

INTERNATIONAL DECISIONS

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THE 2005 ACTIVITY OF THE NAFTA TRIBUNALS

The North American Free Trade Agreement (NAFTA) and its two supplemental agreements on environment and labor create seven primary dispute resolution procedures. Each agreement establishes a mechanism to resolve government-to-government claims.¹ In addition, four procedures allow private actors to bring claims against the NAFTA parties: NAFTA's Chapter 11 provides for arbitration of claims by investors against host governments; its Chapter 19 allows corporations and governments to challenge parties' antidumping and countervailing-duty determinations; and the supplemental agreements allow persons and nongovernmental organizations to claim that the parties are failing to effectively enforce their domestic environmental and labor laws.

In the twelve years since NAFTA and its side agreements entered into force, the parties have almost never used the intergovernmental procedures. They have brought no claims under the side agreements and have brought only three cases to arbitration under NAFTA itself, none since 2001. In contrast, the four mechanisms open to private parties have been quite active, receiving over two hundred claims among them. This report surveys the major developments in these four procedures in 2005.

I. NAFTA CHAPTER 11 INVESTOR-STATE DISPUTES

Although NAFTA primarily concerns trade in goods and services, its Chapter 11 provides basic protections for international investment. In general, Chapter 11 requires that each party treat the other parties' investors and their investments no worse than it treats investors and investments of its own or any other country, that it accord such investments "treatment in accordance with international law, including fair and equitable treatment and full protection and security," and that it not expropriate any such investment without prompt payment of fair market value.² An investor alleging that a party has breached an obligation under Chapter 11 has the right to bring the claim to an ad hoc arbitral tribunal, which may award money damages or restitution, but may not enjoin the party from applying the challenged measure.³

The 2005 developments in Chapter 11 illustrate four ongoing themes: (1) U.S. success and Canadian failure; (2) domestic court deference to tribunal decisions; (3) disagreement among tribunals on basic principles; and (4) the attraction of Chapter 11 arbitration for a wide range of claims.

¹ North American Free Trade Agreement, Dec. 17, 1992, ch. 20, 32 ILM 289 & 605 (1993) [hereinafter NAFTA]; North American Agreement on Environmental Cooperation, Sept. 14, 1993, pt. V, 32 ILM 1480 (1993) [hereinafter NAAEC]; North American Agreement on Labor Cooperation, Sept. 14, 1993, pt. V, 32 ILM 1499 (1993) [hereinafter NAALC].

² NAFTA, *supra* note 1, Arts. 1102, 1103, 1105, 1110.

³ *Id.*, Arts. 1116, 1117, 1134, 1135. The arbitration is under the rules of the International Centre for Settlement of Investment Disputes or the United Nations Commission on International Trade Law, as modified by Chapter 11. *Id.*, Art. 1120.

U.S. Success and Canadian Failure

As of the end of 2005, twenty-seven claims have been submitted to arbitration under Chapter 11, with final decisions entered in eleven cases.⁴ Of the parties, Canada has the worst record, losing both of the awards in claims against it and settling another case after a jurisdictional award in favor of the claimant.⁵ In contrast, the United States has won all four of the decided claims against it, each time against Canadian investors, who have yet to win a case under Chapter 11.⁶ The only final decision on the merits in 2005 continued this trend. In *Methanex Corp. v. United States*, the tribunal rejected the claim by Methanex, a Canadian company, that California had discriminated against it and expropriated its investment by banning methyl tertiary-butyl ether (MTBE), a fuel additive for which Methanex provides a component chemical, methanol.⁷ *Methanex* is an important decision in several respects, and a note analyzing it will appear in a coming issue of the *Journal*.

Domestic Court Deference to Chapter 11 Awards

Investors that receive an award from a Chapter 11 tribunal may enforce it against the losing government under either of two conventions on the enforcement of arbitral awards.⁸ Both conventions “leave each country free to establish its own grounds for vacating awards within its country” but “require deference to valid arbitration agreements and awards.”⁹ Nevertheless, in 2001, the first Canadian court to decide a challenge to a Chapter 11 award, in *Mexico v. Metalclad Corp.*, questioned much of the tribunal’s reasoning and limited its holding.¹⁰ The decision led some commentators to ask whether domestic review of Chapter 11 decisions is appropriate.¹¹

⁴ The numbers in this section are based on the lists of claims maintained online by the U.S. Department of State at <<http://www.state.gov/s/l/c3439.htm>>, International Trade Canada at <<http://www.dfait-maeci.gc.ca/tna-nafta/NAFTA-en.asp>>, Mexico’s Secretaría de Economía at <<http://www.economia.gob.mx/index.jsp?P=2259>>, and Todd Weiler at <<http://www.naftalaw.org>>. The *Waste Management* claim, see *infra* note 6, which was first rejected by a tribunal on procedural grounds and then refiled, counts as one claim here, as do the more than one hundred claims arising from the U.S. decision to prohibit imports of cattle from Canada after the discovery of mad cow disease in Alberta. All of the decisions cited in this section are available through these Web sites.

⁵ *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), Second Partial Award (Oct. 21, 2002), Final Award (Dec. 30, 2002) (discussed in case report by Charles H. Brower II at 98 AJIL 339 (2004)); *Pope & Talbot Inc. v. Canada*, Award on the Merits (Apr. 10, 2001), Award on Damages (May 31, 2002) (discussed in case report by David A. Gantz at 97 AJIL 937 (2003)). Canada settled with Ethyl after the tribunal found jurisdiction in *Ethyl Corp. v. Canada*, Preliminary Award on Jurisdiction (June 24, 1998) (discussed in case report by Alan C. Swan at 94 AJIL 159 (1999)).

⁶ *Mondev Int’l Ltd. v. United States*, Award (Oct. 11, 2002) (discussed in case report by William S. Dodge at 98 AJIL 155 (2004)); *ADF Group Inc. v. United States*, Award (Jan. 9, 2003); *Loewen Group Inc. v. United States*, Award (June 26, 2003) (discussed in case report by William S. Dodge at 98 AJIL 155 (2004)); *Methanex Corp. v. United States*, Final Award (Aug. 3, 2005).

The government of Mexico has a mixed record, winning three and losing two through the end of 2005, each time against U.S. investors. See *Azinian v. Mexico*, Award (Nov. 1, 1999); *Waste Management, Inc. v. Mexico*, Award (Apr. 30, 2004); *GAMI Investments, Inc. v. Mexico*, Final Award (Nov. 15, 2004) (victories); *Metalclad Corp. v. Mexico*, Award (Aug. 30, 2000) (discussed in case report by William S. Dodge at 95 AJIL 910 (2001)); *Feldman v. Mexico*, Award (Dec. 16, 2002) (losses). In January 2006, Mexico won another decision, its first against Canadian investors. *Int’l Thunderbird Gaming Corp. v. Mexico*, Award (Jan. 26, 2006).

⁷ See *supra* note 6.

⁸ NAFTA, *supra* 1, Art. 1136(6); [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 UNTS 38, 21 UST 2517; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 ILM 336 (1975).

⁹ Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration*, 28 YALE J. INT’L L. 365, 374–75 (2003).

¹⁰ *Mexico v. Metalclad Corp.*, 2001 B.C.S.C. 644 (B.C. Sup. Ct. May 2, 2001).

¹¹ William S. Dodge, Case Report: *Metalclad Corporation v. Mexico*, 95 AJIL 910, 916 (2001).

Two decisions in 2005, however, indicate that domestic courts are not as likely to second-guess Chapter 11 decisions as *Metalclad* may have suggested.

In *Mexico v. Feldman*, the Ontario Court of Appeals affirmed the rejection by a lower court of Mexico's challenge to a 2002 award in favor of Marvin Feldman, the U.S. owner of a Mexican company. The award had held that Mexico discriminated in violation of Chapter 11 by failing to provide Feldman's company a tax rebate that Mexico provided to Mexican-owned companies in the same business.¹² Mexico brought its challenge under the UNCITRAL Model Law on International Commercial Arbitration, which under Ontario law applies to international commercial arbitration awards in Ontario.¹³ In its decision, the appellate court emphasized the importance of deference to the international tribunal. In particular, it noted the difficulty of convincing a court to set aside an award on the basis of the public policy exception in the UNCITRAL Model Law, stating that the exception is "to guard against enforcement of an award *which offends our local principles of justice and fairness in a fundamental way.*"¹⁴ As the first appellate decision on a Chapter 11 challenge, and coming shortly after a 2004 rejection by a Canadian federal court to another challenge,¹⁵ *Feldman* is likely to discourage other Canadian courts from overturning or sharply limiting Chapter 11 awards.¹⁶

2005 also saw *Loewen v. United States*, the first decision by a U.S. court asked to review a Chapter 11 award. Raymond Loewen, a Canadian national, and his funeral home company brought claims against the United States arising from a Mississippi court's judgment against the company for \$500 million, which (they argued) led to the company's bankruptcy. In 2003, the tribunal rejected the company's claim, but its disposition of Raymond Loewen's claim was not completely clear. After the United States requested clarification, the tribunal issued a short decision in 2004 stating that the 2003 award had already "dealt with" his claim.¹⁷

Unfortunately for Loewen, he waited until after the 2004 decision to request a D.C. district court to vacate the 2003 award under the Federal Arbitration Act, which requires a petitioner to bring a motion to vacate an arbitral award within three months of the award.¹⁸ The court rejected Loewen's argument that the 2003 award was not final until the 2004 decision, calling the argument "inconsistent with the plain language of the ICSID Rules, the FAA, and case law in this district and elsewhere," all of which indicate that the award is final and binding on the parties once it issues.¹⁹ While not as broad as *Feldman*, *Loewen* indicates that domestic courts will not lightly reach out to review Chapter 11 decisions.

Disagreement Among Chapter 11 Tribunals

Chapter 11 tribunals are not bound to follow the reasoning in previous awards, and they have no appellate body to ensure that their decisions are uniform. As a result, they can and often do contradict one another. Three decisions in 2005 show the types of conflicts that can result.

¹² *Feldman*, *supra* note 6.

¹³ International Commercial Arbitration Act, R.S.O. 1990, c. 1-9, §2.

¹⁴ *Mexico v. Feldman Karpa*, O.J. No. 5070, para. 66 (Ont. S.C.J. 2005).

¹⁵ *Canada v. S.D. Myers, Inc.*, 2004 F.C. 38 (Fed. Ct. 2004).

¹⁶ See Rajeev Sharma & Adam Goodman, *Ontario Court of Appeal Upholds NAFTA Chapter 11 Award*, ASIL INSIGHTS (Feb. 2005), at <<http://www.asil.org/insights/2005/02/insight040214.html>> (noting that the Ontario Court of Appeals is the most influential court in Canada after the Canadian Supreme Court).

¹⁷ *Loewen Group, Inc. v. United States*, Decision on Respondent's Request for a Supplementary Decision, para. 23 (Sept. 6, 2004).

¹⁸ 9 U.S.C. §12 (2000).

¹⁹ *Loewen v. United States*, No. 04-2151, mem. op., at 5 (D.D.C. Oct. 31, 2005).

The first decision is the contribution of the *Methanex* tribunal to the debate over “regulatory expropriation.” For years, many academics and environmental advocates have feared that Chapter 11 allows corporations to demand payment for regulations of general application merely because the regulations adversely affect corporate profits. Exhibit A in the critics’ case has been the 2000 *Metalclad* award, which states:

[E]xpropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property. . . .²⁰

Although the Canadian court that reviewed the decision questioned this reasoning,²¹ and no later tribunal has gone as far, investors have continued to cite *Metalclad*, and critics have expressed concern that later tribunals, including *Methanex*, would follow it.²²

In fact, the 2005 *Methanex* decision provides a vastly different standard for assessing whether regulations are expropriatory:

[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.²³

While under *Metalclad* almost any regulation that adversely affects investors in a significant way might be considered expropriatory, under *Methanex* environmental and other regulatory laws of general application would virtually never be expropriatory. It remains to be seen which, if either, of these interpretive poles will prove more attractive to later tribunals.

Another conflict arises from two 2005 decisions on the standard for consolidating claims under Chapter 11, which allows a NAFTA party or investor to request creation of a “consolidation tribunal” with jurisdiction to decide whether to consolidate more than one claim already submitted to arbitration under that same chapter. If the claims have a question of law or fact in common, then the tribunal may, “in the interests of fair and efficient resolution of the claims,” consolidate the claims and decide them itself.²⁴ In 2005, the first two consolidation tribunals issued contradictory decisions on the standard for consolidation.

In the first decision, a consolidation tribunal rejected Mexico’s request to consolidate two claims that its excise tax on imports of soft drinks containing high-fructose corn syrup discriminated against U.S. companies and expropriated their investment in Mexico.²⁵ The tribunal noted that the claims had common questions of law or fact,²⁶ but held that the consolidation

²⁰ *Metalclad*, *supra* note 6, para. 103.

²¹ Mexico v. Metalclad Corp., 2001 BCSC 664, para. 99 (B.C. Sup. Ct. May 2, 2001) (noting that the tribunal’s definition of expropriation would include “a legitimate rezoning of property”).

²² See, e.g., Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 N.Y.U. L. REV. 30 (2003); William Greider, *The Right and US Trade Law: Invalidating the 20th Century*, NATION (Oct. 15, 2001), at <<http://www.thenation.com/doc/20011015/greider>>.

²³ *Methanex*, *supra* note 6, at IV-D-4.

²⁴ NAFTA, *supra* note 1, Art. 1126(2).

²⁵ *In re* Request for Consolidation by Mexico of the Claims in Corn Products Int’l, Inc. v. Mexico and Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. Mexico, Order (Consolidation Trib. May 20, 2005).

²⁶ *Id.*, para. 6.

would not further their fair and efficient resolution. It gave great weight to the fact that the claimants were “fierce” competitors, and accepted their argument that they could not share with one another the business information necessary for the tribunal to decide their claims.²⁷ The tribunal also took into account that the claimants opposed consolidation.²⁸ It acknowledged that separate proceedings in such similar cases risk inconsistent awards, but concluded that “the risk of unfairness to Mexico from inconsistent awards . . . cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings.”²⁹

The second decision by a consolidation tribunal, less than four months later, reviewed a request by the United States to consolidate three claims by Canadian forest products companies arising from U.S. antidumping and countervailing-duty determinations concerning softwood lumber.³⁰ Based on a review of the drafting history of Article 1126 and a statement by a Canadian attorney involved in its negotiation, the tribunal concluded that the main rationale of Article 1126 was to promote “procedural economy,” from the point of view of the state parties in particular.³¹ The claimants’ opposition to consolidation was irrelevant, as was the fact that they were direct competitors.³² Instead, the tribunal held that the only relevant factors were the effects that consolidation would have on the time and cost incurred by the parties, and the desirability of avoiding conflicting decisions.³³ On the basis of those factors, the tribunal concluded that “procedural economy counsels in favor of the Consolidation Tribunal assuming jurisdiction over all the claims.”³⁴

These two decisions point in opposite directions. Under the first, consolidation would virtually never be appropriate when claimants are direct competitors that oppose it. Under the second, the factors of time and cost would usually cancel one another out, since consolidation will usually save the state party both time and money, and increase the investors’ expenditures of both. The third factor—the avoidance of conflicting decisions—would favor consolidation in almost any case that met the preliminary requirement of having a common question of law or fact. Like the *Metalclad/Methanex* split over regulatory expropriation, the consolidation decisions make it difficult for investors and governments to predict which standard future tribunals will adopt. The 2005 decisions provide more fuel for those who have argued that the Chapter 11 procedure needs an appellate body.³⁵

The Magnetic Attraction of Chapter 11 Arbitration

Perhaps because Chapter 11 offers the prospect of money judgments against the NAFTA parties, claimants have often brought claims under it that seem to relate primarily, if not solely, to other provisions of NAFTA, or to other agreements entirely. For example, the consolidated claims by the Canadian softwood lumber producers closely implicate (and, if the United States

²⁷ *Id.*, paras. 7–9.

²⁸ *Id.*, para. 12.

²⁹ *Id.*, paras. 16–17.

³⁰ *In re* Request for Consolidation by the United States of the Claims in *Canfor Corp. v United States, Tembec et al. v. United States, and Terminal Forest Products Ltd. v. United States*, Order (Consolidation Trib. Sept. 7, 2005).

³¹ *Id.*, paras. 73–76.

³² *Id.*, paras. 78–80, 135. The tribunal said that “concerns over confidentiality” would be relevant only in “exceptional cases where consolidation would defeat efficiency of process or would infringe the principle of due process.” *Id.*, para. 138.

³³ *Id.*, paras. 126–33.

³⁴ *Id.*, para. 220.

³⁵ *E.g.*, Dodge, *supra* note 11, at 918; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1617–20 (2005).

is correct, simply reproduce) claims that the United States has failed to comply with obligations regarding antidumping and countervailing duties under Chapter 19 of NAFTA. Similarly, Canadian cattle producers filed claims under Chapter 11 in 2005 complaining of a U.S. ban on imports of Canadian cattle after a case of mad cow disease was discovered in Alberta—that is, a restriction on trade, not a restriction on foreign investment in the United States.³⁶ And in another claim filed in 2005, Texas irrigators alleged that Mexico expropriated their rights in water in Mexican tributaries to the Rio Grande—rights that they argue arise from a treaty allocating the waters of the Rio Grande between Mexico and the United States.³⁷

Chapter 11 may become less attractive for such claims, however, for two reasons. First, although early decisions often left each party to the arbitration to bear its own costs, tribunals may become more likely to assess costs against losing parties, increasing the potential risk of bringing a long-shot claim. For instance, the 2005 *Methanex* decision ordered Methanex to pay all of the costs of the arbitration, including \$1.5 million in tribunal costs and nearly \$3 million for the U.S. government's legal costs.³⁸ Second, the state parties are unlikely to allow Chapter 11 to become a magnet for claims arising under other agreements. In response to an earlier decision that appeared to be opening the door to such claims, the Free Trade Commission (composed of the NAFTA parties' chief trade officials) issued a binding interpretation stating that a breach of another NAFTA provision or a separate agreement does not thereby violate the obligation under Chapter 11 for parties to accord investments "treatment in accordance with international law."³⁹ One could imagine a similar, more broadly worded interpretation if a tribunal found, for instance, that Chapter 11 authorizes tribunals to review Mexico's obligations under the treaty allocating the waters of the Rio Grande.

II. NAFTA CHAPTER 19 AD/CVD CASES

If an imported good is dumped (sold in trade below its normal value) or subsidized, and if the imports cause material injury to a domestic industry, the domestic law of each NAFTA party provides for the imposition of duties to offset the difference between the dumped and normal prices, or to "countervail" the effect of the subsidy. The application of antidumping (AD) and countervailing duty (CVD) laws has long been controversial. In particular, Canada has complained that the United States unfairly relies on these laws to impose duties on Canadian goods, including, most famously, softwood lumber. During the negotiation of the precursor agreement to NAFTA, the U.S.-Canada Free Trade Agreement of 1988, the treatment of AD/CVD laws was especially hard fought, with Canada arguing that they should be eliminated and the United States insisting on retaining them. As a compromise, Canada and the United States agreed to allow parties to appeal adverse AD/CVD determinations directly to a binational panel of five experts, rather than to the domestic courts of the country imposing the duties. Although this solution was initially expected to last only until the parties developed more specific rules governing dumping and subsidies, the NAFTA negotiators included it with only minor modifications in NAFTA's Chapter 19. Crucially, these binational panels decide only

³⁶ The claimants apparently intend to argue that Article 1102 requires the United States not to discriminate against Canadians even with respect to their investments in Canada.

³⁷ Treaty Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219, 9 Bevans 1166. Although the claimants' notice of arbitration is not on the official government sites, it is available at <http://www.naftaclaims.com/texas_water_claims.htm>.

³⁸ *Methanex*, *supra* note 6, at V-2.

³⁹ Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), at <<http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>>.

whether the challenged agency determination accords with the AD/CVD law of the importing party, *not* whether it violates NAFTA itself.⁴⁰

In the twelve years since NAFTA entered into force, Chapter 19 has been used more often than any other NAFTA dispute resolution procedure, receiving 105 claims through the end of 2005. Two-thirds of these claims, and more than 85% of the claims filed in the last five years, have been against the United States.⁴¹ Of the 29 pending cases, 25 are against the United States, and all of the Chapter 19 panel decisions in 2005 were in cases challenging U.S. agency determinations.

A typical Chapter 19 case against the United States arises from a complaint that the Department of Commerce, which makes dumping and subsidy determinations, or the International Trade Commission (ITC), which makes findings of material injury, has failed to consider or has incorrectly decided an issue, or has provided insufficient support for its findings. The Chapter 19 panel usually affirms the agency determination in part but remands the case to the agency for further consideration of some issues, either because the agency has decided them incorrectly or, more often, because the panel wants a clearer explanation of the agency decision. Upon reconsideration after remand, the panel usually accepts the explanation and affirms the decision.⁴²

Some decisions deviate from this pattern, however. In particular, some of the 2005 decisions raise issues involving: (1) AD/CVD case fragmentation; (2) the remedial powers of Chapter 19 panels; and (3) the review of panel decisions by an Extraordinary Challenge Committee.

Fragmentation of AD/CVD Cases

Every AD or CVD determination involves at least two agency decisions: a finding that goods are being dumped or subsidized, and a finding that the dumping or subsidy is causing or threatening material injury to domestic industry. In addition, agencies conduct regular reviews of their dumping/subsidy determinations. Each of these decisions is subject to appeal to a Chapter 19 panel and may be subject to challenge in other forums as well. As a result, a set of closely related issues may be addressed in separate proceedings, each moving at its own pace.

The softwood lumber dispute provides an extreme example. In the spring of 2002, the U.S. Commerce Department determined that the Canadian government was subsidizing softwood lumber producers and that softwood lumber was being dumped in the U.S. market, and the ITC found a threat of material injury. Canadian producers and (in two cases) the Canadian government challenged those determinations in three separate Chapter 19 proceedings. The Canadian government also brought three cases, one for each determination, to the World Trade Organization. The six cases have produced at least twenty decisions (twelve under Chapter 19 and eight under the WTO), with more on the way.

⁴⁰ NAFTA, *supra* note 1, Art. 1904(2), (3). That means, for review of U.S. agency determinations, the use of the “substantial evidence” standard, under which a tribunal is bound to affirm the determination unless it finds it “to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 USC 1516a(b)(1)(B); *see* NAFTA, *supra* note 1, Annex 1911 (definition of “standard of review”).

⁴¹ These numbers are drawn from the Web site of the NAFTA secretariat, <<http://www.nafta-sec-alena.org>>, which is also where the Chapter 19 decisions cited in this section can be found.

⁴² *See, e.g., In re Carbon and Certain Alloy Steel Wire Rod from Canada*, No. USA-CDA-2002-1904-09 (Aug. 12, 2004; Apr. 18, 2005); *In re Corrosion-Resistant Carbon Steel Flat Products from Canada*, No. USA-CDA-00-1904-11 (Oct. 19, 2004; Apr. 29, 2005); *In re Hard Red Spring Wheat from Canada*, No. USA-CDA-2003-1904-06 (June 7, 2005; Dec. 12, 2005).

Moreover, even though the first six cases are still not all completed, the Canadians filed a new round of challenges in 2005 in response to a new set of U.S. agency determinations.⁴³ The battle has spilled over into Chapter 11, as the preceding section notes, and is finding its way to domestic courts as well. In 2005, Canada pursued a claim before the U.S. Court of International Trade that the United States is failing to comply with Chapter 19 decisions on softwood lumber, and the U.S. lumber industry brought a constitutional challenge to Chapter 19 in U.S. federal court.⁴⁴

This fragmentation creates at least two problems. First, it prolongs final resolution of the underlying dispute. Although most of the decisions have been in favor of the Canadian parties, Canada has been unable to slay the softwood lumber hydra, both because the U.S. government has won enough decisions to claim that it is not required to end the duties and because U.S. agencies continue to issue new decisions, each of which gives rise to a new set of challenges.

Second, the proliferation of decisions increases the possibility of inconsistent judgments. The likelihood of real conflict should not be overstated. The Chapter 19 panels are each reviewing different (although closely related) decisions, and although they are reviewing the same decisions as the WTO tribunals, they are applying different standards: the Chapter 19 panels assess whether the decisions accord with U.S. domestic law, whereas the WTO tribunals examine the consistency of the decisions with U.S. obligations under the WTO agreements.⁴⁵ Nevertheless, WTO tribunals and Chapter 19 panels can face overlapping issues.

For example, Canada challenged the U.S. practice of “zeroing” before both the Chapter 19 panel and the WTO tribunal reviewing the 2002 softwood lumber dumping determination. (In determining the average margin by which imported products have been dumped—sold at less than fair market value—“zeroing” is the practice of assigning above-market sales a margin of zero, while assigning positive margins to below-market sales.) The Chapter 19 panel initially held that the Commerce Department had the discretion to construe U.S. law to allow zeroing, but after the WTO Appellate Body determined that zeroing in the dumping determination violated the WTO Anti-dumping Agreement, the panel changed its mind. Relying on the *Charming Betsy* canon of interpretation, under which “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,”⁴⁶ the panel decided that the agency could no longer construe U.S. federal law in a way that conflicted with an international legal obligation. The panel thus held the use of zeroing in the dumping determination to be inconsistent with U.S. law because a WTO tribunal had first held it to be inconsistent with the Anti-dumping Agreement.⁴⁷

Remedial Powers of Chapter 19 Panels

A Chapter 19 panel may either uphold a challenged agency determination or remand it to the agency “for action not inconsistent with the panel’s decision.”⁴⁸ In general, panels that do

⁴³ See *Certain Softwood Lumber Products from Canada*, No. USA-CDA-2005-1904-01 (challenging Commerce Department administrative review of CVD determination), No. USA-CDA-2005-1904-03 (challenging ITC implementation of WTO decision on material injury), No. USA-CDA-2005-1904-04 (challenging Commerce Department implementation of WTO decision on AD).

⁴⁴ Rossella Brevetti, *Lumber Industry Files Federal Court Challenge to Constitutionality of Chapter 19*, 22 Int’l Trade Rep. (BNA) 1477 (Sept. 15, 2005).

⁴⁵ See Joost Pauwelyn, *The US-Canada Softwood Lumber Dispute Reaches a Climax*, ASIL INSIGHTS (Nov. 30, 2005), at <<http://www.asil.org/insights/2005/11/insights051129.html>>.

⁴⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴⁷ *In re Certain Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-02 (June 9, 2005).

⁴⁸ NAFTA, *supra* note 1, Art. 1904(8).

not affirm a determination remand it to the agency for further consideration. While many cases are resolved after only one or two remands, cases occasionally become a ping-pong game between the panel and the agency. For example, the panel reviewing the 2002 softwood lumber subsidy determination has remanded the case to the Commerce Department five times, including twice in 2005.⁴⁹

Another softwood lumber panel, reviewing the ITC's material injury finding, lost patience with the game. After the panel held twice that the ITC's finding was unsupported by substantial evidence, the ITC reached the same conclusion a third time on the same evidence. Instead of remanding again, the panel directed the ITC to enter a finding of no material injury.⁵⁰ The United States objected that the panel exceeded its authority on this and other grounds, and requested review of the decision by an Extraordinary Challenge Committee (ECC), an ad hoc tribunal appointed from current or former domestic judges, which under limited conditions may overturn a panel decision.⁵¹ In August 2005, the softwood lumber ECC rejected the U.S. challenge. Looking to the powers of U.S. courts as the touchstone for the panel's authority to review U.S. agency determinations, the ECC held that while U.S. courts may normally remand agency decisions only for reconsideration in accordance with the court's judgment, "in rare circumstances" a court may direct the agency to issue a particular decision.⁵² In particular, the ECC held that a panel may do so where, as here, the panel finds on the basis of substantial evidence that a remand for further consideration by the agency would be futile.⁵³

ECC Standard of Review

Of the seven NAFTA dispute resolution procedures, Chapter 19 is the only one that provides for appeals to a "higher" international tribunal. As the ECC decisions themselves note, though, the ECC's standard of review is so circumscribed that an ECC is not a normal appellate body. Based on the plain language of Chapter 19, ECCs have held that they may vacate or remand a panel decision only if (1) a panel member materially violated the rules of conduct, the panel seriously departed from a fundamental rule of procedure, or the panel manifestly exceeded its powers, and (2) any of those actions both materially affected the panel's decision and threatens the integrity of the panel review process.⁵⁴

The August 2005 softwood lumber decision was the third by an ECC under NAFTA. Like the earlier ones, the 2005 decision illustrates the difficulty of convincing an ECC to reverse a panel decision. In all three cases, the ECC did not overturn the panel decision despite indicating that the panel misapplied the law.⁵⁵ The problem with such a limited standard of review

⁴⁹ *In re* Certain Softwood Lumber Products from Canada, No. USA-CDA-2002-1904-03 (Aug. 13, 2003; June 7, 2004; Dec. 1, 2004; May 23, 2005; Oct. 5, 2005).

⁵⁰ *In re* Certain Softwood Lumber Products from Canada, No. USA-CDA-2002-1904-07 (Aug. 31, 2004).

⁵¹ NAFTA, *supra* note 1, Annex 1904.13(3).

⁵² *In re* Certain Softwood Lumber Products from Canada, No. ECC-2004-1904-01-USA, Opinion and Order, at 44–45 (Extraordinary Challenge Comm. Aug. 10, 2005) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

⁵³ *Id.* at 45–48.

⁵⁴ *Id.* at 6–7 (citing NAFTA, *supra* note 1, Art. 1904).

⁵⁵ In the *Softwood Lumber* case, the ECC found that the panel manifestly exceeded its powers by failing to apply the appropriate standard of review on one issue, but that the error did not materially affect its decision because the error applied to only one component of a subsidiary finding. *Id.* at 43. Similarly, the first ECC decision, in 2003, stated that the panel had failed to follow the better-reasoned approach of the panel's dissenting member, but that even if the panel erred by failing to apply the substantial evidence standard correctly, its failure did not rise to the level of manifestly exceeding its powers, and "above all," nothing in its conduct threatened the integrity of the process. *In re* Gray Portland Cement and Clinker from Mexico, No. ECC-2000-1904-01-USA, Opinion and Order,

is obvious: ECC decisions that regularly identify panel mistakes without correcting them will eventually undermine confidence in the panels and the entire Chapter 19 procedure.

III. CITIZEN SUBMISSIONS UNDER THE ENVIRONMENTAL SIDE AGREEMENT

The United States proposed the North American Agreement on Environmental Cooperation (NAAEC) to respond to concerns that U.S. companies might move to Mexico to take advantage of low Mexican environmental standards. As written, Mexican environmental standards are comparable to U.S. standards, but compliance in Mexico is far lower. The NAAEC therefore requires the parties to effectively enforce their domestic environmental laws,⁵⁶ and creates two mechanisms to induce the parties to do so: (1) an intergovernmental procedure that allows parties to bring claims against one another for persistent patterns of failure to enforce their domestic laws, which in principle can lead to economic sanctions; and (2) a citizen-submissions procedure through which nongovernmental actors may claim that a party is failing to effectively enforce its laws.

Citizen submissions are filed with the secretariat of the international organization created by the NAAEC, the Commission for Environmental Cooperation (CEC). To be admissible, a submission must meet basic requirements, such as clearly identifying the submitter and providing sufficient information to allow a review of the submission.⁵⁷ In deciding whether to request a response from the party, the secretariat must also consider other factors, including whether the submission “raises matters whose further study . . . would advance the goals of this Agreement.”⁵⁸ If, in light of these factors and the response, the secretariat decides that the submission warrants further investigation, it so informs the CEC Council, composed of representatives of the parties, which decides whether to instruct the secretariat to prepare a “factual record” on the issues raised by the submission.⁵⁹ The factual record is not binding, and the parties’ view is that it may not even indicate whether the specific party in question has violated its obligation to effectively enforce its laws. The factual record may, however, provide the evidence necessary for others to decide whether the party has done so.

The submissions procedure has been active: it has received fifty-two submissions and has produced eleven factual records, with four more in preparation.⁶⁰ In 2005, it produced decisions at every stage of the process: the secretariat decided whether five submissions were admissible; it decided whether to recommend factual records in two of those cases and in three others; the council decided whether to authorize two factual records; and the secretariat completed its eleventh factual record. Rather than review each of these decisions, this section describes two features of the procedure that the decisions highlight: (1) the tension between the secretariat and the council in performing their quasi-judicial roles in the procedure, and (2) the lack of submissions and factual records concerning the United States.

at 6 (Extraordinary Challenge Comm. Oct. 30, 2003). Most strikingly, a subsequent, October 2004 ECC decision found that even though a panel’s failure to apply the correct standard of review did materially affect its decision in that case, the mistake still did not threaten the integrity of the panel review process. The committee suggested that for a decision to threaten the integrity of the process, the panel would have to include a biased member, to conduct its own fact-finding inquiries, or to completely fail to follow domestic law. *In re Pure Magnesium from Canada*, No. ECC-2003-1904-01-USA, Decision and Order, at 8 (Extraordinary Challenge Comm. Oct. 5, 2004).

⁵⁶ NAAEC, *supra* note 1, Art. 5.

⁵⁷ *Id.*, Art. 14(1).

⁵⁸ *Id.*, Art. 14(2).

⁵⁹ *Id.*, Art. 15.

⁶⁰ These and the other numbers in this section are drawn from the CEC Web site, <<http://www.cec.org/citizen/index.cfm?varlan=english>>, where one can also find the decisions cited in this section.

A Judicial Secretariat and a Conflicted Council

For the submissions procedure to be effective, the body reviewing the submissions must be impartial as well as competent. The secretariat's decisions in 2005 demonstrate that it does not simply rubber-stamp submissions: it recommended that the council authorize a factual record in three cases, but rejected two other submissions as not warranting further investigation. This pattern is consistent with the secretariat's record since the inception of the procedure. Of the forty-nine submissions that have received final procedural decisions, the secretariat has rejected sixteen on admissibility grounds, denied another eleven on the ground that they did not warrant further investigation, and recommended a factual record in twenty-two.

The council's role in authorizing factual records is more problematic because it has an inherent conflict of interest. In every case presented to it by the secretariat, at least one of the parties represented on the council is the subject of the submission—and has typically argued to the secretariat in its response to the submission that it does not warrant a factual record. Nevertheless, the council has flatly denied secretariat suggestions for factual records in only two cases and has approved sixteen, including two in 2005.⁶¹

Despite this apparently admirable record, tensions in the council's dual role appear in other ways. For example, the council often approves factual records only after limiting their scope, which may also limit much of their usefulness.⁶² In addition, the council may delay acting on factual records. One of its two authorizations in 2005 came more than nine months after the secretariat proposal,⁶³ and it has yet to act on two secretariat proposals made in May 2005.⁶⁴ The council delayed for five months publishing the one factual record completed by the secretariat in 2005, a report on a claim by a Mexican human rights group that Mexico had failed to respond to citizen complaints effectively, to prosecute violations, and to consult with indigenous peoples in relation to illegal logging in the Sierra Tarahumara mountains in Chihuahua.⁶⁵

As the Tarahumara factual record illustrates, the parties' reluctance to authorize investigations by the secretariat may stem from their fear of embarrassment. Like other factual records, the Tarahumara report describes a number of sensitive areas in matter-of-fact detail. It states, for example, that the Mexican federal government did not meet its own legal deadlines for responding to citizen complaints. It describes "challenges" to effective enforcement arising from the relations between indigenous communities and the government, the remote location of the communities, and linguistic differences. And it makes clear that the federal officials charged with investigating violations are underpaid and understaffed. Perhaps most troubling, the factual record states that Mexico failed to provide the secretariat with basic information about the actions that it did or did not take to enforce its laws, making it far more difficult for the secretariat to investigate the submitters' complaints.⁶⁶

Unbalanced Numbers of Submissions

Of the submissions to the CEC in the last twelve years, twenty-six, or half, have concerned Mexico, seventeen have been directed against Canada, and only nine have been against the

⁶¹ Of the twenty-two requests for factual records, three others are pending with the council, and one was withdrawn by the submitter.

⁶² The practice of authorizing factual records different from those requested by the secretariat has been criticized as inconsistent with the spirit and letter of the NAAEC. See David L. Markell, *The CEC Citizen Submissions Process: On or off Course?* in GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION 274 (David L. Markell & John H. Knox eds., 2003).

⁶³ ALCA-Iztapalapa II, No. SEM-03-004.

⁶⁴ Lake Chapala II, No. SEM-03-003; Quebec Automobiles, No. SEM-04-007.

⁶⁵ See Tarahumara, No. SEM-00-006, Factual Record (July 26, 2005).

⁶⁶ *Id.* at 83–84.

United States. Of the eleven published factual records, only one, issued in 2003, has concerned the United States.⁶⁷ This disparity is growing: only one of the twenty-four submissions filed in the last five years has been against the United States.

One reason for the low number of submissions against the United States may be that failures to enforce U.S. laws can often be redressed through citizen suits in U.S. courts. But this factor cannot completely explain why fewer submissions are filed against the United States than against Canada, a country that also has widely available domestic remedies and relatively well-financed environmental groups able to pursue them. Canadian groups have used the procedure to call attention to widespread failures of enforcement that may not be susceptible to domestic litigation. In 2005, for example, the council approved the preparation of an expanded factual record to examine claims that Canada has failed to effectively enforce its protections for migratory birds against logging operations throughout Ontario.⁶⁸

The only factual record issued against the United States to date was based on a submission that sought a similarly broad examination of U.S. law protecting migratory birds from logging, but in authorizing it the council narrowed its scope drastically, undercutting much of its value.⁶⁹ In this respect, the most consequential decision by the secretariat in 2005 may have been to recommend a factual record to investigate the only submission filed against the United States in the last five years, a submission that calls attention to another widespread problem. Led by two U.S. environmental groups, a consortium of U.S. and Canadian groups complained that the United States allows coal-fired power plants to add mercury to rivers and lakes throughout the United States in amounts that violate water quality standards under the Clean Water Act.⁷⁰ If the council authorizes the factual record as proposed, and if it proves useful to U.S. environmental groups in raising awareness of an important problem, it may reawaken their interest in the procedure.

IV. CITIZEN SUBMISSIONS UNDER THE LABOR SIDE AGREEMENT

The United States proposed the labor side agreement, like the environmental side agreement, to respond to concerns that NAFTA would cause U.S. companies to relocate to Mexico in order to take advantage of lower standards. Of course, lower labor costs are a comparative advantage of Mexico in trade among the North American countries, so the labor agreement does not require Mexico to raise wages. Instead, it requires the parties to enforce their existing domestic labor standards.⁷¹ Like the environmental agreement, the labor agreement creates a procedure through which a party may claim that another party has engaged in a persistent pattern of ineffective enforcement, and provides for another procedure through which nongovernmental actors may raise claims of ineffective enforcement. Unlike the environmental agreement, however, the labor agreement does not provide for the second type of claim to be filed with an independent body. Instead, it requires each party to receive "public communications on labor law matters arising in the territory of *another* Party."⁷² As a result, a complaint that the United States is failing to enforce its labor laws must be submitted to Canada or Mexico.

⁶⁷ Four factual records have concerned Canada, and the Tarahumara factual record was the sixth regarding Mexico.

⁶⁸ CEC Council Res. 05-04 (Apr. 1, 2005), at <http://www.cec.org/files/pdf/sem/04-6-Resolution_en.pdf>.

⁶⁹ Migratory Birds, No. SEM-99-002, Factual Record (Apr. 24, 2003); see Chris Wold, Lucus Ritchie, Deborah Scott, & Matthew Clark, *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOYOLA L.A. INT'L & COMP. L. REV. 415, 425-29 (2004).

⁷⁰ Coal-Fired Power Plants, No. SEM-04-005.

⁷¹ NAALC, *supra* note 1, Art. 3.

⁷² *Id.*, Art. 16(3) (emphasis added).

The agreement leaves to the party receiving such communications complete discretion to decide whether to pursue any issues they raise, but provides several intergovernmental mechanisms that may be used for that purpose: consultations between the labor ministries at the working level; ministerial consultations; an investigative report by independent experts; and the formal arbitration noted above.⁷³ The scope of these mechanisms narrows as they become more potentially intrusive. While a party may request consultations regarding any matter within the scope of the agreement, the independent investigative report may examine only patterns of enforcement of labor laws *other than* laws directly related to freedom of association and the right to organize, the right to bargain collectively, and the right to strike,⁷⁴ and formal government-to-government claims may examine only persistent patterns of failure to enforce occupational safety and health, child labor, or minimum-wage labor standards.⁷⁵

A Procedure in Decline

The labor submissions procedure had very little activity in 2005. Like the dog that did not bark in the night, the lack of activity is itself evidence, in this case of why the labor procedure is failing to attract many submissions. Indeed, the labor procedure is the only one of the four procedures described in this review that seems to be in decline. After twenty-two labor submissions in the first six years, the same number received by the CEC, only eleven labor submissions have been filed in the most recent six years, while the CEC has received thirty.⁷⁶

Each NAALC party follows a similar pattern with respect to a submission that it finds admissible: it considers the submission, obtains further evidence on its claims (including, in the United States, through a hearing at which submitters and experts may testify), and issues a report. Sometimes these reports have made clear-cut determinations that the accused party has acted inconsistently with the agreement. But in no case has any party shown interest in requesting an independent investigative report under the agreement. At most, parties request ministerial consultations, which typically conclude with an agreement to hold training sessions or set up a committee to address the issues raised by the submission. Understandably, submitters may feel that this outcome is not worth the time and effort necessary to file a claim, especially since doing so may subject them to reprisals from their employers.⁷⁷ But developments in 2005 indicate that even ministerial consultations are becoming rare.

In 2003, a group of nongovernmental organizations from all three countries filed two submissions, one with the United States and one with Canada, alleging that Mexico had failed to enforce its labor laws with respect to two clothes factories in the state of Puebla by rejecting the workers' request to form a union. After investigating the submission, the U.S. Labor Department concluded that the union registration was rejected on "hyper-technical" grounds, that the tribunal hearing the request had a conflict of interest (one of its members was from the traditional union that would be challenged by the proposed new union), and that these types of

⁷³ *Id.*, Arts. 21–23, 29.

⁷⁴ *Id.*, Arts. 23(2), 49.

⁷⁵ *Id.*, Art. 27(1).

⁷⁶ Of the thirty-three labor submissions to date, twenty-one have concerned Mexico, and all but two of those have been filed with the United States. Another ten have been directed against the United States, eight of which have been filed with Mexico. Because the labor submissions are not received by the Commission for Labor Cooperation, the organization created by the labor side agreement, that commission's Web site does not keep a record of them. Instead, they are listed on the Web site of the U.S. Labor Department's Bureau of International Labor Affairs, at <<http://www.dol.gov/ilab/programs/nao/status.htm>>.

⁷⁷ See Monica Schurtman, *Los "Jonkeados" and the NAALC: The Autotrim/Customtrim Case and Its Implications for Submissions Under the NAFTA Labor Side Agreement*, 22 ARIZ. J. INT'L & COMP. L. 291 (2005).

problems recur in Mexico, making recognition of new unions far more difficult. It requested ministerial consultations.⁷⁸ In April 2005, in the only decision issued pursuant to the labor agreement procedure that year, Canada also issued a report and request for ministerial consultations with respect to the Puebla submission.⁷⁹ Similarly, in December 2004, Mexico requested ministerial consultations on a submission that it had received alleging failure to provide adequate translation services in workers' compensation proceedings involving migrant workers, and excessive delays in adjudication of workers' compensation generally, by the state of New York.⁸⁰ Throughout 2005, however, none of the requested consultations occurred.

It may be too early to sound the death knell for the labor procedure. There were four new submissions in 2005, the highest number since 1998, which suggests that submitters have not yet lost hope in it. But the failure to obtain even ministerial consultations indicates that the procedure is in danger of declining from mere weakness to complete uselessness. Although there may be many reasons for its relative ineffectiveness, one obvious reason is that, alone among the four procedures described in this review, the labor procedure is completely controlled by the parties. Although the governments have not whitewashed one another's behavior, neither have they been willing to pursue issues raised by private submissions very far. One lesson from the NAFTA experience is that a claims process that is completely under party control will not be useful to private complainants. For the labor procedure to avoid further decline, therefore, it might have to be restructured to allow submissions to an independent body, rather than to the parties themselves. There is no reason to believe that such a change is likely.

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European Convention on Human Rights—reviewability of national actions to implement EU law—impounding aircraft—right to property

BOSPHORUS HAVA YOLLARI TURIZM VE TICARET ANONIM SIRKET V. IRELAND. App. No. 45036/98.
At <<http://www.echr.coe.int>>.
European Court of Human Rights (Grand Chamber), June 30, 2005.

In *Bosphorus Hava Yollari Turizm v. Ireland*¹ (*Bosphorus Airways*), the European Court of Human Rights (ECHR) held that Ireland did not violate the applicant's right to property, as set out in Article 1 of Protocol No. 1² to the European Convention on Human Rights,³ in impounding one of the applicant's leased aircraft.

The applicant, a Turkish airline charter company, leased two airplanes from Yugoslav Airlines in 1992 and subsequently registered them in Turkey. On April 17, 1993, the UN Security Council adopted Resolution 820, which provided that states should impound, inter alia, all

⁷⁸ Report of Review of U.S. NAO Submission No. 2003-01 (Aug. 3, 2004), at <<http://www.dol.gov/ilab/media/reports/nao/submissions/Sub2003-01.pdf>>.

⁷⁹ Review of Public Communication CAN 2003-1 (Apr. 12, 2005), at <<http://www.hrsdc.gc.ca/en/lp/spila/ialc/pcnaalc/pdf/01pdf.shtml>>.

⁸⁰ Public Report of Review of Mexican NAO Submission No. 2001-01 (Nov. 19, 2004), at <http://www.dol.gov/ilab/media/reports/nao/ny_mexico_srор.htm>.

¹ App. No. 45036/98 (Eur. Ct. H.R. June 30, 2005) [hereinafter Judgment]. The judgments and other materials of the European Court of Human Rights are available online at the Court's Web site, <<http://www.echr.coe.int>>.

² Protocol [No. 1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, ETS 9, 213 UNTS 262.

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS No. 5, 213 UNTS 222.