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Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond*

Gilbert R. Winham**

Heather A. Grant***

The use of antidumping (AD) and countervailing duties (CVDs) to prevent or remedy unfair trade practices has been an important issue during recent multilateral and regional trade negotiations. It is a particularly difficult issue because parties differ on the role unfair trade remedies should play in trade policy. One approach is to view these measures as an attempt to remedy or offset unfair trade practices by foreign governments or exporters. Alternatively, exporters may view these measures as politically motivated contingency protection, or as "measures of 'stand-by protection' or techniques of administered trade."¹ Unfair trade remedies are provided on the initiative of specific

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1. RODNEY DE C. GREY, UNITED STATES TRADE POLICY LEGISLATION: A CANADIAN VIEW 8 (1982).

industries on the basis of a complicated body of trade regulations. The system is discrete and highly legalistic, and is an alternative to a more general approach to trade policy based on multilateral tariff reductions or codes of conduct.

Because parties differ on the role unfair trade remedies should play in trade policy, these remedies have been applied unevenly among the Contracting Parties (CPs) to the General Agreement on Tariffs and Trade (GATT).² The result is an "uneven playing field" among trading partners,³ and it has become evident that more standardized rules and procedures governing the application of these remedies are required. A considerable step in the direction of greater standardization has been achieved in the Antidumping and Subsidies Codes negotiated in the Uruguay Round. Elsewhere, other measures have been considered in regional agreements to achieve the desired security of access to a trading partner's market in order to foster economic growth in a competitive environment.

The application of AD and CVDs by the United States was one of the major Canadian grievances that surfaced during the negotiation of the Canada-U.S. Free Trade Agreement (FTA).⁴ Initially, Canada tried unsuccessfully to gain a blanket exemption from U.S. trade remedy laws. As an alternative, Canada placed considerable emphasis on negotiating a dispute settlement mechanism into the FTA that would reduce Canada's exposure to the use of AD and CVDs by the United States.

The dispute settlement mechanism ultimately incorporated into Chapter 19 of the FTA provides for judicial-like review of AD and CVD actions by binational panels.⁵ More specifically, it provides exporters and importers the option of taking a disputed

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

3. J. Michael Finger, *Antidumping and Antisubsidy Measures*, in *THE URUGUAY ROUND: A HANDBOOK ON THE MULTILATERAL TRADE NEGOTIATIONS* 153, 155 (J. Michael Finger & Andrzej Olechowski eds., 1987).

4. Canada-United States Free Trade Agreement, Jan. 1, 1989, 27 I.L.M. 281 [hereinafter FTA]. For a discussion of Canadian grievances regarding the application of AD and CVDs by the United States, see GILBERT R. WINHAM, *TRADING WITH CANADA: THE CANADA-U.S. FREE TRADE AGREEMENT* 38 (1988).

5. FTA, *supra* note 4, art. 1904(2). Article 1904(2) states, in pertinent part:

Either Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of either Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.

Id.

AD or CVD action to a binational panel with binding powers in lieu of seeking judicial review by a domestic court.⁶ Because individuals from both the United States and Canada sit on the panels, it is generally assumed that binational panels promote greater consistency and objectivity in AD and CVD practices. Although the panels are not authorized to create substantive law, the review mechanism helps to ensure that each nation is applying its own laws fairly and consistently. Determinations of dumping and subsidization can be different in each country, but will be upheld as long as the administrative agency made its determination in accordance with domestic law.⁷ Owing to these various characteristics, Chapter 19 has been one of the most unique dispute settlement mechanisms developed in recent years.

The success of the FTA Chapter 19 mechanism leads somewhat obviously to its consideration as a model for other trade agreements. What remains at issue is whether this mechanism can be applied effectively in a considerably broader context, such as a hemispheric or multilateral trade agreement, given the differences that exist between the legal and administrative practices of the prospective negotiating parties. The purpose of this Article is to examine some of the obstacles and implications of adopting a Chapter 19 dispute settlement mechanism in other trade agreements. After examining the operation of Chapter 19 in the FTA, the Article focuses on the incorporation of Chapter 19 into the North American Free Trade Agreement (NAFTA).⁸ The extension of Chapter 19 to Mexico in NAFTA raised some of the problems that may later be encountered either in extending NAFTA to new parties or in establishing a Chapter 19-type mechanism in other trade agreements.

To appreciate the significance of a Chapter 19 mechanism, it is first necessary to look at the historical development of AD and CVD actions in international trade. The intent of this review is twofold. First, it serves to set out the basic tenets underlying the creation of these measures to remedy unfair trade practices. Second, it illustrates the impact that the use of unfair trade remedies by the United States had on Canada, and indicates why Canada initially sought a binding dispute settlement mechanism on AD and CVDs.

6. *Id.*

7. *Id.*

8. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mexico-Canada (Draft of Sept. 6, 1992) [hereinafter NAFTA].

I. HISTORY AND DEVELOPMENT OF AD AND CVDs

A. AD AND CVDs UNDER THE GATT

One of the primary objectives of the GATT is to promote secure access to foreign markets so that businesses will feel confident that they can export their products to other countries without encountering any unfair or unforeseen impediments in competing for a portion of the consumer market.⁹ Dumping and unrestricted subsidization have long been recognized as serious obstacles to this objective. Dumping is generally understood as the sale of goods on a foreign market at a price which is less than that at which the product is sold on the seller's domestic market. A subsidy is the granting of a non-commercial benefit, usually by the government, at any stage of a good's manufacture, production or export.

A general concern about the harmful effects of dumping and subsidization resulted in their inclusion in the GATT negotiations in 1947. These negotiations concluded with the insertion of a remedy under Article VI of the final Agreement, which allows CPs to the GATT to take unilateral action to offset the effects of dumping or subsidies on their domestic industries through the use of AD and CVDs.¹⁰

GATT Article VI allows the application of an AD duty against an imported good where it is being dumped on the foreign market and is causing or threatening to cause "material injury to an established industry . . . or materially retards the establishment of a domestic industry."¹¹ A CVD may be applied to an imported good to offset the effects of a foreign subsidy where the subsidy causes, or threatens to cause, injury to the domestic industry or the potential development of such industry.¹²

The GATT provisions for AD and CVDs represented minimal commitment to any real control over these practices. Over time, and with increased use, AD and CVDs were arguably used

9. The preface to the GATT states, in pertinent part, that the Contracting Parties are:

desirous of . . . entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce. . . .

GATT pmbl.

10. ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 6 (John H. Jackson & Edwin A. Vermulst eds., 1989).

11. GATT art. VI:1.

12. *Id.* art. VI:6(a).

less as remedies and more as protectionist devices in themselves. This realization paved the way for the creation of the Antidumping and Subsidies Codes during the Kennedy Round in 1967 and the Tokyo Round in 1979. The purpose of these Codes was to define more precisely the conduct expected of CPs in their investigation and assessment of dumping and subsidy practices so that unfair usage would not jeopardize the free flow of goods.

The first Antidumping Code, concluded in 1967, was replaced in 1979 by a new Code,¹³ which sets out more explicit requirements governing a country's conduct of its antidumping and injury investigations, and the application of duties or price undertakings. The Tokyo Round Code has been largely successful in achieving a greater standardization of antidumping practices among CPs.¹⁴

In contrast, the Subsidies Code,¹⁵ negotiated during the Tokyo Round, has not been as useful in standardizing world practice. Like the Antidumping Code, the Subsidies Code imposes some greater procedural requirements upon signatories with respect to employing subsidies and assessing CVDs. However, because of differing views among trading nations on the legitimacy of subsidies in domestic economies, and hence a lack of cooperative support, the Subsidies Code is essentially weak international law. Moreover, prior to the Uruguay Round, the Subsidies Code was not incorporated into the GATT, although signatories were obliged to implement its provisions into their domestic laws.

While dumping is generally considered an unfair practice, not all forms of subsidies are necessarily considered unfair. Thus, not all subsidies are countervailable. As recognized in the preamble to the Subsidies Code, subsidies have a dual nature: they can be instrumental in promoting important domestic policy objectives, while at the same time possibly harming a foreign industry's competitiveness.¹⁶ The Code's objective in defining

13. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 4919 *reprinted in* BISD 26th Supp. 171 (1979).

14. Finger, *supra* note 3, at 156.

15. Agreement on Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513 *reprinted in* BISD 26th Supp. 56 (1979).

16. *Id.* The preamble states, in pertinent part:

Recognizing that subsidies are used by governments to promote important objectives of national policy,

when and how a subsidy may be countervailed is to balance the harm of a subsidy against the injurious effects of a CVD.

Among CPs, there is considerable disparity in the application of subsidies and CVDs.¹⁷ The United States is by far the most important country on this matter. The U.S. government strongly opposes the use of subsidies. In an effort to protect U.S. producers from competition with subsidized imports, the United States has been the most frequent user of the CVD mechanism.¹⁸ As a result, subsidies and CVDs are important trade issues for nations that have extensive trade with the United States.

B. U.S. POLICY ON AD AND CVDs

The United States is a signatory to both Tokyo Round Codes and has incorporated the provisions of the Antidumping Code and the Subsidies Code into U.S. law through the Trade Agreements Act of 1979¹⁹ (TAA). However, the TAA also contained provisions which made it easier to bring AD and CVD actions.

The TAA restructured the U.S. unfair trade remedy system in a politically significant manner. From 1954 until the enactment of the TAA, bureaucratic responsibility for the trade remedy system had been divided between the Treasury Department, which made determinations of dumping or subsidy, and the International Trade Commission (ITC), which handled determinations of injury. In 1979, responsibility for the former was shifted to the International Trade Administration of the Department of Commerce. Because that department was perceived as being more sympathetic to domestic producers than the Treasury Department had been, this change was widely regarded as a move to facilitate the use of trade remedies by U.S. constituents.²⁰

Recognizing also that subsidies may have harmful effects on trade and production,

Recognizing that the emphasis of this Agreement should be on the effects of subsidies and that these effects are to be assessed in giving due account to the internal economic situation of the signatories concerned as well as to the state of international economic and monetary relations . . .

Id.

17. J. Michael Finger & Julio Nogués, *International Control of Subsidies and Countervailing Duties*, 1 WORLD BANK ECON. REV. 707, 712 (1989).

18. Between 1980 and mid-1986, the United States initiated 281 CVD actions. THE URUGUAY ROUND, *supra* note 3, Annex 8.

19. Trade Agreements Act of 1979, Pub. L. No. 93-39, § 1(a), July 26, 1979, 93 Stat. 144 (codified as amended at 19 U.S.C. § 2501 *et seq.* (1988)) [hereinafter TAA].

20. GREY, *supra* note 1, at 56.

The main impact of the TAA on CVDs was to incorporate the Tokyo Round Subsidies Code into U.S. legislation.²¹ The major change was to introduce a material injury requirement into U.S. CVD practice. The obligation to demonstrate injury on products coming from Subsidies Code signatories was an important change in U.S. law. However, it appears that the requirement of "material" injury has not been significant in practice.²²

Greater transparency in the rules and regulations, as well as new procedural requirements incorporated into the TAA, made it easier for domestic producers in the United States to petition for AD or CVD actions, and to seek review of those actions through the judicial system.²³ This has produced a sharp increase in the number of actions launched by the United States

21. Prior to the TAA, the Trade Act of 1974, Pub. L. No. 93-618, tit. I, §§ 402, 407, 409, Jan. 3, 1975, 88 Stat. 1978 (codified as amended at 19 U.S.C. §§ 2101-2487 (1988)), had expanded CVD procedures in U.S. law, especially regarding judicial review. The Act provided for a right to request judicial review by a Customs Court, which later became the Court of International Trade (CIT). Manufacturers and producers in the United States were given standing to make such a request. Previously, only importers had that right. Additionally, parties were given the right to have judicial review of negative findings and to challenge the amount of a CVD finding in addition to the finding itself.

The Trade Act of 1974 both facilitated the use of CVDs and improved the procedural safeguards associated with those procedures. For example, writing about the pre-1974 period, Stanley Metzger noted,

[o]ne of the most striking aspects of countervailing duty administration in the United States is the almost total lack of procedural safeguards in official proceedings. Neither statute, nor regulations make any provision for hearings and the usual ancillary procedures according substantial elements of procedural due process to parties or countries affected by a countervailing duty imposition. The lack of procedural safeguards is peculiarly disturbing in view of the very great discretion delegated to the secretary of the treasury and, through him, to the Bureau of Customs.

STANLEY D. METZGER, *LOWERING NONTARIFF BARRIERS: U.S. LAW, PRACTICE AND NEGOTIATING OBJECTIVES* 105 (1979).

22. Material injury was defined in the TAA as "harm which is not inconsequential, immaterial or unimportant." TAA § 771(7)(A), 93 Stat. at 178 (current version at 19 U.S.C. § 1677(7)(a) (1988)). Washington trade lawyer Matthew Marks has observed: "I can only conclude . . . that the substitution of a material injury standard for the prior standard of simple injury under the Trade Act of 1974 has had little, if any, effect on the Commission's administration of the Anti-dumping Act and countervailing duty law to date." GREY, *supra* note 1, at 46 (citing the text of letter of 31 July 1980 of Matthew Marks to Rodney Grey).

23. See Matthew J. Marks, *Recent Changes in American Law on Regulatory Trade Measures*, 2 *WORLD ECON.* 427 (1980). Among the changes to CVD procedures noted by Marks are shortened time periods for the agency to reach decisions, and provision for the use of "best information available," which, as Marks notes, "traditionally, has been a euphemism for the allegations supplied in the petition." *Id.* at 432. Marks states, "Given the strong Congressional criticism of the Treasury Department's recent administration of the unfair-trade laws . . . it

since the passage of the TAA in 1979 (and the Trade Act of 1974). Prior to 1974, the United States only occasionally resorted to AD or CVD actions. Between 1934 and 1974, approximately forty-one CVD orders were issued, roughly one a year.²⁴ In contrast, the United States initiated 281 CVD investigations from 1980 to 1986.²⁵ The United States initiated eleven new CVD actions against Canada alone from 1980 to 1986.²⁶

The use of trade remedies increased worldwide in the 1980s, but whereas the use of AD duties is fairly evenly distributed among trading nations, CVDs are principally a U.S. policy instrument.²⁷ As aptly described by Patrick Messerlin, "[t]o the United States, the [Subsidies] [C]ode is an instrument to control subsidies. To the rest of the world, it is an instrument to control U.S. countervailing duties."²⁸

II. THE CANADA-UNITED STATES FREE TRADE AGREEMENT

In view of the frequent use by the United States of unfair trade remedies during the 1980s, especially countervailing duties, Canada recognized the need to achieve more secure access to the U.S. market, given its high dependence on trade with that country and the likelihood of its increased dependence in the future. Security of access, therefore, became one of the major goals pursued by Canada in the FTA negotiations. During the negotiations, Canada originally hoped to achieve an exclusion from the scope of U.S. unfair trade remedy laws. However, the United States never considered this proposal a serious option. Canada's alternate suggestion, that a list of "acceptable" and

would seem likely, in situations where all the facts are not available, that doubts will be resolved in favour of the petitioner." *Id.* at 433.

24. Michael M. Hart, *The Future on the Table: The Continuing Negotiating Agenda under the Canada-United States Free Trade Agreement*, in *LIVING WITH FREE TRADE: CANADA, THE FREE TRADE AGREEMENT AND THE GATT* 67, 97 (Richard G. Dearden et al. eds, 1989).

25. THE URUGUAY ROUND, *supra* note 3, at 259.

26. *Id.* at 260.

27. Between 1980 and 1986, AD actions initiated by three GATT CPs were as follows: United States 350; EC 280; and Canada 230. *Id.* at 265. CVD actions initiated over the same period were: United States 281; EC 7; and Canada 11. *Id.* at 262.

28. Finger, *supra* note 3, at 156 (quoting Patrick Messerlin, *Public Subsidies to Industry and Agriculture and Countervailing Duties* (paper prepared for the European Meeting on the Position of the European Community in the New GATT Round October 2-4, 1986)).

"unacceptable" subsidies be established by the parties, similarly came to an *impasse*.

Canada's lack of success in negotiating the inclusion of either of these proposals into the FTA led it to accept an interim dispute settlement mechanism based on binational panel review of AD and CVD actions.²⁹ Canada believed that this mechanism would provide some indirect control over the use of U.S. trade remedy laws against Canadian goods. For Canada, the mechanism was fundamental to closing a deal. Had the proposal been rejected by the United States, Canada would not have signed the Agreement. Only hours before the deadline, the United States agreed to a binding dispute settlement mechanism covering AD and CVDs.

Dispute settlement on AD and CVDs is included in Chapter 19 of the FTA. The Chapter contains three parts. First, the parties agreed to continue negotiating on dumping and subsidy issues, and to establish alternative rules in seven years if possible.³⁰ Although the parties created a Working Group to pursue this task,³¹ both countries agreed to negotiate issues of

29. The idea for binational review was first proposed by Representative Sam Gibbons, chairman of the Trade Subcommittee of the Ways and Means Committee of the U.S. House of Representatives. It was enthusiastically accepted by the Senate Finance Committee which had strongly opposed any attempt to grant exceptions for Canada from U.S. trade remedy laws. See WINHAM, *supra* note 4, at 42.

30. FTA, *supra* note 4, art. 1906. Article 1906 states:

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 this Chapter shall be extended for a further two years. Failure to agree to implement a new regime at the end of the two-year extension shall allow either Party to terminate the Agreement on a six-month notice.

Id.

31. *Id.* art. 1907. Article 1907 states:

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 subsidies; and
 - c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.
2. The Working Group shall report to the Parties as soon as possible. The Parties shall use their best efforts to develop and implement the substitute system of rules within the time limits established in Article 1906.

Id.

dumping and subsidy/countervailing duties in the multilateral Uruguay Round in *lieu* of bilateral talks.

Second, the parties agreed that amendments to either country's AD or CVD laws would be subject to constraints of notification and consultation, and that such amendments would be consistent with relevant provisions of the GATT, other multilateral accords and the FTA itself.³² Additionally, the parties agreed to submit proposed legislative changes to a binational panel for an advisory opinion on the consistency of the changes with existing obligations under international law.³³

Third, the parties established binational panels to replace judicial review by domestic courts of final AD or CVD determi-

32. *Id.* art. 1902(2). Article 1902(2) 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 the other Party only if such application is specified in the amending statute;
- b) the amending Party notifies the other Party 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 the other Party, consults with the other Party prior to the enactment of the amending statute; and
- d) such amendment, as applicable to the other Party, is not inconsistent with:

- i) the *General Agreement on Tariffs and Trade* (GATT), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the Antidumping Code), or the *Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* (the Subsidies Code), or

- ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalizing of trade between the two countries while maintaining effective disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

Id.

33. *Id.* art. 1903(1). Article 1903(1) states that:

A Party may request in writing that an amendment to the other Party's antidumping statute or countervailing duty statute be referred to a panel for a declaratory opinion as to whether:

- a) the amendment does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of Article 1902; or
- b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of Article 1902. Such declaratory opinion shall have force or effect only as provided in this Article.

Id.

nations by national agencies.³⁴ Each party agreed to retain its own AD and CVD practices³⁵ — which were fairly similar in any case — and to make available binational panels to persons who would otherwise have been entitled to judicial review under domestic law.³⁶ The panel's mandate is to consider the administrative record of the case challenged and decide generally whether the final determination has been made in accordance with the applicable domestic law.³⁷

Panels are composed of five members chosen from a roster of trade experts, primarily lawyers, established in each country.³⁸ Two panelists are selected by each country while the fifth member is chosen jointly, or, where there is no agreement on the final member, by lot.³⁹ In practice, the fifth member's nationality has alternated between the two countries from one panel to the next.

The standard of review to be applied by the panel is the standard applicable in the country where the AD or CVD action was taken.⁴⁰ In Canada, the test is whether the agency: (a)

34. *Id.* art. 1904.

35. *Id.* art. 1902(1). Article 1902(1) states that:

Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

Id.

36. *Id.* art. 1904(2). Article 1904(2) states, in pertinent part:

Either Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of either Party to determine whether such determination was *in accordance with the antidumping or countervailing duty law of the importing Party*. . . .

Id. (emphasis added). Subsection (3) adds that: "[t]he Panel shall apply . . . 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. art. 1904(3).

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

38. FTA, *supra* note 4, Annex 1901.2.

39. *Id.*

40. *Id.* art. 1904(3). Article 1904(3) of the FTA states that, "[t]he Panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." *Id.* Article 1911 of the FTA defines the standard of review:

standard of review means the following standards, as may be amended from time to time by a Party:

- a) in the case of Canada, the grounds set forth in section 28(1) of the *Federal Court Act* with respect to all final determinations; and
- b) in the case of the United States of America,

failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; (b) erred in law in making its decision or order, whether or not the error appears on the face of the record; or (c) based its decision or order on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it.⁴¹ In the United States, the test is whether the agency's decision is unsupported by substantial evidence on the record, or is otherwise not in accordance with domestic law.⁴²

It is important to note that the panels are not authorized to create substantive law. Rather, their determinations must be consistent with the laws of the importing country.⁴³ Conse-

-
- i) the standard set forth in section 516A(b)(1)(B) of the *Tariff Act of 1930*, as amended, with the exception of a determination referred to in (ii), and
 - ii) the standard set forth in section 516A(b)(1)(A) of the *Tariff Act of 1930*, as amended, with respect to a determination by the United States International Trade Commission not to initiate a review pursuant to section 751(b) of the *Tariff Act of 1930*, as amended.

Id. art. 1911.

41. Federal Court Act, R.S.C., ch. F-7, § 28.1 (1985) (Can.). Under NAFTA, the applicable standard of review is amended and adopted from section 18.1(4) of the Federal Court Act, which applies the following test,

[whether the agency]:

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
- (e) acted, or failed to act, by reason of fraud or perjured evidence; or
- (f) acted in any other way that was contrary to law.

Federal Court Act, S.C., ch. F-7 (1985), *amended by* ch. 8, 1990 S.C. (Can.).

42. The standard of review applicable in the United States is adopted from section 516A(b)(1) of the *Tariff Act of 1930*. *Tariff Act of 1930*, ch. 497, 46 Stat. 687 (1930) (codified as amended at 19 U.S.C. § 1516a (1988)). See generally Gary N. Horlick & F. Amanda DeBusk, *The Functioning of FTA Dispute Resolution Panels*, in *NEGOTIATING AND IMPLEMENTING A NORTH AMERICAN FREE TRADE AGREEMENT 1* (Leonard Waverman ed., 1992); Stewart Abercrombie Baker, *Antidumping and Countervailing Duty Law*, in K.R. SIMMONDS & D.J. MUSCH, *NORTH AMERICAN FREE TRADE AGREEMENT: DISPUTE SETTLEMENT* (forthcoming, Oceana Publications 1994).

43. FTA, *supra* note 4, art. 1904(2). Article 1904(2) states that: "[e]ither Party may request that a panel review . . . a final antidumping or countervailing duty determination . . . in accordance with the antidumping or countervailing duty law of the importing Party." *Id.* (emphasis added).

quently, determinations of dumping and subsidization can be arrived at differently in each country, but the specific determination will be upheld as long as it was made in accordance with domestic law.

Review of a panel's decision is very limited. There is no appeal mechanism in the FTA to challenge a panel's findings on the grounds of legal or factual error. However, provision is made for extraordinary challenges. This provision is invoked only where: (1) there are allegations of gross misconduct, bias, serious conflict of interest or other material violation of the rules of conduct by a panelist, or there is a serious departure from a fundamental rule of procedure by the panel, or if the action by the panel is manifestly in excess of its powers, authority or jurisdiction; and (2) any of the actions outlined above materially affected the panel's decision or threatened the integrity of the review process.⁴⁴

Through October 1993, the parties had initiated forty-four Chapter 19 cases and two "extraordinary challenges."⁴⁵ Of these cases, twenty-eight were directed against U.S. agencies (i.e., the Department of Commerce (DOC) or the International Trade Commission (ITC)).⁴⁶ Eighteen of these cases have been

44. *Id.* art. 1904(13). Article 1904(13) sets forth the circumstances in which the extraordinary challenge procedure may be used. FTA Annex 1904.13 details the procedure to be followed in an extraordinary challenge. *Id.* Annex 1904.13.

45. U.S.-CAN. FREE TRADE AGREEMENT BINATIONAL SECRETARIAT, U.S. SECTION, FTA DISPUTE SETTLEMENT (CHAPTERS 18 & 19) STATUS REPORT FOR OCTOBER 1993 (1993) [hereinafter FTA STATUS REPORT]. The two cases that were reviewed by an Extraordinary Challenge Committee were: *Fresh, Chilled and Frozen Pork from Canada* ECC-91-1904-01 USA (June 14, 1991) and *Live Swine from Canada* ECC-93-1904-01 USA (Apr. 8, 1993). *Id.*

46. FTA STATUS REPORT, *supra* note 45. The following cases have been initiated against U.S. agencies: *Certain Softwood Lumber Products from Canada* USA-92-1904-01 (active); *Certain Softwood Lumber Products from Canada* USA-92-1904-02 (active); *Pure and Alloy Magnesium from Canada* USA-92-1904-03 (active); *Pure and Alloy Magnesium from Canada* USA-92-1904-04 (active); *Magnesium from Canada* USA-92-1904-05/06 (active); *Certain Cold-Rolled Carbon Steel Flat Products from Canada* USA-93-1904-01 (active); *Certain Hot Rolled Carbon Steel Flat Products from Canada* USA-93-1904-02 (active); *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada* USA-93-1904-03 (active); *Certain Cut-To-Length Carbon Steel Plate from Canada* USA-93-1904-04 (active); *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada* USA-93-1904-05 (active); *Red Raspberries from Canada* USA-89-1904-01 (Dec. 15, 1989); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-02 (Jan. 25, 1990); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-03 (Mar. 7, 1990); *Dried, Heavy, Salted Codfish from Canada* (terminated); *Replacement Parts for Self-Propelled Bituminous Paving Equipment*

completed, while ten remain active.⁴⁷ Sixteen cases have been initiated against Canadian agencies (i.e., Revenue Canada (RC) or the Canadian International Trade Tribunal (CITT)).⁴⁸ Five of these cases have been completed, while eleven remain active. Two of the sixteen cases against Canadian agencies were launched by a Canadian petitioner, thirteen were launched by U.S. petitioners, and the remaining case was launched by a U.S.

from Canada USA-89-1904-05 (terminated); Fresh, Chilled and Frozen Pork from Canada USA-89-1904-06 (Sept. 28, 1990); New Steel Rail, Except Light Rail, from Canada USA-89-1904-07 (June 8, 1990); New Steel Rail, Except Light Rail, from Canada USA-89-1904-08 (Aug. 30, 1990); New Steel Rails from Canada USA-89-1904-09/10 (Aug. 13, 1990); Fresh, Chilled or Frozen Pork from Canada USA-89-1904-11 (Jan. 22, 1991); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada USA-90-1904-01 (May 15, 1992); Oil Country Tubular Goods from Canada USA-90-1904-02 (terminated); Sheet Piling from Canada USA-90-1904-03 (terminated); Oil Country Tubular Goods from Canada USA 91-1904-01 (terminated); Iron Construction Castings from Canada USA-91-1904-02 (terminated); Live Swine from Canada USA-91-1904-03 (May 19, 1992); Live Swine from Canada USA-91-1904-04 (Aug. 26, 1992); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada USA-91-1904-05 (terminated). Id.

47. FTA STATUS REPORT, *supra* note 45.

48. *Id.* The following cases have been initiated against Canadian agencies: *Certain Machine Tufted Carpeting Originating in or Exported from the United States of America* CDA-92-1904-01 (active); *Certain Machine Tufted Carpeting Originating in or Exported from the United States of America* CDA-92-1904-02 (active); *Gypsum Board Originating in or Exported from the United States of America* CDA-93-1904-01 (active); *Gypsum Board Originating in or Exported from the United States of America* CDA-93-1904-02 (active); *Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat-Treated or not, Originating in or Exported from the United States of America* CDA-93-1904-04 (active); *Certain Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States of America* CDA-93-1904-05 (active); *Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat-Treated or not, Originating in or Exported from the United States of America* CDA-93-1904-06 (active); and *Certain Flat-Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States of America* CDA-93-1904-07 (active); *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America* CDA-93-1904-08 (active); *Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America* CDA-93-1904-09 (active); *Certain Solder Joint Pipe Fittings Originating in or Exported from the United States of America* CDA-93-1904-10 (active); *Polyphase Induction Motors from the United States* CDA-90-1904-01 (Sept. 11, 1991); *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* CDA-91-1904-01 (Aug. 6, 1992); *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* CDA-91-1904-02 (Feb. 8, 1993); and *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America* CDA-93-1904-03 (terminated). *Id.*

producer and several Canadian importers.⁴⁹ All of the cases against U.S. agencies were brought by Canadian petitioners, although in six of these cases U.S. petitioners were also present.⁵⁰ Overall, Canadians have been the major users of Chapter 19 procedures, and the main respondents have been U.S. agencies. However, there has been a sharp rise in the number of cases initiated against Canadian agencies over the past year, totalling ten new cases launched.

The results of Chapter 19 actions are that just less than half that were reviewed by a panel (and not terminated) resulted in a remand in whole or in part;⁵¹ that is, the determination was returned to the agency for "action not inconsistent with the panel's decision."⁵² In the five Canadian cases completed, the actions of the agency were affirmed in one panel and remanded in two others, while the final two were terminated by the parties.⁵³ For the completed U.S. cases, seven were remanded, four were affirmed, and seven were terminated.⁵⁴ Excluding terminated

49. FTA STATUS REPORT, *supra* note 45. The two cases launched by Canadian petitioners against negative injury findings by the CITT are: *Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat-Treated or not, Originating in or Exported from the United States of America* CDA-93-1904-06; and *Certain Flat Hot-Rolled Carbon Steel Sheet Products Originating in or Exported from the United States of America* CDA-93-1904-07. *Id.*

50. FTA STATUS REPORT, *supra* note 45. U.S. petitioners were present in the following six cases: *Certain Softwood Lumber Products from Canada* USA-92-1904-01 (May 6, 1993); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-02 (Jan. 25, 1990); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-03 (Mar. 7, 1990); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-05 (Mar. 7, 1990); *New Steel Rails from Canada* USA-89-1904-09/10 (Aug. 13, 1990); and *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-90-1904-01 (May 24, 1990). *Id.*

51. See FTA STATUS REPORT, *supra* note 45.

52. FTA, *supra* note 4, art. 1904(8).

53. FTA STATUS REPORT, *supra* note 45. These cases are: *Polyphase Induction Motors from the U.S.* CDA-89-1904-01 (terminated); *Integral Horsepower Induction Motors* CDA-90-1904-01 (Sept. 11, 1991) (affirmed); *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* CDA-91-1904-01 (Aug. 6, 1992) (remanded); *Certain Beer Originating in or Exported from the United States of America by G. Heileman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia* CDA-91-1904-02 (Feb. 8, 1993) (remanded); and *Tomato Paste in Containers Larger than 100 Fluid Ounces, Originating in or Exported from the United States of America* (terminated). *Id.*

54. FTA STATUS REPORT, *supra* note 45. Cases can be remanded in whole or in part, hence a "remand" may be a relatively insignificant action. The seven

cases, approximately similar results in the United States were produced by the Court of International Trade in the period prior to the FTA.

On balance, the judgment of many jurists is that the Chapter 19 panel process has worked effectively. In a lengthy review of dispute settlement in the first two years of the FTA, Professor Andreas Lowenfeld of New York University wrote that: "[a]ll things considered, the unique binational dispute settlement mechanisms created by the Canada-United States Free Trade Agreement have worked extraordinarily well."⁵⁵ In particular, Lowenfeld notes that the panels have conscientiously applied the law of the country in which the case arose.⁵⁶ Panel decisions have not reflected a bias for or against trade remedy legislation. Most important, panels have not reflected nationalistic behavior, for panelists usually have dealt objectively with legal issues and have not attempted to push a Canadian or American approach to the cases.

Given the success of the FTA Chapter 19 mechanism, it must be given serious consideration as a means of dealing with AD and CVDs in other trade agreements. The extension of Chapter 19 to Mexico in NAFTA provides a useful case study of how this might be achieved and the problems which might be encountered.

III. AD AND CVDs UNDER NAFTA

Like Canada in the FTA negotiations, Mexico aimed to achieve greater and more secure access to the U.S. market by

following U.S. cases were remanded in whole or in part to the U.S. agency: *Red Raspberries from Canada* USA-89-1904-01; *Fresh, Chilled and Frozen Pork from Canada* USA-89-1904-06; *New Steel Rail, Except Light Rail, from Canada* USA-89-1904-07; *Fresh, Chilled or Frozen Pork from Canada* USA-89-1904-11; *Replacement Parts for Self-Propelled Bituminous Paving* USA-90-1904-01; *Live Swine from Canada* USA-91-1904-03; and *Live Swine from Canada* USA-91-1904-04. *Id.* The four following cases were affirmed: *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada* USA-89-1904-02; *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*; *New Steel Rail, Except Light Rail, from Canada* USA-89-1904-08; and *New Steel Rails from Canada* USA-89-1904-09/10. *Id.*

55. Andreas F. Lowenfeld, *Binational Dispute Settlement under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal* (paper prepared for the Administrative Conference of the United States, December 1990) (unpublished manuscript, on file with the *Minnesota Journal of Global Trade*).

56. *Id.*

negotiating a NAFTA with the United States and Canada.⁵⁷ In recent years, Mexico has increasingly found itself at the receiving end of U.S. AD actions.⁵⁸ Between 1980 and 1990, eight AD actions were initiated by U.S. companies against Mexican producers.⁵⁹ In seeking to address the issue of trade remedies in NAFTA, the parties turned to the Chapter 19 mechanism.

However, even though the dispute settlement mechanism in Chapter 19 of the FTA has worked well in a bilateral context between Canada and the United States, it was not necessarily suitable for NAFTA. There were a variety of obstacles and concerns raised by the possible extension of the FTA's dispute settlement mechanism to Mexico. Before delving into the issues that were raised by the question of extending a Chapter 19 mechanism to NAFTA, it is useful to briefly consider the nature of Mexico's unfair trade remedy system as it existed prior to NAFTA.⁶⁰

57. MICHAEL HART, *A NORTH AMERICAN FREE TRADE AGREEMENT: THE STRATEGIC IMPLICATIONS FOR CANADA* 126-27 (1990).

58. Stephen J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. 177, 179 (1990). Mexico has not encountered the same problem with U.S. CVD actions as Canada has, because it signed the "Understanding on Subsidies and Countervailing Duties" with the United States in 1986. Pursuant to its obligations under the Agreement, Mexico substantially altered its subsidy practice. See Celia R. Siac, *Does Mexico Subsidize too Much? Perceptions versus Reality*, 36 C.D. HOWE INST. COMMENTARY 6 (1992).

59. U.S. INT'L TRADE COMM'N ANN. REP. (1980-1989). These include: *Carbon Steel Wire Rod from Argentina, Mexico, Poland, and Spain*, I.T.C. investigations 731-TA-157 through 160 (preliminary) and 701-TA-209 (preliminary) (1983); *Oil Country Tubular Goods from Argentina, Brazil, Korea, Mexico and Spain*, I.T.C. investigations 701-TA-215 through 217 (preliminary) and 731-TA-191 through 731-TA-195 (preliminary) (1984); *Welded Steel Wire Fabric, for Concrete Reinforcement from Italy, Mexico, and Venezuela*, I.T.C. investigations 701-TA-261(A), 263(A), and 264(A) (preliminary) and 731-TA-289(A) through 291(A) (preliminary) (1986); *Porcelain-On-Steel Cooking Ware from Mexico, the People's Republic of China, and Taiwan*, I.T.C. investigations 701-TA-265 (final) and 731-297-299 (final) (1986); *Certain Fresh Cut Flowers from Peru, Kenya, and Mexico*, I.T.C. investigations 303-TA-18 (final) and 731-TA-332 and 333 (final) (1987); *Portland Hydraulic Cement and Cement Clinker from Columbia, France, Greece, Japan, Mexico Republic of Korea, Spain, and Venezuela*, I.T.C. investigation 731-TA-365 through 363 (preliminary)(1986); *Certain Steel Pails from Mexico*, I.T.C. investigation 731-TA-435 (preliminary) (1986). *Id.*

60. As of this writing in December 1993, and as part of the legislative implementation of NAFTA, Mexico is amending its AD and CVD legislation to conform to its obligations under Chapter 19 of NAFTA, and especially Annex 1904.15 Schedule B.

A. THE NATURE OF MEXICO'S AD AND CVD SYSTEM

Mexico's pre-NAFTA legislation governing AD and CVD actions consisted of *The Foreign Trade Regulatory Act*⁶¹ (Act) and *Regulations Against Unfair International Trade Practices*⁶² (Regulations). The agency responsible for AD and CVD actions under that legislation was the *Secretaria de Comercio y Fomento Industrial* (SECOFI), a division of the budget and finance ministry, with the *Comisión de Aranceles y Controles al Comercio Exterior* (CACCE)⁶³ providing consultative support particularly on the issue of duty assessments.

SECOFI was empowered to conduct up to two investigations leading to provisional duty assessments and a third culminating in a final determination.⁶⁴ In order to make a positive finding, SECOFI had to determine that an unfair practice (dumping or subsidization) existed in conjunction with injury to the domestic industry.⁶⁵ Mexican importers could appeal final affirmative determinations to SECOFI in order to obtain revocation of the finding, or appeal further to the Federal Fiscal Tribunal (FFT) for judicial review.⁶⁶ In addition, the Mexican Constitution provided a supplemental remedy known as *amparo* by which the constitutionality of the administrative action could be challenged before the Federal Judicial Courts.⁶⁷ The significance of

61. *Decreto por el que se Crea la Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*, D.O., Jan. 13, 1986 [hereinafter Act]. The source of the translation is the GATT Committee on Anti-Dumping Practices, as reproduced in *REVIEW OF TRADE & INVESTMENT BY MEXICO*, 1990 USITC REP. 2275, at 4-13 [hereinafter USITC REPORT].

62. *Reglamento Contra Prácticas Desleales del Comercio Internacional*, D.O., Nov. 25, 1987 [hereinafter Regulations].

63. CACCE has been translated as the Committee on Foreign Trade Tariffs and Controls. Ernesto Rubio del Cueto, *Countervailing Duties Affecting United States-Mexican Trade*, 12 Hous. J. INT'L L. 323, 325-26 (1990).

64. Act, *supra* note 61, ch. II, arts. 11-14.

65. *Id.*, arts. 14-15; Regulations, *supra* note 62, ch. V, art. 12. "Injury" is defined in Article 1(VIII), Chapter I of the Regulations as:

the loss or impairment of a national asset or the closure of access to any licit, normal gain which one or several domestic producers representing a significant part of national production, suffer or may suffer as an immediate and direct consequence of any of the unfair international trade practices envisaged in Article 7 of the Act and in the Regulations. This concept includes impediments to the establishment of new industries or to further development of existing industries as a direct result of unfair international practices.

Regulations, *supra* note 62, ch. 1, art. 1(VIII).

66. Act, *supra* note 61, ch. III, art. 24.

67. *TRADE POLICY REVIEW MECHANISM: MEXICO*, GENERAL AGREEMENT ON TARIFFS & TRADE 102 (1993).

the *amparo* procedure and remedy will be discussed in greater detail below.⁶⁸

Mexico's AD provisions have been invoked often since 1987. Between 1987 and 1989, Mexico initiated thirty-five AD proceedings, fifteen of which were against U.S. imports.⁶⁹ The majority of cases against the United States were initiated in 1987: only two were initiated in 1988 and 1989 each, thus indicating a decline in their initiation.⁷⁰ Mexico's CVD provisions have been invoked considerably less than AD actions, as is the case with most nations.

B. TECHNICAL ISSUES RAISED BY INCORPORATING MEXICO INTO A CHAPTER 19

From an organizational perspective, there were both technical and substantive concerns raised by the potential extension of Chapter 19 to Mexico. The first technical concern was that the FTA Chapter 19 mechanism was drafted in a bilateral context rather than in a trilateral context. This raised the question of whether the mechanism would be amended to reflect trinational as opposed to binational review. Such an amendment could have taken a number of forms. For example, one option involved binational review by the parties directly involved in the dispute with the third party having a right to participate in the hearing as a litigant, but without national representation on the panel. This option required relatively minor changes to the current structure and functioning of the Chapter 19 mechanism. An alternate option involved trinational panel review, but that option may not have been as appealing because it effectively required that a non-party to the dispute would be involved in the reviewing process. This involvement could conceivably complicate rather than facilitate the decision-making process. In the end, binational dispute resolution was negotiated into NAFTA.

The second and third technical issues were more serious and involved Mexico's Constitution. The second technical concern raised by the potential extension of Chapter 19 to Mexico was that Mexico's adherence to the Calvo doctrine might render recourse to binational panels invalid under Mexican law. The Calvo doctrine provides that where legal disputes arise between national and foreign business partners, domestic remedies

68. See *infra* text accompanying notes 74-80.

69. USITC REPORT, *supra* note 61, at 4-17.

70. *Id.*

should be used to the exclusion of international ones.⁷¹ Some Latin American states, including Mexico, have adopted a provision in their constitution requiring foreigners who have been granted certain commercial rights to abstain from seeking the protection of their governments where a dispute concerning those rights arises.⁷² Because the binational panels provided for in the Chapter 19 mechanism might be perceived as granting a form of protection by a foreign government, there was a technical concern that recourse to these panels might not be valid under Mexican law.⁷³ Apparently, the Calvo clause in the Mexican Constitution did not pose a real threat to adopting binational review under NAFTA and was effectively dealt with early on in the Chapter 19 negotiations. However, because so many Latin American states incorporate a form of the Calvo clause in their constitutions, this issue could be raised in the context of extending NAFTA throughout the Western Hemisphere.

The third technical problem raised by the potential extension of Chapter 19 to Mexico involved Mexico's writ of *amparo*. The writ of *amparo* is a legal device which provides for a process and remedy to redress violations of constitutionally protected individual rights by an "authority" which has caused a party injury.⁷⁴ Article 103 of Mexico's Constitution establishes the

71. Dr. James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in the LDCs*, 5 OHIO ST. J. ON DISP. RESOL. 75, 75 (1989). Two cardinal principles constitute the core of the Calvo Doctrine:

First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from 'interference of any sort' . . . by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities.

DONALD R. SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 19 (1955).

72. See MEX. CONST. art. 27, pt. I. Article 27 provides:

The State may grant the same right to foreigners [*vis.*, the right to acquire ownership of lands, waters, or to obtain concessions for the exploration of mines or waters], provided they agree before the Ministry of Foreign Affairs to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto. . . .

Id.

73. SHEA, *supra* note 71, at 5-6.

74. For a useful discussion of *amparo*, see Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. W. INT'L. L.J. 306 (1979).

controversies subject to an *amparo* proceeding,⁷⁵ while a lengthy Article 107 regulates its operation.⁷⁶

There appeared to be two possible implications of this device for the incorporation of binational review into NAFTA. First, *amparo* may have been used to challenge the rights of foreigners to participate in a binational review, owing to the limits placed on those rights under Article 27 of the Mexican Constitution.⁷⁷ If a court were to find the law establishing binational review unconstitutional, it could conceivably have invalidated the specific panel decision against which the *amparo* process was invoked, but not strike the law down generally.⁷⁸

The second implication of *amparo* for binational review involved recourse to *amparo* for violations of individual procedural and substantive rights during the course of administrative proceedings. In the context of unfair trade remedies, *amparo* might have provided recourse to Mexican importers for infringements by SECOFI of individual rights — as established under Article 14 of the Constitution — where all other remedies have been exhausted.⁷⁹ In such cases, administrative reviews by binational panels of SECOFI's final determinations could have been subjected to further review by the Federal Judicial Courts,

75. MEX. CONST. art. 103. Article 103 states:

The federal courts shall decide all controversies that arise:

- I. Out of law or acts of the authorities that violate individual guarantees,
- II. Because of laws or acts of the federal authority restricting or encroaching on the sovereignty of the States,
- III. Because of laws or acts of State authorities that invade the sphere of federal authority.

Id.

76. Article 107 of the Mexican Constitution provides that all controversies mentioned in Article 103 are subject to trial in *amparo* and *amparo* can be invoked in criminal, administrative, civil, and labor matters. *Id.* art. 107.

77. *See supra* note 72.

78. The writ of *amparo* provides individual and not general relief. Article 107 of the Mexican Constitution provides:

The judgment shall always be such that it affects only private individuals, being limited to affording them redress and protection in the special case to which the complaint refers, without making any general declaration as to the law or act on which the complaint is based.

MEX. CONST. art. 107, pt. II.

79. *Id.* art. 14. Article 14 states:

No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.

Id.

thereby resulting in panel decisions being overturned through domestic judicial procedures.

A further concern in the NAFTA context was that recourse by way of an *amparo* process appeared to be limited to those who suffered an injury directly.⁸⁰ In the context of trade remedy procedures, this meant *effectively* Mexican importers as they would be the parties required to pay the duties imposed by SECOFI. Thus, foreign exporters or producers could possibly be excluded from recourse to *amparo*. Furthermore, the grounds for review in an *amparo* action are not very transparent. This would make it difficult for foreign nationals to understand how the mechanism works and how the law is applied.

Finally, the most important concern for binational review is that the *amparo* process could have undermined the finality of panel decisions. Because the right to petition review of an administrative decision under *amparo* is constitutionally entrenched, it would seem that a party meeting the basic requirements necessary to invoke *amparo* cannot be denied that remedy. If this is the case, then decisions by binational panels could have been subject to review by a superior domestic court if they were considered to be an "authority" whose decisions may have been challenged through *amparo*. Consequently, one of the primary purposes of the binational panel — to be the final arbiter in an AD or CVD dispute — would have been undermined.

C. SUBSTANTIVE ISSUES RAISED BY INCORPORATING MEXICO INTO A CHAPTER 19

The success of the FTA Chapter 19 mechanism is primarily attributable to the fact that Canada and the United States share similar legal traditions and unfair trade remedy systems. One of the challenges in extending Chapter 19 to NAFTA is that the parties do not share a common legal tradition. Mexico's legal system is based on the civil law, whereas Canada and the United States have systems based on the common law. Although a general comparison between Mexican civil law and the common law in Canada and the United States is beyond the scope of this Article, it is sufficient for our present purposes to suggest that the approach to the application and interpretation

80. A trial in *amparo* shall always be held at the instance of the injured party. *Id.* art. 107, pt. I.

of law in each of these systems is conceptually different and ultimately results in a disparity between the two systems.⁸¹

A major concern as to whether a Chapter 19-like mechanism was suitable for NAFTA involved differences between the manner of conducting administrative proceedings in Mexico compared to the procedure in the United States and Canada. In the United States and Canada, it is considered extremely important that procedural safeguards are incorporated into the structure and regulations governing the conduct of an administrative agency in order to protect individuals from potential abuse of state authority. A superior body's review of an administrative body's decision to determine whether it was made in accordance with the law can include either a finding as to whether the agency acted outside the scope of its powers, or whether it breached a procedural requirement, thereby affecting an individual's right to due process or natural justice.

As indicated earlier, the essence of Chapter 19 is that it requires a binational panel to assess whether an agency made its determination in accordance with domestic law.⁸² Consequently, if specific procedural safeguards governing the conduct of an agency's investigation and duty assessments are not incorporated into one party's administrative system, the result is a lower value of binational review for all parties involved in a dispute. In Canada and the United States there are generally high standards of transparency, due process and structural safeguards to guarantee an absence of bias in the decision-making process. These standards are incorporated into the conduct of administrative proceedings and ensure that decisions are made in a quasi-judicial manner. Mexico's different standards of transparency, due process, and structural safeguards appeared to have serious implications for binational review.

81. For example, while law is created under the common law by judges interpreting legislation in conjunction with cases establishing legal precedents, the civil law tradition is rule based, with limited authority given to judges to actually impose their own interpretation on the legislation. Civil law judges look at the text of specific rules to determine whether the text applies to a specific fact situation. Under the common law, judges have the power to modify or add to the law through the application of specific rules of interpretation. See Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 Sw. U. L. REV. 1161, 1164-65 (1990).

82. FTA, *supra* note 4, art. 1904.

1. Transparency

Transparency is a key element of the law governing the conduct of Canadian and U.S. administrative bodies. The standard of transparency in Canada and the United States generally requires that the law applicable to an administrative agency be set down in a clear and concise fashion and be accessible to the public. Furthermore, the agency's conduct in performing its duties must be evident in order that its practice can be properly reviewed by a superior body to determine whether the agency fulfilled its duties in accordance with the law.⁸³

These standards were not inherent aspects of Mexico's pre-NAFTA unfair trade law administration. Mexico's system was characterized by very general rules and regulations providing SECOFI with broad discretionary powers to perform its duties. SECOFI's broad powers of discretion emanated in part from the fact that limited transparency existed in how SECOFI's investigations and determinations of unfair trade practices were actually carried out. Two examples highlight the absence of transparency and its implications for the standard of judicial review under a Chapter 19-like mechanism.

First, SECOFI's time frame for conducting its investigation and making its dumping, subsidy or injury assessments did not reflect the time frame envisioned by the Act and Regulations. According to the law, SECOFI was required to initiate an investigation within five days of receipt of a petition that complied with the regulatory requirements.⁸⁴ If SECOFI found sufficient evidence to sustain an initial determination of dumping or subsidization and injury, a first provisional duty could be imposed, also within five days of receipt of the petition.⁸⁵ If SECOFI made such a determination, a second investigation would be conducted after which a revised assessment regarding the appropriate amount of the duty would be made, taking into account the results of the investigation to date, as well as

83. For example, in Canadian and U.S. AD and CVD actions, the agency is obliged to complete an administrative record (AR) of the evidence provided by counsel for the parties in a case. Decisions of the agency must be substantiated by the evidence in the AR. A reviewing court (or a binational panel) will scrutinize the same evidence used by the agency (i.e., the AR), and if it finds that the agency's decision cannot be substantiated by evidence, the action can be remanded to the agency.

84. Regulations, *supra* note 62, ch. VI, art. 13. SECOFI may also commence an investigation at its own initiative pursuant to ch. VI, art. 15. *Id.*

85. Act, *supra* note 61, ch. II, art. 11.

information provided by any interested parties.⁸⁶ This second provisional duty determination was to be made within thirty days of the commencement of the investigation.⁸⁷ According to the Act, a final determination was to be made within six months of the initial duty determination.⁸⁸

In reality, SECOFI's practice did not reflect this process. SECOFI usually launched a formal investigation within three months of receiving a petition, and required at least a week (although it could take as long as a month) before a first provisional assessment was made.⁸⁹ The extension of deadlines was widespread throughout Mexico's unfair trade law administration. Consequently, although SECOFI was required to complete its investigation within six months, it usually took between fifteen and eighteen months for completion once the proceedings were initiated, or eighteen to twenty-one months from the filing date.⁹⁰

A second problem with transparency in Mexico's trade administration related to the compilation of the administrative record. Because there were no explicit provisions in the Regulations outlining what should constitute the administrative record, SECOFI could effectively determine what should or should not be included in the written record. This use of discretion meant that the compiled record would often be inadequate for the purposes of judicial review under a Chapter 19-like mechanism. A detailed record of an agency's actions is central to a review process. Without a proper record, a binational panel cannot effectively review an agency's practices and determine whether the challenged order was dealt with properly at the lower stages of the investigation or in the assessment of the amount of the duty.

The absence of a sufficient degree of transparency in an agency's governing legislation and practice might adversely affect a party's interests. Uncertainty as to the time-frame for SECOFI's investigations and duty assessments might also impair the ability of parties to prepare properly for participation in

86. *Id.* ch. II, art. 12.

87. *Id.*

88. *Id.* art. 13.

89. USITC REPORT, *supra* note 61, at 4-13, 4-14.

90. *Id.* Regarding time frame, it appears that SECOFI's actual practice is more liberal than its written regulations. However, SECOFI's practice disadvantaged exporters by creating legal uncertainty about deadlines and, where procedures drag on extensively, by requiring exporters to pay duties while making a final determination.

the investigative and assessment process, as well as for payment of the duty. Moreover, parties might be unable to criticize an agency for unfair treatment where the agency appears to have acted within its broad discretionary powers. This problem could be compounded by the fact that an absence of clear guidelines governing the compilation of the administrative record means that a superior body could not fully know how an agency performed its duties. Therefore, it could not assess properly whether an agency's actions met certain procedural standards intended to protect individuals from an abuse of agency power.

2. Due Process

SECOFI's non-adherence to the deadlines as envisioned by the Regulations raised another major concern about the extension of Chapter 19 in terms of the standard of due process in Mexico's unfair trade law administration. Due process requires that individuals whose interests are affected by an administrative action are given adequate notice of the action and a sufficient opportunity to respond to it. However, under the terms of Chapter 19, Mexico's practice was problematic in two respects. First, binational panels must apply written law, and Mexico's law was inconsistent with that of Canada and the United States. Second, the discrepancy between Mexico's written law and practice created a perception of arbitrary procedures.

In the United States, the analogous remedy to the imposition of a first provisional duty under Mexico's Regulations requires the posting of a cash bond, deposit or other form of security for the importation of each allegedly subsidized or dumped product once an affirmative preliminary determination has been made.⁹¹ Given the time frames for making a preliminary determination, such security would only be required at least eighty-five days after the filing of a CVD petition or 160 days in the case of an AD petition. Canada usually makes its preliminary determinations within ninety days, at which time it may impose provisional duties or cause security to be posted by the importer.⁹² Both of these situations allow the affected industry to participate to some extent in the investigation and assessment of the provisional duty.

A clear example of the lower standard of due process in Mexico's system is reflected by the time frame established in the

91. 19 U.S.C. §§ 1671b(d)(2), 1673b(d)(2) (1988).

92. Special Imports Measures Act, R.S.C., ch. S-15 (1985), *amended by* S.C., ch. 65, § 26(1) (1988) (Can.).

Act and the Regulations for SECOFI to conduct its investigations and make its determinations. As stated earlier, SECOFI was required to initiate an investigation within five days of receiving a petition in compliance with regulatory requirements.⁹³ Yet, the Act also contemplated the application of a first provisional duty within five days of the initiation of the investigation.⁹⁴ SECOFI was required to notify the complainant and respondent of its decision to initiate an investigation⁹⁵ and also to publish its first provisional duty determination in the *Diario Oficial*.⁹⁶ The legislation, moreover, contemplated simultaneous notice of the initiation of the investigation and the imposition of a provisional duty.⁹⁷ Given the timeframes and the notice requirements, a Mexican importer or a foreign exporter could have been left unaware of the initiation of an investigation until the first provisional duty was imposed.⁹⁸ Consequently, an importer could have been required by law to pay a duty without having any opportunity to participate in the assessment of the first provisional duty. Moreover, SECOFI calculated the appropriate amount of the first provisional duty on information obtained from international data banks and not on data from either importers or producers of the goods at issue.⁹⁹ Thus, the dumping margin or subsidy calculation was also not very accurate.

Another issue of due process which could have threatened the viability of the Chapter 19 mechanism in NAFTA was that under the Act only importers had standing to appeal an affirmative finding of an unfair trade practice.¹⁰⁰ Thus, Canadian and U.S. exporters were unable to appeal decisions by SECOFI and, therefore, would have been unable to request binational review under a Chapter 19 mechanism.

3. Structural Safeguards

Another element important to the common law notion of effective judicial review is the requirement that administrative agencies act independently or semi-independently of the govern-

93. See *supra* note 84.

94. Act, *supra* note 61, art. 11.

95. Regulations, *supra* note 62, ch. VI, art. 13.

96. *Id.* ch. VI, art. 18. The *Diario Oficial* is Mexico's equivalent to the *Canada Gazette* and the *Federal Register* in the United States.

97. *Id.* ch. VI, art. 16.

98. USITC REPORT, *supra* note 61, at 4-13, 4-14.

99. *Id.* at 4-14.

100. Act, *supra* note 61, ch. III, art. 24.

ment. In the case of AD and CVD determinations, this independence is necessary in order to de-politicize the process and to ensure greater objectivity in agencies' decisions. In addition, it is considered important that dumping and subsidy assessments and injury determinations be made by two different agencies in order to prevent potential bias in the final decision.

The U.S. International Trade Commission (ITC) and the Canadian International Trade Tribunal (CITT) are independent bodies responsible for material injury determinations.¹⁰¹ Moreover, their final determinations are made independently of the dumping or subsidy findings by the International Trade Administration (ITA) of the Department of Commerce (DOC) and the Assessment Programs Division of Revenue Canada (RC). The roles of the CITT, ITC and ITA are both investigative and adjudicative. Although the ITA is a branch of the DOC, it acts in a quasi-judicial manner independent of the DOC. Revenue Canada's situation is somewhat different. It does not technically conform to the requirement of semi-independence, because it is more closely connected with the federal revenue department, a fact that has been criticized by the United States. However, its determinations are subject to judicial review similar to injury findings of the CITT and are, therefore, acceptable. In spite of RC's unique situation, the independence or semi-independence of the agencies responsible for dumping and subsidy determinations is still considered an important quality for effective judicial review.

As indicated above, dumping and subsidy determinations as well as injury findings were made in Mexico by SECOFI, which is effectively a branch of the Mexican Department of Commerce. The determinations were influenced by the *Comisión de Aranceles y Controles al Comercio Exterior* (CACCE),¹⁰² an interagency working group consisting of officials from SECOFI and other executive agencies. The CACCE advised SECOFI on the level of duty to be applied as well as the content of SECOFI's final determination regarding the investigated merchandise. Consequently, SECOFI's determinations were made neither independently nor semi-independently from the government. Moreover, dumping and subsidy determinations were not necessarily made independently of injury assessments. Given these

101. In Canada, preliminary injury determinations are in fact made by Revenue Canada, whereas in the United States, both the preliminary and final injury determinations are made by the ITC.

102. See *supra* note 63.

facts, there was a concern that SECOFI's findings on injury might be either politically influenced or substantially affected by its findings in a dumping or subsidy investigation. However, there appears to be no express provision in NAFTA Annex 1904.15 requiring Mexico to adopt a structure similar to that of Canada and the United States.

4. Trade Law Administration

In addition to the factors discussed above, there were specific elements of Mexico's unfair trade law administration that were less favorable to affected parties than the equivalent Canadian and U.S. provisions. In Mexico, the proceedings culminating in a final determination were in practice considerably longer than in Canada and the United States. In the United States, a final determination must be made between 205 and 300 days after a countervailing duty petition is filed, or between 280 and 420 days after the filing of an antidumping petition.¹⁰³ In Canada, the CITT must make its final determination within 120 days after receiving notice of the preliminary determination from Revenue Canada.¹⁰⁴ As indicated earlier, in Mexico, the complete process, culminating in a final determination, usually took from eighteen to twenty-one months from the date the petition was filed.¹⁰⁵ The length of the proceedings had an impact on interested parties in Mexico in part because once a preliminary dumping or subsidy determination was made and a provisional duty was imposed, the affected importers had to pay the duty until it was either finalized or revoked. This would have been costly and detrimental to both importers and foreign exporters, especially where the preliminary finding was found to be unsubstantiated in subsequent investigations.

D. SUMMARY

Without transparency in laws and proceedings, high standards of due process, and the independence or semi-independence of administrative bodies, judicial review is hollow and ineffective. SECOFI's broad discretionary powers which resulted from the lack of transparency in Mexico's unfair trade law administration created the potential for interested parties and

103. 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d (1988). See USITC REPORT, *supra* note 61, at 4-16.

104. Special Import Measures Act, R.S.C., ch. S-15 (1985), amended by S.C., ch. 65, § 43(1) (1988) (Can.).

105. See *supra* text accompanying note 90.

the government to influence SECOFT's deadlines and duty assessments. Without the incorporation of higher standards into the conduct of Mexico's trade law administration, a Chapter 19 dispute settlement mechanism in NAFTA would not have been suitable.

The differences between Mexico's unfair trade system and that of Canada and the United States were not ultimately a barrier to extending Chapter 19 to NAFTA. However, the lack of experience of Mexican and American/Canadian lawyers and administrators with each other's legal system will doubtless generate some problems of adaptation in the early Chapter 19 panels involving effectiveness of the panel process in Mexico.¹⁰⁶ No formal transitional period was incorporated into the NAFTA Chapter 19 to ensure that lawyers and officials familiarize themselves with foreign procedures of judicial review, nor was there any similar transition period in the Canada-U.S. FTA. It appears likely that some time will pass before Mexican jurists, in particular, will have an opportunity to fully incorporate the changes to Mexico's unfair trade remedy rules and administration required under NAFTA.

IV. INCORPORATING THE CHAPTER 19 MECHANISM INTO NAFTA

As discussed above, Mexico's pre-NAFTA AD and CVD system differed substantially from that of Canada and the United States. Yet, the underlying compatibility of Canadian and American legislation and administrative practices was the basis for negotiating a binational dispute settlement mechanism into the FTA. In negotiating a similar mechanism in NAFTA, some basic accommodation on the part of Mexico was clearly required in order to maintain the standards of judicial review and due process inherent in the FTA mechanism. This same choice will face other parties seeking to accede to NAFTA.

In light of this situation, some important changes in Chapter 19 were required to ensure that Mexico's trade remedy system was sufficiently similar to that of Canada and the United States. Where this was not possible, or where (as in the case of *amparo*) the operation of the Mexican legal system appeared uncertain to Mexico's trading partners, it was important to ensure that adequate remedial provisions were incorporated into the

106. Peter Morici, *Trade Talks with Mexico: A Time for Realism* 38 (April 1991) (unpublished manuscript, on file with the *Minnesota Journal of Global Trade*) (forthcoming 1994).

Agreement to protect the other parties. The rationale underlying these changes is that Chapter 19 presupposes that a binational panel will apply the domestic law of the party whose agency's determination is being challenged. Where a party's administrative procedures, statutes, or standard of judicial review do not match, or at least come close to, those found in the other parties' unfair trade remedy systems, interested nationals of those other parties may not receive a standard of due process equivalent to that extended by their governments to foreign exporters.

There were three important changes negotiated to Chapter 19 to allow Mexico, Canada and the United States to reach agreement in NAFTA. First, the parties included in NAFTA a section outlining desirable qualities for the administration of antidumping and countervailing duty laws.¹⁰⁷ Second, the parties included a section that outlines a series of twenty obligatory amendments to Mexico's unfair trade remedy regime which would make the Mexican system more compatible with that of Canada and the United States.¹⁰⁸ The proposed amendments are mainly procedural, and are intended to address the low standards of due process that are characteristic of Mexico's unfair trade remedy legislation.¹⁰⁹ For example, there are requirements that Mexican legislation shall provide explicit timetables for administrative proceedings, full participation in the administrative process for interested parties, and timely access to all non-confidential information.¹¹⁰ Mexico must change its law that allows for the imposition of duties only five days after receipt of a petition. In addition, Mexico must expand its recognition of parties having standing to request judicial review to include foreign producers and exporters who were formerly excluded from seeking such review of an agency's determination. Perhaps most importantly, Mexico is required to compile a comprehensive administrative record of the proceedings of the investigating agency and a detailed statement of legal reasoning underlying the agency determination. This record and state-

107. For example, "publish notice of initiation of investigations," and "provide disclosure of relevant information . . . [including] . . . an explanation of the calculation or the methodology used to determine the margin of dumping or the amount of subsidy," and so forth. NAFTA, *supra* note 8, art. 1907(3).

108. *Id.* Annex 1904.15(d), pt. B.

109. It should be recalled that the provision of due process in unfair trade remedy practice is a relatively recent phenomenon in Canada and the United States. Furthermore, it is probable that Mexico provided greater due process in practice than required by Mexican law.

110. NAFTA, *supra* note 8, Annex 1904.15(d), pt. B.

ment would then become the basis for judicial review by a binational panel.

Third, under the title of "Safeguarding the Panel Review System," the parties included a section in NAFTA which provides remedies if a party does not comply with its obligations under Chapter 19.¹¹¹ Specifically, if the application of a party's domestic law prevents a binational panel from carrying out its functions, NAFTA provides recourse to consultation and then to a Special Committee of three individuals selected from the same roster used for the purpose of establishing Extraordinary Challenge Committees.¹¹² If the Committee finds that a party has not complied with Chapter 19, then the complaining party can suspend binational panel review or equivalent "appropriate" benefits with respect to that party.¹¹³ Article 1905 further provides that binational panel reviews between the disputing Parties will be stayed,¹¹⁴ and will revert to domestic courts if necessary;¹¹⁵ and gives the party complained against rights to retaliate in kind to a suspension of binational panel review by the complaining party.¹¹⁶ In the event the party initially complained against removes the cause for complaint, provision is made to reconvene a Special Committee to assess the situation and then terminate counter-measures, if appropriate.¹¹⁷

Given the successful history of Chapter 19 in the FTA, it is unlikely that a Special Committee would arise between Canada and the United States, but it may form a useful sanction to ensure that Mexico (or any other country acceding to NAFTA) adopts the domestic practices necessary to implement Chapter 19. However, it is unlikely that the extension of Chapter 19 to Mexico could survive any substantial use of Article 1905, since such use would essentially signal a breakdown of the undertakings of Chapter 19 itself.

111. *Id.* art. 1905.

112. *Id.* Extraordinary Challenge Committees were provided for in the FTA to permit a party to challenge a binational panel decision on grounds, *inter alia*, of misconduct or abuse of power. FTA, *supra* note 4, art. 1904(13). NAFTA has a similar provision. NAFTA, *supra* note 8, art. 1904(13).

113. NAFTA, *supra* note 8, art. 1905(8).

114. *Id.* art. 1905(11).

115. *Id.* art. 1905(12).

116. *Id.* art. 1905(9).

117. *Id.* art. 1905(10).

V. CONCLUSION

The similarities in how Canada and Mexico approached AD and CVDs in a regional trade agreement may provide clues as to how this issue might play out in a broader context, such as a hemispheric or multilateral trade agreement. First, both Canada and Mexico recognized that resort to unfair trade remedies by the larger trade partner — the United States — could threaten security of access to the U.S. market, and therefore undercut the value of a trade agreement. Second, both Canada and Mexico sought an exception from U.S. unfair trade legislation, and failed. Third, both Canada and Mexico tried to negotiate a broader understanding over the use of AD and CVDs, but also failed.¹¹⁸ Finally, both countries settled on a binding dispute settlement mechanism, built around an internationalized form of judicial review of domestic agency actions, as a surrogate for a more permanent solution to the problem of AD and CVDs between close trading partners.

If other hemispheric nations were to accede to NAFTA or negotiate a new hemispheric trade agreement, it is likely that a Chapter 19-like mechanism would appeal to them for the same reason it appealed to Canada or Mexico. Trade remedy actions like AD and CVDs arguably amount to increased protectionism, and they are on the increase in international trade. It is in the interest of most nations to have AD and CVD actions conform to high standards of due process, even more so if the substance of these actions may have a harmful impact on international trade relations. Given the widespread use of AD and CVDs, in particular by the United States, and the difficulties in establishing standardized substantive rules in this area, it seems probable that other countries will consider negotiating a Chapter 19-like mechanism.

The Canada-U.S. FTA negotiation demonstrated that it is easier to adopt a Chapter 19 mechanism for AD and CVDs where legal systems are similar, while the NAFTA negotiation illustrated how accommodation can be made where systems are different. Any attempt by hemispheric nations to accede to NAFTA would raise some of the same issues faced in the NAFTA Chapter 19 negotiation, such as the role of *amparo* (which has been widely adopted in South America from the Mex-

118. In the case of AD duties, such an understanding might be the use of national competition policy as an alternative to AD actions. For CVDs, the Subsidies Code in the Uruguay Round will likely improve the legal framework concerning subsidies and CVDs in regional trade agreements.

ican legal system), as well as the nature and procedural standards of AD and CVD investigations and their consequent impact on the standards of judicial review and due process under a Chapter 19-like mechanism. Given the Mexican example, it seems likely that sufficient accommodation could be made for other countries to accede to a Chapter 19 mechanism, especially if new accessions were negotiated on a serial basis.

Owing to the greater diversity of legal systems and the greater complication of negotiating detailed matters of administrative law on a multilateral basis, it is less likely that a Chapter 19 mechanism would be amenable to multilateral negotiation in the GATT. However, the pressures to establish due process in trade remedy practices are undeniable. The conditions for the rise of Chapter 19 initially in Canadian-U.S. relations, which then extended to Mexico, were an increase in domestic trade regulatory actions coupled with an increase in international economic interdependence. These conditions are not abating in the international system. To the extent that foreigners can be affected by the domestic administrative regulations of their neighbors, it is possible that they will seek forums like Chapter 19 which are intended to ensure as much as possible that their due process rights will be protected.