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Introduction: Chapter 19--Private Party Appeals from Government Rulings: A Dispute Settlement Procedure in Operation, How Effective Is It in the Resolution of Disputes--Are Changes Needed or Possible

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INTRODUCTION: CHAPTER 19 – PRIVATE PARTY APPEALS
FROM GOVERNMENT RULINGS: A DISPUTE SETTLEMENT
PROCEDURE IN OPERATION, HOW EFFECTIVE IS IT IN
THE RESOLUTION OF DISPUTES? ARE CHANGES NEEDED
OR POSSIBLE?

James McIlroy

Today I have the pleasure of introducing two people who really need no introduction. Many of you know them. They are both highly respected, very highly regarded, and widely recognized as experts in their field.

On my left, we have Dick Cunningham. Dick is the Senior International Trade Partner in the Washington, D.C. based firm of Steptoe and Johnson. On my right, I have Simon Potter. Simon is a partner in the Montreal law firm of Ogilvy Renault where he leads their International Trade practice.

We heard this morning about negotiators and litigators; both of these individuals are litigators. They both have considerable hands-on experience with their topic today, which is Chapter 19 of the North American Free Trade Agreement,¹ regarding private party appeals from government rulings.

I would like to set the stage for this panel by reminding people that Chapter 19's roots were formed in the Canada/U.S. Free Trade Agreement that came into force in 1989.² It was extremely controversial and typical of Canada/U.S. relations. It was a compromise that was developed at a very high level of government, and at the very last minute of the negotiations. Before I turn the podium over to Dick Cunningham, I would like to also mention that Chapter 19 was intended to be a temporary solution to a very complex problem. And without exaggerating, I think it is fair to say that Chapter 19 was a deal-breaker. It was one of the most important parts of the Canada/U.S. Free Trade Agreement. That is why I think this panel this afternoon is going to be of such interest to us.

I want to mention one thing. There was a provision in the Canada/United States Free Trade Agreement that was titled "Duration," Article 1906, and I will just read it to you briefly, because it tells you just how important Chapter 19 was and is. It states:

¹ North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-United States, 32 I.L.M. 605 (1993).

² U.S.-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (1988).

[t]he provisions of this Chapter shall be in effect for five years pending the development of a substitute system of rules in both countries for anti dumping and countervailing duties as applied to their bilateral trade. If no such system of rules is agreed and implemented at the end of five years, the provisions of this Chapter shall be extended for a further two years. Failure to agree to implement a new regime at the end of the two-year extension shall allow either Party to terminate the Agreement on six-month notice.”³

It is very clear that, one, this was supposed to be temporary, and two, people were willing at the time they signed this treaty to gut the entire agreement if progress was not made.

We all know Chapter 19 did not disappear and that Article 1906 did not play out the way it was supposed to. Without any further ado, I would like to turn things over to Dick Cunningham and then to Simon Potter to tell us what really happened with Chapter 19. Thank you very much.

³ Id. at art. 1906.