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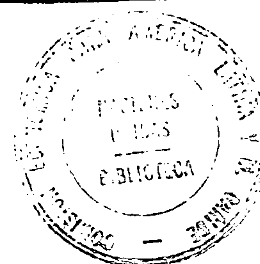

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Antidumping and Countervailing Duties in a Western Hemispheric Free Trade Agreement

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ANTIDUMPING AND COUNTERVAILING DUTIES IN A WESTERN HEMISPHERIC FREE TRADE AGREEMENT (WHFTA)

The use of antidumping (AD) duties and countervailing duties (CVDs) to prevent or remedy unfair trade practices has been an important issue during recent multi- and bi-lateral trade negotiations. They are important because parties differ on the role unfair trade remedies should play in trade policy, and this difference has led to inconsistent applications of these remedies among GATT Contracting Parties (CPs). The result is an 'uneven playing field' between trading partners.[1] It has become evident that more standardized rules and procedures governing the application of these remedies are required. Whether these will be developed in the near future is largely dependent on the outcome of the Uruguay Round, where draft Codes have been drawn up dealing with dumping and AD duties, as well as subsidies and CVDs. In the meantime, other measures must be considered for inclusion 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 duties and CVDs by the United States was one of the major Canadian grievances that surfaced during

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[1]J. Michael Finger and Andrzej Olechowski, eds., The Uruguay Round: A Handbook for the Multilateral Trade Negotiations, Washington, D.C.: The World Bank, 1987, 155.

the negotiation of the Canada-U.S. Free Trade Agreement (FTA).[2] Initially Canada tried to gain a blanket exception from U.S. trade remedy laws, but this was unobtainable. As an alternative, Canada placed considerable effort on negotiating a dispute settlement mechanism into the FTA that would in particular reduce Canada's exposure to the use of AD duties and CVDs by the United States.

The dispute settlement mechanism ultimately incorporated into Chapter 19 of the FTA provides for the judicial review of AD and CVD duty actions by means of binational panels.[3] More specifically, it provides exporters and importers the option of taking a disputed AD or CVD action to a binational panel with binding powers in lieu of seeking judicial review by a domestic court. 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. Perhaps because of these characteristics, it has been one of the most successful dispute settlement mechanisms developed in recent years.

There is no question that the initiation of a AD or countervailing action, as well as the imposition of a duty itself, can have serious consequences for exporters or

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[2]Gilbert R. Winham, Trading with Canada: The Canada-U.S. Free Trade Agreement, New York: Priority Press Publications, 1988, 38.

[3]FTA, Article 1904.

importers. Given the seriousness of the interests at stake, combined with the tendency towards increasing use of unfair trade remedies, it is important that consideration be given to negotiating an FTA-like mechanism for the resolution of AD and CVD disputes into a prospective WHFTA.

The success of the FTA Chapter 19 mechanism leads somewhat obviously to its consideration as a model for a WHFTA. What remains at issue is whether this mechanism can be applied effectively in a considerably broader trade agreement such as a WHFTA, given the differences that exist between the legal and administrative practices of the prospective negotiating parties. The purpose of this paper is to examine some of the obstacles and implications of extending the FTA's Chapter 19 dispute settlement mechanism to a WHFTA by using Mexico as a reference point for the discussion. Mexico is chosen because the negotiation of Chapter 19 in the NAFTA raised many of the problems that may later be encountered either in extending NAFTA to new members or in creating a broader hemispheric trade agreement.

To appreciate the significance of a Chapter 19 mechanism for a WHFTA or NAFTA, it is first necessary to look at the historical development of AD and CVD actions in international trade. The purpose 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 parallel that exists between Canada's

bargaining position under the FTA to that of Mexico and other WHFTA nations vis-a-vis the United States, thereby emphasizing the need for a binding dispute settlement mechanism in a WHFTA. A discussion of the major provisions of Chapter 19 and its application to date will follow this historical analysis.

I. History and Development of AD and CVDs

One of the primary objectives of the GATT is to promote secure access to foreign markets in order that businesses will feel confident that when they export their products they will encounter no unfair or unforeseen impediments in competing for a portion of the consumer market. 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, whereas a subsidy is the granting of a benefit, usually by 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

industry through the use of AD and CVDs.[4]

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 retard[s] the establishment of a domestic industry." A CVD may be applied to an imported good to offset the effects of a foreign subsidy where it also causes or threatens to cause injury to the domestic industry or the potential development of such industry.

The GATT provisions for AD and CVDs represented minimal commitment to any real control over these practices, and consequently these trade remedies became protectionist devices in themselves. This realization paved the way for the creation of Antidumping and Subsidies Codes during the Kennedy and Tokyo Rounds in 1969 and 1979 respectively. 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 the free flow of goods was not jeopardized by their unfair usage.

The first Antidumping Code, concluded in 1967, was replaced in 1979 by a new Code,[5] which sets out more explicit

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[4]John H. Jackson and Edwin A. Vermulst, eds., Antidumping Law and Practice: A Comparative Study, Ann Arbor: The University of Michigan Press, 1989, 6.

[5]Officially titled: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

requirements governing a country's conduct of its antidumping and injury investigations, and the application of duties or price undertakings. The new Code has been largely successful in achieving a greater standardization of antidumping practices amongst CPs.[6]

In contrast, the Subsidies Code,[7] also 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 evaluating subsidies and assessing CVDs. However, owing to the conflict between 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, unlike the Antidumping Code the Subsidies Code has not yet been incorporated into GATT, although signatories are obliged to implement its provisions into their domestic laws.[8]

Whereas dumping is generally considered an unfair practice, all forms of subsidies are not necessarily considered unfair and, therefore, countervailable. In its preamble, the Subsidies Code recognizes the dual nature of subsidies: that

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[6]Finger and Olechowski, ibid., 156.

[7]Officially, Agreement on Interpretation and Application of Article VI, XVI, and XXIII of the General Agreement on Tariffs and Trade.

[8]Other Latin American and Caribbean states that signed the Subsidies Code in 1979 are: Brazil, Chile, and Uruguay.

they can be instrumental in promoting important domestic policy objectives, while at the same time possibly harming a foreign industry's competitiveness. The Code's objective in defining when and how a subsidy may be countervailed is to balance the harm of a subsidy against the injurious effects of a CVD.

As between member states, there is considerable disparity in the application of subsidies and CVDs.[9] By far the most important country on this matter is the United States. The U.S. Government takes a strong position opposing the use of subsidies, and it has been the most frequent user of the CVD mechanism in an effort to protect U.S. producers from competition with subsidized imports. Subsidies and CVDs therefore become important trade issues for nations with extensive trade with the United States.

1. **U.S. Policy on AD duties and CVDs**

As a signatory to both Codes, the United States implemented the provisions of each through the Trade Agreements Act (TAA) of 1979. The Act restructured the U.S. unfair trade remedy system in a politically significant manner. From 1954 to 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

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[9] *J. Michael Finger and Julio Nogues*, "International Control of Subsidies and Countervailing Duties", The World Bank Economic Review 1:4, 712.

determinations of injury. In 1979, responsibility for the former was shifted to the International Trade Administration of the Department of Commerce. Since that Department was perceived as being more sympathetic to importers than Treasury had been, this was widely regarded as a move to facilitate the use of trade remedies by U.S. constituents.[10]

Title VII of the TAA incorporated the Tokyo Round Antidumping Code into U.S. domestic law, but in the process several modifications were made. First, enhanced access to the information accumulated and used in AD duty cases was provided to importers and exporters of goods under investigation. Second, regional markets were given standing to initiate AD cases. Third, importers were given greater influence in negotiating undertakings by exporters in lieu of AD duties, and a fourth change made it easier for petitioners to initiate AD cases. The combined effect of these changes was to facilitate AD actions.

Regarding CVDs, the main impact of the TAA of 1979 was to incorporate the Tokyo Round Subsidy Code into U.S. legislation, and especially to introduce a material injury requirement into U.S. CVD practice. The obligation to demonstrate injury (on products coming from Subsidy Code signatories only) was an important change to U.S. producers, although it would appear

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[10]Rodney de C. Grey, United States Trade Policy Legislation: A Canadian View, Montreal: The Institute for Research and Public Policy, 1982, 56.

that the requirement of "material" injury likely did not add much.[11] Other procedural changes in the TAA facilitated CVD petitions and administrative procedure.[12]

The greater transparency in the rules and regulations, as well as procedural requirements governing AD and CVD actions incorporated into the TAA, made it easier for importers in the United States to petition for AD or CVD actions, and to seek

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[11]Material injury was defined in the TAA as "harm which is not inconsequential, immaterial or unimportant," Section 771(7). Washington trade lawyer, Matthew Marks has observed: "I can only conclude ... that the substitution of a material injury standard of simple injury under the Trade Act of 1979 has had little, if any, effect on the Commission's administration of the Anti-Dumping Act and countervailing duty law to date". Text of letter of 31 July 1980 of Matthew Marks to Rodney Grey, cited in Grey, ibid., 46.

[12]Prior to the TAA, the Trade Act of 1974 had expanded CVD procedures in U.S. law, especially regarding judicial review. The Act provided for a right of appeal to a Customs Court, which later became the Court of International Trade (CIT). Manufacturers and producers in the United States were given standing to pursue an appeal. 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 it improved the procedural safeguards associated with those procedures. For example, writing about the pre-1974 period, Stanley Metzger has 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, Washington, D.C.: The Brookings Institution, 1979, 105.

review of those actions through the judicial system. The result was a sharp increase in the number of actions launched by the U.S. since the amendments brought about by the TAA (and the Trade Act of 1974). Prior to 1970 the United States only occasionally resorted to AD or CVD actions; for example, as noted by Hart: "[b]etween the enactment of the final countervailing duty statute in 1897 and 1969 only some 65 countervailing duty orders were issued, roughly one a year."[13] This contrasts sharply with the situation immediately following passage of the TAA, where the United States initiated 280 CVD investigations over the period 1980-1985.[14] Against Canada, the United States initiated eleven new CVD cases over the period 1980-1987.

There are two approaches to the use of AD and CVDs. On the one hand, these measures can be seen as an attempt to remedy or offset unfair trade practices by foreign governments or exporters. Alternatively, they can be seen as a system of contingency protection, or "measures of 'stand-by protection' or techniques of administered trade."[15] Contingency protection is especially provided on the initiative of specific industries

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[13]Michael Hart, "The Future on the Table: the Continuing Negotiating Agenda under the Canada-United States Free-trade Agreement", Paper presented at a Conference held at the University of Ottawa, Faculty of Law (Common Law), May 5, 1989, 39.

[14]Finger and Nogues, ibid., 708.

[15]Grey, ibid., 8.

on the basis of a complicated body of trade regulations. The system is discrete and highly legalistic, and it is an alternative to a more general approach to trade policy based on multilateral tariff reductions or codes of conduct. The use of contingency protection - or trade remedies - increased in the 1980s, but whereas the incidence of AD duties is fairly evenly distributed between trading nations, CVDs are principally a U.S. policy instrument.[16] 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."[17]

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 under the FTA 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 of Canada in the FTA negotiation.

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[16] Finger and Nogues note that over 1980-1985, AD actions initiated by three GATT CPs were as follows: United States, 280; EC, 254; and Canada, 219; 708.

[17] 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. Spain, October 2-4, 1986, as referred to in Finger and Olechowski, ibid., 156.

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 '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 suggest the adoption of an interim dispute settlement mechanism, in the belief that this would give Canada 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 and it has three parts. First, the parties agreed to continue negotiating on dumping and subsidy issues and to establish alternative rules in seven years if possible. A Working Group was created to pursue this task, but both countries agreed to negotiate issues of dumping and subsidy/countervail in the multilateral Uruguay Round in lieu of bilateral talks. Unless an agreement is reached at the Uruguay Round, it seems unlikely that a new AD or CVD regime

will be established in the North American context.

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 and other multilateral accords, and the FTA itself. Additionally, parties agreed to submit proposed legislative changes to a binational panel (see below) for an advisory opinion on the consistency of the change with existing obligations under international law.

Third, the parties established binational panels to replace judicial review by domestic courts of final AD or CVD determinations by national agencies. Each party agreed to retain its own AD and CVD practices - 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. The panel's mandate is to consider the administrative record of the case appealed and decide generally, whether the final determination has been made in accordance with the applicable domestic law.[18]

Panels are composed of five members chosen from a roster of trade experts, primarily lawyers, established in each country. Two panelists are selected by each country while the fifth member is chosen jointly, or by lot, where there is no agreement on the final member. In practice, the fifth member's

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[18]FTA, Article 1902.

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 was made. In Canada, the test is whether the agency (a) 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. 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 the domestic laws.[19]

It is important to note that the panels are not authorized to create substantive law but must act consistently with the laws of the importing country. Consequently, determinations of dumping and subsidization can be different in each country but

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[19]FTA, Article 1911 defines the standard of review. In Canada the standard of review under the FTA is adopted from s.18.1(4) of the Federal Court Act, S.C. 1985, c.F-7 as amended, while the standard of review applicable in the United States is adopted from s.516A(b)(1) of the Tariff Act of 1930. See generally Gary Horlick and Amanda DeBusk, "The Functioning of the U.S.-Canada Free Trade Agreement Dispute Resolution Panels," in Leonard Waverman, ed., Negotiating and Implementing a North American Free Trade Agreement, Toronto: The Fraser Institute, 1992, 1; and, Stewart Abercrombie Baker, "Chapter Nineteen: The Antidumping and Countervailing Duty Laws," Unpublished Article, 1991.

will still be upheld as long as the administrative agency made its determination in accordance with domestic law.

Review of the 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. Only where 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 any of the actions outlined above materially affected the panel's decision or threatened the integrity of the review process, can the extraordinary challenge procedures by invoked.[20]

Through November 1992, thirty Chapter 19 cases have been initiated, plus one Extraordinary Challenge.[21] Of these cases, 24 were directed against U.S. agencies (ie. the Department of Commerce (DOC) or the International Trade Commission (ITC)). Fifteen of these cases have been completed while nine remain active. Six cases have been initiated against Canadian agencies (ie. Revenue Canada (RC) or the Canadian International Trade Tribunal (CITT)). Three of these cases have been completed while 3 remain active. One of the 6 cases against Canadian

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[20]FTA, Article 1904.

[21]Status Report of Cases (chapters 18 and 19) Canada-U.S. FTA Binational Secretariat, Canadian Section, November 1992.

agencies was launched by a Canadian petitioner, while the rest were launched by U.S. petitioners. All of the cases against U.S. agencies were brought by Canadian petitioners, although in seven of these cases U.S. petitioners were also present. Overall, Canadians have been the major users of Chapter 19 procedures, and the main respondents have been U.S. agencies.

The results of Chapter 19 actions are that about half of the cases resulted in a remand in whole or in part; that is, the determination was returned to the agency for "action not inconsistent with the panel's decision."[22] In the two Canadian cases completed, the actions of the agency were affirmed in one panel and remanded in the other. For the completed U.S. cases, 4 were remanded and four were affirmed.[23] Approximately similar results in the United States were produced by the Court of International Trade in the period prior to the FTA.

The overall judgment of the Chapter 19 mechanism is that the panel process has worked effectively, In a lengthy review of dispute settlement in the FTA, Professor Andreas Lowenfeld of New York University has written that: "[a]ll things considered, the unique binational dispute settlement mechanism created by the Canada-United States Free Trade Agreement have

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[22]FTA, Art. 1904(8).

[23]Cases can be remanded in whole or in part, hence a "remand" may be a relatively insignificant action.

worked extraordinarily well."[24] Especially, Lowenfeld notes that the panels have conscientiously applied the law of the country in which the case arose. Panel decisions have not reflected a bias for or against trade remedy legislation. Most important, panels have not reflected nationalistic behaviour, for panelists have dealt objectively with legal issues and have not attempted to push a Canadian or American approach to the cases.

III. AD duties and CVDs in the NAFTA[25]

Like Canada in the FTA negotiations, Mexico aimed to achieve greater and more secure access to the U.S. market by negotiating a NAFTA with the United States and Canada. In recent years, Mexico has increasingly found itself at the receiving end of U.S. AD actions.[26] Between 1980-1990, eight

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[24]Andreas F. Lowenfeld, "Binational Dispute Settlement under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal" Administrative Conference of the United States, December 1990, 78.

[25]Michael Hart, A North American Free Trade Agreement, Ottawa: Centre for Trade Policy and Law, 1990, 126-127.

[26]Stephen J. Powell, Craig R. Giesse, and Craig L. Jackson, "Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks," 11 Northwestern Journal of International Law and Business (1990), 179. Mexico has not encountered the same problem with countervailing duty actions as Canada since it signed the "Understanding on Subsidies and Countervailing Duties" with the United States in 1986 and pursuant to its obligations under the Agreement, substantially altered its subsidy practice. See Celia R. Siac, "Does Mexico Subsidize too Much? Perceptions versus Reality," Toronto: C.D. Howe Institute Commentary No. 36, February 1992, 6.

actions were initiated by U.S. companies against Mexican producers.[27] Although AD practices have become more standardized amongst GATT members, there still remains some discrepancy in their usage and interpretation due to the lack of precision in the wording of the GATT's AD rules and procedures, although not to the same extent as with CVDs.[28] Binational review as exists in Chapter 19 of the FTA can reduce the possibility of abuse by promoting the consistent application of domestic trade remedy laws and regulations through the involvement of panelists from the countries party to the dispute. Thus, a Chapter 19-like mechanism could provide an adequate legal solution to an otherwise political problem.

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, this did not mean that it is was necessarily suitable for NAFTA or other agreements. There were a variety of obstacles and concerns raised by the possible extension of the FTA's dispute settlement mechanism to Mexico. The purpose of this section is to discuss some of these obstacles, as well as the implications of extending a Chapter

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[27]These include: Carbon Steel Wire Rod; Oil Country Tubular Goods; Welded Steel Wire Fabric; Porcelain-On-Steel Cooking Ware; Certain Fresh Cut Flowers; Portland Hydraulic Cement; Certain Steel Pails and Gray Portland Cement & Clinker; taken from U.S. ITC Annual Reports 1980-1989.

[28]William B. Carmichael, "Review of the Customs Tariff, (Antidumping) Act," Submission to the Gruen Review Canberra, 1986, as referred to in Finger and Olechowski, ibid., 159.

19-like mechanism to NAFTA. The discussion is certainly not exhaustive, but gives some indication of what problems or concerns were dealt with at the negotiating table before a deal on this point was struck.

Before delving into the issues that were raised by the question of extending a Chapter 19 mechanism to NAFTA it is useful to outline briefly the nature of Mexico's current unfair trade remedy system.

1. The Nature of Mexico's AD and CVD System

Mexico's primary pieces of legislation governing AD duty and CVD actions are The Foreign Trade Regulatory Act[29] (Act) and Regulations Against Unfair International Trade Practices (Regulations).[30] The agency responsible for AD and CVD actions is 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)[31] providing consultative support particularly on the issue of duty assessments.

SECOFI conducts up to two investigations leading to

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[29]Decreto por el que se Crea la Ley Reglamentaria del Artículo 131 de la Constitución Politica de los Estados Unidos Mexicanos en Materia de Comercio Exterior, D.O., Jan. 13, 1986.

[30]Reglamento Contra Practicas Desleales del Comercio Internacional, D.O., Nov. 25, 1987.

[31]CACCE can be translated as the Committee on Foreign Trade Tariffs and Controls. Ernesto Rubio del Cueto, "Countervailing Duties Affecting United States-Mexican Trade", 12 Houston Journal of International Law (1990) 323.

provisional duty assessments and a third culminating in a final determination. In order to make a positive finding, SECOFI must determine that an unfair practice (dumping or subsidization) exists in conjunction with a finding of injury to the domestic industry. Final affirmative determinations may be appealed by Mexican importers to the Federal Fiscal Tribunal (FFT) on grounds outlined in the Código Fiscal (Fiscal Code), such as the incompetence of officials or a breach of formal requirements. In addition, the Mexican Constitution provides a supplemental remedy known as amparo that can be requested where a guaranteed individual right was breached during the administrative process and had an impact on the outcome of the action. The significance of the amparo procedure and remedy will be discussed in greater detail below.

Mexico's AD provisions have been invoked often since 1987. Between 1987-1989, 35 AD proceedings were initiated, 15 of which were against U.S. imports. The majority of cases against the United States were initiated in 1987 with only 2 being initiated in 1988 and 1989 each, thus indicating a decline in their initiation.[32] Mexico's CVD provisions have been invoked considerably less, with only one case being initiated against Malaysia over the same time period.

2. Technical Issues of Incorporating Mexico into a Chapter 19

From an organizational perspective, there were both

[32]USITC, Review of Trade and Investment Measures by Mexico, USITC Report No. 2275 (April 1990), 4-17.

technical and substantive concerns raised by the potential extension of Chapter 19 to Mexico. We begin with the technical impediments, three of which will be discussed. First, the Chapter 19 mechanism of the FTA was drafted in a bilateral context rather than in a trilateral (or multilateral context) such as NAFTA (or WHFTA). This raised the question whether the mechanism would be amended to reflect trinational as opposed to binational review. There were a number of forms such an amendment could have taken. For example, one option was 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 mechanism. Trinational panel review may not have been as appealing since a non-party to the dispute would effectively be involved in the reviewing process and conceivably complicate as opposed to facilitate the decision-making process. In the end, binational dispute resolution was negotiated into the NAFTA.

The second and third technical issues are more serious and involve Mexico's Constitution. The second problem deals directly with Mexico's adherence to the Calvo doctrine of law, which subscribes to the notion that where legal disputes arise between Mexican and foreign business partners, Mexican internal

remedies should be used to the exclusion of international ones.[33] Some Latin American states, including Mexico, have adopted a provision in their Constitution requiring foreigners who have been granted certain rights to abstain from seeking the protection of their governments where a dispute concerning those rights arises. This clause raised the issue whether recourse to binational panels was valid under Mexican law since the panels might be perceived as granting a form of protection by a foreign government.[34] Apparently this provision 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, in the context of a WHFTA, this issue will be raised again since so many Latin American states incorporate a form of Calvo clause in their constitutions.

The third technical problem involves Mexico's writ of amparo, which was mentioned earlier. As indicated above, the writ of amparo is a legal device which provides for a process and remedy to redress violations of constitutionally protected individual rights which have caused a person injury.[35] Article

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[33]Dr. James C. Baker and Lois J. Yoder, "ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in the LDCs", 5 Ohio State Journal on Dispute Resolution (1989), 75.

[34]Donald R. Shea, The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy, Minneapolis: University of Minnesota Press, 6.

[35]For an indepth discussion of amparo see Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo" 9 California Western International law Journal, (1979), 306-348.

103 of Mexico's Constitution establishes the basis of recourse through an amparo proceeding while Article 107 regulates its operation.

In the context of AD and CVD actions, the writ of amparo provides recourse for infringements of individual due process rights by SECOFI as established under Article 14 of the Constitution where all other remedies have been exhausted. There would appear to be two possible implications of this device for the adoption of binational review into NAFTA. First, amparo may be used to challenge the constitutionality of a law, such as whether binational review violates Article 27 of the Mexican Constitution which requires recourse to Mexican institutions for resolution of disputes involving foreigners, ie. the Calvo clause discussed above. If a court should find the law unconstitutional, it could conceivably invalidate the specific decision over which amparo was invoked but not strike down the law generally.

The second implication of amparo on binational review involves more directly recourse to amparo for violations of individual procedural and substantive rights during the course of administrative proceedings as opposed to the constitutionality of the law under which a decision was made. In such cases, administrative reviews by the Federal Fiscal Tribunal of SECOFI's final determinations can be subject to review by district courts, collegiate courts or the Supreme Court depending on a variety of factors.

In administrative proceedings in the NAFTA context, the issues that arise are of a dual nature. One type involves the impact of amparo on the right to judicial review, where petitioners seek review of SECOFI's actions in domestic courts in place of binational review. For example, recourse to amparo would appear to be limited to Mexican importers and exporters, thereby excluding recourse by non-residents. Furthermore, the grounds for review in an amparo action are not very transparent. This makes it difficult for foreigner nationals to understand how the mechanism works and the law is applied.

The second type, which is of far greater concern for judicial review by binational panels, is that the amparo process could undermine the finality of panel decisions. Because the right to petition review of an administrative decision under amparo is constitutionally entrenched, if a party meets the basic requirements to invoke amparo, it would seem this remedy cannot be denied. If this is the case, decisions by binational panels would be subject to review by a superior domestic court. This would consequently undermine one of the primary purposes of the binational panel, which is to be the final arbiter in an AD or CVD dispute.

3. Substantive Issues Raised by Chapter 19

Numerous substantive issues were also raised in contemplation of extending a Chapter 19-like mechanism to Mexico. By way of summary, two major substantive problems

needed to be considered. First, the FTA mechanism in the trilateral context contemplates the application of Mexican law by the reviewing body to disputes involving the determination of an unfair trade practice. The problem can be stated in this manner: because of a common legal background in the United States and Canada, the dispute mechanism in Chapter 19 of the FTA inherently contains within it certain standards applicable to due process and judicial review. However, concern was raised during the NAFTA negotiations that because of the differing legal and administrative traditions in Mexico the standards of due process and judicial review, inherent in the functioning of the mechanism between Canada and the United States, would be lowered in the trilateral context. These concerns focused, _inter alia_, on the enforcement of deadlines, the suitability of the written record for judicial review and the absence of potential bias in the administration of AD and CVD actions.

Second, there are specific differences between Mexico's trade law administration and those of Canada and the United States. The Mexican administration is less favourable to affected parties than the Canadian and U.S. systems. These differences will be highlighted below once the potentially lower standard of due process and judicial review inherent in the application of Mexican law to trade disputes is discussed. How these issues have been dealt with in NAFTA will follow this discussion.

It has been stated that the success of the FTA's mechanism

is largely due to the fact that Canada and the United States share similar legal traditions and unfair trade remedy systems. One of the overriding factors in the NAFTA situation is that the parties do not share a common legal tradition. Mexico's system is based on the civil law whereas Canada and the United States have systems based on the common law. A general comparison between Mexican civil law and the common law in Canada and the United States is beyond the scope of this paper. For our present purposes it is sufficient to suggest that the approach to the application and interpretation of law in each of these systems is conceptually different and ultimately results in a disparity between the two systems.[36]

The differences between the two systems were not 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 systems would doubtless have generated some lack of confidence in the effectiveness of

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[36]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 Southwestern University Law Review, (1990), 1164-1165.

the panel process in NAFTA.[37] Although no transitional period was incorporated into the NAFTA Chapter 19 to ensure that lawyers and officials familiarize themselves with foreign procedures of judicial review, it appears likely that some time will pass before Mexico, in particular, has an opportunity to incorporate the changes to its unfair trade remedy rules and administration required under the NAFTA. The time lapse should help ensure a higher level of confidence in the mechanism all round.

A major problem 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 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 an administrative agency's conduct in order to protect individuals from potential abuse of state authority. When a superior body is asked to review the decision of an administrative body to see if it was made in accordance with law, this can include making 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.

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[37]Peter Morici: "Trade Talks with Mexico: A Time for Realism", Unpublished Article, University of Maine, April 1991, 38.

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. 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, this will lower the 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 are incorporated into the conduct of administrative proceedings and ensure that decisions are made in a quasi-judicial manner. The different standards of these three aspects of Mexico's system in relation to the Canadian and U.S. systems under binational review will be focused on in the following discussion.

(i). 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.[38]

These same standards are not inherent aspects of Mexico's unfair trade law administration. Mexico's system is characterized by very general rules and regulations providing SECOFI with broad discretionary powers to perform its duties. SECOFI's broad powers of discretion emanate in part from the fact that there is limited transparency in how SECOFI's investigations and determinations of unfair trade practices are actually carried out. This fact has implications for the standard of judicial review under a Chapter 19-like mechanism. More specifically, two examples highlight the absence of transparency and the problems this poses to the standard of review under a Chapter 19-like mechanism.

First, SECOFI's time frame for conducting its investigation and making its dumping, subsidy or injury assessments does not reflect the time frame envisioned by the Regulations. In fact, numerous deadlines governing various stages of the proceedings are not adhered to. According to the law, SECOFI is required to initiate an investigation within five days of receipt of a petition. If it finds sufficient

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[38]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 (ie. the AR), and if it finds the agency's decision cannot be substantiated by evidence,the action can be remanded to the agency.

evidence to sustain a preliminary determination of dumping or subsidization in conjunction with an injury finding, a second investigation must be conducted after which a revised assessment regarding the amount of the duty to be imposed must be made within 30 days of the commencement of the investigation. According to the Regulations, the final determination must be completed within 60 of the investigation's initiation. In fact, SECOFI's practice does not reflect this process. SECOFI usually launches a formal investigation within three months of receiving a petition, and requires at least a week (although it could take as long as a month) before a first provisional assessment is made.[39] The extension of deadlines is widespread throughout Mexico's unfair trade law administration. Consequently, although SECOFI is required to complete its investigation within six months, it usually takes between 15 and 18 months for completion once the proceedings are initiated, or 18 to 21 months from the filing date.[40]

A second problem with transparency in Mexico's trade administration relates to the compilation of the administrative

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[39]USITC, Review of Trade and Investment Measures by Mexico, USITC Report No. 2275 (April 1990), 4-14.

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

record. There are no explicit provisions in the Regulations outlining what should constitute the administrative record in a case. SECOFI can, therefore, effectively determine what should or should not be included in the written record. This use of discretion means that the record compiled is inadequate for the purposes of judicial review under a Chapter 19-like mechanism. A detailed record of the agency's actions is central to the appeal process. Without a proper record a binational panel cannot effectively review the agency's practices and determine whether the challenged order was dealt with properly at the lower stages of the investigation and assessment of the amount of the duty.

The absence of a sufficient degree of transparency in an agency's governing legislation and practice may adversely affect a party's interests. The uncertainty as to the time-frame for SECOFI's investigations and duty assessments may impair the ability of parties to prepare properly for participation in the assessment process and payment of the duty. Moreover, parties may be unable to criticize an agency for unfair treatment where the agency appears to have acted within its broad discretionary powers. This problem is compounded by the fact that an absence of clear guidelines governing the compilation of the administrative record means that a superior body cannot fully know how an agency performed its duties, and therefore, assess whether its actions met certain procedural standards intended to protect individuals

from an abuse of agency power.

(ii). Due Process

SECOFI's non-adherence to the deadlines as envisioned by the Regulations raises 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. Mexico's deadlines did not meet GATT standards of due process at the time it became a Contracting Party to the GATT, therefore it extended them in practice. Even though SECOFI does not adhere to the deadlines, because they reflect the law they are applicable under binational review.

In the United States, the analogous remedy to the imposition of a provisional duty under Mexico's Regulations requires the posting of a cash bond for every allegedly subsidized or dumped product, but it cannot be imposed until at least 90 days after the filing of an AD or CVD petition. Canada usually makes its dumping or subsidy determinations within 90 days, at which time it may impose provisional duties. Both these situations allow the affected industry to participate to some extent in the investigation and assessment of the provisional duty.

A clear example of problems with due process is reflected by the time frame established under the Regulations for SECOFI

to conduct its investigations and duty assessments. As stated earlier, SECOFI must initiate an investigation within 5 days of receiving a petition. The Regulations moreover contemplate the application of a first provisional duty within 5 days of the initiation of the investigation. Notice of both the initiation of the investigation and the first provisional duty assessment must be published in the Diario Oficial[41]. These deadlines conceivably permit the simultaneous publication of the initiation of the investigation and the imposition of a provisional duty. Under these legal requirements a potential respondent could be left unaware of both the preliminary investigation until it is published and the provisional duty until it is imposed. Consequently, an interested party could in law be required to pay a duty without being forewarned or having an opportunity to participate in the assessment process. An additional point is that SECOFI bases its first provisional duty assessment on information from an international data bank and not on data from the specific industry, which prevents exporters from providing information in support of their individual circumstances.

The Mexican system currently provides a lower standard of due process than in Canada and the United States with respect to who has the authority to appeal a final determination of SECOFI. According to the Código Fiscal, only importers of goods

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[41]The Diario Oficial is Mexico's equivalent to the Canada Gazette and the Federal Register in the United States.

have standing to appeal an affirmative finding of an unfair trade practice. Exporters and domestic producers are prohibited from doing so. Thus, Canadian and U.S. exporters are currently unable to appeal decisions by SECOFI and, therefore, would be unable to request binational review under a Chapter 19 mechanism.

(iii). 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 government. In the case of AD and CVD determinations, this is necessary in order to de-politicize the process and to ensure greater objectivity in the agencies' decisions. In addition, it is considered important that the injury determinations and dumping and subsidy assessments 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. Moreover, their determinations are made independent 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 as regulatory agencies are both adjudicatory and investigative. 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, since it is more closely connected with the federal revenue department, a fact that has been criticized by the United States. However, its determinations are reviewable according to the same standards as the injury findings of the CITT and, therefore, are at least minimally acceptable. In spite of RC's unique situation, the 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 are made in Mexico by SECOFI, effectively the Department of Commerce, and influenced by CACCE, an interagency working group consisting of officials from SECOFI and other executive agencies. The Comisión de Aranceles y Controles al Comercio Exterior advises SECOFI on the level of duty to be applied, as well as the content of SECOFI's final resolution regarding the investigated merchandise.

SECOFI is neither independent nor semi-independent from the government. Moreover, dumping and subsidy determinations are not necessarily made independent of its injury assessments. Given this fact, there is concern that SECOFI's findings may be either politically influenced or affected by its findings in

the other category; ie. a finding of dumping could be construed as providing evidence that there is injury and, therefore, improper by common law standards.

Without transparency in the laws and proceedings, high standards of due process and the independence or semi-independence of the administrative bodies from the government, judicial review is hollow and ineffective. SECOFI's broad powers of discretion emanating from the lack of transparency in Mexico's unfair trade law administration means that there is potential for SECOFI's deadlines, as well as duty assessments to be influenced by interested parties and government. Without the incorporation of higher standards in the way Mexico's trade law administration is conducted, a chapter 19 dispute settlement mechanism in NAFTA would not be suitable.

Due process and the standard of judicial review aside, there are specific elements of Mexico's unfair trade law administration which are not as favourable to affected parties as the equivalent Canadian and U.S. provisions. The following will focus on some of these differences.

In Mexico, the proceedings culminating in a final determination are 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. In Canada, the CITT must make its final determination within 120 days

after receiving notice of the preliminary determination from Revenue Canada. As indicated earlier, in Mexico, the complete process, culminating in a final determination, usually takes 18 to 21 months from the date the petition is filed. The length of the proceedings can have an impact on interested parties in Mexico in part because once a preliminary dumping or subsidy determination is made and a provisional duty is imposed, the affected importers must continue paying the duty until it is either finalized or revoked. This could be costly and detrimental to both importers and producers especially where the preliminary finding is found unsubstantiated in subsequent investigations.

Another difference among the parties' laws involves the timing of review of duty orders. Annual review of duty orders is required in the U.S., while it is suggested for dumping values and subsidy amounts in Canada as well. The CITT may review its injury findings at its discretion. However, if a review is not initiated within five days of the original order, the order is automatically rescinded. In Mexico, such review is discretionary. It can be initiated by SECOFI at the request of an interested party or _ex officio_, where it appears justified in doing so. Once again, it is SECOFI's discretion that may unfavourably affect Canadian and U.S.' exporters. Under Mexican law there is no consistency in SECOFI's initiation of review proceedings. Moreover, SECOFI is under no obligation to do so. Thus, there currently exists the potential that SECOFI's

initiation or non-initiation of a review could be politically influenced.

To sum up the discussions of section III, it is apparent that Mexico's AD and CVD system differed substantially from that of Canada and the United States. However, the basis for Chapter 19 in the FTA was the underlying compatibility of Canadian and American legislation and administrative practices on AD and CVDs. The result is that if Mexico were to seek to negotiate a dispute settlement system similar to Chapter 19 of the FTA, some basic accommodation between the Mexican systems, and the Canadian and American systems, would be necessary. This same choice will face other parties seeking to negotiate a WHFTA or to accede to NAFTA.

IV. Conclusion

AD and CVDs were a major issue in the Canada-U.S. FTA, but until recently this subject was not on the table at the NAFTA. However, in early May, 1992, negotiations on AD and CVD were fully joined, and Mexican negotiators indicated a great interest to conclude an agreement on this issue roughly along the lines of Chapter 19 in the FTA. Likely Mexico took this course because trade policy has become judicialized within GATT and elsewhere, and because trade relations themselves are becoming more litigious. This can be seen as an inevitable reaction to the greater exposure national economies have toward each other as a result of trade liberalization. Law suits are a

form of conflict between people who do business with each other, not between people who are distant, and as trade relations increase it seems likely disputes over unfair trade will increase as well.

There were similarities between how Canada and Mexico approached AD and CVDs in a regional trade agreement, which may provide clues as to how this issue might play out in a WHFTA. 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, Canada and Mexico tried to negotiate a broader understanding over the use of AD duties and CVDs, but also failed.[42] 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 antidumping and countervail between close trading partners.

There were three important changes negotiated to Chapter 19 in order that Mexico, Canada and the United States could

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[42]In case of AD duties, such an understanding might be the use of national competition policy as an alternative to AD actions. For CVDs, an understanding might be a Subsidies Code negotiated on a North American basis, or the adoption of a Subsidies Code in the Uruguay Round.

reach agreement in the NAFTA. First, the NAFTA includes a section (Article 1907:3) that outlines desirable qualities for the administration of antidumping and countervailing duty laws.[43] This change (as well as the two following changes) were added to NAFTA to ensure that Mexico's trade remedy system is sufficiently similar to that of Canada and the United States to make a Chapter 19 mechanism suitable; and if not, to ensure that adequate remedial provisions are incorporated into the Agreement to protect the other Parties. The rationale underlying these changes is that Chapter 19 presupposes 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.

Second, the NAFTA includes a section (Annex 1904.15(d) Schedule B) that outlines a series of twenty obligatory amendments to Mexico's unfair trade remedy regime similar to that of Canada and the United States. The proposed amendments

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[43]For example, "publish notice of initiation of investigations"; "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.

are mainly procedural, and are intended to address the low standards of due process that are characteristic of Mexico's unfair trade remedy legislation.[44] For example, there are requirements that Mexican legislation shall provide explicit timetables for administrative proceedings, participation by interested parties, and timely access to all non-confidential information. The Mexican law that allows for the imposition of duties only five days after receipt of a petition must be changed, and, as well Mexico's recognition of parties having standing to request judicial review must be expanded to include foreign producers and exporters which were formerly excluded from seeking judicial review of an agency's determination. Perhaps most importantly, Mexico will be 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, which is the basis for judicial review by a binational panel.

Third, under the title of "Safeguarding the Panel Review System", the NAFTA includes a section (Article 1905) that provides remedies if a Party does not comply with its obligations under Chapter 19. If the application of a Party's domestic law prevents a binational panel from carrying out its functions, the NAFTA provides recourse to consultation and then to a Special Committee of three individuals selected from the

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[44]It is probable that Mexico provides greater due process in practice than that required by Mexican law.

same roster used for the purpose of establishing Extraordinary Challenge Committees.[45] If the Committee finds a Party has not complied with Chapter 19 the complaining Party can suspend binational panel review or equivalent "appropriate" benefits with respect to that Party. Article 1905 further provides that binational panel reviews between the disputing Parties will be stayed, and will revert to domestic courts if necessary; and it gives the Party complained against rights to retaliate in kind to a suspension of binational panel review by the complaining Party. 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 to terminate counter-measures if appropriate. To sum up, if appears that given the successful history of Chapter 19 in the FTA it is unlikely 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 the NAFTA) adopts the domestic practices necessary to implement Article 19. However, it is unlikely the extension of Chapter 19 to Mexico could survive any substantial use of Article 1905, since that article essentially signals a breakdown of the undertakings of Chapter 19 itself.

If other hemispheric nations were to accede to NAFTA or

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[45]Extraordinary Challenge Committees were provided for in the FTA to permit an appeal from a binational panel decision on grounds, inter alia, of misconduct or abuse of power. The NAFTA has a similar provision.

negotiate a WHFTA, it is likely that a Chapter 19-like mechanism would appeal to them for the same reason it appealed to Canada or Mexico. A WHFTA negotiation would also raise some of the issues faced in the NAFTA negotiation, such as the role of amparo (which has been widely adopted in South America from the Mexican legal system) and the Calvo doctrine in dispute settlement procedures, as well as the nature and procedural standards of AD and CVD investigations and assessments and their consequent impact on the standards of judicial review and due process under a Chapter 19-like mechanism.

The extension of Chapter 19-like procedures to a WHFTA would likely have some positive payoff for Canada and the United States. Canada would gain because the principle of binational review of unfair trade actions - which was originally a Canadian demand - would be more firmly established in North American trade policy. For the United States, the issue is more complicated. One would expect there would be domestic opposition to any perceived weakening of U.S. control over unfair trade remedies. On the other hand, a Chapter 19-like process might advantage the United States (and Canada) by curbing the expansion of AD and CVD use in its southern neighbours. Mexico is now the third largest user of AD actions worldwide, and any expansion of AD and CVD practices in South America could limit the potential for American exports in the future. Furthermore, there is no guarantee that other Western Hemispheric nations will conduct unfair trade remedy procedures

in the manner American exporters might feel entitled to. Ironically, the less foreign practices conform to American notions of due process, the greater the incentive to negotiate a dispute settlement mechanism. It the United States is seriously interested in negotiating a WHFTA, it is likely it will negotiate as well an internationalized legal regime to set limits on the national use of unfair trade remedies like AD and CVDs.