, (2) the market price for the transaction (which could not be calculated in that instance) and (3) the affiliate's cost of producing the particular service. In response to a Commerce Department questionnaire Stelco only indicated (3), but the Department used a distinct methodology, increasing the reported cost of services by the weighted average difference between (1) and (3). The Department determined that these transfer prices were above the affiliated supplier's cost of production. It therefore used this new value when calculating the normal value of Stelco's production.

In March 2001 a binational panel remanded in the matter with fairly specific instructions:

- (1) recalculate Stelco's cost of production, taking into account the year-end return of profits to Stelco, providing the method by which the Department recalculated the cost of production [and therefore ultimately the normal value], and explain this methodology in light of the statute and other relevant legislation;
- (2) reevaluate the application of s. 773(f)(3) of the Act in light of the requirement that the Department adjust the transfer price, as above;
- (3) to correct any errors on the imputed credit expenses.

In July 2001 the Department issued its final remand results, recalculating Stelco's cost of production by taking into account year-end return of profits to Stelco from affiliates Baycoat and Z-Line. The panel had found that the Department "did not fairly reflect" the amount of cost usually reflected in sales, which was the invoice price less profits returned from Baycoat. The panel further found that even if the Department was entitled to rely on the invoice price paid by Stelco, rather than the invoice price adjusted for the profits remitted from Baycoat, the Department did not establish that it had taken due account of all the material factors in arriving at a reasonable calculation of costs.

The Department here did something very interesting. It noted that in light of the panel's statement remanding for the Department the task of comparing Baycoat's transfer price without profits to the Cost of Production:

we interpreted the Panel's ruling to mean that, pursuant to the major input rule, the Department is to ensure that the value of the major inputs used to calculate Stelco's COP are not below the cost of producing such inputs. In the Final Remand Results, we recalculated Stelco's COP for the subject merchandise based upon the adjusted transfer. Where the Department found that the adjusted transfer price value was less than Baycoat and Z-Line's respective costs of producing such inputs, the Department used the COP for such inputs, pursuant to the major input rule.

These "interpretative" comments appear to qualify the panel's decision, narrowing the ambit of what the Department was required to do. Furthermore, in a brief, but telling, passage Commerce expressed its continuing resistance to the panel's methodology:

We note that the NAFTA Panel's ruling does not establish binding

precedent and that the Department believes its interpretation of these statutory rules is reasonable and consistent with the intent of Congress. We also note that, in future reviews, the Department intends to pursue an examination of market price more fully to ensure appropriate application of the test, consistent with subsections 773(f)(2) and (f)(3) of the Act.⁶⁰

In August 2001 the binational panel affirmed this re-determination.

5. “Two Strikes and You’re Out”: *High Fructose and Pure Magnesium*

Cases examined so far have resulted in either facial or substantive compliance. Compliance is not always so automatic, however. Agency recalcitrance and resistance can take a variety forms. To return to the metaphor of dialogue, there are cases under Ch. 19 where it appears that no understanding has been reached between panels and national agencies about what needs to be done and where, consequently, remand degenerates into a “conversation of contempt”, that is, a situation where panels and agencies simply repeat the same words to each other without genuinely addressing the substantive issues involved.

A good example of this phenomenon is ongoing in *Pure Magnesium*⁶¹, a case which arose from “sunset review”, or a review conducted upon termination, of certain antidumping duties. The duties were originally imposed on magnesium produced by Norsk Hydro Canada Inc. (NCHI) in Canada and exported to the U.S.. The order itself was set to expire in 2000 and was therefore preceded by a sunset review conducted by the Department of Commerce to determine whether the duties should remain in place. International law provides that any duty is to be terminated five years from the time it is first imposed in order to prevent the duty from becoming an anticompetitive barrier. This is unless national authorities determine that expiration “would be likely to lead to

⁶⁰ See *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, USA-CDA-98-1904-01, 66 F.R. 52095-03 (Oct. 12, 2001).

⁶¹ *Pure Magnesium from Canada (Final Results of the Sunset Review of Antidumping Order on Pure Magnesium from Canada)*, USA-CAN-00-1904-06.

continuation or recurrence of dumping and injury.”⁶²

In its first determination on the matter in July 2000 Commerce found that revocation of the duty would be likely to lead to the continuation or recurrence of dumping, principally because declining imports signalled a slowdown in the U.S. pure magnesium industry that new imports would be sure to exacerbate.⁶³ The Government of Quebec then took the matter to a Ch. 19 panel.⁶⁴ The panel subsequently rejected Commerce’s finding, concluding that Commerce acted contrary to law when it refused to find that good cause exists “based solely on declining imports.”⁶⁵ The panel therefore instructed Commerce to reconsider the GOQ’s “good cause” claims related to price, cost, the market or other economic factors that might affect the sunset determination as set forth in the Act and the Department’s decision to report the investigation rate as the margin of dumping likely to prevail if the order was revoked.⁶⁶

On its first re-determination Commerce referred to its Sunset Policy Bulletin to justify its earlier findings, observing that:

the Sunset Policy Bulletin further instructs that Commerce will normally find [continued] likelihood [of dumping] where, inter alia, dumping was eliminated after the issuance of the order and import volumes for the subject merchandise decline significantly.⁶⁷

It found that:

... pursuant to the Panel’s instructions, we have considered additional information with respect to the “other factors” alleged by NHCI. In doing so, we continue to conclude upon remand that the rate calculated during

⁶² This is provided by Art. 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (also known as the WTO Antidumping Agreement).

⁶³ *Pure Magnesium from Canada (Final Results of the Sunset Review of Antidumping Order on Pure Magnesium from Canada)*, 65 Fed. Reg. 41436 (July 5, 2000).

⁶⁴ *Pure Magnesium from Canada*, USA-CDA-00-1904-06 (March 27, 2002).

⁶⁵ *Ibid.*, p. 28.

⁶⁶ *Ibid.*, Conclusion.

⁶⁷ *Pure Magnesium from Canada (Results of Redetermination Pursuant to Panel Remand)*, USA-CDA-00-1904-06, p. 7 (Jan. 28, 2003).

the investigation is the only calculated rate that reflects the behaviour of NHCI absent an order ... Commerce is not convinced that NHCI is no longer interested in the pure magnesium market. Moreover, NHCI has not been able to sell in the U.S. market in commercial quantities since the imposition of the antidumping duty order. We have relied on our previous findings of non-commercial quantities in the administrative reviews of this order to reinforce our conclusion that NHCI's shipments to the United States declined significantly since the imposition of the original order. ... We have analyzed the facts in this sunset review again upon remand and conclude that the margins from the original investigation are probative of the behaviour of Canadian producers and exporters of pure magnesium if the order were to be revoked.⁶⁸

This last passage provides something sense of the attitude that the panel later had so much trouble with. On return to the binational panel a second time, the principal issue appeared to be the *contra preferentum* way in which the Department had dealt with the issues on a successive occasions, effectively reversing the onus.⁶⁹ Taken to the extreme advocated by the Department, the position would require that once a dumping order had been put in place it would be very difficult, if not impossible, for *any* order to be revoked.

The panel later remanded Commerce's first re-determination in the sunset review for a second time, "for further consideration of the record concerning the "other factors" which are required to be taken into account in Sections 2 and 3 of the Panel's opinion; (ii) for consideration of whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here." This direction is almost the same as the first direction on two of the three major points. In its second re-determination – the third time it was dealing with the matter - the Department came to exactly the same result as it had in the past. It concluded:

⁶⁸ Ibid., pp. 15-16.

⁶⁹ For example, "There is no evidence on the record of the sunset review indicating that any long-term contracts NHCI has with its alloy magnesium customers prevent NHCI from increasing it[s] production of pure magnesium in the future."

[W]e are convinced that NHCI's long-term contract commitments would not change the outcome of this sunset review. There is significant additional information on the record from Commerce's previous administrative reviews and this sunset review that leads us to conclude that absent the antidumping order on Pure Magnesium from Canada, dumping is likely to continue or recur. ... Thus, as we determined in our first remand, we find it reasonable to conclude that prior to the order, Canadian producers were only able to maintain their share of import levels by dumping. ... We continue to conclude upon remand that the rate calculated during the investigation is the only calculated rate that reflects the behaviour of NHCI absent an order.⁷⁰

Evidently aggravating the situation was the fact that the Department also refused to consider new information submitted by NHCI on the issue of pricing. Given that the Department's own practice on this point has been inconsistent and that it was by then aware of the panel's stridency in this case, the refusal appeared to be further evidence of the Department's determination to insist upon its position.

The agency's failure to adequately address the points raised by the binational panel in the second remand prompted a third complaint by the GOQ to the panel, which on this occasion expressed its concern with the agency's failure to thoroughly address the evidence before it. In July 2003 it therefore remanded the Department's decision "with instructions to revoke the anti-dumping order on pure magnesium from Canada."⁷¹ The direct language obviously rankled the Department, which issued the following tartly-worded rebuttal a few days later:

Publication of this notice fulfils the obligation imposed upon the Department by the decision in *Timken*. In addition, this notice will serve to continue the suspension of liquidation. If an Extraordinary Challenge Committee panel request is not filed, or if an ECC panel request is filed, and the NAFTA panel's decision is upheld, the Department will publish amended final sunset review results revoking the anti-dumping order on

⁷⁰ *Pure Magnesium from Canada (Final Results of the Sunset Review of Antidumping Order on Pure Magnesium from Canada)*, USA-CAN-00-1904-06, pp. 12, 15 (Jan. 28, 2003).

⁷¹ *Pure Magnesium from Canada (Final Results of the Sunset Review of Antidumping Order on Pure Magnesium from Canada)*, USA-CAN-00-1904-06, p. 23 (April 28, 2003).

pure magnesium from Canada.⁷²

As if to further underscore its displeasure with the result, the U.S. indicated in early October 2003 that it was taking the highly unusual step of proceeding with an Extraordinary Challenge under NAFTA Art. 1904(13) in *Pure Magnesium* on the grounds that the panel had “manifestly exceeded its powers, authority and jurisdiction” and its actions had “materially affected the panel’s decision and threaten[ed] the integrity of the binational panel review process”⁷³ This was only the second time that an Extraordinary Challenge had been launched under NAFTA, and only the second time under either NAFTA or the FTA that an Extraordinary Challenge did not involve an allegation of misconduct by an individual panellist.⁷⁴

Agency resistance has been even more apparent in *High Fructose Corn Syrup*⁷⁵, a case involving access to the Mexican market for U.S.-produced high fructose corn syrup whose primary use is as an industrial sweetener. In the 1990s growing imports of corn syrup put pressure on the Mexican sugar industry. The dispute began in January 1998 when the Mexican Secretary of the Economy (or “IA” for “Investigating Authority”) published a final antidumping determination that dumped imports of corn syrup from the U.S. threatened material injury. A month later U.S.-based producers initiated a complaint under NAFTA Ch. 19 alleging that the investigation had been conducted in a highly irregular fashion, including allegations of numerous procedural errors and the possibility

⁷² 68 Fed. Reg. 42004-01 (July 16, 2003).

⁷³ *U.S. Proceeds to Extraordinary Challenge in NAFTA Magnesium Case*, INSIDE U.S. TRADE (Oct. 17, 2003).

⁷⁴ An Extraordinary Challenge may be launched where a panel member is guilty of misconduct, a panel seriously departs from a fundamental rule of procedure or a panel manifestly exceeds its powers and where any of these actions has materially affected the panel decision and threatens the integrity of the binational panel review process. There were three Extraordinary Challenges under the FTA, all of them launched by the U.S. and all of them unsuccessful. In October 2003 an Extraordinary Challenge Committee dismissed allegations in *Gray Portland Cement and Clinker from Mexico (5th Administrative Review)*, ECC-2000-1904-01USA (Oct. 30, 2003) that the binational panel acted in a manner that “threaten[ed] the integrity of the Binational Panel Review process”. A decision in the *Pure Magnesium* ECC is due sometime in 2004.

⁷⁵ *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, MEX-USA-98-1904-01 (Aug. 3, 2001).

that Mexican officials involved in the antidumping investigation had colluded with Mexican sugar interests.⁷⁶ A series of delays in the appointment of panel members resulted in the case not being heard until August 2000. Many further challenges followed. Nevertheless the binational panel rendered its first decision in August 2001.⁷⁷

Although it is easy to be awed by the more melodramatic aspects of the proceedings, the real issue in *High Fructose* revolved around whether there was sufficient evidence for SECOFI to identify a threat of material injury. In this respect it should be recalled that the international law on which NAFTA antidumping claims are ultimately based requires that “a threat of material injury *shall be based on facts and not merely on allegations, conjecture or remote possibility.*”⁷⁸ This standard is specified in order to forestall indiscriminate use of antidumping action as a non-tariff barrier. In its first determination, however, the panel found there to be clear evidence that conditions in the Mexican sugar industry were actually improving. It contrasted this with SECOFI’s conclusion:

that the IA’s determination rests on the projection of a sudden and massive import of fructose in 1997. This Panel has found that the record does not support such a determination. This projection is not based on fact, but on allegation, conjecture and remote possibility ... The [investigating authority’s] analysis falls short of providing a meaningful or defensible explanation as to why HFCS imports would injure or threaten to cause injury when they presently show an improving domestic industry.⁷⁹

The panel therefore concluded that:

⁷⁶ The complaint triggering the antidumping investigation was made by the Mexican National Chamber of Sugar and Alcohol Industries. On binational review the panel heard claims relating to the Sugar Chamber’s ability to initiate a complaint and its standing in the proceedings, the commencement of proceedings without certain necessary information, and SECOFI’s determination of corn syrup as a “like” product to sugar. The panel also heard arguments that SECOFI did not give the full opportunity for a defence and other procedural protections to U.S. corn syrup producers.

⁷⁷ See *supra*, note 25.

⁷⁸ This wording appears in Art. 3.7 of the WTO Antidumping Agreement, 33 I.L.M. 1125 (1994). Article 3.7 further specifies that “The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.”

⁷⁹ *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, MEX-USA-98-1904-01, paras. 827-828 (Aug. 3, 2001).

the IA has only two causes of action that are consistent with this determination of the panel. The Panel therefore orders the following:

1. that because the IA has failed to prove threat of injury, the IA promptly terminate the anti-dumping duties imposed to the HFCS imports originating in the United States of America and refund the duties collected since the imposition of those duties; or
2. should the IA wish to re-evaluate what basis and justification – if any – there is for its finding of threat of injury, consistent with the findings of this Panel, and in light of the multiple proceedings already completed, it proceed accordingly.⁸⁰

The extreme specificity of the remedy in this case (“the IA has *only* two causes of action”) may be welcome evidence of a desire for precision, but it is also undoubtedly attributable to the protracted nature of the proceedings and the fact of very public disagreement over the result.⁸¹

A complicating factor was concurrent litigation before the World Trade Organization (WTO). Due to frustration with the slow pace in the case under NAFTA the U.S. government had begun parallel proceedings before the WTO in May 1998. A WTO panel rendered its decision in *High Fructose* in January 2000. In that decision the WTO found that Mexico had failed to identify evidence that would establish the threat of injury sufficient to justify the duties imposed.⁸² However, WTO panels are much more constrained in their remedial jurisdiction than their NAFTA Ch. 19 counterparts, being limited to the directive that:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that

⁸⁰ See text of Order, MEX-USA-98-1904-01 (Aug. 3, 2001).

⁸¹ One of the panelists, Saul L. Sherman, declined to sign the report.

⁸² *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, WT/DS132/R (Jan. 28, 2000).

agreement.⁸³

Practice under the WTO Agreement appears to confirm the tendency of panels to follow this direction literally with very little elaboration.⁸⁴

SECOFI's action to comply to the WTO panel's remedy in *High Fructose* was to redo its original investigation with minimal elaboration. For the binational panel this immediately raised the question of what to do with the WTO's decision and Mexico's attempt to comply. Although there are some indications that in the event of conflict NAFTA should prevail, the binational panel accepted the WTO's outcome as dispositive on points where it had already made a determination and considered its own jurisdiction to be "limited, in what it considers legally justified, to the points not considered by the [WTO panel] in applying the principle of comity."⁸⁵ For this reason too, the binational panel ruled that it had jurisdiction over SECOFI's original determination *and* the revised determination arising from SECOFI's attempt to comply with the WTO Agreement.

As seen, the panel specified on remand that Mexico had two options: re-determination or revocation and repayment. However, activity by Mexican officials over the next eight months was insufficient for either of these purposes.⁸⁶ In April 2002 a reconvened binational panel issued its second decision in *High Fructose* in even sharper terms than before, as follows:

Whereas:

⁸³ See WTO *Dispute Settlement Understanding*, Art. 19.1, 33 I.L.M. 1125 (1994).

⁸⁴ A WTO panel has, for instance, refused to make an order for the repayment of antidumping duties part of its recommendation, or to require the repeal of WTO-inconsistent antidumping legislation.

⁸⁵ *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, MEX-USA-98-1904-01, para. 188 (Aug. 3, 2001).

⁸⁶ Most obviously of concern was the behaviour of the Secretary of the Economy which refused to appear or cooperate with the panel at this stage of the proceedings. The panel was then left in the position of having to review the revised determination and the adjusted report as the sole source of the Secretary's decision. For this reason the panel observed that it "had no opportunity to clarify the many obscure and ambiguous aspects of the [investigating authority's] discussion of threat of injury."

1. The IA has had multiple opportunities to both review the material in the administrative record and to expand upon it as a result of the first review by the WTO-DSB; and
2. The IA has twice failed to demonstrate to this Panel that the administrative record supports its conclusion that imports of HFCS from the United States pose a threat of injury to the Mexican sugar market; and
3. Under the terms of NAFTA Chapter 19, panel review of these determinations is to be based exclusively on the administrative record.
4. That there exists no support in the combined record resulting from the original investigation and from the investigation carried out by the IA regarding its Original Decision, for the conclusion of the IA that imports of HFCS from the United States pose a threat of injury to the Mexican sugar industry, rendering the three determinations adopted by the IA inconsistent to international provisions and applicable laws.
5. As a result of this determination, this Panel also finds that the imposition and collection of the antidumping duties posed to HFCS imports coming from the United States of America had been and continue being inconsistent to international provisions and applicable laws, inasmuch as they were the result of the unlawful conclusion of the IA regarding threat of injury also inconsistent to international provisions and applicable laws.

Now, therefore, it orders the following:

This Panel remands this matter to the IA to take action consistent with the Panel's Decision that the duties have been imposed and collected contrary to law, no later than 30 days following the entry of this decision.

While the procedural to-ing and fro-ing in both *Pure Magnesium* and *High Fructose* is impressive, it should not obscure the fact that the central explanation for the failure to comply in this instance was the inability of panels and national agencies to reach an understanding of what needed to be done. In other words, there was no underlying agreement as to the elements requiring change. Each adjudicator persisted in their own appreciation of the law and facts, a situation that ultimately led to dissonant results.

Both *Pure Magnesium* and *High Fructose* also demonstrate how panels have a limited power to get at and assess the evidence and how this disability effectively handicaps their remedial jurisdiction. They rely on agencies to make the initial assessment, effectively assuming a default role after the agency has made a determination. When the agency refuses to act or to do anything new however, the binational panel is compelled to dictate the specific result it seeks. This is an extreme outcome and something that leaves the binational panel open to the charge that it exceeded its jurisdiction, as the Department's phrasing of its final rebuttal in *High Fructose* implies.

It is also noteworthy that in both cases – despite entirely different benches and obviously different facts – binational panels felt authorized to issue specific orders where two reviews had passed. Ostensibly there is no magic in the number two. Other cases under NAFTA Ch. 19 have involved two reviews and less spectacular results. However, what two provides for corresponds with the stages of legal appreciation in most developed systems of domestic law: a stage of initial fact-finding and an appeal. In the case of Ch. 19 review the national agency is authorized and justified to make an initial determination, which the panel will review in the normal exercise of its jurisdiction. If a re-determination is required, then the panel will remand, leaving itself the option of further review. At this point the issues are reasonably clear. Indeed, in both *Pure Magnesium* and *High Fructose* they hardly changed at all. The agency is subsequently left to make a determination which must be confirmed by the panel, meaning that the panel has the ultimate right of approval. If it effectively does nothing, then the panel in the exercise of its reserve power is motivated to act to preserve the effectiveness and

integrity of the system. An informal dictum of “two strikes and you’re out” appears to be emerging.

6. Conclusion

If this article began with the observation that anniversaries are good opportunities to take stock, then it is appropriate to end on that note as well. The question of remedial limits posed at the outset of this article has an answer: panels in all three NAFTA jurisdictions *have* ventured beyond the confines of the treaty wording and have yielded generally acceptable - and occasionally even forceful - results. Given the panels’ review function these results are often negative in nature, but they have substantial positive elements, requiring national agencies to do certain things before final confirmation from a panel is received.

Decisions such as *Live Swine* and *Machine Tufted Carpets* represent perhaps the high-water mark in binational panel activism. In those instances panel conclusions caused outcomes to change markedly. In many other cases, a close reading is required to determine what the actual outcome of remand is and the result has been far less dramatic. But there is also no doubt that, as seen in *High Fructose*, *Pure Magnesium* and the *Carbon Steel* cases, national agencies continue to “bridle at the bit”. There *is* resistance to binational panel decision-making, and it is difficult to tell how persistent such behaviour will continue to be.

Much of this reaction can be understood by analyzing the form and function of binational panels. A framework for such analysis was presented by Anne-Marie Slaughter in her 1992 article *A Typology of Transjudicial Communication*⁸⁷. There she observed that “[c]ourts are talking to one another all over the world” and posited that there are two

⁸⁷ See *supra*, note 7.

forms of transjudicial communication, horizontal and vertical. Horizontal communication takes place between courts of the same status; vertical communication between national and supranational courts. It is into the second of Slaughter's categories that the process of NAFTA Ch. 19 can be placed: binational panels act as supranational tribunals reviewing the work of national agencies. At the same time, Slaughter also suggested that transjudicial communication should be distinguished by the degree of "reciprocal engagement" that arises. In NAFTA this could be characterized as a process of "direct dialogue", or what Slaughter describes as "communication between two courts that is effectively initiated by one and responded to by other." The difficulty with applying Slaughter's typology to the case of NAFTA Ch. 19 is that she describes direct dialogue's "distinguishing feature" as being "the awareness on the part of both participants of whom they are talking to and a willingness to take account of the response."⁸⁸ Such willingness cannot yet be taken for granted of national agencies in their response to binational panel reports. As seen, it is the inability of national agencies to arrive at any underlying agreement with binational panels over what needs to be changed that is the greatest flaw in the process to date.

The reason for these differences is best identified by means of a comparison with the European Court of Justice (ECJ). Commentators today tend to gloss over the early difficulties of the ECJ in establishing a "habit of deference" to its decisions among European national courts without always appreciating the incrementalism involved.⁸⁹ In

⁸⁸ *Ibid.*, p. 113.

⁸⁹ Two landmark cases in establishing the Court's importance were *Van Gend en Loos* and *Simmenthal*. In *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1 the European Court made its now famous observation that "[t]he objective of the EEC Treaty, which is to establish a common market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States. This view is confirmed by the preamble to the Treaty, which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. The conclusion to be

fact, the European Court had to develop a role for itself over several decades. This effort was aided immeasurably by the existence of a separate body of law that the ECJ could claim to be the ultimate interpreter of and by its express purpose to protect the role of individuals – a role that national courts could be readily enlisted in.

In the case of binational panels under Ch. 19, a number of factors suggest that such incrementalism may be much more gradual. Both elements commonly identified as critical to the European Court's hard-earned success – a distinct body of law and a mission to protect individual rights – are missing from Ch. 19. Binational panels do not have a separate body of law that they are the acknowledged guardian of. If anything, they compete with national agencies in the interpretation of domestic law. In some sense they are trying to move into territory that is already occupied and as seen in the *Carbon Steel* case, this is hard to do. Binational panels also do not share the same role as national agencies and therefore cannot appeal to them for assistance in fulfilling a common purpose. The role of binational panels may be to reinforce the interpretation of AD/CVD laws with an eye to protecting individual rights, but the role of national agencies is more evidently to ensure the law's proper application in order to counter dumping or subsidization that causes material injury. These purposes are distinct and the differences suggest that panels must be constantly vigilant if they are to fulfil their function fully under NAFTA.

draw from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals." *Van Gend en Loos* gave expression to the idea that Community law constituted a separate legal order which the ECJ was first and foremost entrusted with interpreting. Later, in *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, [1978] E.C.R. 629 the European Court held that "the relationship between provisions of the [European] Treaty and directly applicable measures of the institutions on one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable and conflicting provision of national law but ... also preclude the valid adoption of new national legislative measures to the extent which they would be incompatible with Community provisions." This expression by the Court is commonly taken to recognize the supremacy of EC over conflicting domestic law.

There are, in addition, other factors which indicate that the process of more automatic acceptance of panel decisions will be a long time in coming. Binational panels are *ad hoc* institutions. Their short-lived nature constantly works against any emerging sense of continuity and institutional identity. They also have fewer opportunities to develop the elements of judicial autonomy, persuasive authority, and common judicial enterprise that Slaughter identifies as preconditions for successful transjudicial communication.⁹⁰ National agencies know this. As seen in this article, a form of dialogue *does* already exist between institutions, but without authoritative or precedential effect there is always the temptation to revert to old ways.

Of course a legal critic might always hope for conflict between panels and agencies that is even more graphic than that detailed here in order to illustrate the problems discussed, but we have to remember the wider context. It is a context of three relatively mature democracies that have collectively agreed to surrender some sovereignty in exchange for bilateral review of certain administrative decisions and for the enhanced legitimacy this entails. In 1994 they were not willing to go much further and it is unlikely that they would go still further today. A cynic might be tempted to dismiss Ch. 19 as window-dressing, essentially a cover by which retired judges and other worthies are used to rubber-stamp agency decisions. Yet as seen, there *have* been some changes, and arguably, *any* improvement to official decision-making is of some value. Corrections have been made, even if they sometimes appear small and are hard to appreciate cumulatively. This is particularly important in an era when business is conducted on razor-thin margins.

There have also been developments as a result of Ch. 19 that transcend pure

⁹⁰ Slaughter, *supra*, note 7, p. 122.

economics and the bottom line. A procedure for review now exists. A body of law has been created. Transparency has been promoted. One has the sense in reading decisions that national agencies *are* more careful, even if, perhaps, they are also more careful at immunizing themselves from effective review and at covering their tracks.⁹¹ Hence, while Ch. 19 might be considered a technicality by laypersons, it still represents something, something that we - as North Americans - have done in a decade together.

⁹¹ In this regard the Commerce Department observed in *Gray Portland Cement and Clinker from Mexico, USA-MEX-1997-1904-03*, p. 13, that "If we were not to correct this error now, we would necessarily have to request another remand so that we could correct this error. Therefore, in order to forestall another remand on this case over the matter of a clear clerical error and to thereby conserve scarce administrative resources, we have decided in this instance to accept STCC's submission as well as respondent's rebuttal comments, and correct this clerical error in the context of this remand."