

DISPUTE RESOLUTION UNDER CHAPTER 19 OF THE NAFTA: ANTIDUMPING AND COUNTERVAILING BUSINESS AS USUAL

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I. INTRODUCTION

In August 1992 President Bush announced that negotiations between the United States, Canada, and Mexico had successfully produced a comprehensive trade expanding accord titled the North American Free Trade Agreement (NAFTA or the Agreement).¹ An official document was released shortly thereafter² and ratification and implementation are the final steps remaining in the formation of what is projected to be the largest single trading block in history.³

NAFTA follows soon after the governments of Canada and the United States signed an extensive trade agreement;⁴ soon, that is, in terms relative to trade policy evolution. In fact, that accord, the United States—Canada Free Trade Agreement (USCFTA), became a model for constructing NAFTA.⁵ Comparing more closely specific portions of both agreements clearly illustrates the parallelism.⁶

Obvious concerns have surfaced about the implications of applying a USCFTA template to merge Mexico's economic interests and legal practices into a synergistic trilateral trade regime. This Comment focuses on one small but

1. *NAFTA: President Bush Announces NAFTA Accord*, 9 Int'l Trade Rep. (BNA) 1375 (Aug. 12, 1992).

2. North American Free Trade Agreement (Proposed) Sept. 6, 1992, Can.—Mex.—U.S. [hereinafter NAFTA (Proposed)].

3. D.L. Riner & J.V. Sweeney, *Mexico: Meeting the Challenge* 11 (1991). The NAFTA market will reportedly consist of almost 360 million people and have total gross domestic production (GDP) of about U.S.\$5.9 trillion, compared with the European Community comprised of roughly 320 million people and involving U.S.\$4.8 trillion GDP. *Id.*

4. Free Trade Agreement, U.S.—Can., 27 I.L.M. 281 (1988) (entered into force Jan. 1, 1989) (implemented by United States—Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851), *reprinted in* John D. Richard & Richard G. Dearden, *The Canada—U.S. Free Trade Agreement, Final Text and Analysis* (1989) [hereinafter USCFTA].

5. *Framework For North American FTA Similar To That Of U.S.—Canada FTA*, 8 Int'l Trade Rep. (BNA) 507 (Apr. 3, 1991). Mexican negotiator J. Enrique Espinosa, commenting on the similarities between the agreements, said "[w]e're not trying to reinvent the wheel." *Id.*

6. *See infra* notes 155-217 and accompanying text. The structure and primary components of NAFTA's Chapter 19 substantially mirror the USCFTA's Chapter 19.

significant area of attention: NAFTA's Chapter 19,⁷ which deals expressly with reconciling Antidumping Duty (ADD) and Countervailing Duty (CVD) disputes.⁸

Essentially, Chapter 19 establishes an alternative channel for appealing a Party's⁹ ADD or CVD order.¹⁰ Following NAFTA's implementation, disgruntled importers or offended exporters will have the option of appealing an ADD or CVD order either by following the normal judicial course¹¹ or by using Chapter 19's new dispute settlement mechanism. In this option context, then, it is important to understand the ADD/CVD issues underlying Chapter 19's operation to fully appreciate how the new settlement mechanism will function.

Imagining the ADD/CVD appeal handling process as a mathematical equation provides a useful perspective. Chapter 19 furnishes dispute settlements only and these can be analogized to problem solutions. The chapter embodies a structure, analogous to an equation, that provides a tool for ordering and processing the problem's primary elements—the variables. These variables, the ADD and CVD actions, are the factors that will fluctuate with each individual complaint. Accordingly, that deviation will produce a unique outcome when an

7. Chapter 19's official title is: *Chapter Nineteen, Review and Dispute Settlement in Antidumping and Countervailing Duty Matters*. NAFTA (Proposed), *supra* note 2.

8. Antidumping Duty (ADD) and Countervailing Duty (CVD) concerns are defined and discussed in Part III, see *infra* notes 43-129 and accompanying text.

9. For the purpose of this writing "Party" will denote a member country and "party" will pertain to individual complainants.

10. See *infra* Part IV, notes 168-82 and accompanying text. The essence of Chapter 19 consists of a panel review process where appeals from national ADD and CVD determinations can be taken. NAFTA's Chapter 19 has another significant feature; it provides that no Party's ADD/CVD laws may be amended to apply against another Party without first being reviewed and approved by a NAFTA committee. See *infra* text accompanying notes 211-17. However, since most major tariff reforms have already been consummated, it is doubtful that this provision will receive much notoriety or application. Chapter 19's preeminent feature will continue to be its somewhat novel ADD/CVD appeal process.

11. The "normal" judicial process in the United States has been briefly summarized as follows:

Antidumping and countervailing duty investigations are currently administered . . . by the International Trade Administration (ITA) of the Department of Commerce (Commerce) and the International Trade Commission (ITC). Prior to the [USCFTA], the U.S. Court of International Trade (CIT) had sole jurisdiction to review AD/CVD determinations of ITA and the ITC. Individuals could appeal the decisions of the CIT to the Court of Appeals for the Federal Circuit, with ultimate review by writ of certiorari to the U.S. Supreme Court.

Thomas W. Bark, Note, *The Binational Panel Mechanism for Reviewing United States—Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?*, 29 VA. J. Int'l L. 681, 684-85 (1989). See *infra* note 71 for a discussion of the Mexican process.

action is appealed and processed in the Chapter 19 equation.

Part II of this Comment begins by discussing Chapter 19's role in NAFTA and the international influences that helped shape the Agreement (the problem setting). Part III provides a synopsis of dumping and subsidy issues (the variables). Part IV then looks at the intricacies of the Chapter 19 mechanism (the equation). Part V examines the probable outcomes (the solutions) which may flow from this new equation. And finally, Part VI concludes that Chapter 19's new settlement proposal will indeed enhance the appeal process. However, it will do nothing to dissuade ADD and CVD protectionist tactics and will do little to enhance market efficiencies, which should be the goal of a true free trading arrangement.

Although NAFTA is a trilateral agreement,¹² this Comment assumes a bilateral perspective. Two reasons justify this approach: (1) the Canadian legal system mirrors the U.S. system in substantive part,¹³ and (2) matters affecting U.S.—Canada trade and judicial policy have been thoroughly examined in light of the existing USCFTA.¹⁴ Therefore, this discussion presents issues in terms of the United States and Mexico only.¹⁵

12. NAFTA (Proposed), *supra* note 2.

13. Kevin C. Kennedy, *The Canadian and U.S. Responses to Subsidization of International Trade: Toward a Harmonized Countervailing Duty Legal Regime*, 20 *Law & Pol'y Int'l Bus.* 683, 700, 758 (1989) (commenting on the "striking" and "remarkable" semblance between the related CVD laws); Bark, *supra* note 11, at 711 (concluding that "the success in negotiating [USCFTA Chapter 19] was attributable in part to the similarity in U.S.—Canadian legal systems" and conventions). Furthermore, not only are the ADD/CVD laws alike, but "Canadian and U.S. agencies responsible for administering the [ADD] and [CVD] laws employ essentially the same substantive standards concerning dumping, subsidization, material injury, and causation . . ." Debra P. Steger, *An Analysis of the Dispute Settlement Provisions of the Canada—U.S. Free Trade Agreement*, in Earl H. Fry & Lee H. Radebaugh, *The Canada—U.S. Free Trade Agreement: The Impact On Service Industries*, 121, 128 (1989).

14. See, e.g., Mark J. Gillis, Note, *The United States—Canada Free Trade Agreement and Its Effect on Antidumping/Countervailing Duty Law: Does the Interim Measure Beat the Long-Term Solution?*, 15 *Suffolk Transnat'l L.J.* 700 (1992); William K. Ince & Michele C. Sherman, *Binational Panel Reviews Under Article 19 of the U.S.—Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution*, 37 *Fed. Bus. News & J.* 136 (1990); Bark, *supra* note 11; Kennedy, *supra* note 13.

15. When references are made or implied to distinctions between a U.S. perspective and a Mexican perspective, like distinctions between the Canadian and Mexican perspectives should not automatically be drawn. In most situations involving general legal principles the distinction will be the same. However, many of the details discussed in this analysis may vary somewhat between the U.S. and Canadian positions and those differences will not be addressed.

II. THE PROBLEM SETTING

Canada, Mexico, and the United States have each been active participants in international trade for some time. Each has been using ADD and CVD tactics to protect national industries from deleterious foreign trade practices, although Mexico's experiences in this arena are more recent than its NAFTA counterparts.¹⁶ A brief account of the relevant international trade practices and NAFTA Chapter 19's intended role therein will assist in understanding the analysis that follows. Specifically, a cursory review of international trade's most significant organization, the General Agreement On Tariffs And Trade (GATT), is necessary to appreciate the backdrop against which NAFTA will operate.

A. GATT: The Cardinal Commerce Control Contrivance

GATT is the most influential framework directing international trade agreements and trade policy formulation today.¹⁷ Its underlying purpose is to standardize trading practices and balance trading advantages among member nations.¹⁸ One commentator explains GATT's significance this way: "The basic

16. Discussed *infra* notes 66-76 and accompanying text.

17. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted as amended* in John H. Jackson & William J. Davey, *Legal Problems of International Economic Relations* 1 (2d ed. supp. 1989) [hereinafter GATT]. GATT is a multilateral trade agreement that now has the support of over 100 signatory countries. Operation of the Trade Agreements Program 42d Report 1990, USITC Pub. 2403 (July 1991), *available in* WESTLAW, FINT-ITC Database, at *1 [hereinafter USITC Pub. 2403]. It has evolved through seven negotiating "rounds" and is currently experiencing another, the Uruguay Round. John H. Jackson, *GATT and the Future of International Trade Institutions*, 18 *Brook. J. Int'l L.* 11, 17 (1992). The seventh round of negotiations, the Tokyo Round, concentrated more on creating rules to apply to nontariff trade restraint measures than any of the earlier rounds. *Supra* USITC Pub. 2403, at *2. For a clear summary analysis of the GATT evolution and progress see Bradley Larson, *Introduction to Nontariff Barriers to International Trade*, 7 *Bridgeport L. Rev.* 155, 157-70 (1986).

GATT is truly a multi-faceted entity that has been described in various ways. "[I]t is both a comprehensive set of rules governing most aspects of international trade, and a forum for multilateral trade negotiations and dispute resolution . . ." *Supra* USITC Pub. 2403, at *1. "[I]t is the major international treaty discipline for world trade, and the most important international organization regarding that trade." Jackson, *supra* at 15. "[I]t is an international organization; it is a system of rules; but most of all, it is a process." Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 *Tex. Int'l L.J.* 339, 340 (1988).

18. English, *supra* note 17, at 340. This author summarizes the fundamental principles for which GATT stands as follows:

The evolving system is based on five basic principles:

notion underlying GATT is that of 'fair trade'; namely, that producers should be able to compete in the world's markets on the basis of market principles that apply equally to all."¹⁹

All three NAFTA Parties are members of GATT, thus all have existing international trade obligations operating to abate import tariff restrictions.²⁰ Primary among those are the 1979 Subsidies Code (Subsidies Code),²¹ which attempts to control both the use of subsidies and counter measures employed against them,²² and the 1979 Antidumping Code (Antidumping Code),²³ which

1. Contracting parties must give unconditional most-favored-nation treatment to the products of other contracting parties (the Most-Favored-Nation Principle).

2. Contracting parties must maintain customs duties on the importation of products at levels not more than those specified in the latest applicable schedules that the party has filed (the Tariff Concession Principle).

3. Contracting parties may not impose more onerous internal taxes or regulations on imported products than on like domestic products (the National Treatment Principle).

4. Contracting parties should not use quantitative and other nontariff barriers to restrict trade (the Principle Against Nontariff Barriers).

5. Contracting parties should not promote exports through subsidies or "dumping" and may defend domestic industries from such unfair practices only through the use of reasonable, proportionate tariff measures (the Fair Trade Principle).

Id. at 341-42.

19. James F. Smith, *GATT Disputes End in Whose Court?*, Bus. Mex., Dec. 1986, at 44.

20. For a complete analysis of GATT conventions and obligations, see Edmond McGovern, *International Trade Regulations: GATT, the United States and the European Community* (2d ed. 1986) (discussing GATT throughout but addressing it specifically and explaining it fully at 3-45).

21. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of GATT, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 (entered into force Jan. 1, 1980) (implemented by Title I, Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 150), reprinted in Jackson & Davey, *supra* note 17, at 69) [hereinafter Subsidies Code].

22. Restatement (Third) of Foreign Relations Law § 806 reporter's note 1 (1987) [hereinafter Restatement] (stating that the Subsidies Code "regularizes the procedures in countervailing duty cases and provides notice and opportunity to be heard to foreign parties"). The Subsidies Code does not prohibit the use of subsidies, except for export subsidies on non-primary products; instead it suggests avoiding their use whenever possible and it provides for two possible counteractive procedures: countervailing duties and consultations. English, *supra* note 17, at 350-52. Primary products are those "of farm, forest or fishery in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade." McGovern, *supra* note 20, at 329. The distinction between export and domestic subsidies is discussed *infra* at note 93.

23. Agreement on Implementation of Article VI of GATT, Apr. 12, 1979, 31

performs relatively the same function for product dumping issues.²⁴

These GATT codes were drafted to help control unfair trade practices and to provide some mechanism for retaliating against them. Historically, however, national trade protection measures have been the preferred retaliatory devices because of their increased efficacy.²⁵ Faced with reduced tariff rate schedules and increased import activity, protection-seeking producers have exploited government legislation to safeguard national markets.²⁶ Regarding U.S. trade practices, that protection typically has been granted to specific industries.²⁷

Non-tariff barriers (NTBs),²⁸ primarily ADD and CVD laws, have been used

U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) (implemented by Title I, Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 150), *reprinted* in Jackson & Davey, *supra* note 17, at 92 [hereinafter Antidumping Code]. For a discussion of both 1979 GATT agreements and their (limited) impact in international trade, see English, *supra* note 17, at 350-56; and see Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 Cornell Int'l L.J. 145 (1980).

24. Restatement, *supra* note 22, § 807 reporter's note 3. This section states that the Antidumping Code "seeks to make national procedures more 'transparent' (more fully disclosed) and orderly, and provides for an international committee with functions similar to those of the committee established pursuant to the Subsidies Code." *Id.* Similar to the Subsidies Code, the Antidumping Code does not proscribe dumping; it cautions against the practice and provides a framework for retaliatory measures. English, *supra* note 17, at 353-56.

25. English, *supra* note 17, at 393. National producers have faithfully relied upon national enforcement agents to achieve more equitable trade balances. This reliance in itself constitutes a latent threat to the efficiency of GATT's enforcement system. Weaknesses inherent in the GATT system are: (1) "GATT is an Agreement, not a court"; (2) "GATT is supplemented by Codes, administered by Code Committees of signatories, but even these committees must rely on voluntary compliance"; and (3) "retaliatory procedures of GATT—the ultimate sanctions—can be self-defeating." Peter D. Enrenhaft, *Remedies Against "Unfair" International Trade Practices*, in The American Law Institute ALI-ABA Course of Study (1990), available in WESTLAW, INT-TP Database, C536 ALI-ABA 551, at *2.

26. Sidney Weintraub, *A Marriage of Convenience: Relations Between Mexico and the United States 69-71* (1990). This authority states that U.S. trade policy has been changing to emphasize "greater protectionism" which is "largely of a contingent nature, reacting to what are considered unfair practices by others." *Id.* at 69. Moreover, the course of "U.S. trade policy in the 1980s [was] clear—it [was] toward greater protection." *Id.* at 71. For an enlightening view of the interplay between GATT provisions and national protective strategies, see *The GATT (General Agreement on Tariffs and Trade): GATT Membership—Benefits and Non-Benefits*, Bus. Mex., Nov. 1985, at 78, 78-84.

27. See Weintraub *supra* note 26, at 203.

28. Nontariff barriers (NTBs) "include all prohibitions, restrictions or regulation of imports accomplished by means other than the use of tariffs." Larson, *supra* note 17, at 156 n.9. This definition implies that NTBs can "come in a variety of forms. They may be as understandable as import quotas or they may be as vague as technical standards and government procurement policies. All nontariff barriers, however, exert

extensively as retaliatory devices.²⁹ That trend will continue among NAFTA parties because, although it will progressively reduce trade restrictions, the Agreement does not proscribe the use of antidumping and countervailing NTBs.³⁰ This is where GATT may yet play a role, albeit a doubtful one. Since NAFTA countries are also GATT signatories, they must be sure to remain within the guiding directives fostered by GATT. In other words, Parties may reduce tariffs and the use of NTBs below what GATT suggests but they may not raise tariffs or exploit NTBs above the limits set therein.³¹

B. Chapter 19: Reasons, Resistance, & Resolve

Some experts have argued that an effective dispute resolution function is vital to the entire Agreement's kismet.³² Logic urges that because conflicts in

a restraining effect on efforts to liberalize international trade." Roland J. Behm, *A Proposed Modification of U.S. Import Relief Measures In The Context of A U.S.-Canada Free Trade Agreement: Safeguard, Countervail, and Antidumping*, 17 Ga. J. Int'l & Comp. L. 99, 101 (1987). For an excellent account of GATT's handling of NTBs see McGovern, *supra* note 20, at 347-56 (dealing specifically with his Principle Against Nontariff Barriers and Fair Trade Principles Against Subsidies and Dumping).

29. Michael Sandler, *Primer On United States Trade Remedies*, 19 Int'l Law. 761, 763 (1985) (listing ADD and CVD laws as principal "key remedies" used against "unfair trading practices that benefit imports"); Judith H. Bello & Alan F. Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions*, 19 Int'l Law. 639, 639 (1985) (reporting that ADD and CVD retaliation measures "are usually the most frequently invoked trade remedies"). See generally Behm, *supra* note 28 (discussing the usage of three specific NTB import relief measures and their application in a free trade zone).

30. See NAFTA (Proposed), *supra* note 2. The Agreement is comprehensive and aggressive in its efforts to eventually minimize trade regulation between the United States, Canada, and Mexico. Although NAFTA's Chapter 19 operates *ex post* with new measures to settle ADD/CVD disputes, it does almost nothing *ex ante* to alleviate ADD/CVD law application. Discussed *infra* in Part IV, notes 209-17 and accompanying text. This viewpoint has also been recognized regarding USCFTA provisions: "[the USCFTA Chapter 19] does not provide for de novo review of an [ADD] or [CVD] determination; nor does it provide any opportunity to review or recommend modifications to the [existing] domestic [ADD] and/or [CVD] laws of the parties." Judith H. Bello & Alan F. Holmer, *Dispute Resolution Under The United States-Canada Free Trade Agreement*, in Practising Law Institute (PLI), Commercial Law and Practice Course Handbook Series (1989), available in WESTLAW, INT-TP Database, 510 PLI/Comm 305, at *4.

31. See McGovern, *supra* note 20. Essentially, because all Parties are members of GATT and because that agreement establishes the upper limit for retaliatory measures between member signatories, NAFTA Parties are constrained, in any case, by the GATT mandates.

32. Bello & Holmer, *supra* note 30, at *6. Referring to USCFTA, the authors conclude that "[t]he importance of the dispute settlement provisions of the [USCFTA] cannot be underestimated. As a general matter, the Agreement itself is valuable only to

this setting will occur,³³ conflict resolution in this setting is preferred. The USCFTA has an almost identical settlement structure.³⁴ And even though USCFTA's provisions are generally considered an improvement over pre-USCFTA review procedures,³⁵ as discussed below, that implied success does not automatically carry over to NAFTA's tripartite structure or to NAFTA's Chapter 19.

Many experts agree that integrating another country into the USCFTA framework will not be easy.³⁶ Problems are sure to arise from efforts to harmonize two fundamentally dissimilar legal systems and judicial philosophies—a common law system and a civil law system.³⁷ Reconciling the two divergent economic systems also will effect Chapter 19 issues.³⁸

the extent that its rules are observed and any disputes about the application of those rules are resolved quickly and fairly." *Id.* See also Shelly P. Battram & Peter L. Glossop, *Dispute Resolution Under the Canada—United States Free Trade Agreement*, in Fry & Radebaugh, *supra* note 13, at 104, 105 (commenting that "[w]ithout an enforceable dispute settlement mechanism, economic access to each other's markets under a free trade arrangement would be under constant threat of being eroded by political, sectoral, and regional protectionism").

33. NAFTA's Chapter 19 stipulates that each country's current ADD/CVD laws will remain in force against other member countries. Discussed *infra* in text accompanying notes 211-17. Thus, appeals from future ADD/CVD orders will continue to vex parties to the Agreement.

34. USCFTA, *supra* note 4, ch. 19.

35. Steger, *supra* note 13, at 128; Jean Anderson & Jonathan T. Fried, *The Canada—U.S. Free Trade Agreement in Operation*, 17 *Can.—U.S. L.J.* 397, 410 (1991) (comments by Ms. Anderson). Two examples are much quicker decisions (less than 315 days compared with two to three years in the Court of International Trade) and more aggressive analysis (generally from Canadian economists and American attorneys performing in quasi-judicial capacities). Stewart A. Baker, *Antidumping And Countervailing Duty Law*, in *Law And Practice Under The GATT And Other Trading Arrangements*, A.4 at 22 (Kenneth R. Simmonds & Donald J. Musch eds., Oceana Looseleaves Release 92-1, issued June 1992). Additionally, one author expresses greater confidence in the "fair and objective application" of ADD and CVD principles. Bello & Holmer, *supra* note 30, at *4. This is confidence reposed in "a more impartial arbiter of trade commission decisions." Gillis, *supra* note 14, at 721.

36. See, e.g., Bark, *supra* note 11, at 711 (agreeing on an acceptable procedure "with a country with different laws and procedures would prove more difficult" than it was with Canada); Guy C. Smith, *The United States—Mexico Framework Agreement: Implications for Bilateral Trade*, 20 *Law & Pol'y Int'l Bus.* 655, 680 (1989) ("integrating trade . . . would be difficult to achieve because of the differences that exist between the three countries").

37. See Fernando Orrantia, *Conceptual Differences Between the Civil Law System And The Common Law System*, 19 *Sw. U. L. Rev.* 1161 (1990) (explaining the divergent practices of the civil and common law systems by elucidating the historical underpinnings of Mexican law); Rodolpho Sandoval, *Legal Issues with Respect to Free Trade Between United States and Mexico*, 19 *Int'l J. Legal Info.* 91 (1991).

38. Stephen J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.—Mexico Free Trade*

At the outset, initiatives must be taken to insure that the relevant parts of the two legal and administrative systems are synchronized. Synchronization in this context is necessary due to Chapter 19's review panel structure and specifications.³⁹ For example, certain Mexican administrative procedures must be reformed to accommodate the level of transparency⁴⁰ and due process⁴¹ required for appellate review under our familiar common law standards.⁴²

III. UNFAIR TRADE PRACTICES (The Variables)

A. Dumping and Antidumping Duties

Generally, product dumping occurs when a producer sells its goods in another country at a price less than what it charges in its own national market.⁴³ Dumping is considered an "unfair" trade practice⁴⁴ because it theoretically

Talks, 11 Nw. J. Int'l L. & Bus. 177, 179-80 (1990) (stating that negotiators must not neglect critical ADD/CVD issues as they "attempt to unite two radically dissimilar economies"). Mexico's historically close economic/governmental relationship is discussed *infra* notes 109-15 and accompanying text.

39. NAFTA (Proposed), *supra* note 2. Chapter 19 panels will be composed of trade experts and legal professionals from all involved countries and will hear appeals from any country's complaining party. See also *infra* notes 168-82 and accompanying text. These adjudicating bodies will require procedural consistency among prosecuting authorities and complete adherence to due process to provide a reviewable record and ensure judicial integrity. Also discussed *infra* in text accompanying notes 205-08.

40. Transparency, as employed herein, denotes the practice of obtaining public input into, and evaluation of, an administrative process, such as conducting public hearings, opening public records, and creating access to government agencies and procedures.

41. Due process, as employed herein, embodies concepts such as having the opportunity to confront a fair, consistent procedural framework, to present evidence and argue allegations, and to expect a timely disposition of an appeal.

42. Discussed *infra* in text accompanying notes 84-90.

43. Restatement, *supra* note 22, § 806 cmt. a. The quick definition of dumping is "selling a product in an export market at a price, netted back to the originator's factory door, below the price received in the domestic market." Roger Phillips, *The Business Perspective: Cross Border Views*, 17 Can.—U.S. L.J. 47, 48 (1991). Another writer, however, characterized the situation a bit differently, claiming that "dumping is price discrimination between nations," which is more indicative of a circumstance than an act. Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 Tex. Int'l L.J. 265, 280 (1987). Knoll defines price discrimination as "discrimination occur[ring] when a manufacturer sells to some buyers at lower prices than to other buyers." *Id.* at 266. Thus, according to Knoll, dumping is a price condition that exists between two national markets, not an act perpetrated by a single producer. *Id.* at 283-84. For a clear analysis of dumping from both a GATT perspective and a U.S. perspective, see McGovern, *supra* note 20, at 336-41, 359-77.

44. An important distinction must be emphasized: certain practices that may be

injures,⁴⁵ or threatens to injure, producers of like products in the market where the underpriced goods are sold. Not all commentators agree that all arguments against dumping are justified,⁴⁶ suggesting that the activity may not be as easily condemnable as some experts charge, nor do they agree that the resulting injury is obvious and easily determinable.⁴⁷

Injury, the theory goes, results from the "negative effects of unfairly-priced imports."⁴⁸ Objectors to this theory raise the issue that not all reasons for

considered unfair in international trade are not necessarily unfair in domestic commerce. The competitive "norm" accepted in U.S. trade and protected by antitrust laws is not automatically recognized in international trade. Enrenhaft, *supra* note 25, at *1. And, pertaining specifically to unfairness in product dumping, "[t]he idea is that a foreign producer ought not focus—or dump—his excess production abroad by offering a lower price on his exports than on his domestic sales." Sandler, *supra* note 29, at 763.

45. Antidumping Code, *supra* note 23. The Antidumping Code provides a guide for determining injury:

1. A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

Id. art. 3. Dumping has been referred to as a "trade distortion" that should not be tolerated in international trade. Larson, *supra* note 17, at 184. Additionally, "the injury that should be legally recognized is the injury suffered because the practice in question causes lost market share or sales to a competitively structured industry." Diane P. Wood, "Unfair" Trade Injury: A Competition-Based Approach, 41 Stan. L. Rev. 1153, 1173 (1989) (emphasis added). In theory, harm may occur in both the importing and exporting markets. The "classic theory" holds that because artificial restraints on trade grant a producer unnatural protection in its home market, it has a heightened opportunity to establish monopoly power and exploit that market. Then, "[t]he foreign exporter essentially leverages the lower priced export sales with higher priced home-market sales." Powell et al., *supra* note 38, at 181.

46. See, e.g., Wood, *supra* note 45. The author argues against both an "imperialistic justification" for condemning dumping and subsidization, using ADD laws as a "foreign policy instrument" to coax offending countries into developing their own competitive markets, and an "artificial advantages" justification for condemning dumping and subsidization—detering firms benefiting from unnatural market advantages from winning the "competitive battle." *Id.* at 1169-71.

47. See, e.g., Knoll, *supra* note 43, at 286 (arguing that since dumping cannot be isolated and characterized as a single act, a resulting, precisely quantifiable injury cannot be measured). Although tests can be performed to simulate the injury, the calculation of explicit harm to a specific industry caused by dumping would be "conjectural and arbitrary." *Id.*

48. Behm, *supra* note 28, at 114. Behm advances several reasons for dumping: "(1) to prevent the creation of a competitive domestic industry; (2) to eliminate competition in a export market; (3) to reduce excess inventories without disrupting

selling at lower prices are unfair—that some forms of competitive pricing schemes are valid, useful business tools.⁴⁹ Nonetheless, ADD laws today do not discriminate; they apply wherever price differences can be proven.⁵⁰ Upon closer examination, it is evident that these product dumping counter-measures are protection oriented. National laws react to *the effects* of dumping in international markets, not to *the reasons* producers may have for dumping.

1. The U.S. Position

United States antidumping laws are designed to "neutralize artificial economic advantages"⁵¹ and to protect local "industries."⁵² But protection from deleterious pricing schemes is not spontaneous, it must first be shown that an industry has experienced, or will experience, some material injury from the dumping.⁵³ After both dumping and injury are established, the laws stipulate

domestic pricing policies; and (4) to utilize excess production capacity." *Id.* (summarizing H. Gray, *International Trade, Investment, and Payments* (1979)). The author stresses that the final two reasons are "rational and competitive response[s]" in international competition that perhaps should not be thwarted by import relief laws. *Id.*

49. See, e.g., Wood, *supra* note 45. The prevailing philosophy makes a distinction between dumping for predatory purposes and dumping for prudent business purposes. Predation is truly anti-competitive, yet business activities such as inventory reduction or utilizing excess production capacity can be natural consequences of business cycles or demand fluctuations. The foible of our laws is that "[e]very indicium of injury mentioned in the unfair trade statutes is ambiguous because it may stem from healthy and fair competition or it may stem from predatory or unfair competition." *Id.* at 1174.

50. Steven F. Benz, *Below-Cost Sales and the Buying of Market Share*, 42 Stan. L. Rev. 695, 706-16 (1990). For an enlightening review of the economic significance of business cycles in competitive trade see James R. Cannon, Jr., *Material Injury and the Business Cycle in Antidumping and Countervailing Duty Cases*, 14 B.C. Int'l & Comp. L. Rev. 53 (1991). For the seminal discussion on dumping in international trade see J. Viner, *Dumping: A Problem In International Trade* (1923).

51. Wood, *supra* note 45, at 1172.

52. See U.S. antidumping law, codified at 19 U.S.C. §§ 1673—1677k (1988 & Supp. III 1991). Section 1673 indirectly defines dumping as occurring when "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." Section 1677(7)(A) defines injury as "harm which is not inconsequential, immaterial, or unimportant." Factors important in this regard are listed in § 1677(7)(B) and factors important in considering a threat of injury are provided in § 1677(7)(F). Section 1677(4)(A) defines industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." *Id.*

53. 19 U.S.C. § 1673(2) (1988). "Under the law of the United States, an anti-dumping duty will be imposed if imported goods are sold at a price that is lower than the foreign market value and such sales cause or threaten material injury to a domestic industry." Restatement, *supra* note 22, § 807(2). Therefore, dumping is not

that a duty may be imposed on imported goods sufficient to make the import price commensurate with the producer's home market price.⁵⁴

Two government agencies are involved in this process. First, the International Trade Administration (ITA), an agency within the Department of Commerce, must find that the import price is indeed less than the home market price.⁵⁵ Because national economies and trading markets vary considerably from country to country, establishing benchmark prices in foreign markets is not always an easy task.⁵⁶ Second, the International Trade Commission (ITC) must make a clear determination of injury or threat of injury to a specific industry resulting from the low-priced imported goods.⁵⁷

United States ADD laws form an imposing obstacle to product dumping,⁵⁸

disciplined in a "strict liability sense, . . . [the] injury must occur 'by reason of' the imports or the sales for importation." Wood, *supra* note 45, at 1163. For a thorough, exhaustive explanation of U.S. antidumping law, see Powell et al., *supra* note 38.

54. 19 U.S.C. § 1673 (1988). After a dumping determination is made, "there shall be imposed . . . an antidumping duty . . . in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." *Id.* For an abbreviated analysis of how GATT's Antidumping Code has been integrated into United States law, see Larson, *supra* note 17, at 177-85.

55. 19 U.S.C. § 1673(1) (1988). See also Powell et al., *supra* note 38, 184-97 (defining a "dumping margin" and explaining the computations involved in calculating "foreign market value," "U.S. price," and adjustments necessary to both for creating a meaningful comparison).

56. See Charlene Barshefsky, *Non-Market Economies In Transition and the U.S. Antidumping Law: Remarks On The Need For Reevaluation*, 8 B.U. Int'l L.J. 373 (1990) (dealing with the problems of applying U.S. ADD law and projecting foreign market value on countries that either lack established markets for the sale of specific merchandise or have nascent markets that are not sufficiently competitive); Gilbert B. Kaplan et al., *Antidumping, Countervailing Duty, and National Security Provisions in the 1988 Trade Act*, 22 Geo. Wash. J. Int'l L. & Econ. 553, 610-17 (1989) (providing an in-depth analysis of this problem in the context of the 1988 ADD/CVD law amendments).

57. 19 U.S.C. § 1673(2) (1988). See also Powell et al., *supra* note 38, at 197-200 (explaining the important factors in determining the relevant industry, the period of the investigation, and the conditions necessary for finding injury); Sandler, *supra* note 29, at 768 (listing the following indicia of causation: price undercutting, declining sales by local producers, and rising import volumes).

58. The range and ramifications of U.S. ADD laws are far too broad to be fully examined in this writing. However, the essence of the law has been distilled as follows:

1. There is no requirement that the dumping injure competition—material harm to an industry is sufficient;
2. Although the [1979] Act requires "material injury," this means only that the injury is not inconsequential, immaterial, or unimportant;
3. Although the injury must be "by reason of" the dumped imports, below priced imports need not be the principal, a substantial, or a significant cause of the material injury; nor does the Act contemplate

and these laws are used often to garner protection for specific U.S. industries.⁵⁹ As one might expect, the protectionist tactics generally elicit chagrin and resentment from foreign suppliers who are subjected to what they interpret as trade-restraining harassment.⁶⁰ Nonetheless, a recent resurgence of protectionist

that injury from such imports be weighed against other factors that also may be contributing to overall injury to an industry;

4. In determining material injury, the ITC *must* cumulatively assess the effects of imports from all countries subject to investigation (thereby enabling the U.S. administering authority to conclude that the domestic industry has been materially injured by dumped imports in cases in which the evidence linking a particular country to the material injury is very weak or non-existent);

5. A specific export or group of exporters need not be named in a complaint, imposing the burdens of the antidumping law on all suppliers from the countries named (even those not engaging in dumping); and

6. The ITC may, but it is not required, to render a negative decision even when the dumping price is roughly equivalent to domestic prices, or when the margins of underselling were substantially greater than margins of dumping.

Ivan R. Feltham et al., *Competition (Antitrust) and Antidumping Laws in the Context of the Canada—United States Free Trade Agreement*, 17 Can.—U.S. L.J. 71, 89-90. For a detailed review of the most recent changes to ADD/CVD law introduced by the Omnibus Trade and Competitiveness Act of 1988 see Kaplan et al., *supra* note 56.

59. See *supra* notes 26-27 and accompanying text. The protectionist position manifest by U.S. law also has been described from a different perspective:

While many of the complaints about [ADD/CVD] laws are essentially about their substantive provisions, a number of the complaints concern procedural matters. In particular, some critics have contended that the high cost of defending these cases, which are often quite complex proceedings involving the collection and analysis of vast amounts of data and which often continue for years, amounts to a new form of protectionism—*process or procedural protectionism*.

1 C.F.R. § 305.91-10 (1993) (Administrative Procedures Used in Antidumping and Countervailing Duty Cases (Recommendation No. 91-10)) (emphasis added).

60. ADDs and CVDs are considered "contingent" factors used extensively by U.S. business to harass, delay foreign entry into the market, or make it "prohibitively expensive" for foreign producers to enter the market. Brendan Hudson, *The Background for NAFTA Dispute Resolution*, Bus. Mex., Nov. 1991, at 40, 41-42. Hudson also reports that statistics seem to prove why the Canadians, when negotiating the USCFFTA, were interested in obtaining some form of "contingency protection" since "two-thirds of dumping complaints brought against Canadian companies were found groundless." *Id.* Contingent protection "refers to actual or threatened actions . . . to either limit imports or impose supplemental duties on the grounds of . . . unfair trade practices." Weintraub, *supra* note 26, at 81. ADDs and CVDs are also considered "covert" acts of undue protectionism. Strong protectionist sentiment "captures" legitimate fair trade principles and "misuses" those to intimidate and oppress foreign producers and dissuade them from entering U.S. markets. Jagdish

attitudes⁶¹ indicates that ADD laws will remain one of the most utilized weapons in the U.S. trade control arsenal.⁶²

Some writers believe that ADD laws run counter to a free trade philosophy⁶³ and that they should not apply between Parties to a free trade agreement.⁶⁴ Others suggest that their improper usage, as tactical protectionist devices, sullies the entire trade control plan.⁶⁵ But in spite of the many plausible arguments against their application, ADD laws are alive and, some say, well. When (if) NAFTA is enacted, Chapter 19 will be the only stratagem mitigating the application of ADD laws between NAFTA Parties.

2. The Mexican Position

Prior to 1986 Mexico did not have an antidumping law; instead, import restrictions and controls were maintained using a variety of other methods.⁶⁶

Bhagwati, *The United States and Trade Policy: Reversing Gears*, 42 J. Int'l Aff. 93, 93-94 (1988-89).

61. One authority refers to the 1988 Omnibus Trade and Competitiveness Act with its expanded application of certain ADD/CVD provisions as *prima facie* evidence of burgeoning protectionism. He claims this misdirection "represents a retrograde step into pernicious bilateralism that promises mischief, in particular by making U.S. 'fair trade' procedures easier to capture by protectionist forces for use to their own advantage." Bhagwati, *supra* note 60, at 93. The author goes on to document the dramatically increased incidence of ADD/CVD actions. This, he professes, represents "harassment of successful foreign suppliers." *Id.* at 94-95.

62. Enrenhaft, *supra* note 25, at *2 (stating that "price-equalization laws can be offensive weapons against trade restraints preventing imports from being the target of the price discrimination"). During the past fifteen years the use of those weapons has increased noticeably as trading attitudes have become more protectionist. Weintraub, *supra* note 26, at 71, 81-85, 203-04.

63. Behm, *supra* note 28, at 115. This author reasons that:

[t]he economic effect of a free trade agreement would be to increase competition, which would hopefully result in lower prices and greater efficiency. Therefore, the focus of economic regulation should be to encourage and facilitate that competition. The focus of the antidumping law, however, is not on the protection of competition but on the protection of competitors.

Id.

64. Hudson, *supra* note 60, at 41 (referring to ADDs and CVDs as the "Achilles heel" of a free trade agreement). Hudson argues that since the rationale behind a free trade area is to create conditions of open competition, as between individual states in the United States where accusations of dumping or subsidization are not an option, why should producers in one part of that trade area be exposed to trade restrictions which are not applicable to producers in other parts of that same free trade area? *Id.*

65. Bhagwati, *supra* note 60, at 93-98.

66. Rudy Sandoval, *Mexico's Path Towards the Free Trade Agreement with the U.S.*, 23 Inter-Am. L. Rev. 133, 134-45 (1991). Mexico's government used trade restricting measures such as "tariffs, subsidies, import licenses, quotas, and local

From the mid-1940s until the mid-1980s, the Mexican government was shielding a largely isolated economy.⁶⁷ What followed was a period of virtual trade policy revolution where the Government's focus shifted from activist protectionism to trade liberalization—a period where the government began a trade reform strategy designed to bolster import and export activities.⁶⁸

One of Mexico's first maneuvers was to implement a trade law "very similar to the U.S. and Canadian laws."⁶⁹ In January 1986, in a bid to harmonize Mexico's trade regime with international standards, Mexican President Miguel de la Madrid promulgated the *Regulatory Law of Article 131 of the Political Constitution of the United States of Mexico in Matters of Foreign Trade* (Foreign Trade Law).⁷⁰ This new law signaled the beginning of antidumping and

content restrictions" to maintain a strategy of "import substitution." *Id.* at 134.

67. Weintraub, *supra* note 26, at 70. Following World War II Mexico began a serious effort to secure development through "protection and import substitution." *Id.* Another policy employed to promote internal development was "industrial integration," meaning "domestic manufacturing of domestic raw materials and intermediate goods." John M. Vernon & Enrique A. González Calvillo, *Planning for Free Trade: Taking Advantage of the Transition*, 23 St. Mary's L.J. 673, 678 n.23 (1992). These "interventionist" economic policies were intended to promote self-sufficiency and thwart "foreign domination of its economy"; instead, they eventually "led to a lack of competition and inefficiency in the allocation of resources in the domestic economy." Review of Trade and Investment Liberalization Measures by Mexico and Prospects for Future United States—Mexico Relations, USITC Pub. 2275 (Apr. 1990), available in WESTLAW, FINT-ITC Database, at *11, *12 [hereinafter USITC Pub. 2275].

68. USITC Pub. 2275, *supra* note 67, at *12-14. New economic policies, commencing in the early 80's and forced by heavy debt burdens, shifted Mexico's trade focus outward and loosened its trading policies. *Id.* "In exchange [for IMF loan money] Mexico agreed to major reforms of its economic policies including reductions in tariffs and restrictions on trade, liberalization of foreign investment, reductions in public spending, tax reform, divestiture of state-owned enterprises, and reform of domestic price controls." *Id.* at *14.

69. Hudson, *supra* note 60, at 42.

70. Decreto por el que se Crea la Ley Reglamentaros del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materis de Comercio Exterior, 394 Diario Oficial de la Federación (D.O.) 30, Jan. 13, 1986, *translated and reprinted in* Business Mexico, Feb. 1986, app. III at 100 [hereinafter Foreign Trade Law]. The Foreign Trade Law gives force and effect to the Mexican Constitution's trade regulating mandates. Paragraph 2 of the Constitution's Article 131 explains that Congress may empower the Executive Branch to raise, lower or eliminate export or import duties established by Congress itself as well as to fix new ones, restrict and forbid imports, exports, and the transit of articles, when considered necessary so as to regulate foreign trade, control the country's economy, maintain domestic production's stability or for any other purpose with the country's best interest in mind. Constitución Política de los Estados Unidos Mexicanos, art. 131 [Political Constitution of the United Mexican States] *translated and reprinted in* Gisbert H. Flanz & Louise Moreno, *Constitutions of the Countries of the World* 112 (Oceana Pub. 1988) [hereinafter Constitution].

countervailing actions by Mexican producers against foreign exporters.⁷¹

71. USITC Pub. 2275, *supra* note 67, at *75-77. The Foreign Trade Law also furnished a critical element for the new trade policy by instituting the "legal basis for foreign trade policies and instruments." Ernesto Rubio del Cueto, *Countervailing Duties Affecting United States—Mexican Trade*, 12 Hous. J. Int'l L. 323, 325 (1990) (emphasis added). The Foreign Trade Law's most significant elements are: (1) Articles 4 and 5, listing six broad categories of exports and seven categories of imports, respectively, under which regulations or restrictions will be allowed. Foreign Trade Law, *supra* note 70, arts. 4, 5. (2) Article 7, defining unfair trade practices by stating, in part:

For purposes of this Law, the following shall be considered as unfair international trade practices:

I. The importing of merchandise at a price lower than that of comparable merchandise which is identical or similar destined for consumption in the country of origin or source. [Dumping]

...

II. The importing of merchandise which in the country of origin or source has been the object, directly or indirectly, of inducements, incentives, premiums, subsidies or supports of any kind for its exportation, except in the case of accepted international practices. [Subsidization]

Id. art. 7. (3) Article 8, validating the application of tariff [duty] charges by stating:

The physical or moral entities who introduce merchandise into the Republic under conditions of unfair international trade practices are obligated to pay a compensatory tariff in order not to affect the stability of national production or obstruct the establishment of new industries or the development of existing ones.

The compensatory tariff shall be the equivalent of:

I. The difference between the lower and the comparable price in the exporting country referred to in subsection I of the foregoing article. [Dumping Margin]

II. The value of the benefit indicated in subsection II of said article. [Subsidy]

III. The total of the two previous categories in the case of the unfair international trade practices being combined.

Id. art. 8. (4) Article 10, specifying that at least 25% of local producers of "goods identical or similar to those which are being imported . . ." must be effected before a complaint can be filed. *Id.* art. 10. (5) Article 11, obliging the Secretariat of Commerce and Industrial Promotion [Secretariat] to reach a decision within five working days of the complaint and apply a provisional duty when indicated. *Id.* art. 11. (6) Article 12, stipulating that within thirty days the Secretariat "shall confirm, modify or revoke" the order. *Id.* art. 12. (7) Article 13, directing that within six months from the provisional decision, after concluding an investigation, the Secretariat will announce a final decision. *Id.* art. 13. (8) Article 14, providing for an injury test when previously agreed upon by the government of the country involved and reciprocal treatment offered Mexican products. *Id.* art. 14. (9) Article 15,

Rules executing the Foreign Trade Law, *Regulation covering Unfair Practices of International Commerce (Regulations)*,⁷² were promulgated several months after the trade law became effective.⁷³ The Regulations provide many of the necessary procedural guidelines required to claim injury and find dumping or subsidization.⁷⁴ Many of the Regulations' requirements were written "very similar" to GATT standards⁷⁵ and U.S. procedures,⁷⁶ again evincing an effort to

directing the Secretariat to make the investigation of injury or threatened injury and offering factors to consider in the making the determination. *Id.* art. 15. (10) Article 18, providing that the affected importers may appeal to the Secretariat for modification of the order when changed circumstances can be shown. *Id.* art. 18. (11) Article 19, stating the duty will persist until it is proven that the unfair practice has stopped and listing four situations which will cancel a countervailing duty. *Id.* art. 19. (12) Article 24, providing for appeals from final decisions under the "Tax Code of the Federation." *Id.* art. 24.

An appeal will be heard in the "Federal Fiscal Tribunal" (tax court) and a further appeal on that decision can be brought in a suit for "*amparo*" (judicial protection). English, *supra* note 17, at 385. However, Articles 103 and 107 of the Constitution authorize initial *amparo* suits in administrative matters under certain circumstances. Constitution, *supra* note 70, arts. 103, 107. For a brief explanation of the *amparo* suit, see James E. Herget & Jorge Camil, *An Introduction to the Mexican Legal System*, 27-29, 72-73 (1978). For a more detailed explanation its history and significance, see Hector F. Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 Cal. W. Int'l L.J. 306 (1979).

72. *Reglamento Contra Prácticas Desleales del Comercio Internacional*, 399 D.O. 5, Nov. 25, 1986 (modified and enlarged May 19, 1988) [hereinafter Regulations].

73. The "Reglamento" is analogous to the Code of Federal Regulations in the U.S. It is seen as a type of "sub-legislation" declaring the operative rules needed to give a more general law practical effect, but having the same legal status as that law. Herget & Camil, *supra* note 71, at 23. Promulgation is an important step in the Mexican process because a new law cannot be enforced until it has been published in the official gazette. The president of Mexico is charged with the obligation of "promulgat[ing] and execut[ing] the laws enacted by the Congress of the Union." Constitution, *supra* note 70, art. 89(I). To execute means to enact all acts and regulations necessary to give force to the law; promulgation is the same as publication and "a law is not effective until it is published in the *Diario Oficial*." James Smith, *The Presidential Succession*, Bus. Mex., Dec. 1988, at 19, 25-26.

74. Regulations, *supra* note 72. Generally, the rules "establish procedural time limits, define terms in the Foreign Trade Law, establish procedures for determining injury or the threat of injury to domestic producers, provide for levying countervailing duties, and establish procedures for investigation of unfair trading practices." Rubio del Cueto, *supra* note 71, at 327.

75. Rubio del Cueto, *supra* note 71, at 327-28.

76. Mexican claimants must prove two things: first, they must demonstrate the existence of "unfair international trade practices" and next, they must show that the "unfair practice" has caused injury, or threatens to cause injury, to the domestic industry. USITC Pub. 2275, *supra* note 67, at *77. This procedure is virtually the same as most United States ADD/CVD proceedings, excluding 19 U.S.C. § 1303 countervailing actions against countries not "under the agreement," which is discussed *infra* in the text accompanying notes 103-08. Article 14 of the Foreign Trade Law

harmonizing Mexican law with international directives.

One cogent example of this harmonization relates to the practice of finding injury to the involved industry before retaliating against a disallowed practice. Article 12 of the Regulations elaborates on the injury test as follows:

In the cases referred to in article 14 of the Law, definitive compensatory duties will only be determined if as a result of the investigation of unfair practices of international commerce, the Ministry concludes the existence of damage or the threat of this to National production or that the establishment of industries is hindered due to importation carried out or to be carried out under such conditions.⁷⁷

Thus, Article 12's close symmetry with both the Antidumping Code and U.S. law regarding injury clearly indicates Mexico's intent to enforce trade restraining standards already utilized by others in international trade.

Mexico acceded to the GATT at about the same time as it was enhancing its trade laws, in August 1986.⁷⁸ Although this action symbolized a progressive policy shift, some experts believed that real progress would be slow and problematic.⁷⁹ Aside from the issue of complicated or uncomplicated progress, one thing is certain: GATT accession essentially charted a new direction for Mexico in international trade because, once adopted, the GATT conventions became integrated into Mexican Law and were given constitutional status, thereby committing the government to observe the basic GATT directives.⁸⁰

affords an injury test but it does not mandate such a finding or require "material" injury. However, in its GATT accession negotiations Mexico agreed to abide by the GATT injury standard, especially in cases where it has agreed upon similar arrangements with other countries. English, *supra* note 17, at 384.

77. Regulations, *supra* note 72, art. 12 (translation provided by Mexican Embassy, on file with author). Compare 19 U.S.C. §§ 1671, 1673 (dealing with countervailing duties and antidumping duties respectively, and stating that a duty will be applied in both cases where an industry, or the establishment of an industry, is materially injured or threatened with injury).

78. English, *supra* note 17, at 369. Mexico's accession to GATT advanced its commitment to expand worldwide trading because increased access to world markets has two closely associated indirect benefits: (1) it strengthens Mexico's "competitive position vis-à-vis" the United States; and (2) it sends a positive signal concerning Mexico's determination to secure "open and fair trade" relations. Sandoval, *supra* note 66, at 142.

79. See, e.g., Sandoval, *supra* note 66, at 141 (cautioning that the implications for enhanced trade relations are tempered by the country's many years of introverted development and protectionist policies).

80. Brendan Hudson, *FTA Negotiations Will Bring Mexico's Foreign Investment and Anti-Dumping Laws Under Close Scrutiny*, Bus. Mex., May 1991, at 28. In Mexican law, once a treaty is adopted it acquires status equal to the Constitution. Thus, "the terms of a [concluded agreement] would predominate if there were conflicts with the laws or regulations not directly included in the Constitution, such as the [F]oreign [Trade] [L]aw." *Id.*

One year later, on July 24, 1987, Mexico also became a signatory to the GATT Antidumping Code.⁸¹ These actions—implementing a trade law, enacting complementing regulations, acceding to the GATT, and accepting the obligations of the Antidumping Code—illustrate the Government's willingness to modernize its trade policies.⁸² They also indicate how recently that country began exercising trade regulating practices akin to those utilized for decades by the United States and Canada.⁸³

Notwithstanding the progressive intent of the Foreign Trade Law, apparent complications exist⁸⁴ that must be rectified before the Foreign Trade Law and its Regulations will comport with Chapter 19 directives.⁸⁵ Consider, for instance: (a) the Regulations' provision that provisional duties may be imposed in under five days without the involved parties' participation offends the due process foundation of Chapter 19; (b) the Regulations' allowing further administrative action without public hearings presents the same problem; and (c) customary administrative practices often allow cases to continue long after the official deadlines have passed, even though short, strict procedural timelines are stated in the Regulations.⁸⁶

81. English *supra* note 17, at 386. Mexico conditioned its signing of the Antidumping Code upon formal acceptance by the government. The government's acceptance was forthcoming and Mexico was officially recognized as an Antidumping Code signator on March 10, 1988. USITC Pub. 2275, *supra* note 67 at *21.

82. The policy shift from import substitution to export substitution has been called "structural change." Herminio Hernández, *Tariffs and Barriers Coming Down, Down, Down*, Bus. Mex., Sept. 1987, at 30.

83. For a detailed scrutiny of Mexico's trade regime, including an analysis of procedural requirements, definitions, conformity with GATT standards, and comparisons with U.S. law, see USITC Pub. 2275, *supra* note 67, ch. 4 at *54-92.

84. Sharon D. Fitch, Comment, *Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?*, 22 Cal. W. Int'l L.J. 353, 386 (1992) (citing as primary complaints the lack of both a notification of impending proceedings and an opportunity to protect vested interests). Another commentator cites a study done by the California International Trade Commission and reports that the vagueness in many of the trade regulations is one of the biggest impediments to U.S.-Mexico trade. Brendan Hudson, *Business And Law*, Bus. Mex., Mar. 1991, at 31, 32.

85. The substance of NAFTA's Chapter 19 is its review process. See *infra* notes 168-82 and accompanying text. For that process to operate effectively there must be "a basic standard of due process" that the Mexican system currently fails to provide. Hudson, *supra* note 80, at 29.

86. USITC Pub. 2275, *supra* note 67, at *82. A current review of the problems reveals that:

Once the case goes to investigation, the administrative procedures and the substantive rights of the concerned companies are poorly defined. Notification of the investigation is not clearly required and

Foreigners are not the only ones who see problems with the Mexican system; local complainants also criticize it.⁸⁷ Steps have been taken to remedy some deficiencies in the system,⁸⁸ but doubts about true reform remain.⁸⁹ Further modifications and adjustments must be made before Mexico's procedural policies can be integrated into a multilateral review system such as anticipated in NAFTA's Chapter 19. However, government officials have stated that deficiencies in trade law application and review proceedings are recognized and that changes are forthcoming.⁹⁰

3. Significance to NAFTA

Each country's ADD laws are similar enough in substance to facilitate consistent review patterns between any two members of the trilateral Agreement. Accordingly, it is the administrative procedural mechanisms that must be harmonized before the Chapter 19 protocols can be applied constructively.⁹¹ This means that investigating and operating policy reforms are the consequent next

investigations can and do proceed to a decision without prior notice to the exporter and without giving the exporter the right to participate. In addition, the law does not formally require that a clear administrative explanation of the basis of the decision be provided. And as with much of Mexican administrative law, there is no [direct] recourse to judicial review.

Hudson, *supra* note 80, at 29.

87. Rubio del Cueto, *supra* note 71, at 330. The author lists the following general complaints of domestic producers: (1) Government authorities enjoy a high degree of discretionary power; (2) Too much information is requested in order for a petition to be accepted for review; (3) The authorities do not comply with the time limits; (4) The authorities do not initiate an investigation upon submission of evidence of a threat to domestic industry; (5) The authorities do not offer assistance in accessing information required to substantiate statements required in the petition; (6) Procedures would be more just if public hearings were implemented; (7) Collections of countervailing duties are not being adequately kept track of by customs; and (8) Authorities demand more evidence in cases filed against U. S. exporters. *Id.*

88. Hudson, *supra* note 84, at 32. The Secretariat of Commerce recently established a new commission, General Commission on Commercial Practices, to conduct hearings and investigate dumping allegations. Reportedly this was done to better align Mexico's administrative procedures with its NAFTA partners. *Id.*

89. Hudson, *supra* note 80, at 29 (reporting that "[t]he new commission really only resolves the government's past failure to apply the anti-dumping law," it does nothing to correct the problems resident in the Foreign Trade Law or its Regulations).

90. Interview with Lic. Gerardo Olea, Mexican attorney, Center For InterAmerican Free Trade, Tucson, Arizona (Nov. 1992).

91. Fitch, *supra* note 84, at 383. The author reasons as follows: granted the laws are similar due to the GATT imposed design framework, it is the difference in legal processes, "the interpretation and weight given the economic and legal differences reviewed and applied during the trade action proceeding," that will color the outcome in any given case. *Id.*

step in Mexico's aggressive trade reforms. Based on the government's recent campaign, however, one would expect that the forthcoming revisions will meet the NAFTA requirements and will facilitate Chapter 19's application.

B. Subsidies and Countervailing Duties

Subsidies are benefits granted to manufacturing enterprises, predominately by host governments, which operate to reduce production or export costs.⁹² These benefits are generally lumped into two broad categories: export subsidies and domestic subsidies.⁹³ Export subsidies are strongly denounced in international trade,⁹⁴ but domestic subsidies, because of their oftentimes laudable purposes,⁹⁵

92. See McGovern, *supra* note 20. An insightful definition of a subsidy in the context of international trade is not easily found but this author summarizes it nicely as:

a measurable economic advantage afforded to an enterprise by or at the direction of a government, without adequate recompense, and in a way which discriminates against other enterprises or economic activities in the same country.

The advantage may take the form of money, goods, or services or of a dispensation of taxation or other charges such as social security contributions. By requiring that the advantage be measurable one excludes assistance provided by the ordinary provision of roads and railways, etc., (a road built to assist a particular firm would be a different matter).

Id. at 312.

93. Behm, *supra* note 28, at 108-09. Export subsidies are provided to assist exportation or are based on export performance. Domestic subsidies are given without reference to destination, instead they are intended to support production for any reason. *Id.*

94. *Id.* "Export subsidies are *per se* improper, since they are considered to be a direct attempt by the subsidizing government to gain a greater share of foreign markets." *Id.* at 109.

95. Domestic subsidies are recognized by the GATT as having worthwhile, necessary social purposes and these are outlined in the Subsidies Code, which reads:

1. Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable. Signatories note that among such objectives are: (a) the elimination of industrial, economic and social disadvantages of specific regions; (b) to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become unnecessary by reason of changes in trade and economic policies, including international agreements

cannot be so easily censured. The problem, at least from a retaliatory perspective, is in identifying those domestic subsidies that are not generally provided to enhance national welfare—that is, those that ultimately injure foreign competitors through selective distribution to specific industries.⁹⁶

One can easily argue that government provided benefits distort a firm's true production and/or distribution costs, thereby allowing an exporter to sell its products in foreign markets at prices that do not reflect a wholly competitive position.⁹⁷ Furthermore, as with dumped products, imported products that have benefited from subsidization are generally rejected for their potential to harm domestic industries because they create the ability to sell at prices below naturally competitive levels.⁹⁸

resulting in lower barriers to trade; (c) generally to sustain employment and to encourage re-training and change in employment; (d) to encourage research and development programmes, especially in the field of high-technology industries; (e) the implementation of economic programmes and policies to promote the economic and social development of developing countries; (f) redeployment of industry in order to avoid congestion and environmental problems.

Subsidies Code, *supra* note 21, art. 11.

96. Sandler, *supra* note 29, at 769-70 (noting that under U.S. law a domestic subsidy must be shown to have been provided to a "specific" industry or to not be "generally available" before it may be countervailable). See James D. Southwick, Note, *The Lingering Problem With the Specificity Test in United States Countervailing Duty Law*, 72 Minn. L. Rev. 1159 (1988). For an elaborate review of U.S. law dealing with domestic subsidies, see Kaplan et al., *supra* note 56, at 617-23.

97. Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 Colum. L. Rev. 199, 199 (commenting that subsidies tend to provide an "unfair competitive advantage"). Furthermore, the rationale for applying CVDs to counter subsidies can be expressed in a "cosmopolitan theory of free trade. The optimal allocation of world activity requires that no country artificially distort its comparative advantage by substantial subsidies to specific commercial activities . . ." Bhagwati, *supra* note 60, at 94. The GATT Subsidies Code addresses this issue as follows:

Signatories recognize . . . that subsidies other than export subsidies . . . may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition.

Subsidies Code, *supra* note 21, art 11.2 (emphasis added).

98. See, e.g., Michael S. Knoll, *An Economic Approach to the Determination of Injury Under United States Antidumping and Countervailing Duty Law*, 22 N.Y.U. J. Int'l L. & Pol. 37 (1989). This author clearly expressed the injury concept in economic terms:

A subsidy injures competing domestic producers by driving down the import supply curve; the injury to U.S. producers from a subsidy depends, in part, on the size of this shift. The purpose of the

To countervail is to "act against with equal power or effect."⁹⁹ Accordingly, countervailing duties are imposed by importing governments to compensate for the production cost advantage afforded exporting producers through "unfair" subsidization.¹⁰⁰ The impetus for applying CVDs is on protecting domestic industries (in much the same vein as ADD laws), not on protecting either competition or consumers.¹⁰¹ Here too, this goal is realized in a remedial sense in that penalties are not assessed and injured parties are not compensated.¹⁰²

1. The U.S. Position

U.S. CVD law differs from U.S. ADD law in that CVD law may apply with or without an injury test. The determining factor is whether the offending country has made prior subsidy control commitments either with the U.S. itself or in another international trade agreement.¹⁰³

countervailing duty law is to protect competing domestic producers from the adverse effects of the subsidy, and the impact of the subsidy depends not on the size of the subsidy but on the size of the shift in the import supply curve.

Id. at 108.

99. New Expanded Webster's Dictionary 71 (spec. ed., P.S.I. & Assoc. Inc.) (1988). In the discussion that follows, "countervail" may be used in a verb form to denote the act of applying countervailing duties.

100. Michael P. Mabile, *Import Relief—The U.S. Antidumping and Countervailing Duty Laws*, 65 Fla. B.J. 13, 17 (1991); Southwick, *supra* note 96, at 1159.

101. Sykes, *supra* note 97, at 202 (describing a CVD as "a tool of 'unilateral' trade policy" confined only by the "limited restrictions" championed by the GATT). It is a tool used almost exclusively by the United States, *id.*, which clearly demonstrates U.S. producers' resolve to protect vested interests. CVDs could also be considered a retaliatory measure to frustrate "protectionist" practices in the exporting country. By lowering the cost of production, subsidies may in many cases provide indirect protection for local producers from import competition that cannot effectively compete with the subsidized price. Edward R. Easton & William E. Perry, *Countervailing Duty Investigations, in Law & Practice of United States Regulation of International Trade* 5 (Oceana Pub. 1992).

102. Mabile, *supra* note 100, at 14 (noting, for example, that U.S. law does not punish foreign exporters or domestic importers, that U.S. petitioners in the injured industry do not recover damages, and that the price-adjusting remedy is only applied prospectively). Because the Treasury is the party collecting the newly-imposed duty, the "injured" industry only indirectly benefits from raised import prices; and because the law only restores import prices to a "fair" level, it cannot be considered either penal or punitive. Enrenhaft, *supra* note 25, at *3.

103. Restatement, *supra* note 22 states that:

Under the law of the United States, (a) a countervailing duty may be imposed on imports of products that have benefited from a subsidy, whether on manufacture, production, or export; (b) if such imports have originated in a state party to the Agreement on Subsidies and

When an offending country can be categorized as one "under the agreement"—a country which is a party to either a bilateral or a multilateral subsidies control agreement—a specific injury determination must be made.¹⁰⁴ Therefore, when CVD law is applied against a country under the agreement, as defined in 19 U.S.C. section 1671(B), both a finding of unfair subsidization and a determination of injury are required.¹⁰⁵ Procedurally, the process of imposing a CVD in this case is almost identical to what is required for an ADD determination.¹⁰⁶

In contrast, when an offending country has not signed a previous subsidy control measure, or similar agreement, with either the United States or an international trade regulating body, then no injury determination is needed.¹⁰⁷ All that is required before a CVD is applied in this case is a decision that the imported product has benefited from a government subsidy.¹⁰⁸

As evidenced by these two different approaches, U.S. CVD laws attempt to recognize and give preferential treatment to exporting countries whose governments have agreed to some form of subsidy control.

Countervailing Measures or comparable agreement, a countervailing duty may be imposed only if the imports are determined to cause or threaten material injury to a domestic industry.

Id. § 806(4). U.S. countervailing duty law is codified at 19 U.S.C. §§ 1303, 1671—1671h, 1675—1677k (1988 & Supp. III 1991).

104. 19 U.S.C. § 1671.

105. 19 U.S.C. §§ 1671—1671h, 1675—1677k (1988 & Supp. 1991). This bifurcated approach establishes two barriers that hinder producer claims: (1) finding a subsidy; and (2) proving material injury. Southwick, *supra* note 96, at 1162. For an excellent appraisal of subsidies and retaliatory CVDs, see Sykes, *supra* note 97, at 203-09. There are two notable exceptions to 19 U.S.C. § 1671 application: (1) CVDs will generally not be applied against countries with non-market economies, ADD laws will be applied where warranted; and (2) the United States may withdraw its recognition that a country is a signatory to the Subsidies Code when such obligations have not been observed, 19 U.S.C. § 1303 will then be applied without the injury test. Easton & Perry, *supra* note 101, at 2, 6-7.

106. Sandler, *supra* note 29, at 772-74. For a detailed evaluation of ITC procedures for finding injury and a vivid account of the parallelism, see Gary N. Horlick & F. Amanda Debusk, *Commerce Procedures Under Existing and Proposed Antidumping/Countervailing Duty Regulations*, 22 Int'l Law. 99 (1988).

107. 19 U.S.C. § 1303 (1988). This section only requires finding that a subsidy has been bestowed upon an imported product. It applies when 19 U.S.C. § 1671 does not; thus, it applies when an opposing country is not considered to be "under the agreement." Accordingly, "country under the agreement" is defined in 19 U.S.C. § 1671(B) dealing with subsidies conferred by certain countries. Section 1671(B) applies to countries that: (1) are signatories to the GATT Subsidies Code, (2) have committed themselves to obligations substantially similar to the Subsidies Code, or (3) are merely members of GATT whose exports in question would normally enter duty free. Sandler, *supra* note 29, at 769.

108. 19 U.S.C. § 1303(A)(1).

2. The Mexican Position

Historically, the government of Mexico has owned and controlled many industries deemed essential to national welfare.¹⁰⁹ This practice became pervasive during the country's period of self-imposed segregation.¹¹⁰ By the early 1980s, government contributions in one form or another could be traced to almost every segment of the economy.¹¹¹ Consequently, most products exported from Mexico at that time were supported by some form of government subsistence program. Therefore, CVDs were the routine retaliatory measure employed, primarily by U.S. firms, to counter the subsidization activity.¹¹²

Mexico's commitment to international fair trade obligated the government to

109. Stephen T. Zamora, *Searching for the Mexican Model of Government*, 12 Hous. J. Int'l L. 181 (1990). In the past, Mexico's ambitious attempts at "economic self-sufficiency" precipitated a pattern of centralized control over important parts of the local economy, which eventually resulted in an economic structure "insulated from outside competition." *Id.* at 182. The right to government ownership and control of business and service affairs is founded in the Constitution at Article 90, which provides for establishing and distributing the control of "para-statal" entities, and Article 134, which calls for prudence and efficiency in the management of "economic resources" and "public state-like administrations [*paraestatales*]." Constitution, *supra* note 70, arts. 90, 134 (emphasis added).

110. USITC Pub. 2275, *supra* note 67, at *43. The justification for government ownership spread well beyond its original constitutional bounds. Failing firms were rescued and supported by government action "to preserve employment, continue the supply of items deemed necessary for the economy and produce substitutes for imported goods." *Id.* Despite the benevolent intentions, this practice contributed to a severe debt problem. The *paraestatales* are notorious for inefficiency and they multiplied almost exponentially. George M. Armstrong Jr., *Law and Market Society in Mexico* 108 (1989).

111. USITC Pub. 2275, *supra* note 67, at *43. In December 1982 there were 1,155 *paraestatales* enterprises operating in Mexico. *Id.* This engendered a system of "[c]entralized economic planning" concomitant with "a constellation of devices for governmental control of private market activity," appropriately referred to as "an administered market economy." Armstrong, *supra* note 110, at 103. For an interesting examination of how the Mexican economy developed, the proliferation of *paraestatales*, and the ensuing limitations on efficient markets, see *id.* at 103-17.

112. Hover E. Moyer, Jr. & Catherine Curtiss, *Solutions to U.S. Antidumping and Countervailing Duty Actions Against Latin American Companies*, 21 U. Miami Inter-Am. L. Rev. 473, 473-74 (1989-90). The authors report that in the United States as of November 1, 1988, "seventeen dumping findings or orders and forty-six countervailing duty orders or suspension agreements existed against Latin American countries and products." *Id.* Roughly half of those were against Brazil and Mexico but this illustrates a willingness (eagerness) to initiate CVD actions to counter exports from predominately government controlled countries. See also Weintraub, *supra* note 483, at 83 (commenting that before Mexico and the United States signed a 1985 agreement limiting CVD actions, discussed *infra* in text accompanying note 119, it was "open season" on products benefiting from any form of subsidy whatsoever).

withdraw from its deep involvement in economic matters and to begin shifting toward a more market-oriented economy.¹¹³ To accomplish that end, the government began divesting many of its holdings through privatization¹¹⁴ and clearing many of the administrative impediments to trade through deregulation.¹¹⁵

One glaring holdup in Mexico's trade reform was its refusal to become a signatory to the GATT Subsidies Code.¹¹⁶ A plausible explanation for the government's position is that the Subsidies Code mandates numerous procedural devices,¹¹⁷ most of which support transparency and due process and run counter

113. USITC Pub. 2275, *supra* note 67, at *42-43. Referred to in Mexico as "disincorporation," the process involves liquidating some *paraestatales*, selling others to private enterprise, merging certain such entities, and transferring others to local governments or worker's unions. *Id.*

114. *Id.* Between 1982 and 1989, the Mexican government reduced the number of government-owned enterprises from 1150 to 400 while only creating 60 new ones. Riner & Sweeney, *supra* note 3, at 77. Furthermore, privatization is a significant element of Mexico's current National Development Plan (1989-94). That Plan embraces three important policy objectives:

- (1) Decrease the size of the *paraestatales* [government owned] sector while improving the efficiency of the Government as an economic regulator;
- (2) Generate savings for the Government by eliminating government subsidies that are not considered of social importance; and
- (3) Shift the task of production to the private sector in order to promote increased industrial productivity, implement the policy of industrial restructuring, and open markets to foreign competition.

USITC Pub. 2275, *supra* note 67, at *44-45 (emphasis added). For a thorough report of Mexico's privatization program, see *id.* ch. 3, at *32-54.

115. USITC Pub. 2275, *supra* note 67, at *32. Deregulation is defined as follows: "[b]ased on the premise that excessive and obsolete regulations were largely responsible for inefficiency in the use of Mexican resources, SECOFI's [Secretariat of Commerce and Industrial Development] mandate is to make the new rules simpler, less pervasive and less rigid, and to allow more room for private initiative and competition." *Id.* Government officials intend that this particular restructuring policy will "remove the arbitrariness of governmental authorities in implementing regulations [and create a] more transparent legal environment, coupled with a more efficient executive apparatus." *Id.* at *53. For an enlightening review of the Mexican economy's transition, especially during the 1980's, see Riner & Sweeney, *supra* note 3, ch. 4, at 69-100.

116. USITC Pub. 2275, *supra* note 67, at *21.

117. English, *supra* note 17, at 352. Some of the procedural devices listed in the Subsidies Code include:

petitions for an investigation, notification of concerned signatories and importers, mandatory simultaneous consideration of the evidence of subsidization and injury, required public notice of the investigation and its determinations, a right of the investigation authorities to examine nonconfidential evidence, a general limitation of the period of the

to Mexico's past administrative policies.¹¹⁸ Those Subsidy Code requirements would have forced the government to alter its lax procedural practices at a time when it may not have been prepared to conduct such far-reaching administrative reform. However, Mexico's stance on the Subsidies Code has not been a critical issue regarding trade with the United States—primarily because one of Mexico's first reform tactics was to negotiate a bilateral subsidies understanding (Understanding) with the United States in 1985,¹¹⁹ several months prior to promulgating the Foreign Trade Law.¹²⁰ Apparently, Mexican officials sought an understanding with the United States to limit the number of countervailing complaints initiated by United States producers against exports from Mexico.¹²¹

By signing that 1985 agreement the Mexican Government actually manifested a more far-reaching policy shift. The Understanding signaled Mexico's emerging acquiescence to U.S. protectionist policies and a departure from eschewing involvement with U.S. economic policies.¹²² Another trade understanding signed between the two countries in 1987¹²³ furthered that aim, and the 1988 election of President Carlos Salinas de Gortari certified this new policy direction.¹²⁴ Still, subsidies remain a significant part of Mexican internal

investigation to one year, and specification of the conditions under which the investigation is to be suspended or terminated.

Id.

118. Discussed *supra* notes 84-90 and accompanying text.

119. Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, Apr. 23, 1965, United States—Mexico, *reprinted in* Bus. Mex., Nov. 1985, app. I at 98 [hereinafter Understanding].

120. See Foreign Trade Law, *supra* note 70.

121. Weintraub, *supra* note 26, at 203-04. The bilateral subsidies Understanding provides that the United States will afford an injury test on subsidized products from Mexico (providing "country under the agreement" status and shifting application from 19 U.S.C. § 1303 to § 1671) and that Mexico will curtail specific subsidies on products destined for the United States. Understanding, *supra* note 119. It is significant to note that Mexico did not have a CVD law at the time the Understanding was signed. However, in § 8 Mexico agrees that if its authorities were to take CVD-like action against U.S. products it would treat them the same as products from any other country. Thus, by agreeing to comply with international (GATT) standards during the proceedings, Mexico indirectly accepted the Subsidies Code provisions. *Id.* § 8.

122. Weintraub, *supra* note 26, at 203.

123. Framework Understanding on Bilateral Trade and Investment, Nov. 6, 1987, Mexico-United States, 27 I.L.M. 439 (1988), *reprinted in* Bus. Mex., Nov. 1987, at 86.

124. Jorge G. Castañeda, *Salinas's International Relations Gamble*, 43 J. Int'l Aff. 407, 410 (1989-90). President Salinas' conviction is exemplified in an unconfirmed statement he made regarding relations between Mexico and the rest of the Latin American community: "Mexico can either face north and be the poorest of the rich, or face south, and be the richest of the poor. The first choice is the right one." *Id.* at 413.

economic policy.¹²⁵

3. Significance to NAFTA

The progress on subsidies and CVDs achieved to date should forestall any serious challenges to Chapter 19 application. Indeed, one impetus for completing the Agreement is "to 'lock-in' the benefits enjoyed by the United States and Canada as a result of the Mexican reforms over the past six years . . ." ¹²⁶ Two observations are worth reiterating, however.

First, when subsidized goods are imported into a true market economy they tend to distort the "level playing field" concept required for the market's efficient operation.¹²⁷ NAFTA Parties then, in light of the potential conflicts, can be expected to continue monitoring the use of subsidies and retaliating whenever appropriate. Second, the procedural aspects of administrative action must be modified to facilitate the Chapter 19 appeal process.¹²⁸ Changes are expected, though, which should accommodate these requirements.¹²⁹

C. The Debate: Continue the Existing Retaliatory Measures or Find an Alternative

Free trade between NAFTA countries is an ideological concept that will remain just that for some time.¹³⁰ International trade routines have developed from a different perspective than have U.S. national trade policies.¹³¹ In the

125. See Robert T. Givens & Rayburn Berry, *United States Customs Law Affecting the Movement of Goods Into and Out of Mexico*, 23 St. Mary's L.J. 773, 789-91 (1992).

126. David A. Gantz, *A Preliminary Assessment of the North American Free Trade Agreement*, Bull. Int'l Bureau Fiscal Doc., Sept. 1992, at 424.

127. Sandler, *supra* note 29, at 791 (defining the level playing field concept as "a set of trading rules and practices that permit trade to be carried out free of artificial stimulants or barriers"). Subsidies are surely "artificial stimulants" that impede competitive forces and potentially harm industries.

128. Mexico's problem areas are discussed *supra* notes 84-86 and accompanying text.

129. Gantz, *supra* note 126, at 428. The author reports that Mexico has agreed to "complete[ly] revise its procedures for handling these cases," and most trade authorities agree that an improved "trade action appeal mechanism" will principally benefit United States producers. *Id.*

130. Weintraub, *supra* note 26, at 71. The author implies a lengthy adjustment period by stating that Mexico "is becoming a freer trading nation . . . [and] the operative word is 'freer,' not 'free'; and in becoming more free, Mexico starts from a relatively high protective position." *Id.* Change in trade policy follows changes in political, social, and economic conditions; the pace of change in these categories can be glacial.

131. National trade policies have been geared toward protecting "freely

international arena, national policy makers must also factor in concerns about national welfare.¹³² Furthermore, vast disparities between social, political, and economic conditions cannot quickly evolve to a point sufficient for all trade impediments to be lifted.¹³³ As long as pockets of cheap labor, exploitation, and subsidized production remain, ADD/CVD laws will continue to be applied to protect important national producers from more opportunistic foreign competitors.

Yet the question remains: Are ADDs and/or CVDs the most effective, efficient devices available for assuring import relief where needed? Some experts say the laws should be abandoned¹³⁴—that ADD laws are too easily and readily

competitive markets, increasing consumer welfare, and protecting American businesses." Craig Marquiz, Comment, *The North American Free Trade Agreement & The Extraterritorial Application of United States Antitrust Legislation: A Proposal For Change*, 10 *Ariz. J. Int'l & Comp. L.* 139, 148 (1993). In contrast, international trade policies have been based on concerns such as national security and industry welfare. See Enrenhaft, *supra* note 25, *1, *2.

132. Enrenhaft, *supra* note 25, *1, *2. This author emphasizes the international perspective by stating:

The rules of international trade are built not on the U.S. tradition of competition, but on concepts adopted by many countries, including the United States, when it acts as a "nation among nations": (1) To protect domestic interests against foreign dependence, exploitation, and investment in domestic affairs affecting vital industries or interests; (2) To avoid the "shocks" of adjustment to changes in technology, international comparative advantage or the rate of adaptation; [and] (3) To create "self-enforcing" procedures for securing adherence to the international rules in the absence of a supranational "enforcement agency."

Id.

133. Armstrong, *supra* note 110, at 109 (citing the multiple disparities between the United States and Mexico). An example of how far apart these countries' culture and trade practices are is provided by examining certain market forces at work in Mexico:

Mexico is far beyond the United States [in degree of government intervention into market activity], owing to two factors. First, legal, cultural, geographical, and political causes have retarded the development of the market in Mexico. Subsistence farming, internal tariffs, debt peonage, and numerous other institutions . . . have always prevented bargain-based contractual relations from occupying the central place in society. Second, hostility to profit in transactions involving items of necessity is deeply rooted in the legal culture. Consequently, market exchange does not occupy a position of political power or sentimental respect in Mexico, in contrast with the United States.

Id.

134. See, e.g., Wood, *supra* note 45, 1155 n.7 (pointing out that many others

applied¹³⁵ and CVD laws do not effectively combat unfair subsidization practices.¹³⁶ Essentially, this argument maintains that these protectionist-oriented laws are no longer justified in international trade, especially in free trade areas.

Others argue for replacement, implying that the ADD laws connote a shotgun approach to protection.¹³⁷ This argument suggests that ADD laws target all dumping in an effort to hit a relatively small number of truly pernicious cases.¹³⁸ Replacement proponents claim that, mainly from an econometric perspective, antitrust laws could achieve a more suitable result, especially in ADD cases.¹³⁹ After all, antitrust laws are truly anti-competition laws that serve

argue for the complete repeal of ADD/CVD laws); Feltham et al., *supra* note 58, at 166 (stating that replacing the ADD laws between Canada and the U.S. is the "logical and legally feasible next step in the removal of barriers").

135. Feltham et al., *supra* note 58, at 78-79 (reiterating that the main problem with ADD laws is that they are non-discriminating, they apply in all cases where export prices are less than domestic prices and injury to an importing industry is confirmed). In reality, ADD laws "may punish firms engaged in pro-competitive, efficiency enhancing competition . . ." *Id.* at 74. See also *supra* note 488 (illustrating the overinclusive properties of ADD laws). For a breakdown of dumping types and an analysis of ADD laws' limitations see Benz, *supra* note 50, at 710, 729-31.

136. Anderson & Fried, *supra* note 35, at 406-07 (comments by Mr. Fried). Mr. Fried notes that CVD laws seem to apply in situations where perhaps they should not because "[i]n practice, countervailing duties often either do less, or do more, than neutralize the cross-border impact of a foreign country's subsidies." *Id.* In addition,

the unilateral imposition of [CVDs] on "subsidized" imports does not systematically promote national economic welfare, and existing law is poorly tailored to identify the cases in which [CVDs] are arguably beneficial. Instead, the duties are imposed mechanically under conditions that may often produce a considerable net welfare loss to the U.S. economy. As a consequence, duties under existing law will enhance national economic welfare only by chance. Because the need for any type of [CVD] policy is questionable, abolition of the [CVD] laws might best serve the national economic interest.

Sykes, *supra* note 97, at 207.

137. See Feltham et al., *supra* note 58, at 74. ADD "laws are violated by discriminatory pricing (across a border), whether or not this price is predatory," unlike antitrust laws that are "violated by predatory pricing, designed to eliminate competitors or make markets less competitive in other ways." *Id.* Moreover, "[u]nlike the notion of 'unfair pricing' under U.S. competition law, there is no requirement [in ADD cases] that the administering authorities consider the relationship of price to cost, or the feasibility of acquiring market power and recouping lost revenue." *Id.* at 89.

138. *Id.*

139. See Derek Ireland, *The Government Perspective: Effects Upon Present Competition Policy*, 17 Can.—U.S. L.J. 189, 199 (1991) (Canadian perspective) (claiming "the research and economic developments [in the last four years] . . . further

to safeguard competition while maximizing "consumer welfare."¹⁴⁰ In a truly free trade zone, the theory goes, product arbitrage would frustrate injurious dumping.¹⁴¹

The opposition to this argument, however, insists that competition laws are ill-suited to replace ADD/CVD laws.¹⁴² Specifically, arbitrage is too slow in short-term or third-country dumping cases. Multiple defenses and rigorous standards abet the offender, and lengthy, costly judicial struggles would provide relief only after it is too late to be effective.¹⁴³ Another concern that is particularly relevant is, at this time, Mexico does not have anti-competition laws to apply.¹⁴⁴

Another option is to modify portions of the current system: alter the laws so they apply only against proven wrongdoers, thereby promoting international competition and enhancing consumer welfare by allowing well-intended trade practices to continue unimpeded.¹⁴⁵ Thus, producers would be protected only in situations where long-term consumer welfare is threatened or when truly unfair conditions exist. Proponents of this option advance proposals such as: countervail only subsidies that provide a benefit greater than a preselected limit,¹⁴⁶ restrict a complaining producer's access to CVD laws if it is receiving

strengthens the case for replacing antidumping with competition policy rules"). See also Behm, *supra* note 28, at 116 (listing three reasons why antitrust laws are preferred: (1) reduce the matter to a "business-to-business problem" like it really is; (2) furnish a remedy for the injured manufacturer, not the government; and (3) promote "cost-effectiveness" by letting the injured party decide how much corrective action is worth).

140. Wood, *supra* note 45, at 1155 (noting that the original concepts "in antitrust theory would . . . [fashion] a better balance between the protection of legitimate producer interests and the enhancement of consumer welfare").

141. See Steger, *supra* note 13, at 127-28 (summarizing various authorities and saying that where trade barriers are dropped and markets are combined, "reverse dumping" can provide a deterrent to dumping and competition laws can deal with anti-competitive pricing).

142. See, e.g., Benz, *supra* note 50, at 731-34 (arguing that U.S. antitrust laws are largely inadequate in many situations and difficult to apply extraterritorially); Sykes, *supra* note 97, at 243 (professing the "act of state" doctrine would discourage application of antitrust laws in cases involving alleged price predation through subsidy programs).

143. Powell et al., *supra* note 38, at 253-54.

144. *Canada Set to Negotiate Antidumping Changes in Trilateral Free Trade Talks, Official Says*, 8 Int'l Trade Rep. (BNA) 441 (Mar. 20, 1991).

145. See Southwick, *supra* note 96; Behm, *supra* note 28; Wood, *supra* note 45; Knoll, *supra* note 43.

146. Southwick, *supra* note 96, at 1184. This modification proponent advocates dropping the distinction between export subsidies and domestic subsidies (with their inherently complex specificity or general availability test requirements), treating them all alike, and countervailing only those subsidies that provide the foreign producer with cost reduction benefits over a set "de minimis" level. *Id.*

benefits similar to the ones complained of,¹⁴⁷ or refine the injury test to apply more discriminately.¹⁴⁸ Although modification is an option, it presupposes that current conditions are not optimal—a supposition that not all experts may be willing to accept.

The ongoing Uruguay Round of GATT Multilateral Trade Negotiation (MTN) may provide some movement towards reform.¹⁴⁹ However, persistent conflicts continue to delay results in the negotiations and doubts that a meaningful resolution can be achieved are evident.¹⁵⁰ Moreover, enforcement and management problems in the GATT system could dampen the impact of the Uruguay Round even if the talks are successful.¹⁵¹ And to further dampen any enthusiasm, reform tactics emanating from the GATT could have a delayed and softened impact on trading practices because the GATT's ancillary agreements operate more as official guides than enforceable rules.¹⁵²

147. Behm, *supra* note 28, at 110-11. This author espouses a "clean hands" equitable doctrine: a producer receiving a benefit similar to the one complained of should not be allowed to complain at all. *Id.*

148. Wood, *supra* note 45, at 1199-1200. Wood advocates redefining the injury test: isolate and assist only those firms operating in a truly competitive environment; do not assist producers that already experience economic advantage. *Id.* Another approach would be to calculate the injury in a more productive manner: take a legitimate economic approach, use a sophisticated mathematical model, and provide protection only where it can be shown that industries are truly economically impaired by the subsidized imports. Knoll, *supra* note 98, at 63-97.

149. See Gary N. Horlick, *Proposals for Reform of the GATT Antidumping Code*, 18 Brook. J. Int'l L. 181 (1992).

150. The Uruguay round began in Punta del Este, Uruguay in 1986. Talks almost collapsed in 1988 and again in 1990. The situation has been complicated by the large number of items being considered (a total of 15 negotiating groups) and an opening declaration that proclaimed "nothing is final until everything is final." USITC Pub. 2403, *supra* note 17, at *13. A current report characterizes the talks as "totally blocked." *Proposed North American Trade Area Does Not Threaten GATT*, Dunkel Says, 9 Int'l Trade Rep. (BNA) 1503 (Aug. 26, 1992).

151. See Jackson, *supra* note 17, at 18-19. There are innate weaknesses in the GATT system, those that it began with and those that have developed over time. The "institutional problems" affecting the system include: 1) a confusing "provisional" application; 2) amendment procedures that are difficult to administer and that have militated separate "side agreements"; 3) "murky" relationships between the side agreements and the primary accord; 4) conflicts between the "treaty system" and the national laws of some countries; 5) variations in membership status and contracting arrangements; 6) problems in the definition and responsibility of various parties acting in concert; 7) in spite of certain successes, problems remain in some dispute settlement provisions; and 8) uncertainties in the relationship between the GATT and other influential international organizations, such as the IMF and the World Bank. *Id.*

152. *Id.* at 19-21 (noting that GATT is indeed a "rule-based system"). One inherent problem is that the system is plagued with enforcement problems.

The existing system is a hodgepodge of several separate dispute

Notwithstanding the controversy, NAFTA Chapter 19 does nothing to change the application of current law or assuage the debate. Its purpose is to provide quicker, more attractive appeals from ADD/CVD determinations.¹⁵³ Chapter 19 provides a mechanism for expediting the appeal process and for monitoring future amendments to existing laws; it does nothing to change either the operation of those laws or the reasons for exercising them.¹⁵⁴ In other words, the debate continues.

IV. CHAPTER 19 (The Equation)

Since NAFTA Parties each have similar laws to counter unfair trade practices, it is almost certain that those laws will continue to be exploited under the guise of national market protection. The variables, then, are in place. The next question is: "How will dumping and countervailing be handled under the Agreement?"

A. NAFTA's Chapter 19: Origin and Essential Elements

When asking how ADD/CVD laws will be dealt with under NAFTA, one has only to look to USCFTA for guidance. That bilateral agreement was used extensively as a model to construct NAFTA.¹⁵⁵ Comparing the general structure

settlement procedures, some of them, established under the separate treaty codes and side agreements of GATT. The system cries out for a unified dispute settlement process to avoid the forum shopping and the competence disputes that are inherent in a fragmented system, as well as to strengthen the public perception and the careful procedural evolution of that system.

Id. at 21.

153. Cf. Steger, *supra* note 13, at 139. While commenting on the USCFTA's provisions, the author stipulates that "[USCFTA Chapter 19] review procedures will be established to provide [implicated] exporters involved in an antidumping or countervailing duty investigation with quick, cheap, and effective justice." *Id.*

154. See *infra* notes 168-82 and accompanying text.

155. Fitch, *supra* note 84, at 360. NAFTA's Chapter 19 (NAFTA-19) has its origins in USCFTA's Chapter 19 (USCFTA-19), but the story of how that chapter originated presents an interesting sidenote. Neither Canada nor the United States initially proposed such a process. Ince & Sherman, *supra* note 14, at 137-38. During the course of the bargaining negotiators became aware that ADD/CVD "laws were some of the most divisive issues" that they would have to deal with. Baker, *supra* note 35, at 1. Each Party remained steadfast and negotiations in this matter quickly reached an impasse, threatening completion of the entire USCFTA. Ince & Sherman, *supra* note 14, at 137. In an "eleventh hour" compromise, *id.*, the Parties agreed upon a three-part solution and it was here that the panel review process originated. Baker, *supra* note 35, at 2. The first part of the compromise consisted of establishing a "Working Group" empowered to continue efforts toward finding an alternative to replace

of each agreement's Chapter 19 illustrates this point. USCFTA's Chapter 19 (USCFTA-19) has eleven articles and three annexes.¹⁵⁶ NAFTA's Chapter 19 (NAFTA-19) has eleven articles and six annexes.¹⁵⁷ These sections are not all identical but the degree of congruence is substantial.

The most pertinent NAFTA-19 articles, Article 1903, Review of Statutory Amendments,¹⁵⁸ and Article 1904, Review of Final Antidumping and Countervailing Determinations,¹⁵⁹ have only minor wording changes to clarify meanings and to accommodate a third Party. Certain requirements stated in

ADD/CVD actions against either country. USCFTA, *supra* note 4, art. 1907. USCFTA Article 1907 reads in pertinent part:

1. The Parties shall establish a Working Group that shall: (a) seek to develop more effective rules and disciplines concerning the use of government subsidies, (b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and (c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.

Id. The second part stipulated that further amendments to either country's ADD/CVD laws would not apply against the other Party unless certain conditions were met. Baker, *supra* note 35, at 2. Appropriately, USCFTA-19 Article 1902(2), *supra* note 4, contains the same stipulations. It states:

Each party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute: (a) such amendment shall apply to goods from another party only if the amending statute specifies that it applies to the Parties to this Agreement; (b) the amending Party notifies any Party to which the amendment applies in writing of the amending statute as far in advance as possible of the date of enactment of such statute; (c) following notification, the amending Party, upon request of any Party to which the amendment applies, consults with that Party prior to the enactment of the amending statute; and (d) such amendment, as applicable to another Party, is not inconsistent with: (i) [the GATT Antidumping Code or Subsidies Code] or successor agreements to which all the original signatories to this Agreement are party, or (ii) the object and purpose of this Agreement and this Chapter,

The third part of the compromise consists of "a novel and multi-faceted *interim* dispute settlement measure," replacing domestic judicial review of final ADD and CVD determinations with a binational panel review process. Baker, *supra* note 35, at 2 (emphasis added). USCFTA-19 may or may not have been a novel development; nevertheless, it was surely intended to be a *temporary* one. See *infra* text accompanying notes 161-165.

156. See USCFTA, *supra* note 4.

157. See NAFTA (Proposed), *supra* note 2.

158. *Id.* art. 1903.

159. *Id.* art. 1904.

Article 1904 pertaining to amending national laws and implementing Article 1904 provisions have been removed to an annex,¹⁶⁰ but that is the only significant variation in the key articles of the chapter.

Focusing for a moment on USCFTA-19, an analysis of Article 1904 reveals that it was created as a *temporary* fixture in that agreement.¹⁶¹ USCFTA-19's transitory status is further mandated by the coalescing provisions of Articles 1906 and 1907. USCFTA-19's Article 1906 puts specific time limits on developing a better system for managing ADD/CVD issues.¹⁶² It specifies that if a more suitable arrangement is not eventuated within a maximum of seven years, the entire agreement can be terminated.¹⁶³ The inclusion of this article demonstrates both a patent dissatisfaction with prevailing ADD/CVD laws between the United States and Canada and a quiet uncertainty about the viability of a panel review process. Furthermore, USCFTA-19's Article 1907 establishes a Working Group and directs it to develop a substitute system of rules and procedures to replace existing law as applied between the Parties.¹⁶⁴ These two articles, then, were ostensibly designed to force creation of a new system to supplant both existing law and USCFTA-19.¹⁶⁵

Noticeably absent in NAFTA-19 are the provisions of USCFTA-19 Articles 1906 and 1907. Whereas USCFTA-19 settlement provisions are temporary, NAFTA-19 provisions are, for all intents and purposes, permanent. Thus, a measure that began as an untested "stop-gap" provision, only enforceable until a better solution could be concocted, has become a permanent fixture in NAFTA-19.¹⁶⁶ Some might argue that this is good because USCFTA-19's review procedures have since developed into an acceptable, perhaps laudable, ADD/CVD dispute resolution mechanism.¹⁶⁷

160. *Id.* Annex 1904.15(d), Amendments to Domestic Laws.

161. *See supra* note 155.

162. USCFTA, *supra* note 4, art. 1906.

163. *Id.* USCFTA Article 1906, entitled Duration, reads as follows:

The provisions of this Chapter shall be in effect for five years pending the development of a substitute system of rules in both countries for antidumping 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 the 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.

Id.

164. *Id.* art. 1907.

165. Powell et al., *supra* note 38, at 251-52.

166. Kevin C. Kennedy, *International Commercial Arbitration Legislation in the State of Michigan: A Proposal*, 1990 Det. C.L. Rev. 867, 921 (1990).

167. *See, e.g.*, Fitch, *supra* note 84, at 363 (maintaining that the binational panels increases both the "consistency and predictability" of trade law remedies; increases the "procedural neutrality, efficiency and efficacy" of the appeal process; and

Article 1904 is essentially the heart of NAFTA-19. Its primary import is that it calls for creating binational panels empowered to hear appeals from any Party's ADD or CVD determinations.¹⁶⁸ Basically, the article "establishe[s] quasi-judicial fora, similar to arbitration panels,"¹⁶⁹ that provide "a form of supranational review jurisdiction over national decisions under an international agreement."¹⁷⁰ Article 1904 accomplishes this by expressly stating which laws will apply,¹⁷¹ the standard of review to apply,¹⁷² and what action will be taken when a decision is rendered.¹⁷³ The article also sets out a specific timetable that must be followed in Article 1904 proceedings, one that culminates in a final decision in 315 days or less.¹⁷⁴

NAFTA-19 Article 1901(2) references Annex 1901.2, which stipulates how the review panels will be constructed and administered when requested under Article 1904.¹⁷⁵ Panels will be convened on a case-by-case basis¹⁷⁶ and be comprised of five individuals chosen from a roster of at least 75 qualified experts, 25 appointed by each country.¹⁷⁷ Two panelists are to be chosen by each

enhances the "legitimacy and legality" of USCFTA's ADD/CVD dispute settlement mechanism).

168. *Id.* art 1904. Article 1904 begins by stipulating: "As provided in the Article, the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." *Id.* art. 1904(1). For a detailed review of USCFTA Chapter 19 Article 1904 see Ince & Sherman, *supra* note 14, at 137-39.

169. Powell et al., *supra* note 38, at 248.

170. Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada—U.S. Free Trade Agreement*, 23 *Int'l Law* 401, 403 (1989).

171. NAFTA (Proposed), *supra* note 2, art. 1904(2). Specifically, "the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." *Id.*

172. *Id.* art. 1904(3). This section states: "The panel shall apply the standard of review described in [Annex 1911, Country-Specific Definitions] 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." *Id.*

173. *Id.* art. 1904(8).

174. *Id.* art. 1904(14). The relevant portion of this section reads as follows:

The rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made, and shall allow: (a) 30 days for the filing of the complaint; (b) 30 days for designation or certification of the administrative record and its filing with the panel; (c) 60 days for the complainant to file its brief; (d) 60 days for the respondent to file its brief; (e) 15 days for the filing of reply briefs; (f) 15 to 30 days for the panel to convene and hear oral argument; and (g) 90 days for the panel to issue its written decision.

Id.

175. *Id.* art. 1901.

176. *Id.* art. 1904(4).

177. *Id.* Annex 1901.2(1).

involved Party and one chosen by agreement among the Parties.¹⁷⁸

Furthermore, Article 1904 stipulates that: (1) Chapter 19 will not apply when neither Party requests its review procedure or when either party has already selected judicial review;¹⁷⁹ (2) Chapter 19 shall not affect the judicial process of a Party, or cases pursued thereunder;¹⁸⁰ (3) binational panel decisions shall be binding on the involved Parties to the extent of the decision rendered;¹⁸¹ and (4) binational panel decisions will not be subject to further judicial review.¹⁸² These essential guidelines, mostly borrowed from USCFTA, are, therefore, the provision that will control ADD/CVD appeals under NAFTA.

B. NAFTA's Improvements on USCFTA

NAFTA-19 contains several additions that distinguish it from its USCFTA-19 counterpart. First is a "stand-alone" qualification guaranteeing that no other provisions in the Agreement will affect ADD/CVD law or policy.¹⁸³ Second is Article 1910, Miscellaneous, which compels release of all public information compiled in the course of an investigation.¹⁸⁴ This article is ostensibly included to promote transparency and due process—two primary concerns surrounding Mexico's inclusion in the settlement mechanism.¹⁸⁵ Third, three annexes have been added: Annex 1904.15(d), Amendments to Domestic Laws, which provides complete schedules for each country's requisite amendments;¹⁸⁶ Annex 1905.7, Special Committee Procedures, obligating the Parties to establish rules of procedure to foster Special Committee operations;¹⁸⁷ and Annex 1911, Country-Specific Definitions.¹⁸⁸

Finally, and most significantly, a new article, Article 1905, titled "Safeguarding the Panel Review System," has been added.¹⁸⁹ Its purpose is to

178. *Id.* Annex 1901.2(1)-(3).

179. *Id.* art. 1904(12).

180. *Id.* art. 1904(10).

181. *Id.* art. 1904(9).

182. *Id.* art. 1904(11).

183. *Id.* art. 1901. Article 1901 states, "With the exception of Article 2203 (Entry into Force), no provision of any other chapter of this Agreement shall be construed as imposing obligations on the Parties with respect to the Parties' antidumping law or countervailing duty law." *Id.* art. 1901(3).

184. *Id.* art. 1910.

185. *See supra* text accompanying notes 39-42 and *see* notes 84-90 and accompanying text.

186. NAFTA (Proposed), *supra* note 2, Annex 1904.15(d). This provision simply removes to an annex and expands language in USCFTA-19 that was originally included in its Article 1904(15).

187. *Id.* Annex 1905.7.

188. *Id.* Annex 1911. This Annex simply expands and supplements definitions that originally appeared in USCFTA Chapter 19, Article 1911.

189. *Id.* art. 1905.

insure that no country's laws or legal processes interfere with the workings of the review panels.¹⁹⁰ One can easily conclude that Article 1905 was added as an overt attempt to guarantee that Mexican law and administrative policy is modified such that the panels can be given full effect. The article authorizes the establishment of a special committee to investigate charges of Government interference in panel processes.¹⁹¹ Article 1905 includes specifications of committee design,¹⁹² timetables for committee operation,¹⁹³ and sanctions for noncompliance.¹⁹⁴ The sanctions are harsh, but they fall far short of terminating the Agreement altogether,¹⁹⁵ an option available in the USCFTA for failure to institute a new ADD/CVD regime.¹⁹⁶

The Article 1905 Safeguard Committee is unique to NAFTA, but only in

190. *Id.* Article 1905 begins:

1. Where a Party alleges that the application of another Party's domestic law, (a) has prevented the establishment of a panel requested by the complaining Party; (b) has prevented a panel requested by the complaining Party from rendering a final decision; (c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel; or (d) has resulted in a failure to provide opportunity for review of a final determination by a court or panel of competent jurisdiction that is independent of the competent investigating authorities, that examines the basis for the investigating authorities' determination and whether the investigating authority properly applied domestic antidumping and countervailing duty law in reaching the challenged determination, and that employs the relevant standard of review identified in Article 1911, that party may request in writing consultations with the other Party regarding the allegations. The consultations shall begin within 15 days of the date of the request.

Id.

191. *Id.*

192. *Id.* art. 1905(4)-(6).

193. *Id.* art. 1905(2), (3).

194. *Id.* art. 1905(8).

195. NAFTA's article 1905(8) states:

If . . . the Parties are unable to reach a mutually satisfactory solution to the matter, or the Party complained against has not demonstrated to the satisfaction of the special committee that it has corrected the problem or problems with respect to which the committee has made an affirmative finding, the complaining Party may: (a) suspend the operation of Article 1904 with respect to the Party complained against; or (b) suspend the application to the Party complained against of such benefits under this Agreement as may be appropriate under the circumstances.

Id.

196. *See supra* note 163 and accompanying text.

respect to how it applies—in this case, against the offending country. A similar mechanism, the Extraordinary Challenge Committee, is included in both USCFTA¹⁹⁷ and NAFTA¹⁹⁸ to deal with situations where the panel itself has acted improperly. This challenge committee can be activated to hear complaints that a panel member has acted imprudently, that a panel did not follow proper procedure, or that a panel exceeded its authority.¹⁹⁹ The composition of the Safeguard and the Extraordinary Challenge Committees is identical—both are controlled by Annex 1904.13, which contains the particulars of operational makeup and effect.²⁰⁰

NAFTA-19 Article 1907, Consultations, formerly USCFTA-19 Article 1908, is the one article that has been vastly expanded and improved.²⁰¹ It begins by repeating and strengthening the USCFTA-19 directive of mandating annual consultation between Parties, or more frequently if a Party requests, to treat any complications pertinent to Chapter 19.²⁰² Article 1907 then continues by incorporating, in palliated form, the USCFTA-19 provisions for developing a substitute system of rules to apply in ADD/CVD matters.²⁰³ Rather than mandating a replacement system within a specified time, however, it simply suggests that the Parties consult on the matter.²⁰⁴ Apparently a substitute system is still a goal envisioned by all Parties. Pursuit of that goal, though, seems to have waned considerably in the new trilateral perspective.

Article 1907 concludes with a lengthy subsection requiring "competent investigating authorities" (e.g., the Mexican Secretariat of Commerce or the U.S. ITC and ITA) to consult on issues such as: (1) public notice about commencing an investigation, (2) public notice covering timetables for submitting relevant information, (3) notice to interested parties covering their responsibilities, (4) opportunities to be heard and present evidence, (5) maintaining complete administrative records of all proceedings, and (6) disclosure of all relevant information once a determination has been reached, including a "statement of reasons" for finding both "material injury" and "dumping or subsidization."²⁰⁵ Obviously, transparency and due process were huge issues facing negotiators at the outset of negotiations. Article 1907, taken as a whole, manifests a solid determination to address these issues and to resolve them.

197. USCFTA, *supra* note 4, art. 1904(13), Annex 1904.13.

198. NAFTA (Proposed), *supra* note 2, art. 1904(13), Annex 1904.13.

199. *Id.* art. 1904(13).

200. *Id.* Annex 1904.13.

201. *Id.* art. 1907.

202. *Id.* art. 1907(1).

203. *Id.* art. 1907(2).

204. *Id.* art. 1907(2). This new watered down version reads: "The Parties further agree to consult on: (a) the potential to develop more effective rules and disciplines concerning the use of government subsidies; and (b) the potential for reliance on a substitute system of rule for dealing with unfair transborder pricing practices and government subsidization." *Id.*

205. *Id.* art. 1907(3).

Another example of this ardent commitment to due process appears in Annex 1904.15(d), Amendments to Domestic Laws.²⁰⁶ Part B, Schedule of Mexico, contains a twenty-part register of changes needed to insure openness.²⁰⁷ A few examples of these changes include: eliminating the five-day provisional duty application, providing opportunity for interested parties to participate and appeal, providing notice to interested parties regarding any facet of the proceedings, maintaining a complete administrative record, and recognizing and enforcing panel decisions.²⁰⁸

C. NAFTA Provisions Carried Over from USCFTA

Many administrative and operational details found in USCFTA-19 have been carried over to NAFTA-19 without revision. An example is NAFTA-19 Article 1906, Prospective Application.²⁰⁹ This article is repeated verbatim from USCFTA Article 1905, stipulating that NAFTA-19 will apply only on "final determinations of a competent investigating authority" and only on ADD/CVD "statutes enacted after the date of entry into force of this Agreement," under 1903.²¹⁰

Two other important articles, 1902 and 1903, are also included virtually intact. Article 1902, Retention of Domestic Antidumping Law and Countervailing Duty Law, reserves in each Party the right to retain and apply their laws against member countries.²¹¹ Each Party also reserves the right to amend their laws, but any changes that affect member countries are subject to consultation.²¹² Article 1902 has been referred to as a "standstill provision," insuring that changes in ADD/CVD laws not in another Party's best interest cannot occur without prior notification and approval.²¹³

Article 1903, Review of Statutory Amendments, stipulates that a binational panel will be convened in cases where a complaining Party is concerned that another Party's particular amendment could apply against it and be contrary to the Agreement.²¹⁴ However, a panel convened for this purpose is limited to

206. *Id.* Annex 1904.15(d).

207. *Id.* Annex 1904.15(d), pt. B, sched. of Mex.

208. *Id.*

209. *Id.* art. 1906.

210. *Id.*

211. *Id.* art. 1902(1).

212. *Id.* art. 1902(2).

213. Kennedy, *supra* note 166, at 922.

214. NAFTA (Proposed), *supra* note 2, art. 1903(1). The composition of the panel convened in this instance is identical to a panel seated to hear an order appeal under Article 1904. Both are controlled by Annex 1901.2. *Id.* art. 1901(2). The wording of Article 1903 indirectly imposes some limit on its application. It refers to amendments to statutes, which would imply that "changes in administrative practice, legislative proposals, and bills would not be within the purview of a panel." Battram & Glossop,

investigating three circumstances: whether the amendment (a) is consistent with the GATT Subsidies or Antidumping Code, (b) is consistent with the "object and purpose of this Agreement and this Chapter," or (c) has the effect of overturning a prior panel decision.²¹⁵ The panel's influence here is significant. If it determines that the proposed legislation should not be made or, if already passed, has not been corrected, the panel will report its findings to the complaining Party.²¹⁶ At that time the affected Party may either institute comparable legislation or terminate the Agreement as between the affected Parties,²¹⁷ both harsh, unforgiving reactions. In fact, this is the only article in this chapter stipulating that a Party may terminate its participation in the Agreement, *vis-à-vis* the offending Party, as a consequence of noncompliance.

D. NAFTA's Operational Aspects

NAFTA's Chapter 19 equation, therefore, looks very much like the equation applied to resolving like issues in the USCFTA context. After an antidumping or countervailing investigation is concluded and a determination rendered,²¹⁸ an interested Party²¹⁹ will have the option of subjecting that order to binational

supra note 32, at 113.

215. NAFTA (Proposed), *supra* note 2, art. 1903(1).

216. *Id.* art. 1903(2).

217. *Id.* art. 1903(3).

218. A final determination can be either an affirmative or negative duty determination or, in the case of the United States, it can be any decision submitted by either the ITA or the ITC or both. NAFTA (Proposed), *supra* note 2, Annex 1911. This provision would appear to allow an interlocutory appeal from an ITC injury finding, for example, which has been otherwise eliminated in normal U.S. trade law practice. Bello & Holmer, *supra* note 29, at 650-52. However, that possibility has not created an issue in the USCFTA operation due to the difficulty in determining "the extent and nature of the reviewable error of law that will be made by the final administrative decision maker from statements of reasons rendered at this stage." Battram & Glossop, *supra* note 32, at 114.

219. NAFTA (Proposed), *supra* note 2, art. 1904(5). This section states:

An involved Party on its own initiative *may* request review of a final determination by a panel and *shall*, upon request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

Id. (emphasis added). An involved Party can be either "(a) the importing Party, or (b) a Party whose goods are the subject of the final determination." *Id.* art. 1911. However, U.S. legislation implementing the USCFTA, having identical provisions as 1904(5), provided that "only the private U.S. national with standing to challenge final orders before the International Trade Court under present law with proper notice may request the United States to trigger binational review proceedings. Without a private request, the United States may not on its own request binational review." Christenson & Gambrel, *supra* note 170, at 405 n.17. How the implementing

panel review.²²⁰ When a request is made, an *ad hoc* panel is formed and the inquiry begins.²²¹

Several aspects of this process are particularly significant. First is the constitutionality, under U.S. law, of replacing national judicial review with binational "non-judicial" panels. Questions about the constitutionality of this process began right after negotiators concluded the USCFITA.²²² One of the first questions asked was "Does the presence of Canadian citizens on the binational panels violate the Appointments Clause of [A]rticle II of the U.S. Constitution?"²²³ Congress acted swiftly to avoid a problem here by providing a "fallback provision" in the implementing act.²²⁴ This provision stipulates that if the panel process could not sustain a judicial challenge on Appointments Clause grounds, "panel decisions would be routed through the President," thereby permitting panel directives to U.S. agencies to come directly from the President instead of the panel itself.²²⁵

The second and third constitutionality questions were: "Does substitution of binational panel review for the U.S. domestic system of judicial review deprive a litigant of due process under the [F]ifth [A]mendment?";²²⁶ and "Does the

legislation regarding the proposed NAFTA will deal with this situation remains to be seen.

220. NAFTA (Proposed), *supra* note 2, art. 1904(4). This article essentially precludes normal judicial recourse for a period of 30 days after official publication of an order or receipt of equivalent notice. Either involved Party retains the option during that time to seek Chapter 19 review, which would preempt judicial challenge by an opposing Party. *Id.*

221. *Id.* art. 1904.

222. Baker, *supra* note 35, at 3.

223. Karen H. Albright, *Chapter 19 of the Canada—United States Free Trade Agreement: An Unconstitutional Preclusion of Article III Review*, 5 Conn. J. Int'l L. 317, 318 (1989). The author summarizes the issue as:

The Appointments Clause of the U.S. Constitution provides that the President must appoint all "Officers of the United States." The Supreme Court has broadly defined "Officers of the United States" to include any appointed official who exercises "significant authority" pursuant to U.S. laws. Since the President does not appoint the [foreign] panelists, who arguably exercise "significant authority" pursuant to the laws of the United States when reviewing U.S. AD/CVD determinations, the [USCFITA] panels may violate the Appointments Clause.

Id. at 327 (citing U.S. Const. art. II, § 2, cl. 2, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)).

224. Peter Huston, *Antidumping and Countervailing Duty Dispute Settlement Under the United States—Canada Free Trade Agreement: Is the Process Constitutional?* 23 Cornell Int'l L.J. 529, 541-42 (1990).

225. *Id.* Also, President Reagan agreed in advance to uphold any panel decision that ultimately came to him through the fallback provisions. *Id.* at 542.

226. Albright, *supra* note 223, at 318. This author summarizes the due process issue as follows:

[USCFTA's] preclusion of panel decisions from U.S. judicial review violate [A]rticle III of the U.S. Constitution?"²²⁷ Most commentators now agree that Chapter 19 processes will not offend constitutional ideals.²²⁸ However, one author believes that a challenge on Article III grounds may succeed, arguing that the panels are essentially adjudicating "private rights" which must be heard in true Article III Courts.²²⁹ Another theory rebuts this argument. In reality, the authors posit, the rights in question are indeed public rights: "The correction of market distortions for the broader purpose of greater wealth and economic integration and the adjustments necessary to avoid unfair competition are public problems ill-suited for traditional adjudication."²³⁰

Until now, all commentary on these issues has been purely academic. That situation may change soon. A federal suit was filed recently claiming that USCFTA unlawfully confers upon USCFTA binational panels the power to overturn rulings from the ITA and the ITC as well as U.S. court decisions involving trade disputes.²³¹ A judicial opinion will help resolve the debate, but one can easily speculate that this challenge will not be upheld.

A second interesting aspect of the panel process is the ambit of panel

The due process clause states that "[n]o person shall be deprived of life, liberty or property without due process of law." This clause requires that a litigant subject to government action be afforded the right to a hearing before a fair and impartial decision-maker and the opportunity to be heard "in a meaningful time and in a meaningful manner."

Id. at 326 (citing U.S. Const. amend. V.; *In re Murchison*, 349 U.S. 133, 136 (1955); and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

227. *Id.* at 318. Article III of the U.S. Constitution states:

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.

....

The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority

U.S. Const. art. 3, §§ 1, 2. The issue then becomes whether the withdrawal of ADD/CVD appeals to binational panels violates the provisions of this article by removing cases that arose under federal statute from Article III tribunals. *Albright*, *supra* note 223, at 328.

228. *See, e.g.*, Baker, *supra* note 35, at 3-6; Huston, *supra* note 224, at 552; Christenson & Gambrel, *supra* note 170, at 441.

229. *Albright*, *supra* note 223, at 329. The author notes that there is a "public rights" exception to Article III review, but this situation involves importers who "may be subject to an unconstitutional taking of his property by the government." *Id.* at 329, 341.

230. Christenson & Gambrel, *supra* note 170, at 418.

231. U.S.—*Canada FTA Dispute Procedures Challenged In District Court Action*, 9 Int'l Trade Rep. (BNA) 1498 (Aug. 26, 1992).

investigations. The only issue that may be appealed is whether the investigating authority properly applied the law and conformed with common administrative practice.²³² And since neither the applicable law nor the final determination can be appealed, the pertinent question is not whether the decision is right but whether the decision is conceivable given the information available. An excellent reiteration of this circumstance was presented in a recent USCFTA Panel decision:

When reviewing the evidence on the record, the Panel must decide whether the record evidence is sufficient to support the Final Results, *not* whether the Panel would reach the same conclusions Commerce did. Where there is substantial evidence on the record, and conflicting conclusions can be drawn therefrom, this Court will defer to the judgment of the agency, even if the agency's decision is not in accord with the decision the court would have adopted had it reviewed the record *de novo*.²³³

The criteria for review may be limited but the analysis is not. USCFTA panel decisions have been complex and determined.²³⁴ These decisions do not, however, have precedential effect on either a national level or on future panel decisions.²³⁵ One enthusiastic panelist does not agree that should be the case: "While the Panel is not bound to follow [an earlier] decision, it should be a persuasive—even a compelling—indication of this Panel's role and duty on the instant review."²³⁶

232. NAFTA (Proposed), *supra* note 2, art. 1904(2). This subsection reads in pertinent part:

An involved Party may request that a panel review . . . a final antidumping or countervailing duty determination of a competent investigating authority of a Party to determine whether such determination *was in accordance with the antidumping or countervailing duty law of the importing Party*.

Id. (emphasis added). An explanation of the law that applies is provided *infra* note 171. Article 1911 defines what constitutes an administrative record and stipulates that the record entail all information accumulated by the investigating authority including government memoranda, transcripts of hearings or *ex parte* proceedings when kept, all public notices, and copies of any determinations made by the investigating authority. *Id.* art. 1911.

233. Canadian Pork Council and Its Members, Panel No. USA-91-1904-04 (United States—Canada Free Trade Agreement Binational Panel Review 1992), *available in* LEXIS, ITRADE Library, USCFTA File, 1992 FTAPD LEXIS 6, at *9 (emphasis added).

234. *See, e.g., id.*

235. USCFTA, *supra* note 4, art. 1904(9)-(11).

236. Beer from the United States of America, Panel No. CDA-91-1904-02 (United States—Canada Free Trade Agreement Binational Panel Review 1992) (concurring opinion), *available in* LEXIS, ITRADE Library, USCFTA File, 1992 FTAPD LEXIS 5,

A third feature of the Chapter 19 process is that it does not provide for resolutions of purely private commercial disputes.²³⁷ Panels are initiated at government request, they are comprised of government appointees, and they respond to government agencies.²³⁸ Essentially, the chapter entails government monitoring of government trade restraint activities, private disputes must be handled outside the confines of the Agreement.

In summary, NAFTA-19 is very nearly a duplication of USCFTA-19. NAFTA-19 will cover the same offenses, it will function in the same way, and it will provide similar results. Two good explanations can be advanced for reiterating USCFTA-19 provisions: first is an apparent consensus that USCFTA-19 results have been satisfactory, and second is the realization that a substitute system for admonishing unfair dumping and subsidization is not a realistic option at this time given the economic and social differences that remain between contracting Parties.

V. SPECULATING ON PROBABLE OUTCOMES (The Solutions)

Two of the operational aspects discussed above, a panel's limited review and Party to Party application, indicate that NAFTA Chapter 19 panels will serve only as a watchdog of enforcement agency procedures. This proposition has substantial merit when dealing with a country whose administrative enforcement practices have been largely obscured and uncertain. But when pondering whether Chapter 19 will do anything at all to promote a more equitable trade regime or a less protectionist free trade environment, the conclusion can only be that it will not.²³⁹ In fact, it is not hard to imagine that a natural consequence of this action will be to encourage the use of ADD/CVD laws as protectionist devices. As tariffs are reduced²⁴⁰ and trade increases, the use of non-abraded NTBs could go up proportionately. Because any determination can be challenged, favorable or unfavorable,²⁴¹ and a quicker, cheaper review procedure is available, qualifying importers have nothing to lose in pursuing near-frivolous claims.

This last proposition is not supported by evidence gathered following implementation of the USCFTA. As of mid-1991, "[p]anel review has been requested in approximately one-half to two-thirds of all ITA and ITC decisions

at *56.

237. Kennedy, *supra* note 166, at 918.

238. See *supra* notes 168-82 and accompanying text.

239. NAFTA's Chapter 19 provides only for an accelerated, more efficient ADD/CVD review process and for monitoring future changes to existing legislation. See *supra* notes 168-82 and accompanying text. Changes either to existing law or to the application of those laws is not addressed by this Agreement. Therefore, parties from any involved country can be expected to exploit the protectionist potential offered by current law just as they have done during prior years.

240. NAFTA (Proposed), *supra* note 2, *passim* (calling for graduated reductions on various commodities over the next fifteen years).

241. *Id.* art. 1904(2).

eligible for review—about as frequently as parties seek judicial review in trade cases not covered by the FTA.²⁴² Nevertheless, two factors must be considered in light of the NAFTA.

First, the tariff reductions mandated by the USCFTA are graduated over a fifteen year period, depending upon the product involved.²⁴³ Therefore, the true consequence of those reductions will not be realized for some time. Second, the trilateral NAFTA involves tariff reductions on imports originating in a country already the target of frequent NTB applications.²⁴⁴ Again, full tariff reductions will not be realized for up to fifteen years²⁴⁵ so the complete effect of those reductions will not be fully understood for years.

The NAFTA-19 equation will, in fact, provide a quicker, more aggressive evaluation of ADD/CVD decisions.²⁴⁶ Therefore, in its problem-solver role, the NAFTA Chapter 19 panel process has the potential to improve the review process by forcing a more consistent, even-handed application of ADD/CVD laws. The process also will guarantee proper enforcement of current laws and will bring government representatives together to function in a single settlement routine.²⁴⁷ Mexican complainants will have ready access to review panels, consisting partially of Mexican nationals, to examine U.S. law and administrative practice. U.S. complainants will exploit the same privilege. This bodes well for reducing suspicion about trading practices and interjecting cooperation between trade control agencies.

There are also unfortunate aspects to consider, however. For one thing, Chapter 19 will do nothing to change the ADD/CVD laws; the law will continue to apply indiscriminately in some cases and contrary to overall consumer welfare in others. As one commentator put it: "Chapter 19 binational review panels are very much analogous to old wine in a new bottle."²⁴⁸ Additionally, whereas Chapter 19 panels will monitor legislative changes in ADD/CVD laws and assure agency adherence to current law, they will not alter existing policy or provide for *de novo* review to confirm information integrity or thoroughness.

242. Baker, *supra* note 35, at 6.

243. USCFTA, *supra* note 4 (mandating gradual tariff reductions over various periods depending upon the commodity involved).

244. Discussed *supra* at note 112.

245. NAFTA (Proposed), *supra* note 2, *passim*.

246. Baker, *supra* note 35, at 22 (summarizing USCFTA Chapter 19 utility).

247. See *supra* notes 168-82 and accompanying text. Chapter 19 review panels will be composed of participants from each of the affected countries when requested to review any particular dispute.

248. Kennedy, *supra* note 13, at 761.

VI. CONCLUSION

In a truly free trade area producers must be allowed to peddle their merchandise unfettered by biased government action. Mexico, Canada, and the United States will not be operating in a "free" trade environment for some time but preparations must begin today for allowing true competition to control markets instead of government sponsored protectionism.

Natural competitive advantage gives some producers benefits over others. Those advantages should not be nullified by hostile intervention. True, ADD/CVD laws target unfair competition, but in their zeal they also affect other fair competition strategies. Work must continue on finding a substitute system that can be applied to enhance overall consumer welfare.

NAFTA Chapter 19's settlement mechanism hits the target but misses the bulls-eye. For instance, one can ask what the true nature of an ADD/CVD dispute might be. If, "Was the law applied correctly?" is the question, Chapter 19 panels can answer it. However, if, "Should the law have applied at all?" is at issue, Chapter 19 provides no guidance. Unfortunately, the latter is really the relevant question when advocating open markets and free trade.

The assumption underlying Chapter 19 procedures is that antidumping duties and countervailing duties are indeed necessary, fair retaliatory measures. If one assumes they are then the next question is, "Are the optimal results being achieved after those laws are applied and the order is challenged?" The answer: Chapter 19 will operate to optimize those results. However, Chapter 19's weakness lies in the fact that it is predicated on an untenable protectionist position. The variables this equation relies upon are remnants of an earlier, less hospitable era—variables that are arguably inappropriate in a free trade agreement.

The bottom line is this: the new equation and ensuing solutions generally will be a welcome improvement over existing review routines. And if better ADD or CVD appeals is the only goal, then that should be realized. However, this strategy falls short of either addressing the underlying problems or encouraging less protectionism, which, arguably, are both more appropriate goals to accommodate a true North American free trade area.



