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**AN EXAMINATION OF RULE CHANGE:
THE EVOLUTION OF TRADE REMEDY LAWS IN NORTH AMERICA**

by

ANN E. PENNER, B.A., M.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of
Doctor of Philosophy

Department of Political Science

Carleton University
Ottawa, Ontario
September, 1997

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in partial fulfilment of the requirements
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ABSTRACT

The dissertation employs new-institutionalist theories to explain the changes that occurred in the North American trade regulatory process after 1989. The thesis proposes that changes occurred to the characters of the three domestic trade remedy regimes within the context of Chapters 19 of the Free Trade Agreement (FTA) and the North American Free Trade Agreement (NAFTA). Changes in the characters of the three regimes were caused by the degree to which socio-economic factors were reduced by Chapters 19 binational panels. Changes in the characters of the three regimes will be measured in terms of the fairness, transparency, and speed of the process of judicial review.

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PART ONE - SETTING THE STAGE

Part One sets the stage for the dissertation. Chapter One explains what is meant by new forms of protectionism, trade remedy laws, and antidumping and countervailing duties. It will describe the international laws governing trade remedy laws in general, and those of Canada, Mexico, and the United States in particular. Chapter One also discusses the causes and ramifications of the rise of trade remedy laws in international trade. Chapter Two sets the stage for the dissertation's theoretical component. The basic research questions, concepts, variables, and hypothesis are explained. Chapter Two also defends why a new-institutionalist approach was chosen to explain the evolution of trade remedy laws in North America. Chapter Three describes the laws, structures, and processes of the trade remedy regimes of Canada, Mexico, and the United States before 1989. It outlines the dispute settlement mechanisms of the GATT as well, because of their role in the resolution of North American trade disputes.

CHAPTER ONE -
AN INTRODUCTION TO TRADE REMEDY LAWS IN GLOBAL AND
NORTH AMERICAN TRADE

Harold Lasswell characterized “politics” as being about who gets what, when, and how. Lasswell argued that “politics” embraces any activities that involves binding decisions about the division of spoils in a society.¹ Lasswell’s assertion implies that if “politics” involves making binding decisions about the division of spoils in a society, a political scientist must consider the rules of a political system. Rules and laws are essential in any political system because they structure and organize a society. Moreover, rules and laws are imperative because they influence how the political system works. Rules create opportunities for various actors to pursue their interests. By setting out acceptable codes of behaviour, rules allow some actors to achieve their goals and prevent others from pursuing different agendas. Therefore, to borrow Lasswell’s words, rules affect who gets what, when, and how. By implication then, political science, is intimately connected to a study of rules.

Rules can change even though they structure a society and influence behaviour within it. Indeed, each country in the world has instituted a mechanism, or government, to amend rules to meet internal and external developments. Rules are two-sided because they both provide structure to a political system and can be amended by members of society. Rules offer structure and stability to a political system on the one hand, and are evolutionary creatures as they are adjusted to meet evolving needs on the other. Studying rules is fascinating because of this dual nature. The two-sided nature of rules raises the question: why do rules change? To return to Lasswell’s words, why do rules change so that certain individuals are able to get what they desire at one point in time, but may not be able to achieve their goals at another?

Political scientists have presented many theories to explain why rules change.² Essentially, the literature on rule change can be classified into three basic perspectives. The first perspective is that rules change because of societal forces. Individuals and groups are able to manipulate the rules of a society for their own benefit. Rules are simply byproducts of the interests of individuals in society. The second perspective is that rules change under the influence of the State. Statists allege that the state (or governments/bureaucracies) can move above and beyond the demands of social groups and cause rules to change. The third perspective combines elements of the first and second perspectives. Adherents to the third

¹ Harold Lasswell, *Politics: Who Gets What, When, and How?* (New York: McGraw-Hill, 1936).
² The different approaches will be discussed more fully in Chapter Two.

perspective, often referred as “new-institutionalists,” suggest that rules change because of a combination of “societal” and “statist” forces. Rules have a certain staying power of their own; they are able to affect the behaviour of members of society as well as the structure and power of the state. Nevertheless, new-institutionalists argue that rules are creatures of the society that they govern. Rules evolve to meet changing needs and developments that occur both within society and the State.

Different areas of public policy have been used to defend the three perspectives on rule change. My interest in trade policy inspired me to examine how rules have changed in international trade. Trade rules have become increasingly important in the context of protectionism and globalization. Rules have changed to meet new demands for protection, and to ensure that the global economy embodies free yet fair trade. Consequently, the dissertation has been built to address the question of why trade rules change. What are the most important influences in the evolution of rules in general, and trade rules in particular? Why can rules structure trade systems, influence the behaviour of societal actors, and change to meet newer interests and to accommodate socio-economic and political developments?

Overview of the Dissertation

The dissertation discusses the evolution of trade remedy laws in North America. Part One sets the stage for the dissertation. Chapter One explains what is meant by new forms of protectionism, trade remedy laws, and antidumping and countervailing duties (AD/CVDs). Chapter One also describes the international laws that govern the use of trade remedy laws in the global environment and how they have been incorporated into the domestic regimes of Canada, Mexico, and the United States. It also discusses the causes of the rise of trade remedy laws. Chapter One concludes by reviewing three ramifications of the newer forms of protectionism. Chapter Two lays the epistemological and theoretical foundations of the dissertation by setting out the research questions, primary concepts, variables, and hypothesis that will be developed. Chapter Two defends how and why a new-institutionalist approach can be applied to the evolution of trade remedy laws in North America. Chapter Three describes the laws, structures, and processes of the American, Canadian, and Mexican trade remedy regimes before the Free Trade Agreement (FTA) and North American Free Trade Agreement (NAFTA) came into effect, to demonstrate whether

and how the presence of Chapters 19 of the FTA and NAFTA caused them to change.³ Chapter Three also outlines the dispute settlement mechanisms of the General Agreement on Tariffs and Trade (GATT) because of their role in the administration of the three trade remedy regimes before 1989.

Part Two of the dissertation discusses the changes in the North American trade remedy regime after the FTA and NAFTA came into effect. It considers how the rules and institutions of Chapters 19 of the FTA and NAFTA affected the character of the three domestic regimes. Chapter Four describes the provisions of Chapters 19 of the FTA and the NAFTA. Chapters Five, Six, Seven and Eight examine four trade disputes to determine the effects that the presence of Chapters 19 had on the three trade remedy regimes: the Canada-U.S. softwood lumber dispute (1981-1996); the Canada-U.S. dispute over fresh, chilled, and frozen pork (1984-1991); the Canada-U.S. dispute over certain corrosion-resistant steel sheet plate (1993-1995); and the U.S.-Mexico cut-to-length steel plate products dispute (1992-1995). These disputes will consider whether final antidumping and countervail (AD/CVD) determinations were changed in accordance with the panels' orders in order that the regimes became fairer, more transparent, and faster systems of judicial review.

Part Three puts forward a number of conclusions. Chapter Nine synthesizes the four cases, and compares and contrasts the way that the variables of the hypothesis were manifested in them. It then places the hypothesis back into the context of new-institutionalist theory, to determine if institutions did indeed factor into the process of change. Chapter Nine examines the linkages between domestic and international laws. The linkages between domestic and international laws demonstrate why new-institutionalist theories are applicable to the evolution of trade remedy laws in North America, and suggest ways that new-institutionalist theories could be strengthened in the area of international law. Chapter Nine concludes by arguing that the continued success of Chapters 19 captures the paradoxical nature of international law. Chapters 19 of the FTA and NAFTA will only be able to change trade remedy laws if it receives the support of governments and dominant actors in the three countries. Change can continue to occur if dominant policy-makers and interest groups view Chapters 19 to be complementary to their domestic political systems, necessary in the face of economic developments, and compatible with the doctrine of state sovereignty and their national interests.

³ References to Chapter 19 as part of both the FTA and NAFTA will read as "Chapters 19." Singularly, NAFTA-19 and FTA-19 will refer to Chapter 19 of the NAFTA and Chapter 19 of the FTA, respectively.

New Forms of Protectionism—Trade Remedy Laws

An examination of the evolutionary nature of trade remedy laws requires that a number of factual and theoretical issues be addressed. Therefore, in order that the technical issues of trade remedy laws are clear, the remainder of Chapter One will set the groundwork for the empirical section of the dissertation. Appendix A supplements the following discussion, and explains the international laws governing antidumping, subsidies, and countervailing duties in detail.

(1) Antidumping Duties

Dumping is the practice whereby an exporter sells a product at a lower price in a foreign market than it is sold for in the home market. Dumping practices can be acceptable when exporters use them to ensure that price levels are determined by market forces rather than by artificial or imposed means. Similarly, they can allow an exporter to establish a niche within a new market by making his/her product more competitive.⁴ Furthermore, dumping practices often allow smaller countries to establish economies of scale and thereby enhance their comparative advantages.

Conversely, dumping practices can be predatory and negative when they seek to eliminate competition in foreign markets. Predatory dumping consists of “systematically pricing below cost with a view to intimidate and/or eliminate rivals in an effort to bring about a market price higher than would otherwise prevail.”⁵ Such pricing can be negative because a foreign exporter who enjoys a monopoly in his/her home market may finance below-cost export sales to drive out the domestic producers of another country. Once domestic producers have been driven out of business, or have been sufficiently disciplined to allow the dumper to control the export market, the foreign exporter is able to raise the export prices to monopoly levels, recoup its losses, and generate supra-competitive profits in the future.⁶ Antidumping duties (ADDs) are ultimately designed to protect domestic producers against these kinds of predatory practices.

The basic international rules governing dumping practices and ADDs are included in Article VI of the GATT, the GATT’s 1979 Antidumping Code, and the World Trade

⁴ Susan Hutton, Michael Trebilcock, “An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Rationales,” *Journal of World Trade*, Vol. 24 (June, 1990), 127-128.

⁵ Susan Hutton, Michael Trebilcock, “An Empirical Study of the Application of Canadian Anti-Dumping Laws,” *Journal of World Trade*, Vol. 24 (June, 1990), 126.

⁶ Susan Hutton, Michael Trebilcock, “An Empirical Study of the Application of Canadian Anti-Dumping Laws,” *Journal of World Trade*, Vol. 24 (June, 1990), 126.

Organization's (WTO) Agreement on the Implementation of Article VI of the GATT 1994. The WTO Agreement replaced the GATT rules when it came into effect in 1994. Article VI of the GATT defines dumping as the situation when:

A product is ... introduced into the commerce of an importing country at less than its normal value ... and ... this situation occurs if the price of the product exported from one country to another: a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the export country, or, b) in the absence of such domestic price, is less than either i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.⁷

Canada, Mexico, and the United States have implemented their own dumping rules in accordance with the provisions of the GATT and WTO. Dumping practices are governed by the Special Import Measures Act (SIMA) of 1984 in Canada.⁸ The American statute that governs dumping is the Tariff Act of 1930.⁹ Dumping in Mexico is regulated

⁷ For a summary of GATT provisions on dumping and ADDs, see William Davey, "Overview of the General Agreement on Tariffs and Trade," in Pierre Pescatore, William Davey, Andreas Lowenfeld, (eds), *Handbook of GATT Dispute Settlement* (Irvington-on-Hudson: Transnational Juris Publications Inc., 1992), 49-54.

⁸ The SIMA replaced the Anti-Dumping Act of 1970. It modified Canadian antidumping legislation by changing procedural and substantive rules governing anti-dumping investigations. The SIMA also instituted countervailing duty procedures and provided a number of measures which may be implemented to protect the Canadian economy from prejudicial imports. For a detailed description of antidumping laws and the SIMA, see John N. Buchanan, "AntiDumping Law and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 2-22.; R.K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: Carswell, 1986), 107-118; J.G. Castel, A.L.C. de Mestral, W.C. Graham, *The Canadian Law and Practice of International Trade and Practice with Particular Emphasis on Export and Import of Goods and Services* (Toronto: Edmond Montgomery Publications Limited, 1991), 335-375; Peter Magnus, "The Canadian Anti-dumping System," in John H. Jackson, Edwin A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 174-175.

⁹ Title VII of the Trade Agreements Act of 1979 replaced Section 201 of the Tariff Act of 1921 and Title VII of the Tariff Act of 1930 as the major American law governing dumping and anti-dumping duties. For a description of the American laws, see Tracy Murray, "The Administration of the Anti-Dumping Duty Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington: The Brookings Institute, 1991), 23-56; N. David Palmeter, "The Anti-Dumping Law: A Legal and Administrative Nontariff Barrier," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington: The Brookings Institute, 1991), 67-89; James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 110-114.

by the Foreign Trade Law of 1986 as amended in 1993, as well as the accompanying Regulations Against Unfair International Trade Practices.¹⁰

(2) *Countervailing Duties*

Countervailing duties (CVDs) are another form of protectionism that both developed and developing countries have used since the 1970s. CVDs are connected to subsidies. Subsidies are one of the most important tools that governments have used to build their economies. For example, Mexican governments have used subsidies extensively since the 1940s to gain control over the economy, to eliminate and/or significantly reduce external competition, to sustain inefficient domestic industries, and to provide the opportunity for profitable investment in certain sectors of the economy (e.g., natural resources). Mexican governments have never attempted to hide the fact that subsidies have been used to help domestic producers expand their production facilities and manufacture goods for export.¹¹

Similarly, subsidies have been widely used in Canada and the United States. Many Americans have suggested that U.S. governments do not subsidize their domestic producers to the extent that other governments do. However, Nivola argues that subsidies are used in the United States just as much as they are in other industrialized countries. American subsidies are often not recognized as such because they are defined uniquely in the United States. Tax credits, depreciation allowances, defense-related funding of

¹⁰ The rules governing dumping practices are encoded in Articles 7-19 of the Foreign Trade Law. Comprehensive descriptions of the Law are provided by: Ernesto Rubio del Cueto, "Countervailing Duties Affecting United States-Mexican Trade," *Houston Journal of International Law*, Vol. 23, No. 3 (1990), 324-325; Richard D. English, "The Mexican Accession to the General Agreement on Tariffs and Trade," *Texas International Law Journal*, Vol. 23 (1988), 383-387; Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications as well as Practical Business Risks and Realities for United States Exporters to Mexico in the Era of the North American Free Trade Agreement," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 928-944; Neil Longley, Terry Wu, "Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the Free Trade Negotiations," *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 894-896; Peter F. McLaughlin, "Mexico's Antidumping and Countervailing Duty Laws: Amendable to a Free Trade Agreement?" *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1022-1024.

¹¹ Jaime Behar, *Trade and Employment in Mexico* (Stockholm: Swedish Institute for Social Research, 1988), 84-85; Gerardo Bueno, "The Structure of Protection in Mexico," in Bela Balassa et al (eds), *The Structure of Protection in Developing Countries* (Baltimore: The Johns Hopkins Press, 1971), 180; Lorenzo L. Perez, "Export Subsidies in Developing Countries and the GATT," in Pradip K. Ghosh (ed), *International Trade and Third World Development* (Westport: Greenwood Press, 1984), 250; Rene Villarreal, "The Policy of Import-Substituting Industrialization, 1929-1975," in Reyna Jose Luis, Richard S. Weinert (eds), *Authoritarianism in Mexico* (Philadelphia: Institute for the Study of Human Issues, 1977), 74.

research and development, and NASA programs are not considered subsidies that could place foreign firms at a disadvantage in the United States. When those measures are considered, Nivola concludes the American government is just as involved, if not more so, in its economy than other governments are in theirs.¹²

In many respects, subsidies have come to be seen as an integral aspect of the basic social and economic fabric of Canada, Mexico, and the United States.¹³ They raise concerns about national sovereignty because they are intimately connected to a government's ability to intervene in its domestic economy. Consequently, subsidies are fiercely guarded and defended by developing and developed countries alike during trade negotiations. For example, one of the key issues of the FTA and NAFTA negotiations was the legitimate use of subsidies in North America. For Jackson:

Domestic or general subsidies ... are an important tool of government policy. They are used extensively by all governments, and often for laudatory policy goals, such as redressing unfair imbalances of income, alleviating distress of poverty, or pursuing democratic priorities of various types such as cultural, religious, national or security goals. They are mixed deeply into the fabric of national sovereignty. In those cases the objectives of international trade rules to minimize market distortions must be balanced against the competing legitimate government goals.¹⁴

CVDs are linked to subsidies. They are duties that are intended to offset the "unfair" advantages that domestic subsidies can give to goods when exported into another market. The GATT/WTO permits CVDs to be levied in cases where subsidies cause or threaten material injury to other producers.

Causes of the Increased Use of Trade Remedy Laws during the 1970s and 1980s

Newer forms of protectionism such as trade remedy laws arose because of the problems challenging the global economy during the 1970s.¹⁵ For example, the rise of trade remedy laws was sparked by the instability that resulted from the world monetary system's abandonment of relatively fixed exchange rates in the early 1970s. High interest

¹² Pietro Nivola, "Trade Policy: Refereeing the Playing Field," in Thomas E. Mann (ed), *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington: The Brookings Institute, 1990), 212.

¹³ Michael Hart, "The Canada-United States Working Group on Subsidies" (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 5-11.

¹⁴ John Jackson as cited in Michael Hart, "The Canada-United States Working Group on Subsidies" (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 5.

¹⁵ Frank Stone, *Canada, the GATT and the International Trade System 2nd Ed* (Halifax: The Institute for Research on Public Policy, 1992), 188-189.

rates in certain countries caused interest rates and exchange values to rise in others. High exchange values created pressures on trade balances; some countries were unable to retain trade surpluses and were subjected to massive foreign debts. The relationship between interest and exchange rates created a sense of greater risk and uncertainty. Governments around the world feared that they were able to control their economies to the extent that they had done in the 1950s and 1960s.¹⁶ Furthermore, the newer forms of protectionism emerged as patterns of world production and trade began to change in the 1970s. European and North American producers began to lose their comparative advantage and superiority in industrial production with the rise of industrialization and modernization in the Asia-Pacific region. They were forced to rationalize and restructure their production facilities to keep up with the advanced technological industries in Japan and the Newly Industrialized Countries (NICs). While some established industries were able to adjust to the new competition, a large majority were unable or unprepared to adjust to the new international competition. They pressured their governments to protect them from rising imports and to assist them with subsidies and other help in order to maintain their production and employment levels.¹⁷

Therefore, deficits in international balances, exchange-rate problems, large-scale international movements of funds, and the severe Third World debt crisis discouraged the liberalization of border measures. Furthermore, they led to the establishment of tight domestic monetary policies, high interest rates, and high inflation rates in industrialized countries. Subsequently, as levels of instability and uncertainty increased, and domestic economic activity in the industrialized countries was depressed, pressures arose from domestic producers and labour groups for protectionist trade measures such as ADDs/CVDs.¹⁸

Generally speaking, protectionist strategies have been normal practices for developing countries. The high levels of protection offered to domestic producers negated the need for trade remedy laws until the late 1970s and 1980s. Domestic producers were well protected by high tariff barriers, restrictive foreign investment laws, tax subsidies, export incentives, import licences, and low financing arrangements. For example, import licences were a much more stringent form of protectionism than ADDs or CVDs could ever

16 *The Report of the Royal Commission on the Economic Union and Development Prospects for Canada Vol. I* (Ottawa: Minister of Supply and Services Canada, 1985), 239.

17 Frank Stone, *Canada, the GATT and the International Trade System 2nd Ed* (Halifax: The Institute for Research on Public Policy, 1992), 188-189; *Macdonald Commission*, 239.

18 Frank Stone, *Canada, the GATT and the International Trade System 2nd Ed* (Halifax: The Institute for Research on Public Policy, 1992), 188.

have been because they granted domestic producers complete protection from any competition in their home market. Import licences permitted the importation of foreign goods depending on the availability of domestic goods. Similarly, import substitution policies allowed governments to become heavily involved in their countries' economies. Mexican governments, for example, regulated the economy and supported industrial development by providing protection to domestic manufacturers, by sustaining high prices for manufactured goods, by lowering input prices by energy subsidies, and by placing licences on some agricultural raw materials and minerals.

Among other developing countries, Mexico began to liberalize its trade laws and protectionist regimes during the 1970s and 1980s. Liberalized export-oriented strategies were pursued to develop industry, to strengthen international competitiveness, to encourage regional decentralization of industrial sectors, and to regulate foreign investment.¹⁹ Interestingly, liberalized export strategies were pursued by developing countries during the time when industrialized countries were using newer forms of protectionism to protect themselves from increased competition. The newer, liberalized approaches to tariff barriers and import licences caused governments in developing countries to create trade remedy regimes like those in the European Community, United States, and Canada by the mid 1980s. New forms of protectionism, such as ADDs/CVDs, were justified as compatible with the GATT and the spirit of free trade. Moreover, developing countries like Mexico argued that ADDs/CVDs were necessary defences, and not outright examples of protectionism. Trade remedy laws were necessary and justifiable because developing countries were entitled to adopt the same safeguards against unfair trade that the developed countries had never hesitated to use against them.²⁰

¹⁹ Organization of American States, *Interim Report of the OAS Special Committee on Trade to the Western Hemisphere Trade Ministerial* (Denver: June 30, 1995), 39.

²⁰ Jaime Behar, *Trade and Employment in Mexico* (Stockholm: Swedish Institute for Social Research, 1988), 84-85; Ernesto Rubio del Cueto, "Countervailing Duties Affecting United States-Mexican Trade," *Houston Journal of International Law*, Vol. 23, No. 3 (1990), 332; Jaime Ros, "Mexico's Trade and Industrialization Experience Since 1960: A Reconsideration of Past Policies and Assessment of Current Reforms," Working Paper No. 186, Helen Kellogg Institute for International Studies, Notre Dame, 1993, 44-46; Sidney Weintraub, *Free Trade Between Mexico and the United States?* (Washington: The Brookings Institute, 1984), 83; Organization of American States, *Interim Report of the OAS Special Committee on Trade to the Western Hemisphere Trade Ministerial* (Denver: June 30, 1995), 52-53.

The Ramifications of the Use of Trade Remedy Laws

(1) The Politicization of Trade Policy

One of the most damaging effects of the growing reliance on trade remedy laws has been the politicization of trade policy. ADDs/CVDs are politically motivated, protectionist measures that are used by governments to protect their domestic producers. Horlick noted that 90 percent of AD cases in North America have been purely protectionist ones. ADDs have been rarely used to discipline foreign producers who were truly guilty of predatory pricing.²¹ Bovard argued that predatory pricing practices which sought to corner international markets were virtually impossible because international competition had become more widespread and countries had become modernized and industrialized. When examining the use of ADDs in the United States, he explained that “although the fear of predation permeates dumping laws and regulations, there is no known case in the last century of any company dumping its products in a U.S. market, bankrupting American producers, and driving up its prices and shafting American consumers for a long period.”²² Nevertheless, ADDs have been used widely in the United States. The Department of Commerce (DOC) reached a “guilty” verdict in 95% of its 3000 foreign dumping cases during the 1980s.²³ Similar conclusions have been presented about Canadian and Mexican markets.²⁴ Therefore, the evidence demonstrates that North American governments have routinely used ADDs as political weapons to favour their domestic producers over foreigners. Duties have been levied under the protectionist guise of shielding domestic producers from the unfair, predatory pricing practices of their foreign competitors.²⁵

Similarly, CVDs have been used as politically motivated devices to protect domestic producers from “unfair” advantages given by subsidies. American administrative agencies initiated approximately 280 countervail investigations between 1981-1985. By

21 Gary Horlick, “Comment,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 137.

22 James Bovard, *The Fair Trade Fraud* (New York: St. Martin’s Press, 1991), 157.

23 James Bovard, *The Fair Trade Fraud* (New York: St. Martin’s Press, 1991), 1, 169.

24 Susan Hutton, Michael Trebilcock, “An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Rationales,” *Journal of World Trade*, Vol. 24 (June, 1990), 129-130; Craig R. Giesze, “Mexico’s Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 940-944.

25 Gilbert R. Winham, “What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters,” Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 3; Gilbert R. Winham, Heather A. Grant, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA, and Beyond,” *Minnesota Journal of Global Trade*, Vol. 3, No. 1 (Spring, 1994), 19.

comparison, the United States had only issued 40 CVD orders against foreign producers between the 1930s and 1979. Many of those actions were the result of congressional pressure and the protectionist interests of powerful interest groups in the U.S.²⁶ Bovard noted that the DOC's ruling on the legitimacy of Canadian subsidies during the 1986 Softwood Lumber dispute was "clearly timed to save several Republican Senate seats in the timber producing states."²⁷ He argued that political pressure allowed:

Countervailing duty law [to] become a license for American government officials to create artificial advantages for American companies. The current sweeping definition of foreign subsidy has transformed the countervailing duty law from a defensive shield against foreign subsidies into an offensive weapon for American companies.²⁸

Mexican governments have used CVDs to create incentives for domestic producers. The de la Madrid, Salinas, and Zedillo administrations have used CVDs to enable domestic industries to expand their exporting capacities and to ensure that domestic goods were not substituted for foreign imports. Therefore, CVDs have been used as political tools to favour Mexican producers over foreign ones.²⁹ Stephen Powell, Chief Counsel for Import Administration at the DOC, argued that fighting CVD determinations became a standard cost of doing business in Mexico during the 1980s. The birth of the Foreign Trade Law made Mexico "a player overnight" in the unfair regulatory systems of the global trading environment. By 1988, Mexico had initiated more AD/CVD cases than Canada, and "supplanted Canada as the fourth most active user of unfair trade laws." 140 unfair trade cases were launched between 1986-1993 to protect domestic producers from foreign competitors.³⁰

CVDs have not been used as extensively in Canada as in Mexico and the United States. Historically, Canadian governments looked to AD laws to protect domestic producers. Many subsidized imports were also dumped into Canada, and could be dealt with by AD proceedings instead of CVD actions.³¹ In addition, Horlick explained that

²⁶ Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 3.

²⁷ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 173-174.

²⁸ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 191.

²⁹ Sydney Weintraub, *Free Trade Between Mexico and the United States?* (Washington: The Brookings Institute, 1984), 83; Richard D. English, "The Mexican Accession to the General Agreement on Tariffs and Trade," in *Texas International Law Journal*, Vol. 23, No. 3 (1988), 381.

³⁰ Craig R. Giesze, "Mexico's New Antidumping and Countervailing System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 894-895, 935.

³¹ R.K. Paterson et al, *International Trade and Investment Law in Canada* (Toronto: Carswell, 1994), 8-54.

Canadian governments did not consider it rational to impose high CVDs on products that Canadians want to buy.³² Nevertheless, while they have not been used to the extent that other governments have used them, CVDs have been levied in Canada for predominately political, protectionist reasons as well. For Hart, “in part as a defensive mechanism, in part in response to domestic protectionist pressures, Canadian governments have felt compelled to adopt [CVD] laws very similar in intent and result to the protectionist and politically motivated American laws.”³³ Interestingly, CVDs have been becoming more attractive instruments to Canadian trade policy-makers during the 1990s. Faced with fiscal constraints and spending cuts, Canadian governments have been leaning towards the use of CVDs to protect domestic producers instead of relying on subsidies that to “bring them up to bar” with their foreign competitors.³⁴

Therefore, ADDs/CVDs can be almost entirely explained as political devices used by the Canadian, Mexican and American governments to satisfy domestic producers. The administrative bodies which create and apply trade remedy laws in Canada, Mexico, and the United States have consistently issued rulings to favour the interests of their nationals who have used them, “as a weapon against competitors when faced with stiff competition of any kind, and not merely as a protection from unfair competition.”³⁵

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- 32 Gary Horlick. “Comment,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 140.
- 33 Michael Hart. “The Canada-United States Working Group on Subsidies” (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 32-33.
- 34 Murray Smith, “The Economic Impact of the Canada-U.S. Free Trade Agreement and NAFTA,” Paper presented to the Conference on the “Legal Order in Trade Areas in Europe and the Americas” at the University of Ottawa, October 17-18, 1995, 13-14.
- 35 Michael Hart. “The Canada-United States Working Group on Subsidies” (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 141. For similar statements, see Thomas M. Boddez and Michael Trebilcock, *Unfinished Business: Reforming Trade Remedy Laws in North America* (Toronto: C.D. Howe Institute, 1993), 23; John Buchanan, “Anti-Dumping Law and the Special Import Measures Act,” *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 22; James Bovard, *The Fair Trade Fraud* (New York: St. Martin’s Press, 1991), passim; Alan Rugman, “U.S. Protectionism and Canadian Trade Policy,” *Journal of World Trade*, Vol. 20, No. 4 (1986), 366, 370; Ronald A. Cass, Warren F. Schwartz, “Causality, Coherence, and Transparency in the Implementation of International Trade Laws,” in Michael J. Trebilcock, Robert C. York (eds), *Fair Exchange: Reforming Trade Remedy Laws* (Toronto: C.D. Howe Institute, 1990), 26; Robert E. Baldwin, Michael O. Moore, “Political Aspects of the Administration of the Trade Remedy Laws,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 266-267.

(2) The Harmful and Costly Effects of Trade Remedy Laws

The proliferation of protectionist trade remedy laws has been extremely costly to exporters and consumers alike. For example, the average cost to launch a legal battle against American ADDs and CVDs is between US \$500,000 and US \$3 million.³⁶ The legal expenses and costs that Canadian softwood lumber producers incurred while fighting the 1982-1983 American CVD action exceeded CDN \$4 million.³⁷ The high costs of fighting AD/CVD determinations have hindered many small producers from sufficiently protecting themselves when venturing into foreign markets. It is often too expensive for small firms to fight the protectionist trade remedy laws of other countries. Protectionist ADDs/CVDs have also proven to be costly to domestic consumers because the prices they must pay for imported goods are often unnaturally high and subject to foreign monopolies.

The use of protectionist trade remedy laws has not only harmed small producers and consumers, but has hurt smaller countries as well. Grey maintained that "the Anti-Dumping and Countervailing Duty systems as sanctioned by Article VI of the GATT inherently protect producers in large economies more effectively than producers in smaller economies."³⁸ Protectionist trade remedy measures are generally biased in favour of larger, more politically and economically powerful states. For example, Canada directed 86% of its exports into the United States in 1994. Mexican exports to the United States equaled 75% of its total level in the same year. Conversely, only 22.3% and 9.9% of American exports went into Canadian and Mexican markets respectively, even though Canada and Mexico were the first and third most important trading partners of the United States in 1994. Therefore, an American CVD or ADD would likely have far more impact on a Canadian or Mexican industry than a similar Canadian or Mexican duty would have on an American industry. In this way, protectionist trade remedy laws have given the American producers, lobby groups, and officials an advantage over their Canadian and Mexican counterparts because of the size of the American market, and the political and economic clout of the U.S.³⁹

³⁶ Thomas M. Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 26.

³⁷ Alan Rugman, "U.S. Protectionism and Canadian Trade Policy," *Journal of World Trade*, Vol. 20, No. 4 (1986), 373; Susan Hutton, Michael Trebilcock, "An Empirical Study of the Application of Canadian AntiDumping Laws," *Journal of World Trade*, Vol. 24 (June, 1990), 141,144.

³⁸ Rodney Grey as cited in Michael Hart, "The Canada-United States Working Group on Subsidies" (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 15.

³⁹ Organization of American States, *Interim Report of the OAS Special Committee on Trade to the Western Hemisphere Trade Ministerial* (Denver: June 30, 1995), 17-18..

Newer forms of protectionism have posed the most serious threat to the economic development of industrializing countries. Foreign ADDs/CVDs have magnified the distortions that import substitution policies caused for the trade patterns and capabilities of developing countries. For example, ADDs and CVDs have driven developing countries further away from manufacturing activities in which they possessed a clear comparative advantage, and towards those activities where trade was "managed" by foreign owned multinational corporations (MNCs). Many developing countries have suggested that the best means to control new forms of protectionism would be flexible international rules and effective institutions which facilitate definitions of acceptable trading practices and non-tariff barriers. Rules were seen as devices that could reduce power politics within international trade, enhance economic development, and increase the trading/negotiating positions of developing countries vis-à-vis developed ones.⁴⁰ For example, developing countries banded together during the Tokyo Round of Multilateral Trade Negotiations (MTNs) to demand that special conditions be included in the GATT's AD/CVD Codes so they could continue to use export subsidies for economic development. Developing countries maintained that the trade remedy laws of developed countries significantly constrained their trade and compounded their economic disadvantages. Moreover, developing countries argued that they were forced to use non-tariff barriers more than developed countries to account for their structural economic problems. Finally, they suggested that flexible international trade rules would help facilitate their economic growth.⁴¹

The harmful and costly ramifications of trade remedy laws have caused critics to argue that such laws simply favour larger companies and countries with a significant amount of political power and influence.⁴² Many have charged that ADDs and CVDs are

⁴⁰ Gerald K. Helleiner, "The New Industrial Protectionism and the Developing Countries," in Pradip K. Ghosh (ed), *International Trade and Third World Development* (Westport: Greenwood Press, 1984), 190, 210.

⁴¹ It should be noted that special measures were placed into the international trading system to assist developing countries to compete with developed ones. The best known measures have been one-way preferential arrangements such as the Generalized System of Preferences (GSP), the Lomé Convention (between the European Union and the African, Caribbean, and Pacific states), the U.S. Caribbean Basin Initiative (CBI), and Canada's Caribcan Program. Developing countries have also been treated more favourably with respect to their obligations in multilateral trade negotiations through the "special and different treatment" provisions of Part IV of the GATT. Organization of American States, *Interim Report of the OAS Special Committee on Trade to the Western Hemisphere Trade Ministerial* (Denver: June 30, 1995), 8; Lorenzo L. Perez, "Export Subsidies in Developing Countries and the GATT," in Pradip K. Ghosh (ed), *International Trade and Third World Development* (Westport: Greenwood Press, 1984), 251.

⁴² Alan Rugman, "U.S. Protectionism and Canadian Trade Policy," *Journal of World Trade*, Vol. 20, No. 4 (1986), 373; Susan Hutton, Michael Trebilcock, "An Empirical Study of

irrational instruments in a liberalized economic environment because of their harmful and costly nature to consumers, producers, and smaller countries alike. They have recommended that governments abandon ADDs and CVDs and pursue common competition policies, in order that the economic interests of consumers and producers be promoted to the greatest degree within a free market. Others warn against becoming too idealistic when attempting to reform protectionist trade remedy laws. As long as countries such as Canada, Mexico, and the United States remain sovereign states, they will fight to retain their ability to sustain policies that protect the “health” of their domestic producers and economy as a whole.⁴³

(3) The Move towards Judicial Forms of Dispute Settlement to Deal with Trade Remedy Laws

Members of the global trade community have increasingly come to rely on the importance of rule-based trade. Stronger rules and institutionalized forms of dispute settlement were included in each round of multilateral trade negotiations of the GATT, as well as in regional trade agreements around the world. The rule of law was institutionalized into trade agreements to curb the harmful effects of AD/CVD measures. For example, American and Canadian negotiators were among the most vocal critics of the GATT's dispute settlement system. They argued that the GATT was unable to regulate the newer forms of protectionism effectively. They demonstrated that the rise of trade remedy laws made the resolution of disputes within the GATT much more complex. Issues such as dumping, subsidies, and CVDs were not centered on simple tariff reductions, but raised sensitive issues of national sovereignty, national interest, and the ability of states to make domestic policies to protect their own economies and producers. Consequently, they

the Application of Canadian AntiDumping Laws,” *Journal of World Trade*, Vol. 24 (June, 1990), 141,144. Trebilcock has argued this in his two Chapters in *Fair Exchange* (Toronto: C.D. Howe Institute, 1990), and in *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 197-202. Similar conclusions have been reached by Robert E. Baldwin, Michael O. Moore, “Political Aspects of the Administration of the Trade Remedy Laws,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 264-267; Francois, Palmeter, Anspacher “Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 95-96, 100, 130; Tracy Murray, “The Administration of the Anti-Dumping Duty Law,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 51.

⁴³ Michael Hart, “Idealism versus Pragmatism: Policy and the Academic Analyst,” in Michael J. Trebilcock, Robert C. York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990); Jonathan Fried, “The Art of the Possible: A Comment,” in Michael J. Trebilcock, Robert C. York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990).

maintained that the growth of complex trade remedy laws challenged the effectiveness of the GATT to liberalize world trade and to ensure secure market access for its members.

The rise of newer, more complex trade issues (e.g., trade remedies) prevented the GATT's dispute settlement mechanisms from resolving disputes effectively. When disputes arose over purely economic-based tariff issues, the dispute settlement mechanisms of the GATT were able to work well. However, as new forms of protectionism emerged, and as the GATT community began to change, Members began to question the merit, equity, and importance of pursuing legal channels to settle trade disputes. As a result, the dispute settlement mechanisms of the GATT fell into disuse and disrepute, as non-compliance became a viable option for its members.⁴⁴ According to Grey, "the GATT as a set of rules was no longer effective [by the early 1970s.] It no longer served adequately the interests of smaller countries; it no longer served effectively the interests even of the larger countries-which also need rules."⁴⁵ The most poignant problem that challenged the GATT's dispute settlement provisions was that the rule of law was subjugated to the influence of political power and domination.⁴⁶ Governments either hesitated or refused to invoke the dispute settlement procedures of the GATT. Even if they did use the GATT's dispute settlement mechanisms, governments hesitated to implement the decisions of the dispute panels. Jackson explained that the hesitation to use the provisions of the GATT:

... stemmed partly from a lack of faith in the fairness of the process in that an imbalance of power between the disputing parties in many ways tends to bias the dispute resolution mechanism. Even if allowed to retaliate small countries do not feel they will have any effect on larger ones.⁴⁷

In light of the ineffectiveness of the dispute settlement mechanisms of the GATT, members turned to traditional diplomatic techniques and political negotiations to resolve trade disputes that developed out of the new forms of protectionism. However, political

⁴⁴ For a description of the early years of GATT dispute settlement and the reasons why the mechanisms fell into disuse and disrepute, see William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 61-62; Robert Hudec, *The GATT Legal System and World Trade Diplomacy 2nd Ed* (Salem: Butterworth Legal Publishers, 1990), Part II, Chapters 7-10.

⁴⁵ Rodney de C. Grey, "The Decay of the Trade Relations System," in R.H. Snape (ed), *Issues in World Trade Policy* (New York: St. Martin's Press, 1986), 25.

⁴⁶ For summaries of the other major problems identified in the GATT dispute settlement provisions see: John H. Jackson, "The Birth of the GATT- MTN System: A Constitutional Appraisal," *Law and Policy in International Business*, Vol. 12, No. 1 (1980), 34-35; Ivo Bael, "The GATT Dispute Procedure," *Journal of World Trade*, Vol. 22, No. 4 (1988), 71-73; William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 81-90.

⁴⁷ John H. Jackson, "The Birth of the GATT- MTN System," *Law and Policy in International Business*, Vol. 12, No. 1 (1980), 41.

negotiations between members of the “old boys’ networks” were unable to resolve the complex trade disputes created by AD/CVD measures. The common outlooks and assumptions which bound the men that framed the GATT together in an amicable, friendly environment disappeared by the 1970s and 1980s. Trade negotiations and disputes began to involve new actors who did not know, understand, or appreciate the concerns, assumptions, and outlooks of their fellow negotiators. European delegates no longer spoke for their own countries, but began to defer to the spokesman for the European Community instead. American delegates were more likely to have graduated from universities such as Ohio State than from Harvard, Yale, Princeton, or Oxford where their European counterparts did. Canadian representatives to the GATT became more diverse as well; the traditional Queen’s man or scion of the Toronto or Montreal establishment was slowly replaced with Canadians from all walks of life. To add to the diversity of the GATT negotiations, European and North American representatives were joined by representatives from Asia, Africa, and South America.⁴⁸ In light of the changed atmosphere, negotiations were much more complex and subject to highly differentiated opinions and interpretations.

Members of the GATT, both large and small, thus began to assert that agreed upon, impartial rules and procedures be used to avoid and/or resolve trade disputes. Article XXIII of the GATT set out a loose framework of how disputes were to be processed in the event that governmental negotiations and consultations failed to provide an amicable settlement to the disputes. The loose framework of Article XXIII was augmented by agreements such as: the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance; the 1979 Subsidies and Countervailing Duties Code; the 1979 Antidumping Code; the 1982 Ministerial Declaration; and ultimately by the WTO’s “Understanding on Rules and Procedures Governing the Settlement of Disputes” (1994).

In conjunction with the evolution of rules in the GATT, judicial dispute settlement mechanisms were institutionalized in regional trade agreements as well. Canada, Mexico, and the United States began to look to agreements to supplement the structures of their own trade remedy regimes and those of the GATT. For example, legal forms of dispute settlement were officially incorporated into the conduct of Canadian-American trade during the 1970s and 1980s. Generally, Canadian-American trade disputes had been resolved by diplomacy until the late 1970s, in spite of the fact that rules, institutions, and dispute settlement mechanisms were included in a number of bilateral agreements.⁴⁹

⁴⁸ Michael Hart, “Dispute Settlement and the Canada-United States Free Trade Agreement” (Ottawa: Centre for Trade Policy and Law, 1990), 10-11.

⁴⁹ The most notable example was the International Joint Commission of the Boundary Waters Treaty of 1909.

Canadian officials were reluctant to give lawyers a dominant role in the creation of trade policies and laws and in the settlement of bilateral trade disputes until the late 1970s and early 1980s. Canadian diplomats were not “enamoured of international lawyers, and few thought international law of much use when the task was to be flexible and seek compromises, build bridges, or find middle ground toward which others could move.”⁵⁰ In Canadian-American relations, for example, the old boy networks which had dominated the political and foreign agendas of Canada and the United States between 1920-1970 had been able to efficiently and effectively solve trade disputes by negotiating between themselves.⁵¹ Therefore, the more legalistic, structured mechanisms that legal associations espoused to settle bilateral trade disputes were rejected by Canadian trade policy and law makers. Consequently, Canadian lawyers were left out of trade negotiations and the settlement of bilateral trade disputes until the late 1970s and 1980s.

As trade issues and disputes became more complex, Canadian governmental officials began to turn to the legal community for advice. International lawyers began to advocate that legal mechanisms be used instead of diplomacy to avoid and resolve trade disputes with all of Canada’s trading partners, and especially with the United States. According to its report entitled “Settlement of International Disputes Between Canada and the USA,” the Joint Working Group of the American and Canadian Bar Associations (ABA-CBA) recommended that diplomatic negotiations had to be complemented by legal dispute settlement mechanisms. The report affirmed that Canadians and Americans had been able to use diplomatic negotiations and consultations successfully to avoid and settle bilateral trading disputes in the past. Nevertheless, the report insisted that bilateral negotiations were not, and could not always be, successful in settling complex trading disputes between two sovereign states. The report noted that many of the most difficult bilateral trading disputes (e.g., softwood lumber) dragged on for years while the problems became more aggravated and complex. In other cases, diplomatic negotiations were simply suspended when the bilateral issues lost their urgency, thereby leaving the problem unresolved. The report advocated that technical, legal, trade disputes could be resolved more effectively and efficiently in a legal forum that was built upon mutually formulated rules. By referring complex trade disputes to a fully elaborated legal mechanism such as binding arbitration, diplomatic negotiations could be improved by allowing the dispute to be settled according to established rules; the rules of the negotiations would not therefore need to be worked out while the dispute aggravated the level of tension between the two

⁵⁰ Allan Gotlieb, “The United States in Canadian Foreign Policy,” O.D. Skelton Memorial Lecture (Toronto: December 10, 1991), 13.

⁵¹ Michael Hart, “Dispute Settlement and the Canada-United States Free Trade Agreement” (Ottawa: Centre for Trade Policy and Law, 1990), 6.

governments. Binding bilateral dispute settlement mechanisms, such as compulsory third party arbitration could thus continue to make the Canada-United States trade relationship manageable in the face of harmful issues such as AD/CVD laws.⁵² According to the report:

The threads of the relationship are thoroughly interwoven; the fabric is a whole. If loose ends are left unattended, because negotiations will not answer, the entire fabric might unravel. Only a system of arbitration or judicial settlement can, at the last, ensure that these ends will be bound up. Therefore, the possibility of compulsory reference to arbitration is actually essential to the maintenance of the *ad hoc* and informal system of negotiations.⁵³

The Joint Working Group of the ABA-CBA expanded on their recommendations to the Canadian and American governments that legal dispute settlement mechanisms be used above and beyond diplomatic negotiations in resolving trade issues in 1985. The ABA-CBA established a new Joint Committee on Trade and Investment to study the legal issues involved in a bilateral free trade agreement. In addition, the Joint Working Group drafted a number of guiding principles to direct the governments when creating a dispute settlement mechanism in a bilateral free trade context. The group suggested that: (1) any free trade agreement must include an effective dispute settlement system designed specifically for the two nations (i.e., the GATT mechanisms should not be relied upon in the bilateral context); (2) the dispute settlement system should include a variety of means and techniques for dispute settlement, such as governmental negotiation and mandatory third party arbitration; and (3) the system should assist the two governments by presenting recommendations regarding the best possible means to settle a dispute at its various stages.⁵⁴

In addition to the work conducted by the ABA-CBA Joint Working Group, the legal community played a large role in reviewing the text of the FTA by submitting briefs to the Standing House Committee on External Affairs and International Trade. For example, legal firms such as McCarthy and McCarthy, Fraser and Beatty, Fasken and Calvin, Ogilvy Renault, as well as international lawyers such as Simon Potter, Jean G. Castel, and Gary Horlick vigorously defended FTA-19. For representatives of the firm Fraser and Beatty, "the opportunity for binational panels to make binding decisions will improve the

⁵² Joint Working Group on the Settlement of International Disputes Between Canada and the United States, "Settlement of International Disputes Between Canada and the USA - Report and Recommendations of the Canadian and American Bar Associations," March 20, 1979, 57.

⁵³ Joint Working Group on the Settlement of International Disputes Between Canada and the United States, "Settlement of International Disputes Between Canada and the USA - Report and Recommendations of the Canadian and American Bar Associations," March 20, 1979, 92.

⁵⁴ ABA-CBA Joint Working Group on the Settlement of International Disputes, "Settlement of Disputes Under the Proposed Free Trade Agreement" (May, 1987), 12-14.

objectivity and fairness of administrative decisions and limit the ability of Congress to make protectionist laws affecting Canada.”⁵⁵ Members of the Canadian legal community recommended that Canadian interests could be upheld to a much greater extent under a rule based dispute settlement mechanism. As a result, they advised the federal government that rules should be relied on to protect Canadian traders and producers above and beyond diplomatic negotiations and domestic trade remedy laws alone.

The business community also pressured the Canadian government to move towards a more legalized system of dispute settlement to uphold its ability to trade competitively with the United States. Led by the Canadian Chamber of Commerce, the Canadian Manufacturing Agency (CMA), and the Business Council on National Issues (BCNI), members of the Canadian business community actively lobbied the Canadian government for a new and better trading relationship with the United States based upon a legalized dispute settlement system. Their primary concern was the growing reliance on trade remedies, which challenged their access to American markets. Therefore, instead of pressing for the elimination of tariffs or for a more open market for trade in services, the business community advised the Government to negotiate a bilateral agreement based on two elements: (1) a program for negotiating reductions in tariff barriers at some point in the future, and (2) a bilaterally agreed upon set of legal procedures for the speedy and amicable settlement of bilateral trade disputes.⁵⁶ For example, the BCNI submitted a proposal regarding a Trade Enhancement Agreement (TEA) between Canada and the United States in 1985. The TEA set out objectives for improving and expanding Canada-U.S. commercial and economic relations, and for the reduction and removal of bilateral trade barriers. Also, the TEA created an institutional mechanism to reduce and settle trade disputes between the two nations.⁵⁷

Not only did legal and business lobby groups prepare reports suggesting that Canada’s trade remedy regime be strengthened by international rules in the FTA, but they pressured their American counterparts to do the same in the United States. The BCNI was the key political actor leading the way to securing rules in the FTA. The BCNI was able to

⁵⁵ Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade Pursuant to Standing Order 96(2) Consideration of the Canada-U.S. Free Trade Agreement (1986-1988), 55:60.

⁵⁶ Jock Finlayson, “Canadian Business and Free Trade,” *International Perspectives*, (March/April, 1985), 29-31; G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Toronto: Stoddart, 1991), chapter 5; Michael Hart, “Dispute Settlement and the Canada-United States Free Trade Agreement,” (Ottawa: Centre for Trade Policy and Law, 1990), 7.

⁵⁷ The BCNI’s proposals as summarized in James Kelleher, “How to Secure and Enhance Canadian Access to Export Markets” (Ottawa: Minister for International Trade, 1985), 28.

convince an “uninterested” Jim Robinson, Chair of the Business Round Table’s Committee on Trade,⁵⁸ to pressure the American political executive to support the FTA only a few months after the formation of a joint task force called the American Coalition for Trade Expansion with Canada.⁵⁹ Similarly, the Canadian Chamber of Commerce was instrumental in mobilizing American business support through the Chamber’s Committee on Canada-U.S. Relations. Even though it was not a “prime mover” behind the FTA, the Chamber concluded that a comprehensive rule-based bilateral trade agreement was a national priority by 1987 because it would secure and enhance Canadian access to the U.S. market. The Chamber then quickly moved to convince its American counterpart to feel the same. Banded together, the Canadian and American Chambers of Commerce created the FTA Implementation Task Force to publicize the positive aspects of the Agreement and to recommend ways to eliminate the harmful effects of subsidies, dumping, and countervailing measures.⁶⁰ Under the leadership of the Chamber of Commerce and the BCNI, many smaller Canadian business groups such as the Canada-U.S. Business Association joined the cause after the implementation of the FTA to promote the values of its rules in managing the Canadian and American trade remedy regimes.⁶¹

At the insistence of Canadian governmental officials and interest groups, American officials in the executive branch came to recognize that rules were a more effective means

⁵⁸ The Business Roundtable is the American counterpart to the Business Council on National Issues.

⁵⁹ Henry J. Jacek, “Public Policy and NAFTA: The Role of Organized Business Interest and the Labor Movement,” *Canadian-American Public Policy*, No. 19 (October, 1994), 5-9.

⁶⁰ Henry J. Jacek, “Public Policy and NAFTA: The Role of Organized Business Interest and the Labor Movement,” *Canadian-American Public Policy*, No. 19 (October, 1994), 9; Raymond Tatalovich, Peter Sanchez, “Interest Group Politics in the Americas: The Case of NAFTA in Mexico, Canada, and the United States,” Paper delivered to the International Seminar on “The Political Systems in the New North America: Nature, Conflicts and Convergences” at the Center for Research on North America (CISAN), National Autonomous University of Mexico (UNAM), May 17-19, 1995, 9; G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Toronto: Stoddart, 1991), 46.

⁶¹ Jacek explains that by forging domestic and transnational groups to generate support for the agreement, Canadian business and legal groups were in a much better position than labour groups to achieve their agendas. Business and legal groups used their own rules and institutions to pressure the trade remedy laws and governmental institutions of Canada and the United States to change. European business and legal groups employed similar strategies to successfully gain access to the trade policy and law making process of the European Union. For example, well organized agricultural lobby groups banded together across national lines to challenge the European Union’s Common Agricultural Policy (CAP). Therefore, by forming task forces, joint ventures, alliances, and staff sharing agreements, European and North American groups were able to effect change on the subsidization and dumping practices of their domestic governments and trade remedy regimes. Their organizational structures allowed business and legal groups a better opportunity to work with governmental officials to implement new policies regarding the application of trade remedy laws than labour groups were able to do. Henry J. Jacek, “Public Policy and NAFTA: The Role of Organized Business Interest and the Labor Movement,” *Canadian-American Public Policy*, No. 19 (October, 1994), 12-15.

for settling trade disputes than were diplomatic techniques. The development of rule-based trade in Canadian-American relations culminated in the FTA and NAFTA. The agreements contained a number of dispute settlement mechanisms whose objectives were to promote fairness, predictability, and security of North American trade. In order to fulfill those objectives, the dispute settlement mechanisms gave each Party an equal voice in resolving problems, through ready access to objective binational panels. Panels were created to resolve trade disputes by rendering authoritative, and often binding interpretations of the agreement. By emphasizing adjudicative values over political ones, the dispute settlement mechanisms aimed to ensure that Canada, Mexico, and the United States were placed on a more equal, level footing within the North American trading environment. The mechanisms were “motivated by the desire to transfer the resolution of trade disputes from the realm of politics to a technocratic process in which objective judgments, unswayed by domestic political influence, were the norm.”⁶² Chapters 19 of FTA and NAFTA, for example, sought to improve the way that trade remedy disputes were settled by allowing binational panels to review the ways that administrative agencies interpreted and applied their country’s own trade remedy laws.

A number of bilateral efforts were undertaken to improve the conduct of trade between Mexico and the United States as well. For example, Americans proposed to negotiate an agreement on notification and consultations regarding any action that could affect U.S.-Mexican trade in 1980. The proposal was not formalized because of the lack of interest in Mexico. However, other efforts materialized into institutions and agreements to govern the use of trade remedy laws in the bilateral trade relationship. The Joint Commission on Commerce and Trade (JCCT) was established in 1981 to discuss trade issues, to resolve trade disputes, and to expand trade.⁶³ More importantly, the United States and Mexico signed the “Understanding on Bilateral Subsidies” in 1985. The Understanding offered protection to producers in both countries from the application of the other’s CVD laws. It contained a dispute settlement mechanism in the event that a dispute was caused over the application of American or Mexican CVD laws. Paragraph 11 of the understanding allowed either party to request political consultations to settle a dispute. If an acceptable resolution was not reached, either country could, upon 30 days notice, unilaterally “restore the balance of obligations as it deemed necessary including the

⁶² Robert C. York, “A Level Playing Field: Towards a Canada-U.S. Trade Law,” in Michael Trebilcock, Robert York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990), 1.

⁶³ The JCCT was not used by either party and was dissolved in 1983. Brian Timothy Bennett, “Recent U.S.-Mexico Trade Relations: Positive Results and Increased Competition,” in Riordan Roett (ed), *Mexico and the United States: Managing the Relationship* (Boulder: Westview Press, 1988), 87-108.

termination of the present Understanding.” The understanding benefited Mexicans by giving them the advantage of an injuries test in American CVD investigations. American producers benefited from the understanding because it required Mexico to limit the use of export subsidies to some degree.⁶⁴

The 1985 Understanding and Mexico’s accession to the GATT in 1986 ushered in a more amicable trading relationship between the United States and Mexico. The two countries continued to create agreements to govern the use of trade remedy laws in their trade relationship. The 1987 “Understanding Concerning a Framework of Principles and Procedures Regarding Trade and Investment Relations” defined subsidies and acceptable trading practices to reduce bilateral trade disputes and to respond to complaints about the two systems of protectionism. It contained a Consultative Mechanism that provided a bilateral forum in which American and Mexican officials could discuss trade matters. The Mechanism allowed for a number of productive sessions dealing with the flow of steel, textiles, and a variety of other goods that had traditionally plagued the bilateral trade relationship. The Understanding also contained a dispute settlement mechanism in the event that consultations could not settle bilateral disputes within 30 days. It provided a timetable for the resolutions of problems (i.e., a 30 day review period by a “higher agency”). The understanding also stipulated that the GATT dispute settlement mechanisms could be used if the parties so desired. Finally, the Understanding offered both parties the ability to terminate the agreement within 30 days if a GATT panel was unable to provide an acceptable solution to the dispute.⁶⁵ The understandings of 1985 and 1987 were developed even further by the 1989 “Understanding Regarding Trade and Investment Facilitation Talks,” the initiation of the NAFTA negotiations in 1990, President Bush’s Enterprise for the Americas Initiative of 1991,⁶⁶ and the NAFTA in 1993.

⁶⁴ Peter F. McLaughlin, “Mexico’s Antidumping and Countervailing Duty Laws: Amendable to a Free Trade Agreement?” *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1017-1018.

⁶⁵ Riordan Roett, “Mexico’s Strategic Alternatives in the Changing World System: Four Options, Four Ironies,” in Riordan Roett (ed), *Mexico’s External Relations in the 1990s* (Boulder: Lynne Rienner Publishers, 1991), 4-5; Manuel Pastor, Jorge G. Castaneda, *Limits to Friendship: The United States and Mexico* (New York: Alfred A. Knopf, Inc., 1988), 207-208; Peter F. McLaughlin, “Mexico’s Antidumping and Countervailing Duty Laws: Amendable to a Free Trade Agreement?” *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1020; Gary F. Erb, Joseph A. Greenwald, “U.S.-Mexican Trade Issues,” in William Glade, Cassio Luiselli (eds), *The Economics of Interdependence: Mexico and the United States* (San Diego: Center for U.S.-Mexican Studies, 1989), 121-126.

⁶⁶ The Enterprise for the Americas Initiative (EAI) prompted a number of bilateral agreements between the United States and Latin American countries such as Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. The Agreements were to serve as precursors for future free trade agreements (e.g., the proposed Free Trade Area of

Conclusion

The GATT was successful in breaking the traditional tariff barriers that stifled global trade. However, the GATT was less successful in dealing with the newer forms of protectionism that emerged during the 1970s and 1980s. Non-tariff barriers, subsidies, and trade remedy laws became popular forms of protection that shielded domestic producers from their foreign competitors. Political pressure became the order of the day as governments adhered to the interests of their own producers despite their rhetorical commitments to free trade. The proliferation of the new forms of protectionism resulted in a very aggressive, antagonistic trade environment. Consequently, members of the GATT began to argue that rules and institutions were necessary to govern trade remedy laws and give all producers an equal opportunity to export their products around the world. Judicial, institutionalized forms of dispute settlement were lauded as mechanisms which could apply standardized rules of trade. International, impartial bodies were viewed as better forums than domestic agencies which applied trade remedy laws in favour of their own national producers.

The North American trading environment mirrored the developments that were occurring in the broader, global arena. Trade remedy laws became favoured weapons in Canada, Mexico, and the United States during the 1970s and 1980s. Policy-makers and domestic trade tribunals regulated trade in a protectionist, narrow-minded manner that promoted national interests over continental ones. The flow of North American trade was altered with the adoption of the FTA (1989) and the NAFTA (1993). For example, the administration of domestic trade remedy laws changed substantially after 1989. Representatives from all three countries agreed to move the power of judicial review away from domestic trade tribunals and review courts to a process of institutionalized, binational panel review during the FTA and NAFTA negotiations. Chapters 19 of the FTA and NAFTA created the process of binding, binational panel review to oversee the means by

the Americans- FTAA), to promote trade and economic liberalization within the western hemisphere, to create dispute settlement mechanisms to solve trade and investment disputes, to reduce foreign debt loads, and to suppress the illegal drug trade. Pursuant to the EAI, the United States signed 17 framework agreements on trade and investment, 14 bilateral agreements, and two regional agreements covering 32 countries in Latin and South America.

Rebecca D. Dandeker, "The Rose Garden Agreement: Is MERCOSUR the Next Step to a Hemispheric Free Trade Zone?" in *Law and Policy in International Business*, Vol. 24, No. 1 (1992), 157-162; James R. Holbein, Gary Carpentier, "Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere," in *Case Western Reserve Journal of International Law*, Vol. 25, No. 3 (Summer, 1993), 567-569.

which domestic trade tribunals interpreted and applied their country's trade remedy laws. Chapters 19 also offered a better forum for settling disputes than the GATT had done by allowing panels to issue timely, binding decisions. For the first time, American, Canadian, and Mexican producers were offered a fairer, more transparent, and faster setting to challenge the AD/CVD determinations made against them.

Therefore, the newer forms of protectionism inspired a complex set of rules and institutions to deal with the disputes they created in the global and North American trading environments. International rules and institutions supplemented domestic trade remedy regimes to protect producers from one another and governments that sought to assert the interests of their nationals over others. Chapter Two will consider the importance of rules and institutions on a more theoretical level. It will stress that new-institutionalist theories are applicable to the evolution of the North American trade remedy regime because of the centrality of institutions in the process of change. Most notably, the importance of rules and institutions in the evolution of North American trade became paramount with the adoption of Chapter 19 of the FTA in 1989 and NAFTA in 1993.

CHAPTER TWO -
THEORETICAL AND EPISTEMOLOGICAL FOUNDATIONS

(A) Theoretical Foundations of the Dissertation

The North American trade regulatory process is a complex matrix of domestic and international rules which govern the use of trade laws in, and between, Canada, Mexico, and the United States.¹ The institutions and rules which supervise the trade regulatory process are based on the traditions, laws, and processes of the three political systems as well as on the rules of the GATT. Before 1989, the trade remedy laws of Canada, Mexico, and the United States changed slowly at the behest of powerful policy-makers and interest groups as protectionist sentiments competed with the growing trend towards globalization. However, the birth of Chapters 19 of the FTA and NAFTA placed binding international rules and institutions into the trade regulatory process. The international rules and institutions of Chapters 19 became watchdogs, and monitored whether domestic trade remedy laws were applied properly.

An appreciation of rules and institutions is essential to understanding why the North American trade regulatory process changed after 1989. The importance of rules and institutions is extolled by new-institutionalist scholars. The majority of new-institutionalists concur that a complex society requires rules and institutions to operate. Gordon remarked that “a society to operate at all, has to have organizations, and therefore it has to have social and economic and political institutions.”² Institutions and rules influence private and public behaviour. They determine how members of society ought to relate to one another. They influence how individuals conduct business transactions. They define codes of public morality and ethics. They structure how members of a society choose the men and women who govern them. Rules and institutions also influence the ways that political systems operate and produce public policy. Rules and institutions establish the processes through which public policy is created, implemented, enforced, and changed.

¹ The North American trade regulatory process refers to how trade remedy laws were interpreted and applied by administrative agencies in Canada, Mexico, and the United States before and after 1989. The Deputy Minister of Revenue Canada and the Canadian International Trade Tribunal (CITT) are the agencies that administer trade remedy laws in Canada. The Department of Commerce (DOC) and International Trade Commission (ITC) are their administrative counterparts in the United States. The Secretaria de Comercio Y Fomento Industrial (SECOFI) interprets and applies trade remedy laws in Mexico. Review courts and specialized appeal tribunals such as the Court of International Trade (CIT) also participate in the three trade remedy regimes to ensure that domestic agencies adhere to the legal principles and codes of convention of the three countries.

² Wendell Gordon, *Institutional Economics: The Changing System* (Austin: University of Texas Press, 1980), 21.

They limit, restrain, and allow for the control of power within a political system by creating the structures which govern the policy-making process.³

Domestic rules and institutions develop over time, and reflect the collective values, traditions, and cultures of the society that they govern. Nash and Calónico argue that institutions are “human collectivities, perhaps the most stable and recognizable in any society.”⁴ They are visible symbols of society. They deal with common problems and experiences. They reflect how people think and feel about routine affairs of life. Moreover, they confer identity, and encourage a collectivity to form by giving it a sense of values. Therefore, domestic rules form the foundations of a political system because they embody, produce, and reflect agreed upon practices of social behaviour. They have the ability to structure political institutions and constrain patterns of human interaction and behaviour when they are seen to be legitimate and reflective of social values.⁵ Indeed, the authority, legitimacy, and longevity of rules and institutions depend on the extent to which they reflect the nature of the people who created them. For example, the framers of the Constitution of the United States sought to make the American political system reflective of, and responsive to, the liberal democratic beliefs of the public so that the system could work for the good of the entire society, and could enjoy the highest possible degree of authority and stability.⁶

The importance of rules and institutions extends beyond individual political systems. International organizations have been built upon rules and institutions as well. Trade agreements such as the GATT, WTO, FTA, and NAFTA conferred extensive rights and obligations upon their members. Institutions were designed to ensure that the terms of the agreements were extended to all members equally, regardless of their size, wealth, or political power. Many trade experts have concurred that the viability of international trade agreements has been contingent on the existence of effective, respected institutions that deal with disputes arising out of the rules. Jackson explained that “coordinated economic activity between states that is mutually beneficial only can be achieved under a general

³ Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry Into Structures, Incentives, and Outcomes* (New York: New York University Press, 1994), 199-202.

⁴ Jeffrey E. Nash, James M. Calónico, *Institutions in Modern Society: Meanings, Forms, and Character* (New York: General Hall Inc., 1993), 11.

⁵ M.M. Atkinson, “Public Policy and the New Institutionalism,” in M.M. Atkinson (ed), *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt, Brace, Jovanovich Canada Inc., 1993), 6.

⁶ Gary J. Miller, Thomas H. Hammond, “Stability and Efficiency in a Separation of Powers Constitutional System,” in Bernard Grofman, Donald Wittman (eds), *The Federalist Papers and the New Institutionalism* (New York: Agathon Press, 1989), 85-86.

agreement on a set of rules and through compliance with those rules.”⁷ To help ensure that rules are respected, international agreements have gradually incorporated judicial forms of arbitration to settle trade disputes above and beyond the realm of power politics, consultation, and negotiation. As Chapter One demonstrated, institutions have been placed into international agreements to preserve and promote the rules entrenched within them. Since the 1970s, the approach to dispute resolution shifted, “from dispute management and conflict avoidance through consultative mechanisms and negotiations to more binding systems involving third-party-intercession or use of non-governmental experts to assist the parties to trade agreements to settle difficult issues.”⁸ In this way, rules and institutions have proven to be just as fundamental to international agreements as they have been to individual political systems. Rules and institutions have given international agreements a standard by which their members should act when dealing with one another.

***The Importance of Rules and Institutions: A Review of
New-Institutionalist Theories***

The importance of rules and institutions can be appreciated by examining the basic assumptions of new-institutionalist theories. A key assumption of many new-institutionalists is that rules, traditions, and institutional structures bind policy-makers. However, even though new-institutionalists appreciate the constraints that rules and institutions place on the policy-making process, they do not stop there. They do not argue that rules and institutions bind policy-makers to such an extent that they can never be changed. Many new-institutionalists argue that rules and institutional structures must be modified in order that they evolve to suit the changing needs of a society. New-institutionalist theorists generally maintain that rules and institutions can be slowly transformed to keep pace with social, political, and economic developments.

Up until the 1950s, the discipline of political science focused largely on traditional political institutions such as legislatures, executives, legal systems, and constitutions. The state, and its constituent institutions and rules, were portrayed as independent creatures which were important in the ordering and understanding of collective life. Human behaviour was explained in terms of institutional structures of rules, norms, expectations, and traditions which severely limited the free play of individual will and action. The importance of the state waned in theories of political science between the 1950s and 1970s.

⁷ John Jackson, “The Birth of the GATT-MTN System: A Constitutional Appraisal,” *Law and Policy in International Business*, Vol. 12, No. 1 (1980), 26.

⁸ James R. Holbein, Gary Carpentier, “Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere,” *Case Western Reserve Journal of International Law*, Vol. 25, No. 3 (Summer, 1993), 570.

The weakness of the state, and the explosion of political participation in the United States allowed society-centered, “actor-driven” explanations to dominate political theory and practice.⁹ In addition, the behaviouralist revolution made it more fashionable to study the “stateless” societies of the developing world.¹⁰ Society-centered theories were more “contextual, reductionist, utilitarian, functionalist, and instrumentalist” than the traditional, state-based, formalistic ones they replaced.¹¹ Pluralists, structural-functionalists and neo-Marxists portrayed the state as a mere arena for political participation. Institutions and rules were viewed as passive creatures in the policy-making process, driven by other societal factors and actors such as capitalist classes and interest groups. Pluralists, structural-functionalists, and neo-Marxists assumed that societal-based explanations of political events were more effective in explaining political events than were the more traditional, legal-formalist, statist ones based upon institutions and legal structures.

State and institutional based theories regained their place in political science during the late 1970s and 1980s. Statists critiqued the society-centered schools for failing to appreciate the importance of institutions and rules in the policy-making process. They upheld the traditional argument that institutions and rules were the best means by which to understand the relationship between the political, economic, and social spheres of political systems. In other words, state and institutional based theorists sought to bring political theory back to a position where it examined how social choices and actors were shaped, mediated, and channeled by institutions and rules. New-institutionalist, state-centered theories emerged to assert the importance, complexity, and size of political and legal structures in every day life.¹²

State-centered, new-institutionalist theorists redefined the state in the Weberian sense to afford it a greater amount of rationality, power, and autonomy in the policy-making process. The state was conceptualized as an independent actor which was able to make legitimate, authoritative, and binding decisions for a group of people within a given territory. The state was viewed as an organization which included more than governmental institutions. Many state-centered theorists argued that the state included the institutional, legal, administrative, bureaucratic, and coercive structures that attempted to condition the relationships within and between the state and civil society. Moreover, the state was

⁹ J.P. Nettl, “The State as a Conceptual Variable,” *World Politics*, Vol. 20 (1968), 561-562.

¹⁰ Roy Macridis, “Comparative Politics and the Study of Government: The Search for Focus,” *Comparative Politics*, Vol. 1, No. 1 (1969), 83.

¹¹ James March, Johan Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *American Political Science Review*, Vol. 78 (1984), 735.

¹² James March, Johan Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *American Political Science Review*, Vol. 78 (1984), 735-736.

defined as an actor that could not only affect domestic affairs, but could extend its power and control over some aspects of international events as well.¹³ For Krasner, the state consisted of “the central administrative and legal apparatus, including especially central decision-making institutions of a polity, the network of institutional ties, behavioural regularities, and values that knit together public and private actors who play some role in formulating and implementing authoritative decisions.”¹⁴

Therefore, new-institutionalist theorists argued that rules and institutions did matter and had to be appreciated in theoretical literature and applied studies of political systems and the policy-making process. Institutions were of significant importance because they went to the heart of the basic problem of social science; they helped to explain why people did the things they did.¹⁵ According to March and Olsen, “new-institutionalism emphasized the part played by institutions in imposing elements of order onto a potentially inchoate world.”¹⁶ New-institutionalists affirmed that “more than ever before, the state shapes the contours of modern life,” as few if any economic or social relationships remained untouched by political decisions.¹⁷ Many new-institutionalists upheld the view that the state’s political and legal structures were more than the sum of societal interests. Unlike the society-based theories which dominated political theory until the 1970s, new-institutional analyses drew away from “an atomistic view of politics in which the political leaders were simply a collection of individuals constrained more by societal forces than by political institutions, a view in which institutions were merely instrumental devices for the

¹³ Michael Mann, “The Autonomous Power of the States,” in Roy C. Macridis, Bernard E. Brown (eds), *Comparative Politics: Notes and Readings 7th Ed.* (Pacific Grove: Brooks/Cole Publishing Company, 1990); Roy Macridis, “Comparative Politics and the Study of Government: The Search for Focus,” *Comparative Politics*, Vol. 1, No. 1 (1969); Eric A. Nordlinger, “Taking the State Seriously,” in Myron Weiner, Samuel P. Huntington (eds), *Understanding Political Development* (Boston: Little, Brown and Company, 1987); Eric A. Nordlinger, *On the Autonomy of the Democratic States* (Cambridge: Harvard University Press, 1981); Gianfranco Poggi, *The State: Its Nature, Development, and Prospects* (Stanford: Stanford University Press, 1990); Theda Skocpol, “Bringing the State Back In,” in Peter Evans et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985); Charles Tilly, *Coercion, Capital and European States* (Paris: Aubier, 1992); J.P. Nettl, “The State as a Conceptual Variable,” *World Politics*, Vol. 20 (1968); Mark Sproule-Jones, *Governments At Work: Canadian Parliamentary Federalism and its Public Policy Effects* (Toronto: University of Toronto Press, 1993).

¹⁴ Stephen Krasner, “Sovereignty: An Institutional Perspective,” *Comparative Political Studies*, Vol. 21, No. 1 (April, 1988), 86.

¹⁵ Thomas A. Koelble, “The New Institutionalism in Political Science and Sociology,” *Comparative Politics*, (January, 1995), 231-232.

¹⁶ James March, Johan Olsen, “The New Institutionalism: Organizational Factors in Political Life,” *American Political Science Review*, Vol. 78 (1984), 735.

¹⁷ Keith Banting, *The Welfare State and Canadian Federalism 2nd Ed* (Kingston and Montreal: McGill-Queen’s University Press, 1987), 1.

aggregation of preferences.”¹⁸ Instead, new-institutionalists illustrated that institutions were the basic organizers of society and had a basic need to maintain control and order of that society.¹⁹ Theorists presented a research approach in which rules and institutions were significant in their own right. Rules and institutions were seen to be entities that structured governmental activities, and restricted the behaviour of societal and political actors.

Main Concepts of New-Institutionalist Theory

(1) The Legitimacy and Authority of Institutions

New-institutionalist theorists concur that institutions and rules embody the dominant values, beliefs, myths, and traditions of a society, which in turn make them legitimate and authoritative. The positions, policies, programs, and procedures that are accepted by institutions in democratic societies are enforced “by the views of important constituents, by knowledge legitimated through the educational system, by social prestige, by the law, and by the definitions of negligence and prudence used by the courts.”²⁰ Dahrendorf explained that an institution was “legitimate if what it does is right both in the sense of complying with certain fundamental principles, and in that of being in line with prevailing cultural values.”²¹

Incorporating cultural norms enhances the legitimacy and stability of institutions because it increases the commitment that societal actors have to those institutions. North explained that self-interested, rational individuals often obey customs, rules, and laws because they have a deep-seated conviction that the rules are legitimate. Individuals often forego their own desires because of ideological beliefs which support the traditions and customs that are built into the rules and institutions of their society. For North:

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- 18 Patricia Johnson Conover, “Political Socialization: Where’s the Politics,” in William Crotty (ed), *Political Science: Looking to the Future Vol. III: Political Behaviour* (Evanston: Northwestern University Press, 1991), 141.
 - 19 Theda Skocpol, “Bringing the State Back In,” in Peter Evans et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), 9.
 - 20 John W. Meyer, Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 44.
 - 21 Ralf Dahrendorf, “On the Governability of Democracies,” in Roy C. Macridis, Bernard E. Brown (eds), *Comparative Politics: Notes and Readings 7th Ed.* (Pacific Grove: Brooks/Cole Publishing Company, 1990), 286.

It is the combination of the constitutional rules with the associated moral and ethical codes of behaviour that underlies the stability of institutions and makes them slow to change. The combination produces ingrown patterns of behaviour which tends to be changed only incrementally.²²

Institutions can assume an almost “myth-like” quality, as they are built on the rules, values, and norms of a society. Such a quality places institutions beyond the discretion of any individual participant of the institution itself, or of society as a whole.²³ For example, though a mythical character, Santa Claus is an accepted, “real,” institution-like figure in western culture. Because myth-like institutions are considered to be proper, adequate, rational, and necessary, political actors are likely to incorporate them into the policy-making process so that their policies are labeled legitimate. Similarly, the vocabulary used by institutional actors during the policy-making process is also likely to incorporate cultural norms to enhance the legitimacy of the institution and its products. Affixing correct labels to activities can transform an illegitimate policy into a legitimate one. Word choice and usage can mobilize support for a policy from within the institution and society as a result. As Meyer and Rowan explain:

By designing a formal structure that adheres to the prescription of myths in the institutional environment, an [institution] demonstrates that it is acting on collectively valued purposes in a proper and adequate manner. The incorporation of institutionalized elements provides an account of activities that protects the [institution] from having its conduct questioned. The [institution] becomes, in a word, legitimate, and uses its legitimacy to strengthen its support and secure its survival.²⁴

Institutions and rules must be sensitive to societal values and expectations, because their legitimacy is directly related to societal evaluations of their efficiency, organization, and effectiveness. The more an institution is derived from cultural myths, values, traditions, and beliefs, the more it may solicit the confidence, satisfaction, and good faith of members of society.²⁵ Therefore, many new-institutionalists draw a link between

²² Douglass C. North, *Structure and Change in Economic History* (New York: W.W. Norton and Company, 1981), 205.

²³ John W. Meyer, Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 49.

²⁴ John W. Meyer, Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 49-50.

²⁵ John W. Meyer, Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press,

institutions and society during the policy-making process by highlighting the need for legitimacy.

(2) The Socializing Role of Institutions

Many new-institutionalist theorists maintain that institutions and rules possess authority over society by virtue of their legitimacy and perceived effectiveness. They argue that institutions and rules have the ability to transpose accepted values, beliefs, and traditions back onto society, thereby enhancing their own longevity. Institutions and rules influence the policy-making process by constraining the range of policy outcomes available to governmental and societal actors. Rules and institutions create parameters, which in turn, require policy-makers to reject certain options or render them unlikely to correspond to the values embedded in their society. In this way, institutions and rules have a creative side, and play a critical role in the social construction of reality. They may shape the beliefs and values of political and societal actors within an institutional context.

In addition, institutions can act as a guide to demonstrate how social problems should be defined, how policy options should be evaluated, and how solutions should be brought about. For example, even though societal actors play a large role in the policy-making process, they are influenced, spurred, and shaped by the rules and institutions that govern the environment in which they act. Societal actors are motivated by decisions made within the parameters of traditional institutions and rules. Consequently, institutions and rules can subordinate societal actors because they operate within the autonomy, authority, and capabilities of those rules and institutions.²⁶ Scharpf suggests that institutions and rules generate group norms and collective identities. Group norms and collective identities encourage societal actors to share their common history and experiences. In turn, the sharing of common history and experiences can solidify institutional rules and norms, and can create a culture of trust between members of society.²⁷ The stability, authority, and

1991), 59; Theda Skocpol, "Bringing the State Back In," in Peter Evans et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985), 20; Eric A. Nordlinger, *On the Autonomy of the Democratic States* (Cambridge: Harvard University Press, 1981), 386-387.

²⁶ Theda Skocpol, "Bringing the State Back In," in Peter Evans et al (eds), *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985); Eric A. Nordlinger, "Taking the State Seriously," in Myron Weiner, Samuel P. Huntington (eds), *Understanding Political Development* (Boston: Little, Brown and Company, 1987); Mark Sproule-Jones, *Governments At Work: Canadian Parliamentary Federalism and Its Public Policy Effects* (Toronto: University of Toronto Press, 1993).

²⁷ F.W. Scharpf, "Decision Rules, Decision Styles, and Policy Choices," *Journal of Theoretical Politics*, Vol. 2 (1989), 153.

longevity of institutions and rules are thereby preserved and promoted as they mould and temper social values, practices, and identities.

Approaches to New-Institutionalist Theory

(1) The Rational Choice Approach to New-Institutionalist Theory

New-institutionalist theories can be divided into two approaches or schools of thought: the rational choice school, and the structural/sociological school.²⁸ Adherents to the rational choice approach begin their examination of institutions and rules at the level of individual political actors.²⁹ Rational choice theorists build their assumptions upon utilitarian and micro-economic theories which view the individual as a self-interested, rational being who seeks to maximize his/her preferences and goals. From such a view of the individual, rational choice theorists conceptualize institutions to be “condensed conventions,” which reflect the tastes and values of individual actors about societal rules.³⁰ Institutions are sets of rules which define the parameters within which rational actors can maximize their goals. Individual actors can therefore change the rules and structures of institutions by pursuing their agendas. Rules and institutions are devised as a consequence of the bargaining strength of those in control of the decision-making process.³¹ For example, Moe argues that market/institutional outcomes are the products of the behaviour of individual firms and consumers who act to protect their own property rights and to

²⁸ Thomas Koelble argues that there are three approaches or schools of new-institutionalist theory: (1) the rational choice approach which, argues that individuals and their strategic calculations ought to be the central concern of social science, (2) the sociological approach, which sees individual decisions as the product of not only institutional settings but of culture, society, organizational identity, and industrial sectors; and (3) the historical approach, which suggests that outcomes are the product of interactions among various groups, interests, ideas, and institutional structures. I will only use two schools of theory because I believe that the sociological and historical approaches are very similar. Both see that individual choices/actions are the products of institutional structures and the interplay of sociological, cultural forces and groups.
Thomas A. Koelble, “The New Institutionalism in Political Science and Sociology,” *Comparative Politics*, (January, 1995), 231-232.

²⁹ There are other theories which are closely associated with the rational choice school of new-institutionalism. They include public-choice theory, agency theory, rational actor models of decision-making, and the new-institutional economics.

³⁰ William Riker, “Implications from the Disequilibrium of Majority Rule for the Study of Institutions,” in *American Political Science Review*, Vol. 74 (1980), 22; Kenneth A. Shepsle, “Institutional Equilibrium and Equilibrium Institutions,” in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 65-66.

³¹ Douglass C. North, “Institutions and Economic Performance,” in Uskali Maki, Bo Gustafsson, Christian Knudsen (eds), *Rationality, Institutions and Economic Methodology* (London: Routledge, 1993), 247.

promote economic goals such as efficiency.³² Loasby, Schotter, and North explain that technology and education offer more knowledge to policy-makers which, in turn, places new concerns, needs, and demands into an individual's plans. Their new self interests prompt them to reform institutions and rules so that they are more applicable to modern society.³³ Weaver and Rockman, Shepsle, and Searing argue that elite political and bureaucratic actors use formal and informal roles to affect change on the institutions in which they operate. Similarly, Fiorina, Fenno, and Dodd demonstrate that American members of Congress interact with bureaucratic and societal elites to prompt American governmental institutions and rules to change.³⁴ In this way, rational choice theorists argue that institutions and rules are patterns of interaction that are determined by human beings. They can be changed as individual preferences and interests evolve.

It must be noted that rational choice theorists do not discount the powerful role that institutions play when arguing that individuals can affect a great deal of change by pursuing their own interests. Rational choice theorists maintain that individual actors are not able to pursue all of their self-interests. Individuals allow themselves to become part of organizations and institutions to promote and/or protect their narrow interests. Moreover, individuals allow organizations, political institutions, and rules to constrain some behaviour and/or interests for the broader good of society. Constraints used by institutions often range from taboos to rules to methods of exhortation. While some constraints are common to all societies, others are specific to the interests of dominant actors in different contexts. In this way, institutions are deliberately chosen as individuals place socially constructed values and norms into them and the rules which act to constrain particular interests of

³² T.M. Moe, "Interests, institutions, and positive theory: the politics of the NLRD," in K. Orren, S. Skowronek (eds), *Studies in American Political Development Vol. 2* (New Haven: Yale University Press, 1987), 267-277.

³³ Douglass C. North, "Institutions and Economic Performance," in Uskali Maki, Bo Gustafsson, Christian Knudsen (eds), *Rationality, Institutions, and Economic Methodology* (London: Routledge, 1993), 242-243; Brian Loasby, "Institutional Stability and Change in Science and the Economy," in Uskali Maki, Bo Gustafsson, Christian Knudsen (eds), *Rationality, Institutions, and Economic Methodology* (London: Routledge, 1993), 204-205; Robert Grafstein, "The Problem of Institutional Constraint," *The Journal of Politics*, Vol. 50, No. 3 (August, 1988), 580.

³⁴ Kenneth A. Shepsle, "Institutional Equilibrium and Equilibrium Institutions," in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 66; Donald Searing, "Roles, Rules, and Rationality in the New Institutionalism," *American Political Science Review*, Vol. 85, No. 4 (1991), 1252; R. Kent Weaver, Bert A. Rockman, "Institutional Reform and Constitutional Design," in R. Kent Weaver, Bert A. Rockman (eds), *Do Institutions Matter? Government Capabilities in the United States and Abroad* (Washington: The Brookings Institute, 1993), 465; Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* (New Haven: Yale University Press, 1977), passim; Richard F. Fenno, *Congressmen in Committee* (Boston: Little Brown, 1973), passim; Lawrence C. Dodd, "The Cycles of Legislative Change: Building a Dynamic Theory," in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 82-104.

societal actors.³⁵ Institutions prescribe and constrain the set of choosing agents, the manner in which their preferences might be revealed, the alternatives over which preferences might be expressed, the order in which such expressions could occur, and the way in which business is conducted.³⁶

Bates explains that the fundamental assumption of rational choice theorists can be summarized by the concept of “collective dilemmas.” Collective dilemmas are the gaps that develop when individual and collective interests diverge. Many rational choice theorists use the concept to argue that institutions and rules are important to reconcile collective dilemmas because they prevent some actors from always being able to dominate society by combining interests to achieve the collective good. Therefore, institutions are important in the process of change because they influence the behaviour of individual actors. They encourage individuals to cooperate and/or trade off interests when striving to achieve their own.³⁷ When doing so, institutions achieve stability and order in society.

(2) The Structural/Sociological Approach to New-Institutionalist Theory

The structural/sociological approach is the second variation within new-institutionalist theory. The structural/sociological approach is reminiscent of the traditional views of government, rules, and institutions that dominated political science up until the behaviouralist revolution of the 1950s-1960s. In particular, members of the structural/sociological school believe that institutions embody formal rules such as constitutions, laws, and contracts which guide individual behaviour and secure order in the political world. They advocate that institutions are culturally and historically based. Institution and rules inherit their authority because they embody a socially legitimate order, pattern, or convention. The dignity and authority of institutions and rules afford them the

³⁵ Gary J. Miller, Terry M. Moe, “The Positive Theory of Hierarchies,” in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 169; Douglass C. North, *Structure and Change in Economic History* (New York: W.W. Norton and Company, 1981), 203.

³⁶ Kenneth A. Shepsle, “Institutional Equilibrium and Equilibrium Institutions,” in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 52.

³⁷ Robert H. Bates, “Contra Contractarianism: Some Reflections on the New Institutionalism,” *Politics and Society*, Vol. 16, No. 2-3 (1988), 390-392; Kenneth A. Shepsle, “Institutional Equilibrium and Equilibrium Institutions,” in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 75; Kenneth A. Shepsle, “Institutional Equilibrium and Equilibrium Institutions,” in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 66; Mark Sproule-Jones, *Governments At Work: Canadian Parliamentary Federalism and Its Public Policy Effects* (Toronto: University of Toronto Press, 1993), 27-28; Amartya K. Sen, *Collective Choice and Social Welfare* (San Francisco: Holden Day Inc., 1970), 6.

luxury of being engrained in society to such a degree that they are often taken for granted. For Jepperson:

Persons may not well comprehend an institution, but they typically have ready access to some functional or historical account of why the practice exists. They also have an expectation that further explication is available should they require it. Institutions are taken for granted, then, in the sense that they are both treated as relative fixtures in a social environment and explicated (accounted for) as functional elements of that environment.³⁸

Focused upon historical, sociological and formal assumptions, adherents to the structural/sociological approach imply that institutions enjoy long periods of constancy. Institutions do not change as easily or as often as societal preferences do. Instead, they evolve slowly. In this way, structural/sociological theorists see institutions as conservative bodies which resist change. Change is not a regular occurrence because it can be costly and problematic. When institutional change does occur, it is likely to be episodic and highlighted by a brief period of crisis, and then followed by longer periods of stability and institutional development. Therefore, institutional change is gradual and evolutionary. Once an institutional and legal order is back in place, "it tends to reconstitute itself, walling itself off from outside influences."³⁹ In summary, members of the structural/sociological school generally present a view of institutions and rules "that emphasizes glacial evolution, long periods of constancy, mutation like accident in the form of experiments with new institutional ideas, and the survival of some of these new practices via a sort of natural selection."⁴⁰

Like many rational choice theorists, members of the structural/sociological school assume that institutions and rules are grounded in the historical beliefs, values, practices, and traditions of a society. For Krasner, institutions are both "the derivative character of individuals and the persistence of something- behaviour patterns, roles, rules, organizational charts, and ceremonies over time."⁴¹ However, unlike members of the rational choice approach, structural/sociological new-institutionalists tend to argue that individual actors do not control institutions, but are rather controlled by them. Institutions

³⁸ Ronald J. Jepperson, "Institutions, Institutional Effects and Institutionalism," in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 147.

³⁹ Walter W. Powell, "Expanding the Scope of Institutional Analysis," in Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 197.

⁴⁰ Kenneth A. Shepsle, "Institutional Equilibrium and Equilibrium Institutions," in Herbert F. Weisberg (ed), *Political Science: The Science of Politics* (New York: Agathon Press, 1986), 66-67.

⁴¹ Stephen Krasner, "Sovereignty: An Institutional Perspective," *Comparative Political Studies*, Vol. 21, No. 1 (1988), 73.

and rules are not mirrors of social reality or aggregates of individual interests. Instead, they are “transcendent social entities with objective constraining power.”⁴² Therefore, structural/sociological new-institutionalists emphasize the notion that institutional structures and rules constrain the policy-making process by shaping the motives and conduct of political and societal actors. Moreover, they argue that institutions and rules cannot only constrain political actors, but can transform the preferences and beliefs of those individuals in the construction and implementation of public policy as well. For Searing, “*homo politicus* made history, but he made it on stages constructed by constitutions and controlled by formal rules.”⁴³ Similarly, Krasner states:

[I]nstitutional structures and rules are the building blocks of social and political life. The preferences, capabilities, and basic self-identities of individuals are conditioned by these institutional structures. Historical developments are path dependent; once certain choices are made, they constrain future possibilities. The range of options available to policymakers at any given point in time is a function of institutional capabilities that were put in place at some earlier period.⁴⁴

In this way, adherents to the structural/sociological approach assert the dominance of institutions and rules over society and individual actors. Institutions, and the rules upon which they are built, are paramount in the policy-making, implementation, and enforcement processes.

The Differences between the Approaches to New-Institutionalist Theory

The theories of members of the rational choice and structural/sociological approaches to new-institutionalism differ in four major ways. First, they define institutions differently. Members of the rational choice approach define institutions as consciously created bodies which serve individual interests and preferences. Adherents to the structural/sociological school also define institutions and rules as products of society and human activity. However, institutions and rules are not deliberately created by self-serving rational individuals. Instead, they enjoy a more permanent nature and transcend the interests of individuals alone.

⁴² M.M. Atkinson, Robert A. Nigol, “Selecting Policy Instruments: New Institutionalism and Rational Choice Interpretations of Automobile Insurance in Ontario,” in *Canadian Journal of Political Science*, Vol. XXII, No. 1 (1989), 109.

⁴³ Donald Searing, “Roles, Rules and Rationality in the New Institutionalism,” *American Political Science Review*, Vol. 85, No. 4 (1991), 1240.

⁴⁴ Stephen Krasner, “Sovereignty: An Institutional Perspective,” *Comparative Political Studies*, Vol. 21, No. 1 (1988), 67.

Second, members of the two approaches to new-institutionalism differ with regard to whether institutions reflect individual or collective interests. Rational choice theorists believe that institutional arrangements are adaptive solutions to individual problems and concerns. Institutions reflect individual interests as societal actors use them to accomplish their ends. Conversely, structural/sociological theorists argue that institutions and rules reflect collective interests because they shape the choices, interests, and actions of individuals by defining what type of actions and values are appropriate in society. They believe that individual interests can not be understood outside of the cultural and historical frameworks in which they are embedded.

Third, members of the two approaches to new-institutionalism differ over the autonomy, plasticity, and efficiency of institutions and rules. In other words, they disagree over what causes legal and political structures to change, and how easily those changes occur. Rational choice theorists demonstrate that institutions and rules change easily as the interests, values, and preferences of individual actors do. Institutions and rules remain unchanged only in so far as they contribute to the achievement of some desired goal. In contrast, institutions are given much more permanence by members of the structural/sociological school. Change is seen to come more from within institutions and rules themselves as they slowly respond to the historical evolution of society.

Fourth, while they share a concern for the role of institutions in society, members of the two approaches differ in their research methods. Rational choice theorists view institutions as intervening (but not determinative) variables that are capable of affecting an individual's choices and actions. Conversely, adherents to the structural/sociological approach argue that institutions play a determinant role because they, along with societal and cultural factors, shape an individual's choices and actions.⁴⁵

New-Institutionalist Theories and the Evolution of Trade Remedy Laws in North America

(1) New-Institutionalist and Society-Centered Approaches to the Process of Change

Both approaches to new-institutionalism stress the importance of rules and institutions when examining the intricacies of the policy-making processes. They insist that an understanding of how public policies are implemented must appreciate that the rules and

⁴⁵ Walter W. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 8-11; Thomas A. Koelble, "The New Institutionalism in Political Science and Sociology," *Comparative Politics*, (January, 1995), 232.

institutions which structure a political system are evolutionary creatures. Rules and institutions are responsive to ever-changing needs, values, traditions, and beliefs. Members of the two approaches to new-institutionalism do not agree on how easily or frequently rules change, nor on how much influence individual actors have on the process. Indeed, Powell and DiMaggio, for example, admit that while new-institutionalists have few problems explaining institutional stability, they have more difficulty explaining institutional change. Sociological new-institutionalists like Powell, DiMaggio, Steinmo, Thelen, and Longstreth suggest that institutional change comes from institutional contradictions, extra-institutional sources, cultural systems, and individual choices and preferences. Rational choice theorists such as North use economic theories to suggest that institutional change is the result of "changing prices." "Changing prices" provide incentives for those within (and sometimes outside) institutions to renegotiate terms of participation and power in order to change institutional rules and enforcement procedures.⁴⁶

Nevertheless, members of both approaches concur that institutions and rules change to bring themselves in line with new values and developments in society. Societal actors adapt rules and institutions to new conditions to reinforce their usefulness and legitimacy. New-institutionalists in both schools of thought acknowledge that a two-way relationship exists between the state (e.g., institutions and rules) and society. For example, Powell and DiMaggio argue that institutions change because of influences that develop inside and outside of a system's political institutions.⁴⁷ In other words, institutional change occurs because societal and state based factors. Similarly, Krasner maintains that a theory of change has to have a horizontal and vertical dimension to account for the interplay between state and society. The horizontal dimension captures how changes in some institutions affect other ones, thereby making change an ongoing process. The vertical dimension reflects how institutional structures define the very actors which pressure them to change.⁴⁸ Finally, North sets out that a theory of institutional change has to be built on three fundamental components: (1) a theory of property rights which describes the incentives and interests of individuals, groups, and organizations in a political system; (2) a theory of the

⁴⁶ Walter J. Power, Paul J. DiMaggio, "Introduction," in Walter J. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 29-30; Sven Steinmo, Kathleen Thelen, Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge University Press: Cambridge, 1992), 16-17; Thomas A. Koelble, "The New Institutionalism in Political Science and Sociology," *Comparative Politics*, (January, 1995), 237-240.

⁴⁷ Walter J. Powell, Paul J. DiMaggio, "Introduction," in Walter J. Powell, Paul J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis* (Chicago: The University of Chicago Press, 1991), 29-30.

⁴⁸ Stephen Krasner, "Sovereignty: An Institutional Perspective," in *Comparative Political Studies*, Vol. 21, No. 1 (April, 1988), 74-75.

state because the state specifies and enforces property rights; (3) a theory of ideology which explains how different perceptions of reality affect the way that individuals, groups, and organizations react to changes in the environment.⁴⁹ For North:

Institutions ... determine the opportunities in a society. [Societal groups] and organizations are created to take advantage of those opportunities, and as the organizations evolve, they alter the institutions. The resultant path of institutional change is shaped by (1) the lock-in that comes from the symbiotic relationship between institutions and the organizations that have evolved as a consequence of the incentive structure provided by those institutions, and (2) the feedback process by which human beings perceive and react to the changes in the opportunity set.⁵⁰

Therefore, the majority of new-institutionalist theorists from both schools of thought stress that institutions lead the process of change. They are the dominant partner in the two-way relationship between state and society.

Theories of change are also present in society-centered approaches such as pluralism, neo-Marxism, and structural-realism. These approaches present individual actors (e.g., groups or states) or socio-economic factors as the primary agent of change. Pluralists focus on the role that groups play in the process of political change. Following in the traditions of Bentley, Dahl, Latham, and Truman, pluralists suggest that political change is the product of the demands of societal groups. Institutions and rules are simply the contexts within which group activity occurs.⁵¹ Individuals form groups to become more influential over the direction in which rules and institutions evolve. Groups which conform to dominant codes of behaviour are generally those which have the most influence over the process of change. Those groups that operate within the accepted codes of behaviour are able to change laws by interacting with policy-makers in the legislative, executive, and bureaucratic branches of government. Schattschneider, for example, points to business and upper socio-economic-status groups as the most effective interest groups. By virtue of their power, wealth, and status, they are the ones which have the most influence over the ways that rules and institutions change.⁵²

⁴⁹ Douglass C. North, *Structure and Change in Economic History* (New York: W.W. Norton and Company Inc., 1981), 7-8.

⁵⁰ Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 7.

⁵¹ Allan J. Cigler, "Interest Groups: A Subfield in Search of an Identity," in William Crotty (ed), *Political Science: Looking to the Future: Vol. IV American Institutions* (Evanston: Northwestern University Press, 1991), 105-106.

⁵² E.E. Schattschneider, *The Semisovereign People* (New York: Holt, Rinehart and Winston, 1960); Stephen Krasner, "Sovereignty: An Institutional Perspective," in *Comparative Political Studies*, Vol. 21, No. 1 (April, 1988), 69-70; Raymond Tatalovich and Peter Sanchez, "Interest Group Politics in the Americas: The Case of NAFTA in Mexico, Canada, and the United States," Paper Delivered to the International Seminar on

Neo-Marxists focus on economic factors and the hegemony of some interest groups over others when explaining how institutions and rules change. Essentially, neo-marxist scholars argue that institutional change is controlled by the owners of the modes of production who pressure institutions to create rules that allow capitalist structures to remain intact. Structural neo-Marxists, such as Poulantzas, argue that rules are changed solely by capitalists because state institutions are controlled by them. Rules and institutions have no autonomy from the economic interests of the ruling class. Instrumental neo-Marxists, such as Miliband, argue that while economic elites do cause rules to change to a great extent, state institutions can make some changes on their own. State institutions enjoy a relative degree of autonomy from capitalist interests. They can resist changes to a marginal degree within the broader context of the capitalist system.⁵³

Finally, the structural/realist approach to international relations presents another society-centered, “actor-driven” approach to political change. The structuralist approach reduces sovereign states to singular, individual entities in much the same way as pluralists portray groups within society. Kenneth Waltz, for example, argues that sovereign states are the most important actors in international affairs. In other words, individual sovereign states (i.e., actors) operate within the broader society of international relations. Change is therefore a function of the distribution of power among sovereign states just as the relative power of certain groups cause change within pluralist theories. According to adherents to structural-realism, shifts in the ways that power is divided affect the policies that sovereign states pursue individually and collectively. International politics, and the ways that the rules which govern it change, are determined solely by individual states. Because of their sovereignty and freedom from constraints, individual states may affect change on the dynamics of international politics.⁵⁴

“The Political Systems in the New North America: Nature, Conflicts and Convergences” at the Centre for Research on North America (CISAN), National University of Mexico (UNAM), May 17-19, 1995, 1-2; Allan J. Cigler, “Interest Groups: A Subfield in Search of an Identity,” in William Crotty (ed), *Political Science: Looking to the Future: Vol. IV American Institutions* (Evanston: Northwestern University Press, 1991), 105-106.

53 Nicos Poulantzas, *State, Power, Socialism* (London: Verso Editions, 1980); Ralph Miliband, *Class Power and State Structure* (London: Verso Editions, 1978); Stephen Krasner, “Sovereignty: An Institutional Perspective,” in *Comparative Political Studies*, Vol. 21, No. 1 (April, 1988), 70; Jeffrey E. Nash, James M. Calónico, *Institutions in Modern Society: Meanings, Forms, and Character* (New York: General Hall Inc., 1993), 2-3.

54 Kenneth Waltz, *Theory of International Relations* (Reading: Addison-Wesley, 1979), passim; Stephen Krasner, “Sovereignty: An Institutional Perspective,” in *Comparative Political Studies*, Vol. 21, No. 1 (April, 1988), 70.

(2) The Applicability of New-Institutionalist and Society-Centred Perspectives to the Evolution of Trade Remedy Laws in North America

In some respects, the society-centered approaches to political change apply to the changes that occurred in the North American trade remedy regime. In line with the neo-Marxist approach, economic protectionism affected policy-makers and interest groups when the FTA and NAFTA were created. Borrowing pluralist assumptions, interest groups gained a great deal of power in the trade policy-making process of the three countries, especially the United States. Finally, based on structural-realism, the power relationships between sovereign states stipulated the way that each country participated in the FTA and NAFTA negotiations and was affected by the resulting Agreements. For example, some in Canada hoped that a continental body of competition laws could replace domestic trade remedy laws during the FTA and NAFTA negotiations. Working groups were formally charged with the responsibility of formulating a continental approach to antidumping and countervailing measures in Articles 1905-1907 of the FTA. Ad hoc committees were convened to discuss the idea under the NAFTA in 1993-1995. However, neither the FTA groups nor the NAFTA groups were able to fulfill their mandates. Instead, national trade remedy laws remained firmly in place because of the strength of economic protectionism, American interest groups, and the hegemony of the United States in North American trade negotiations. Protectionism dominated the agendas of powerful lobby groups and members of Congress. They did not wish to harmonize AD/CVD measures and end American control over domestic trade laws. Their interests caused the executive branch to stall the schedules of the FTA/NAFTA working groups, and thus inhibit the process that would have transformed domestic trade remedy laws into a more liberalized, continental approach to non-tariff barriers. Therefore, social, economic, and political forces inhibited the power of the institutionalized working groups of the FTA and NAFTA. In addition, Chapter 19 panels have not always been able to cause administrative agencies to change their behaviour when applying domestic AD/CVD laws. Insulating domestic producers from foreign competition had become an engrained precept in Canada, Mexico, and the United States by the late 1980s. Many powerful policy-makers and interest groups wished that protectionist methods of interpreting and applying AD/CVD laws would remain in place in spite of the decisions of Chapter 19 panels. Therefore, they have inhibited the power of some binational panels to retain the protectionist ways that trade remedy laws were interpreted and applied.

A review of some of the negligible effects that Chapters 19 working groups and certain binational panels have had over the North American trade regulatory process could

lead to the argument that society-centered approaches are more applicable to the process of change than new-institutionalist theories. The power that policy-makers and interest groups retained over the trade regulatory process could imply that societal and environmental forces affected trade remedy laws more than institutionalist factors. Nevertheless, the social, political and economic factors singled out by neo-Marxists, pluralists, and structural-realists were present before and after the FTA and the NAFTA came into effect. The only new factors in the trade regulatory process after 1989 were the institutionalized binational panels of Chapters 19 of the FTA and NAFTA.

Therefore, the changes that did occur to the character of the three trade regimes can therefore be attributed to institutions. Dominant policy-makers and interest groups responded to the rise of new forms of protectionism by advocating that a more rule-based, institutional process be used to settle AD/CVD disputes. The traditional use of diplomacy changed to a more rule-based, institutional approach in order that the adjudication of trade disputes would be done in a fairer, more transparent, faster forum. The rules and institutions of Chapters 19 of the FTA and NAFTA were given the force of law when the three governments brought the Agreements into effect. Consequently, the Agreements allowed the institutionalized binational panels of Chapters 19 to begin to change the context in which administrative agencies interpreted and applied their country's trade remedy laws after 1989. In particular, the decisions of certain binational panels of Chapters 19 influenced the behaviour of administrative officials in the American, Canadian, and Mexican trade regulatory processes, when it deviated from accepted domestic traditions, international regulations, and international agreements. Therefore, institutions contributed to the changes in the character of the three trade remedy regimes after 1989.

Furthermore, policy-makers and interest groups were required to use other institutions and rules such as courts, bureaucracies, and administrative agencies to accomplish their goals. Domestic and international structures, rules, traditions, and conventions placed certain individuals and groups into positions from where they could begin to affect the ways that trade remedy laws were interpreted and applied. Similarly, domestic and international structures placed some binational panels in positions where they could begin to change administrative practices after Chapters 19 of the FTA/NAFTA came into effect. Consequently, changes to the character of the three trade remedy regimes did indeed come about incrementally because of institutional factors. Peter Hall called this phenomenon the "institutional enterprise." He argued that institutions shaped the preferences and goals of actors in the decision-making process. Furthermore, institutions helped to shape the outcomes of the process by distributing power among the players. For Hall:

Institutional factors play two fundamental roles in [the institutional enterprise]. On the one hand, the organization of policy-making affects the degree of power that one set of actors has over the policy outcomes. On the other hand, organizational position also influences an actor's definition of his own interests, by establishing his institutional responsibilities and relationships to other actors. In this way, organizational factors affect both the degree of pressure an actor can bring to bear on policy and the likely direction of this pressure.⁵⁵

Domestic and international laws and institutions thereby had a primary role to play in how trade remedy laws evolved after 1989. New-institutionalist theorists like Hall recommend that an understanding of the ebb and flow of policy-making must address the institutional frameworks within which societal actors operate. Indeed, Hall maintained that the two central variables in the process of change were the institutional distribution of power and the formation of strategies to obtain desired goals by individual actors given their institutional context.⁵⁶ Domestic and international rules played a definitive role in regulating the relationships between binational panels, policy-makers, interest groups, environmental factors, and administrative trade agencies in the North American trade remedy regime. Institutions, and not societal factors, influenced the ways that North American trade remedy laws evolved after 1989 to the greatest degree. New-institutionalist theories can thus be used to explain the process of change because they account for the relationships in and between domestic laws, domestic actors, and international institutions. Institutions were central in the process of change by placing some actors into positions to change behaviour, and by influencing the choices and preferences of certain individuals as economic conditions in North America evolved.

(B) Epistemological Foundations of the Dissertation

One of the basic assumptions of new-institutionalist theorists is that institutions are central to any study of change because they are intimately related to the causes of individual behaviour. In other words, institutions “matter” because they can change behaviour by setting out binding codes of acceptable conduct. If institutions are central to the process of change because they influence human behaviour, then they should be considered as part of the changes that occurred in the North American trade regulatory process after the FTA and

⁵⁵ Peter Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (New York: Oxford University Press, 1986), 19.

⁵⁶ Peter Hall, *Governing the Economy: The Politics of State Intervention in Britain and France* (New York: Oxford University Press, 1986), 19.

NAFTA came into effect. Based on their authority from Chapters 19 of the FTA and the NAFTA, institutionalized binational panels should have been a factor in causing individuals within administrative agencies to change the means by which they interpreted and applied AD/CVD laws, and thereby a factor that helped make the three regimes fairer, more transparent, and faster.

The influence that institutions had on the evolution of North American trade remedy laws raises a number of interesting research questions. How much did the presence of institutionalized binational panels of Chapters 19 of the FTA and NAFTA change the ways that domestic trade remedy laws were interpreted and applied in Canada, Mexico, and the United States? How did Chapters 19 panels encourage the three trade regimes to become fairer, more transparent, faster systems? In cases where change did not occur, did certain domestic policy-makers and interest groups use their influence to temper the power of binational panels to offset the perceived loss of protectionism? How did the factor of state sovereignty encourage domestic actors to either abide by or override Chapters 19 panels? Where did domestic policy-makers and interest groups get the power that enabled them to challenge the effects of Chapters 19 panels? These research questions make the North American trade regulatory process an instructive area of public policy to understand why rules evolve. Moreover, they help to assess the utility of a new-institutionalist approach to the reasons behind why rules change.

(1) Hypothesis

New-institutionalist theories have been chosen as the most applicable theoretical approach to generate a hypothesis about the process of rule change in North America. The remainder of the thesis will consider whether or not the presence of Chapters 19 binational panel decisions affected the character of the American, Canadian, and Mexican trade regimes after 1989. The thesis will consider the changes that occurred in the three trade regimes in the context of FTA-19 and NAFTA-19. Specifically, ***the hypothesis will propose that changes in the character of the three regimes were caused by the degree to which socio-economic forces were reduced by Chapters 19 panel decisions. Changes in the character of the three regimes will be measured in terms of the fairness, transparency, and speed of the process of judicial review.***

Before 1989, the three trade remedy regimes were criticized for being biased towards their own domestic producers, and for being non transparent, slow systems which released unsubstantiated conclusions about the presence of dumping, subsidization, and

injury. Economic protectionism, hegemonic relationships between interest groups, administrative agencies, and policy-makers, hegemonic relationships between countries, and concerns with state sovereignty influenced the character of the three regimes. After 1989, economic protectionism, hegemonic relationships, and concerns with state sovereignty were still present in the three trade regulatory processes. Moreover, the nature of the three systems was still somewhat biased, slow, and non transparent.

However, the hypothesis will consider the extent of the changes that occurred in the three trade regulatory processes with the inception of Chapters 19. It is expected that having the institutionalized binational panel process in place reduced the extent to which economic protectionism, hegemonic relationships, and concerns with state sovereignty influenced the three trade regimes. When those factors remained strong, change to the character of the American, Canadian, and Mexican systems occurred minimally. However, when administrative agencies, interest groups, and policy-makers conceded to the authority of Chapters 19 panels, real change in the character of the three systems occurred. Therefore, the hypothesis draws from new-institutionalist theories to propose that institutions (e.g., the binational panels of Chapters 19 of the FTA/NAFTA) were important in the evolution of the North American trade remedy regime. Socio-economic and political factors such as economic protectionism, hegemonic relationships, and concerns with state sovereignty affected the character of the three domestic systems before and after 1989. Nevertheless, changes to the character (i.e., fairness, transparency, and speed) of the three regimes began only after institutionalized panels entered the process of administering and applying the AD/CVD laws of Canada, Mexico, and the United States. In other words, Chapters 19 panels became a systemic condition or inherent factor in the three trade remedy regimes after 1989/1993. They became the channels that socio-economic factors had to “flow through” to affect the character of the three trade regulatory processes in the post-FTA and NAFTA environments.

The hypothesis flows from some assumptions held by both schools of new-institutionalism. It reflects some of the arguments of rational choice theorists. Rational choice theorists stress that institutions are chosen by individuals to restrain certain narrow interests in favour of the collective good. Bates, for example, maintains that institutions reconcile diverging interests or “collective dilemmas.”⁵⁷ Rules and institutions prevent some actors from always dominating society by combining different interests and promoting the collective good. Institutions are designed to stabilize exchange relationships, to induce cooperative behaviour among self-interested individuals, and to minimize

⁵⁷ Robert H. Bates. “Contra Contractarianism: Some Reflections on the New Institutionalism,” *Politics and Society*, Vol. 16, No. 2-3 (1988), 390-392.

transaction costs between the parties.⁵⁸ Institutions therefore guide the process of change by influencing the behaviour of individual actors in society.

Applying the assumptions of rational choice theorists to North American trade, Chapters 19 panels were chosen to ensure that ADDs/CVDs were administered in a fairer, more transparent, and faster manner to make the resolution of disputes less susceptible to political manipulation. Chapters 19 were seen as a necessary institution to bridge the gaps or “collective dilemmas” between free trade on a continental level, and the narrow interests of policy-makers and interest groups in the three countries. Therefore, the institutionalized panels of Chapters 19 were chosen to govern the process of change by regulating how North American trade remedy laws were interpreted and applied by administrative agencies. The panels were institutionalized to change the character of the trade regulatory process by considering the broader interests of North American producers, instead of the specific agendas of producers in Canada, Mexico, and the United States, as domestic agencies and domestic review courts were prone to do. Consequently, the very presence of institutionalized panels helped to change the character of the three trade remedy regimes by injecting fairness, transparency, speed, stability and order into the regulation of North American trade.

The hypothesis also reflects some of the arguments of adherents to structural-sociological new-institutionalism. Members of the structural-sociological school focus on the importance of traditions and history. Cultural traditions and historical practices bolster the authority, longevity, and resiliency of institutions. The historical nature of an institution causes change to occur very slowly. Change is a rare occurrence. When it does occur, it tends to come from within an institution itself, as members of the institution change their behaviour to allow rules to evolve to accommodate new societal developments. Thelen, Steinmo, and Longstreth suggest that institutional change is likely to occur when: new yet influential actors use established institutions to pursue their interests; when established actors pursue their goals through established institutions; or when actors within institutions adapt to institutional change.⁵⁹ The logic of the structural-sociological school thereby implies that change occurs when dominant members of an institution feel that change is necessary.

The character of the three domestic trade remedy regimes changed when dominant policy-makers, interest groups, and administrative officials heeded the authority of

⁵⁸ Thomas Koelble, “The New Institutionalism in Political Science and Sociology,” *Comparative Politics* (January, 1995), 238.

⁵⁹ Sven Steinmo, Kathleen Thelen, Frank Longstreth, *Structuring Politics: Historical Institutionalism in Comparative Analysis* (Cambridge: Cambridge University Press, 1992), 16-17.

Chapters 19 panel decisions. Gradual changes occurred slowly when trade policy-makers and interest groups accepted that the panels possessed the power to issue binding decisions about faulty AD/CVD determinations. However, when other traditional protectionist or political interests were involved, trade policy-makers and interest groups obstructed the authority that Chapters 19 panels were given in the post-FTA/NAFTA regime. The extent to which trade policy-makers and interest groups could obstruct the process of change stemmed from the degree to which trade laws and protectionist beliefs penetrated the three domestic regimes. In addition, the ability of certain individuals to slow the process of change came from their influence within each country's political configuration as well. Structural-sociological new-institutionalists argue that change upsets traditional practices, beliefs, and rules. Consequently, changes to the character of the three domestic trade remedy regimes were facilitated or impeded depending on the historical nature of the trade regulatory processes. In other words, changes occurred depending on the extent to which economic protectionism, hegemonic relationships, and state sovereignty penetrated the views of domestic actors within the three domestic trade regimes.

(2) The Importance of the Hypothesis

Why is the hypothesis important and relevant? The hypothesis moves new-institutionalist theories beyond the simplistic notion that human characteristics and behaviour change when new rules and institutions are put in place. It does propose that the character of the three trade remedy regimes changed because new rules and institutions were placed into the context of North American trade. However, the hypothesis extends beyond that simplistic notion because critics did not believe that the new rules and institutions of Chapters 19 of the FTA and NAFTA could change human behaviour. In other words, critics of Chapters 19 never expected the binational panel process to have the kind of impact that it did. Furthermore, critics did not agree that the character of the three regimes could become fairer, more transparent, and faster because of Chapters 19 panel decisions. Critics were skeptical that any change could occur because binational panels were only able to review how domestic AD/CVD laws were applied in each country. They argued that if domestic laws remained in place, the biases, slowness, and lack of transparency would remain as well. Critics doubted that the presence of Chapters 19 panels would be able to reduce the effects that socio-economic and political factors such as economic protectionism, hegemonic relationships, and concerns with state sovereignty had

on the characteristics of the three trade regulatory processes.⁶⁰ Similarly, critics feared that Chapters 19 panels would have little effect on Mexico's trade regime because of the country's different legal and political traditions. They doubted that a panel could successfully review AD/CVD determinations when Mexico's domestic laws and practices were influenced by authoritarian, single ruling party traditions, and administrative agencies were subject to intense political manipulation.⁶¹

In spite of those arguments, however, the hypothesis projects that the presence of Chapters 19 panels decisions was able to change the character of the three trade remedy regimes so that they operated in a fairer, more transparent, faster, manner. New-institutionalist theories will be used to help to understand if and how change occurred. Indeed, the hypothesis will account for the fact that some American policy-makers and interest groups felt that the presence of Chapters 19 panels had been able to change the North American trade regime to such an extent that they wanted FTA-19 removed from the NAFTA's negotiating table. If FTA-19 could not be removed, many American critics insisted that it should be significantly weakened and/or not extended to new members of the Agreement (e.g., Chile). Unsubstantiated arguments regarding the panels' use of the standards of review, the creation of a second body of trade law, the constitutionality of the binational panel system of judicial review, and conflicts of interest were advanced to discredit the success of the Chapters 19 system of review.⁶² Therefore, the hypothesis

⁶⁰ James Laxer, "The Rules that emerge will be the rules that suit the Americans," in Laurier Lapierre (ed), *If You Love This Country: Facts and Feelings on Free Trade* (Toronto: McClelland and Stewart, 1987), 134-137; Duncan Cameron, Stephen Clarkson, Mel Watkins, "Market Access," in Duncan Cameron (ed), *The Free Trade Deal* (Toronto: James Lorimer and Company, Publishers, 1988), 46-58; John J. Quinn, "A Critical Perspective on Dispute Settlement," in Marc Gold, David Leyton-Brown (eds), *Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement* (Agincourt: The Carswell Company Limited, 1988), 188-194; the Hon. John N. Turner, *House of Commons Debates* (October 5, 1987), 96345; G. Bruce Doern, Brian W. Tomlin, *Faith and Fear: The Free Trade Story* (Stoddart: Toronto, 1991), 95-96.

⁶¹ The compatibility of the Mexican system and NAFTA-19 will be discussed more fully in Chapter Four. Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Matters," Public Address delivered at El Colegio de México, Mexico City (May 21, 1994), 8-10; Representative Sam Gibbons, Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 100th Congress, 2nd Session (April 28, 1988), 98-99.

⁶² Testimony of Malcolm R. Wilkey before the Subcommittee on Trade of the Committee on Ways and Means of the House of Representatives (June 21, 1995), 2-4; United States General Accounting Office, *U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels* (Washington: GAO, 1995), 80-81; Robert E. Burke, Brian R. Walsh, "NAFTA Binational Panel Review: Should it be continued, eliminated, or substantially changed," *Brook Journal of International Law*, Vol. 20, No. 3 (1995), 545-546; John Ragosta, "Sacrificing the Constitution for Comity?: NAFTA Chapter 19 Panels and the U.S. Constitution," presented in Monterey, Mexico in March, 1996; Jim Chen, "Appointments With Disaster: The

moves beyond the critiques and will examine the extent to which the presence of institutionalized Chapters 19 panels was able to reduce the influence that economic protectionism, hegemonic relationships, and state sovereignty had over the three trade regulatory processes

Not only is the hypothesis important because it addresses critics' claims about the possibility of change, it is important because it goes to the heart of the problem of the social sciences as well. Even though institutions (e.g., binational panels) set the context for changes to occur in the character of the three trade regimes, the hypothesis considers "how much weight ought to be given to the institutions and to the larger environmental factors such as culture, social norms, and conventions in the process of change."⁶³ In other words, the hypothesis recognizes that political and socio-economic forces were at work in North American trade even once Chapters 19 panels were in place. Economic protectionism, hegemonic relationships, and concerns with state sovereignty retained a great deal of influence in the three trade regulatory processes. Therefore, their influence or strength must be accounted for vis-à-vis the binational panels to fully appreciate the changes that occurred to make the three trade regimes fairer, more transparent, and faster after 1989.

Finally, the hypothesis is important because it addresses the extent to which international laws and institutions can change domestic laws and practices. Generally speaking, new-institutionalist theories have been applied more often to domestic than to international laws. New-institutionalist theorists have tended to restrict their analyses to a discussion of the constraints and opportunities that affect individuals within their own political systems. New-institutionalist theories can, however, be extended to international laws as the hypothesis suggests. Indeed, economic interdependence and globalization have made it necessary to examine how the legal structures of states, the authoritative claims of states, and their ability to implement such claims have changed with regard to international or transnational laws and institutions.⁶⁴ According to Preston and Windsor:

Unconstitutionality of Binational Arbitral Review Under the United States-Canada Free Trade Agreement," *Washington and Lee Law Review*, Vol. 49 (1992), 1456-1496; Christopher Murphy, "Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold?" *The Transnational Lawyer*, Vol. 4 (1991), 599-601.

⁶³ Thomas A. Koelble, "The New Institutionalism in Political Science and Sociology," *Comparative Politics* (January, 1995), 232.

⁶⁴ Stephen Krasner, "Sovereignty: An Institutional Perspective," *Comparative Political Studies*, Vol. 21, No. 1 (1988), 86; Henry J. Jacek, "Public Policy and NAFTA: The Role of Organized Business Interests and the Labor Movement," *Canadian-American Public Policy*, No. 19 (October, 1994), 2.

Although the process of globalization is far from complete, it is already creating strong pressures for the development of mutually acceptable norms and patterns of behaviour among important actors - enterprises, governments, and economic life. These pressures lead, in turn, to the development of international policy regimes, understandings, and systems of behaviour that facilitate and mediate collaboration and competition within the global economy.⁶⁵

In order to develop new-institutionalist theories in the area of international law, new-institutionalists need to consider the concept of state sovereignty and the binding nature of international laws to fully appreciate the resilience and authority of rules in the face of social, political, and economic pressures to change. Domestic and international laws are different because domestic laws tend to be more binding and enforceable than international laws. International rules may be altered, disregarded, or broken more easily because of state sovereignty, and the fact that they are only "morally binding" on signatory parties. There are very few means to enforce international rules on sovereign states who disregard them. International laws such as those in the FTA and NAFTA are only as strong, effective, and binding as member states desire them to be. Ultimately, the three governments may violate their FTA and NAFTA obligations, disregard the rulings of binational panels, and uphold their own national interests if they choose because they represent sovereign states. The moral, political, and economic ramifications of such actions are the only considerations that may dissuade them from doing so.

Therefore, new-institutionalist theorists would be wise to acknowledge that the constraints which international laws and institutions place on states, policy-makers, and interest groups are not as binding as the constraints that domestic laws place on individuals in the process of change. Even though international rules may constrain policy-makers, they can be disregarded more easily because of state sovereignty and the lesser degree to which international regimes can override national governments. The different degrees to which domestic and international laws can bind sovereign states, governments, and societal actors directly influence the ease and rate at which the laws evolve. Sovereign states may be more likely to call the legitimacy and authority of international laws into question more readily than domestic actors would do of their domestic laws. International laws do not incorporate the historical values, beliefs, and aspirations of a collectivity to the extent that domestic laws do. Consequently, they can be changed more easily because they are more the products of the ways that governmental actors and concerned interest groups respond to environmental developments, than they are of longstanding historical traditions and cultural

⁶⁵ Lee E. Preston, Duane Windson, *The Rules of the Game in the Global Economy: Policy Regimes for International Business* (Boston: Kluwer Academic Publishers, 1992), xvi.

ideologies. In this way, the beliefs of the rational choice school of new-institutionalism meet the realities of international laws better than the theories of the structural/sociological school. Rational choice theorists emphasize that rules and institutions change more easily than individual and group preferences do. Even though rules such as international trade agreements are binding, they are more responsive to the demands of the actors within the states and societies of their members.

The concept of hegemony also needs to be taken into consideration by new-institutionalists when examining the process of change in international law. As the hypothesis suggests, panels were placed into the power structure of each domestic system and the North American trade environment. Consequently, hegemonic power relationships had a role to play in how the rules and institutions of Chapters 19 were embraced within and between political systems. New-institutionalist theorists have indirectly included the concept of hegemony in their analyses by stressing that the legitimacy and authority of domestic rules and institutions are contingent on the support they receive. Similarly, new-institutionalists have implicitly acknowledged the concept of hegemony by maintaining that the rate at which domestic rules and institutions change is related to the degree to which they are supported by dominant actors in the political system they govern. If influential policy-makers and interest groups support an existing set of rules or laws, change is unlikely to occur. Conversely, change should occur when powerful members of society want rules to evolve to meet new socio-economic and political developments.

However, new-institutional analyses need to explicitly recognize the concept of hegemony if they are to be extended to the process of change in international relations. The concept that rules change according to the level of support they receive is as true for international rules as it is for domestic laws. International laws and agreements are created when sovereign states agree to limit their freedom to act according to their narrow national interests. The degree to which sovereign states abide by the terms and institutions of an agreement is contingent on the degree to which the agreement is compatible with the domestic traditions, cultural ideologies, and interests of its dominant members. For example, domestic policy-makers and interest groups used their power to influence administrative structures to apply trade remedy laws in a protectionist manner before 1989, so that they would be isolated from the globalizing trends of international trade. Similarly, certain policy-makers and interest groups appealed to their country's administrative agencies to resist the role that binational panels of Chapters 19 of the FTA and NAFTA had in the interpretation and application of trade remedy laws after 1989. The rate that the character of the three trade remedy laws changed, then, was related to the amount of support the AD/CVD laws received from powerful domestic actors that dominated their

own country's agendas, and the direction in which the FTA and NAFTA developed during the trade negotiations.

(3) The Variables in the Hypothesis

(A) Independent Variables

The independent or causal variables in the hypothesis are: economic protectionism; hegemonic relationships between interest groups, administrative agencies, and policy-makers within and between the three countries; and concerns with state sovereignty. They vary in terms of the strength, and thus influence, they had over the character of the three trade remedy regimes. The strength of the three independent variables affected the degree of change in the character of the three trade regimes in the context of Chapters 19.

The independent variables can be broken into two categories: (1) a domestic category, which includes economic protectionism and hegemonic relationships between interest groups, policy-makers and administrative agencies within each country; and (2) an international category, which includes hegemonic relationships between the three countries, and state sovereignty. The variables in the domestic and international categories are related to one another in a symbiotic relationship. Economic protectionist beliefs helped to spur interest groups and policy-makers on to fight the ways that Chapters 19 could end domestic practices of shielding producers from foreign competitors and from changing the character of the three regimes. The degree to which economic protectionism was accepted at a given time helped to elevate the influence of its adherents within the power configurations of each political system. The two domestic independent variables not only affected one another, but influenced those in the international category as well. The political power and economic beliefs that influential policy-makers had in their own political systems was directly reflected in their approaches to the FTA/NAFTA negotiations and the binding nature of international law. If influential policy-makers in the executive and legislative branches of the three governments were attuned to stringent trade remedy laws and economic protectionism, it was likely that they would want to restrict the "liberalizing" effects that Chapters 19 panels had on the "protectionist" character of the trade regulatory processes. Conversely, if influential policy-makers and interest groups had an interest in developing liberalized, rule-based, free trade, it could only be expected that they would facilitate the role that Chapters 19 panel decisions had in reviewing questionable administrative practices, and making the administration of trade remedy laws fairer, more transparent, and faster.

(i) Observations of the Independent Variables

“Economic protectionism” refers to the belief that domestic producers need to be insulated or protected from competitive foreign imports. As explained in Chapter One, AD/CVD measures became favoured forms of protectionism during the 1970s and 1980s. Protectionist beliefs encouraged producers, interest groups, and policy-makers to lobby their country’s administrative agencies to shield them by protectionist, narrow interpretations of AD/CVD laws. In turn, protectionist beliefs prompted some Canadians, Americans, and Mexicans to try to impede the role of FTA-19 and NAFTA-19 in the changing North American trade regulatory process.

The presence of the variable “economic protectionism” can be assessed by the arguments that certain interest groups and policy-makers put forward during the four trade disputes. If interest groups and/or policy-makers resorted to domestic trade laws for protection, or publicly denounced the binational panel decisions, it can be assumed that economic protectionist beliefs had a role to play in the process of change. The degree to which domestic trade remedy laws or critiques of NAFTA-19 were pursued by policy-makers, and/or reflected in the remand determinations of administrative agencies, can indicate how the variable of economic protectionism influenced the character of the American, Canadian, and Mexican systems. Furthermore, the speed and ease with which panel decisions were adhered to by the three governments and administrative agencies can help to uncover the effects of economic protectionism in the process of change.

The second independent variable in the domestic category encapsulates the hegemonic relationships between policy-makers, interest groups, and administrative agencies in Canada, Mexico, and the United States. A hegemonic relationship is one where the leader (i.e., the hegemon) is able to influence the other parties. In other words, a hegemonic relationship is one in which weaker parties are dominated by stronger, larger, or more powerful members. Hegemonic relationships can occur between individuals, groups, or even countries. In this context, the hegemonic relationships involved trade policy-makers, interest groups, and administrative agencies in the three countries. The variable accounts for the relative power that trade policy-makers, interest groups, and administrative agencies had in the three domestic trade regulatory processes before and after 1989.

The variable was chosen because trade policy-makers (e.g., members of the executive and legislative branches of the three central governments, officials in subnational levels of government, members of the bureaucracies) influenced the evolution of trade remedy laws before and after 1989. Selected policy-makers also had a formative role to

play in the negotiation of Chapters 19 of the FTA and NAFTA. Similarly, domestic interest groups lobbied governmental officials and administrative agencies to apply AD/CVD laws in a protectionist manner, and/or to promote stronger international trade rules and dispute settlement mechanisms. For example, North American legal associations were formidable influences in the creation of FTA-19 and NAFTA-19. Large steel, lumber and pork producers were powerful counterbalances to the binational panels that were instituted to settle trade disputes between the three countries. The connections that interest groups had to their country's dominant policy-makers help to uncover why they had so much power over the character of the three trade regulatory processes. Moreover, their connections also explain why certain interest groups were more powerful than others in the process of change. The role that hegemonic relationships played in the process of change can be gauged by appreciating the relative power of certain interest groups and policy-makers vis-à-vis administrative agencies and Chapters 19 panels. Did hegemonic relationships allow some individuals to be able to encourage or inhibit the process of change? Did domestic groups and policy-makers have enough social, political, or economic clout to be able to encourage administrative agencies to change their behaviour in accordance with panel decisions and thus make a difference in the character of the regime, or to ignore the panel decisions and continue to act as they had before 1989?

The international category of independent variables includes hegemonic relationships between the three countries and state sovereignty. It will be assessed in terms of whether and how international relationships affected the behaviour of policy-makers, interest groups, and administrative agencies in the resolution of the three disputes. The hypothesis will seek to appreciate that hegemonic relationships between Canada, Mexico, and the United States affected the process of change in two ways. First, the groundwork for Chapters 19 and the binational panel process of review was laid during the FTA and NAFTA negotiations. The rules and institutions of Chapters 19 were formulated in the midst of discussions about the propriety of the three trade remedy regimes, and particular views about the conduct of trade. Chapters 19 were a reflection of the countries, groups, and policy-makers that held the balance of power within and between the political systems. Therefore, hegemonic relationships were built directly into Chapters 19 because the binational panel process was founded on the power configurations that existed between interest groups and policy-makers within and across the three countries.

For example, Canadian objectives were often tainted by the economic and political power of the U.S. during the FTA negotiations. Furthermore, Canada was the "demandeur" in the negotiations, the party most anxious for an agreement. As Doern and Tomlin explain, Canada had created elaborate facilities and a large bureaucracy to handle

the FTA negotiations because it was extremely committed to securing an agreement. Conversely, the Americans took a much more casual approach to the negotiations because they were not as committed or dependent on an agreement. The U.S. negotiating team, therefore, capitalized on Canada's desire for a deal, and knew "that the Canadians would be reluctant to put the negotiations at risk by digging in their heels and refusing to make further concessions."⁶⁶ In this way, the asymmetry in the Canadian and American strategies, desires, and potential gains from an agreement, allowed the U.S. to be in a hegemonic position during the negotiating process.

As a case in point, Canadian negotiators were driven by a desire to place effective legal mechanisms into the agreement so that Canadian producers would be treated fairly in the administration process of the American trade remedy regime. They had initially hoped that U.S. trade remedy laws could be replaced by new disciplines and procedures more appropriate to a free-trade area. However, the American negotiators refused to excuse Canadians from their domestic trade remedy laws. Consequently, FTA-19 became the next best option to ensure that Canadians could securely access American markets.

Similarly, Mexican negotiators were buried under the relative weight of their Canadian and American counterparts during the NAFTA discussions. The Mexican government desperately wanted to conclude a trade agreement with Canada and the United States. Guaranteed, secure access to North American markets was seen as a partial solution to Mexico's economic problems. The political and economic power of Canada and the United States thus affected the relative position of Mexico during the NAFTA negotiations. Canadian and American negotiators insisted that the Mexican Government make substantive and procedural changes to its trade remedy regime before an agreement could be concluded. International hegemonic relationships thereby influenced the character of the three domestic regimes because they allowed the more powerful negotiators to dictate how much influence Chapters 19 could assume vis-à-vis other political and socio-economic factors.

Second, the hypothesis will recognize that international hegemonic relationships also affected the extent to which Chapters 19 panels could change the character of the three systems because of the different levels of economic and political power that each country possessed. As Chapter One explained, ADDs/CVDs were more harmful to producers in smaller economies (e.g., Canada and Mexico) than in larger economies (e.g., the United States). Furthermore, larger, wealthier powers like the United States were in a better position to use trade remedy laws without fear of retaliation. Smaller countries, on the other hand, were not in such a position to use protectionist AD/CVD laws because the

⁶⁶ G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Stoddart: Toronto, 1991), 278.

health of their economies was contingent on free trade. Therefore, Mexico, and to a lesser extent Canada, needed to comply completely with NAFTA-19 panel decisions, and change their regimes into fairer, more transparent, and faster systems of judicial review, to avoid international censure and American displeasure. By complying with NAFTA-19 panel decisions, Canadian and Mexican policy-makers could argue more forcefully that the Americans needed to abide by international laws and obligations as well.

The second independent variable in the international category is state sovereignty. State sovereignty focuses on the ability of states to pursue their national interests in international affairs. It examines the freedom that states have to act outside of their own borders, by considering the degree to which a state's freedom is limited by other states, international laws, and international conventions of behaviour. Therefore, state sovereignty embraces the "policy capacity" of a state, or "the combination of attributes (e.g., policy instruments, knowledge, and political mobilization) that a country needs to possess in order to solve many of the economic, political, and social problems that confront it."⁶⁷

While state sovereignty may be defined easily in the abstract, a consensus has yet to emerge on a definition of sovereignty that suits modern economic realities. Two major approaches to sovereignty were captured in the Permanent Court of International Justice's decision in the *Austria-German Customs Union Case* (1931). The majority of the Court ruled that sovereignty existed where a government had the sole, absolute right and ability to make a decision. Conversely, the minority held that sovereignty was said to exist when a government had the right and ability to exercise its own judgment, including the right to accept restrictions on freedom of action if the acceptance was freely given. In other words, the minority felt that absolute sovereignty was impossible. Sovereignty would always be limited but not denied when a state entered into a treaty.⁶⁸

The minority's view is more relevant for today's international trade environment. Globalization has limited the absolute sovereignty of all countries. Every country, regardless of its power or wealth, is somewhat more vulnerable to the actions of other countries, domestic actors or conflicts in other countries, and international regimes. Therefore, complete sovereignty and independent decision-making ability are impossible, given present global economic circumstances. Indeed, it is often in a state's self-interest to enter a treaty and decrease its sovereignty to a certain extent as a result.⁶⁹ For example, the

⁶⁷ G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Stoddart: Toronto, 1991), 246.

⁶⁸ Jonathan Fried, "Two Paradigms for the rule of International Trade Law," *Canada-United States Law Journal*, Vol. 20 (1994), 40.

⁶⁹ Jonathan Fried, "Two Paradigms for the rule of International Trade Law," *Canada-United States Law Journal*, Vol. 20 (1994), 39-41; Earl H. Fry, "Sovereignty and Federalism: U.S. and Canadian Perspectives," *Canada-United States Law Journal*, Vol. 20 (1994), 303-304; Stephen Clarkson, "Constitutionalizing the Canadian-American Relationship,"

governments of Canada, Mexico, and the United States committed themselves to the terms of the FTA and NAFTA, and agreed to relinquish a measure of their sovereignty to reap the perceived benefits of a more integrated North American trading environment. To facilitate the liberalized flow of trade, binational panels were given authority over domestic trade agencies according to the texts of Chapters 19 of the FTA and NAFTA. The three governments agreed to limit the freedom that their trade tribunals had to apply domestic trade remedy laws in any way they saw fit. The voluntary limitation of state sovereignty allowed Chapters 19 panels to begin to change the character of the three systems and the ways that trade remedy laws were interpreted and applied in Canada and the United States after 1989 and in Mexico after 1993.

State sovereignty becomes complicated when put into practice. It raises the paradoxical nature of international law. States often agree to limit their sovereignty on an official level, but hesitate to follow through with their commitments in the face of socio-economic developments and political pressures. Canada, Mexico, and the United States committed themselves to strong judicial regimes such as Chapters 19 of the FTA and NAFTA in an effort to make the North American trading environment a fairer, more transparent, and faster environment since the mid 1980s. However, the three countries have often hesitated to allow those rules to affect their own domestic systems as they were intended to. The orders of some of the Chapters 19 binational panels have sometimes been disregarded by the very trade agencies and policy-makers they were intended to affect. Political issues and domestic actors have minimized the power of the international institutions in the face of developments in the international trade environment. International laws may be changed and/or disregarded more easily than domestic ones because of the concept of state sovereignty. International laws are, in effect, only as strong and binding as the will of the signatory parties to uphold them.

Therefore, the international laws of Chapters 19 have become somewhat paradoxical because they were created by sovereign states which have sometimes chosen to ignore them for national interests. Indeed, this is how the variable of state sovereignty affected the extent to which Chapters 19 panel decisions could change the character of the trade regulatory systems. State sovereignty can be measured by looking at the willingness of the three governments to allow their country's domestic laws and practices to be changed by international institutions. Particularly, the variable of state sovereignty can be assessed by examining governmental statements which supported or opposed Chapters 19 in general, and panel decisions in particular, the extent to which panel decisions were accepted

and acted upon, the number of remand determinations that administrative agencies required before complying with panel orders, and the number of times that the three governments resorted to appeal procedures to challenge panel decisions in the process of judicial review.

(ii) Justifying the Independent Variables

Chapter One described the rise of new forms of protectionism during the 1970s, 1980s, and 1990s in the global trading environment. It also explained that trade remedy laws became favoured weapons of protection in Canada, Mexico, and the United States in the face of economic integration. By and large, AD/CVD measures were requested by industries (e.g., steel, textiles, electromechanics, chemical products, automobiles, agricultural, and natural resources) that faced stiff competition and had trouble withstanding pressure from foreign competitors. Furthermore, AD/CVD measures were generally requested by larger firms that could afford the costs of trade remedy litigation. Indeed, trade remedy actions were often protectionist strategies to harass smaller importers. They were used to discourage smaller, competitive firms from staying out of a market because they did not have the resources to defend themselves against trade remedy actions.⁷⁰ Because economic protectionism has played such a central role in global and North American trade, it must be considered in the process of change. Specifically, it must be viewed as a variable that affected the character of the three trade remedy regimes before and after the FTA and NAFTA came into place and must be considered in the context of Chapters 19.

“Hegemonic relationships between interest groups, administrative officials, and policy-makers” was chosen to be an independent variable because of the relationships that drive the trade policy-making processes in the three countries. In spite of their different political structures and traditions (e.g., parliamentary versus presidential government, liberal democracy versus authoritarianism, corporatism, and single party rule), there is interplay between state and societal forces (such as interest groups and policy-makers) in Canada, Mexico, and the United States. In the context of the three trade remedy regimes, the administration of AD/CVD laws was directly affected by the relationships between those groups of actors. Consequently, the relative power that they had vis-à-vis one another must be accounted for in a study of how the character of the three regimes changed

⁷⁰ Testimony given by Professor Klaus Stegemann, Professor Robert Howse, Professor Emmanuel Nyahoho, and Mr. Peter Clark before the Joint Committee of the Sub-Committee on the Review of the Special Import Measures Act of the Standing Committee on Justice and Legal Affairs, and the Sub-Committee on Trade Disputes of the Standing Committee on Foreign Affairs and International Trade, September 18, 1996.

after Chapters 19 of the FTA and NAFTA came into effect. Furthermore, the relative power of interest groups, administrative agencies, and policy-makers can be used to understand if and why Chapters 19 panels were able to have an effect on the fairness, transparency, and speed of the three trade remedy regimes.

The literature suggests that interest groups have been formidable actors in the North American trade regulatory process. Most notably, interest groups have become extremely strong influences in the American trade policy-making process.⁷¹ Globalization, changes in the strategic security interests of the United States, the growing federal deficit, the changing mix of groups affected by trade policy, and more aggressive media attention on trade policy initiatives, have enlarged the role that interest groups have played. Mobilized interest groups from trade associations, business associations, and labour unions have routinely pressured Congress to ensure that administrative agencies would apply protectionist AD/CVD laws. In the event that those administrative agencies did not satisfy their protectionist concerns, interest groups have pressured Congress to make small, technical amendments to existing trade laws. Many of the changes made to American trade remedy laws during the 1970s, 1980s, and 1990s have been the product of pressure that interest groups have placed on Congress. For example, when Congress amended the Omnibus Trade and Competitiveness Act, “it jiggled the regulatory and administrative remedies in ways guaranteed to be politically profitable to special claimants.”⁷² Nivola explains that :

⁷¹ Alan J. Cigler, “Interest Groups: A Subfield in Search of an Identity,” in William Crotty (ed), *Political Science: Looking to the Future: Volume IV American Institutions* (Evanston: Northwestern University Press, 1991), 118-122; Morris P. Fiorina, *Congress: Keystone of the Washington Establishment 2nd Ed.* (New Haven: Yale University Press, 1989); I.M. Destler, *American Trade Politics 3rd Ed.* (Washington: Institute for International Economics, 1995).

⁷² John T. Tierney, “Interest Group Involvement in Congressional Foreign and Defense Policy,” in Randall B. Ripley, James M. Lindsay (eds), *Congress Resurgent: Foreign and Defense Policy on Capitol Hill* (Ann Arbor: University of Michigan Press, 1992), 95-96, 100-102.

The American trade remedy regime was formally designed to channel and contain demands for protection and to promote a free trade position within the international economic environment. Nevertheless, the regime has steadily become one that has done the opposite since the 1970s. The regulation of “unfair” trade practices by Congress, the executive branch, and administrative agencies has stimulated the appetite of American firms and industries for protection rather than quenched it. The official rhetoric espousing free trade has been replaced with a preoccupation with fair trade within American governmental structures and society. Protectionism, under a guise of a “fair trade” strategy, has been regularly pursued by American trade policy-makers in a subtle form of collusion to respond to the demands of American producers.⁷³

Indeed, huge legal/lobby firms, such as Dewey, Ballantine of Washington D.C., have made fortunes by launching countless lawsuits and petitions in the American trade remedy regime. Trade analysts have suggested that firms such as Dewey, Ballantine have caused an unhealthy shift from a diplomatic, state-led trade policy making process to one in which the wishes of individual businesses and industrial sectors have begun to dictate the U.S. trade agenda. Trade policy-making in Washington has been described as “the perfection of special interest lobbying or rent seeking” where American industries stand to gain far more from unfair trade cases than the costs of their lawyers.⁷⁴ Therefore, interest groups have lobbied policy-makers to use their positions of influence on congressional committees to control the tone of the laws that administrative agencies interpreted and the purse strings of the agencies themselves. Consequently, the hegemonic relationships between interest groups, policy-makers, and administrative agencies have had a significant impact on the character of the American trade regime in the context of Chapters 19.

The literature also suggests that interest groups have been influential in Canada and Mexico, although not to the same degree as in the United States. Generally speaking, Canadian business and legal groups were able to overshadow the labour, environmental, and cultural groups that opposed free trade, and were able to successfully pressure the Mulroney and Chrétien governments to continue integrating the North American market.⁷⁵

⁷³ Pietro Nivola, “Trade Policy: Refereeing the Playing Field,” in Thomas E. Mann (ed), *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington: The Brookings Institute, 1990), 201, 214-219; David H. Blake, Robert S. Walleys, *The Politics of Global Economic Relations 3rd Ed.* (Englewood Cliffs: Prentice Hall Inc., 1987), 27-30.

⁷⁴ “Allan Wolff,” *National Journal* (August 5, 1995), 1995-1998; “Robert Lighthizer” *National Journal* (November 18, 1995), 2853-2858.

⁷⁵ G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Stoddart: Toronto, 1991); Michael Hart, *Decision at Midnight* (Vancouver: University of British Columbia Press, 1995); Raymond Tatalovich, Peter Sanchez, “Interest Group Politics in the Americas: The Case of NAFTA in Mexico, Canada, and the United States.” Paper Delivered to the International Seminar on “The Political Systems in the New North America: Nature,

As demonstrated, business and legal groups helped to place free trade on the government's agenda in the mid-1980s. Reports released by the Canadian Manufacturers Association, the Business Council on National Issues, and the Canadian Bar Association, were instrumental in encouraging the Mulroney government to negotiate a comprehensive free trade agreement with the United States in 1987.⁷⁶ Furthermore, business and legal groups were instrumental in making "secure market access" and "the rule of law" central goals for Canada in the FTA and NAFTA negotiations.

Even in the presence of Mexico's authoritarian regime, certain interest groups have been able to affect the trade policy-making process. Historically, business groups have been the most independent and autonomous interest groups in Mexico because they have been the only segment of society to enjoy independent resources and organizational skills. Very few other non governmental groups have been able to provide an effective or comparable counterbalance to the power of business groups in Mexico. In comparison to American and Canadian business groups which have had to balance their interests with those of regional, agricultural, labour, and consumer groups, the Mexican business sector has been able to hold the balance of power within the non-state sector.⁷⁷ Therefore, Mexican business groups have enjoyed more leverage in the trade policy-making process. Unlike those groups coopted into the PRI (e.g., labour, agrarian, peasant groups), business groups such as the National Federation of Chambers of Commerce (CONCANACO), Confederación Patronal de la República Mexicana (COPARMEX), Confederación de Cámaras Nacionales de Comercio (CONCANACO), Consejo Mexicano de Hombres de Negocios/ Mexican Council of Businessmen, and the Mexican Business

Conflicts and Convergences" at the Center for Research on North America, National University of Mexico (UNAM), May 17-19, 1995.

76 Joint Working Group on the Settlement of International Disputes Between Canada and the United States, "Settlement of International Disputes Between Canada and the USA - Report and Recommendations of the Canadian and American Bar Associations," March 20, 1979; Joint Working Group on the Settlement of International Disputes Between Canada and the United States, "Settlement of Disputes Under The Proposed Free Trade Agreement," May 15, 1987; submissions of the Canadian Manufacturers Association and Business Council on National Issues in the Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade Pursuant to Standing Order 96(2) Consideration of the Canada-U.S. Free Trade Agreement Volumes 55-60 (1986-1988); James Kelleher, "How to Secure and Enhance Canadian Access to Export Markets," (Ottawa: Minister for International Trade, 1985).

The concerns raised in those reports are summarized in Jock Finlayson, "Canadian Business and Free Trade," *International Perspectives*, (March/April, 1985), 29-31; G. Bruce Doern, Brian W. Tomlin, *Faith and Fear* (Toronto: Stoddart, 1991), chapter 5; Michael Hart, *Decision at Midnight* (Vancouver: University of British Columbia Press, 1994).

77 John F.H. Purcell, Susan Kaufman Purcell, "Mexican Business and Public Policy," in James M. Malloy (ed), *Authoritarianism and Corporatism* (Pittsburgh: University of Pittsburgh Press, 1977), 192-195.

Council for International Affairs (CEMAI) have been able to deal directly with the executive branch when making their demands about trade liberalization known. Their concerns have been accounted for by Mexican presidents, especially during times of political and economic restructuring.

Mexican business organizations gained a great deal of credibility and power vis-à-vis the executive in the making of trade remedy laws during the 1980s. Their influence steadily increased over the direction of Mexican trade policy and law as Presidents Portillo, de la Madrid, Salinas, and Zedillo pursued economic liberalization, trade remedy laws, and membership in international agreements.⁷⁸ For example, President Salinas felt pressure from the business community to continue on with the de la Madrid administration's program of economic reform and increased foreign trade when he assumed office in 1988. To accommodate their demands, Salinas coopted key business groups that supported trade liberalization into his new ruling coalition.⁷⁹

⁷⁸ Sidney Weintraub, "The North American Free Trade Debate," Paper presented for the International Forum: Mexico's Trade Options in the Changing International Economy, Universidad Tecnológica de Mexico, Mexico City, June 11-15, 1990, 3; Michael Hart, *A North American Free Trade Agreement: Strategic Implications for Canada* (Ottawa: Center for Trade Policy and Law, 1990), 4; Luis Rubio, "The Changing Role of the Private Sector," in Susan Kaufmann Purcell, *Mexico in Transition: Implications for U.S. Policy* (New York: Council on Foreign Relations, 1988), 31-42; Gary F. Erb, Joseph A. Greenwald, "U.S.-Mexican Trade Issues," in William Glade, Cassio Luiselli (eds), *The Economics of Interdependence: Mexico and the United States* (San Diego: Center for U.S.-Mexican Studies, 1989), 112-114; Sidney Weintraub, *Free Trade Between Mexico and the United States?* (Washington: The Brookings Institute, 1984), 85-89; Richard D. English, "The Mexican Accession to the General Agreement on Tariffs and Trade," *Texas International Law Journal*, Vol. 23 (1988), 340-385; Dale Story, "Trade Politics in the Third World: A Case Study of the Mexican GATT Decision," *International Organization*, Vol. 36, No. 4 (1982), 778-789; Laurence Whitehead, "Political Change and Economic Stabilization: The "Economic Solidarity Pact," in Wayne Cornelius et al (eds), *Mexico's Alternative Political Futures* (San Diego: Center for U.S.-Mexican Studies, 1989), 210; Guy Poitras, Raymond Robinson, "The Politics of NAFTA in Mexico," *Journal of InterAmerican Studies and World Affairs*, Vol. 36, No. 1 (Spring, 1994), 10.

⁷⁹ For example, the Coordinadora de Organismos Empresariales de Comercio Exterior (COECE) was created in 1990 to serve as a critical coordinating body that linked the executive branch to the business sector. COECE represented approximately 114 sectors of the Mexican economy, and incorporated 16 business associations including CONCAMIN, CANACINTRA, and the US Chamber of Commerce of Mexico. COECE became the most important group of its kind within the new ruling coalition and a close ally of the Government on pursuing its free trade agenda. Indeed, the business leaders of COECE shared ideology, personnel, and positions on key issues with those in SECOFI and other trade officials in the Salinas administration. The relationship between COECE and SECOFI was often described as "tight," and one that epitomized the power of business in the new ruling coalition. Even though the role of the COECE was only to advise the Government on its trade policies and laws, the extensive amount of interaction between COECE, SECOFI and the President was instrumental in providing the Government with both the input and the support of business it needed to arrive at its position on trade issues.

Tonatiuh Guillen Lopez, "Mexican Policy and Its Implications for United States-Mexican Government Relations," in Edgar W. Butler, Jorge A. Bustamante (eds), *Succession*

Mexican business groups used their new power and cooperated with their American and Canadian counterparts to pressure the Salinas administration to make Mexico's trade remedy regime compatible with the Canadian and American systems. For example, a great deal of pressure to reform the trade remedy regime came from one of Mexico's "favourite industrial sons." CEMEX, Mexico's leading cement producer, was involved in a dumping investigation in the United States during the late 1980s and early 1990s. CEMEX officials were extremely upset by the "arbitrary" methods that the DOC and ITC used to administer American AD/CVD laws and levy ADDs on their exports to the United States. On behalf of CEMEX, the Mexican Government appealed the dumping determinations to a GATT dispute settlement panel. Despite the fact that the panel ruled in favour of the Mexican industry, the American government refused to implement the GATT decision. The decision taken by the American government aggravated the Mexican government and CEMEX to such an extent that it came to represent one of the critical domestic policy considerations that propelled the Salinas administration to reform its domestic AD/CVD laws. Because of the CEMEX dispute, the Salinas administration decided that reciprocal treatment would become a cornerstone of its new AD/CVD regime. If another GATT member were to implement and administer its own AD/CVD laws in an "overly harsh manner" against Mexican products, then Mexico would respond in kind with the equally harsh imposition of AD/CVD duties against the products of the foreign country in question. To ensure that Mexico could execute this new principle of reciprocal treatment, and thus play "hard ball with the big boys" in the United States and EC, the Salinas administration undertook other major reforms which culminated in the New Foreign Trade Law of 1993.⁸⁰

In spite of their influence, Canadian and Mexican interest groups have been generally less influential than those in the United States. Deference towards authority, larger governments, and centralized power has been accepted much more readily in Canada and Mexico. The dominant role interest groups have gained in the United States was facilitated by different values supporting small, divided government, and laissez-faire economics. Consequently, the power of Canadian and Mexican policy-makers must also be accounted for in the variable "hegemonic relationships" because of their importance in setting the direction, tone, and character of the trade remedy regimes.

Presidential: The 1988 Mexican Presidential Election (Boulder: Westview Press Inc., 1991), 90-91; Guy Poitras, Raymond Robinson, "The Politics of NAFTA in Mexico," *Journal of InterAmerican Studies and World Affairs*, Vol. 36, No. 1 (Spring, 1994), 14-15.

⁸⁰ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 938-941.

Congressional officials have responded to protectionist demands by asserting control over the administrative structures that levied ADDs/CVDs against foreign producers. In other words, Congress has elevated itself vis-à-vis the executive branch in the U.S. trade policy-making process since the 1970s. For example, Congress developed “fast track authority” in the Trade Act of 1974. Within the American system of checks and balances, fast track authority strengthened the control Congress had over the trade remedy regime by making the USTR the focal point of trade negotiations.⁸¹ Because the USTR was required to involve congressional committees and/or delegations during trade negotiations and was obliged to report to Congress on a regular basis, Congress was able to ensure that protectionist American laws, interests, and objectives were not sacrificed within international agreements. In other words, fast track authority allowed Congress to place the protectionist demands of their domestic constituents into international trade negotiations. For example, Section 409 of the FTA Implementation Legislation required the executive to consult with Congress before an agreement on subsidies and countervailing duty measures was reached by the Working Group of Article 1906 of the FTA. The working group was required to consult with Congress and the private sector, and to make annual progress reports to the Senate Finance Committee and House Ways and Means Committee. Fast track authority to conclude a subsidies agreement was contingent on congressional approval that the agreement would give more discipline over subsidies, would limit unfair pricing practices, and was consistent with the GATT Codes and the Uruguay Round.⁸² Similarly, Congress has been able to exercise a great deal of control over administrative agencies such as the Department of Commerce (DOC), the International Trade Commission (ITC), and the Court of International Trade (CIT) because it sets their

⁸¹ “Fast track authority” refers to the ability of the executive branch to negotiate a comprehensive trade package as a whole. When ratifying a package created under fast track authority, Congress is only permitted to approve or reject it in its entirety. It is not empowered to consider individual clauses of the package on their own. Fast track authority gave the executive branch a measure of power over Congress during trade negotiations because the executive branch was able to include or exclude those issues that it felt did or did not uphold American interests. However, in conjunction with the system of checks and balances, Congress did retain control over the executive when exercising its fast track authority. Congress has only granted fast track authority for a certain period of time. If the trade negotiations were not completed within that time frame, Congress regained the ability to ratify the resulting package on a clause-by-clause basis. In addition, Congress has often agreed to authorize fast track authority in the event that the executive complied with their demands. For example, fast track authority was granted during the FTA negotiations in the event that the conclusion of the FTA was linked to the resolution of the Canada-U.S. softwood lumber trade dispute. Congress may withhold fast track authority during the negotiations of including Chile in the NAFTA if the NAFTA’s dispute settlement mechanisms are not significantly changed..

⁸² Stewart A. Baker, Shelly P. Battram, “The Canada-United States Free Trade Agreement,” *The International Lawyer*, Vol. 23, No. 1 (Spring, 1989), 73.

budgets, and has had a role to play in who was appointed through the ratification process in the Senate. As will be demonstrated in Chapter Three, the DOC, ITC, and CIT took congressional interests into consideration when making their AD/CVD determinations.⁸³ In her statement to the Senate Finance Committee Oversight Hearings on Trade Policy, Dr. Paula Stern, Chairperson of the ITC stated "Our chief concern need not be the tilt of the playing field. We must concentrate instead on building the strength of the American team," through protectionist antidumping and countervailing laws and unilateral retaliatory measures.⁸⁴

In Canada, Cabinet is the most powerful influences over Canadian trade policy and the character of Canada's trade regime. Cabinet, by virtue of its role as the most important policy-making structure of the federal government, has cooperated with bureaucratic elites within the departments of Foreign Affairs and International Trade, Finance, the Privy Council Office, Industry Canada, and Agriculture Canada to formulate Canada's trade policies and laws.⁸⁵ Bureaucratic officials have been given authority by Cabinet to formulate trade initiatives because of their seniority, expertise, and adherence to the priorities of the government. Certain agencies and departments have been often elevated at the expense of others to meet the interests of Cabinet. Nevertheless, agencies and departments cooperate with Cabinet to ensure that the best interests of the country are met instead of catering to their narrow departmental interests.⁸⁶ Occasionally, other governmental, business, and legal elites are coopted into the trade policy- and law-making process by Cabinet as well. Therefore, the conduct and substance of Canada's trade policies and laws have remained under the federal government and Department of Foreign Affairs. Consequently, they have enjoyed a great deal of control over domestic trade policy-making circles and interest groups within the country.

⁸³ Sharyn O'Halloran, "Congress and Foreign Trade Policy," in Randall B. Ripley, James M. Lindsay (eds), *Congress Resurgent: Foreign and Defense Policy on Capitol Hill* (Ann Arbor: University of Michigan Press, 1992), 287-293

⁸⁴ Dr. Paula Stern, Testimony to the Senate Finance Committee Oversight Hearings on Trade Policy: Washington D.C. November 20, 1985 as cited in Alan Rugman, "U.S. Protectionism and Canadian Trade Policy," *Journal of World Trade Law*, Vol. 20, No. 4 (1986), 378.

⁸⁵ Other departments such as Agriculture, Energy Mines and Resources, Fisheries, and Consumer and Corporate Affairs have been involved on an ad hoc basis depending on how particular trade issues affect them.

Gerald Wright, "Bureaucratic Politics and Canada's Foreign Economic Policy," in Denis Stairs, Gilbert Winham (eds), *Selected Problems in the Formulation of Foreign Economic Policy* (Toronto: University of Toronto Press, 1986), 8-11.

⁸⁶ The influence of bureaucratic officials has not been as publicized in Canada as it has been in the United States because of the central role that the cabinet plays in the policy-making process.

Similarly, in Mexico's case, the Mexican Constitution created a system of checks and balances to ensure that one branch of government (e.g., executive) would not gain too much power over the other two (e.g., legislature, judiciary). However, the system of checks and balances has evolved into an extremely centralized system of presidential government in spite of the written provisions of the Constitution of 1917. In fact, the ways in which the President has been able to dominate the other two branches of the central government have led many to believe that Mexico is governed by a six-year benevolent dictatorship.⁸⁷ Perhaps the creation of foreign and trade policy are two areas where the President's power over the other branches of government has been the most evident. Any policies created by the president and executive branch, such as import substitution protectionism, regulation of foreign investment, liberalization of Mexico's trade remedy regime, and participation in international agreements (e.g., the GATT and NAFTA) have been unconditionally accepted by Congress because of the hegemony and influence of the PRI. Similarly, the single ruling party system has assisted the President when exercising control over the activities of Congress and the administrative agencies of Mexico's trade remedy regime. Mexican presidents have often deliberately employed officials within a number of important ministries and executive agencies to help create Mexican trade policy and laws.⁸⁸ For example, Salinas appointed officials who were sympathetic to his free trade agenda and desires to reform Mexico's trade remedy regime. All of Mexico's NAFTA negotiators and those who were instrumental in reforming the Foreign Trade Law were officials who, like Salinas, had earned doctorates in economics from prestigious universities in the United States.⁸⁹ Therefore, Mexican presidents have been able to manipulate the administration of Mexican AD/CVD laws, and the character of the regime by commanding Congress and administrative agencies to execute their policies. Indeed, all of the initiatives aimed at economic liberalization, more transparent AD/CVD rules, and membership in international agreements that were put in place during the 1980s and 1990s, were done under the direct authorization of presidents de la Madrid and Salinas. In

⁸⁷ William P. Tucker, *The Mexican Government Today* (Minneapolis: University of Minnesota Press, 1975), 81.

⁸⁸ The important ministries and executive agencies which help the President create Mexican trade policies and laws include the ministries of Foreign Affairs, Finance and Public Credit, Trade and Industrial Promotion, Energy, Mining and Parastate Industries, the Mexican Trade Secretariat (SECOFI), the Coordinator of Business Organizations for Foreign Trade (COECE), the Trade Commission of the Senate, the President's Chief of Staff, the Bank of Mexico, the Nacional Financiera, and the National Bank of Foreign Commerce.

⁸⁹ Carlos A. Heredia, "NAFTA and Democratization in Mexico," *Journal of International Affairs*, Vol. 48, No. 1 (1994), 19-25; Guy Poitras, Raymond Robinson, "The Politics of NAFTA in Mexico," *Journal of InterAmerican Studies and World Affairs*, Vol. 36, No. 1 (Spring, 1994), 12-13.

conjunction with constitutional powers and traditions of authoritarianism, corporatism, and the single ruling party, presidents have been able to exercise a considerable amount of power over the ways that the Mexican trade remedy regime evolved before and after the NAFTA came into effect.

In light of the importance of interest groups and policy-makers in Canada, Mexico, and the United States, their relative power vis-à-vis administrative agencies is a critical factor in understanding if and why the character of the trade regimes became fairer, more transparent, and faster in the context of Chapters 19. Similarly, the independent variable of “hegemonic relationships” will also be used in an international context to capture the relationships between the three countries. After 1989, change in the character of the Mexican trade regime was dramatic. Because of the political and economic power of the United States (and Canada to a lesser degree), Mexico was forced into making changes to its domestic regime if it wanted to join the NAFTA. The changes Mexico was required to make foreshadowed the possibility of a revolutionary, transparent trade remedy regime that could uphold liberal legal principles, such as due process. For “optics sake,” Canadians and Americans agreed to make minor changes to their own trade laws in order that NAFTA-19 appeared to affect all three countries equally. Furthermore, the power that the executive branch had in the authoritarian, corporatist, and single party regime allowed the changes to take effect quickly within Mexico itself. The critiques of dissenting policy-makers and interest groups were left unheard as Mexico’s legal and economic systems were changed to accommodate Chapter 19 of the NAFTA.

The character of Canada’s trade remedy regime also changed after 1989 as trade policy-makers responded to the rising waves of American protectionism and the provisions of the FTA and NAFTA. Essentially, Canadian trade remedy laws were written, interpreted, and applied in ways that were compatible with the agreements. However, some changes were made in response to the agreements and panel decisions to make the system more “American.” For example, Canadian negotiators removed the Canadian International Trade Tribunal’s (CITT) “privative clause” to allow Chapter 19s panels to show less deference to the agency in the process of review. American negotiators felt that the privative clause would lead to a more deferential standard of review for Canadian agencies, thus creating a situation where panels overturned the decisions of American agencies more than those of their Canadian counterparts. Moreover, trade policy-makers, provincial politicians, and interest groups worked to change domestic trade remedy laws to appease their powerful American counterparts during the softwood lumber and steel disputes. Indeed, some interest groups, such as the Canadian Steel Producers Association, indicated that Canada’s trade remedy regime should become even more like the American

system so that Canadian producers would be given similar treatment as their American counterparts during AD/CVD investigations in Canada.

The most significant change that occurred to the character of the American trade regulatory process was the fact that the American negotiators officially agreed to allow a binational panel process replace domestic judicial review of AD/CVD/injury determinations. American administrative agencies were placed under the jurisdiction of not only domestic review courts, but international panels as well. Nevertheless, changes to the character of the American trade remedy regime occurred to a lesser degree than in Canada and Mexico because economic protectionism continued to dominate the agendas of powerful producer groups and members of Congress as competitive foreign imports flowed into American markets. The amount of influence certain interest groups and members of Congress gained in the American trade remedy regime reduced the influence of some binational panels. For example, binational panels had to issue many decisions during the softwood lumber and pork disputes to encourage administrative agencies to act in a fairer, more transparent, faster manner. A number of calls to abrogate and/or weaken Chapters 19 of the FTA and NAFTA have been made in the United States since 1989. Members of Congress and interest groups who have not supported the Chapters have argued that they are unconstitutional and/or gives too much preference to Canadian and Mexican producers.

The final independent variable, state sovereignty, is important to include when considering the process of change because the FTA and NAFTA are international agreements. Consequently, the laws and institutions of the agreements must be accepted by the three countries before they can be operational. State sovereignty is important variable when examining the likelihood that a country will allow itself, and its domestic laws and procedures, to be affected by international institutions. All three countries were extremely determined to retain independent decision-making ability when the FTA and NAFTA were negotiated. The idea of a customs union such as the European Union was explicitly rejected because of concerns with state sovereignty.

Ensuring the preservation of state sovereignty and their country's autonomy has been a central feature of American, Canadian, and Mexican foreign policy throughout the 20th century. For example, the preservation of state sovereignty has been a constant, major theme of the foreign and trade policy of the United States. Indeed, American policy-makers were very hesitant to enter into international organizations until after World War II for fear of sacrificing national sovereignty. Even after becoming the leader of international affairs, American policy-makers continued to stress the importance of preserving American

independence and control.⁹⁰ Throughout the presidential campaign of 1996, Senator Dole repeatedly criticized President Clinton for handing U.S. sovereignty and independence away to international institutions such as the United Nations. Senator Dole also spoke out against NAFTA-19 in the fall of 1995 because it detracted from the American process of judicial review. In the interests of state sovereignty, he argued that NAFTA-19 should be eliminated and replaced with the dispute settlement mechanisms of the World Trade Organization (WTO). Dole's pleas were echoed by other Americans like Judge Malcolm Wilkey during the softwood lumber dispute. Their arguments will be developed more fully in Chapter Five.

Similarly, Canadian foreign and trade policy-makers have continually recognized the need to search for means to enhance Canada's power vis-à-vis the United States in order that Canada could remain in control of its decision-making abilities, as well as its political, economic, and cultural sovereignty. Multilateral forums, defensive nationalistic policies such as the Foreign Investment Review Agency and National Energy Policy, and rule-based continental free trade have been means that Canadian governments have used to promote Canadian sovereignty since World War II. Gotlieb summarized the central thrust of Canada's foreign policy by stating "[D]eveloping our own distinctive international outlook while managing our all-pervasive bilateral relationships with the U.S. are but two dimensions of a single preoccupation that has dominated [the Canadian] existence [since World War II]. Our overriding national preoccupation has been about how to limit U.S. power over our national destiny while deriving maximum advantage from our propinquity."⁹¹

Mexico's foreign policy has also been designed to maximize state sovereignty and autonomy from the United States. Since Mexico's current constitution was put into place in 1919, Mexico's political system and public policies have always been influenced by its geographical proximity to the United States. Mexican governments have continually sought to reduce Mexico's dependency on the United States. Even when Mexico found that economic growth could not continue without close American ties and increased levels of U.S. economic investment in the mid 1980s, autonomy and sovereignty were still promoted to protect Mexican culture and decision-making ability. Indeed, Mexico's Constitution enshrines a number of principles to protect sovereignty and independence

⁹⁰ Judith Bello, Alan F. Holmer, "Reflections on the NAFTA as a Turning Point in American Foreign Policy," *International Lawyer*, Vol. 28, No. 2 (1994), 425-430; Walter LaFeber, *The American Age: United States Foreign Policy at Home and Abroad since 1750* (New York: W.W. Norton and Company, 1989), *passim*.

⁹¹ Allan Gotlieb, "The United States in Canadian Foreign Policy" O.D. Skelton Memorial Lecture, Toronto, December 10, 1992, 2.

from countries like the United States. For example, Mexico's foreign trade policy must oppose the intervention into the internal affairs of other states, insist on the equality of all states in status and rights, oppose the use of recognition of new governments as a tool of foreign policy, insist on fairness in international economic relations between weak and strong states, and refuse to recognize the transfer of territory effected by force. Similarly, the "Calvo Doctrine" has been a longstanding principle of Mexican foreign and trade policy. The Calvo Doctrine dictates that in economic activities, foreigners should put themselves on the same footing as nationals of a country in which they do business, abiding by laws and judicial procedures and refraining from appealing to their home government for support in cases of disputes.⁹²

(B) Dependent Variable

The dependent variable in the hypothesis is the character of the American, Canadian, and Mexican trade remedy regimes. Four trade disputes will be used to describe whether, and to what extent, the character of the three trade regimes changed in the direction of greater fairness, more transparency, and faster processing of decisions. The trade disputes will highlight the relative presence or absence of the three independent variables by examining how binational panel decisions were received by administrative agencies, interest groups, and policy-makers in the three trade regulatory processes. In particular, they will be used to determine how much each decision caused the particular administrative agency to rework its AD/CVD/injury determination in the face of the socio-economic factors in the independent variables. The disputes will also illustrate how much authority each panel's decision was given by the governments and interest groups involved. Were all of the panel decisions binding on the parties involved? Did all of the decisions settle the issue(s) under dispute conclusively, or did some only add to the political tensions inherent in the disputes? Issues such as which officials were authorized to conduct AD/CVD/injury investigations, injury, subsidies, specificity, market distortion, preferentiality, general availability, and the calculation of the margin of dumping will be focused on to discuss how administrative agencies interpreted and applied trade laws differently before and after 1989, and thus ushered in different type of trade remedy regime.

⁹² Martin C. Needler, *Mexican Politics: The Containment of Conflict 2nd Ed* (New York: Praeger Publishers, 1990), 118; Wayne Cornelius, Ann Craig, *The Mexican Political System in Transition* (San Diego: Center for U.S.-Mexican Studies, 1991), 17-20.

Therefore, the trade disputes will help to test whether the character of the three trade regimes became fairer, more transparent, and faster as socio-economic factors waned in the presence of institutionalized Chapters 19 panels. Fairness refers to the tone or atmosphere of the binational panel process of judicial review. Proponents of Chapters 19 hoped that binational panels would be able to transcend the biased, nationally oriented nature of the three domestic trade regimes. They hoped that exporters from all three countries would be given equitable treatment by administrative agencies and domestic review courts as AD/CVD laws were interpreted, applied, and reviewed. The four trade disputes will be used to assess whether panels were fairer bodies in the post-FTA/NAFTA process of review. Fairness will be measured by examining if panel decisions were unanimous or divided across national lines. Politically oriented, national biases are not likely to be factors that reduce the fairness and impartiality of a trade remedy regime if a panel's decision was unanimous and/or did not split according to national lines. Subsequently, fairness can be expected more often in the absence of national biases.

A more transparent system refers to an open, accessible process of decision-making. For example, a legal system is said to be transparent if an administrative agency or court acted in a transparent manner by clearly discussing how its decisions were made. In other words, a transparent legal system is one in which decisions are fully explained in oral hearings or written publications so that any interested party can understand why an administrative agency or court acted in a particular manner. Chapters 19 panels were created to ensure that the three trade remedy regimes were fully transparent. Exporters often lamented that AD/CVD/injury determinations were not explained clearly. They criticized agencies in Canada, the United States, and especially Mexico, for not fully discussing their logic and reasons when reaching a particular determination. Similarly, exporters argued that domestic review courts did not always explain their decisions or force administrative agencies to do likewise when AD/CVD/injury determinations were appealed. Therefore, many North American exporters and policy-makers hoped that Chapters 19 panels would increase the transparency of the three trade remedy regimes by issuing well reasoned decisions that required administrative agencies to do the same. Indeed, Canadian and American negotiators insisted that Mexico change its Foreign Trade Law so that it would operate in a more open, transparent, accessible manner in Annex 1904.15 before they agreed to the NAFTA.

The extent to which changes occurred in the transparency of the three trade remedy regimes will be examined in terms of how detailed each panel's reasoning was, and how administrative agencies clarified their determinations on remand. It stands to reason that if an administrative agency complied with a Chapters 19 panel by uncovering more of its

reasons for a certain AD/CVD/injury determination, then the presence of the panel was able to cause other socio-economic factors to wane. In turn, the very presence of the institution allowed a change in the ways that trade remedy laws were interpreted and applied by making the North American trade regulatory process more transparent. The changes in transparency will also be tested by examining the standards of review that panels used. Panels were required to apply the standards of review that domestic review courts used to assess the propriety of an AD/CVD/injury determination. Changes in transparency can be expected to occur when panels applied the standards of review in a rigorous or active manner. An active application of the standard of review would force administrative agencies to turn from unsubstantiated decisions that were biased by other socio-economic factors. If panels exercised a more deferential standard, changes in the degree to which the behaviour of administrative agencies became more transparent were less likely to occur.

Proponents of Chapters 19 of the FTA/NAFTA hoped that binational panel decisions would be issued faster than domestic review courts took to reach theirs. In light of the lengthy process of judicial review in Canada, Mexico, and the United States, proponents hoped that Chapters 19 panels would change the behaviour of administrative agencies and domestic courts by making the system faster. The negotiators of Chapters 19 hoped to speed up the process of judicial review by instituting rigid timelines into the agreements. Articles 1904 (14) of the FTA and NAFTA designated that panel review had to be completed within 315 days of the date on which the request for a panel was made. Articles 1904 (15) set out strict timetables for procedural aspects of the binational system as well. Assessing whether the three systems became faster will be done by comparing the length of time that panels and domestic review courts took to release decisions and the speed at which decisions were adopted.

(4) Why the Four Case Studies were Chosen

Four case studies will be discussed to test the two hypothesis about the process of change in North American trade. Each case study will discuss a trade dispute that was resolved under the Chapter 19 panel system of judicial review. The trade disputes include the Canada-United States softwood lumber dispute (1981-1996), the dispute over fresh, chilled, and frozen pork between Canada and the United States (1984-1991), the dispute over certain corrosion-resistant steel sheet plate between Canada and the United States (1993-1995), and the cut-to-length steel plate products dispute between Mexico and the United States (1992-1995).

Pursuant to FTA-19, binational panels were convened to address 45 trade disputes between 1989-1993. Panels issued binding decisions in 32 of the disputes, and the remaining 13 were terminated by the parties. Three Extraordinary Challenge Committees (ECCs) were instituted under Chapter 19 of the FTA to review panel decisions at the request of the American government. Binational panels have been convened to address 23 disputes under NAFTA-19 since 1993.⁹³ Some of the disputes have involved large amounts of money and volumes of trade. Others have been over smaller issues. Generally, the majority of disputes have been resolved quickly and within the designated timeframes. Some of the larger, more contentious cases have led to multiple remands and appeal procedures.

The four case studies were selected for a number of reasons. First, the softwood lumber and pork cases have been two of the most contentious and politicized cases that have come before Chapters 19 panels since 1989. They have been parts of much larger trade that raged between Canada and the United States since the early 1980s. The length of the disputes made them instructive cases to use to test the hypothesis because they reveal the intricacies of the American trade remedy regime before and after Chapters 19 came into effect, how interest groups and policy-makers put trade remedy laws into place to protect American producers, and most importantly, how administrative behaviour changed in the context of Chapters 19.

The corrosion-resistant steel dispute was chosen because it was part of the much larger Canadian-American steel war. This particular steel dispute was selected because it illustrates the dynamics of Canada's trade regime. It also dealt with the changes that the NAFTA negotiations made to Canada's trade remedy laws. Namely, it was the first time that a binational panel reviewed Canadian administrative agencies after the CITT's privative clause was removed. The case also illustrates how Chapters 19 panels have begun to use one another when making informed decisions on technical definitions arising in the administration of antidumping and countervailing laws.

The U.S.-Mexican steel case was chosen because it was the only case where a binational panel had reviewed a Mexican determination at the time when the dissertation was written. Since then, binational panels have been convened to review a number of other Mexican determinations as Appendix A illustrates. Because the panel was the first one to review SECOFI, it went to considerable efforts to provide detailed information about the intricacies of the Mexican trade remedy regime before and after 1993. Therefore, it is a valuable resource in determining the changes that were made the administrative behaviour of Mexican officials.

⁹³ See Appendix B for a summary of Chapters 19 disputes between January, 1989 and July, 1996.

Conclusion

With the theoretical and epistemological foundations set, the remainder of the dissertation will consider the degree of change that occurred in the three trade regimes in the context of the institutions of Chapters 19. Changes in the character of the three regimes will be determined by the degree to which socio-economic factors flowed through, or were reduced by, panel decisions to affect the fairness, transparency, and speed of the process of judicial review. Chapters Three and Four describe the mechanics of the American, Canadian, and Mexican trade regimes and Chapters 19 of the FTA/NAFTA. Chapters Five, Six, Seven, and Eight use four trade disputes to assess the hypothesis. Concluding remarks and observations are provided in Chapter Nine.

CHAPTER THREE -
THE NORTH AMERICAN TRADE REMEDY REGIME BEFORE 1989:
DOMESTIC LAWS, STRUCTURES, AND PROCESSES AND THE GATT

As Chapter Two explained, new-institutionalist theories were used to generate a hypothesis about the evolution of the North American trade regulatory process. The hypothesis addresses the causes of change in the character of the trade remedy regimes of Canada, Mexico, and the United States after Chapters 19 of the FTA and NAFTA came into effect. Chapter Three will review the domestic laws, structures, and processes of the American, Canadian, and Mexican trade remedy regimes before the FTA and NAFTA came into effect. The major critiques of the three systems will be explained. The dispute settlement mechanism of the GATT will also be reviewed because it was a forum that member governments could use to challenge final antidumping and countervailing duty (AD/CVD) determinations that were GATT-inconsistent before 1989.

An understanding of the nature of the three domestic processes and the GATT is an appropriate starting point for the investigation of the hypothesis, because it sets the groundwork for assessing whether the domestic regimes became fairer, more transparent, faster systems of judicial review in the context of Chapters 19 of the FTA and NAFTA. Furthermore, an appreciation of the pre-1989/1993 regimes allows one to gauge the role that socio-economic factors such as economic protectionism, hegemonic relationships, and concerns with state sovereignty played in the process of change after the FTA and NAFTA came into effect.

The Trade Remedy Regime of the United States

Administrative Agencies of the American Trade Regulatory Process

(1) The Department of Commerce

Four executive agencies were involved in the trade regulatory process of the United States before 1989, and are still the agencies that interpret and apply AD/CVD laws in the United States. The first agency administering American trade remedy laws is the Department of Commerce (DOC). The DOC is charged with the responsibility of identifying the presence of unfair dumping practices and subsidies in the American market. The DOC is also responsible for estimating the margin of dumping in an AD investigation,

and for calculating the benefit that a subsidy conferred on an imported good in a CVD investigation.

The DOC received its authority over AD/CVD investigations in 1979, when Congress removed the power from the Treasury Department. The DOC was given jurisdiction over trade remedy cases for political and protectionist reasons. The Treasury Department had generally adopted a liberal position when dealing with trade matters. Treasury's liberal position was the result of its statutory concerns with financial matters, and its connections with the large financial and corporate interests of the United States. In contrast, the DOC interacted with both large and small businesses in the manufacturing field, and was concerned with the economic conditions facing those businesses. Consequently, DOC officials tended to be more sympathetic to protectionist arguments of American firms than were officials from the Treasury Department. By transferring the authority over AD/CVD investigations from the Treasury to the DOC, Congress "took an important step toward achieving their goal of tightening the enforcement of the fair and [protectionist] trade law."¹

(2) The International Trade Commission

The second administrative agency involved in the American trade remedy regime is the International Trade Commission (ITC). The ITC is charged with the task of assessing the extent to which American domestic producers have been injured, are being injured, or could be threatened, with injury by foreign competitors. It was created in 1975 out of the U.S. Tariff Commission. The Tariff Commission had been established in 1916 to provide objective, scientific guidance for decisions on American trade barriers, and to recommend methods to remove politics from those barriers. However, the Tariff Commission fell into disuse and disrespect because it became a victim of the protectionist biases of its members and the American government. Congress transferred the Tariff Commission's power to determine injury to the ITC in 1975. Congress believed that the ITC was better equipped to deal with injury because of its studies of American industries.²

¹ Robert E. Baldwin, Michael O. Moore, "Political Aspects of the Administration of the Trade Remedy Laws," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 257-258.

² James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 197; Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 104-105.

(3) The Court of International Trade

The third agency in the American trade regulatory process is the Court of International Trade (CIT). The CIT is the review court that domestic and/or foreign enterprises and governments may use to challenge an AD/CVD/injury determination. The CIT developed out of the Customs Court, which was established by the Tariff Act of 1930. While the Customs Court did not have the complete power of judicial review over the decisions of the DOC or ITC, the Customs Court Act of 1980 gave the CIT full jurisdiction over trade remedy cases. It was permitted to review and overturn all of the determinations rendered by the DOC and ITC. The transfer of power illustrated that Congress intended that the CIT would “provide protection for parties asserting that they had been aggrieved as a result of wrongful government action arising out of import transactions, and that such protection be equivalent to that available to parties aggrieved by the actions of other governmental agencies.”³

The CIT examines whether a final AD/CVD/injury determination was supported by substantial evidence on the record and was otherwise in accordance with law. In cases where a determination was not supported by evidence or in accordance with law, the CIT may remand it to the relevant agency for reconsideration. CIT decisions are reviewable by the Court of Appeal for the Federal Circuit and, ultimately, by the Supreme Court of the United States.

(4) The United States Trade Representative

The fourth agency involved in American trade remedy regime is the United States Trade Representative (USTR). The USTR evolved out of the Office of the Special Representative for Trade Negotiations. The Office of the Special Representative was established by the Trade Expansion Act in 1962 to provide a “focal point in the executive branch for the responsibilities for carrying out the authorities delegated to the President by Congress under trade agreement legislation.” Moreover, it was created to detract from the “strictly foreign policy orientation that trade agreement negotiations had been subjected to under the leadership of the Department of State.”⁴ Congress reformed the Office of the

³ Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 62; Gary Horlick, “The United States Antidumping System,” in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 108, 130.

⁴ The House Ways and Means Committee as cited in Sharyn O’Halloran, “Congress and Foreign Trade Policy,” in Randall B. Ripley, James M. Lindsay (eds), *Congress*

Special Representative in the Trade Reform Act of 1974. The Act re-established the Office as an agency of the Executive Office of the President. According to the Ways and Means Committee of the House of Representatives, the creation of the USTR was to reaffirm Congress' belief that a :

...Strong and independent office, headed by Government officials reporting directly to the President and responsible to the Congress, is the best means of assuring that in trade policy matters the United States is speaking with one strong voice on behalf of the executive branch and that positions taken accurately reflect the intent of Congress.⁵

The USTR plays two roles in the American trade remedy regime. First, the USTR cooperates with the executive branch, congressional delegates, private sector advisory committees, and foreign governments to ensure that American interests and practices are protected during international trade negotiations.⁶ When doing so, the USTR has had to balance the protectionist interests of American interest groups and members of Congress with the liberalized views of the executive branch. Similarly, the USTR has often been placed into awkward positions when trying to resolve international trade disputes because he/she has not only had to defend the demands of American producers, but the provisions to which he/she agreed during international negotiations as well. For example, Congress was the main force behind the wave of American protectionism during the 1970s and 1980s. At the same time, the USTR attempted to dissuade Congress from enacting provisions that were inconsistent with the GATT, and that could be interpreted as excessively protectionist by their trading partners.⁷

The second role that the USTR plays in the American trade remedy regime is to invoke retaliatory actions against "unfair" foreign imports. The Trade and Tariff Act of 1984 required the USTR to prepare annual reports for Congress on foreign barriers or threats that faced American goods, services, and investments. Those annual reports were to assist Congress when pressuring the executive branch to focus on how foreign trade

Resurgent: Foreign and Defense Policy on Capitol Hill (Ann Arbor: The University of Michigan Press, 1992), 292.

⁵ The House Ways and Means Committee as cited in Sharyn O'Halloran, "Congress and Foreign Trade Policy," in Randall B. Ripley, James M. Lindsay (eds), *Congress Resurgent: Foreign and Defense Policy on Capitol Hill* (Ann Arbor: The University of Michigan Press, 1992), 292-293.

⁶ Alan F. Holmer, "The Office of the Trade Representative: Recent Legal Developments," *International Lawyer*, Vol. 20, No. 4 (Fall, 1986), 1356-1357; Alan F. Holmer, Judith Hippler Bello, "The 1988 Trade Bill: Savior or Scourge of the International Trading System," *International Lawyer*, Vol. 23, No. 2 (Summer, 1989), 524.

⁷ Robert E. Baldwin, Michael O. Moore, "Political Aspects of the Administration of the Trade Remedy Laws," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 253-254.

barriers could be reduced or eliminated for American exporters. Furthermore, the Omnibus Trade and Competitiveness Act of 1988 authorized the USTR to take retaliatory actions against questionable foreign trade practices or breaches of international obligations. The Act's "Super 301" required the USTR to determine when a foreign practice was unfair and to act in response. Super 301 also demanded that the USTR self-initiate a number of investigations in 1989-1990 to identify and eliminate unfair trade practices that hurt American producers. Specifically, Super 301 required the USTR to take action against any action that was "unjustifiable" (i.e., that violated or was inconsistent with the international legal rights of the U.S.), "unreasonable" (i.e., that denied fair and equitable opportunities and protections for American firms), "discriminatory" (i.e., denied most-favoured-nation status), or burdensome and restrictive to American commerce. USTR Carla Hills exercised her mandate by initiating Super 301 investigations against Japan, India, and Brazil in 1989 to appease the protectionist sentiments that dominated Congress.⁸ Super 301 therefore charged the USTR to act in conjunction with the DOC and ITC in applying American trade remedy laws to protect American producers.

The Administrative Process of Imposing ADDs/CVDs in the United States

The DOC and the ITC are formally linked in the administrative process which imposes trade remedy measures on foreign imports. The process for imposing ADDs/CVDs is summarized in Appendix C and described in the following analysis.

(1) The Filing of the Petition

AD/CVD investigations are launched when a formal petition is filed with the DOC. According to American law, petitions are to be filed "on behalf of an industry" in the United States.⁹ However, in practice, petitions may be filed by individual firms as long as

⁸ Alan F. Holmer, "The Office of the Trade Representative: Recent Legal Developments," *International Lawyer*, Vol. 20, No. 4 (Fall, 1986), 1356-1357; Alan F. Holmer, Judith Hippler Bello, "The 1988 Trade Bill: Savior or Scourage of the International Trading System," *International Lawyer*, Vol. 23, No. 2 (Summer, 1989), 528-529; Carl Svernlöv, "The Implementation of Super 301," *Harvard International Law Journal*, Vol. 31, No. 1 (Winter, 1990), 359-360, 366.

⁹ Tracy Murray, "The Administration of the Antidumping Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 27-29; Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 27; Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 28; Margaret Smith, "Subsidies and the United States Trade Law: The

the majority of the other firms within that industry do not object. AD/CVD petitions are routinely filed by manufacturers, wholesalers, trade unions, and groups of workers of industry, trade, or business associations of the United States. Petitions must explain why an industry believes that foreign imports were: (1) unfairly dumped into the U.S.; (2) given the benefit of a foreign government's subsidy; and (3) were the cause or threat of material injury. According to the Tariff Act of 1930, the petition must be "accompanied by information reasonably available to the petitioners supporting [their] allegations."¹⁰ It should be noted that the DOC may also initiate an AD/CVD investigation on its own (i.e., without a formal petition), as it did in the 1986 round of the Canada-U.S. softwood lumber dispute.

(2) The DOC's Summary Investigation and the International Trade Commission's Preliminary Injury Investigation

Upon receiving a formal petition, the DOC begins a summary investigation to determine whether the petition contains adequate information to support the allegation of dumping or subsidization. The DOC's summary investigation must be conducted within 20 days of the date that the petition was filed. If the DOC finds that adequate information exists to warrant an AD/CVD investigation, it will publish a notice of "Initiation" in the Federal Register. In cases where adequate information is not found, the DOC will publish a notice of "Dismissal," and will terminate the investigation process.¹¹

While the DOC is conducting the summary investigation, the ITC begins a preliminary investigation to determine whether there is a "reasonable indication" that injury was caused by foreign dumping or subsidization. The ITC's preliminary injury determination must be completed within 45 days of the filing of the petition. If the ITC's preliminary investigation is affirmative, the DOC will begin a 60-day review process in which it gathers information from domestic producers or manufacturers, as well as from the foreign producers against whom the dumping and subsidization allegations were made.

Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 6.

10 Such information includes a description of the product that was challenged by dumping or subsidization, the names of the exporters and the countries of origin, domestic and foreign cost and sales data for the exporters in question, the structure of the domestic industry, the evidence of dumping or subsidization being relied upon, and the evidence of the extent of the material injury alleged to have been suffered.

Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 28-29.

11 Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 25.

Information is gathered from the interested parties by a detailed questionnaire. The questionnaires are extremely complex and lengthy. For example, questionnaires ranged from 52-158 pages in length between 1987 and 1990. They require that enough information is provided for the DOC to investigate nearly every U.S. sale or transaction for a period of six months prior to the filing of the petition.¹² Foreign producers must supply the required information and documentation so that “their side of the story” can be accounted for in the DOC’s preliminary investigation. During the preliminary and final determination, the DOC verifies the information provided in the questionnaires through consulting with the petitioner, the petitioner’s counsel, the defendant’s counsel, and on-site visits. The verification report is then subject to criticism by interested parties on both sides.¹³

(3) The DOC’s Preliminary and Final Determinations

The DOC uses the information that foreign and domestic producers are able to supply in the questionnaires to determine whether there is a “reasonable likelihood” that imports were dumped or subsidized during the preliminary investigation. The DOC refers to the information as the “best information available” (BIA).¹⁴ If, after a review of the BIA, the DOC finds that foreign goods were dumped into the American market or subject to a countervailable subsidy, imports are cleared through customs under what is termed “suspension of liquidation” from that date forward. Under suspension of liquidation, the importer is required to make a cash deposit or post a bond or other security to guarantee the

¹² Questionnaires generally require specific accounting data about individual sales in the home market, sales to the U.S., packaging costs, shipping costs, selling costs, distributor and other middleman costs, adjustments for taxes and duties on imported inputs, adjustments for exporter’s sales prices, international shipping costs, tariffs in the U.S., distribution costs in the U.S., and any costs of adding value in the U.S.

¹³ For more information about the questionnaires, see: Gary Horlick, “The United States Antidumping System,” in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 111; N. David Palmetier, “The Antidumping Law: A Legal and Administrative Nontariff Barrier,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 64-69; Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 28-30; Tracy Murray, “The Administration of the Antidumping Law by the Department of Commerce,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 34; James Bovard, *The Fair Trade Fraud* (New York: St. Martin’s Press, 1991), 134-135.

¹⁴ The DOC and ITC are legally permitted to make use of “best information available” by the Tariff Act of 1930, the Trade Agreements Act of 1979, and the Court of Appeals for the Federal Circuit’s ruling in *American Lamb Company v. United States* (1986).

potential dumping/CVD liability. The amount of the security is based on the margin of dumping or quantum of subsidy as estimated in the DOC's preliminary determination.¹⁵

The DOC must issue its preliminary determination approximately 115 days after the filing of the petition. It is then required to complete its AD/CVD investigation and issues a final determination on whether dumping practices and government subsidization have occurred. If the DOC reaches a negative finding, the investigation is terminated. If the finding of dumping or subsidization is affirmative, the DOC calculates the margin of dumping and quantum of benefit that should be made subject to an AD/CVD.

(4) The ITC's Final Injury Determination

The ITC conducts its final injury determination while the DOC is conducting its determinations of dumping and subsidization. The ITC must complete the final determination within 120 days of the DOC's preliminary determination. When conducting the preliminary and final determination, the ITC also makes use of a questionnaire and BIA. If both the DOC and the ITC reach affirmative final determinations, an AD/CVD order is issued. If either the DOC or ITC reaches negative final determinations, the investigation is terminated regardless of the other agency's findings. It should be noted that the timelines which structure DOC and ITC investigations are not rigorously enforced and are subject to extension and delay in complex circumstances.¹⁶

The Termination or Suspension of an American AD/CVD Investigation

American AD/CVD investigations may be terminated or suspended in a number of ways. First, AD/CVD investigations may be terminated at any time if the petitioner withdraws the petition. Investigations are also terminated if either the DOC or ITC reaches a negative preliminary or final determination. Second, AD/CVD investigations may be suspended as a result of an "undertaking." In accordance with the GATT's Antidumping, Subsidies, and CVD Codes, an importer who has been accused of unfair dumping or subsidization practices may revise the price of the imported good to offset the margin of dumping, the effect of the subsidy, and cause or threat of material injury to like goods in

¹⁵ Tracy Murray, "The Administration of the Antidumping Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 54.

¹⁶ Tracy Murray, "The Administration of the Antidumping Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 25.

the United States. Undertakings are accepted if 85% of the foreign firms under investigation agree that: (1) the dumping or subsidization practices will be eliminated; or (2) shipments to the U.S. will cease within six months of the suspension; or (3) prices will be adjusted to eliminate the injurious effects of dumping or subsidization. Undertakings may also occur if the U.S. Secretary of Commerce accepts an agreement with a foreign government to limit the volume of imports being investigated, and/or to limit the amount of subsidy offered to foreign producers that are "injuring" American producers. Before accepting this type of agreement, however, the Secretary of Commerce must determine that termination of the investigation would be in the public interest through consulting with potentially affected American producers, workers, and consuming industries. Third, AD/CVD investigations may be suspended if a suspension of the investigation would be more beneficial to the American industry than would be its continuation.¹⁷

Calculations Made by the DOC: The Margin of Dumping and the Benefits Conferred by Subsidies

The DOC calculates the margin of dumping to assess the duty that should be levied against dumped foreign imports. The margin of dumping is calculated in one of two ways: (1) by comparing each sale in the U.S. to a single weighted average home market price, (2) by a single "constructed value" which is the DOC's estimation of the costs that a foreign producer incurred when producing a good, plus a statutory eight percent profit margin. The Trade and Tariff Act of 1984 authorized the DOC to use averages of American prices as well when calculating the margin of dumping. However, the DOC has been reluctant to make use of this power because it tends to decrease the margin of dumping, and therefore tends to favour exporters at the expense of the domestic petitioners. For example, the DOC has only made use of this when investigating perishable products such as Fresh Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Kenya, Mexico and Peru.

¹⁷ Tracy Murray, "The Administration of the Antidumping Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 55-56; Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 6-8; John Buchanan, "Anti-Dumping Laws and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 10; Robert Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: The Carswell Company Limited, 1986), 145; Alan Rugman, Samuel Porteous, "Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures," *North Carolina Journal of International Law and Commerce Regulation*, Vol. 15 (1990), 79-81.

The DOC often makes price comparisons on a monthly basis to ensure that injurious dumping practices do not severely threaten American producers.¹⁸

When calculating margins of dumping, the DOC uses factors such as foreign exchange rates, the quality of goods in question, and wholesale and retail prices.¹⁹ The DOC does not include instances of "negative dumping" when calculating the margin of dumping. When merchandise is sold for more than the normal value in the U.S., the difference in the price of the foreign good above the price of the American good is not balanced off against sales of merchandise at less than normal value in the United States.²⁰

The DOC uses a general availability or specificity test when determining the presence of a subsidy. In accordance with the GATT, American CVD laws are designed to attack imports where domestic subsidies have been provided to a specific industry, enterprise, or group of industries or enterprises. Therefore, CVDs are only to be imposed when a subsidy benefits a specific company or industry. They are not to be levied when the subsidy is generally available to all industries in a foreign economy.

The DOC has interpreted the general availability/specificity test to mean that a subsidy was countervailable only if it was available to a particular industry, enterprise, or group of industries and enterprises in a number of cases during the early 1980s. The DOC's interpretation raised considerable controversy. Many American producers argued that the test went against Congress' protectionist intent for how the CVD law was to be applied. For example, the DOC's interpretation of the test led it to reject a petition for CVDs against Canadian softwood lumber in 1983. American lumber producers alleged that the DOC's interpretation prevented CVDs from being levied on Canadian softwood lumber because the subsidies in question were aimed at the overall growth of the Canadian economy. They criticized the DOC's use of the test because it had simply focused on those subsidies that were designed to help a number of specific industries and not Canadian lumber producers in general. In other words, they criticized the DOC's use of the general availability/specificity test because they felt that the DOC should have interpreted it in a more stringent, protectionist manner. Similarly, the DOC was criticized when it applied the general availability/specificity test to a series of disputes over Mexico's policy of setting prices of hydrocarbon resources to its domestic industries. The Mexican government allowed domestic producers to price their hydrocarbon products at a much lower level than

18 Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 146-147.

19 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 116-122.

20 Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 146.

foreigners did by offering them subsidies. American firms felt that their Mexican counterparts had an unfair advantage over them, and insisted that the subsidies should be subjected to a countervailing duty. However, the DOC used the general availability/specificity test to determine that the subsidy was not countervailable because it was generally available to all Mexican industries.²¹

The House of Representatives attempted to change the way that the DOC applied the CVD law following the disputes over Canadian and Mexican natural resources. Under a provision of the Trade Remedies Reform Bill (1984), the House of Representatives declared that a natural resource subsidy would be countervailable if, by government regulation: (1) natural resources, such as lumber or energy products, were priced for domestic users below the export price or fair market value; (2) access to the resource at the low domestic price was denied to U.S. purchasers; (3) the cost of the resource at its fair market value constituted a significant portion of the production cost of the product in question. The provision was therefore designed to eliminate the broad exclusion rule based on the DOC's general availability test. However, the proposal met stiff opposition within the executive branch and the Senate, and was defeated as a result.²²

The DOC's use of the general availability/specificity test was forced to change after the CIT ruled that "the generally available benefits rule as developed and applied by the DOC [was] not an acceptable legal standard for determining the countervailability of benefits," in *Cabot Corporation v. United States*. (1985).²³ According to the CIT, a more appropriate standard for assessing the specificity of a subsidy required the DOC to focus on the actual (or *de facto*) effect of the benefits provided under a particular program. The DOC's practice of focusing on the nominal general availability of a subsidy was thereby rejected.²⁴ The CIT's decision in *Cabot* was incorporated into the Omnibus Trade and Competitiveness Act of 1988. The DOC is now required to determine whether a domestic subsidy is given to a specific industry even though, under the relevant law or regulation,

²¹ The disputes about the prices placed on Mexico's hydrocarbon resources were: Anhydrous and Aqua Ammonia From Mexico (1983), Carbon Black From Mexico (1983), Lime From Mexico (1983), Hydraulic Cement and Cement Clinker From Mexico (1983). Laurie A. Cameron, Gerald C. Berg, "The U.S. Countervailing Duty Law and the Principle of General Availability," *Journal of World Trade Law*, Vol. 19 (1985), 497, 501-502.

²² Laurie A. Cameron, Gerald C. Berg, "The U.S. Countervailing Duty Law and the Principle of General Availability," *Journal of World Trade Law*, Vol. 19 (1985), 502.

²³ *Cabot Corporation v. United States* (1985) as cited in Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 9.

²⁴ As will be demonstrated, the *Cabot* interpretation of the specificity test was applied by the DOC to the second Canadian softwood lumber case in 1986. Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 10.

the subsidy is nominally available to industries in general. Therefore, the *de facto* application of a subsidy has become the critical factor in DOC determinations.²⁵

In accordance with the GATT, the amount of any countervailing duty imposed by the DOC must not exceed the amount of the net subsidy that the DOC felt benefited a foreign good.²⁶ When determining the amount of the subsidy that is countervailable, Section 1677:1(a) of the 1988 Omnibus Trade and Competitiveness Act authorizes the DOC to subtract from the gross subsidy the amount of:

- (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
- (B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
- (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.

If the calculation of a subsidy results in a *de minimis* amount (i.e., less than one-half of one percent of the sale value of the product), no countervailing duty is to be levied by the DOC.²⁷ If the amount of subsidy is greater than that amount, a CVD may be imposed within the bounds of American and international law. American agencies will now be required to increase the *de minimis* amount to one percent in accordance with the WTO's Agreement on Subsidies and Countervailing Measures.

The Ways in which the ITC Determines Material Injury

Before it considers the presence or threat of material injury, the ITC determines if the product that was dumped or received a foreign subsidy was similar to, or "like," the product that was allegedly injured in the American market. The ITC then defines the American industry producing the "like" product.²⁸ Upon establishing the similarity of the American and foreign products and industries, the ITC assesses the extent to which the American petitioner was injured or exposed to the threat of injury.

The ITC has traditionally taken a two-pronged approach to determine if material injury did, does, or could exist. First, it uses an injury test that analyzes the conditions facing the domestic industry. It compares factors such as plant closures, profitability,

²⁵ Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 10.

²⁶ Article 4(2) of the 1979 GATT Subsidies and Countervailing Duties Code.

²⁷ Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 12.

²⁸ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 197.

employment levels, capacity utilization, and return on equity to their levels in previous years. The ITC's reasoning is that if an industry is performing well or at least better than it was in previous years, it has not been adversely affected by the dumped or subsidized imports. The dumping and subsidy practices are therefore not unfair or distortive, and there is no need to impose an antidumping or countervailing measure. Conversely, if a review leads the ITC to conclude that the domestic industry is performing poorly or is in decline, it proceeds to its second test, the causation test.

Second, the ITC will use a test to establish a causal link between the imports and injury. The "causation test" evaluates the effects of the imports in question on the domestic industry. In determining whether the imports have contributed to the injury of the domestic industry, the ITC considers three variables: (1) the presence of underselling²⁹, (2) evidence of lost sales by the domestic industry based on anecdotal evidence supplied by the petitioner, and (3) American import trends to establish if there is a correlation between increasing imports and declining domestic industrial performance. Upon an affirmative finding in each category of the causation test, the ITC will conclude that injury has indeed been caused by an import. It must be noted that the causation test does not focus on the dumping or subsidization practices that have been alleged to occur. Instead, the causation test simply focuses upon the effect of the imports as a whole.³⁰

Appeal Procedures in the American System before 1989

(1) Reviews of Outstanding AD/CVD Orders

Section 751 of the Tariff Act of 1930 requires the DOC to conduct annual reviews of AD/CVD orders if requested by a domestic or foreign producer (i.e., an "interested party"). The annual reviews are to determine the amount of a net subsidy or margin of dumping, and/or to determine compliance with suspension agreements and undertakings. The DOC is authorized to review outstanding AD/CVD determinations and agreements after

²⁹ Underselling is similar to dumping. Dumping is found where the product in question is sold in a foreign market for less than it is sold for in the home market. Underselling compares the price at which the imported product is sold in the foreign market to the price at which domestically produced like goods are sold in the same market. If the price of the imported product is less than the price of the domestically produced goods, the ITC determines that underselling has occurred.

Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 55.

³⁰ Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business*: (Toronto: C.D. Howe Institute, 1993), 55;

Margaret Smith, "Subsidies and the United States Trade Law: The Application to Canada" (Ottawa: Library of Parliament Research Branch, October 1989), 6.

receiving information which demonstrates that circumstances surrounding the duties have changed. Interested parties bear the burden of persuading the DOC and ITC that circumstances have changed sufficiently to warrant a review and/or revocation of the duties. Based on a review of the interested parties' arguments, the DOC may either revoke an ADD/CVD in whole or part, terminate the investigation as unwarranted, or resume a suspended investigation.³¹

(2) Domestic Judicial Review

The American political and legal system is built on the principle that individuals have the right to challenge state actions if those actions seem to violate their rights. For example, Congress allows foreign importers and domestic producers to challenge any duties that it, or the administrative agencies of the American trade remedy regime, placed on goods in the American market. The ability to obtain judicial review of AD/CVD determinations is a statutory right that may be exercised by foreign importers and American producers alike.³² Appealing final AD/CVD determinations was done entirely in domestic courts prior to the implementation of the Free Trade Agreement (FTA) in 1989. Final AD/CVD determinations could only be appealed to the CIT. Decisions rendered by the CIT could be appealed to the U.S. Court of Appeals for the Federal Circuit. Decisions of the Court of Appeals could be taken to the U.S. Supreme Court.³³

The CIT employs the standard of review of Section 516 A (b) (1) (B) of the Tariff Act of 1930 when reviewing final determinations of the DOC and ITC. Section 516 A (b) (1) (b) stipulates that a "court shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law." Section 705 of the Administrative Procedure Act of 1946 built on the standard of review by providing that "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (C) unsupported by substantial evidence in a case involving adjudication on the record."

³¹ United States International Trade Commission, *The Year In Trade: Operation of the Trade Agreements Program 46th Report* (Washington: USITC Publication 2894, July 1995), 125.

³² James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 239.

³³ It should be noted that domestic judicial review may still be used in certain circumstances in spite of Chapters 19 of the FTA and NAFTA.

The American standard of review uses two tests to ascertain whether there was a rational basis in fact for the determination, and whether the agency went beyond its lawful authority when issuing a determination. The first test, the “substantial evidence” test, was developed in *Matasushita Electric Industrial Co. Ltd. v United States* (1984). “Substantial evidence” was defined as “more than a mere scintilla, and enough to reasonably support a conclusion.” Review courts have used the test to ensure that a determination is reasonably supported by evidence on the record. They have also used the test cautiously. Insofar as a determination is based on substantial evidence, courts have deferred to the administrative agency’s expertise, statutory interpretation, and methodology. The second test is the “errors of law” test, which was developed by the CIT in *Chevron USA Inc. v Natural Resources Defence Council* (1984). *Chevron* held that a review court need not conclude that an agency’s interpretation was the only reasonable one, but was simply based on a “permissible” construction of its empowering statute. Courts have used *Chevron* to give the DOC and ITC a great deal of latitude. If an agency’s methods were not specifically authorized by a statute, courts have generally bowed to the agency’s expertise by stating that “Congress never directly addressed the precise question at issues and the Court should not do it either as long as the legislative history was not disturbed.”³⁴ Therefore, the two tests of the standard of review require domestic review courts to assess “whether an agency abused its discretion, was arbitrary and capricious, or otherwise acted not in accordance with the law.” It is a narrow standard “to ascertain whether there was a rational basis in fact for the determination,” and whether the agency went beyond its lawful authority when rendering a determination.³⁵

Domestic appeal courts have followed a general rule of thumb when applying the American standard of review. Essentially, the CIT, Court of Appeals, and U.S. Supreme Court have been extremely deferential to administrative agencies when reviewing final AD/CVD determinations. For example, the CIT has often ruled that a final AD/CVD determination should be upheld if it was reasonable and based on longstanding administrative practice even if it (i.e., the CIT) would have reached a different conclusion. Moreover, appeal courts have excused the DOC and ITC for not providing explicit reasoning in an AD/CVD determination when the agency’s reasoning could be “discerned” from the administrative record. The CIT has also offered the DOC and ITC a great amount

³⁴ John M. Mercury, “Chapter 19 of the United States-Canada Free Trade Agreement 1989-1995: A Check on Administered Protection?” *NorthWestern Journal of International Law and Business*, Vol. 15, No. 3 (Spring, 1995), 573-574; James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard’s/McGraw-Hill Inc., 1994), 63-66.

³⁵ James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard’s/McGraw-Hill Inc., 1994), 63-64.

of deference by finding provisions in American trade statutes to be ambiguous. The Court has allowed them to make "adjustments" in their calculations even when not expressly authorized to do so in law.³⁶

Critiques of the American Trade Regulatory Process before 1989

Domestic producers became increasingly interested in protectionist trade remedy laws during the 1970s and 1980s. They used their influence to encourage Congress to protect their products from foreign competition through the application of AD/CVD laws. In response, Congress pressured the DOC and ITC during AD/CVD investigations, and urged them to find material injury and to impose penalties to assist their constituents. Because Congress controlled the budgets of the executive agencies and was responsible for ratifying appointments, congressional intervention in AD/CVD investigations was taken seriously by DOC and ITC. In this way, the American system was often tilted in favour of strong, politically powerful domestic producers. In an analysis of the American process of laying ADDs/CVDs, Hansen remarked that the likelihood of American industries being granted protection "seemed to depend less on economic need and more on their ability to apply political pressure and influence the decision makers."³⁷

In addition to being politically oriented, the American process was criticized for being biased in favour of American producers. The DOC and ITC "routinely punished foreign corporations for normal business practices and hid behind excuses such as 'government subsidies' and 'high U.S. social standards' to justify their actions."³⁸ Many trade law experts believed that this was done intentionally to persuade foreign companies to abandon the hope of exporting to the United States.³⁹ For example, the questionnaires and information used by the DOC and ITC were prejudiced against foreign importers. They placed excessive cost, time, and administrative burdens on foreign producers. Indeed, the U.S. General Accounting Office admitted that the DOC's and ITC's questionnaires were unfair, arbitrary, and biased sources of information.⁴⁰

³⁶ James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 63-66.

³⁷ Wendy Hansen as cited in James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 220.

³⁸ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 108.

³⁹ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 135.

⁴⁰ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 203-206; Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 110-112; Ronald A. Cass, Warren F. Schwartz, "Causality, Coherence, and

In addition, the DOC tended to launch AD/CVD investigations automatically upon the request of an American producer. According to Horlick, "virtually all petitions were accepted. The filing of a petition in this country in essence automatically triggered an elaborate quasi-judicial proceeding" by the DOC and ITC.⁴¹ Between 1986 and 1989, the DOC felt that 96 percent of the petitions submitted by American companies provided sufficient grounds to launch AD/CVD investigations of foreign companies.⁴² The American system was also criticized as being biased because the DOC and ITC tended to assume that American firms were truthful and in the right, and assumed that foreign firms were not when conducting their AD/CVD investigations.⁴³ The DOC often looked for the practice of dumping but did not consider if the practice was rational from the foreign company's point of view.⁴⁴ Finally, the system was seen as biased because once a foreign firm was convicted of dumping or being the beneficiary of a government subsidy, it was almost impossible for that firm to get rid of the AD/CVD restrictions. 90 percent of foreign companies convicted of dumping practices between 1980-1991 remained under restrictive dumping orders for the entire decade. Moreover, between April 1981-June 1987, no revocations of CVDs were granted by the DOC. When the DOC did consider revoking an AD or CVD order, almost any objection from an American producer or union was taken as sufficient grounds to deny it.⁴⁵

Foreign companies and governments not only had to face political pressure and inherent biases when facing the American system of laying ADDs and CVDs, but had to face significant costs as well. In fact, foreign companies and governments often had to spend more when defending themselves than the total amount of the alleged subsidy. The uncertainty faced by importers was another expensive cost that had to be incurred as a result of the American system.

The American process was also severely criticized for being a process that lacked due process of law. American lawyers have often been struck by the differences between the DOC and ITC processes and the traditional American system of justice (i.e., the

Transparency in the Implementation of International Trade Laws," in Michael Trebilcock, Robert York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990), 60.

41 Gary Horlick, "The United States Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 121.

42 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 140.

43 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 207.

44 Tracy Murray, "The Administration of the Antidumping Duty Law by the Department of Commerce," in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 30.

45 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 140, 145, 181.

adversarial system in which two parties argue their case before an impartial arbiter and the complaining party has the burden of proof).⁴⁶ The DOC and ITC have traditionally acted like inquisitorial bodies, and have placed undue burdens on foreign companies who exported their products into the United States. As stated, foreign companies were often deemed guilty before an AD/CVD investigation began. Therefore, the onus fell on them to prove their innocence by supplying information to show that their dumping practices or use of government subsidies were non-existent or did not threaten American industries. According to Palmeter:

Unlike all other areas of U.S. law, the trade remedy laws place no burden of proof on the complaining party—the burden, even the burden of proving the negative, is on the responding party. As a prominent British legal philosopher has noted, “Practical decisions often turn on the burden on proof.” Indeed they do.⁴⁷

Trade law experts noted that because the DOC and ITC did not have to justify their AD/CVD determinations they denied due process as well. For Cass and Schwartz, the DOC and ITC seldom “stated the standards that guided decisions and rarely contained detailed discussion of the way in which evidence was evaluated, the basis for particular factual inferences, and the connection of such inferences to the ultimate decision.”⁴⁸ Both the DOC and ITC have been reprimanded by the CIT, the Court of Appeals for the Federal Circuit, and the Supreme Court of the United States for the lack of reasoning in their AD/CVD determinations. For example, the CIT remanded a case back to the DOC on the grounds that “the failure of the DOC to provide the court with the basis of its determination preclude[d] the court from fulfilling its statutory obligation on review” in *Industrial Fasteners Group v. United States*.⁴⁹

⁴⁶ N. David Palmeter, “The Antidumping Law: A Legal and Administrative Nontariff Barrier,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 67-69.

⁴⁷ Joseph F. Francois, N. David Palmeter, Jeffrey C. Anspacher, “Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 99.

Other sources that comment on the lack of due process in DOC and ITC investigations include: Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 32-33; N. David Palmeter, “Torquemada and the Tariff Act: The Inquisitor Rides Again,” *International Lawyer*, Vol. 20 (Spring, 1986), 641-658; James Bovard, *The Fair Trade Fraud* (New York: St. Martin’s Press, 1991), Chapter 7.

⁴⁸ Ronald A. Cass, Warren F. Schwartz, “Causality, Coherence and Transparency in the Implementation of International Trade Laws,” in Michael Trebilcock, Robert York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990), 41.

⁴⁹ *Industrial Fasteners Group v. United States* as cited in Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 65.

The American trade regime was also criticized for being unpredictable and for being a system which denied secure market access for foreign exporters. It had a chilling effect on trade because it denied predictability and security of access to foreign importers. The lack of predictability in the U.S. process was chiefly caused by the fact that there were very few set rules and definitions that the DOC and ITC had to apply when making AD/CVD determinations. Both the DOC and ITC authorized themselves to “create” the rules of the process on a case-by-case basis. In a *Federal Register* note on a review of a dumping order on barium chloride from China, the DOC observed, “neither the law nor the Commerce Regulations compel us to use precisely the same method of determining foreign market value as that used in the original investigation or a previous administration rule.”⁵⁰ In addition, DOC continually changed the way in which subsidies were defined as demonstrated in the discussion of the specificity test.

Similarly, the General Accounting Office noted that the ITC “had not developed any type of procedural guides setting forth standards for defining industry, injury ... and the nature of information needed to support an injury determination.”⁵¹ For example, the ITC took various approaches when applying the causation test to assess the presence or threat of material injury. Some ITC commissioners believed that the effects of dumping or of subsidies should be assessed. Others assessed the effects that the suspect class of imports as a whole had on competing U.S. produced goods. Finally, a number of commissioners did not consider the magnitude of the effects of the dumped or subsidized goods, but looked for the mere existence of effects of injury to American producers instead.⁵² Consequently, DOC and ITC had few restraints on their power over foreign companies that were seen to be threatening to their American counterparts.

The Macdonald Commission summarized the unpredictability of the American system by stating:

U.S. trade policy is created and applied through political and legal processes which decentralize decision-making power and enhance the political influence of relatively small and narrowly based interest groups such as unions and trade associations ... The most notable examples ... are the legal mechanisms that afford producers contingent protection from import competition ... U.S. legislation gives domestic producers the right to launch costly lawsuits against foreign rivals, with little risk of loss if claims of unfair and injurious import competition are proved groundless ... It is seldom possible to predict when [lawsuits] will be launched. Thus the

50 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 147.

51 James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 197-198.

52 Ronald A. Cass, Warren F. Schwartz, “Causality, Coherence and Transparency in the Implementation of International Trade Laws,” in Michael Trebilcock, Robert York (eds), *Fair Exchange* (Toronto: C.D. Howe Institute, 1990), 46-47.

threat of harassment they pose deters Canadian investment in new plants and equipment when the future profitability of such facilities depends on uninterrupted access to the North American market.⁵³

Finally, the American process was criticized for not being in accordance with some of the international legal obligations of the GATT. Historically, the United States has upheld national interests at the expense of its international legal obligations in the event that the two did not coincide. Article VI of the GATT states that “no contracting party shall levy any anti-dumping [sic] or countervailing duty on the importation of any product ... unless it determines that the effect of the dumping or subsidization ... is such as to cause or threaten material injury.” Section 1677(7)(A) of the Tariff Act of 1930 defined material injury as “harm that is not inconsequential, immaterial, or unimportant.” As Boddez and Trebilcock explained, “this circular definition offered almost no assistance in determining whether or not material injury was found to be present.”⁵⁴ As a result, the DOC and ITC routinely considered factors that focused on the effects of the imports instead of on the effects of dumping and subsidization as mandated by the GATT.⁵⁵ In this way, the American process breached the obligations of Article VI of the GATT.

Moreover, the GATT AD and CVD Codes permit the use of ADDs and CVDs inasmuch as they do not exceed the amount of the margin of dumping or domestic subsidy. However, the DOC automatically imposed the full margin of duty instead of applying a lesser amount sufficient to offset injurious effects of dumping or subsidization, thereby adding a punitive duty against the foreign importer.⁵⁶ When speaking particularly on the subject of American CVD laws, trade experts asserted:

If one believes the rhetoric justifying the CVD laws, the laws are meant to target pernicious and unfair practices that are serious enough to merit the suspension of the basic tenets of the GATT. As currently administered, however, the laws are routinely applied in cases that simply do not fit this description ... The laws ... have become a tool for protecting producers from all imports fair and unfair alike.⁵⁷

53 *The Report of the Royal Commission on the Economic Union and Development Prospects for Canada Vol. 1* (Ottawa: Minister of Supply and Services Canada, 1985), 302-303.

54 Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 9-10.

55 Thomas M. Boddez, Michael J. Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 58.

56 Joseph Francois, N. David Palmeter, Jeffrey Anspacher, “Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law,” in Richard Boltuck, Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 100.

57 Joseph Francois, N. David Palmeter, Jeffrey Anspacher, “Conceptual and Procedural Biases in the Administration of the Countervailing Duty Law,” in Richard Boltuck,

Unilateral, retaliatory Super 301 Actions were also criticized as being contrary to American commitments under the GATT. In particular, the dispute settlement mechanisms of the GATT required that panel rulings on AD/CVD determinations be implemented by the disputing parties. In other words, the decisions of international dispute panels were to influence the domestic administrative agencies that administered trade remedy laws. Super 301 required that the USTR consider the decisions made by international dispute settlement panels. Nevertheless, it also explicitly reserved the right to impose unilateral sanctions if the USTR deemed them to be in the American national interest.⁵⁸

The Trade Remedy Regime of Canada

The Canadian trade regulatory process has been structured in much the same way as the American system. Many of Canada's trade remedy laws, procedures, and administrative agencies were modeled on those of the United States.⁵⁹ Consequently, Canada's trade remedy regime has been criticized for many of the same reasons for which the American system has been critiqued. Therefore, this section will briefly describe the relevant Canadian statutes and agencies that govern the administration of Canadian trade remedy laws, and will highlight the fundamental differences between the Canadian and American systems.

The Statutory Foundations of Canada's Trade Regulatory Process

The Special Import Measures Act of 1984 (SIMA) is the fundamental piece of legislation that governs the structures and processes of Canada's trade remedy regime. The SIMA enables Canadian producers to seek the imposition of ADDs/CVDs against dumped or subsidized imports. The stated purpose of the SIMA is to make Canada's AD/CVD laws more effective in protecting Canadian producers from dumped or subsidized imports. It enables Canadian producers to seek trade remedy measures and places specific time limits on the various stages of dumping, subsidy, and injury investigations. It also coordinates

Robert E. Litan (eds), *Down in the Dumps* (Washington: The Brookings Institute, 1991), 130.

58 Carl Svernlöv, "The Implementation of Super 301," *Harvard International Law Journal*, Vol. 31, No. 1 (Winter, 1990), 364-365.

59 Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public address delivered at El Colegio de México, Mexico City, May 21, 1994, 10.

the work of the administrative agencies involved in the trade regulatory process to complete cases more rapidly.⁶⁰

Administrative Structures of the Canadian Trade Regulatory Process

Two administrative agencies were involved in Canada's trade remedy regime before 1989. They retained their jurisdiction over the administration of the process after 1989 as well. Appendix D provides a summary of the Canadian process.

(1) The Deputy Minister of the Department of National Revenue, Customs and Excise

The Deputy Minister of the Revenue Canada determines the presence of dumping and subsidization in the Canadian regime. The Deputy Minister is also responsible for calculating the margin of dumping and/or the amount of benefit offered by a foreign subsidy. As in the United States, the Deputy Minister uses a detailed questionnaire to gather information from domestic and foreign companies during an AD/CVD investigation. Upon receiving the questionnaires, the Deputy Minister verifies the information at the premises of the domestic and foreign producers using teams of Revenue Canada case officers.⁶¹

The SIMA contains elaborate provisions dealing with the determination of the margin of dumping and the amount of benefit conferred by a subsidy. The Deputy Minister must account for the normal value of the good in the Canadian market, the home market method of calculation of normal value, the constructed cost method of calculation of normal value, and the third country method of calculation of normal value when determining the margin of dumping. When assessing the benefits offered by a subsidy, the SIMA requires that the Deputy Minister account for: (1) Articles 9 and 11 of the GATT Subsidies Code in any question relating to the definition of "subsidy;" and (2) Sections 38 and 41 of the

⁶⁰ Detailed descriptions of Canadian trade remedy laws are provided in: Sub-Committee on the Review of the SIMA of the Standing Committee on Finance and the Standing Committee on Foreign Affairs and International Trade, *Report on the Special Import Measures Act* (Ottawa: House of Commons, 1996); R.K. Paterson et al, *International Trade and Investment Law in Canada 2nd Edition* (Carswell: Scarborough, 1994); Robert K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: The Carswell Company Limited, 1986); John H. Buchanan, "AntiDumping Law and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986); Castel, de Mestral, Graham, *The Canadian Law and Practice of International Trade* (Toronto: Edmond Montgomery Publications Ltd., 1991).

⁶¹ Peter A. Magnus, "The Canadian Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 184-185.

GATT Code to determine if the export subsidy in question is “not inconsistent with” the exporting country’s obligations under the GATT.⁶²

(2) The Canadian International Trade Tribunal

The Canadian International Trade Tribunal (CITT) was created in 1988. It assumed the roles of the administrative agencies which had been responsible for trade issues before the SIMA came into effect in 1984: the Tariff Board, the Canadian Import Tribunal, the Textile and Clothing Board, and the Antidumping Tribunal. The CITT was given powers above and beyond the administrative bodies it replaced. Most notably, the CITT was empowered to conduct injury investigations not only at the request of the Canadian government, but at the request of Canadian producers as well. When creating the CITT, the federal government argued that it was doing so for “housekeeping” and cost-cutting reasons. However, “whether or not it was a housekeeping measure, the CITT reflected a general recognition that ... for the sake of its bilateral and multilateral interests, Canada required the strongest possible trade remedies and inquiries institution.”⁶³ In other words, the CITT was created to subject foreign importers to a more stringent system of protection like Canadian producers were faced with in the United States.

The CITT is responsible for assessing the extent to which Canadian producers were injured or threatened with injury by dumped or subsidized imports. It holds both public and confidential hearings where all interested persons may call witnesses, present evidence, and make presentations supporting their cases. Cross-examination is a major component of the CITT hearings.

Unlike the specific means that the SIMA lays out for the Deputy Minister to calculate the margin of dumping and the benefits of subsidization, the SIMA does not define the concept of injury for the CITT. As a result, the CITT has developed its own criteria. Generally, the CITT has considered factors such as the loss of domestic production and sales, loss of market share, loss of profit, decrease in capacity utilization, lowering return on investment, and loss of employment during an injury investigation. As does the ITC, the CITT has used a causation test to determine the impact of dumping and

⁶² Castel, de Mestral, Graham, *The Canadian Law and Practice of International Trade* (Toronto: Edmond Montgomery Publications Ltd., 1991), 340-350; Robert K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: The Carswell Company Limited, 1986), 145.

⁶³ John Coleman, “New Rules, New Institutions: The Canadian International Trade Tribunal,” in R.G. Dearden, M.M. Hart, D. Steger (eds), *Living With Free Trade: Canada, the Free Trade Agreement and the GATT* (Halifax: The Institute for Research on Public Policy, 1989), 52, 58, 60-63.

subsidization on Canadian producers. The causation test involves an examination of the volume and market share of dumped goods, the degree of price undercutting of domestic goods, and/or the effect on price in the domestic market.⁶⁴

An injury investigation will result in one of three types of decisions. First, the CITT may find that injury did not occur (i.e., a negative determination). A negative determination will terminate the investigation, and remove or refund any provisional ADDs or CVDs that had been collected during the process. Second, the CITT may find that a Canadian producer was injured by foreign imports (i.e., an affirmative determination). An affirmative determination will ensure that an ADD/CVD is levied against the imported goods by Revenue Canada. Third, the CITT may issue a partial injury decision to demonstrate: that injury could be caused in the future; injury had only been caused by one out of a number of importing countries; or that certain products did not cause injury and should be exempted from the AD/CVD investigation.⁶⁵

Appeal Procedures in the Canadian System before 1989

The SIMA permits domestic or foreign producers to appeal final AD/CVD determinations. In the event that a producer desired to initiate a challenge, a two step process would be used: (1) administrative review (i.e., a redetermination of the original AD/CVD decision by the Deputy Minister of CITT); (2) judicial review of the administrative review in the courts. It must be noted that judicial review could only be requested in cases where the redetermination had violated a narrow set of grounds.⁶⁶ Section 96(2) of the SIMA set out the grounds by which a final determination could be judicially reviewed. Determinations could be appealed to the Federal Court of Appeal when the Deputy Minister or CITT:

- (1) Failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise the jurisdiction of the Deputy Minister or the Tribunal;
- (2) Erred in law in making the determination, decision, order, or finding, whether or not the error appears on the face of the record; or

⁶⁴ John Buchanan, "AntiDumping Law and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 21.

⁶⁵ Peter A. Magnus, "The Canadian Antidumping System," in John H. Jackson, E.A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 189-190.

⁶⁶ John Buchanan, "AntiDumping Law and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 8-9

- (3) Based the determination, decision, order, or finding on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before the Deputy Minister or the Tribunal.

The availability of judicial review was significantly broadened when Section 76 of the SIMA was amended during NAFTA negotiations. American negotiators desired that a wider standard of review should be instituted in the event that an American producer wanted to challenge a Canadian AD/CVD determination in the new free trade environment. Consequently, Section 76(1) was amended to ensure that FTA/NAFTA binational panels could remand AD/CVD determinations to the Deputy Minister or CITT in the event that either of those agencies applied Canada's AD/CVD laws incorrectly. In addition, Section 96(2) of the SIMA was modified because the Federal Court expanded the scope for judicial review in Subsection 18.1(4) of the Federal Court Act in 1993. Consequently, the grounds by which AD/CVD determinations were reviewed (i.e., Section 96(2) of the SIMA) had to be expanded as well. Section 96(2) of the SIMA and Subsection 18.1(4) of the Federal Court Act now permit a review to be made when it can be demonstrated that an administrative tribunal such as the Deputy Minister or the CITT:

- (1) Acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (2) Failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (3) Erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (4) 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;
- (5) Acted, or failed to act, by reason of fraud or perjured evidence; or
- (6) Acted in any other way that was contrary to law.

The Federal Court may set an administrative tribunal's decision or order aside in the event that one of those grounds is found to be true.⁶⁷

There are essentially two kinds of issues (or errors) that a Canadian review court examines in the process of judicial review: (1) jurisdictional issues, and (2) issues within an agency's jurisdiction. Once a court decides what type of issue/error was committed, it will decide which standard of review is applicable. Jurisdictional issues define a tribunal's powers, and are matters on which a tribunal must be correct. Jurisdictional issues are reviewed by the "correctness" standard. Issues/errors within an agency's jurisdiction are

⁶⁷ James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 68-74.

reviewed according to the “patently unreasonable” test to determine if an administrative agency acted appropriately within its jurisdiction or extended its analysis too far. Courts may overturn a determination if there was a reasonable indication that the agency went beyond its jurisdiction.

Canadian courts have accorded agency determinations a great deal of deference in the process of review. Courts have determined the required degree of deference and standard of review by assessing a number of factors such as the nature of the issue that was put before the agency by Parliament, and the agency’s empowering statute. In *U.E.S. Local 298 v Bibeault* (1988), the Supreme Court held that if it was determined that Parliament intended the question to be answered by the agency, the issue was considered to be “within jurisdiction” and the “patently unreasonable” standard was applied. If, however, Parliament intended the question to be answered by the courts, the issue was to be considered “jurisdictional” and the agency would have to be “correct” in its interpretation of the relevant “legislative provisions.”⁶⁸

Canadian courts have shown a great amount of deference to the CITT with respect to issues/errors of jurisdiction. Deference to the CITT has been extremely high because it was protected by a privative clause until 1994. Section 76(1) of the SIMA demanded that administrative findings of the CITT be “final and conclusive.” The legacy of Section 76(1) ensured that the CITT could only be subjected to judicial review if its interpretation of its statutory authority was so “patently unreasonable that its construction could not be rationally supported by relevant legislation.”⁶⁹ “Curial” deference was the term courts used when referring to the degree to which they should defer to the Tribunal.

Following the repeal of the CITT’s privative clause on January 1, 1997, the CITT may now be reviewed to determine if it committed an error of law. Canadian courts and panels have now begun to follow the Supreme Court in *Pezim v British Columbia* (1994). *Pezim* dictated that “considerable deference” (as opposed to curial deference) should be shown to an agency in the absence of the privative clause when the court examines alleged errors of law. In addition, “considerable deference” has been seen as a slightly lower standard of deference than the “patently unreasonable” standard, and considers the expertise of an agency for issues within its jurisdiction.⁷⁰

⁶⁸ *U.E.S. Local 298 v Bibeault* (1988), 2 S.C.R., 1087-1088; Joel Robichaud, “Chapter 19 of the FTA and NAFTA: The First Seven Years of Judicial Review in Canada,” (Ottawa: Unpublished, 1995), 15.

⁶⁹ *S.E.I.U. Co. 333 v Nipawin District Staff Nurses’ Association*, 1 S.C.R. (1975), 382; *CUPE v N.B. Liquor Corporation*, 2 S.C.R. (1979), 227.

⁷⁰ John M. Mercury, “Chapter 19 of the United States-Canada Free Trade Agreement 1989-1995: A Check on Administered Protection?” *NorthWestern Journal of International Law and Business*, Vol. 15, No. 3 (Spring, 1995), 554-568.

It should be noted that Canadian courts have never reviewed a Revenue Canada determination. However, based on court decisions, Chapters 19 panel decisions thus far, and administrative laws and practices, it could be expected that Revenue Canada would be subjected to both the "correctness test" and "reasonableness test" because it has not been protected by a privative clause at any time. Under the "reasonableness" test, Canadian courts could hold that Revenue Canada determinations would not be overturned unless they were unreasonable. If there was more than one reasonable interpretation of an aspect of the SIMA, the agency's determination could be upheld insofar as it was reasonable based on fact and law.

The Major Similarities between the American and Canadian Trade Regulatory Processes

The Canadian and U.S. trade remedy regimes are similar in three major ways. First, both are very costly to access and burdensome for participants. However, Revenue Canada, the DOC, and ITC provide some non-financial assistance to small and medium-sized enterprises when they file a complaint.⁷¹ They provide technical assistance to firms which do not have the resources to compile information or prepare petitions on their own. The three agencies exercise discretion when determining which producers require assistance on a case-by-case basis. Second, the regimes are similar in that neither system uses a "lesser duty rule." In other words, AD/CVDs are almost always greater than necessary to alleviate injury, because both departments automatically set the duties at the full estimated margin of dumping or quantum of subsidy, without considering whether a lesser duty would eliminate injury. Third, the regimes are similar in that affirmative injury determinations are reached at a comparable frequency.

The Major Differences between the American and Canadian Trade Regulatory Processes

The first major difference between the two regimes is the degree to which the systems are bifurcated. Bifurcation refers to the division of labour between the DOC and ITC in the U.S., and Revenue Canada and the CITT in Canada. In the U.S., the DOC

⁷¹ The CITT does not provide such assistance and producers generally employ legal counsel to file their case. The CITT does not provide assistance because Revenue Canada usually provides advice on how the CITT hearing will proceed. Furthermore, the CITT does not provide assistance or advice because it is a quasi-judicial body and should stay out of the investigative process, whereas the ITC is a purely investigative administrative agency. As a quasi-judicial body, the CITT uses cross-examination during a court-like hearing, whereas the ITC relies on more behind-the-scenes, administrative work before it simply issues a final decision (without cross-examination) during an injury investigation).

conducts the preliminary and final determinations of dumping and subsidization, and the ITC conducts the preliminary and final determinations of injury. However, in Canada, Revenue Canada conducts the preliminary and final determinations of dumping/subsidization, as well as the preliminary determination on injury. The CITT only becomes involved after Revenue Canada has concluded the preliminary investigation, and determined that dumping/subsidization occurred and caused or threatened injury.

The two regimes also differ in the enforcement procedures used by the DOC and Revenue Canada, and the subsequent costs of compliance. Canada is the only NAFTA country to use a “prospective” enforcement system. It permits exporters to raise prices to avoid paying duties. Importers know the “fair price” constructed by Revenue Canada before importation, and can therefore avoid duties by pricing up to that level. Conversely, the DOC uses a much more burdensome “retrospective” system, in which the actual liability is not known until after the administrative review has been completed (up to two years after importation). In the U.S., a deposit is immediately collected on importation to cover the estimated duty. All importers are reviewed annually by the DOC, and duties may be either collected retroactively or deposits refunded.⁷²

The third major way that the regimes differ is the use of *de minimus* levels for exclusion purposes. AD/CVD investigations must be terminated if the margin of dumping or quantum of subsidy is found to be below the *de minimus* level (i.e., less than two percent). In Canada, *de minimus* is applied on a country basis. Individual importers are included in an AD/CVD investigation even if their margin of dumping or quantum of subsidy is less than two percent, but their country’s average margin of dumping or subsidy is higher. Conversely, individual exporters will be excluded from an U.S. investigation if their margins of dumping or subsidization are less than two percent regardless of their country’s average level.

Fourth, the two regimes differ in the speed at which preliminary determinations are reached. Preliminary determinations are generally reached faster in Canada than in the U.S. Consequently, Canadian firms may benefit from provisional duties at an earlier stage in an investigation. The SIMA provides that preliminary determinations must be made within 59-90 days of the initiation of an investigation. In normal U.S. AD/CVD investigations, preliminary determinations are issued within 140 days of the investigation. The determination may be extended for 50 days in complicated circumstances. In both systems, however, provisions are made to speed up the process in certain cases. Revenue Canada will generally issue a preliminary determination in 60 days if it is aware that a

⁷² Peter Clark, “A Comparison of the Antidumping Systems of Canada and the USA - A Study Prepared for the Department of Finance” (Ottawa: Minister of Finance, 1996).

perishable agricultural good is involved. Similarly, the DOC may expedite a preliminary determination for cases involving "short life cycle merchandise," if the foreign producer has been subject to prior affirmative determinations on similar products. Expedited preliminary determinations may also be made in the U.S. within 90 days of initiation, if the petitioner provides sufficient supporting information within 60 days, and agrees (in writing) to waive verification visits.

The fifth way that the systems are different is the composition of the CITT and ITC. The CITT is made up of nine members. Three out of the nine members of the CITT usually hear a case of material injury. Therefore, a deadlock or tie is very unusual and next to impossible. Conversely, the ITC is made up of six commissioners. Generally, all six ITC commissioners rule on each injury investigation separately, making tie decisions a very possible result. If a tie occurs, the ITC's determination will be affirmative and favour the domestic petitioner.⁷³

Sixth, the CITT and ITC also differ in their approaches to determining injury. For example, the CITT's injury hearing is much longer than the ITC's (two weeks versus one to two days). The CITT's hearing is longer because it involves cross-examination of arguments in a quasi-judicial/adversarial setting, whereas the ITC's public hearing is more limited and relies more heavily on staff research and analysis. Furthermore, the CITT is not legally required to consider the cumulative effects of imports from several sources when assessing injury, whereas the ITC must do so by law. In practice, however, the CITT generally does consider cumulation in virtually all injury investigations. Finally, the CITT uses a collective, bifurcated approach to determine injury (i.e., is there injury, and if so, is it material, and if so, is dumping/subsidization a cause), whereas the ITC commissioners operate independently from one another and may use different approaches to determine injury.

The seventh major difference between the two systems is that Section 45 of the SIMA introduces the concept of public interest into Canada's trade regulatory process. A consideration of the public interest is absent from the American system. Section 45 of the SIMA stemmed from complaints that Canadian trade remedy laws were overly concerned with the interests of domestic producers, and ignored the effects that duties had on the downstream users of the goods and on Canadian consumers. Critics argued that antidumping and countervailing measures were contrary to the public interest because the costs incurred by society at large were often greater than the benefits that the duties extended to domestic producers. Section 45 of the SIMA gave the CITT the authority to

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Alan Rugman, Samuel Porteous, "Canadian and U.S. Unfair Trade Law," *North Carolina Journal of International Law*, Vol. 15 (1990), 70.

examine the impact of its affirmative injury determination on the Canadian public interest. The CITT was required to submit a report to the Minister of Finance if it determined that AD/CVD duties were not in the public interest in a certain case. The Minister could then exercise discretion to lower and/or eliminate the duties altogether. It must be noted that the CITT has rarely used its authority to consider the public interest during injury investigations. Only three public interest hearings have been conducted since 1984. In only one of those cases (the report on grain corn) was a report made to the Minister of Finance.⁷⁴ Nevertheless, the public interest clause of the SIMA does represent a significant difference between the Canadian and American AD/CVD regimes despite its minimal use.

The last major difference between the two regimes is undertakings. Undertakings are agreements that foreign firms make to compensate for their dumping practices or subsidization. Undertakings are permitted at any time during an AD/CVD investigation in the United States. By contrast, Canada's system is more restrictive. Undertakings may only be accepted in Canada prior to the Deputy Minister's preliminary AD/CVD determination. Time restrictions were placed on Canadian undertakings to avoid the costs of an injury inquiry and to provide Canadian and foreign governments and producers with an incentive to reach an agreement quickly. Despite the time restrictions, undertakings are accepted more easily in Canada than in the United States. The U.S. Trade Agreements Act of 1979 restricted the circumstances under which an undertaking could be accepted to protect domestic interests. An undertaking could only be accepted if the AD/CVD investigation was "complex," and if termination of the investigation would be more beneficial to the domestic industry than its continuance would be. Moreover, undertakings could not be accepted under U.S. law if they could not be monitored effectively, and if suspension of the duties would be harmful to the public interest. On the other hand, Canadian law simply required that undertakings be accepted if: (1) all, or substantially all, of the dumped or subsidized goods were accounted for by the undertaking; (2) the undertaking was completed prior to the Deputy Minister's preliminary determination; (3) the undertaking would not cause the prices of imports to increase by more than the margin of dumping or the amount of the countervailable subsidy.⁷⁵

74 Alan Rugman, Samuel Porteous, "Canadian and U.S. Unfair Trade Law," *North Carolina Journal of International Law*, Vol. 15 (1990), 77-78

75 Alan Rugman, Samuel Porteous, "Canadian and U.S. Unfair Trade Law," *North Carolina Journal of International Law*, Vol. 15 (1990), 79; John Buchanan, "AntiDumping Law and the Special Import Measures Act," *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 8; Robert K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: The Carswell Company Limited, 1986), 145-146.

Critiques of the Canadian Trade Regulatory Process before 1989

The Canadian trade regulatory process has been criticized for many of the same reasons as the American regime. For example, the process has been very politically oriented and has placed unfair burdens on foreign producers. Similarly, determinations made by the Deputy Minister and CITT have been inherently protectionist, and have favoured large and politically powerful Canadian firms and industries.⁷⁶ In addition, the Canadian system was criticized for contravening the spirit of the GATT. For example, the 1979 GATT AD Code required that duties only be used to the extent necessary to eliminate the threat or presence of material injury. However, the rigorous timelines instituted by the SIMA often caused the Deputy Minister to overestimate the margin of dumping which subsequently increased the scope of the duty.⁷⁷ Moreover, the Canadian system has been criticized for its arbitrariness. In particular, critics have argued that the CITT has too much discretion during injury investigations and public interest reviews because clear guidelines for defining primary concepts such as “injury” and “public interest” are not provided for in the SIMA. Finally, the SIMA has been criticized, by domestic and foreign producers alike, for its costliness and burdensomeness. Small and medium sized producers have stressed that the amount of information needed to submit a petition to Revenue Canada, the costs to hire legal counsel and trade consultants to prepare petitions and legal arguments, and the costs and time commitments to appear before the CITT can be overwhelming, and can often prevent firms from filing petitions even when an investigation was warranted.

The Trade Remedy Regime of Mexico

Mexico did not have a trade remedy regime until 1986. Import substitution policies, high tariffs, and subsidies were sufficient forms of protection to guard Mexican producers from competitive imports. However, Mexico’s accession to the GATT in 1985 made manufacturing and governmental elites attune to the fact that other members of the GATT could use dumping or subsidization practices to gain access to the Mexican market. Consequently, they wanted a regime that would protect Mexican producers from their

⁷⁶ Susan Hutton, Michael Trebilcock, “An Empirical Study of the Application of Canadian Anti-Dumping Laws,” *Journal of World Trade*, Vol. 24, No. 3 (1990), 124-125, 129-130, 144; John Buchanan, “AntiDumping Law and the Special Import Measures Act,” *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 22; Alan Rugman, Samuel Porteous, “Canadian and U.S. Unfair Trade Law,” *North Carolina Journal of International Law*, Vol. 15 (1990), 83-84.

⁷⁷ John Buchanan, “AntiDumping Law and the Special Import Measures Act,” *The Canadian Business Law Journal*, Vol. 11 (1985-1986), 8.

foreign competitors. The de la Madrid administration passed the Foreign Trade Regulatory Act Implementing Article 131 of the Constitution (i.e., the Foreign Trade Law of 1986) and the Regulations Governing Unfair International Trade Practices. Articles 7-19 of the Foreign Trade Law dealt with relief measures for unfair dumping and subsidization practices.

Taken together, the laws and regulations created a rudimentary, unsophisticated trade remedy regime that was criticized both inside and outside of Mexico. Mexican industries complained that the laws and regulations failed to provide adequate protection for Mexican producers from unfair imports and competition. Mexican producers also argued that the agency which administered the laws regularly bowed to American pressures, and did not initiate proceedings even if they were legally justified. When it did initiate an action, Mexicans argued that the administrative agency acted too slowly to provide adequate relief. The inadequacies of the system led many Mexican executives to question the legitimacy of the trade law regime. They demanded answers as to why the de la Madrid administration had created such an ineffective system. Foreign producers, especially in the United States, also criticized the ways that the regime was implemented and administered. They claimed that the law's procedures and tests were inconsistent with the GATT, were not transparent enough, and did not provide due process of law.

Upon assuming office in 1988, President Salinas acted to reform Mexico's trade remedy regime. He responded to domestic and international pressures to make the system more effective and efficient for Mexican producers, and to increase the levels of transparency and due process in the administrative process.⁷⁸ Essentially, Salinas acted to make the system more American in response to domestic and international pressures. As Chapter Two explained, President Salinas felt pressure from business groups that were supportive of trade liberalization. Consequently, he coopted them into his ruling coalition to accommodate their demands, receive their support, and solidify his power. More importantly, Salinas reformed Mexico's trade remedy regime in response to international pressures, and to ensure that they did not violate Mexico's international obligations in the GATT and reputation in the NAFTA negotiations. Commentators have argued that even though the Salinas administration was prepared to change Mexico's trade remedy laws

⁷⁸ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *Sr. Mary's Law Journal*, Vol. 25, No. 3 (1994), 930-941; Jorge Witker Velazquez, "The Antidumping Administrative Proceeding in Mexico," (Unpublished Draft, 1992), 1-2.

because of domestic pressures, the changes were “probably deeper and more far-reaching than they might have been without the pressure of the NAFTA negotiations.”⁷⁹

The new Foreign Trade Law and implementing regulations were passed on July 27, 1993 and ratified by Congress in December, 1993. The following analysis will describe Mexico’s trade regulatory process before it was changed in 1993. It should be noted however, that some aspects of the process stayed the same. The similarities will be highlighted. The most important changes that occurred in 1993 will be discussed in Chapter Four because they were directly related to NAFTA-19. Appendix D provides a summary of Mexico’s trade regulatory process.

Administrative Agencies of the Mexican Trade Regulatory Process

(1) The Secretaria de Comercio Y Fomento Industrial (SECOFI)

Unlike the Canadian and American trade remedy regimes, Mexico’s system only uses one administrative agency to impose AD/CVDs. The Mexican Congress delegated the day-to-day regulation and surveillance of foreign dumping and subsidization practices to the Secretaria de Comercio Y Fomento Industrial (SECOFI)—Secretariat of Trade and Industrial Development—in the Organic Law of Federal Public Administration of 1976. SECOFI’s structure and organization are governed by legislation such as the Constitution, the Organic Law of Federal Public Administration, the Foreign Trade Law of 1986 as amended in 1993, the SECOFI internal regulations, and the SECOFI organizational manual.⁸⁰

Article 29 of the Foreign Trade Law authorizes SECOFI to impose trade remedy measures when two legal conditions exist: (1) the foreign merchandise in question has been subsidized in its home market or dumped into the Mexican economy; and (2) the subsidized or dumped import has caused, or has threatened to cause, economic injury to the competing Mexican industry.⁸¹ SECOFI created a number of administrative subunits to assist it during AD/CVD investigations. Article 2 of SECOFI’s Internal Regulations of 1989

⁷⁹ Gilbert R. Winham, “What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters,” Public address delivered at El Colegio de México, Mexico City, May 21, 1994, 9-10.

⁸⁰ All of those laws have undergone a number of changes. The Organic Law was amended on December 29, 1976 and December 28, 1994. SECOFI’s Internal Regulations were amended on August 20, 1985, March 16, 1989, April 1, 1993, and September 14, 1994. SECOFI’s Organization Manual was changed on October 20, 1986, September 19, 1988, June 5, 1989, and July 28, 1994.

⁸¹ Craig R. Giesze, “Mexico’s New Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 893.

created the Dirección General de Servicios al Comercio Exterior (DGSCE) to study and propose the amount of AD/CVDs that should be levied. The Unidad de Prácticas Comerciales Internacionales (UPCI) was created by the Internal Regulations of 1993 to assist SECOFI in considering whether an “unfair international trade practice” did indeed exist.

(2) The Comisión de Aranceles Y Controles al Comercio Exterior (CACCE)

The Comisión de Aranceles Y Controles al Comercio Exterior (CACCE)—Commission on Tariffs and Trade—is an interdepartmental consultative agency of the federal executive. It is composed of representatives of the Treasury Department, the Department of Programming, the Bank of Mexico, and the Department of Industry, Trade and National Development. Its mandate is to consider the effects of ADD/CVDs on the public (i.e., consumer) interest. In addition, the CACCE assists SECOFI in verifying the information used during AD/CVD investigations to ensure that the information captures the effects that dumped/subsidized goods have, or could have, on Mexican producers.⁸²

(3) Upper Division of the Federal Tax Court

The Upper Division of the Federal Tax Court (also known as the Federal Fiscal Tribunal) was established in 1936 to review financial decisions made by the federal bureaucracy. The Court’s jurisdiction expanded and allowed it to review any acts and decisions of administrative agencies. For example, Article 15(VII) of the Organic Law of the Federal Fiscal Tribunal granted the Court jurisdiction to resolve AD/CVD disputes pursuant to the Foreign Trade Law. Although the Court is within the scope of the federal executive by virtue of Mexico’s single ruling party system, its independence was established in the Organic Law of 1967. The Law provided that, “the Federal Fiscal Tribunal is an administrative court endowed with full autonomy and with the organization and attributes established herein.”

The Court is composed of seventeen lower chambers. Each chamber is made up of three judges who function as a panel. The Court also includes an upper chamber of nine judges. Judges are appointed by the President and approved by the Senate. Judges must be Mexican by birth, over thirty years of age, and a lawyer with at least five years standing.

⁸² Joanne Osendarp, “Legal and Administrative Regulation of Unfair Trade Practices,” (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 8, 12.

The position is held for a six-year term, after which judges may be either reinstated or removed.⁸³

The Administrative Process of Imposing ADDs/CVDs in Mexico

The Initial Investigation

The Foreign Trade Laws of 1986 and 1993 provided that SECOFI could either initiate an AD/CVD investigation on its own, or could do so after a written petition was filed by a Mexican "interested party." Article 10 of the Foreign Trade Laws defined a "Mexican interested party," as a natural or corporate person who produced merchandise identical or similar to that being imported into Mexico under conditions of unfair international trade practices, and who constituted at least 25 percent of the relevant domestic industry or a legal organization pursuant to Mexican law.⁸⁴ Officially, petitions were to contain a description of the goods in question, the exporters and countries involved, normal values and export prices of the subject goods, and information demonstrating that the introduction of the goods causes or threatens injury to domestic production. In practice, however, petitions only needed to allege that named or un-named exporters were either selling at below the "normal" price (i.e., fair market value), or were the recipients of subsidies.⁸⁵ SECOFI was allowed to issue a provisional AD/CVD duty 10 days after receiving a petition by Article 11 of the Foreign Trade Law of 1986 and Articles 15-18 of the Foreign Trade Regulations of 1986. Provisional duties could not be greater than the margin of dumping or the amount of the subsidy. In practice, provisional duties were often levied as early as five days after a petition was accepted.

Articles 13 and 14 of the Foreign Trade Regulations of 1986 and 1993 provided that SECOFI was to determine if the request for relief from competitive imports was legally sufficient within 30 days of receiving a written petition.⁸⁶ A 30 day period could be granted to clarify any matters that were either unclear or incomplete in the petition. If an investigation was initiated, SECOFI had to notify the interested Mexican importers, foreign exporters, and foreign governments by publishing its decision in the *Diario Oficial de la*

⁸³ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 36-37; Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo," *California Western International Law Journal*, Vol. 9 (1979), 326.

⁸⁴ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 1005-1006.

⁸⁵ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 4.

⁸⁶ This is now contained in Article 52 of the Foreign Trade Law of 1993.

Federación. After notifying the interested parties of the investigation, SECOFI was obliged by both Laws to issue a questionnaire to the foreign entities and Mexican importers to gather information about the case.

The questionnaires were very similar to those used to gather information in the Canada and the United States. They solicited information about sales, prices, costs, government subsidy programs, import volume, production capabilities, and shipments. Foreign and domestic firms had 30 days to complete the questionnaires accurately. Firms could be permitted to submit supplementary reports to correct any deficiencies identified by SECOFI in the original response. In the event that the questionnaires were not completed properly within the allotted time period, SECOFI relied on the "information available to the Secretary" to calculate dumping and subsidy margins.⁸⁷

All of the information contained in the questionnaires was to be verified. SECOFI officials would visit the premises of the responding parties to examine and analyze their relevant financial books and records. By convention, SECOFI has always issued a daily verification certificate to the respective party at the end of each verification visit. SECOFI has also granted the party being investigated a period of seven business days to clarify any information contained in the verification report. The CACCE has provided SECOFI with additional input during the verification process since 1989. Participating in the verification process has been one of the most important things that foreign and domestic firms can do during an investigation. Foreign and Mexican firms must ensure that Mexican trade officials can tie all of the information that SECOFI decides to verify to the nonclassified books and records of the responding parties. Failure to cooperate during the verification process may cause SECOFI to rely upon the "information available to the Secretary" to establish the margins of dumping or subsidization.⁸⁸

After verifying the information, SECOFI was required to publish its preliminary determination in the *Diario Oficial* within 40 days of when it received the petition (Article 12 of the Foreign Trade Law of 1986). A presidential accord extended the time period to 100 days. In spite of the formal timetables, however, SECOFI generally issued a preliminary determination 195-225 days after the investigation was initiated between 1989-1993.⁸⁹ The Preliminary Determination was to review the provisional resolution and duties. It could result in one of four possible outcomes: (1) the decision to reduce or revoke the provisional duty, in which case all excess duties had to be refunded within 10

⁸⁷ This practice was retained in Articles 53-55 of the Foreign Trade Law of 1993.

⁸⁸ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 1009-1010.

⁸⁹ Article 57 of the Foreign Trade Law of 1993 provides that preliminary determinations must be published within 130 days of when SECOFI received the petition.

days, (2) the decision to impose a duty if a provisional duty had not been imposed earlier, (3) a decision to dismiss the case for lack of evidence of an unfair international trading practice, or (4) a decision to continue on with the investigation without the imposition of a duty.⁹⁰ In the event of an affirmative preliminary investigation, the Foreign Trade Laws required SECOFI to direct the Secretary of Treasury and Public Credit, Customs Administration to levy an ADD or CVD on the foreign good. The duty would be placed on the good(s) in question beginning on the day following the publication of the preliminary determination.

All of the foreign and domestic interested parties had to be notified of the outcome of the preliminary determination. Interestingly, the Foreign Trade Law of 1986 did not entitle "interested parties" to obtain the internal documents that SECOFI officials relied on during the preliminary investigation. In practice, however, SECOFI often choose to reveal the documents to the interested parties at a "disclosure meeting" that was held prior to the final determination, if such a meeting was requested.⁹¹ Similarly, SECOFI did not generally impose duties in the preliminary determination until foreign importers and/or governments had been given an opportunity to respond to SECOFI's information. SECOFI officials explained that Article 14 of the Mexican Constitution encouraged them to protect the property of individuals from the state until those individuals had been given a trial. Trade law experts suggested that SECOFI's practice could also have been motivated by concerns about international censure if provisional duties were imposed before foreigners could see the information that had been used against them.⁹²

The Final Determination

Both Foreign Trade Laws directed SECOFI to send the administrative record and a draft of its "final determination" to the CACCE. The CACCE was to provide SECOFI with an "opinion" of the contents of the draft, and more importantly, of the amount of the final duty. The CACCE could, for example, advise SECOFI that a duty less than the margin of dumping or the amount of subsidy should be imposed when it believed that a "less amount was sufficient to eliminate the injurious effects on domestic production." After the CACCE formulated its "opinion," the record of the case was to be returned to SECOFI. SECOFI

⁹⁰ Joanne Osendarp, "Mexico's Trade Remedy Regime," (Department of Foreign Affairs and International Trade, Ottawa, Unpublished, 1992), 2.

⁹¹ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 9.

⁹² Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 5.

officials were then responsible for formalizing the final determination and amount of duty in accordance with the CACCE's recommendations.⁹³

Article 13 of the Foreign Trade Law of 1986 provided that SECOFI had to publish the final determination in the *Diario Oficial* within 195 days of when the investigation was initiated.⁹⁴ SECOFI tended to extend the time period to 300-500 days after the petition was accepted. The final determination was either to establish and impose a final ADD/CVD, reverse and revoke the provisional duty, or to declare the investigation completed, without establishing or imposing a duty. All of the interested parties were to be notified of the final determination. When issuing an affirmative determination SECOFI was required to direct the Secretary of the Treasury and Public Credit, Customs Administration to undertake the collection of the final duty. The Secretary of the Treasury was required to collect "the actual payment of final antidumping or countervailing duties ... or in the absence of such payment, to ... make effective the security that was previously granted and posted by the importer," after the preliminary investigation. If the preliminary duty was modified or revoked by the final determination, SECOFI was to direct the Secretary of the Treasury to "modify or cancel the applicable security ... and return, in addition to any applicable interest, any cash previously deposited or bond posted as a security for the revoked provisional antidumping or countervailing duties, or reimburse the importer for the respective difference between the amount of the final duties and provisional duties."⁹⁵

The Foreign Trade Law of 1986 offered SECOFI a great deal of discretion when it published a final determination. SECOFI had the authority to determine whether a final determination would include a reasoned statement regarding the factors it took into account when determining injury. In other words, the Foreign Trade Law of 1986 did not require SECOFI to base its final determination on the information contained in the administrative record. Therefore, SECOFI could often "construct" a final determination by relying on privileged, confidential information that was not available to the public. In practice, however, SECOFI generally provided a statement justifying its actions when publishing the final determination in the *Diario Oficial*.⁹⁶

93 Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 11-12.

94 Article 59 of the Foreign Trade Law of 1993 gave SECOFI 260 days to publish the final determination.

95 Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 1010-1013.

96 Article 49 of the Foreign Trade Law of 1993 changed that practice in accordance with Chapter 19 of the NAFTA. SECOFI must now base a final AD/CVD determination solely on the administrative record that is available to the public.

Calculations Made by SECOFI: The Margin of Dumping and the Benefits Conferred by Subsidies

SECOFI's calculation methods are very similar under the Foreign Trade Laws of 1986 and 1993 and will be analyzed together in the next section. SECOFI calculates the amount of an ADD based on the margin of dumping. The margin of dumping is assessed by subtracting the normal value of a good in its home market from the price at which it is exported. The "normal" value or selling price refers to the list price paid or to be paid by independent purchasers outside of the Mexican market. It is calculated by one of three methods: (1) home-market sales, (2) third-country sales, or (3) constructed value.⁹⁷ Regardless of the method that SECOFI uses to establish the normal value of the good in question, it will calculate a weighted-average normal value for the entire period under investigation. The investigative period includes the period that begins on the date six months preceding the initiation of the investigation and ends on the date of initiation. SECOFI, at its own discretion, may extend this period to cover a representative time span subsequent to the initiation of the unfair trading proceeding.⁹⁸

Upon calculating the normal price of the good, SECOFI will turn to assess the export price of the merchandise as sold in the Mexican market to determine the margin of dumping. The export price is calculated by one of two methods: (1) the straight export-sales-price method, (2) the exporter's resale-price method.⁹⁹ It must be noted that SECOFI adjusts the calculated normal and export prices to account for different costs, expenses, and currency rates incurred by domestic and foreign producers. It makes a

⁹⁷ The home market sales method is used when sales of the good constitute 15% or more by volume of identical or similar merchandise sold by the foreign exporter in the Mexican market. Third-country sales will be used if home-market sales do not exist, or if such sales constitute fewer than 15% of the export sales made to the Mexican market. The constructed value is a hypothetical calculation used to provide a reasonable approximation for final selling price of a good, when home-market or third-country sales do not exist in sufficient quantities and in the ordinary course of trade.

⁹⁸ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 964-966.

⁹⁹ The straight export-sales-price method is used when the foreign exporter sells the good(s) in the Mexican market to independent or unrelated Mexican importers. In other words, the straight export-sales-price method is used when an independent Mexican importer purchases, or agrees to purchase, the foreign goods well before it/they are imported into Mexico. The exporter's resale-price method is used when the net list export sales price does not exist, or is not readily available, or when, at SECOFI's own discretion, the net list export sales price is not comparable with the normal value of the good. This generally occurs when the foreign exporter and the Mexican importer are related parties, or when some kind of compensatory arrangement exists between them. The export price is then determined on the basis of the price at which the imported products are resold for the first time to an independent or unrelated purchasers in the Mexican market. Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 971-973.

“symmetrical price comparison” between the goods sold in the country of origin and the Mexican economy by selecting a common point. The common point occurs when the merchandise is at the factory gate.¹⁰⁰ Therefore, the final margin of dumping is assessed by comparing the adjusted normal and export prices. SECOFI must render a negative dumping determination and terminate the investigation if it determines that the export price is equivalent to, or higher than, its normal value. Conversely, an antidumping duty equal to the margin of dumping may be placed on the good if the export price is lower than the normal value, and either caused or threatened to cause injury.

During a CVD investigation, SECOFI calculates the benefits conferred by a foreign subsidy by employing the “benefit-to-the-recipient” standard in accordance with the laws and practices of other members of the GATT/WTO. The “benefit-to-the-recipient” standard allows SECOFI to assess the degree of subsidization by comparing a hypothetical example where no subsidies were given with the actual situation under review. “Market benchmarks” are used by SECOFI to reflect the competitive and undistorted commercial activity that would exist in the absence of the identified foreign government subsidy. SECOFI determines market benchmarks by requesting the Mexican and foreign governments to provide prices, costs, and interest rates to reflect the economic activity that would occur without the presence of subsidies. After having constructed the benchmarks, SECOFI compares the hypothetical prices, costs, and interest rates with the preferential terms and conditions that are actually offered by the investigated foreign government in the country of exportation. Once it has determined the gross economic benefit attributable to the subsidy by establishing benchmarks, SECOFI is required to “deduct the total amount of any export taxes, duties, or other charges to which the exported merchandise was subject in the country of origin specially designed to offset the conferred subsidy,” to arrive at the net countervailable benefit by Article 38 of the Foreign Trade Law. SECOFI is then required to divide the resulting net countervailable benefit by the total volume of sales subject to investigation in order to calculate the final, net *ad valorem* subsidy rates that the Secretary of Treasury and Public Credit must collect from Mexican importers at the border if injury does, or threatens to, occur.¹⁰¹

¹⁰⁰ Craig R. Giesze, “Mexico’s New Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 974-979.

¹⁰¹ Craig R. Giesze, “Mexico’s New Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 990-991.

The Ways in which SECOFI Determines Injury

SECOFI uses a two-pronged test before levying an ADD/CVD. The first part of the test is to determine whether dumping or subsidization occurred by employing the methods explained above. The second prong of an investigation is to determine if the dumping or subsidization practices caused, or threatened to cause, injury to Mexican producers of similar goods. Article 39 of the Foreign Trade Law defines the concept of “injury” as:

[T]he loss or proprietary impairment of a national asset or the deprivation of any lawful and normal profit that the domestic industry producing the merchandise subject to investigation has suffered or may suffer, or the prevention of the establishment of new industries. The threat of injury is the imminent and clearly foreseeable danger of injury to the domestic industry. The determination of the threat of injury shall be based upon facts and not merely upon allegation, conjectures, or remote possibilities.

SECOFI employs a three step analysis during an injury determination. First, it seeks to identify the Mexican domestic producers who manufacture the subject merchandise for the purpose of establishing the legal contours of the competing Mexican “domestic industry.” A “domestic industry” that qualifies for an injury determination may be either “national” or “regional” in scope, but must include at least 25% of the domestic producers who create merchandise that is identical or similar to the goods being imported. Second, SECOFI attempts to determine whether the domestic industry is actually suffering from injury or from the threat of injury. This is done by analyzing financial and commercial information and data covering a three year period.¹⁰² Third, SECOFI works to determine whether a causal link exists between the dumped or subsidized foreign merchandise and the economic injury or threat of injury incurred by the domestic industry. Causality is considered by assessing whether there has been a significant increase in foreign imports during the six month investigative period. SECOFI also determines the effect that the volume of unfairly traded imports may have upon Mexican producers’ prices of the goods in question, and upon the overall economic health of such producers. Specially, SECOFI attempts to determine whether the volume of imports has contributed to price undercutting, price depression, or price suppression of the merchandise sold by Mexican domestic producers. SECOFI will generally conclude that a causal nexus does exist if a positive

¹⁰² Factors such as Mexican domestic output, sales, market shares, profits, productivity, returns on investment, capacity utilization, cash flow, inventory levels, employment, wages, ability to raise capital investment, production, and growth are analyzed for a three year period. A downward trend in all of those factors over one economic cycle within the three year period is a strong indicator that the industry is suffering injury.

relationship is found between increasing volumes of dumped or subsidized imports and depressed/suppressed Mexican prices, and/or if the economic health of the Mexican domestic industry is deteriorating.¹⁰³

SECOFI evaluates a number of factors to consider if Mexican industries are threatened with injury. In particular, Article 42 of the Foreign Trade Law requires SECOFI to consider:

- (1) An increase in the unfairly traded imports in the domestic market, demonstrating the likelihood of a substantial increase in such imports in the immediate future;
- (2) existing unused capacity in the production facilities of the exporter or an imminent and significant increase in that capacity;
- (3) importations made at prices that will have an adverse effect upon domestic prices, resulting in price depression of domestic prices or preventing prices from increasing;
- (4) inventories of the merchandise subject to investigation;
- (5) if applicable, the anticipated return on feasible investments; and
- (6) such other factors that the Secretary deems relevant.¹⁰⁴

In addition, the GATT Antidumping and Subsidy Codes require SECOFI to account for any other economic factor that could be responsible for the deteriorating or vulnerable economic conditions of the competing Mexican domestic industry in order to conclusively determine that a threat of injury exists.

Channels for Administrative Relief

The Foreign Trade Law of 1986 provided two administrative options that could be used prior to the publication of the final determination in order to avoid the imposition of duties. The practice was retained in the Foreign Trade Law of 1993. First, "interested" parties and/or representatives of foreign governments may request that SECOFI hold a "conciliation meeting" at any time between the preliminary and final determinations. The conciliation meeting is an opportunity for various interested parties to present "oral representations" aimed at finding a solution to the trade dispute. If a solution is found, SECOFI will publish a resolution in the *Diario Oficial* indicating that the investigation had been concluded. The second option allows exporters to use an "undertaking" (i.e., an agreement to adjust their prices or stop exporting goods into Mexico) to avoid the

¹⁰³ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 996-1001.

¹⁰⁴ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 1002.

imposition of a duty. Both SECOFI and the CACCE had to consent to the terms of an undertaking. A resolution outlining the terms of the undertaking was to be published in the *Diario Oficial*. SECOFI was required to monitor if foreign firms were complying with the undertaking. The investigation was to be resumed, and provisional duties levied, if the terms of the undertaking were violated.¹⁰⁵

Annual and "Changed Circumstances" Administrative Reviews

ADD/CVDs remain in effect for "such time and to the extent necessary to counteract the unfair trade practice that is causing injury, or threatening to cause injury, to the domestic industry" in Mexico's trade regulatory process. SECOFI is allowed to review antidumping or countervailing duties on an annual basis by the two Foreign Trade Laws. The purpose of the annual review is to determine the actual amount of the margin of dumping or subsidization to conclude if the ADD/CVD is sufficient enough to protect domestic producers or if the ADD/CVD is still applicable. Foreign firms are also allowed to petition SECOFI for an exclusion from the duties if they change their questionable trade practices. In other words, they may request that duties be revoked when the normal values and/or the amount of subsidization have been modified, and/or they no longer export goods into Mexico at dumped or subsidized prices.

Interested parties that may request a review include: (1) an interested party that actively participated in the investigation, (2) a non-participating producer, exporter, importer or foreign government. Requests for an annual or changed circumstances review have to be made in writing. After receiving a request, SECOFI determines if it was legally sufficient to warrant the initiation of an administrative proceeding. SECOFI is obliged to notify all interested parties (foreign and domestic) if it decides to undertake the review. All of the parties are to be given opportunities to participate in the investigation. SECOFI is to release its final determination within 260 days of officially publishing the initiation of the review. The final determination directs the Secretary of the Treasury to either continue collecting the duty, revise the amount of the duty that is collected, or revoke the duty. Revoking the duty results in a series of periodic reviews over a three year period to determine if it should be reinstated.¹⁰⁶

¹⁰⁵ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 13-14.

¹⁰⁶ Article 70 of the Foreign Trade Law of 1993 provided that the initial imposition of the antidumping or countervailing duty would be revoked if neither SECOFI nor any of the interested parties requested an annual or changed circumstances administrative review within a period of five years from the initial imposition of the duty.

Domestic Judicial Review in Mexico's Trade Regulatory Process

The Foreign Trade Law of 1986 was criticized because it was unable to provide judicial relief for foreign parties, and could not address the growing number of lawsuits and constitutional challenges that plagued the trade remedy regime.¹⁰⁷ Essentially, the Foreign Trade Law of 1986 provided for a two fold process of judicial review: (1) administrative review; and (2) judicial review.¹⁰⁸ The administrative review process was simply another SECOFI investigation. The purpose of the administrative review was to "reverse and revoke, modify, or uphold the contested administrative determination that initially established the final antidumping or countervailing duties, as well as the administrative acts pertaining to the collection of such duties, the legal grounds upon which such administrative acts are based, and the underlying administrative facts."¹⁰⁹ Article 24 of the Foreign Trade Law provided that judicial review could be used in the event that a Mexican party was unsatisfied with the administrative process. Judicial review of a final determination could be undertaken within the Upper Division of the Federal Tax Court and/or by the writ of Amparo. It must be noted that the process of judicial review could only be used after all administrative recourses to SECOFI had been exhausted.

(1) The Upper Division of the Federal Tax Court

The first form of judicial review that could be used to challenge a final determination was the Upper Division of the Federal Tax Court (or Federal Fiscal Tribunal). Only Mexican citizens had standing before the Court. Foreign firms could only appeal SECOFI determinations by the writ of Amparo in federal courts before 1993.

Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 1014-1015.

¹⁰⁷ The Foreign Trade Law of 1993 expanded the availability of judicial review for domestic and foreign interested parties who wished to challenge SECOFI's final determinations. In particular, foreigners could bring their cases before Mexican courts after 1993. More importantly, domestic and foreign firms could challenge SECOFI's final determination before a NAFTA panel. This will be explained in Chapter Four.

¹⁰⁸ Canada and the United States also use a two-pronged approach to judicial review. The administrative review process in Canadian AD/CVD determinations occurs when a redetermination of the Deputy Minister's decision is made by an administrative tribunal. The process of judicial review occurs before the Federal Court of Appeals and/or the Supreme Court. Similarly, the CIT performs the stage of administrative review in the U.S. CIT decisions may be appealed to higher appeal courts in the process of judicial review. Chapter 19 of the FTA and NAFTA added to the process of judicial review by allowing binational panels to replace domestic courts when reviewing the administrative decisions of the Deputy Minister, CIT, DOC, and ITC.

¹⁰⁹ Article 95 of the Foreign Trade Law of 1993.

Furthermore, the Court's decisions were only applicable to the party who initiated the appeal. This differed substantially from the Canadian and American appeal processes where the plaintiff's benefit was everyone's benefit. An appeal of AD/CVD determination could only be brought to the Upper Division of the Federal Tax Court after SECOFI's appeal process had been exhausted.

The standard of review that the Court used to review a final determination was contained in Sections 214, 219, and 237-239 of the Federal Fiscal Code. The Court still uses Articles 214, 219, 237-239 of the Code in the process of judicial review. Articles 214 and 219 of the Federal Fiscal Code restrict the Court to a consideration of the evidence that was before the administrative authority (e.g., SECOFI) when it formulated its decision.¹¹⁰ Article 237 requires that the Court base its decisions and orders upon law. The decisions and orders must also examine each of the issues that was explicitly raised by the complainants. The Court has interpreted Article 237 to mean that it may not annul or modify an act of an administrative authority that has not been expressly contested by the complainant. Article 238 provides that a decision may be challenged on broad grounds of procedural error, error of law, error of fact, and abuse of discretion. More specifically, Article 238 (1)-(V) commands the Upper Division of the Federal Tax Court to examine issues such as:

- (I) Lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued;
- (II) An omission of formal legal requirements by the agency or official issuing the challenged determination which affects the person's right of proper defence as well as the scope or meaning (outcome) of the challenged determination, or a failure of the agency or official to provide a reasoned determination based upon the record;
- (III) A violation or defect of procedure by the agency or official issuing the challenged determination which affects the person's right of proper defence as well as the scope or meaning (outcome) of the challenged determination;
- (IV) If the facts which underlie the challenged determination do not exist, are different from the facts cited by the agency, or were considered by the agency in an erroneous way, if the challenged determination was issued by the agency in violation of the applicable laws or rules, or if the correct laws or rules were not applied by the agency; and
- (V) Whenever a discretionary determination by an agency falls outside the lawful scope of that discretion.

The Court is to examine the five subsections of Article 238 in a consecutive or hierarchical order. By law, the Court must begin by examining whether an administrative

¹¹⁰ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 38-40.

agency violated one of the components of Article 238(I). The Court may only consider the remaining four subsections if it was satisfied that a ground under Article 238(I) was breached. In practice, the Court has held that the most important subsections to examine are Article 238 (I) and (IV).

Article 239 of the Federal Fiscal Code sets out what the Court may do after hearing a case. The Court may: (1) uphold the decision; (2) declare the decision null and void (i.e., reverse the decision); or (3) declare the decision null and void for certain reasons and ask SECOFI to reconsider specific parts of its determination (i.e., remand the decision). The Court's actions have depended on which part of Section 238 has been violated. Generally, the Court has declared a case to be a "nullity" if it involved the grounds of Articles 238 (I) and/or (IV). If a case is declared to be a "nullity," the determination in question is quashed and the entire proceeding must be terminated by the administrative agency. With respect to cases falling under Article 238 (II), (III), and (V), the Court has tended to remand those determinations to the agency for correction of the errors found. In other words, the Court has not quashed those determination nor has it terminated those proceedings. Instead, following the correction of the errors, the Court has normally allowed the agency to continue on with its investigation.

Decisions of the Upper Division of the Federal Tax Court may be appealed to the Mexican Court of Appeals. Those decisions may be appealed further to the Mexican Supreme Court. However, the Mexican Supreme Court rarely entertains judicial decisions in AD/CVD matters. Instead, the Court will almost always defer to lower courts that are more familiar with technical trade laws. The Court will hear appeals that deal with constitutional issues.

(2) The Writ of Amparo

The writ of Amparo is an appeal process that is intended to protect the individual from governmental actions and decisions. It is based on a core principle of Mexico's judicial system which stipulates that state organs and administrative agencies may only do that which they have been expressly authorized by law. Therefore, the Amparo is aimed at allowing members of society to curb undue and/or illegitimate exercises of state power.¹¹¹ The Constitution of 1917 and Law of Amparo stipulate that the Amparo is to perform a number of different functions such as: (1) protection of individual rights and guarantees; (2) testing allegedly unconstitutional laws; (3) contesting judicial decisions; and (4)

¹¹¹ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 30, 33-34.

challenging administrative acts and determinations. For example, Article 14 of the Constitution sets out that the Amparo is a constitutional right of any Mexican. Article 16 of the Constitution requires that officials must demonstrate the competency of their jurisdiction and to justify the legal basis on which their determination was made. Article 103 of the Constitution provides that an Amparo may be used to challenge the decisions or actions of an "authority." The Law of Amparo defines an "authority" as "one who promulgates, publishes, orders, executes or tries to execute the law or act against which the Amparo action is brought." The Supreme Court has argued that an "authority" is an employee of the State that uses civic force to impose its decisions. In this way, an Amparo may be invoked against any officials, agencies and authorities of the executive branch of government.¹¹²

There are two types of Amparo. The first type is the "Legality Amparo" and is used to challenge judicial and administrative actions or decisions. The Legality Amparo may be direct or indirect. A direct Amparo is initiated in cases where a final decision or judgment has been rendered by a court, board, or administrative tribunal (e.g., the Federal Fiscal Court). An indirect Amparo is brought in cases where the administrative act has not been finalized in a judicial decision. Placed in the context of an AD/CVD investigation, a decision released by SECOFI may be appealed under an indirect Amparo because it has not been finalized by a court such as the Federal Fiscal Tribunal. Once an appeal is heard by the Court, the decision has been finalized and may be subjected to a direct Amparo. Direct Amparos account for more than 80% of all Amparo actions initiated. The second type of Amparo is the "Constitutionality Amparo." It is used to challenge an offending statute or regulation. This can be done by either attacking the constitutionality of the law itself, or the legality of a judgment that invokes the statute or regulation in question. This type of Amparo is unlikely to be initiated to attack the workings of Mexico's trade remedy regime.¹¹³

Article 107 of the Constitution and Article 73 of the Law of Amparo stipulate that Amparo may only be used after all other appeal channels have been exhausted.

¹¹² Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 20-23; Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo," *California Western International Law Journal*, Vol. 9 (1979), 316-317; Carlos del Rio Rodriguez, "Judicial Review from a Mexican Perspective," *California Western International Law Journal*, Vol. 20, No. 1 (1989), 13-15; Martin C. Needler, *Mexican Politics: The Containment of Conflict 2nd Ed.* (New York: Praeger Publishers, 1990), 90.

¹¹³ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 24-25.

Furthermore, an Amparo action cannot be brought by a party that has consented to an act of an administrative authority. For example, if a party has not challenged a SECOFI determination within the time frames set out by Article 95 of the Federal Tax Code, the determination will be regarded as “accepted” and may not be challenged by an Amparo action. Articles 14 and 16 of the Constitution set out the grounds for review in an Amparo proceeding in the event that one may be initiated. They include the denial of due process of law in any of the former proceedings or the misapplication of the substantive law by the lower court or administrative authority. The scope of review of the contested act or decision is restricted to a consideration of the legality of the act or the decision. The judge is bound by the terms of the complaint and cannot go outside these parameters to reach a decision. This principle is referred to as “Amparo strict law.” Similarly, Article 78 of the Law of Amparo provides that the challenged act or decision shall be considered by the Amparo court on the same basis as by the administrative or judicial authority. New evidence or substantiating documentation may not be introduced. *De novo* review does not occur. The facts of the case are reviewed only to the extent that they have a bearing on the decision.¹¹⁴

Parties to an Amparo proceeding consist of the petitioner (“injured party”), the respondent authorities, interested third parties, and the Federal Public Minister. Article 72 of the Law of Amparo requires that the petitioner or injured party establish a legal interest and that the injury sustained be direct and personal. In the context of AD/CVD investigations, “injured parties” are those who have paid an ADD/CVD. Therefore, an exporter would generally be precluded from initiating an Amparo action against SECOFI because its injuries would only be indirect, and would have resulted only as a consequence of the direct injury incurred by the domestic producer (i.e., the duty that they pay when purchasing foreign goods that were dumped into the Mexican market or subsidized in their home market). Respondent authorities are those accused of violating the petitioner’s legal or constitutional rights. They are called “those responsible” because they not only execute, but may order, the questionable action that is the subject of the Amparo Proceeding. The interested third party is one who has an interest in preserving and perpetrating the act in contention.¹¹⁵

¹¹⁴ Joanne Osendarp, “Legal and Administrative Regulation of Unfair Trade Practices,” (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 26-28; Hector Fix Zamudio, “A Brief Introduction to the Mexican Writ of Amparo,” *California Western International Law Journal*, Vol. 9 (1979), 325-326.

¹¹⁵ Joanne Osendarp, “Legal and Administrative Regulation of Unfair Trade Practices,” (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 28; Hector Fix Zamudio, “A Brief Introduction to the Mexican Writ of Amparo,” *California Western International Law Journal*, Vol. 9 (1979), 336-337.

Amparo suits may be heard in the Mexican Supreme Court, the Collegiate Tribunals, or the Federal District Courts.¹¹⁶ Articles 103 and 107 of the Constitution set out the procedures that govern an Amparo action. The Amparo procedure is entirely written. It is initiated by the presentation of a claim which detail the facts as they relate to the violation being alleged, the grounds for review, the injury sustained, and arguments of law. The Law of Amparo gives a judge discretion to refuse a claim if it is not substantiated. In certain instances, the judge may "supplement the demand" or correct any errors or deficiencies in the claim. If the claim is accepted by the court, the responding authority is notified and given time to respond. Both the private party and authoritative agency are on equal footing throughout the action; neither is given preferential treatment. However, the burden of proof is on the authoritative agency to demonstrate the legality or constitutionality of its actions and decisions. Respondents must not merely deny the allegations set out in the claim, but must justify the authority's position by providing documentary evidence. If the authority under examination does not respond, it is automatically presumed to be guilty. It should be noted that the Amparo process contains a remedy known as "suspension of the act complained of," which is similar to an injunction in the Canadian or American legal systems. The point of the remedy is to preserve the rights of the petitioner until a final judgment is reached and to avoid the infliction of further, irreparable harm.¹¹⁷

The Court's final decision is based on written evidence provided by both parties. It may affirm, revoke, or modify the authority's determination. Judgments must contain a clear statement of the acts complained of, the evidence proving or disproving the acts, and legal basis for the judge's decision. It must be noted that Amparo decisions only affect the individuals who bring the actions forward. Article 80 of the Law of Amparo requires the authority to take all necessary actions to restore the legal position of the parties if the Amparo judge rules against it. For example, SECOFI would be required to return a duty that was collected prior to the initiation of the Amparo action if a party was successful in having an AD/CVD determination revoked. Similarly, Article 107 of the Constitution provides that if the administrative authority fails to comply with the decision, the responsible official shall be immediately removed from office and taken before the

¹¹⁶ The forum is determined by the type of Amparo action being brought.

¹¹⁷ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 29-33; Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo," *California Western International Law Journal*, Vol. 9 (1979), 329-339.

appropriate Federal Court Judge. Amparo decisions may be reviewable by higher courts in certain circumstances. Appeals are referred to as an "Amparo en revision."¹¹⁸

Critiques of the Mexican Trade Regulatory Process before 1993

The Mexican system of laying ADDs/CVDs was criticized for being very unpredictable and arbitrary. In particular, very little warning was offered to foreign firms when investigations were being administered by SECOFI, thereby causing the system to lack transparency and due process. Indeed, the domestic petitioner's claim was not circulated to foreign producers or governments as matters of law and practice prior to December, 1993. Moreover, SECOFI was not required to share its documents or reasoning with "interested" parties during an investigation if it did not wish to do so until the new Foreign Trade Law of 1993 was passed. For example, SECOFI published a legal notice in the *Diario Oficial* on April 15, 1993 regarding the initiation of a number of dumping investigations and duties on 75% of exports from the People's Republic of China without any advance notice. The ADDs ranged from 1,105% for footwear articles, to 533% for apparel items, to 351% for toys, and 129% for television sets and other electronic equipment. Nevertheless, SECOFI did not realize that the imposition of those duties adversely affected many important American retailers that had established manufacturing facilities and business operations in China. Therefore, the lack of any advance notice informing American retailers of the duties severely disrupted their business operations. The majority of American businesses did not become aware of the AD action until Mexican customs officials had embargoed their goods at the relevant Mexican port of entry.¹¹⁹

Foreign and domestic firms argued that SECOFI had too much discretion during AD/CVD investigations before 1993. Many argued that the injury criteria of the Foreign Trade Law of 1986 was so broad that it was almost impossible to disprove the presence or threat of injury even if only a single market competitor had been affected by the foreign good(s).¹²⁰ Similarly, SECOFI was able to levy a duty at any time during an investigation

¹¹⁸ Joanne Osendarp, "Legal and Administrative Regulation of Unfair Trade Practices," (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 33; Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo," *California Western International Law Journal*, Vol. 9 (1979), 345.

¹¹⁹ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 934-935.

¹²⁰ Peter F. McLaughlin, "Mexico's Antidumping and Countervailing Duty Law: Amendable to a Free Trade Agreement," *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1025; Ernesto Rubio del Cueto, "Countervailing Duties Affecting United-States Mexican Trade," *Houston Journal of International Law*, Vol. 23, No. 3 (1990), 330.

if it felt that there was a “sufficient justification” for doing so prior to 1993.¹²¹ However, SECOFI was not required to put its reasoning on the administrative record until 1993. Consequently, SECOFI officials had complete discretion when deciding what information should be included in, or excluded from, the administrative record to substantiate the claim that there was “sufficient justification” for a duty.¹²² Moreover, critics argued that what was written in Mexico’s foreign trade laws or regulations did not always correspond to how SECOFI actually administered the law. SECOFI had so much discretion over the application of the laws that it could change practices and procedures unilaterally. For example, according to the Foreign Trade Law of 1986, SECOFI was required to complete its AD/CVD investigation within six months. In practice, SECOFI usually took between fifteen and twenty-one months to complete the investigation once the petition was filed. SECOFI’s ability to stall the investigations placed exporters at a disadvantage by creating legal uncertainty about deadlines, and by requiring them to pay duties while SECOFI made its final determination.¹²³

The Mexican system was also criticized for being very hard to understand. Interestingly, more than half of the investigations between 1990-1992 were initiated by the agency itself. Mexican firms were hesitant to invoke the procedures for fear that they would not improve their situation. Mexican producers were equally as uncertain regarding how the laws would be applied, what they required, and how procedures would be conducted, as foreign firms were.¹²⁴ Perhaps the most important reason that the Mexican system was so hard to understand was because Mexico’s civil law tradition. With the exception of the concept of “jurisprudencia,” Mexican courts are not bound by precedents as are Canadian and American courts.¹²⁵ Therefore, the lack of binding precedents denied foreign and domestic firms the assurance that their case would be decided in the same manner as cases decided before it. The lack of binding precedent compounded the great deal of discretion enjoyed by SECOFI during AD/CVD investigations.

¹²¹ Joanne Osendarp, “Legal and Administrative Regulation of Unfair Trade Practices,” (Department of Foreign Affairs and International Trade, Ottawa: Unpublished, 1992), 10.

¹²² Gilbert R. Winham, Heather A. Grant, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA, and Beyond,” *Minnesota Journal of Global Trade*, Vol. 3, No. 1 (Spring, 1994), 25.

¹²³ Gilbert R. Winham, Heather A. Grant, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA, and Beyond,” *Minnesota Journal of Global Trade*, Vol. 3, No. 1 (Spring, 1994), 24-25, 29.

¹²⁴ Peter F. McLaughlin, “Mexico’s Antidumping and Countervailing Duty Law: Amendable to a Free Trade Agreement,” *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1026.

¹²⁵ “Jurisprudencia” refers to a situation in which a court has ruled on the same point of law in five successive decisions by a specified minimum number of majority votes. If this occurs, it, and all lower courts, will be bound by the ruling.

Foreign firms criticized the Foreign Trade Laws of 1986 and 1993 for being dominated by politics and for being biased towards Mexican producers. The presence of politics within Mexico's AD/CVD regime was encouraged by the fact that SECOFI was a branch of the Mexican DOC. SECOFI's determinations were influenced by the CACCE, an interagency working group consisting of officials from SECOFI and other executive agencies. Therefore, SECOFI's determinations were not made independently from the government. Because of the power of Mexico's ruling party, the Partido Revolucionario Institucional (PRI), SECOFI officials would be directly appointed by, and loyal to, those in authority over them. Consequently, SECOFI's determinations were criticized as inherently political because of the close ties that SECOFI officials had with other governmental agencies.¹²⁶ Similarly, SECOFI was influenced by the Coordinadora de Organismos Empresariales de Comercio Exterior (COECE). Created in 1990, the COECE was to link the executive branch and private sector in the policy and trade law making process. The COECE represented 114 sectors of the economy and 16 business associations. The leaders of the COECE shared ideological perspectives, personnel, and policy positions with members of SECOFI and enjoyed a "tight" relationship with them. Many of SECOFI's decisions were sympathetic to the interests of members of the COECE, which added to the politically charged, biased nature of SECOFI's investigations.¹²⁷

In addition, many American producers argued that SECOFI's procedures and tests were biased in favour of Mexican producers because they generally resulted in the imposition of duties even if American producers were not guilty of the alleged charges. American producers charged that they could not provide the necessary information required by SECOFI's questionnaires as quickly as Mexican firms could. Therefore, SECOFI based its decisions on incorrect, biased information which placed foreign competitors at a significant disadvantage.¹²⁸ In much the same way as the DOC and ITC relied on the "best information available," SECOFI generally used the information given to it by the domestic producer in the petition. As a result, foreign exporters were placed at a

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- ¹²⁶ Gilbert R. Winham, Heather A. Grant, "Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA, and Beyond," *Minnesota Journal of Global Trade*, Vol. 3, No. 1 (Spring, 1994), 29.
- ¹²⁷ Guy Poitras, Raymond Robinson, "The Politics of NAFTA in Mexico," *Journal of InterAmerican Studies and World Affairs*, Vol. 36, No. 1 (Spring, 1994), 17.
- ¹²⁸ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 932; Ernesto Rubio del Cueto, "Countervailing Duties Affecting United-States Mexican Trade," *Houston Journal of International Law*, Vol. 23, No. 3 (1990), 330.

disadvantage when SECOFI resorted to the “information available to the Secretary,” because the alleged margins of dumping or subsidization tended to be very high.¹²⁹

Perhaps the most serious critique of the Mexican trade remedy regime was that it violated Mexico’s international obligations in the GATT. Mexico’s Foreign Trade Law of 1986 did not contain an injury test as required by Article VI of the GATT and the Antidumping and Subsidy Codes of 1979. The new Foreign Trade Law of 1993 acted to compensate for the omission and required SECOFI to conduct an injury test before levying ADDs/CVDs. However, trade experts argued that the injury test of the Foreign Trade Law of 1993 was not compatible with the GATT because SECOFI did not have to prove economic injury in every investigation in order to impose an ADD/CVD. Article 29 of the new Foreign Trade Law provided that:

[T]he injury or threat-of-injury test shall be granted and applied to the merchandise subject to investigation, provided that reciprocity exists in the country of origin or the country of exportation of the subject merchandise. In cases in which such reciprocity does not exist, the Secretary may impose the corresponding antidumping or countervailing duties, without proving injury or the threat of injury.

In other words, Article 29 allowed SECOFI to overlook important provisions of the GATT (e.g., Articles I and VI of the GATT, Articles 2 and 6 of the Subsidy Code) in the event that a foreign country did not have a trade remedy regime and/or similar injury test. Many have noted that this argument may be a moot or academic point because the Mexican government pledged that SECOFI would always conduct an injury test regardless of the letter of Mexico’s trade laws before a GATT working group in 1985. Moreover, SECOFI was required to conduct an injury test by the reciprocity principle of Article 29 of Foreign Trade Law of 1993 when conducting AD/CVD investigations of Canadian and American firms because injury tests were used in those two countries. Nevertheless, the Foreign Trade Laws still violated GATT laws because they only required that SECOFI showed the existence of “injury” instead of the existence of “material injury” as required by the GATT. In this way, the exclusion of the word “material” allowed SECOFI to apply ADDs/CVDs in an easier manner than other GATT members.¹³⁰

¹²⁹ Craig R. Giesze, “Mexico’s New Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 1007-1008.

¹³⁰ Craig R. Giesze, “Mexico’s New Antidumping and Countervailing Duty System,” *St. Mary’s Law Journal*, Vol. 25, No. 3 (1994), 945-950.

The Dispute Settlement Mechanisms of the GATT

The dispute settlement mechanisms of the GATT were the only international forum that could be used to contest a final AD/CVD determination of administrative agencies in Canada, Mexico, or the United States prior to the creation of Chapters 19 of the FTA and NAFTA. Foreign governments could request that a dispute settlement panel be convened pursuant to Articles XXII-XXIII of the GATT and/or the dumping and subsidies code on behalf of a domestic producers in the event that they felt that another country's trade remedy laws had been used against them unfairly.

In the same way as the GATT evolved into a permanent multilateral international agreement, the dispute settlement mechanisms of the GATT also evolved as the Contracting Parties sought to balance the politics and rules intimately involved in the global trading environment. In addition to the major Articles pertaining to the settlement of trade disputes in the Agreement (i.e., Articles XXII, XXIII), supplementary rules were agreed upon in 1955, 1966, 1979, and 1982 as members of the GATT sought to negotiate additional dispute settlement rules and procedures so as to enhance the effectiveness of the GATT's legal system.¹³¹ Similarly, two of the most important objectives of the Uruguay Round of

¹³¹ On October 6, 1955, the Executive Secretary of the GATT released a note entitled "Considerations Concerning the Extended Use of Panels" in which the tradition of using panels to settle disputes arising out of the GATT was entrenched into the Agreement. In 1966, the GATT Committee on Legal and Institutional Framework created an Ad Hoc Group on Legal Amendments to Article XXIII. Its report of April 5, 1966 dealt with how the mechanisms could be improved to ensure that less developed countries could make good use of them. In 1979, the GATT Subsidies and Countervailing Codes and GATT Antidumping Codes codified a number of changes to the dispute settlement processes arising out of AD/CVD laws. Also in 1979, the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance was released to improve and refine the GATT dispute settlement mechanisms. At the 1982 Ministerial Meeting of the GATT, a roster of non governmental experts was established from which to select dispute panels. In addition, the Director-General of the GATT was authorized to draw on the roster of panelists in the event of a deadlock over panel selection. The 1984 CP Ministerial Meeting pointed to the need for clear understandings on dispute time frames, approval of panel decision, and surveillance. For summaries of the above amendments to the GATT, see: Ernst-Ulrich Petersmann, "Improvements to the Functioning of the GATT System including Dispute Settlement," in Thomas Oppermann, Josef Molsberger (eds), *A New GATT for the Nineties and Europe '92* (Baden-Baden: Verlagsgesellschaft, 1991), 113-118; Ernst-Ulrich Petersmann, "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations 2nd ed* (Deventer: Kluwer Law and Taxation Publishers, 1991), 324, 331; A. Jane Bradley, "Implementing the Results of GATT Panel Proceedings" in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations 2nd Ed* (Deventer: Kluwer Law and Taxation Publishers, 1991), 347.; Robert H. Hudec, *The GATT Legal System and World Trade Diplomacy 2nd Ed* (Salem: Butterworth Legal Publishers, 1990), 324-325; John H. Jackson, *Legal Problems of International Economic Relations* (St. Paul: West Publishing Company, 1977), 429-430; William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal*, Vol. 11, No. 1 (1987),

Multilateral Trade Negotiations were to improve and strengthen the GATT dispute settlement system.¹³² Major improvements were made to the entire dispute settlement process by the adoption of the World Trade Organization (WTO) to ensure that its members adhered to their trading obligations.

Articles XXII and XXIII of the GATT

While there was no single or general dispute settlement mechanism (DSM) in the General Agreement prior to the WTO, the mechanisms for solving trade disputes were essentially contained in Articles XXII and XXIII of the GATT. Articles XXII and XXIII combined a power-oriented approach with a rule-based approach to dispute settlement. Not only did the Articles attempt to secure the fulfillment of the agreed upon rules of the Agreement, but they attempted to settle trade disputes by diplomatic negotiation and consultation as well.¹³³ The central features of Articles XXII and XXIII were consultation, notification, dispute settlement, and surveillance.¹³⁴ Article XXII required that "each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding ... any matter affecting the operation of this agreement." Therefore, government level consultations were to be the first means to settle a trade dispute between two or more Contracting Parties of the GATT. This practice has remained in the DSMs of the WTO. Over the GATT's history of dispute settlement, one-half of the trade disputes arising out of the Agreement were settled by negotiation and consultation.¹³⁵ Hilf explained that the members of the GATT traditionally preferred to

57-58; Frank Stone, *Canada, The GATT, and the International Trade System* (Halifax: The Institute for Research on Public Policy), 211-212.

132 For statements outlining the objectives for strengthening the dispute settlement provisions of the GATT in the Uruguay Round see the 1986 Ministerial Declaration on the Uruguay Round in *Basic Instruments and Selected Documents* 33rd Supplement (Geneva: The Contracting Parties of the General Agreement on Tariffs and Trade, 1987) and the Mid-Term Review Agreements Adopted By the Trade Negotiations Committee on 8 April 1989 in *GATT Activities 1988* (Geneva, 1989). The Aims of the 1986 Declaration are summarized by Rudolf Dolzer, "The Philosophy of the Declaration of Punta del Este," in Thomas Oppermann, Josef Molsberger (eds), *A New GATT for the Nineties and Europe '92* (Baden-Baden: Verlagsgesellschaft, 1991), 33-54.

133 Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* 2nd ed (Deventer: Kluwer Law and Taxation Publishers, 1991), 290; William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal* Vol. 11, No. 1 (1987), 65-81.

134 Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* (Boston: Martinus Nijhoff Publishers, 1985), 72-73, 79.

135 Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement

settle disputes by consultation and negotiation because of the advantages that those means of dispute settlement offered them. By using the diplomatic and political tools of consultation and negotiation, members could control the dispute settlement process and the outcome of that process. In addition, they were assured that the result would have maximum acceptability and would not impede on-going long-term cooperative relations.¹³⁶ However, members of the GATT gradually moved towards a rule-oriented, institutionalist approach to dispute settlement during the 1970s, to protect their national interests from the rise of protectionism in the global trading environment.¹³⁷

Article XXIII of the GATT set out a loose framework of how disputes were to be processed in the event that governmental negotiations and consultations failed to produce an amicable settlement to the dispute. The loose framework of Article XXIII was developed by the 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (i.e. the 1979 Understanding), the 1979 Subsidies and Countervailing Duties Code, the 1979 Antidumping Code, the 1982 Ministerial Declaration, and ultimately by the WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" (1994).¹³⁸ The following account of the dispute process will incorporate the process and procedures instituted by those documents. It must be remembered, however, that the WTO effectively replaced the provisions of the GATT. Therefore, its provisions are the ones according to which disputes will be settled from now on. Nevertheless, it is important to understand the processes and mechanisms that were in place before the WTO came into force, because they were the ones that supplemented the domestic trade remedy regimes in

Procedures," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* 2nd ed (Deventer: Kluwer Law and Taxation Publishers, 1991), 302. A comprehensive record of all of the disputes settled by GATT mechanisms is given by Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem: Butterworths Legal Publishers, 1993).

136 Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* 2nd Ed (Deventer: Kluwer Law and Taxation Publishers, 1991), 302-303.

137 Ronald A. Brand, "Competing Philosophies of GATT Dispute Resolution in the Oilseeds and the Draft Understanding on Dispute Settlement," in *World Trade Materials- Journal of World Trade*, Vol. 5, No. 5 (1993), 120-122; Timothy M. Reif, "Coming of Age in Geneva: Guiding the GATT Dispute Settlement System on Review of Antidumping and Countervailing Duty Proceedings," in *Law and Policy in International Business*, Vol. 24, No. 4 (1993), 1188; Robert Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business," *Cornell International Law Journal*, Vol. 13, No. 2 (1980), 153-155; John H. Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relations Press, 1990), 49.

138 The WTO "Understanding on Rules and Procedures Governing the Settlement of Disputes" will be referred to as the WTO Understanding for the remainder of the Chapter.

North America before 1989. The dispute settlement process of the GATT is summarized in Appendix F.

Nullification and Impairment

Article XXIII:1 of the GATT provided that a Contracting Party could launch the dispute settlement process if it believed that a benefit was “nullified or impaired” as a result of another member’s breach of obligation. Nullification and impairment generally meant that harm or injury had occurred to a member or one of its domestic producers. Nullification and impairment were also said to have occurred if the reasonable expectations of a GATT member were not fulfilled after trading opportunities and benefits were reached in trade negotiations. It must be emphasized that nullification and impairment had to have occurred in order for a Party to initiate the dispute process of Article XXIII. Failure to carry out GATT obligations alone was neither a necessary nor sufficient prerequisite to Article XXIII action. Harm and/or injury must have occurred.¹³⁹

When a GATT right and/or obligation had been nullified or impaired, the complaining party could ask either the entire body of the Contracting Parties or the GATT Council¹⁴⁰ to establish a panel of independent experts to study the dispute and give recommendations to the disputing parties.¹⁴¹ Article XXIII and the 1979 Understanding did not give GATT members the absolute right to establish a panel. Indeed, the party that was being complained against could argue that the appointment of a panel would have been premature or otherwise inappropriate. Nevertheless, panels were virtually always established if requested, assuming that the request was vigorously pursued by a

¹³⁹ John H. Jackson, “The Jurisprudence of International Trade,” *American Journal of International Law*, Vol. 72 (1978), 754-755.

¹⁴⁰ The GATT Council of Representatives (i.e., the Council) is the intersessional body of the members of the GATT and meets nine-twelve times each year. It is composed of representatives from any Party that wishes to become a member. The Council has the authority to address all questions dealt with by the entire membership of the GATT. It also possesses the authority to address any urgent matters arising out of the operation of the GATT. Finally, it is authorized to create subsidiary bodies such as committees, panels, and working groups as it deems necessary. Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* (Boston: Martinus Nijhoff Publishers, 1985), 47-48.

¹⁴¹ It should be noted that the members of the GATT do not have to use panels to settle trade disputes. They may make rulings and recommendations on matters in dispute, and may therefore implement their own decisions. As Olivier Long states, “the extent to which the panel system is used depends on its effectiveness. Confidence is the key factor. It is not easy for governments to agree that a contentious issue ... should ... be handed over for examination to an international forum.” Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* (Boston: Martinus Nijhoff Publishers, 1985), 85.

complaining party.¹⁴² The 1979 Codes dealing with Subsidies, Countervailing Duties, and Antidumping Duties conferred the unqualified right to have a panel appointed.¹⁴³ However, great delays often resulted between the time of the request for a panel and the establishment of a panel. Article Five of the WTO Understanding acted to solve that problem by stipulating that panels must be convened within 60 days of when consultations failed to settle the dispute.¹⁴⁴

The Dispute Panels of the GATT

The dispute panels of the GATT were composed of three to five members. That practice was retained in the WTO. GATT panel members were generally governmental officials who were based in Geneva, and were responsible for overseeing their country's GATT business. When deciding upon a trade dispute, panelists were not to serve as governmental representatives but were to serve as independent experts. Until the institutionalization of the 1979 Understanding and AD and CVD Codes, a disputing party's own nationals often served on the panel overseeing the dispute. However, Article 18(3) of the 1979 Subsidies and Countervailing Duties Code changed that practice by stating, "it is understood that citizens of countries whose governments are parties to the dispute would not be members of the panel concerned with that dispute," to decrease the potential of power politics entering the dispute settlement process. Article 8 of the WTO's Understanding built on that practice by barring citizens of governments who were parties to the particular dispute from serving on dispute panels, unless the disputing parties agreed otherwise.¹⁴⁵ Lowenfeld questioned this tradition and argued that it was good to have panelists who asserted the interests of their government or state and/or were knowledgeable about those interests during the dispute settlement process. Interested citizens and governmental officials could offer valuable information about the complicated legal and administrative environments in which trade policy was made in each country. If the panels equally represented the disputing parties, Lowenfeld explained that it could be extremely helpful to have one panelist from each party to guide the others, "through the maze of law,

¹⁴² William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 58-59.

¹⁴³ Article 18(1) of the 1979 Subsidies and Countervailing Code and Article 15(5) of the 1979 Antidumping Code.

¹⁴⁴ Andreas Lowenfeld, "Remedies Along With Rights: Institutional Reform in the New GATT," in *American Journal of International Law*, Vol. 88, No. 3 (July, 1994), 482.

¹⁴⁵ Department of Foreign Affairs and International Trade, "Agreement Establishing the World Trade Organization- Canadian Statement of Implementation," in *Canada Gazette* Part I, (January 1, 1995), 4942.

tradition and custom that goes into many trade or trade related measures emanating from” other members of the GATT/WTO.¹⁴⁶

The Director-General¹⁴⁷ of the GATT selected panelists from an informal roster of experts within 30 days of the request for a panel. The 1979 Understanding and the 1982 Ministerial Declaration set out that the disputing parties could only reject the panelists named by the Director-General within seven days of their appointment if they had “compelling reasons” to do so.¹⁴⁸ Article Eight of the WTO Understanding provides that the Secretariat of the WTO will nominate panelists to hear disputes arising out of the new multilateral rules. The parties to the dispute will then formally agree to the actual members who will serve on the panel.¹⁴⁹ The WTO Understanding also provides that a panelist must be “well qualified” in order to participate in the dispute settlement process. A “well qualified” panelist is one who may have been previously involved in a panel proceeding, served as a trade official or in the GATT secretariat, or taught or written about international trade law and/or policy. A well qualified panelist does not need to be a lawyer. In fact, the majority of panelists were not lawyers until the creation of a legal department of the GATT during the 1980s. Pescatore noted that the GATT was gradually discovering the virtues of the law and lawyers by appointing more lawyers to panels. The use of lawyers had facilitated a significant improvement in the style and content of panel reports.¹⁵⁰

Once appointed, GATT panels were given the mandate to assist the Contracting Parties in settling the dispute by making “an objective assessment of the matter before it,

¹⁴⁶ Andreas Lowenfeld, “Remedies Along With Rights: Institutional Reform in the New GATT,” in *American Journal of International Law*, Vol. 88, No. 3 (July, 1994), 483.

¹⁴⁷ The Director-General of the GATT acts as the chief administrative and executive officer of the multilateral agreement. The duties of the Director-General include acting as the guardian of the GATT, initiator of solutions, conciliator and negotiator, and manager of the GATT. Despite being the chief administrative and executive officer of the GATT, the Director-General has the power of persuasion only. It should be noted that the powers and mandates of the Director-General are not explicitly enumerated in the GATT and have therefore developed empirically. Consequently, the personality and management style of the Director-General are important in determining what his or her approach to the position will be. Furthermore, they are important in determining the amount of success the Director-General will have in fulfilling his or her duties.

Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* (Boston: Martinus Nijhoff Publishers, 1985), 53.

¹⁴⁸ Andreas Lowenfeld, “Remedies Along With Rights: Institutional Reform in the New GATT,” in *American Journal of International Law*, Vol. 88, No. 3 (July, 1994), 483.

¹⁴⁹ Department of Foreign Affairs and International Trade, “Agreement Establishing the World Trade Organization- Canadian Statement of Implementation,” in *Canada Gazette Part I*, (January 1, 1995), 4942.

¹⁵⁰ Pescatore explains that the “ideal” panel should be chaired by a “qualified lawyer” (i.e., one who is knowledgeable on international trade law and conversant with the art of legal drafting) The lawyer should then be surrounded by 2 trade experts.

Pierre Pescatore, “The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects,” in *The Journal of International Arbitration*, Vol. 10, No. 1 (1993), 31.

including an objective assessment of the facts of the case and the applicability of, and conformity with, the General Agreement.”¹⁵¹ In fulfilling its mandate, the panel “received written and/or oral submissions from the contending parties and could receive submissions from other interested parties.”¹⁵² GATT panels were assisted by the GATT Secretariat¹⁵³ when deciding upon a dispute. Trade experts in the Secretariat’s legal division assembled the facts and relevant documents required for the panel’s decision, and prepared draft reports. In addition, the Secretariat cited precedents of past and present GATT practice to aid the panelists in making their decision.¹⁵⁴ Panels under the WTO have more extensive abilities to seek information and technical advice from other experts, persons and/or bodies when making their decisions. Appendix 4 of the Understanding sets out a mechanism for a panel to obtain the assistance of an expert review group in matters relating to scientific or technical issues.¹⁵⁵

GATT panels made a preliminary report to the disputing parties after studying the dispute. The panels also invited the parties to comment on its report and to negotiate to find a mutually acceptable solution. The disputing parties could either settle the dispute or request that another panel be convened to clarify the conclusions of the first. In this way, the reports issued by the GATT panels were not automatically binding in force and were generally viewed as simply being advisory opinions.¹⁵⁶ If no acceptable solution was reached within 19 days after the reception of the preliminary report, the panel would issue a final report within six months of the lodging of the complaint. The final report was either directed to the GATT Council or to the entire membership of the GATT based upon the panel’s consideration of the comments offered by the disputing parties. The report of the panel generally resolved the major issues raised by the contending parties. If nullification and impairment were found, the panel report would generally recommend that the

¹⁵¹ Article 16 of the 1979 Understanding.

¹⁵² William Davey, “Dispute Settlement in the GATT,” *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 59.

¹⁵³ The GATT Secretariat is not mentioned in the GATT and has developed empirically. It has assumed the attributes of a secretariat of an organization in the UN System on a *de facto* basis. The GATT Secretariat is based in Geneva, and employs approximately 300 persons to facilitate the efficient operation of the GATT system. Frank Stone, *Canada, the GATT, and the International Trade System* (Halifax: The Institute for Research on Public Policy, 1992), 24.

¹⁵⁴ Andreas Lowenfeld, “Preface,” in Pierre Pescatore, William J. Davey, Andreas Lowenfeld (eds), *Handbook of GATT Dispute Settlement* (Irvington-on-Hudson: Transnational Juris Publications, Inc., 1992), xv.

¹⁵⁵ Department of Foreign Affairs and International Trade, “Agreement Establishing the World Trade Organization- Canadian Statement of Implementation,” in *Canada Gazette* Part I, (January 1, 1995), 4943.

¹⁵⁶ Panel decisions may be binding upon the disputing parties if they agree to binding arbitration when the panel is being convened.

offending measure be removed, or if that was not possible, that the injured party be compensated. As a last resort, the panel could suggest that the injured party be authorized to retaliate against the offending party.¹⁵⁷ Retaliation was only recommended by a dispute panel once between 1948 and 1992. Therefore, GATT panels did not usually go beyond stating that a given practice was unjustified and should be terminated. Lowenfeld explained that GATT panels “rarely addressed the question of remedies.” Their decisions were based upon the assumption that, “in keeping with the quasi-diplomatic character of the [dispute] procedure, member states would in due time comply with panel reports once they were approved by the GATT Council.”¹⁵⁸

Panels created under the WTO are also required to make an objective assessment of the issues before them, including a determination of the facts of the case and the applicability of specific rules under the relevant WTO agreements. However, Article 15 of the WTO Understanding creates a new procedure, known as the “interim report stage,” to allow the disputing parties an opportunity to review a panel’s findings and conclusions before the report is finalized. The panel’s final report is not given to the entire membership of the GATT to settle the dispute. Instead, WTO panels submit their reports to the Dispute Settlement Board (DSB) of the WTO.¹⁵⁹ The DSB will then decide how the panel’s report is to be implemented in order to settle the dispute within nine-twelve months of when the panel was convened.

Acceptance of the Panel’s Report

Upon reviewing the panel’s final report, the GATT Council or entire membership had to decide upon a settlement package by consensus within a “reasonable amount of time.”¹⁶⁰ Unanimity was required when a trade dispute was being resolved. Disputing

157 William Davey, “Dispute Settlement in the GATT,” *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 59-60.

158 Andreas Lowenfeld, “Preface,” in Pierre Pescatore, William J. Davey, Andreas Lowenfeld (eds), *Handbook of GATT Dispute Settlement* (Irvington-on-Hudson: Transnational Juris Publications, Inc., 1992), xv.

159 The Dispute Settlement Board (DSB) is the body which administers the dispute settlement process of the WTO. It has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions or obligations.
Department of Foreign Affairs and International Trade, “Agreement Establishing the World Trade Organization- Canadian Statement of Implementation,” in *Canada Gazette* Part I, (January 1, 1995), 4940-4941.

160 The only notable exception to this rule involves the final reports issued by the panels instituted by the 1979 Subsidies and CVD Code. In the Article 18(9) of the 1979 CVD Code, the panel report is adopted not by the entire membership, but by the agreement’s committee of signatories.

parties, as members of the GATT, possessed the right to participate in the consensus. Because it would undoubtedly act in its own national interests, the losing party had the ability to block a decision taken by the entire membership when participating in the consensus. In this way, the dispute settlement process of the GATT was made a victim of the potential of being paralyzed, in that trade disputes could continue indefinitely. Cheetham argued that "the ability of a member to veto a report that would find against it is at the heart of the tension between a 'rule-oriented' versus a consensual or 'power-oriented' approach to dispute settlement in the GATT system."¹⁶¹ The members of the GATT recognized the potential problems that could have arisen if the dispute process became routinely paralyzed by the need for unanimity. For example, the United States put forward a recommendation that the disputing parties abstain from the consensus in 1982.¹⁶² Similarly, the 1982 Ministerial Declaration required that outright, unjustified obstructionism of panel decisions not be seen as an acceptable practice for GATT members. Finally, Article 16 of the WTO Understanding adopted a Canadian proposal and permitted panel decisions to take effect automatically within sixty days of being issued unless disapproved by consensus or appealed to a standing body on a point of law.¹⁶³ Moreover, the creation of the DSB removed the potential for the problem because it, and not the members of the GATT, will ultimately decide upon the settlement of the dispute in the future.

It should be noted that trade disputes arising out of the GATT were frequently settled prior to the consensus phase, thereby by passing this problem. Only four of the 50 panel reports delivered between 1981-1991 were not adopted either by the members of the GATT or by the disputing parties themselves. GATT Parties generally did not want to block the consensus for political reasons and fear of being alienated by other members of the multilateral Agreement. Complying with the consensus also offered a member a justification for abiding by the Agreement's spirit of liberalized trade in the face of nationalist, protectionist sentiments within their own domestic political systems.¹⁶⁴ The

¹⁶¹ Hugh J. Cheetham, "The Federal Government Proposals for Reform of the GATT Dispute Settlement System," in *Revue Generale De Droit*, Vol. 22, No. 2 (1991), 431.

¹⁶² Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* 2nd ed (Deventer: Kluwer Law and Taxation Publishers, 1991), 316.

¹⁶³ Hugh J. Cheetham, "The Federal Government Proposals for Reform of the GATT Dispute Settlement System," in *Revue Generale De Droit*, Vol. 22, No. 2 (1991), 431-437; William Davey, "Dispute Settlement in the GATT," *Fordham International Law Journal*, Vol. 11, No. 1 (1987), 94; Andreas Lowenfeld, "Remedies Along With Rights: Institutional Reform in the New GATT," in *American Journal of International Law*, Vol. 88, No. 3 (July, 1994), 480.

¹⁶⁴ Meinhard Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement

operation of the dispute settlement process was also aided by the fact that parties could agree to the recommendations of the panels with reservations. Nevertheless, the ability of a member to accept panel decisions with reservation seriously undermined the effectiveness of the GATT's dispute settlement mechanism because the objective decisions of dispute panels could have been overridden by politically motivated, self-interested considerations.¹⁶⁵

Articles 22-24 of the 1979 Understanding set out a number of loose guidelines for how the panel decision was to be implemented by the disputing parties. The members of the GATT were required to "keep under surveillance any matter on which they have made recommendations or given rulings." If they found that the recommendations had not been implemented within a "reasonable period of time," the contracting party bringing the case could ask the entire membership to find an appropriate solution. Articles 21-22 of the WTO Understanding clarified the 1979 provisions regarding the implementation and surveillance process. For example, the panel's report will automatically and unconditionally take effect within sixty days of being delivered in the event that it is not appealed by one of the disputing parties. In the case of an appeal, the new report must take effect within thirty days of being rendered by the appellate body.

The requirement that the report be implemented automatically and unconditionally was created to ensure that the obligations and rules of the WTO are applied as intended and that any deviations from them are stopped. Moreover, the WTO Understanding requires the Party which breached the treaty to inform the DSB of its intention to implement the provisions of the panel's report. If the Party cannot implement the report immediately, it will have a "reasonable period of time" to do so. The duration of the "reasonable period of time" is determined either by the DSB, by an agreement between the disputing parties within 45 days of the adoption of the report, or by binding arbitration. Furthermore, the WTO Understanding requires that the DSB keep the implementation process under regular surveillance to ensure that the disputing parties continue to adhere to the panel's decision. Finally, if a member fails to implement the panel's report within a "reasonable amount of

Procedures," in Ernst-Ulrich Petersmann, and Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations* 2nd ed (Deventer: Kluwer Law and Taxation Publishers, 1991), 299-300.

¹⁶⁵ An interesting way to understand the dispute settlement process of the GATT before the creation of the WTO is to compare it to a *compromis*. A *compromis* sets out the facts of a dispute, terms for settling disputes, and occasionally the outcome of the dispute and is mutually acceptable to the disputing parties. Therefore, since losing parties could accept a recommendation with reservations, they were in a sense agreeing to a *compromis* which narrowed the scope and facts of the disputes, thereby allowing themselves to "save political face" when presenting the outcome to their own national legislatures and people. A good example of a member accepting a GATT panel decision with reservations is the 1988 Canada-United States dispute over ice cream and yogurt.

time,” the WTO Understanding authorizes it to negotiate with the complaining state for mutually acceptable compensatory measures. If no agreement or compensation is reached within 20 days of the expiration of the “reasonable period of time,” the complaining party may retaliate by suspending the application of other obligations to the offending state. Authorization for such temporary retaliatory measures must be given by the other members of the Agreement.¹⁶⁶

Conclusion

Trade remedy laws were created in Canada, Mexico, and the United States to shield domestic producers from foreign competition. Dispute settlement mechanisms were placed into the GATT to provide a solution (albeit a weak one) for disputes over AD/CVD laws. Chapters 19 of the FTA and NAFTA added a new element to the domestic trade regulatory processes of Canada, Mexico, and the United States and the dispute settlement mechanisms of the GATT/WTO. Chapters 19 of the FTA and NAFTA replaced domestic judicial review with binding, binational panel review. American, Canadian, or Mexican producers could ask their government to challenge the final AD/CVD determinations of administrative agencies in another country before the binational panels instead of before domestic appeal courts or GATT/WTO dispute settlement mechanisms. Article 1904 of the FTA and NAFTA required that binational panels determine whether a final AD/CVD determination was in accordance with the domestic trade remedy laws of Canada, Mexico, or the United States. Binational panels were required to apply the procedures and standards of review that would have been used in a domestic appeal court or tribunal. Unlike the decisions of the GATT system, decisions rendered by FTA/NAFTA binational panels were binding on the administrative agencies concerned. In the event that a binational panel found that the administrative agency had applied its domestic AD/CVD laws incorrectly, the panel could authorize it to issue a new determination within a specified time frame. The provisions of Chapters 19 of the FTA/NAFTA will be described in Chapter Four.

¹⁶⁶ Andreas Lowenfeld, “Remedies Along With Rights: Institutional Reform in the New GATT,” in *American Journal of International Law*, Vol. 88, No. 3 (July, 1994), 485-487; Department of Foreign Affairs and International Trade, “Agreement Establishing the World Trade Organization- Canadian Statement of Implementation,” in *Canada Gazette* Part I, (January 1, 1995), 4944-4945.

PART TWO - THE NORTH AMERICAN TRADE REMEDY REGIME AFTER CHAPTER 19 OF THE FTA AND NAFTA CAME INTO EFFECT

Part Two examines the North American trade remedy regime after Chapters 19 of the FTA and NAFTA came into effect. It considers how the rules and institutions of Chapter 19 affected the implementation and application of trade remedy laws in Canada, Mexico, and the United States after 1989. Chapter Four describes the provisions of Chapters 19 of the FTA and NAFTA. Chapters Five, Six, Seven, and Eight test the hypothesis outlined in Chapter Two by studying the Canada-United States softwood lumber dispute, the Canada-United States dispute over fresh, chilled, and frozen pork, the Canada-United States dispute over certain corrosion-resistant steel sheet plate, and the Mexico-United States dispute over cut-to-length steel sheets. The trade disputes confirm the hypothesis. They demonstrate that the characters of the three trade remedy regimes changed when socio-economic factors waned in significance in the context of Chapters 19 panels. The three trade regimes gradually became fairer, more transparent, and faster processes of judicial review when the authority of Chapters 19 panels was acknowledged by policy-makers and interest groups in Canada, Mexico, and the United States, and when beliefs in economic protectionism and concerns with state sovereignty became secondary to the goals of the FTA and NAFTA.

CHAPTER FOUR -
CHAPTERS NINETEEN OF THE FREE TRADE AGREEMENT AND THE
NORTH AMERICAN FREE TRADE AGREEMENT

The FTA and NAFTA formally ushered in a new North American trade environment. Rules codified what had been developing between Canada, Mexico, and the United States during the 1970s and 1980s - a rule-based, liberalized, "level" trading field. For example, the institutional components of the Agreements added a new element to the interpretation and administration of trade remedy laws. Chapters 19 of the FTA and NAFTA created a binational panel system to replace the domestic processes of judicial review in antidumping or countervailing duty (ADD/CVD) cases.

The provisions of Chapters 19 of the FTA and NAFTA are described in this Chapter of the dissertation. A review of Chapters 19 demonstrates that a new-institutionalist approach can be used to explain why the North American trade regulatory process changed after 1989. Chapters 19 gave an institutionalized binational panel process the legal authority to change the administration and interpretation of trade remedy laws in Canada, Mexico, and the United States. Reflective of the arguments of the rational choice school, a new institution was deliberately placed into the three domestic trade regimes in 1989 and 1993, and provided an alternative to the GATT's dispute settlement process. Trade policy-makers and dominant members of the three countries agreed to change the rules governing trade remedies to make them more applicable to the integration of the North American market. In addition, a review of Chapters 19 lays the groundwork for the four case studies that will follow in Chapters Five to Eight.

An Overview of the FTA and NAFTA

The FTA was signed by Prime Minister Brian Mulroney and President Ronald Reagan on January 2, 1988, and took effect on January 1, 1989. The FTA represented the largest, most comprehensive trade agreement that had ever been concluded between the two countries to that date, and included more trade and trade related issues than had any other trade treaty negotiated between them. The FTA developed out of Article XXIV of the GATT and was designed to operate in conjunction with the larger, multilateral agreement.¹ It contained five key elements: (1) all tariffs on Canada-U.S. trade would be gradually

¹ Article XXIV of the GATT permits members to conclude regional trade agreements, in so far as the regional agreements are compatible with GATT provisions and the principles of most-favoured nation status and national treatment.

eliminated over a ten-year period; (2) non-tariff barriers (NTBs) would be greatly reduced; (3) bilateral investment flows would be liberalized; (4) impediments to cross-border business travel would either be eliminated or greatly reduced; and (5) impartial procedures for the resolution of trade disputes were instituted to ensure that both nations upheld the spirit of free trade as provided for in the Agreement.²

Canada-U.S. trade disputes had been generally solved by diplomatic techniques until the late 1970s and 1980s, in spite of the fact that loosely defined rules and procedures were provided for in a number of bilateral agreements.³ However, by the mid 1980s, Canadians identified American trade remedy laws as detrimental to their economic interests and trading abilities. Therefore, Canada insisted that strong, effective, binding, institutionalized dispute settlement mechanisms were absolutely essential to uphold Canadian interests within a bilateral agreement. Rule-based agreements and institutional provisions were recognized as better solutions to ensure secure market access for Canadian producers. During the FTA negotiations, Canada relentlessly argued for “mutually accepted rules, a mechanism that was comprehensive, exhaustive of remedies, and binding: in effect, a mechanism that instituted restitution rather than retaliation.”⁴ With such rules and institutions in place, Canada hoped that decisive, effective solutions could be used against FTA-inconsistent trade actions, thereby allowing the two partners to balance free and “fair” trade.⁵ Without such a mechanism, Canada maintained that the spirit of free trade could be lost, thereby making the bilateral agreement meaningless.

The NAFTA took shape out of informal discussions about the possibility of concluding a U.S.-Mexico free trade agreement or extending the FTA to Mexico. Presidents Bush and Salinas committed their governments to negotiating an agreement in June of 1990. Following extensive consultations between parliamentary, provincial, private sector, and academic parties, the Canadian government indicated its desire to join the U.S. and Mexico to create the North American free trade area. Formal negotiations began in June of 1991.

Canada’s negotiating team hoped to achieve three objectives in the NAFTA: (1) to gain secure access to the Mexican market; (2) to improve and protect the gains that Canada had achieved in the FTA; and (3) to ensure that Canada remained an attractive location for

² Daniel Nolle (ed), *The Canada-U.S. Free Trade Agreement* (New York: New York University Press, 1990), ix.

³ Perhaps the most notable example is the International Joint Commission of the Boundary Waters Treaty of 1909.

⁴ Charles S. Colgan’s presentation in the “Colloquy on Alternative Dispute Resolution,” *Maine Law Review*, 40(1988), 240-241.

⁵ Ted McDorman, “The Dispute Settlement Regime of the Free Trade Agreement,” *Review of International Business Law*, 2(1988), 304.

foreign investors. American negotiators acted to satisfy the strong desires that many southwestern producers had for closer trade ties with Mexico. They also hoped to ensure that certain standards would be kept in place to protect sensitive areas such as energy, textiles, investments, workers' rights, and the environment. Finally, American negotiators hoped that the NAFTA would preserve the market-oriented, outward-looking economic policies that were being pursued by the Mexican government, would encourage political reforms and democracy, and would curb illegal immigration and the illicit drug trade. Mexican negotiators looked to the NAFTA as a tool for economic development. For example, they hoped that the NAFTA would combat unemployment and/or underemployment, foster economic liberalization to shrink the size of the public sector vis-à-vis the private sector, and secure rules governing AD/CVD measures to shield themselves from American protectionism.⁶

The NAFTA was initialed by Prime Minister Mulroney, President Bush, and President Salinas on October 7, 1992. It established the largest trade deal in the world upon coming into effect on January 1, 1994. The 2000 page document created a single trading market encompassing 363 million people with a collective GNP of \$7 trillion. The NAFTA proposed to eliminate border tariffs on almost all of the products shipped between Canada, Mexico, and the United States by the year 2003. The Agreement was divided into eight parts to govern the flow of goods between the three countries, discipline technical barriers to trade and government procurement programs, liberalize the conduct of business and cross-border trade in services, investment, and financial services, and set out rules of competition and dispute settlement provisions. The NAFTA also contained an accession clause to extend the Agreement to other countries in the Western Hemisphere.⁷

⁶ The objectives of the three countries are summarized in: Government of Canada, *NAFTA: What's It All About?* (Ottawa: External Affairs and International Trade Canada, 1993), 7-8; Michael Hart, *A North American Free Trade Agreement: The Strategic Implications for Canada* (Ottawa: Centre for Trade Policy and Law, 1990), 6-7; Sidney Weintraub, "The North American Free Trade Agreement as Negotiated: A U.S. Perspective," in Steven Globerman, Michael Walker (eds), *Assessing NAFTA: A Trinational Analysis* (Vancouver: The Fraser Institute, 1993), 1-31; Leonard Waverman, "The NAFTA Agreement: A Canadian Perspective," in Steven Globerman, Michael Walker (eds), *Assessing NAFTA: A Trinational Analysis* (Vancouver: The Fraser Institute, 1993), 32-59; Rogelio Ramirez De la O, "The North American Free Trade Agreement from a Mexican Perspective," in Steven Globerman, Michael Walker (eds), *Assessing NAFTA: A Trinational Analysis* (Vancouver: The Fraser Institute, 1993), 60-86.

⁷ Chile was expected to become a member of the NAFTA by 1996. Negotiations were conducted between Canada, the United States, Mexico and Chile during 1995 to determine how Chile would accept the terms of the agreement in contentious areas such as intellectual property, tariff elimination, labour rights and environmental conservation. However, the negotiations were stalled because of the objections that many American members of Congress had to extending the agreement beyond the three original members. American resistance spurred Canada and Chile to conclude a bilateral free trade agreement

The structure of the NAFTA is similar to the FTA, because the NAFTA aimed to extend the provisions of the bilateral agreement to Mexico. However, the NAFTA moved beyond the FTA in a number of ways: the FTA's rules of origin component was clarified; clearer rules for customs administrations were set out; more stringent obligations regarding energy relations were established; provisions regarding land transport were included; cross-border services were extended to include specialty air services; an intellectual property chapter was included; and the dispute settlement procedures were strengthened. In addition, the NAFTA moved beyond the FTA by developing guidelines on environmental and labour standards in the side agreements of 1993.⁸

When negotiating the FTA, Canada and the United States placed many of their GATT rights and obligations into the agreement, and decided that the duplication of FTA and GATT rights could best be simplified by a precedence clause. The clause provided that the FTA would prevail over the GATT in the event of conflict between the two Agreements unless specifically provided for otherwise. In 1993, Canada and the U.S. agreed that the FTA-GATT model would apply to the FTA-NAFTA relationship. Upon coming into effect, the NAFTA was allowed to supersede the FTA because it either incorporated by reference, replaced with trilaterally agreed provisions, or made generic most of the provisions of the FTA. As a result, Canada and the United States agreed to suspend the FTA as long as they were both parties to the NAFTA. They also agreed that

in November, 1996. The Canada-Chile Free Trade Agreement came into effect on July 4, 1997.

⁸ The North American Agreement on Environmental Cooperation (hereafter the Environmental SideDeal) and the North American Agreement on Labour Cooperation (hereafter the Labour SideDeal) were concluded between the three governments during the summer of 1993. Their inclusion into the NAFTA distinguished it from any other bilateral or multilateral trade agreement in the world as no other trade agreement has included those types of issues. President Clinton committed himself to negotiate tougher language and enforcement provisions regarding the environment and labour standards of the original agreement during the Presidential Election of 1992. He was also required to act by the Gephardt-Rostenkowski Resolution (H Res 146) of May, 1991 which linked the renewal of the executive branch's fast track authority to the creation of the side deals. Summaries of the history and contents of the side deals are provided in: *The North American Agreement on Environmental Cooperation Between the Government of Canada, the United Mexican States, and United States of America* (Government of Canada: Ottawa, September 13, 1993); *The North American Agreement on Labour Cooperation Between the Government of Canada, the United Mexican States, and United States of America* (Government of Canada: Ottawa, September 13, 1993); Gary Hufbauer, and Jeffrey Schott, *NAFTA: Issues and Recommendations* (Washington: Institute for International Economics, 1992), chapters 6-7; Terry L. Anderson (ed), *NAFTA and the Environment* (San Francisco: Pacific Research Institute for Public Policy, 1993), passim; William G. Watson, "Environmental and Labour Standards in the NAFTA," Commentary No. 57 (Toronto: C.D. Howe Institute, February 1994), passim.

FTA provisions which were not extended to Mexico would remain operational. These provisions were included in the text of the NAFTA for clarity's sake.⁹

Both the FTA and NAFTA are built on the rule of law. They are very clear examples of how the rule of law was gradually entrenched into international trade agreements between the 1970s and 1990s. No other regional free trade agreements have included such strong rules, institutions or dispute settlement provisions. Indeed, the FTA and NAFTA have been singled out as examples on which other regional and multilateral trade agreements should pattern their institutions and dispute settlement provisions. For example, the FTA and NAFTA were influential in improving the GATT's dispute settlement mechanism during the Uruguay Round. Many of their rules and institutional provisions of the agreements were replicated in the new World Trade Organization (WTO) which now governs global trade.

The FTA contained four different dispute settlement mechanisms: Chapter 16 (investment issues), Chapter 17 (financial services), Chapter 18 (general dispute settlement mechanism), and Chapter 19 (trade remedies).¹⁰ More specific dispute settlement commitments and procedures were placed into the NAFTA in Chapter 11 (investments), Chapter 14 (financial services), Chapter 19 (trade remedies), Chapter 20 (general dispute settlement mechanism), and the environmental and labour side deals.¹¹

Chapters 19 of the FTA and NAFTA

It cannot be emphasized enough that Canadian and Mexican negotiators insisted that effective dispute settlement mechanisms had to be placed into the Agreements during the FTA and NAFTA talks. Both governments were extremely alarmed by the degree to which trade remedies were being used by the U.S. to protect domestic producers from foreign competition. Many Canadian and Mexican producers found American laws and attitudes offensive, and American administrative procedures too easily abused by their American counterparts. These concerns made Canadian and Mexican negotiators insist that a strong, effective, binding, impartial forum be institutionalized to allow Canadian, Mexican, and

⁹ For example, FTA "snapbacks" were retained in the NAFTA for sensitive agricultural products (fruits and vegetables).

¹⁰ As of July, 1996, the only disputes arising out of the FTA were dealt with by Chapter 18 and 19 mechanisms.

¹¹ The only NAFTA dispute settlement mechanisms that have been used to date are Chapter 19 and Chapter 20.

American producers equal protection when operating in the new North American trade regime.¹²

Chapters 19 of the FTA and NAFTA contain the mechanism for solving disputes arising out of the application of the trade remedy laws of Canada, Mexico, and the United States.¹³ They are very similar to one another. Both Chapters replace domestic judicial review of final AD/CVD determinations with binding binational panel review. Because of the similarities of the two chapters, the provisions of FTA-19 will be explained first. The similarities and differences of the two agreements will then be discussed. The Chapters 19 process is summarized in Appendix G.

(A) Chapter 19 of the FTA

Trade with the United States has been vital to the health of the Canadian economy throughout Canada's history. For example, the United States received 80% of Canadian exports at the outset of the FTA negotiations in 1985. Consequently, the rise in American protectionism was significantly felt in Canada during the negotiations. Because it was the smaller and weaker power within the relationship, Canada required a means by which it could effectively combat the increasing use of protectionist, politically motivated American trade remedy measures. Therefore, not only were Canadian negotiators motivated by the desire to obtain the lower tariffs and the economic benefits of secure access to the American market, they were motivated by the fear of U.S. protectionism which would discriminate against Canadian goods, services, and investments flowing into the American economy as well.¹⁴ Canadian negotiators were motivated by the belief that an agreement must ensure freedom from arbitrary and politically based trade distortions through some form of binding

¹² Allan Gottlieb, "Free Trade Was Defensive But Results Are Positive," in *Canadian Speeches: Issues of the Day* (February, 1993), 33-34; Michael Hart, *A North American Free Trade Agreement: The Strategic Implications for Canada*. (Halifax: The Institute for Research on Public Policy, 1990), 126; Victor Carlos, Garcia Morena, Cesar Emiliano, Hernandez Ochoa, "Towards a Free Trade Agreement Between Mexico and the United States: Legal Implications," in Jorge Witker (ed), *Legal Aspects of the Trilateral Free Trade Agreement* (Mexico: Universidad Nacional Autonoma De Mexico, 1992), 53-54; Jose Manuel, Salazar-Xirinachs, Eduardo Lizano, "Free Trade in the Americas: A Latin American Perspective," in Sylvia Saborio (ed), *The Premise and The Promise: Free Trade in the Americas* (Washington: Overseas Development Council, 1992), 81; Craig VanGrasstek, Gustavo Vega, "The North American Free Trade Agreement: A Regional Model?" in Sylvia Saborio (ed), *The Premise and The Promise: Free Trade in the Americas* (Washington: Overseas Development Council, 1992), 168.

¹³ For clarity's sake, Chapter 19 of the NAFTA will be referred to as NAFTA-19 and Chapter 19 of the FTA will be referred to as FTA-19. References to both agreements will continue to read as Chapters 19.

¹⁴ Anthony Chapman, "Canada-U.S. Trade Disputes" (Ottawa: Library of Parliament Research Branch, January 18, 1993), 1.

dispute settlement mechanism and through a more comprehensive regime governing the use of AD/CVD laws.¹⁵

Canadian negotiators had initially sought an “exemption” from U.S. trade remedy laws through a wholly new trade regime that could deal with the underlying problems of anti-competitive pricing practices and subsidization, more in keeping with the spirit of the FTA.¹⁶ Senator Max Baucus (D-Montana) explained that such an exemption would have been unacceptable to Congress because it would have been interpreted as a measure which could have eliminated means to enforce the agreement.¹⁷ In addition, if Canada were to be granted an exemption from AD/CVD laws, Americans feared that a dangerous precedent would be set for their trade relations with other countries.¹⁸ Interestingly, a confidential memorandum by M.G. Clark indicated that Canadian officials understood that the Americans would not agree to give Canada a complete exemption from their AD/CVD laws, or to even afford Canada preferential treatment within a bilateral free trade agreement. Therefore, Canadian officials recommended a dispute settlement mechanism as the next best option to protect Canada’s interests.¹⁹ Consequently, Canadian negotiators vigorously demanded that if a dispute settlement mechanism was not agreed to in last minute negotiations, the process would fail to achieve an agreement.

In the heat of the “eleventh hour” of the FTA negotiations, American negotiators finally conceded that trade remedy laws should be dealt with by binational panels instead of by domestic laws and unilateral decisions. Lisa Koteen, Senior Counsel to the Office of the Chief Counsel for Import Administration U.S. Department of Commerce (DOC), explained that the Americans finally accepted FTA-19 because it preserved U.S. trade remedy laws and provided a form of judicial review which employed the same standards as American courts. FTA-19 also compelled Canada to submit certain determinations that had

¹⁵ See Department of External Affairs, *Canadian Trade Negotiations* (Ottawa: Minister of Supply and Services, Canada, 1985) for a detailed summary of the Canadian and American objectives during the FTA negotiations.

¹⁶ Gilbert R. Winham, “What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters,” Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 3-4, 8; Gilbert R. Winham, Heather A. Grant, “Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA, and Beyond,” *Minnesota Journal of Global Trade*, Vol. 3, No. 1 (Spring, 1994), 33.

¹⁷ Senator Max Baucus, “A Congressional Perception” in Edward R. Fried, Frank Stone, Philip H. Trezise (eds), *Building A Canadian-American Free Trade Area* (Washington: The Brookings Institution, 1987), 22.

¹⁸ John J. Lafalce, “Establishing a Mechanism” in Edward R. Fried, Frank Stone, Philip H. Trezise (eds), *Building A Canadian-American Free Trade Area* (Washington: The Brookings Institution, 1987), 106.

¹⁹ M.G. Clark, Confidential Memorandum Regarding Non-Tariff Measures and Dispute Settlement in the GATT and a Limited Bilateral Agreement with the United States (February, 1987), 9-11.

not been previously subjected to appeal in its national courts to judicial review.²⁰ From the Canadian perspective, while FTA-19 was not what had been hoped for originally, it represented a vital and essential breakthrough, without which there could not have been an agreement. In fact, Canada had withdrawn its negotiating team because the Americans would not move on this point. Canada broke off the FTA talks on September 23, 1987 because of the American refusal to move on a number of key issues including trade remedies. Talks resumed when the Canadians thought that the United States had agreed to consider new proposals on the trade remedy issue.²¹

FTA-19 provided a four-track set of obligations to deal with unfair trade remedy laws. The purpose of the four-track set of obligations was to ensure that Canadian and American producers were afforded secure and predictable access to the North American market.

Track One of FTA-19: Five-to-Seven Year Working Period

Due to the time constraints imposed by the fast-track timetable in the United States, the FTA negotiations fell short of compiling a complete framework that would deal with unfair trading practices, discriminatory trade remedy laws, and government subsidies.²² Consequently, a five-to-seven year working period was established by Articles 1906-1907 to develop a more explicit, mutually advantageous body of rules regarding government subsidies and dumping practices. The working group was given the responsibilities of considering any problems arising from the implementation of FTA-19 and recommending appropriate solutions. If the working group was unable to develop a new body of rules

20 Lisa B. Koteen, "U.S.- Canada FTA Chapter 19 Dispute Settlement: What is the Verdict and Can It Be Applied to NAFTA?" (Washington: Unpublished, 1992), 3-4.

21 Accounts of the "eleventh hour" negotiating process are given by: Bruce Doern, Brian Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddard, 1991), 188-198; Michael Hart, *Decision at Midnight* (Vancouver: UBC Press, 1995).

22 Negotiating these issues is extremely complex because they involve the principles of state sovereignty and a state's unilateral decision making ability. The reasons why Canada and the U.S. were unable to resolve the issue are highlighted by: Michael Hart, *Decision at Midnight* (Vancouver: UBC Press, 1994), passim; Bruce Doern, Brian Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddard Publishing Company, 1991), Chapters 7-8; Michael Hart, "The Canada-United States Working Group on Subsidies," (Ottawa: Occasional Papers International Trade Law and Policy, 1990), passim; M. Jean Anderson, Jonathan Fried, "Subsidies and Countervailing Duties in the United States-Canada Free Trade Agreement," (Washington: Unpublished, 1989), 9-11; Jeffrey J. Schott, "The Free Trade Agreement: A US Assessment," in Jeffrey Schott, Murray Smith (eds), *The Canada-United States Free Trade Agreement: The Global Impact* (Washington: Institute for International Economics, 1988), 28; Jean-Francois Bence, Murray G. Smith, "Subsidies and the Trade Laws: The Canada-U.S. Dimension," *International Economic Issues* (Halifax: Institute for Research on Public Policy, 1989), 1.

governing trade remedy laws and government subsidies within the five-to-seven year period, either party was authorized to terminate the agreement upon six-months notice.

Articles 1906 and 1907 demonstrated that FTA-19 was to serve as an interim measure. FTA-19 would no longer be required to settle trade remedy disputes, because domestic AD/CVD laws were to be eliminated and replaced by a broader set of bilateral rules. Many trade law experts argued that the commitment to develop new rules was one of the strongest points of the dispute settlement mechanisms of the FTA. Steger noted that, "the key accomplishment of the [FTA] in the dispute settlement ... was the commitment on the part of both countries to develop a new trade law system within five to seven years." She went on to argue that, "no one should underestimate the importance of developing those rules. They were extremely important ... without reform ... we could not be assured that Canadian industries would not be subjected to harmful trade cases in the future."²³

The Working Group met on a number of occasions after 1989 and created an agenda for how it would begin to develop a bilateral body of trade remedy laws. However, the Working Group never moved beyond the agenda setting phase because of progress made within the Uruguay Round and NAFTA negotiations. Prime Minister Chrétien and President Clinton formally committed their governments to develop a body of rules governing antidumping duties in 1993. The two governments tacitly agreed to apply the new GATT rules governing subsidies. They also addressed the dumping question by creating a working group to pursue the issue in the broader, trilateral context of the NAFTA (Articles 1504 and 1907 of the NAFTA).²⁴

²³ Debra Steger, "Analysis of the Dispute Settlement Provisions: A Canadian Perspective," in Murray Smith, Frank Stone (eds), *Assessing the Canada-U.S. Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1987), 96. For similar comments see: Gary Horlick, "Analysis of the Dispute Settlement Provisions: A U.S. Perspective," in Murray Smith, Frank Stone (eds), *Assessing the Canada-U.S. Free Trade Agreement* (Halifax: Institute for Research on Public Policy, 1987), 100; Michael Hart, "The Canada-United States Working Group on Subsidies," (Ottawa: Occasional Papers International Trade Law and Policy, 1990), passim; Gordon Ritchie as cited in "A Disgruntled Canadian," *The Wall Street Journal* (September 24, 1992), A18; David P. Cluchey, "Dispute Resolution Provisions of the Canada-United States Free Trade Agreement," *Maine Law Review*, 40(1988), 335; Bruce Doern, Brian Tomlin, *Faith and Fear* (Toronto: Stoddart Publishing Company, 1991), 253.

²⁴ Interview with Michael Hart, Department of Foreign Affairs and International Trade, Ottawa, May, 1995; Interview with Joanne Osendarp, Legal Counsel, Office of North American Trade Negotiations, Department of Foreign Affairs and International Trade, Ottawa, January, 1996.

Track Two of FTA-19: Bilateral Review of Canadian and American AD/CVD Laws

FTA-19 provided for a bilateral review process of Canadian and American AD/CVD laws. Article 1902 allowed both governments to retain their respective AD/CVD laws, and to amend them upon notifying the other Party. However, Article 1903 allowed either Party to request that an amendment be reviewed by an advisory binational panel to determine if it violated the spirit, purpose, and letter of either the FTA or the GATT. Furthermore, either Party could request that an advisory binational panel be convened to consider whether an amendment had the “function and effect” of overturning a decision of an Article 1904 binational panel. In the event that an advisory panel found a violation, and/or that an amendment had overturned a panel’s decision, the governments were to consult with one another for 90 days to reach a mutually acceptable solution. If a solution was not reached by the two governments within the allotted time frame, the complaining government could enact a comparable amendment to its own AD/CVD laws, or terminate the FTA on 60 days notice. The bilateral review process allowed both Canada and the United States to retain their rights as sovereign states to implement and amend their domestic laws to uphold their own national goals and values. Nevertheless, it also ensured that trade remedy laws were in line with the spirit of free and fair trade incorporated in the agreement. The bilateral review process thereby attempted to establish fair and predictable conditions of liberalized trade, which was void of any discriminatory and/or unfair trading practices.²⁵

Track Three of FTA-19 Article 1904 Binational Panels

FTA-19 moved the power of judicial review over trade remedy cases away from domestic courts to a binding binational dispute panel. Binational panels were given the responsibilities of reviewing final AD/CVD determinations made by Canadian and American agencies, and determining whether an administrative agency acted in accordance with its countries’ domestic trade remedy laws. Article 1909 created the Canada-U.S. Trade Secretariat to assist the panels in fulfilling their tasks. Based in Washington and Ottawa, the Secretariat facilitated the work of the panels, and received and filed all requests and documents pertaining to a dispute. The Secretariat was also permitted to provide assistance to the Canada-U.S. Trade Commission if requested under Article 1907(7).

Articles 1904(2) and (3) required that panels used the trade remedy laws and standards of review of the importing country. In other words, binational panels had to

²⁵ Articles 1902 and 1903 were never used under the FTA.

apply the standards of review of the importing country, and the general legal principles that a court of the importing country would apply when reviewing a final AD/CVD determination. Statutes, legislative histories, regulations, administrative practices, judicial precedents, and general legal principles were to be used by a panels determined the purpose and scope of the relevant country's trade remedy laws. Therefore, FTA-19 panels replaced domestic review courts when a Canadian or American producer wanted to challenge the ways that either of the two trade remedy regimes was administered before a binational forum.²⁶

Even though FTA-19 panels performed the same role as domestic courts, a number of significant differences existed between them. First, FTA-19 panels had more members than domestic review courts - five members made up an FTA-19 panel, whereas domestic review courts were generally made up of one-three judges in a trade remedy case. Consequently, the FTA panel process tended to be more inquisitive, and included a more deliberative, cooperative decision-making process. Second, FTA-19 panels were heterogeneous and binational bodies because they included Canadian and American representatives. They naturally brought a binational perspective to AD/CVD disputes in contrast to domestic review courts which were only composed of either Canadian or American judges. Third, members of FTA-19 panels did not all have to lawyers. Many FTA-19 panels included experts in international trade law (e.g., academics, trade consultants) who could often assess technical AD/CVD issues in a more informed manner than domestic review judges were able to do.²⁷

In spite of those differences, FTA-19 panes were given the authority to review AD/CVD determinations in the same manner as domestic review courts did. Domestic review courts and binational panels were only permitted to review the evidence on the investigating authority's administrative record when reviewing a final AD/CVD/injury determination. Binational panel review was not an appeal process or a trial *de novo*. The panel was not free to seek further evidence or to call new witnesses. In addition, the panel could not substitute its opinion for the views of the administrative agency whose decision it was reviewing. Even if the administrative agency was found to have reached its decision unreasonably, a panel was not free to substitute its own decision for that of the administrative agency. It could only uphold the determination, or remand it to the

²⁶ Binational panels had to be requested under the FTA. Domestic review could be used instead if all of the parties to the dispute agreed.

²⁷ Homer E. Moyer Jr. "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort," *The International Lawyer*, Vol. 27, No. 3 (Fall, 1993), 714-715.

administrative authority for being inconsistent with the panel's decision.²⁸ In this way, the binational panels were to act as review bodies for Canadian and American administrative agencies just as domestic courts did. They did not replace Canadian or American trade remedy laws or the agencies that administered them. Instead, they ensured that AD/CVD laws were administered equitably and fairly to producers from both countries.²⁹ A binational panel held that, "the very essence of the Chapter 19 process is one of ensuring that the procedural improvements adopted by Chapter 19 for the review of AD/CVD cases will be faithfully implemented but not to make substantive changes to the domestic laws."³⁰

When a binational panel was requested, five panelists were to be chosen from a predetermined roster of 50 potential candidates within thirty days (Annex 1901(2)). Two panelists were to be selected from Canada and two from the United States. The fifth member was to be agreed upon by the Canadian and American governments. If the two governments could not agree on the fifth panelist within 55 days, the four chosen panelists were to select the fifth by lot within 60 days of the panel request. While all members of a panel did not need to be lawyers, the American negotiating team insisted that the panel chairperson and a majority of the panelists be lawyers at the very least. The team argued that panelists would require a clear understanding of the concepts of the rule of law because their role was to examine the application of AD/CVD laws.³¹

The negotiators of the FTA intended that all panelists would be objective, unbiased, and free from control by either government. In fact, the concern of ensuring the objectivity of the panel members was taken so seriously that the Canadian and American governments were given four pre-emptory challenges to the panelists appointed by the other Party in Annex 1904(13). Cluchey argued that "the parties appeared to have clearly understood that the success of the dispute resolution mechanisms ... depended upon the workability of the panel process."³² That workability could only be achieved if panels were objective and free from political control. Koteen noted that panels were able to separate themselves from

28 Simon Potter, "NAFTA's Chapter 19 Judicial Review in Antidumping and Countervailing Matters," Brief Submitted to the Sub-Committee on International Trade of the Standing Committee on External Affairs and International Trade (Ottawa: November 26, 1992), 10.

29 Stewart A. Baker, Shelly P. Battram, "The Canada-United States Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 1 (Spring, 1989), 75.

30 Memorandum, Opinion, and Order of the Majority, *In the Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 16-17.

31 Lisa Koteen, "U.S.-Canada Free Trade Agreement Chapter 19 Dispute Settlement: What is the verdict and can it be applied to the NAFTA?" (Washington: Unpublished, 1992), 7.

32 David P. Cluchey, "Dispute Resolution Provisions of the Canada-United States Free Trade Agreement," *Maine Law Review*, Vol. 40 (1988), 343.

political influence and control by their governments, thereby adding to the objectivity of their decisions. Both countries removed names from the panel rosters when the other Party objected to them. Two panelists also removed themselves from the roster because they discovered they had conflicts of interest which challenged their objectivity.³³

Articles 1904(5) and 1904(15)(b) stipulated that either government could request a binational panel to review a final AD/CVD determination. However, the two governments were obliged to request a panel upon petition from a person who would have had standing to commence judicial review proceedings under his/her country's domestic law. As a result, companies, individuals, and associations who could have initiated domestic judicial review proceedings were able to request binational panel reviews of AD/CVD determinations with which they disagreed. They were also permitted to appear before a binational panel with independent counsel to present their views.³⁴

It must be noted that private parties and/or government were not obligated to request a panel to challenge a final AD/CVD order. They were given 30 days to request a panel following the publication of a final determination in the Federal Register or Canada Gazette (Article 1904(4)). If a panel was not requested within the 30 days, private parties could resort to their country's domestic appeal courts to challenge the order. However, strict sanctions and penalties were placed into the implementing legislation of Canada and the United States to discourage frivolous claims, and to ensure that the binational panel process was the forum that would be used most frequently for AD/CVD cases after 1989.

It should also be noted that Canada and the U.S. could request GATT panels instead of FTA-19 to resolve trade remedy disputes after 1989, provided there was a legal issue involved that was under the jurisdiction of the GATT. GATT panels did not always have jurisdiction over AD/CVD disputes because they, unlike FTA panels, did not have the power of judicial review. Prior to the creation of the WTO, the GATT provisions governing subsidies and antidumping issues merely contained procedural obligations, whereas FTA-19 contained more substantive commitments. Consequently, GATT panels were unable to consider the substance of Canadian or American AD/CVD laws, and could only assess trade remedy disputes on procedural grounds (i.e., how they were implemented). FTA-19 panels, on the other hand, were able to review AD/CVD laws on both procedural and substantive grounds if required.

33 Lisa Koteen, "U.S.-Canada Free Trade Agreement Chapter 19 Dispute Settlement: What is the verdict and can it be applied to the NAFTA?" (Washington: Unpublished, 1992), 7-8.

34 Ted McDorman, "The Dispute Settlement Regime of the Free Trade Agreement," *Review of International Business Law*, Vol. 2 (1988), 323-324.

Binational panel decisions were to be made by majority vote, and rendered in written form within 315 days of the panel request. Panel decisions were binding under Canadian and American law. In other words, the binational panel's review process was final, and was not subject to further political consultations and/or negotiations. Furthermore, an Article 1904 binational panel decision superseded judicial review in both countries, and was not subject to further appeal.³⁵ According to Article 1904(9) of the FTA, "the decision of a panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel". Therefore, binational panels were authorized to issue binding decisions that directed administrative agencies to "uphold a final determination, or remand it for action not inconsistent with the panel's decision."³⁶ After a panel issued its decision, the administrative agency was required to act on the remand within the time provided for by the binational panel.

Binational panels are not bound by the legal principle of *stare decisis*. In other words, decisions were not to become binding precedents for domestic courts or binational panels reviewing future AD/CVD determinations. There had been broad consensus that FTA-19 panels were not to develop a separate jurisprudence in AD/CVD cases from that of domestic courts and tribunals.³⁷ The implementing legislation that put the FTA into operation in the United States explicitly provided that FTA-19 panel decisions could not bind American courts as precedents.³⁸

³⁵ The only exceptions are the Extraordinary Challenge Committees of Chapter 19, and the ability of American producers to challenge FTA-19 panels on the basis that they violated provisions of the U.S. Constitution.

³⁶ James P. McIlroy, "Antidumping and Countervailing Duties Dispute Resolution under the Canada-United States Free Trade Agreement- The First Year in Review," *Canada-U.S. Business Law Review*, 4 (1991), 200-201; Anthony Chapman, "Canada-U.S. Trade Disputes," (Ottawa: Library of Parliament Research Branch, January 18, 1993), 4-5. Upon agreeing to the terms of FTA-19, a debate began about the meaning of the term "binding" in the agreement. For a summary of the arguments, see Marc Gold, David Leyton-Brown (eds), *Trade Offs on Free Trade* (Agincourt: The Carswell Company Limited, 1988), 171.

³⁷ Memorandum, Opinion, and Order of the Majority, *In the Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 16.

³⁸ Stewart A. Baker, Shelly P. Batram, "The Canada-United States Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 1 (Spring, 1989), 77; Joseph P. Griffin, Statement before the Sub-Committee on Courts, Civil Liberties and the Administration of Justice Committee on the Judiciary, United States House of Representative (Washington: April 28, 1988), 4.

Track Four FTA-19: Mandatory Changes to Domestic Trade Remedy Laws

FTA-19 required that the Canadian and U.S. governments make a number of changes to their domestic trade remedy regimes to facilitate the binational panel process. Article 1904 (14) instructed the Parties to adopt rules of procedure to implement the provisions of FTA-19 by January 1, 1989. The rules of procedure had to be based on the standards of review in the two countries. They also had to include rules concerning the content and service of panel requests. For example, both countries were required to ensure that the competent investigating authority transmitted the administrative record to the panel, confidential information was protected during the panel process, and a process was in place to allow panels to receive, file, and hear briefs during the review process. Article 1904 (15) also required that both countries amend their trade laws to ensure that ADDs/CVDs would be refunded when a panel ordered that a refund was due, that domestic courts would enforce the panel decisions, and that domestic judicial review could not be used for a final AD/CVD determination until the 30 day period for requesting a panel had expired. Article 1904 (15) also instructed each country to implement a number of specific changes to its own regime. Canada was obliged to amend Sections 56 and 58 of the Special Import Measures Act (SIMA) to allow an American request that the Deputy Minister reconsider an AD/CVD determination. Canada was also required to repeal Section 28 (4) of the Federal Court Act so that binational panels could be used to review the determinations of the Deputy Minister and CITT. The United States was required to amend Section 301 of the Customs Court Act in order that binational panels had the authority to remand determinations of the Department of Commerce (DOC) and International Trade Commission (ITC). Both governments complied with the mandatory changes when they brought the Agreements into force.

Appeal Procedures of FTA-19: The Extraordinary Challenge Committee

Annex 1904(13) instituted an extraordinary challenge procedure to review cases where a panel acted inappropriately during the process of judicial review. An Extraordinary Challenge Committee (ECC) was to be made up of three current or retired judges of an American Federal Court or a Court of superior jurisdiction in Canada. Each country prepared a roster from which one judge was to be selected, and the third was to be selected by the first two. A committee was given 30 days to render its binding decision.

It must be stressed that an ECC was to be used in very narrowly defined circumstances laid out by Article 1904(13) of the FTA. According to Article 1904 (13):

Where, within a reasonable time after the [binational] panel decision is issued, a Party alleges that:

- a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- ii) the panel seriously departed from a fundamental rule of procedure, or
- iii) the panel has manifestly exceeded its power, authority, or jurisdiction set forth in this Article, and
- b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process, that party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

Consequently, the only function of an ECC was "to ascertain whether each of the three requirements set forth in Article 1904.13(a) had been established."³⁹ An ECC was to use a three-pronged test to do so. A committee had to decide: (1) whether one of the grounds in category (a) had been established; (2) whether that action had materially affected the panel's decision; and (3) whether tests (1) and (2) had threatened the integrity of the binational panel review process. If an ECC could not determine that all three prongs of the test had been fulfilled, it was to confirm the panel's decision.⁴⁰ Conversely, an ECC had two options for action if it found that one or more of the grounds of Article 1904(13) had been established. First, it had the option to vacate the panel decision, and initiate a new panel procedure. Second, it had the option to remand the original decision to the panel that rendered it, "for action not inconsistent with the committee's decision." Therefore, ECCs were not intended to be routine appeal bodies. Binational panel rulings were given the authority to render final and binding decisions, which were not to be routinely reviewed. An ECC could only be used in extraordinary circumstances to ensure the integrity of the binational panel process remained intact in the event that a panel grossly violated its procedural requirements, objectivity, power, authority, or jurisdiction.

(B) Chapter 19 of the NAFTA

While the dispute settlement mechanisms of FTA-19 worked well, they were not without their faults. The dispute settlement procedures of the NAFTA sought to remedy those problems, and ensure that all three countries were placed on an even more secure, level playing field. A key objective of the Canadian and Mexican negotiators during the NAFTA discussions was to build on the strengths of the FTA and to secure effective, rule-

³⁹ Extraordinary Challenge Committee United States-Canada Free Trade Agreement, *In the Matter of: Fresh, Chilled, or Frozen Pork from Canada*, June 14, 1991, 10.

⁴⁰ Ton Zijldwijk, "Dispute Settlement Mechanisms Under the Free Trade Agreement," *Maine Law Review*, 40(1988), 330.

based dispute settlement mechanisms in the NAFTA. Canada and Mexico wanted to reflect the importance of rules in North American trade to ensure that their domestic producers were not placed at the mercy of the American trade remedy regime which favoured American interests above all others. Both countries had fallen victim to the rising tide of American protectionism too many times during the 1970s and 1980s. It is interesting to note that Gordon Ritchie, one of the chief architects of the FTA, was very skeptical that FTA-19 could be maintained and/or improved in the NAFTA negotiations. In light of the systematic abuses of the FTA by American businesses and government between 1989-1992, Ritchie commented, "I have no hope that NAFTA will improve [the FTA provisions of Chapter 19]. It is no secret that American negotiators have been making attempts to weaken the dispute settlement system because it has been working."⁴¹ However, the common interests and objectives of the Mexican and Canadian negotiators bound them together and allowed them to achieve a stronger, improved dispute settlement mechanism in NAFTA-19. By working together, they were able to resist the efforts of the Americans to weaken the provisions regarding AD/CVD disputes in the trilateral agreement.⁴²

Similarities between NAFTA-19 and FTA-19

(1) Replacement of Domestic Judicial Review with Binational Panel Review

NAFTA-19 is almost identical to FTA-19. The similarities are most apparent in four ways. First, both FTA-19 and NAFTA-19 replace domestic judicial review of final AD/CVD determinations with binding binational panel review. Articles 1904(14) of both agreements permit governments, individuals, or corporations to initiate the binational review process in the event of a dispute. GATT/WTO panels may be used instead if desired by the disputing Parties as long as they have jurisdiction over the case in dispute. The dispute panels of NAFTA-19 are to be composed of five qualified individuals from the countries involved in the dispute; each country will select two panelists from a permanent roster and the fifth member will be selected by the two governments. If the two governments fail to do so within 55 days, the fifth panelist will be chosen by the other four

⁴¹ "A Disgruntled Canadian," in the *Wall Street Journal*, (September 24, 1992), A18.

⁴² Michael Hart, *A North American Free Trade Agreement: The Strategic Implications for Canada* (Halifax: The Institute for Research on Public Policy, 1990), 127; Kristin Oelstrom, "A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA," in *Law and Policy in International Business*, Vol. 25, No. 2 (1994), 793-795; Peter McLaughlin, "Mexico's Antidumping and Countervailing Duty Laws: Amenable to a Free Trade Agreement?" in *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 1041.

by lot.⁴³ The panels apply the domestic law and standard of review of the importing country when reviewing a final AD/CVD or injury determination. When issuing a decision within 315 days of a request for a panel, the dispute panels are to either uphold a final AD/CVD determination as being consistent with the importing country's AD/CVD laws, or remand it to the administrative authority as being inconsistent with domestic laws. As in FTA-19, Article 1904 (9) of the NAFTA declares that "the decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel." Furthermore, the decisions may not be appealed in the domestic courts of any NAFTA country.⁴⁴ Upon receiving a panel's decision, the offending country must ensure that the injured party is offered due compensation for the AD/CVD duties that were levied against it.⁴⁵

(2) Retaining and Amending AD/CVD Laws

The second way that NAFTA-19 is similar to FTA-19 is that the three governments are able to retain and amend their respective domestic trade remedy laws. Whenever a Party to the NAFTA intends to amend its AD/CVD law, the agreement requires that the amendment will only apply to goods of a NAFTA country if the statute specifies that it applies to goods of that Party and provided that advanced written notification and opportunities for consultation are given. As with the FTA-19, any amendment may be subject to panel review if a NAFTA country finds it to be inconsistent with the object and purpose of either the trilateral agreement or with the GATT. A panel may recommend modifications to the amended statute to remedy a non conformity with the NAFTA or GATT. If a panel finds such an inconsistency, and consultations fail to resolve the matter, the country that requested the review may take comparable legislative action or terminate the agreement on 60 days notice.⁴⁶

⁴³ It should be noted that not all of the five panelists who serve on a NAFTA-19 panel have to be lawyers. The majority of panelists must be lawyers. However, other panelists may be experts in international trade law or the area under dispute.

⁴⁴ Once again, the only exceptions are the Extraordinary Challenge Committees of NAFTA-19, and the ability of American producers to challenge NAFTA-19 panels on the basis that they violated provisions of the U.S. Constitution.

⁴⁵ Articles 1903-1904 of the NAFTA.

⁴⁶ Articles 1902-1903 of the NAFTA.

(3) *Extraordinary Challenge Committees*

Third, the NAFTA replicates the FTA-19 process by instituting Extraordinary Challenge Committees (ECC). Similar to the provisions of FTA-19, ECCs may only be requested by the three governments. However, once an ECC has been convened, private parties may appear before the Committee because many of the issues of concern involve them. The ECCs of the NAFTA are charged with the same functions and powers as their counterparts in the FTA.⁴⁷ For example, Article 1904 (13) of the NAFTA provides that an ECC may be requested where a Party alleges that a panelist was guilty of gross misconduct or serious conflict of interest, that a panel seriously departed from a fundamental rule of procedure, that a panel manifestly exceeded its powers, authority or jurisdiction, and that any of these actions materially affected the panel's decision and threatened the integrity of the panel process.

(4) *Mandatory Changes to the Three Domestic Trade Remedy Regimes*

Both FTA-19 and NAFTA-19 required the three Parties to make changes to their domestic trade remedy regimes. NAFTA-19 instituted the greatest number of changes to the Mexican system. For Cannon, the thrust of NAFTA-19 was "to conform Mexican procedures to Canadian and American norms."⁴⁸

Canadian and American negotiators initially questioned whether Mexico's legal system in general, and trade remedy regime in particular, were compatible with the Canadian and American systems and the provisions of FTA-19. FTA-19 was based on the assumption that the trade remedy laws and administrative procedures of Canada and the United States were essentially the same. The compatibility of the two systems was important to Canadian and American negotiators for two reasons. First, it was important for procedural reasons because panelists would have to apply the other country's AD/CVD laws during a panel review. Second, it was important for substantive reasons. If the laws differed significantly from one country to the next, one country's exporters might not receive the same procedural treatment as the exporters of the other country. Canadian and American negotiators feared that Mexico's system was too different from their own in both procedural and substantive terms. It was thought that Canadian or American jurists would not be able to apply Mexico's civil law correctly, nor would Mexican jurists be able to

⁴⁷ Annex 1904.13 of the NAFTA.

⁴⁸ James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 88.

adapt to the common law practices of Canada and the United States. Substantive issues such as the impartiality of the Mexican judiciary, the transparency of Mexican trade law, the political will of the Mexican government to enforce NAFTA provisions and panel decisions onto itself and its nationals, and the possibility of combining an Anglo-Saxon system of common law with Mexico's Franco-Iberian system of civil law caused negotiators and academics to consider whether the FTA's dispute settlement provisions could be replicated in the larger agreement.⁴⁹ The fears about the compatibility of the Mexican legal system with FTA-19 were effectively summarized by Representative Sam Gibbons in his testimony about adding other countries to the FTA. He stated:

When you get past Canada ... there are not a whole lot of targets of opportunity out there that look attractive. For instance, people say we ought to execute one of these agreements with Mexico. Well, the people that do that, don't understand Mexico very well. It would be extremely difficult to have one of these agreements with Mexico because our laws and procedures are so different. Fortunately for us and for the Canadians, our laws and procedures are substantively very similar. They came from the same roots of the old English common law. So while we have different names on different agencies and slightly different procedures, the impact [of FTA-19] is almost identical in Canada and here. Such is not the case with Mexico.⁵⁰

Article 1907 (3) set out a number of changes that Mexico had to make to its domestic AD/CVD laws to ensure that its system would not undermine the effectiveness of the panel process. Furthermore, Annex 1904(15)(d) outlined twenty amendments that Mexico was obligated to make so that its trade remedy regime would be more like the Canadian and American systems. The amendments were mostly procedural, and were intended to address the low standards of transparency and due process which were characteristic of Mexico's entire judicial system. They included: the requirement to publish a notice when an AD/CVD investigation was initiated; an obligation to disclose all of the relevant information regarding the methods that the Secretaria de Comercio Y Fomento Industrial (SECOFI) used to determine the margin of dumping or amount of subsidy; the creation of explicit timetables for administrative proceedings; the assurance that foreign and domestic parties could fully participate in the administrative process; more timely access to all non confidential information; the assurance that provisional duties would not be issued five days after a petition was received from a Mexican firm; the ability for foreigners to

⁴⁹ Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters." Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 8-9.

⁵⁰ Rep. Sam Gibbons, *Hearing* before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 100th Congress, Second Session, April 28, 1988, 98-99.

appeal final determinations before Mexico's Federal Fiscal Court and/or a binational NAFTA panel without needing to exhaust the administrative review process before SECOFI. Most importantly, Annex 1904 (15) required SECOFI to compile a comprehensive administrative record of the proceedings of an investigation and to restrict its final determination to the evidence on that record. Mexico was also required to provide a detailed statement of legal reasoning underlying the agency's determination which formed the basis for judicial review by a NAFTA panel.⁵¹

Mexico complied with the changes it was required to make to its domestic trade remedy regime. For example, Mexico placed explicit and adequate timetables for AD/CVD investigations into the Foreign Trade Law of 1993. Article 57(1) of the new Foreign Trade Law also complied with NAFTA-19 because it only allowed SECOFI to levy a duty if at least 45 days had passed since the investigation was officially initiated and a preliminary determination had been released. Mexico ensured that interested parties were adequately informed of procedures and had a right to submit timely comment on the legal procedures and decisions of their cases. Articles 53 and 81 of the Foreign Trade Law of 1993 obligated SECOFI to hold a public hearing after verifying the information and publishing its preliminary determination. The hearing allowed foreign producers, foreign governments, and Mexican petitioner(s) to file written briefs and present oral arguments in response to SECOFI's preliminary determinations. Finally, the changes to the Foreign Trade Law obliged SECOFI to compile an administrative record during an AD/CVD investigation and to base its decision solely upon that record.⁵² In this way, the institutions of NAFTA-19 had a significant effect on Mexico's trade laws. The New Foreign Trade Law of 1993 was the culmination of the NAFTA negotiations and provisions of NAFTA-19. It affected the most important procedures, methods, and principles that SECOFI used when levying AD/CVDs against Canadian and American producers. Indeed, Canadian and American negotiators would not have concluded the NAFTA, nor would their legislatures have ratified the agreement, if the Mexican government had not undertaken massive reforms to liberalize its AD/CVD laws.⁵³

⁵¹ Gilbert Winham, "Dispute Settlement in the NAFTA and the FTA," in Steven Globerman, Michael Walker (eds), *Assessing NAFTA: A Trilateral Analysis* (Vancouver: The Fraser Institute, 1993), 267-268.

⁵² Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 9-10; Interview with Joanne Osendarp, Legal Counsel, Office of North American Trade Negotiations, Department of Foreign Affairs and International Trade, Ottawa, November 9, 1995.

⁵³ Interview with Joanne Osendarp, Legal Counsel to the Office of North American Trade Negotiations, Department of Foreign Affairs and International Trade, January, 1996.

However, even though Mexico radically changed its trade regulatory process in compliance with NAFTA-19, a number of problems are still present. For example, SECOFI is not legally required to revise its rulings if international tribunals such as NAFTA-19 panels find that they are inconsistent with Mexico's AD/CVD laws. In addition, neither the new Foreign Trade Law nor the Foreign Trade Law Regulations of 1993 set out an express provision that requires SECOFI to issue a preliminary determination and hold public hearing during two kinds of administrative proceedings conducted after the initial investigation: annual administrative reviews and product coverage proceedings as required by the NAFTA. The relevant regulatory provisions also mildly suggest that eligible legal counsel for an interested party might not be able to enjoy complete access to all of the information relied upon by SECOFI during post-investigation and administrative review proceedings.⁵⁴ Finally, the Mexican Constitution and Law of Amparo guarantee that Mexicans may launch an Amparo suit to challenge an "authority's" final decision. Therefore, domestic producers could jeopardize the NAFTA-19 process. According to Article 1904 of the NAFTA, SECOFI would be required to make a redetermination of its initial finding in the event that a binational panel remanded one of its AD/CVD determinations as being inconsistent with the Foreign Trade Law of 1993. In such a case, SECOFI's re-determination would become the "final" decision, and could be challenged by the writ of Amparo. Invoking the writ of Amparo could thereby challenge the final, binding nature of the binational panel's authority. Canadian and American negotiators fought to ensure that this would not occur. They created Article 1905 of the NAFTA to be a safeguard against this possibility. In the event that Mexican producers continued to use Amparo suits to challenge the binational panel process of NAFTA-19, Article 1905 would permit the other two Parties to take NAFTA-19 away from Mexico.⁵⁵

Nevertheless, trade law experts predict that Mexico will comply with NAFTA-19 because it has the force of law in Mexico by virtue of Article 133 of the Constitution. Article 133 provides that international treaties are "self-executing" in Mexico's legal system. After being approved by the Senate, any international treaty that was agreed to by the Mexican president becomes part of the supreme law of Mexico. While international treaties do not assume the same status as the Constitution itself, they take precedence within the hierarchy of Mexican laws. International rules are to be directly applied even if they are inconsistent with pre-existing domestic rules such as the Foreign Trade Law of 1993.

⁵⁴ Craig R. Giesze, "Mexico's New Antidumping and Countervailing Duty System," *St. Mary's Law Journal*, Vol. 25, No. 3 (1994), 953-955.

⁵⁵ Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 11.

Furthermore, experts predict that Mexico will comply with the procedures of NAFTA-19 because it may fear censure from the American and Canadian governments if it does not abide by its obligations.⁵⁶

Now that the NAFTA has taken effect, commentators have argued that the initial misgivings about the compatibility of the three trade regimes within NAFTA-19 were unfounded. Ramirez argued that the differences between common and civil law systems can be overcome within a broader, legal framework (e.g., international trade agreements). Indeed, Ramirez noted that the exchanges between the two types of legal systems have become more common as the international environment was increasingly integrated during the 20th century. He expected that the two judicial traditions could be combined within the NAFTA as the interplay between Canada, Mexico and the United States increased. Similarly, López-Ayllón maintained that the NAFTA's institutions (e.g., the trilateral Free Trade Commission, the NAFTA Secretariat, the working groups charged with administering the agreement, and the dispute settlement panels) would intensify contacts between the officials responsible for the agreement's implementation. Increased contact would lead to an exchange of information that would undoubtedly continue to modify Mexico's administrative practices to make them even more compatible with NAFTA-19. López-Ayllón also argued that increased interaction with American and Canadian officials could re-educate those in Mexico's legal profession. Re-educating them could therefore encourage them to apply more liberal, democratic, transparent procedures when administering the judicial system in general, and AD/CVD investigations in particular.⁵⁷

⁵⁶ Interview with Joanne Osendarp, Legal Counsel to the Office of North American Trade Negotiations, Department of Foreign Affairs and International Trade, January, 1996.

⁵⁷ Sergio López-Ayllón, "Mexico, NAFTA, and Legal Culture," Paper presented to the conference on "The Legal Order in Trade Areas in Europe and the Americas," Ottawa, October 17-18, 1995, 11, 13-14. Similar arguments were made by Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 13-14; Eduardo F. Ramirez, "NAFTA and the Coordination of North American Commercial Law," in A.R. Riggs, Tom Velk (eds), *Beyond NAFTA: An Economic, Political, and Sociological Perspective* (Vancouver: The Fraser Institute, 1993), 233-234; Stephen Zamora, "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement," in *Law and Policy in International Business*, Vol. 24, No. 2 (1993); Michael Walker, "Free Trade and the Future of North America," in A.R. Riggs, Tom Velk (eds), *Beyond NAFTA: An Economic, Political, and Sociological Perspective* (Vancouver: The Fraser Institute, 1993), 18; M. Teresa Guteirrez-Haces, "Transition Without Rule?" in A.R. Riggs, Tom Velk (eds), *Beyond NAFTA: An Economic, Political, and Sociological Perspective* (Vancouver: The Fraser Institute, 1993), 40; Kristin Oelstrom, "A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA," in *Law and Policy in International Business*, Vol. 25, No. 2 (1994), 797-798; Neil Longley, Terry Wu, "Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the Free Trade Negotiations," in *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 911.

Articles 1904 (14) and (15) did not just oblige Mexico to change its laws, but required Canada and the United States to make formal changes to their trade remedy regimes as well, to extend FTA-19 to Mexico. Essentially, the changes required by Articles 1904 (14) and (15) were designed for “optics” sake, and written to appease the Mexicans. Mexican negotiators were very concerned with the appearance of the agreement as it was being shaped. They insisted that rights and obligations be extended equally to all three countries. Therefore, the reasons why Articles 1904 (14) and (15) were written demonstrate the hegemonic relationships that were present in the NAFTA negotiations. Canadian and American officials were able to use their economic and political power to force the Mexicans to change their domestic laws. Because the Mexican government wanted to conclude the agreement, they were at a disadvantage vis-à-vis the other two countries as NAFTA-19 was created.

Annex 1904 (15) of the NAFTA required that United States amend its trade remedy laws to extend the binational process to Mexico. In addition, the United States was instructed to include judges and former judges on its roster of potential panelists. Annex 1904 (15) instructed the Canadian government to amend Part 1(1) of the SIMA to extend the binational panel review process of FTA-19 to include Mexico. Furthermore, Canada was required to make a number of other technical amendments to Part 1(1) of the SIMA. These included: clearer definitions of certain new terms used throughout the Act; new provisions to ensure that duties imposed under the SIMA would continue to be applied during both domestic court and panel proceedings; new provisions for the refund of duties with interest in order to give effect to a court or panel decision; new procedures to be followed by the Deputy Minister and the CITT in cases where decisions were reviewed and referred back for action by a panel; requirements that the CITT make a separate order or finding with respect to goods of a NAFTA country when an inquiry involves more than one NAFTA country or countries in order to preclude access to panels by those countries which are not party to the dispute; provisions which allow the government of a NAFTA country or a manufacturer, producer, or exporter of goods of a NAFTA country to request a redetermination by the Deputy Minister within a year of certain rulings.⁵⁸ Canada and the United States complied with the changes when the NAFTA was implemented by the two governments in 1993.

⁵⁸ Department of External Affairs, “North American Free Trade Agreement: Canadian Statement of Implementation,” *Canada Gazette Part I*, January 1, 1994, 200-203.

The Differences between FTA-19 and NAFTA-19

(1) The Safeguard Mechanism of Article 1905

The provisions of NAFTA-19 and FTA-19 differ in three significant aspects. The first difference is the safeguard mechanism of Article 1905 of the NAFTA. In general, the safeguard mechanism was included to ensure that the panel process would be able to function as intended, and would be protected from the possibility of being undermined by a country's domestic law. In particular, Article 1905 was included as a safeguard against the Mexican writ of Amparo. Any NAFTA country may request that a Special Committee be convened pursuant to Article 1905 to determine if another's domestic law: (1) prevented the establishment of a panel; (2) prevented the panel from rendering a final decision; (3) prevented the implementation of a panel's decision or denied it binding force and effect; or (4) failed to provide an opportunity for judicial or panel review. Article 1905 of the NAFTA requires that the three members of the Special Committee be judges or retired judges, and chosen from the same roster from which extraordinary challenge committees are chosen. The procedures which govern the conduct of the special committees are laid out in Article 1905 and Annex 1905 (6) of the NAFTA.

If a Special Committee makes an affirmative finding on any of the afore mentioned grounds, the countries must attempt to resolve the matter within 60 days. Until the outcome of those negotiations are known, ongoing dispute settlement panel and/or ECC proceedings will be stayed (i.e., put on hold). If parties are unable to resolve the dispute, the complaining country may suspend the panel system altogether, or may suspend other benefits conferred by the agreement. If the complaining country suspends the panel system, the country complained against may take reciprocal action. Any suspension of benefits remain in effect, unless the countries resolve the matter, or the country complained against demonstrates that it has taken corrective action. If such suspensive action occurs:

... binational panel or extraordinary challenge committee reviews of the final determinations of the complaining Party requested by the Party complained against will, at the request of the complaining Party, be irrevocably terminated and referred to the appropriate domestic court for decision.⁵⁹

⁵⁹ Simon V. Potter, "NAFTA's Chapter 19 Judicial Review in Antidumping and Countervailing Duty Matters" before the Sub-Committee on International Trade of the Standing Committee on External Affairs and International Trade (November 26, 1992), 14.

Winham argues that it is unlikely that the need for a Special Committee would arise in a dispute between Canada and the United States in light of the successful history of FTA-19. Winham's point is well taken but may be slightly optimistic. Given the high degree of American protectionism and the fact that American officials and lobby groups have been fighting to weaken the binding nature of FTA-19 since before the NAFTA negotiations began, Canadians and Mexicans should be glad that safeguard measures exist to ensure that the integrity and effectiveness of the binational panel process remain intact. Moreover, given the differences and problems of the Mexican legal system, Canadian and Americans should be pleased that constitutional rights such as Amparo and the informal rules sustained by the traditions of authoritarianism, corporatism, and the single ruling party cannot jeopardize the binational panel process. Winham does note that the ability to refer a dispute to a Special Committee may form a useful sanction to ensure that Mexico (or any other country acceding to the NAFTA) adopts the domestic practices necessary to implement the decisions of NAFTA-19 panels. However, he concludes that it is unlikely that the extension of Chapter 19 to Mexico could survive any substantial use of the safeguard measures of Article 1905 because extensive use of that article essentially signals a breakdown of the undertakings of NAFTA-19 itself.⁶⁰

(2) The Abolition of the Five-To-Seven Year Working Group

The second difference is that the five-to-seven year working group of Article 1906 of the FTA was abolished by Article 1907 of the NAFTA. Instead of setting out a designated time frame to generate a continental body of trade remedy laws, Article 1907(1) of the NAFTA provides that "the Parties shall consult annually, or on the request of any Party, to consider any problems that may arise with respect to the implementation or operation of this Chapter and recommend solutions, where appropriate." Similarly, Article 1907(3) of the NAFTA provides for regular consultations on matters related to fair and open procedures in the administration of the three countries' AD/CVD laws. The competent investigating authorities of the three countries (e.g., the Deputy Minister of National Revenue, CITT, DOC, ITC, SECOFI) are to examine the procedures used during AD/CVD investigations on an annual basis, or upon the request of one of the three governments.

⁶⁰ Gilbert Winham, "Dispute Settlement in the NAFTA and the FTA." in Steven Globerman, Michael Walker (eds), *Assessing NAFTA: A Trinational Analysis* (Vancouver: The Fraser Institute, 1993), 269.

Trilateral working groups on subsidies and AD measures were established to carry out the requirements of Article 1907. They were instructed to build, as appropriate, on the results of the Uruguay Round and to continue the efforts of the FTA's working group. The three countries agreed that the work was to be completed by December 31, 1995. The two-year deadline was an essential precondition set by Prime Minister Chrétien before his government passed the NAFTA. However, the complexities inherent in the issues of dumping and subsidization prevented the three Governments from reaching an agreement by the December 31, 1995 deadline. Indeed, the working groups did not begin to meet to create a harmonized body of trade remedy laws until 1995. When they did meet, they did so hesitantly. The three countries thus agreed to a new timetable for negotiations, and indicated that they might even refocus the terms of a proposed code of conduct for the NAFTA.⁶¹ A report on subsidies and antidumping duties was released in the Spring of 1997. The Report did not resolve any issues dealing with trade remedies, and simply allowed the three governments to continue to disagree how trade remedies would be handled in North America. Canada did insist, however, that any government could reopen discussions at any point in the future.

Russell is critical of the change made to the FTA's working group. He argues that Article 1907 of the NAFTA watered down the FTA's commitment to find a uniform system of rules governing ADDs/CVDs. Conversely, others have argued that the whole idea behind NAFTA-19 was to harmonize North American trade remedy laws. Therefore, the weaker language which charged the NAFTA groups with their tasks did not impede the search for uniform trade remedy laws.⁶² Finally, some have argued that the abolition of the FTA's working group made the provisions of NAFTA-19 much stronger because they were made permanent ones. The provisions of NAFTA-19 can not be abrogated as they could have been under FTA-19 in the event that the dumping/subsidy issue was not resolved. In his testimony before the House of Commons Committee studying the NAFTA, Simon V. Potter of Ogilvy Renault stated:

Negotiating Chapter 19 of the FTA was a great victory for Canada, mitigated only by the fact that the FTA meant it to be a temporary measure, up to seven years during which Canada was obliged to negotiate entirely new rules regarding antidumping practices and an entirely new subsidies code ... Chapter 19 of NAFTA confirms that victory and renders it

⁶¹ "NAFTA Plans to Harmonize Antidumping and Subsidies Rules Abandoned," *The Canadian Free Trader*, Vol. 8, No. 9 (September, 1995), 68.

⁶² James R. Cannon Jr. *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 88.

permanent, an institutionalized fixture of our trading relationship with the rest of the continent.⁶³

(3) The Extraordinary Challenge Committees

The ECCs of the NAFTA were patterned on those of the FTA. However, the negotiators of the NAFTA made two changes to the ECCs. First, Article 1904 (13) (a) (iii) of the NAFTA clarified one of the grounds for establishing an ECC. American negotiators were influenced by powerful interest groups who felt that the panels in the pork and softwood lumber disputes did not apply the American standard of review properly, and exceeded their powers, authority, and jurisdiction. American negotiators took their arguments seriously, and insisted that the standard of review be explicitly mentioned in the grounds for establishing an ECC during the NAFTA discussions. Consequently, an ECC may be requested under NAFTA-19 if a binational panel failed to apply the appropriate standard of review, and manifestly exceeded its powers, authority, or jurisdiction as a result.

The second change stemmed from American fears that an ECC would not be able to fulfill its new tasks in 30 days. Article 1904 (13) of the NAFTA therefore extended the length of time that an ECC could take to review the legal and factual bases of a panel's decision. ECCs under the NAFTA may take 60 days to release their decision, whereas FTA committees were only granted 30 days. By expanding the period of review and requiring ECCs to look at the panel's underlying legal and factual analysis, the Americans felt that the changes clarified that an ECC's responsibilities did not end with simply ensuring that the panel articulated the correct standard of review. Instead, NAFTA ECCs were to examine whether the panel analyzed the substantive and underlying facts in question as well.⁶⁴

⁶³ Simon V. Potter, "NAFTA's Chapter 19 Judicial Review in Antidumping and Countervailing Duty Matters," Brief Submitted to the Sub-Committee on International Trade of the Standing Committee on External Affairs and International Trade, Ottawa, November 26, 1991, 4.

⁶⁴ Interview with Joanne Osendarp, Legal Counsel, Office of North American Trade Negotiations, Department of Foreign Affairs and International Trade, Ottawa, January, 1996; United States Statement of Administrative Action for the NAFTA, January, 1993.

CHAPTER FIVE-
THE SOFTWOOD LUMBER DISPUTE BETWEEN CANADA
AND THE UNITED STATES

The softwood lumber dispute will be the first case to address the hypothesis about the process of change in the North American trade remedy regime. The softwood lumber dispute was chosen because of its significance in Canadian-American trade. To date, it has resulted in three rounds of litigation, and has employed American administrative agencies, GATT panels, FTA-19 panels, NAFTA-19 panels, and an extraordinary challenge committee (ECC). The dispute has also involved national and subnational governmental officials who sought to accommodate the interests of their constituents.

Chapter Five describes the softwood lumber dispute from its beginnings in 1981 to the present. The first two "rounds" of the dispute (1981-1983, 1986-1989) demonstrate how the American trade remedy regime operated before 1989. Rounds One and Two chronicle the efforts that Canadian and American governmental officials and interest groups made to encourage the Department of Commerce (DOC) and the International Trade Commission (ITC) to issue determinations in their favour. The third round of the dispute (1991-1993) illustrates that not only were the DOC and ITC influenced by domestic officials and interest groups after 1989, but they were affected by the presence of institutionalized binational panels, as well. In other words, the presence of FTA-19 and NAFTA-19 set the stage for change to occur in the American trade regulatory process. The DOC and ITC were required to juxtapose the orders of Chapters 19 binational panels with the demands of domestic policy-makers and interest groups as they responded to developments in the North American trading environment. In some instances, the DOC and ITC adhered to the rulings of the binational panels which reviewed their determinations. In other cases, however, the DOC and ITC resisted panel orders and clung to their original findings. Notwithstanding the effects that certain binational panels had, beliefs in economic protectionism, hegemonic relationships, and concerns with state sovereignty remained firmly at the center of the softwood lumber dispute. Influential members of Congress and interest groups used their power to ensure that economic protectionism, traditional modes of insulating domestic producers from foreign competition, and political maneuvering remained part of the North American trade remedy regime in spite of the presence of Chapters 19 after 1989. Chapter Five will conclude with an analytical section to summarize the case study, and to assess the relationships between the variables in the hypothesis.¹

¹ See Appendix H for a summary of the softwood lumber dispute.

Overview of the Canadian Softwood Lumber Industry

From a Canadian perspective, the softwood lumber dispute has been one of the most important events in the Canada-U.S. trading relationship. Historically, Canada has relied on its ability to export natural resources around the world. As an earner of export dollars, the forest industry has been one of Canada's most important sectors. In 1994, it contributed \$27.4 billion to Canada's gross domestic product. Exports of forestry products represented 15 percent of Canada's total exports of goods and contributed \$19.2 billion to Canada's balance of trade. The forest industry employed 311,000 Canadians in 1993. 350 communities in Canada were dependent on the industry for their survival.

The softwood lumber industry represents a large component of Canada's forestry sector. Canada is one of the largest softwood lumber producers in the world. In 1991, Canada accounted for 16 percent of total world softwood lumber production, following only the U.S. (at 24 percent) and the former Soviet Union (at 19 percent). Canada exports more softwood lumber products than does any other country in the world, and accounts for 36 percent (by value) of total world exports. Between 1987 and 1993, Canada's total exports of softwood lumber valued between \$5.9 and \$9.4 billion. Most of Canada's softwood lumber is directed to the United States. In 1992, Canada's softwood lumber exports to the U.S. were worth more than \$4.2 billion and represented 66 percent of Canada's total softwood lumber production. By August, 1995, \$5.92 billion worth of Canadian softwood lumber was exported to the United States. Canada's share of the American lumber market rose from 27 to 36 percent between 1991 and 1994.²

During the 1982-1983 recession, the American lumber industry experienced sharp declines in profits, employment and productivity. While American lumber producers were suffering from economic hardships, however, Canadian producers were able to slowly increase their share of the American market. For example, the value of Canadian exports to

² The statistics were compiled from a variety of sources including: Statistics Canada, International Trade Division, *Exports by Commodity - August, 1995* (Ottawa: Minister of Industry, 1995); Department of Foreign Affairs and International Trade, *Background: Softwood Lumber* (Ottawa: Foreign Affairs and International Trade, Canada, December 14, 1995); Statistics Canada-Industry Division, *Wood Industries* (Ottawa: Minister of Industry, Science and Technology, 1994); Statistic Canada, *Gross Domestic Products by Industry* (Ottawa: Statistics Canada, 1995); Statistics Canada, *Canadian Forestry Statistics* (Ottawa: Minister of Industry, Science and Technology, 1994); Canadian Council of Forest Ministers, *Compendium of Canadian Forestry Statistics* (Ottawa: Canadian Council of Forest Minister, 1995); Minister of Industry, Science, and Technology and Minister for International Trade, *Background on Softwood Lumber* (May, 1993); Drew Fagan, "Canada Wins Trade Round," *Globe and Mail* (May 7, 1993), A1, A18.

the U.S. rose considerably over the 1970s, and reached a peak of nearly \$2.8 billion in 1979. Canadian lumber producers were able to increase their share of the American market from 18 percent in 1975 to an unprecedented 30 percent at the peak of the recession in 1982.³

Canadian softwood lumber exports performed strongly in American markets during the 1980s for three major reasons. First, the American exchange rate climbed steadily during the early 1980s. The U.S. dollar appreciated by over 40 percent between 1982 and 1985 relative to its 1975-1985 base. Consequently, the higher dollar encouraged more Canadian softwood lumber to flow into American markets because it became more competitive and less expensive vis-à-vis American products.⁴ Second, certain types of Canadian softwood lumber were preferred over American products in the U.S. market. For instance, some American mobile home builders and cash and carry outlet managers preferred Canadian spruce, pine, and fir products over products made from the more expensive American southern yellow pine.⁵ Third, the American lumber industry experienced a lag in productivity growth during the early 1980s. Productivity in wood products lagged behind that of other manufacturing industries throughout both Canada and the United States. However, the lag in productivity in the lumber industry was much more severe in the U.S., and allowed Canadian softwood lumber exporters to continue to penetrate the American market as a result. Average labour productivity in Canada was higher than in the U.S. and grew more rapidly. In addition, Canadian firms were improving their production capabilities at a much faster rate than were American softwood lumber firms. Higher rates of investment during the recession produced Canadian mills that were much larger, more efficient, more automated, and more advanced than their American counterparts.⁶

³ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 2; United States International Trade Commission, *Preliminary Determination: Softwood Lumber from Canada* (Washington, November 1982), A-18; Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 7; F.J. Anderson, R.D. Cairns, "The Softwood Lumber Agreement and Resource Policy," *Canadian Public Policy*, Vol. 14, No. 2 (1988), 186.

⁴ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 32.

⁵ F.J. Anderson, R.D. Cairns, "The Softwood Lumber Agreement and Resource Policy," *Canadian Public Policy*, Vol. 14, No. 2 (1988), 186; United States International Trade Commission, *Preliminary Determination: Softwood Lumber from Canada*. (Washington, November 1982), A-10.

⁶ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 38, 41.

Canadian and American Forest Management Programs

American softwood lumber producers added a fourth reason to their poor performance during the early 1980s. They argued that Canada's system of forest management cushioned Canadian producers from the fall in lumber prices during the recession.⁷ Canada's forest management policies have been implemented by the federal and provincial governments. They are known as stumpage programs. Stumpage programs assess the value of standing timber to set stumpage fees.⁸

Stumpage fees are charged for the right to harvest timber from land that belongs to another owner. They are assessed in Canada and the United States by a number of different means. In general, the value of standing timber (i.e., stumpage) is determined by factors such as volume per acre to be cut, the size of the timber, species of timber, terrain, location, log quality, proximity of markets, and allowances for profit and risk.⁹ For example, forest services in British Columbia and the United States set stumpage fees by the Rothery Formula. The Formula calculates the value of standing timber by subtracting the combined sum of harvesting costs and allowance for profit and risk from the end product value of timber.¹⁰ Stumpage fees are imposed as an *ad valorem* or per unit tax on producers in Ontario, Quebec, and Alberta. Ontario calculates the *ad valorem* tax as an increasing function of lumber prices and pulp prices.¹¹

⁷ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 3.

⁸ Stumpage programs are used in the United States as well. There are three major differences between the way that stumpage fees are appraised in Canada and the United States: (1) a public bidding system for rights to harvest timber is only present in the United States - in Canada, the appraised price is usually the final price paid by lumber producers; (2) because most forest land in the U.S. is privately owned whereas in Canada it is Crown land, American tax laws affect the calculation of stumpage fees in Canada and the United States; (3) tenure arrangements on government-owned forest land cause a difference in Canadian and American stumpage fees.

For more information see: Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 9-11; Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 66-69.

⁹ Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 9.

¹⁰ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 66.

¹¹ F.J. Anderson, R.D. Cairns, "The Softwood Lumber Agreement and Resource Policy," *Canadian Public Policy*, Vol. 14, No. 2 (1988), 187.

Round One: The 1982-1983 Dispute over Softwood Lumber from Canada

The U.S. Coalition for Fair Canadian Lumber Imports (CFCLI) was formed in 1982 when a north western group of lumber producers struck an alliance with lumber producers in the southern United States. The CFCLI represented 350 American lumber producers and nine industrial associations. Most of the lumber producers were small and medium sized independents. Collectively, they represented 20 percent of the lumber producers in the United States.

The differences between Canadian and American stumpage systems caused the CFCLI to argue that Canadian producers received “unfair” government subsidies on their lumber products. Coupled with the fact that Canadian softwood lumber exports were increasing dramatically, the CFCLI declared that the Canadian stumpage programs represented unfair, countervailable subsidies, and threatened American producers with material injury. Consequently, the CFCLI pressured Congress to protect its members from the influx of Canadian exports during the early 1980s. In line with the general wave of American protectionism, Congress passed a number of specific bills to limit the growing number of Canadian lumber products in the American market between 1981 and 1987. The bills placed voluntary or mandatory quotas on exports entering the United States, and placed tariffs on the tariff-free trade in natural resources. In addition, they redefined the term “subsidy” in existing American trade laws to increase the probability of affirmative determinations in CVD investigations.

Alongside lobbying efforts for more restrictive measures against Canadian softwood lumber, the CFCLI petitioned the DOC and ITC to prevent Canadian stumpage programs from harming them further. On October 7, 1982, the Coalition filed a countervailing duty (CVD) petition against Canadian softwood lumber, shakes, and shingles. The petition claimed that the Canadian stumpage system allowed timber to be sold at a fraction of its “true market value.” The petition also claimed that an American-style public auction system was the only way to assess “true market value” because the final bid price would reflect the true demand. The petition argued that lumber producers paid an artificially low rate for timber in Canada because demand was not reflected properly in the Canadian stumpage system. Consequently, the differences between Canadian rates for government timber and American “true market value” rates constituted an “unfair,” countervailable subsidy. The petition estimated that the value of the subsidy was U.S.

\$120.94 per thousand board feet of lumber, and requested that a CVD of 65 percent of the value of imported Canadian lumber products be placed on them to offset the subsidy.¹²

The DOC initiated a CVD investigation on October 27, 1982 after finding that the CFCLI's petition contained sufficient information. It should be recalled that the CFCLI only represented 20 percent of American lumber producers. The remaining 80 percent were either neutral, or opposed, to the petition because they did not agree with the subsidy allegations. Indeed, the vast majority of American lumber producers opposed the petition because of their close ties with Canada's softwood lumber industry. Many American producers owned and operated firms in Canada, and/or imported Canadian-made products to the United States. Consequently, they did not wish to see Canadian goods saddled with a CVD for fear that it would harm their production capabilities at home. Interestingly, the CFCLI asked that the American lumber companies which imported Canadian products or owned Canadian subsidiaries be excluded from the definition of the "domestic industry" when filing the petition. The CFCLI made the request to give the impression that more than 20 percent of American producers supported the CVD investigation, even though the vast majority did not.¹³

The DOC was often criticized for launching CVD investigations even though petitions were not supported by a the majority of domestic producers before 1989. Many charged that the DOC initiated any request to satisfy cries for protection. The critique was demonstrated in the first round of the softwood lumber dispute. The DOC initiated the CVD investigation despite the fact that a large part of the domestic lumber industry objected to it.

¹² The programs and agencies that were alleged to offer unfair subsidies included: the Regional Development incentives programs, the Enterprise Development Program, the Forest Industry Renewable Energy, Program for Export Development, Federal Business Development Bank, Export Development Corporation, Transportation, Canadian Forestry Service, Manpower, Small Business loans, Taxation measures, Assistance to Remote Rural Areas program, B.C. Low-Interest Loan Assistance program, B.C. Market Development Assistance program, B.C. forestry job creation program, Quebec Rexfor program, Ontario Employment Development Fund, Alberta Opportunity Company, B.C. Columbia stumpage payment moratoria, Quebec property tax abatement in labour surplus areas, Ontario stumpage payment deferral program, and the Alberta government's assumption of inventory financing costs.
Federal Register Notices, Vol. 47, No. 213 (Wednesday November 3, 1982).

¹³ Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 16.

***The ITC's Preliminary Affirmative Injury Determination:
November 17, 1982***

The ITC released a preliminary affirmative injury determination on November 17, 1982. In accordance with American trade laws, the ITC circulated a questionnaire to Canadian lumber companies. The Commission based its preliminary determination on a very small number of responses to the questionnaire. In fact, the ITC stated that the "best-information-available" was supplied by only 13 American softwood lumber producers, all of whom were from the CFCLI. Therefore, the ITC employed its traditional practice of basing an injury determination on biased, politically motivated sources. Certain laws and forms of behaviour had become deeply engrained in the American regime, thus giving the ITC the authority it needed to draw on longstanding laws and traditions of protectionism. Many argued that the practice resulted in determinations which were unfair, unjustified, and hard on foreign exporters and producers.

The ITC reached the conclusion that there was "a reasonable indication that an industry in the United States [was] materially injured by reason of imports from Canada of softwood lumber." The Commission evaluated the condition of the domestic industry by discussing the economic hardships that American lumber producers faced during the early 1980s. For example, domestic consumption of softwood lumber products declined between 1979 and 1981. American production declined from 29.7 billion board feet in 1979 to 14.3 billion board feet in 1981 as well. The ITC also noted that the number of lumber producing mills declined by 5.6 percent and the utilization of available mill capacity by 20 percent between 1979 and 1981. Thirteen American producers reported a decline in net sales of 23 percent between 1979-1981 and a decline of 25 percent in 1982.¹⁴ The ITC concluded that the economic hardships faced by the domestic industry of softwood lumber producers were directly linked to Canadian imports. Because the prices of American and Canadian softwood lumber had declined slightly and were at equal levels, the ITC concluded that Canadian lumber producers threatened to injure American producers because of their greater share of the domestic market. For the ITC, "although the drop in consumption due in large part to the decline in residential housing construction has greatly affected this industry, we find a reasonable indication that allegedly subsidized imports from Canada have caused material injury."¹⁵

¹⁴ Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 5-7.

¹⁵ Gordon W.V. Jansen, "Canada-U.S. Trade Relations: The Lessons of the Softwood Lumber Case," *Executive Bulletin*, No. 27 (Ottawa: Conference Board of Canada, August, 1984), 7-8.

***The DOC's Negative Determinations:
March 7, 1983 and May 31, 1983***

The DOC issued a negative preliminary determination on March 7, 1983 and a negative final determination on May 31, 1983.¹⁶ Both determinations found that a number of provincial and federal stumpage programs conferred subsidies on the softwood lumber products in question. However, the DOC found that those programs were below the *de minimus* level. The Department did not subject them to CVDs as a result.¹⁷

The CFCLI's petition claimed that Canadian stumpage programs conferred a domestic and export subsidy to Canadian producers. In response, the DOC ruled that stumpage programs were not export subsidies "because they did not, and were not intended to, stimulate exports rather than domestic sales, and because they were not offered contingent upon export performance."¹⁸ The DOC also ruled that stumpage programs were not countervailable domestic subsidies. Pursuant to the general availability or specificity test, the DOC determined that Canadian stumpage programs were not provided to a "specific enterprise or industry, or group of enterprises or industries." Instead, the DOC concluded that stumpage programs were "available within Canada on similar terms regardless of the industry or enterprise of the recipient."¹⁹ The DOC stressed that Canadian stumpage programs were used by several groups of forest industries including the lumber and wood products industries, the veneer, plywood and building boards

¹⁶ The DOC was to issue a preliminary determination on December 31, 1982. However, it postponed its determination for 65 days because the case was deemed to be "extraordinarily complicated."

¹⁷ The federal programs that conferred subsidies on the products under investigation but were below the *de minimus* level were: certain aspects of the investment tax credit, program for export market development, forest industry renewable energy program, regional development incentives program, federal employment program. Federal/provincial programs that conferred *de minimus* subsidies included: the agricultural and rural development agreements, B.C.'s assistance to small enterprise program, NB's NED, KED, SIFAP, Ontario's eastern Ontario subsidiary agreement. Provincial programs included: Alberta's stumpage payment deferral, BC's low-interest loan assistance, stumpage payment deferral, Ontario's stumpage pricing for non-integrated licenses, and Quebec's stumpage pricing on timber limits, Aide à la promotion des exportations, société de récupération, d'exploitation et de développement forestiers du Québec, FRI Tax abatement programs, SDI export expansion program.

United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 2-3, 8.

¹⁸ United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 45-46.

¹⁹ United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 46.

industries, the pulp and paper industries, and the furniture manufacturing industries. Furthermore, a number of industries outside the forest industry, such as those that produced turpentine, charcoal, wood alcohol, and food additives, used stumpage programs as well. By virtue of the Standard Industrial Classification (SIC) system of Canada and the United States, the DOC reasoned that all of those industries could not be grouped into one industry in light of their diverse characteristics.²⁰ Therefore, the general availability or specificity test was not met because the actual number of users of stumpage programs in Canada was large. Users of stumpage programs were not limited to a specific industry, enterprise, or group of industries or enterprises.

The DOC assessed preferentiality by testing whether stumpage programs were provided more favourably to some Canadian producers than to others. The DOC found that with the exception of certain aspects of Ontario's and Quebec's stumpage programs, Canadian stumpage programs did not provide goods at preferential rates to some softwood lumber producers.²¹ The DOC also held that stumpage programs did not give preference to a select group of Canadian softwood lumber producers because they did not assume the costs of production. The DOC noted that "the Canadian government did not relieve the producers of any pre-existing statutory or contractual obligations." Instead, Canadian governments imposed a "cost for the stumpage which they have owned themselves for well over a century." The imposed costs "included not only cash payments for stumpage, but also one or more other costs such as ground rents, forest management plans, silviculture and road building."²²

The CFCLI used the differences in stumpage fees as its critical piece of evidence to argue that federal and provincial stumpage programs gave Canadian producers an unfair

²⁰ The SIC system defined an industry as a "group of establishments primarily engaged in the same activity" and one which met "certain criteria of economic significance" related to employment, value of industry shipments, or number of establishments." The SIC system attached rankings (single to four digit categories) to industries based on their similarity in production. A single digit category signified a very broad, loosely defined industry. Neither the Canadian nor the American SIC categories contained an entry for a "forest products" industry encompassing the forest, wood products, and paper and allied products industries. Such a classification was considered to be too broad for even a one-digit SIC level.

Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 55-56

²¹ United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 48.

²² United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 50.

advantage over their American counterparts.²³ The Coalition insisted that Canadian and American prices should be directly compared to determine if the costs of production were being assumed by Canadian governments via the stumpage programs. The DOC flatly rejected the use of cross-border price comparisons in the preliminary and final determinations. The DOC demonstrated that it had not traditionally relied on cross-border comparisons in establishing commercial benchmarks. Furthermore, the DOC illustrated that Canadian and American prices for standing timber did not vary significantly. Indeed, Canadian prices were often slightly higher once appropriate adjustments had been made to account for the differences in the Canadian and American lumber production processes. The final determination held:

We believe that a comparison of Canadian stumpage prices with U.S. prices would be arbitrary and capricious in view of: (1) the wide differences between species composition; size, quality, and density of timber; terrain and accessibility of the standing timber throughout the United States and Canada; (2) the additional payments which are required in many provinces in Canada, but not generally in the United States; (3) the fact that in recent years, prices in national forests in the United States have been bid anywhere between two to five years in advance of cut, without taking into account the fluctuations in demand for lumber; and (4) the fact that in recent years the U.S. Forest Service has restricted the supply of timber in certain national forests due to budgetary and environmental constraints²⁴

The DOC determined that the most reasonable method to determine whether Canadian producers were paying fair market value for stumpage was the residual value technique. Under the technique, the sellers of stumpage would make allowances for normal profit and risk factors. They would then deduct the manufacturing costs from the end-product price of products made from stumpage to determine the minimum price for stumpage, below which the Canadian government should not sell. Using this method, the DOC ruled that the price of Canadian stumpage did indeed reflect fair market value.²⁵ Therefore, the DOC insisted that Canada's stumpage programs were not countervailable subsidies under American law, and terminated the CVD investigation as a result.

²³ F.J. Anderson, R.D. Cairns, "The Softwood Lumber Agreement and Resource Policy," *Canadian Public Policy*, Vol. 14, No. 2 (1988), 189-190.

²⁴ United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 51-52.

²⁵ United States Department of Commerce International Trade Administration, *Final Negative Countervailing Duty Determinations Certain Softwood Products from Canada* (Washington: May 31, 1986), 52.
 Alan Rugman, Samuel Porteous, "The Softwood Lumber Decision of 1986: Broadening the Nature of U.S. Administered Protection," *Review of International Business Law*, Vol. 2 (1988), 43.

The American Reaction to the DOC's Preliminary Determination: Appeal to the Court of International Trade

The CFCLI appealed the DOC's preliminary determination to the Court of International Trade (CIT) in March of 1983. The CIT rejected the appeal on the basis that it was outside of the Court's jurisdiction. The CIT held that it was only permitted to review an agency's final determination. Because American law and practice stipulated that a review court could not substitute its own opinion for an agency's determination, the CIT could only comment on the way that the agency reached a final determination on evidence on the record. Therefore, the CIT denied the appeal because American law and practice prevented it from interfering in a CVD investigation before a final determination had been released.²⁶

Termination of the 1982-1983 Softwood Lumber Dispute and the Rise of Political Pressure against Canadian Imports

The DOC's negative determination terminated the 1982-1983 investigation of Canadian softwood lumber products. The CFCLI decided not to appeal the DOC's determination because of the costs of litigation, insufficient legal arguments, and regional differences between members.

Within a few months of the DOC's determination, the timber lobby developed into a stronger organization known as the Coalition for Fair Lumber Imports (CFLI). The CFLI was made up of a number of softwood lumber producer associations and major forest product corporations in the United States. Unlike the CFCLI which only represented 20 percent of the domestic industry, the new Coalition accounted for 70 percent of American softwood lumber producers. The CFLI overcame the organizational disabilities of its predecessor, found sympathetic members of Congress, and sought to change the scope and content of American trade laws themselves. Most notably, the CFLI sought to change specificity requirements to prevent subsidized lumber from entering the American market without being subject to CVDs.²⁷

The context of the softwood lumber dispute changed between 1983 and 1986 as the CFLI put considerable pressure on Congress to continue implementing protectionist measures against Canadian softwood lumber products. As part of the larger resource and

²⁶ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 6.

²⁷ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 7.

resource processing sector, the CFLI was in a unique position to place a great deal of pressure on Congress. The American mining, energy, forest extraction, and processing industries were regionally concentrated. Within those regions, communities were generally single industry areas whose economic viability depended on the resource. Consequently, single industry communities and regions were able to exert a great deal of political pressure on Congress in general, and the Senate in particular, where regional interests were most effectively represented in the United States.²⁸ Therefore, under the leadership of the CFLI, American lumber producers were in excellent positions to lobby Congress for stronger, more protectionist CVD laws.

Between 1981-1987, Congress became very receptive to the Coalition's demands, and responded with a host of protectionist bills aimed at limiting softwood lumber exports from Canada. Percy and Yoder argued that "the economic importance of the forest products industry to the Pacific North-West led its Senators and Congressmen to be vigorous advocates on its behalf."²⁹ Senators and members of Congress from timber producing states in the South, the Mountain States, and the North-West were heavily represented on important legislative committees in 1985-1986. Their positions allowed them to bring the softwood lumber dispute to the center of Congress' attention and to highlight the demand for protectionist measures. For example, Robert Packwood (R-Ore) was the chairman of the Senate Finance Committee and a member of the Finance Subcommittee on International Trade. Senators Max Baucus (D-Mont), Malcolm Wallop (R-Idaho), and Steven Symms (R-Idaho) were members of both the Finance Committee and its International Trade Subcommittee. David Pryor (D-Ark) who represented a southern state with a large forest products industry was also on both committees. To publicize their positions against Canadian softwood lumber imports, Baucus and 15 other senators from lumber producing states warned Canada, from the floor of the Senate on February 26, 1986, to reduce softwood lumber exports or face the consequences of CVD measures. Twenty-five other senators provided written comments along similar lines for the record.³⁰

To satisfy their constituents and the lumber CFLI even further, powerful senators, such as Baucus, Packwood, Dole, and Danforth, pressured the executive branch to link the successful conclusion of the FTA negotiations with the resolution of the softwood lumber dispute. Only after being assured by President Reagan that the FTA would not be

²⁸ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 108.

²⁹ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 111.

³⁰ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 111.

concluded until the lumber dispute was settled, did the Senate Finance Committee approve the fast track negotiations with Canada towards the FTA.³¹ Congress also “encouraged the President to facilitate the preparation and the implementation with Canada, of common performance standards for the use of softwood plywood and other structural panels in construction applications in the United States and Canada,” in Section 201 (c) (1) of the FTA’s implementing legislation to afford more protection to the powerful lumber coalition.

Round Two: The 1986 Dispute over Softwood Lumber from Canada

The intensity of the dispute’s political climate of the dispute increased on May 19, 1986 when the CFLI filed a second petition against Canadian softwood lumber. American trade laws permit that a case may be reopened if new evidence can be presented or a change in law occurs. After hearing the DOC’s preliminary determination in *Carbon Black from Mexico* (explained below), the CFLI sensed that the DOC was slowly beginning to change its approach to the administration of American CVD laws. The CFLI seized the opportunity, offered by *Carbon Black*, to test the extent to which administrative agencies would use American AD/CVD laws to protect domestic producers from foreign competitors.

The DOC’s Ruling in Carbon Black from Mexico: De Facto versus De Jure Specificity

The CIT ordered the DOC to reconsider its interpretation of the general availability/specificity test in *Cabot Corporation v. the United States* (1985). The CIT held that the DOC had to examine not only the *de jure* effect of a subsidy, but the *de facto* effect as well. In other words, the CIT insisted that the DOC must consider whether a subsidy was actually being used by all of the producers or enterprises within an industry. The Court stated:

The distinction that has evaded the [DOC] is that not all so called generally available benefits are alike - some are benefits accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes. Thus, while it is true that a generalized benefit provided by government ... is not a countervailable bounty or grant, a generally available benefit ... may nevertheless accrue to specific recipients. General benefits are not conferred upon any specific individuals

³¹ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 111; Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 12-14.

or classes, while generally *available* benefits, when actually bestowed, may constitute specific grants conferred upon specific identifiable entities which would be subject to countervailing duties.³²

Carbon Black revealed that the DOC had begun to adhere to the CIT's opinion in *Cabot*, and had begun to change its approach to the general availability and preferentiality tests.³³ It should be noted that the DOC refused to accept the CIT's decision in its first few determinations of 1986. However, the DOC found it impossible to ignore *Cabot's* new approach for long. Congress placed a tremendous amount of political pressure on the Department to accept the new approach to *de facto* versus *de jure* specificity. Congress reasoned that the new approach to *de facto* specificity permitted the DOC to reach affirmative CVD determinations more easily, thereby increasing the protection afforded to domestic producers. The DOC developed new guidelines for testing preferentiality and specificity in response to Congress' demands. In particular, the new guidelines employed a much more critical, protectionist approach to natural resource pricing, and introduced four new tests to determine price discrimination. The DOC included the new guidelines in the Preferentiality Appendix of its preliminary determination of *Carbon Black*.³⁴

Diplomatic Attempts to Settle the 1986 Softwood Lumber Dispute

The CFLI used *Carbon Black* to argue that a change in law had occurred and that the softwood lumber case could be reopened. The Canadian government vehemently objected to the Coalition's petition, because it felt that new evidence had not been introduced nor had substantial changes been enacted to warrant another investigation against Canadian softwood lumber producers. The Canadian government proposed that special diplomatic envoys be used to settle the dispute and to ward off a harmful subsidy determination against softwood lumber producers. It pointed to the successful use of diplomacy during the acid rain and east coast fisheries disputes to substantiate its requests. Officials in the Office of the U.S. Trade Representative (USTR) convinced the CFLI to postpone its petition for one week to allow for negotiations to occur. The Coalition filed the petition after it deemed diplomatic channels to be an unsatisfactory means to handle the

³² *Cabot Corporation v. the United States* as cited in Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 94.

³³ Alan Rugman, Samuel Porteous, "The Softwood Lumber Decision of 1986," *Review of International Business Law*, Vol. 2 (1988), 47.

³⁴ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 14-15.

dispute. Interestingly, the CFLI offered the Canadian government a final chance to settle the dispute outside of administrative channels when it submitted the petition on May 19, 1986. The CFLI offered to withdraw the petition if the Canadian Government levied a 27 percent export tax on softwood lumber products to offset the CVD being sought from the DOC and ITC.³⁵

The Petition of the U.S. Coalition for Fair Lumber Imports

Essentially, the CFLI's petition contained the same arguments as those put forward by the CFCLI in 1982. The petition alleged that the stumpage programs of Alberta, British Columbia, Ontario, and Quebec represented unfair domestic subsidies in light of the new interpretation of *de jure* and *de facto* specificity. The petition also argued that several factual changes required that the case be reopened. For example, the petition insisted that the use of timber had shifted toward lumber production in Canada between 1983 and 1986. The amount of timber employed by companies outside the forest products group, such as pulp and paper industries, was negligible or nonexistent. Therefore, the petition maintained that provincial stumpage programs ensured that lumber firms were the principal beneficiaries of the timber trade. Furthermore, the petition argued that the furniture industry, found to be a stumpage license holder in 1983, used hardwood products instead of softwood products during its manufacturing process, and used lumber as an input instead of timber. As a result, the petition alleged that the furniture industry should not be classified in the softwood lumber industry and should not be allowed to benefit from stumpage rights. Finally, the petition argued that the DOC had not been sufficiently informed about Canadian timber management policies in 1983, and had missed some of the credits that were given to companies for reforestation and road building costs.³⁶

In much the same way as the 1983 petition was received, the CFLI's petition did not obtain unanimous consent from all lumber producers in the United States. In particular, the petition was contested and stiffly opposed by the Stop Unfair Wood Tariffs Group. The Group was a coalition of American lumber dealers, builders, unions, ports and railroads. It argued that the downstream consequences of increased tariffs on Canadian softwood lumber would do significant economic harm to their businesses and workers.³⁷

³⁵ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 17-18.

³⁶ *Federal Register Notices*, Vol. 51, No. 112. (Wednesday June 11, 1986), 21207.

³⁷ Earl H. Fry, "Softwood Lumber and Canada-U.S. Trade," *Western Perspectives* (Calgary: Canada West Foundation, October 1986), 6.

Nevertheless, the DOC agreed that the CFLI had presented a sufficient amount of new information to reopen the case on June 11, 1986.

The Canadian Response to the 1986 CVD Investigation: Request for a GATT Dispute Panel

The Canadian government responded to the CVD investigation with a petition to the GATT Council on June 5, 1986. Minister of International Trade, James Kelleher, requested that a conciliation procedure address the dispute pursuant to the 1979 Subsidies Code. In a statement to the GATT Council, the Canadian ambassador argued that the CVD investigation represented an "unjustifiable trade harassment," because neither Canadian practices, nor American CVD laws had changed significantly since 1983.³⁸ The conciliation procedure was not successful. Consequently, the Subsidies Committee established a panel to investigate the dispute under Article 18 of the 1979 GATT Code on August 1, 1986.³⁹

The ITC's Preliminary Affirmative Injury Determination: June 26, 1986

The ITC released a preliminary affirmative determination on June 26, 1986. When assessing the conditions of the domestic industry, the ITC noted that marginal improvements had occurred in the industry's performance between 1983 and 1986. However, the ITC found that imports from Canada had increased in 1985 in absolute volume and relative to domestic consumption while domestic lumber prices had fallen. The ITC also noted evidence of underselling by imports from Canada.⁴⁰ The ITC concluded that:

We find that the significant and increasing volume of Canadian imports and the sizable market share taken by those imports, together with generally declining prices at a time of increasing consumption, and evidence of some underselling of the domestic product by the Canadian imports, show a reasonable indication that the subject imports are a cause of material injury to the domestic industry.⁴¹

³⁸ Minister for International Trade, "Canadian Statement to GATT Council Concerning U.S. Countervailing Duty Petition Against Canadian Softwood Lumber," *Communiqué* No. 117 (June 17, 1986).

³⁹ *GATT Activities 1986* (Geneva: General Agreement on Tariffs and Trade, 1987), 59-60.

⁴⁰ United States International Trade Commission, *Preliminary Determination: Softwood Lumber from Canada* (Washington, July, 1986), 3-4.

⁴¹ United States International Trade Commission, *Preliminary Determination: Softwood Lumber from Canada* (Washington, July, 1986), 13.

***The DOC's Affirmative Preliminary Determination:
October 16, 1986***

The most interesting and politically contentious part of the second round of the softwood lumber dispute was the DOC's affirmative preliminary determination. In direct contrast to the 1983 determination, the DOC found that a range of federal and provincial stumpage programs constituted countervailable subsidies.⁴² Consequently, the DOC imposed a 15 percent *ad valorem* duty on Canadian softwood lumber products entering the United States. The DOC immediately directed the U.S. Customs Service to suspend liquidation of all entries of Canadian softwood lumber products that entered, or were withdrawn from warehouse, for consumption on or after October 16, 1985. The DOC also stipulated that the U.S. Customs Service require a cash deposit or bond on entries of Canadian lumber in an amount equal to the estimated net subsidy (i.e., 15 percent). It should be noted that 20 Canadian softwood lumber producers were excluded from the CVD duty because they successfully met the exclusion requirements set out in the DOC's questionnaire.⁴³

Cabot's approach to the general availability or specificity test encouraged the DOC to rework its 1983 conclusion regarding the relationship between Canadian stumpage practices and American CVD laws. Under the new approach, the DOC determined that "specificity was still a requirement for a domestic subsidy, and that a domestic program is a subsidy only if it is limited to a specific enterprise or industry, or group of enterprises or industries." However, the DOC set out three new factors for assessing if a program was indeed a countervailable subsidy. The three factors were designed to distinguish between *de facto* and *de jure* specificity. They included:

⁴² The DOC found that federal and provincial stumpage programs in Alberta, B.C., Ontario, and Quebec conferred countervailable subsidies. Federal programs included: certain types of Investment Tax Credits, Program for Export Market Development, Regional Development Incentive Program, Industrial and Regional Development Program, Community Based Industrial Adjustment Program. Joint federal-provincial programs that conferred subsidies included: certain agricultural and rural development agreements, subsidiary agreements under the general development agreements and the economic and regional development agreements, Sawmill Improvement Program. Provincial programs included: B.C.'s Critical Industries Act and Low Interest Loan Assistance Program as well as Quebec's Tax Abatement Program, Export Promotion Assistance, Assistance to and by the Forest Salvage, Management and Development Corporation of Quebec, Industrial Development Corporation Export Expansion Program and Lumber Industry Consolidation and Expansion Program.

⁴³ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 6-7.

- (1) the extent to which a foreign government acts to limit the availability of a program;
- (2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and
- (3) the extent to which the Government exercises discretion in making the program available.⁴⁴

The three factors distinguished the 1986 determination from the 1983 finding. For example, the DOC did not consider governmental discretion in the 1983 specificity determination. However, the DOC addressed the CFLI's claim that Canadian governments exercised discretion when administering the stumpage programs in 1986. The Coalition insisted that Canadian governments exercised discretion when providing stumpage rights to specific groups of industries. The DOC found that the four provincial governments did indeed exercise "considerable discretion" when granting stumpage licenses, and based their decisions on subjective and selective criteria instead of on a more objective first come, first served basis. The DOC argued that the provincial governments considered subjective criteria such as job information, status of the applicant, the furthering of provincial development objectives, the ability to fully use the timber allocated to the firm, and the efficiency of the applicant's technology.⁴⁵ Similarly, "considerable discretion" was exercised by the four governments because they directed which products were to be harvested from Crown lands. On the basis of finding governmental discretion, the DOC ruled that "while the existence of discretion does not *per se* mean that a benefit is specific, when the discretion results in the targeting of a specific enterprise or industry ... then that program is countervailable."⁴⁶

The CFLI used the concept of *de facto* specificity to allege that furniture manufacturers held negligible stumpage rights in the Canadian system. The DOC concurred with the Coalition's assessment. In contrast to the 1983 determination, the DOC concluded that Canadian stumpage programs were not generally available because they were not actually available to a large number of producers.⁴⁷ In other words, they were *de facto* limited to a small group of enterprises or industries in Canada. Furthermore, the

⁴⁴ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 12-13.

⁴⁵ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 14.

⁴⁶ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 15.

⁴⁷ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 17.

1986 determination did not define the softwood lumber industry as the 1983 determination had. The DOC rejected its 1983 finding that the softwood lumber and pulp and paper producers were in two separate industries based upon the SIC system. Instead, the DOC argued that the two industries were highly concentrated and should be defined as a single industry.⁴⁸ In spite of the large number of industries which could theoretically use stumpage programs in Canada, the number of industries that actually did so was much smaller.

The DOC also modified the preferentiality test in 1986 to determine if the stumpage programs offered preferential treatment to certain Canadian industries and/or enterprises. The DOC indicated that it would consider whether goods were provided at preferential rates by measuring government price discrimination within the relevant jurisdiction. The Preferentiality Appendix of *Carbon Black* was used to do so. The Appendix set out standards for determining whether a government provided a good or service at preferential rates in situations where the number of users was limited. The standards included: (1) prices charged by the Government for a similar or related good; (2) prices charged within the jurisdiction by other sellers for an identical good or service; (3) the Government's cost of producing the good or service; and (4) external prices.⁴⁹ The DOC rejected the applicability of the first two standards and determined that the most appropriate standard was number three (i.e., the Government's cost of producing the good or service).

The DOC applied the third standard by assessing the costs that the provincial governments incurred during the stumpage production process. It found that expenditures directly related to commercial timber harvesting exceeded directly related revenues. In other words, the four provincial governments did not recover their full costs of production from the stumpage fees. Therefore, the DOC concluded that Canada's stumpage programs were countervailable as they provided goods to a selective group of industries at preferential rates.⁵⁰ The DOC determined that Canadian stumpage programs provided a subsidy in the amount of 14.542 percent. Consequently, American producers were compensated by a CVD of 14.52 percent when Canadian softwood lumber products entered the U.S. market.

⁴⁸ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 17-18.

⁴⁹ United States Department of Commerce, *Preliminary Determination: Softwood Lumber Products from Canada* (Washington, October 16, 1986), 19-20.

⁵⁰ Alan Rugman, Samuel Porteous, "The Softwood Lumber Decision of 1986: Broadening the Nature of U.S. Administered Protection," *Review of International Business Law*, Vol. 2 (1988), 51-52.

Final Diplomatic Attempts to Settle the 1986 Dispute over Softwood Lumber from Canada

Officials from Canada and the United States cooperated with their domestic industries in the search for diplomatic methods to settle the trade dispute while the DOC conducted the CVD investigation during the fall of 1986. The search culminated with the Memorandum of Understanding (MOU) on December 30, 1986, one day before the DOC was to issue its CVD determination. In September of 1986, Canada's Minister of International Trade, Pat Carney, proposed a 10 percent export tax on Canadian softwood lumber.

During the discussions, the Canadian government was in the hands of the powerful lumber coalition because it was the only body that was able to terminate the CVD investigation. While Canada preferred to await the DOC's determination and avoid the export tax, "the obvious political success of the coalition, combined with the very visible weakening of the Canadian negotiating stance, provided little incentive for the U.S. industry to come to an early agreement."⁵¹ To promote its own interests to a greater degree, the CFLI argued that the proposed export tax should be increased to 25 percent. Following the DOC's preliminary determination, the Canadian government increased its proposal slightly, and stipulated that a 15 percent export tax would be its final offer. Minister Carney indicated that if the 15 percent export tax was indeed accepted, "the ability of the provinces to determine their natural resource management policies [must] remain unimpeded and the U.S. regulatory authorities [must] not infringe on Canadian sovereignty by policing provincial management practices."⁵²

Termination of the 1986 Dispute over Softwood Lumber from Canada: The Memorandum of Understanding between Canada and the United States - December 30, 1986

The federal and provincial governments met to discuss the proposed MOU at a First Ministers' Conference in Vancouver on November 20-21, 1986. All provinces except Ontario agreed with the principles involved in the Memorandum.⁵³ With the support of

⁵¹ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 126.

⁵² Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 36.

⁵³ Ontario objected to the MOU for the following reasons: (1) it wanted to continue fighting the DOC's preliminary determination in the U.S. system and in the GATT because it believed that it was the right of any government to establish subsidies for the welfare of its citizens; (2) it was afraid that a settlement could lead to a precedent for CVD cases regarding other natural resources; (3) an export charge was only a short term

most of the provinces, the Canadian and American governments formally signed the MOU on December 30, 1986. Under the MOU, Canada agreed to collect an export tax of up to 15 percent of the value of softwood lumber exported to the United States. In return, American lumber producers agreed to withdraw their CVD petition and to terminate the investigation. The MOU also provided that the tax could be reduced and/or eliminated if provincial forest management regimes, stumpage practices, and other forest management charges were changed.

The provisions of the MOU appeased governments and interested parties in both countries. From the Canadian perspective, the 15 percent export tax allowed the provinces to retain control of their stumpage programs, thereby respecting their sovereignty. In addition, because the Canadian government was authorized to collect the tax, the revenue remained in Canada instead of going into the American federal treasury. Therefore, the Canadian government could channel the collected revenues back into the forestry sector. Finally, the negotiated settlement represented a bilateral agreement and not a unilaterally imposed tariff. From the American perspective, the export tax protected U.S. lumber producers from Canadian imports because it raised the prices of Canadian goods before they entered the American market. Moreover, the MOU benefited the U.S. lumber industry by keeping a significant portion of Canadian exports out of the United States.⁵⁴

The Termination of the Memorandum of Understanding by the Government of Canada

The MOU ended the second round of the softwood lumber dispute between Canada and the United States. It allowed for a more amicable atmosphere in which the two countries were able to conclude the FTA in 1987.⁵⁵ By the early 1990s, federal and provincial officials began to argue that the MOU had served its purposes and was no longer applicable to the Canadian sector. British Columbia, Quebec, and Alberta, which collectively accounted for 92 percent of Canadian exports to the United States, had significantly changed their forest management policies by 1991. For example, British Columbia revised stumpage charges and changed the responsibilities of timber license

solution; (4) the export tax would increase stumpage charges and therefore would affect the prices of softwood lumber products for domestic consumers.

Pat Carney, "Softwood Lumber: The Canadian Position," *Trade Law Topics*, Vol. 2, No. 4 (April, 1987), 41; Patrick Lavelle, Leslie Delegram, "Softwood Lumber: The Ontario Position," *Trade Law Topics*, Vol. 2, No. 4 (April, 1987), 42-43.

54 Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 36-37.

55 It should be noted that the MOU was grandfathered by Article 2009 of the FTA. Consequently, its provisions remained in place in spite of the FTA's tariff reduction schedule.

holders for bearing certain reforestation costs to offset the Canadian export tax. Similarly, New Brunswick, Nova Scotia, PEI, and Newfoundland had been exempted from the MOU's export charge since 1988. Moreover, federal officials believed that American surveillance of the provincial forest policies was an intrusion of Canadian sovereignty and an administrative nuisance.⁵⁶ Therefore, the Canadian government decided to terminate the MOU on September 3, 1991. Michael Wilson, Minister of International Trade, explained Canada's action by stating, "[T]he MOU has served its purpose and the time has come for Canada to exercise its right of termination. There is no subsidy on softwood lumber production in Canada."⁵⁷

Round Three: The 1991-1993 Dispute over Softwood Lumber from Canada

In response to the termination of the MOU, the U.S. government imposed an interim bonding requirement on Canadian lumber under Section 301 of the Trade Act of 1974, and thereby instigated the third round of the softwood lumber dispute. The Section 301 action demanded that Canadian importers post bonds to equal the 15 percent tax established by the MOU until the DOC and ITC could review the matter.⁵⁸ The DOC unilaterally initiated a third CVD investigation on October 31, 1991 to examine Canadian stumpage programs and their impact on softwood lumber producers in the U.S.

Canada reacted to the American actions on November 1, 1991 by requesting that a GATT panel investigate the legitimacy of the Section 301 action and the DOC's initiation of the CVD investigation. In its preliminary report of December 8, 1992, the GATT panel ruled that the DOC did have the authority to initiate an investigation itself, instead of waiting for an American industry to file the petition. However, the panel also ruled that the United States had violated its GATT obligations by instituting the Section 301 interim bonding requirements. The panel stated that the U.S. government owed the Canadian lumber industry \$15-20 million to cover the amount of the Section 301 bond. The GATT panel's final determination of February 19, 1993 confirmed its preliminary determination. However, the GATT panel was unable to enforce its decision that the U.S. government

⁵⁶ Thomas R. Waggener, *Forests, Timber, and Trade: Emerging Canadian and U.S. Relations Under the Free Trade Agreement*, Canadian-American Public Policy Series No. 4 (December, 1990), 18; John Saunders, "U.S. trade tribunal rules against softwood producers," *Globe and Mail* (June 26, 1992), B-18.

⁵⁷ Minister of Industry, Science and Technology and Minister for International Trade, "Canada to Terminate Canada-U.S. Softwood Lumber Agreement," *Communiqué* No. 188 (September 3, 1991).

⁵⁸ Kimberly Noble, "Exporters hope to recover funds," *Globe and Mail* (June 27, 1992). New Brunswick, Nova Scotia, PEI, and Newfoundland were excluded from the Section 301 bond.

repay Canadian exporters. The GATT panel could simply appeal to the goodwill of American officials. Senior U.S. trade officials stated that the United States would most likely accept the GATT decision in May of 1993. The panel's decision was officially accepted on October 27, 1993.⁵⁹

***The DOC's Affirmative Determinations:
March 12, 1992 and May 15, 1992***

The DOC released a preliminary affirmative determination on March 12, 1992. Upon concluding that Canadian stumpage practices and British Columbia's log export restrictions (LERs) were countervailable subsidies, the DOC placed a preliminary CVD of 14.48 percent on Canadian softwood lumber imports that entered the United States from that date forward. The 14.48 percent CVD was a combination of the 6.25 percent subsidy accrued by the stumpage programs of Alberta, B.C., Ontario and Quebec, and the 8.23 percent subsidy accrued by the LERs. Subsequently, provisional duties were posted to offset the "unfair" advantage that Canadian producers received between the preliminary and final determinations.⁶⁰

In the final determination of May 15, 1992, the DOC reaffirmed its preliminary finding that Canada's stumpage programs and British Columbia's LERs represented countervailable subsidies. The DOC lowered the CVD from 14.48 percent to 6.51 percent. Of the 6.51 percent, 2.91 percent came from stumpage programs and the remaining 3.6 percent came from the LERs.⁶¹ The DOC concluded that the stumpage practices of Alberta, British Columbia, Ontario, and Quebec were countervailable because they were limited to a specific group of industries (e.g., the primary timber producing industries) and were provided at preferential rates. When examining the specificity of the stumpage programs, the DOC changed its practices from 1983. Most notably, the DOC rejected the general availability test that it had used in its 1983 ruling on Canadian softwood lumber despite the objections raised by Canadian counsel. The DOC justified its actions by stating that Congress did not require the DOC to use that test by virtue of the 1988 Trade and Tariffs Act. Furthermore, the DOC argued that it was not bound by the legal doctrine of *stare decisis*, and could therefore overturn any previously used tests if there was a reasonable, well-articulated reason for doing so. Finally, the DOC concluded that its use of

⁵⁹ "U.S. softwood probe backed," *Globe and Mail* (December 9, 1992); Drew Fagan, "U.S. expected to accept GATT ruling on softwood," *Globe and Mail* (May 5, 1993).

⁶⁰ Kimberly Noble, "Exporters hope to recover funds," *Globe and Mail* (June 27, 1992).

⁶¹ United States Department of Commerce, "Final Determination: Softwood Lumber Products from Canada," *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22575.

the general availability test in 1983 was ill-advised. It argued that the initial use of the general availability test led “to an absurd result; an automatic finding of nonspecificity for all natural resource subsidies.”⁶²

The DOC adhered to its findings in the 1986 determination by applying the concept of *de facto* specificity. However, the DOC relied on four guidelines it devised in 1989 to determine whether the subsidy’s benefits were specific. The guidelines were referred to as the “Proposed Regulations” and included:

- (1) the extent to which a government acts to limit the availability of a program;
- (2) the number of enterprises, industries, or groups thereof that actually use a program;
- (3) whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
- (4) the extent to which a government exercises discretion in conferring benefits under a program.⁶³

Canadian counsel argued that the DOC did not consider all four guidelines when it concluded that the stumpage programs were targeted at specific industries in Canada. Canadian counsel insisted that the DOC had only considered one factor (the limited number of users), failed to consider record evidence, and thereby reached an incorrect conclusion. The DOC responded by stating that the four regulations were only intended to serve as simple guidelines. Furthermore, because the proposed regulations were just guidelines, the DOC authorized itself to examine one guideline more closely than the other three, or to go beyond the list and consider other factors instead. Moreover, the DOC argued that it was only required to consider all four factors before finding that a program was not specific, while an affirmative finding of specificity could be based on any one of the factors on its own. Even if it was required to consider all four of the guidelines, the Department maintained that it had considered the other three. However, it determined that only one factor, the limited number of users, required a finding of specificity. Consequently, that one factor was enough to justify an affirmative conclusion on its own.⁶⁴ In this way, the

⁶² United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22582.

⁶³ United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22582.

⁶⁴ United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22582-22583.

DOC authorized itself to select the provisions of the proposed regulations that it felt supported its conclusions to the greatest degree.

The DOC concluded that a specific group of industries benefited from Canadian stumpage programs. When applying the *de facto* specificity test, the DOC stated that the critical focus of a determination of specificity must be an “analysis of whether a benefit has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or industries.” The Department insisted that stumpage was provided to a specific class of beneficiaries (the primary timber processing industry, solid wood product manufacturers, and pulp and paper manufacturers). The DOC stated that American courts had made it clear that the terms “industries” and “enterprises” were to be applied broadly when considering specificity. Therefore, the DOC stated that, “even if a program is available throughout the forestry sector, it is still specific. Because we have found stumpage programs limited to a group of industries, we find them specifically provided.”⁶⁵

As in 1986, the DOC used *Carbon Black's* Preferentiality Appendix to assess whether stumpage was provided to Canadian producers at preferential rates. Price discrimination and price comparisons were used to determine that stumpage was provided at preferential rates to softwood lumber producers in Alberta, British Columbia, Ontario, and Quebec.⁶⁶

The DOC concluded that British Columbia's LERs represented countervailable subsidies in 1992 as well. The Government of B.C. replaced its stumpage policies with the LERs in order to reduce the export tax of the MOU to 0 percent. The DOC found that British Columbia's LERs were *de jure* limited to a specific group of industries. However, the DOC's affirmative finding in the preliminary determination amounted to a mere assertion that “the export restrictions benefit a specific group of industries, the primary timber processing industries.” The final determination recognized that there had not been a separate specificity analysis in the preliminary determination for the log export issue. Nevertheless, the final determination confirmed the preliminary finding by stating:

⁶⁵ United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22586.

⁶⁶ United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22596.

The DOC had to use a price comparison for Quebec because it did not have enough information to make a determination based on the provincial government's sales of an identical or similar good.

The B.C. log export restrictions, on their face, benefit only B.C. users of logs (i.e., the solid wood products industry and the pulp and paper products industry) ... Accordingly, the domestic benefits conferred by these exports restraints are *de jure* limited to a specific group of industries ... Because the B.C. log export restrictions constitute a “domestic subsidy” that ... provides a measurable benefit to a “specific enterprise or industry, or group of enterprises or industries,”... the [DOC] determines that these export restrictions constitute a countervailable subsidy.⁶⁷

The DOC’s final determination posted a cash deposit or bond on all lumber that entered the United States after May 15, 1992. Softwood lumber that had entered into, or had been withdrawn from, warehouses for consumption were subjected to a CVD of 6.51 percent to offset the subsidies that producers received in Canada.

***The ITC’s Affirmative Injury Determinations:
December 16, 1991 and June 25, 1992***

The ITC released a preliminary determination on December 16, 1991 and a final determination on June 25, 1992. Both determinations noted that the American lumber industry faced poor economic conditions. The ITC explained that western mills could not reach timber supplies easily between 1988 and 1992. Environmental regulations and wildlife preservation programs prohibited logging on large tracts of land owned by the U.S. Forest Service, the Bureau of Land Management, state governments, and private interests.⁶⁸ The decline in supply caused the price of logs to sharply increase. To make matters worse, the demand for lumber decreased as well, because the construction and home building industries were facing sharp declines during the recession of 1991-1992.⁶⁹ The ITC also noted that the number of workers in the American industry had decreased steadily between 1988 and 1991. Lumber companies had also reported a decrease in net sales during 1991.⁷⁰

When assessing the causal relationship between the condition of the domestic industry and the imported softwood lumber from Canada, the ITC identified that Canadian imports had been able to retain a significant share of the declining market between 1988 and

⁶⁷ United States Department of Commerce, “Final Determination: Softwood Lumber Products from Canada,” *Federal Register*, Vol. 57, No. 103 (Washington: May 28, 1992), 22610.

⁶⁸ United States International Trade Commission, *Final Affirmative Determination: Softwood Lumber from Canada* (Washington: July, 1992), 15.

⁶⁹ United States International Trade Commission, *Final Affirmative Determination: Softwood Lumber from Canada* (Washington: July, 1992), 15-16.

⁷⁰ United States International Trade Commission, *Final Affirmative Determination: Softwood Lumber from Canada* (Washington: July, 1992), 19.

1991 despite the MOU's export tax. Moreover, the ITC noted that Canadian logging costs had not risen as sharply as American costs had because of the subsidies that Canadian producers received. Due to the nature of, and demand for, softwood lumber, "the volume and market share of subsidized Canadian imports have [had] a significant impact on U.S. lumber prices and sales."⁷¹ The ITC concluded its analysis of the effects of the Canadian products on the American industry by stating:

Canadian lumber imports consistently accounted for a very large share of apparent U.S. consumption during the period of investigation, and increased when measured by value. Lumber is a highly substitutable, commodity product, sales of which are sensitive to relatively small price movements. In addition, the quantity of lumber demanded ... generally does not change significantly in response to changes in price. The major species group represented in Canada import volumes, [spruce-pine-fir], has a significant influence on price movements in the U.S. market. In these circumstances, it is clear that U.S. producers' inability to raise prices commensurate with rising costs is attributable ... to sales of imported subsidized Canadian lumber. Accordingly, we find that the domestic industry producing softwood lumber is materially injured by reason of subsidized imports of softwood lumber from Canada.⁷²

The ITC's final determination was not unanimous. Commissioners Brunsdale and Nuzum objected to the majority's opinion that there was a positive relationship between Canadian imports and injury to American producers. They felt that there was not enough evidence to safely conclude that the domestic industry was being adversely affected. For Commissioner Nuzum, "the evidence does not support a determination of present injury primarily because, to date, there is no discernible price or volume effect on the domestic industry by reason of the subsidized imports."⁷³

***The Canadian Response to the DOC's Affirmative Determinations:
Request for a Chapter 19 Binational Panel***

On May 28, 1992, the Government of Canada, a number of provincial governments, and the Canadian forest industry appealed the DOC's final determination to a binational panel under Article 1904 of the FTA.⁷⁴ They argued that Canadian stumpage

⁷¹ United States International Trade Commission, *Final Affirmative Determination: Softwood Lumber from Canada* (Washington: July, 1992), 26-27.

⁷² United States International Trade Commission, *Final Affirmative Determination: Softwood Lumber from Canada* (Washington: July, 1992), 34-35.

⁷³ John Saunders, "U.S. trade tribunal rules against softwood producers," *Globe and Mail* (June 26, 1992), B-1.

⁷⁴ The Canadian parties to the dispute included: the Government of Canada, the provinces of Alberta, B.C., Manitoba, Ontario, Quebec, Saskatchewan, the Yukon and Northwest Territories, the Canadian Forest Industries Council and affiliated companies, the Quebec

systems did not constitute a countervailable subsidy as defined by American law. They also argued that the stumpage systems did not distort the market by giving Canadian producers a competitive and/or unfair advantage over their American counterparts. Furthermore, the Canadian parties argued that British Columbia's LERs were beyond the scope of American CVD laws and did not confer a countervailable benefit to lumber producers in that province. Finally, the Canadian parties sought the exclusion of B.C., Quebec, and Alberta from the CVD investigation.⁷⁵

After a number of procedural delays during the selection process, the panel began its review of the softwood lumber dispute on February 11, 1993. The binational panel was made up of three Canadians and two Americans: Chairman Richard G. Dearden (Canadian), Lawson A.W. Hunter (Canadian), Paul Weiler (Canadian), Morton Pomeranz (American), and Michael Reisman (American). The CFLI challenged the panel's jurisdiction at the outset of the process. Citing Article 2009 of the FTA, the U.S. coalition claimed that the MOU denied any Party the right to appeal a softwood lumber dispute to a FTA-19 panel.⁷⁶ The Canadian parties responded to the Coalition's challenge by stating that the Canadian government had the authority to terminate the MOU. By exercising that authority, all of the rights and measures contained in the MOU and/or Article 2009 of the FTA ceased to have meaning. As a result, matters dealing with softwood lumber could be brought before Chapters 19 panels. The panel concurred with the Canadian arguments and held that:

The text of Article 2009 does not exempt softwood lumber, or disputes in relation thereto, from the FTA ... the Panel is of the view that once the MOU was terminated in accordance with its terms, any "rights" or enforcement measures that existed under the MOU ceased to exist. Upon termination, neither Party bore any obligations or had any rights which could be said to "arise out of" the MOU ... The Panel finds it difficult to understand how this panel review can be said to "impair or prejudice" the exercises of rights or enforcement measures that are no longer in existence.⁷⁷

Therefore, the panel concluded that "nowhere in Article 1904 or any other provision of Chapter 19 is this Panel divested of the jurisdiction to review a final determination of

Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association located in Quebec.

⁷⁵ Minister of Industry, Science, Technology, Minister for International Trade, *Background on Softwood Lumber* (May, 1993), 4-5.

⁷⁶ Article 2009 of the FTA states: "The Parties agree that this Agreement does not impair or prejudice the exercise of any rights or enforcement measures arising out of the Memorandum of Understanding on Softwood Lumber of December 30, 1986."

⁷⁷ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 19-20.

[the DOC] regarding softwood lumber.”⁷⁸ Interestingly, even though it challenged the binational panel’s jurisdiction, the CFLI also appealed some of the DOC’s findings to the binational panel. While the CFLI affirmed the DOC’s determination that B.C.’s LERs were countervailable subsidies, it argued that the DOC erred in finding that the stumpage programs in Alberta, Ontario, and Quebec were not countervailable subsidies as well.⁷⁹ In this way, the CFLI recognized the panel’s ability to remand the parts of the CVD determination it did not agree with, but tried to restrict the panel from remanding those parts of the CVD determination which protected its members from competitive imports.

The Standard of Review

Article 1904 (3) of the FTA stipulated that the binational panel was to “apply the standard of review described in Article 1911 and the general legal principles that a court of the importing country otherwise would apply to a review of a determination of the competent investigating authority.”⁸⁰ Because the United States was the importing country in the dispute, the panel employed the standard of review of Section 516 A (b) (1) (B) of the Tariff Act of 1930 to determine if the DOC’s affirmative determination was “supported by substantial evidence on the record or otherwise not in accordance with law.” The binational panel abided by the practice that American review courts used when the wording of trade laws was unclear. It considered Congress’ intent when CVD laws were passed to determine the scope and meaning of the laws. The panel found that Congress’ intent was unclear in the matter at hand and held that the American standard of review required it to “limit the inquiry to the question of whether Commerce’s statutory interpretations were sufficiently reasonable.” A “sufficiently reasonable” determination was one that had a rational basis and complied with the object and purpose of the law. Therefore, the binational panel adhered to the American standard of review by maintaining that its role was not to create the law, but to ensure that it was implemented properly. Because it was an appellate court, the binational panel found that it was required to show deference to the DOC and had to ensure that it did not unnecessarily burden the agency during its determination on remand.⁸¹

⁷⁸ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 18.

⁷⁹ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 61.

⁸⁰ Article 1911 defined “general legal principles” as “principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies.”

⁸¹ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 21-26.

The Binational Panel's Decision

(1) Canadian Stumpage Programs

The binational panel examined Canadian stumpage programs and British Columbia's LERs in its review of the DOC's affirmative determination. When examining Canada's stumpage programs, the panel focused on the DOC's specificity and preferentiality determinations. The Canadian parties disputed the DOC's conclusion that stumpage programs conferred benefits to a "specific group of industries." They also argued that the final determination was contrary to American administrative law and practice. In particular, the Canadian parties rejected the DOC's determination because they felt:

- (1) it failed to consider all relevant evidence in basing the finding of specificity upon the limited number of users of the program and failing to consider the other criteria in the DOC's proposed regulations;
- (2) the DOC unjustly rejected the general availability test upon which it had relied in finding that the same stumpage programs were not specific in the 1983 determination;
- (3) the DOC did not provide a reasonable explanation for changes in prior agency practice in regards to the definition of the appropriate industry which received stumpage benefits; and
- (4) the DOC failed to consider the relevance of the universe of potential users of the program in considering the significance of the number of actual beneficiaries of the program.⁸²

The panel remanded the DOC's technique of determining specificity. It found that the DOC was legally required to consider all relevant evidence when determining whether the actual recipients of a particular program formed a "specific group of industries." Moreover, the panel found that the DOC could not base its decision solely on evidence of the number of industries who were program recipients. In this way, the binational panel upheld the Canadian argument that "the sequential application of the four factors [of the proposed regulations] posited by Commerce was not reasonable and resulted in a failure ... to consider all relevant evidence in the record before it," when coming to a conclusion on specificity.⁸³ The binational panel demanded that the entire body of evidence on the record be reconsidered by the DOC in the remand determination.

⁸² United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 27-28.

⁸³ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 36, 44.

While it rejected the DOC's use of the proposed regulations in determining specificity, the binational panel upheld the DOC's authority to reject the "general availability" test of 1983. The DOC argued that Congress had intended it to reject the "general availability test" when codifying the *de facto* specificity test in the 1988 Omnibus Trade and Competitiveness Act. In light of the 1988 Act, the panel felt that the DOC was correct to conclude that since the number of users of any natural resource was intrinsically limited by the inherent characteristics of that resource, the use of the "general availability test" resulted in the "absurd" rule that no natural resource could be countervailable. According to the panel's decision, "in so far as the [general availability test] ... would result in the *per se* non-countervailability of natural resource subsidies, this Panel agrees with Commerce that it should be, and has been rejected."⁸⁴

Nevertheless, the panel argued that it was not reasonable to interpret the 1988 act as having had the effect of completely eliminating the "general availability test" from a specificity determination altogether. The legislative history of the 1988 act indicated that Congress intended *de facto* specificity to be directly related to the general availability of a benefit. Consequently, the binational panel argued that it was unreasonable for the DOC to dismiss "the actual number of users as entirely irrelevant" in its 1992 determination, even though it affirmed the DOC's right to change its approach to specificity in a determination.⁸⁵ The panel insisted that it was "simply impossible to make any kind of reasonable specificity finding whether *de jure* or *de facto* without considering the number of enterprises or industries either actually receiving or entitled to receive the benefits in question."⁸⁶

The binational panel turned its attention to the issue of preferentiality after remanding the DOC's specificity determination. It examined several definitions of the word "subsidy" in American statutes and case law, and cited the DOC's 1984 preliminary determination in *Carbon Steel Wire Rod from Poland* to demonstrate that the DOC believed that "a subsidy (or bounty or grant) was definitionally any action that *distorted or subverted the market process* and resulted in a misallocation of resources, encouraging inefficient production and lessening world wealth."⁸⁷ During the 1992 lumber investigation, the

⁸⁴ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 39-40.

⁸⁵ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 40-41.

⁸⁶ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 37.

⁸⁷ *Carbon Steel Wire from Poland* as cited in United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 47-48. Emphasis added by author.

Canadian parties pointed to *Carbon Steel Wire* to charge that the DOC should have examined the market distorting effects of the Canadian stumpage programs when determining if they conferred preferential treatment to Canadian producers. However, the DOC rejected *Carbon Steel Wire's* definition of subsidy and the need to examine market distorting effects of a subsidy. It claimed that the definition of subsidy used in *Carbon Steel Wire* pertained to imported products from non-market economies only. Therefore, the DOC concluded that the definition did not correspond to Canadian softwood lumber products because they were produced in a liberal, market-based economy.

The panel reasoned that the DOC should not have refused the Canadian argument about the market-distorting effects of all of the subsidies offered by federal and provincial governments in Canada.⁸⁸ Consequently, it ordered the DOC to use *Carbon Steel Wire from Poland's* "market distortion" approach when addressing if the stumpage programs and LERs were countervailable subsidies. The panel stated:

We conclude that ... the [DOC] should have considered whether or not these provincial [stumpage] programs could and did have a distorting effect on the operation of normal competitive markets before concluding that these governmental policies involve the type of "preferential" pricing that constitutes a countervailable subsidy ... Accordingly, we remand this part of the stumpage decision back to [the DOC] for review of all the evidence regarding the natural resource market for standing timber in light of the legal principles formulated in this decision.⁸⁹

(2) *B.C.'s Log Export Restrictions*

Following its examination of the DOC's treatment of Canadian stumpage programs, the binational panel examined the DOC's determination regarding B.C.'s LERs. In both the preliminary and final determinations of 1992, the DOC found that B.C.'s LERs were *de jure* limited to a specific group of industries (e.g., the primary timber processing industries). This conclusion was based on the DOC's definition of *de jure* specificity of *Carbon Steel Wire Rod from Malaysia*. *De jure* specificity was defined as "the extent to which a foreign government acted, as demonstrated in the language of the relevant enacting legislation and implemented regulations to limit the availability of a program."⁹⁰ The DOC argued that the LERs benefited a limited number of users in British Columbia. It stated that

⁸⁸ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 51-52.

⁸⁹ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 59-60.

⁹⁰ *Carbon Steel Wire Rod from Malaysia* as cited in United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 70.

“the export restriction scheme constitutes indirect, rather than direct, government action. This indirect scheme ... has the effect of reducing the production costs of B.C. softwood lumber manufacturers.”⁹¹

The panel stated that its role was not to consider whether the DOC’s finding was correct, but whether the DOC’s finding of *de jure* specificity was reasonable.⁹² The panel exercised its role by noting that B.C.’s LERs applied equally to each and every resident of the province. The panel also found that there was nothing in the legislation that indicated the degree to which raw logs were restricted when exported from the province. Instead, the restrictions depended on circumstances regarding the requirement for logs in the province, the location of processing facilities, transportation costs, and forestry practices on Crown lands.⁹³

The binational panel concluded that the DOC’s finding of *de jure* specificity was unreasonable. By finding that the LERs were indirectly limited to softwood lumber manufacturers in B.C., the DOC unreasonably abandoned its examination of *de jure* specificity. The panel held that the DOC arbitrarily concluded its determination by finding that the B.C. LERs were *de facto* specific because they were provided to a specific group of industries only. According to the panel, “the program’s benefits are not apparent on the face of the legislation. To say that the restrictions *de facto* operate to the benefit of the producers of timber products is far too great a leap for *de jure* specificity.”⁹⁴ The panel thereby remanded the DOC’s final determination because substantial, reasonable evidence was not offered to justify the requirements of *de jure* specificity. Consequently, the DOC was instructed to review the record and establish whether the LERs truly represented *de jure* specific or *de facto* specific subsidies.

The panel also examined the Canadian arguments that the DOC had “erred as a matter of law in determining that LERs constitute[d] a countervailable subsidy.” Canadians demonstrated that the DOC had not viewed LERs as countervailable domestic subsidies in other investigations.⁹⁵ The DOC argued that it had the authority to depart from previous determinations if it had a reasonable basis for doing so. Moreover, American law did not preclude it from changing its practices. As it had during the examination of Canadian

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- 91 United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 73.
 92 United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 71.
 93 United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 72-73.
 94 United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 74.
 95 United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 86.

stumpage policies, the binational panel affirmed the DOC's ability to depart from previous CVD determinations. After examining the Tariff Act of 1979, Section 301 of the Trade Act of 1974, and the GATT Subsidies Code, the binational panel determined that the DOC was not precluded from departing from previous practice and from defining the term "subsidy" broadly.⁹⁶ Nevertheless, the binational panel noted that the broader definitions of the term "domestic subsidy" were confusing for foreign governments and exporters. As a result, the panel remanded the final determination of the DOC "for clarification of the meaning of the applicable legal standard and demonstration that the standard was met by substantial evidence on the record."⁹⁷

***The DOC's Remand Determination:
September 17, 1993***

The DOC released a remand determination on September 17, 1993. The remand determination addressed the issues that were raised by the binational panel. For example, the DOC addressed the specificity of the stumpage programs. The panel remanded the DOC to provide "an express evaluation and weighing of all four factors enunciated in its proposed regulations, as well as any other factors relevant to *de facto* specificity."⁹⁸ The DOC complied with the remand, and analyzed the record evidence with respect to the four factors.

In regards to the first factor (the number of enterprises that use a program), the DOC illustrated that very few industries used the provincial stumpage programs, thereby making them *de facto* specific. The DOC cited evidence to show that 3600 out of 885,000 enterprises used stumpage programs in Canada. Moreover, the evidence showed that 27 industries used the stumpage programs. The DOC noted that it was uncertain if the 27 industries did indeed use the stumpage programs, because the Canadian complainants had not submitted the correct information about them in their questionnaire. Therefore, the DOC concluded that the limited number of industries which used stumpage fees was

⁹⁶ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 89-113.

⁹⁷ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada* (May 6, 1993), 118.

⁹⁸ The four factors of the Proposed Regulations included: (1) the number of enterprises, industries, or groups thereof that actually use a program; (2) whether there are dominant users of a program, or whether certain enterprises, industries or groups thereof receive disproportionately large benefits under a program; (3) the extent to which a government exercises discretion in conferring benefits under a program; (4) the extent to which a government acts to limit the availability of a program.

sufficient in and of itself to render the programs specific on a *de facto* basis.⁹⁹ The DOC addressed the second factor by arguing that the primary timber processing industries were dominant and disproportionate users of stumpage. The record illustrated that the primary timber processing industries accounted for 84.6 to 99.8 percent of the total harvest in Canada. Because softwood lumber resources were limited, the recipients of the subsidies used them completely. Therefore, the DOC held that the small number of timber processing industries were dominant and disproportionate users of the subsidies.¹⁰⁰ The DOC discussed the third factor (the extent to which a government exercised discretion in conferring benefits under a program) in response to the panel's remand. It noted that the Department had not placed a great deal of emphasis on the third factor when assessing *de facto* specificity in the past. Nevertheless, the DOC acted to comply with the panel's decision. Even though governmental discretion had been exercised in a number of provinces when stumpage programs were applied, one class of users had not been favoured over another.¹⁰¹ Finally, the DOC addressed the fourth factor to uncover the extent to which a government acted to limit the availability of a program to a number of users. Traditionally, the DOC had only considered this factor during a *de jure* specificity investigation, but applied the factor to the finding of *de facto* specificity to comply with the panel's orders. The DOC explained that government action limited free and equitable access to timber in varying degrees throughout the Canadian provinces. Notwithstanding the limits used by provincial governments, the DOC found that the "restrictions largely served to supplement and complement the stronger indicia of specificity resulting from analyses of the number of users and disproportionate use factors."¹⁰²

The panel instructed the DOC to weigh the four factors during the *de facto* specificity examination. The DOC complied with the order, and found that the analysis of the governmental limitation and discretion factors did not independently yield sufficient evidence to conclude that stumpage programs were specific. However, the DOC found that both the first and second factors (i.e., the number of users and dominant and disproportionate use of the program) provided sufficient evidence to conclude that stumpage programs were specific to the primary timber processing group of industries.

99 Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 14, 19, 24-25.

100 Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 27, 41-42.

101 Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 42.

102 Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 45-46.

Furthermore, the DOC suggested that the factor provided compelling evidence that stumpage was specific to the softwood lumber industry.¹⁰³

The DOC turned its attention away from the issue of specificity and towards the issue of preferentiality by reviewing why it had issued a CVD on softwood lumber from Canada in 1992. The DOC explained that Canadian governments provided a good to a specific group of industries at a preferential rate. As a result, the goods injured American producers when exported into the United States. Consequently, the DOC justified the CVD as compatible with Section 701 of the Tariff Act of 1930. Both the Canadian complainants and the panel found that the DOC's reasoning was not substantial enough; the DOC needed to illustrate that the subsidy had a market distorting effect before levying a countervailing duty. Consequently, the panel remanded the decision to the DOC for further consideration.

The DOC did not agree that "market distortion" was a necessary element in a CVD investigation under the Tariff Act of 1930. Even though the rationale for the CVD was to offset the "distorting" effect of a subsidy, the DOC explained that it was not explicitly required to consider market distortion during a CVD investigation. The DOC complied with the panel's request and examined whether the provincial stumpage programs could and did have a distorting effect on the operations of a normal competitive market. The DOC examined a number of economic theories such as marginal cost analyses and economic rent theories to do so. It considered the marginal cost analysis to be the most appropriate because the price that the government charged for stumpage affected the output of logs and softwood lumber.¹⁰⁴ In other words, the DOC heeded to the panel's authority and changed the ways that it administered American CVD laws by considering the "market distorting" effects of the Canadian programs, even though its traditional methods did not require it to do so.

The DOC moved to consider B.C.'s LERs to comply with the panel's remand determination. The panel remanded the DOC's treatment of the LERs because record evidence did not warrant a determination of *de jure* specificity. The panel instructed the DOC to reconsider if a determination of *de jure* or *de facto* specificity truly applied. The DOC concurred with the panel's conclusion that the LERs were not *de jure* specific. After a "thorough" review of the record evidence, the DOC admitted that its finding of *de jure* specificity was incorrect. It had applied American CVD laws too broadly in the final determination. Instead of finding an explicit link between the LERs and the lumber industry, the DOC had inappropriately based its finding of *de jure* specificity on an implicit

¹⁰³ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 48-49.

¹⁰⁴ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 49-51.

connection.¹⁰⁵ In this way, the panel caused the DOC to take a narrow, more focused, and justifiable approach to *de jure* specificity. The DOC insisted that the LERs were *de facto* specific after reviewing the record evidence. The DOC concluded that the small number of beneficiaries, the inequity of the benefits, the government limitations, and the amount of governmental discretion and exemptions illustrated that certain softwood lumber producers in B.C. enjoyed a number of benefits that American producers did not. Consequently, the DOC found that the LERs were *de facto* specific and subject to countervailing measures under U.S. law.¹⁰⁶

The panel concurred with the DOC's final determination that the LERs were a "domestic subsidy" within the meaning of the Tariff Act of 1930. However, the panel remanded the final determination for clarification of the applicable legal standard for determining whether the LERs did, in fact, confer a countervailable benefit, and how that standard was met by substantial evidence on the record. The DOC reiterated the tests it used during the final determination. It cited that the direct and discernible effects tests had been used to assess the price of logs in British Columbia. Furthermore, the DOC recalled that the substantial evidence had been used. Evidence regarding the economic impact of the LERs, the intent and effectiveness of the LERs, the restrictiveness of statutory domestic producing requirements, export tax rates for logs, the cost of transporting logs from the harvest site to export ports, the volume of export trade in logs, the balance of trade in logs, and the foreign market demand for logs confirmed its belief that the LERs were countervailable subsidies. The DOC's remand determination echoed the final one by stating "[W]hen the record is viewed as a whole, it is clear that there is more than a mere scintilla of evidence to support Commerce's determination that B.C.'s LERs have the effect of reducing the price of logs sold in the B.C. market," thereby making them countervailable and injurious to American producers.¹⁰⁷

The DOC complied with the panel's orders on a number of other smaller issues in the remand determination, and therefore adhered to the authority of the institutionalized panel under international law. For example, the DOC reworked its findings regarding the log purchase price index, the species grade adjustment, economic adjustment to export

¹⁰⁵ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 118-119.

¹⁰⁶ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 120-124.

¹⁰⁷ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 133.

price, and the within grade adjustments. Even though the DOC did not agree with the panel's findings on those issues, it corrected its calculations accordingly.¹⁰⁸

Furthermore, the DOC considered the panel's remand regarding the exclusion order of a number of lumber producers in Quebec. The panel felt that Les Industries Maibec and Matériauz Blanchet should have been excluded from the CVD investigation because they had fulfilled all of the criteria set out in the questionnaire. The DOC complied with the panel's order by reconsidering their requests for exclusion. In the final determination, the DOC refused to exempt the two companies because they did not submit the necessary information within the time frame set by the agency. The DOC admitted that it overlooked a requirement in its own regulations when refusing the exemption. American regulations stipulated that the DOC was required to return the untimely responses to explain why requests for exclusion had been denied. The DOC admitted its error in the remand determination. It maintained that the two companies had submitted untimely requests, but committed itself to responding to them. The DOC did not, however, agree to exclude the two companies from the investigation. The DOC simply stated that "in the event that the panel does not agree with Commerce's [remand] determination to reject the submission ... Commerce will exclude these two companies from the order, subject to the panel's approval."¹⁰⁹

Finally, the DOC addressed the panel's concerns about one of the participants of the CVD investigation. The DOC had employed Dr. Lange to gather and assess information about the Canadian softwood lumber industry. The Canadian complainants argued that Dr. Lange's past involvement with the American lumber coalition made him susceptible to biases and conflicts of interests in the CVD investigation. The panel acknowledged the controversies over Dr. Lange and ordered the DOC to provide evidence to confirm that he did not investigate the Canadian programs in a biased manner. The DOC complied with the request by providing affidavits, letters, and character witnesses to demonstrate that Dr. Lange was not a biased source of information. Furthermore, the DOC illustrated that both Dr. Lange and Commerce officials were sensitive to the potential ethical issues raised by his previous work. No one who worked with Dr. Lange during the investigation felt that he threatened the integrity of the process. Dr. Lange had simply played an extremely limited role in the CVD investigation. He was not a decision-maker. On major issues such as the countervailability of the provincial stumpage programs, Commerce officials did not

¹⁰⁸ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 168-175.

¹⁰⁹ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 178-179.

solicit Dr. Lange's opinion, nor did he offer them, during the course of the investigation.
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***The Binational Panel's Opinion of the DOC's Remand Determination:
December 17, 1993***

The binational panel released a split decision after reviewing the DOC's remand determination on December 17, 1993.¹¹¹ The panel adhered to the American standard of review as required by Article 1904 (3) of the FTA. It referred to the Federal Circuit Appeals Court in *Daweco Electronics Co. Ltd et al v U.S.* (1993) to clarify its obligations under the American law. *Daweco* discussed the amount of discretion that an administrative agency had in an AD/CVD investigation and the nature of the substantial evidence test when describing the American standard of review. The Court acknowledged that Congress gave the DOC discretion to choose whichever methods it would use to calculate ADDs/CVDs in an investigation. However, the Court insisted that the DOC was required to base an AD/CVD determination on substantial evidence. An agency's discretion could not be used to negate "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹¹²

The binational panel relied on the principles of *Daewoo* when setting out its standard of review. The DOC accused the binational panel of failing to comply with the American standard of review in the determination on remand. Because the panel instructed it to employ "substantial evidence" that it felt was unnecessary to determine the presence of a subsidy, the DOC accused the panel of going beyond its jurisdiction as an appellate court. The DOC argued that the panel had not restricted itself to reviewing the final determination but had created a new law instead. The panel defended its actions by suggesting that the *Daweco* Court did not abandon the practice of deferring to administrative agencies by requiring the DOC to rely on "substantial evidence" when making a determination. It maintained that it had the power to determine if the DOC's evidence was reasonable and substantive enough to warrant an affirmative determination. Regardless of the principle of deference, the panel argued that it could "not permit the agency under the guise of lawful

¹¹⁰ Department of Commerce, International Trade Administration, *Determination Pursuant to Binational Panel Remand* (September 17, 1993), 187-189.

¹¹¹ The majority of the panel included Richard G. Dearden (Canadian), Lawson A.W. Hunter (Canadian), J. Robert S. Prichard (Canadian). The two panelists who disagreed and attached a dissenting opinion were Michael Reisman (American) and Morton Pomeranz (American). J. Robert S. Prichard replaced Paul Weiler (American) who served on the first panel of May, 1993.

¹¹² Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 13-15.

discretion or interpretation, to contravene or ignore the intent of Congress” when it replaced a domestic review court.¹¹³

Daweco's interpretation of the American standard of review led the majority to uphold the original panel's decision of May 6, 1993. The majority found that the DOC's Determination on Remand failed to provide a rational basis for concluding that provincial stumpage programs were specific (i.e., were directed to a specific enterprise or industry, or group of enterprises or industries). Consequently, the majority remanded the issue and ordered the DOC to rework its findings to comply with the record evidence and American law and practice. Moreover, the majority held that the DOC's conclusion that provincial stumpage programs distorted the normal competitive markets for softwood lumber was not supported by substantial evidence on the record. The DOC was directed to rework this finding as well. The majority commended the DOC for complying with the original panel's order regarding the establishment of a direct and discernible effect between the LERs and log prices in B.C. It thereby affirmed the DOC's Determination on Remand that the LERs in B.C. conferred a benefit which, if specific, would be countervailable. Nevertheless, the majority argued that the Determination on Remand failed to establish that the LERs of B.C. were specific, and thus benefited a specific enterprise or group of enterprises in accordance with American law. The majority maintained that the DOC erred because it relied on its stumpage specificity analysis and failed to analyze the range of industries which actually purchased the logs. Therefore, the majority remanded the matter to the DOC for a finding of non-specificity with respect to B.C.'s LERs.

The binational panel considered two other issues that were raised in the Determination on Remand. First, the panel discussed the Canadian allegations against Dr. Lange. The Canadians argued that Dr. Lange's involvement violated the principle of due process during the 1991-1993 investigation. The original panel ordered the DOC to provide details and documentation of Dr. Lange's specific role in the investigation. Furthermore, the panel requested information explaining the role that Dr. Lange may have had in the formulation of the DOC's determinations to assess whether there was a basis for the allegations that the principles of due process and impartiality had been violated. In the Determination on Remand, the DOC provided the declarations of a number of department officials who were involved in the investigation and the formulation of the determination. The binational panel reviewed the DOC's submissions regarding the role of Dr. Lange. It noted that it had serious concerns with the DOC's decision to retain the services of Dr. Lange because of his previous connections with the CFLI. Nevertheless, the panel

¹¹³ Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 17.

determined that “neither the record evidence nor the information provided by Commerce in response to the Panel’s remand meets the evidentiary threshold required by existing U.S. law to overturn an agency decision on due process grounds.” Therefore, the panel concurred with the DOC’s Determination on Remand and maintained that Dr. Lange had only assisted the investigations and had not tainted the process. Consequently, the panel held that the Canadian allegations about a violation of due process were false.¹¹⁴

Second, the binational panel examined the issue of whether two lumber producers from Quebec should have been excluded from the DOC’s final determination. The DOC refused to consider the applications of Les Industries Maibec and Matériaux Blanchet for exclusion from its final CVD determination because they filed their questionnaire responses after the set deadline. The two companies argued that they should have been excluded from the investigation because they produced lumber almost exclusively from American timber during the investigation and only received *de minimis* (i.e., under one percent) benefits. Aside from the question of late filing, the two companies fulfilled the exclusion criteria set out by the DOC. The first original panel held that “having fulfilled all of the criteria required for exclusion, the DOC should have excluded these companies.” The panel therefore ordered the DOC to reconsider its refusal to exclude them from the investigation. In the Determination on Remand, the DOC affirmed its previous decision to refuse the two companies exclusion. The DOC argued that the two companies would have fulfilled the requirements for exclusion had they responded to its questionnaire in a timely manner. The binational panel echoed its first order, and found that the DOC acted contrary to American law by failing to exclude the two companies from the CVD order. Consequently, the binational panel ordered the DOC to exclude them from payment of the duty.¹¹⁵

The two dissenting panelists concurred with the majority with regards to Dr. Lange and the propriety of directing the DOC to exclude Les Industries Maibec and Matériaux Blanchet from the countervailing duty. Furthermore, the dissenting members agreed with some of the majority’s conclusions about B.C.’s LERs. Nevertheless, the dissenting panelists disagreed with the majority’s views in two ways: (1) the DOC’s treatment of specificity and preferentiality in various Canadian stumpage programs; and (2) the majority’s interpretation of *Daweoo*. The two dissenting panelists used *Daweoo* to argue that the DOC was entitled to a great deal of leverage and discretion with regards to the issues of specificity and preferentiality. They stressed that the DOC was free to choose whatever calculation methods and statutory provisions it felt were relevant in a given

¹¹⁴ Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 103-105.

¹¹⁵ Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 101-102.

AD/CVD investigation. Similarly, the dissenting panelists insisted that a reviewing court or binational panel had to defer to the DOC in spite of arguments regarding “substantial evidence.” Reviewing courts or binational panels were not able to assume a political role and “create new laws” by raising issues such as “substantial evidence.” Deference to administrative agencies was more important according to American law and practice. Therefore, the dissenting panelists upheld the ways that the DOC addressed specificity and preferentiality in the determination on remand.¹¹⁶

***The DOC's Final Determination on Remand:
January 6, 1994***

The DOC reworked the affirmative CVD determination and found the subsidy rates to be 0 percent in response to the binational panel's opinion of the Determination on Remand. Consequently, the duties levied on Canadian softwood lumber were revoked. An estimated \$800 million in CVDs was refunded to Canadian softwood lumber producers between 1994 and 1995.¹¹⁷ Therefore, the presence of the binational panel was able to influence the means by which the DOC implemented U.S. trade remedy laws after 1989. The panel ordered the DOC to change those practices which continued to violate American law and practice, and commended the agency for fixing some of the violations in the determination on remand.

***The Canadian Response to the Affirmative Determinations of the ITC:
Request for a Chapter 19 Binational Panel***

The Government of Canada requested that a separate binational panel be convened to review the ITC's affirmative injury determination on behalf of Alberta, B.C., Ontario, Quebec, the Canadian Forest Industries Council, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association. A binational panel was convened under Article 1904 (2) of the FTA in response to the request. It was made up of Joseph F. Dennin - Chairman (American), Steven W. Baker (American), Harry B. Endsley (American), James F. Grandy (Canadian), and Donald M. McRae (Canadian).

The American CFLI challenged the establishment of the binational panel on November 20, 1992. The CFLI argued that the binational panel did not have the requisite

¹¹⁶ Binational Panel Review, *Decision of the Dissenting Panelists on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993).

¹¹⁷ The Hon. Roy MacLaren, Minister of International Trade, “MacLaren Welcomes U.S. Announcement of a Full Refund of Softwood Lumber Duties,” *Communiqué* No. 246 (December 15, 1994).

jurisdiction to review the ITC's injury determination for two reasons. First, the CFLI argued that the CVD investigation was an "enforcement measure" within the terms of Article 2009 of the FTA. The use of a binational panel would impair the American right to exercise such a measure. Consequently, the CFLI suggested that the CVD investigation should be exempt from panel proceedings. Second, the CFLI argued that the binational panel process impaired its constitutional right to judicial review before a domestic court such as the CIT.

The binational panel rejected the Coalition's motion on March 4, 1993. The panel maintained that Article 2009 did not expressly grant or remove jurisdiction. The purpose of Article 2009 was simply to ensure the coexistence of the MOU and the FTA. Furthermore, the panel did not accept the argument that the CVD order was an enforcement measure arising out of the MOU. Instead, the panel felt that the CVD investigation was an objective proceeding to determine whether an injurious subsidy existed and caused injury to American producers. When ruling on the second issue, the panel held that FTA-19 granted it jurisdiction to review the ITC's final injury determination. Furthermore, the panel upheld its jurisdiction over the case because none of the enumerated exceptions for a Chapters 19 panel had been met, and because the language of FTA-19 did not expressly place softwood lumber beyond the purview of binational panel review.¹¹⁸

***The Binational Panel's Opinion of the ITC's Affirmative
Injury Determination:
July 26, 1993***

The panel released its opinion of the ITC's affirmative injury determination on July 26, 1993. The panel began by addressing the standard of review that it was to employ when considering the Commission's conclusions. It maintained that Section 516 of the Tariff Act of 1930 required it to "hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." The panel interpreted "substantial evidence" to mean information that was on the record as a whole, including that which opposed the ITC's view. However, the panel noted that the substantial evidence standard did not permit it to reweigh the evidence, nor to substitute its judgment for that of the Commission. Furthermore, the panel maintained that the American standard of review required it to show deference to the ITC. In other words, the panel was to presume that the Commission's findings were

¹¹⁸ Binational Panel Review, *Opinion of the Panel Regarding The Motion to Dismiss for Lack of Jurisdiction In The Matter of Softwood Lumber from Canada* (March 4, 1993), 1-6.

correct, and to place the burden of demonstrating otherwise on the party challenging the determination. Notwithstanding the principle of deference however, the panel insisted that it was able to conduct a meaningful review of the Commission's investigation. The panel could therefore demand that the ITC's determination had a reasoned basis, relied on thorough evidence, displayed a rational connection between the evidence and the choice made by the agency, complied with congressional intent, and provided an adequate explanation for its conclusions.¹¹⁹

The binational panel considered four parts of the ITC's injury determination: (1) price suppression, (2) the impact of Canadian Spruce-Pine-Fur (SPF) imports on the potential increases in softwood lumber prices in the United States, (3) the legality of the ITC's cross-sectoral comparisons, and (4) the Quebec finding. All issues were related to the ITC's finding that Canadian imports contributed to the suppression of softwood lumber prices in the United States and thereby caused material injury to American producers.

(1) Price Suppression

The ITC reasoned that the significant volume of Canadian imports increased the likelihood that material injury threatened an American industry. Moreover, the ITC argued that the volume of Canadian imports suppressed American prices because it affected the supply and demand curve of the market. The Commission used a cross-sectoral analysis to confirm its view that Canadian lumber imports were suppressing the prices of similar American products. The analysis compared the performance of the softwood lumber industry to that of the "wood products and building materials industry." The Canadian complainants challenged the ITC's conclusions, and insisted that the findings were not supported by evidence. The ITC's cross-sectoral analysis did not conclusively prove that Canadian imports had an effect on American lumber prices. Without substantial evidence to establish a sound link between the imports and the condition of the domestic industry, the Canadians argued that the ITC's determination was not supported by substantial evidence and was not otherwise in accordance with law.¹²⁰

The binational panel concurred with the Canadian complainants and held that the ITC's findings of price suppression were not supported by substantial evidence. The ITC

¹¹⁹ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 11-16.

¹²⁰ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 18.

traditionally used increased imports by volume or market share, decreased prices, underselling, confirmed lost sales, or price leadership to support an affirmative determination. However, the panel explained that the ITC did not use them in the softwood lumber investigation. It reasoned that the unreliability of the pricing data made many of those factors unavailable to the Commission. Similarly, other data regarding increased imports by volume simply did not exist. Therefore, the panel considered the type of evidence that the ITC could have used to reach its affirmative determination. In other words, it sought to discern what other “concrete evidence” and “verifiable events” could have substantiated the Commission’s finding of price suppression. The panel agreed with the ITC that the volume of Canadian imports was “significant” during the period of investigation. Nevertheless, it noted that the “mere presence of a significant volume of unfairly traded imports was not sufficient to support an affirmative injury determination. In the absence of increases in quantities or shares, or other indicia, the volume of imports alone does not constitute substantial evidence of injury by reason of imports.”¹²¹

While the panel did not require the ITC to assess price suppression in any particular manner or according to a set of particular factors, it did insist that the Commission base its findings on evidence on record. Actual evidence of any factor such as injurious shifts in market share, rising import volume, decreasing prices, underselling, lost sales, or price leadership was required to demonstrate injury. The panel remanded the ITC for basing its conclusions on a “handful of broad statements which did not begin to satisfy the [statutory] criteria that the Commission’s injury determination must be supported by rationally based findings.”¹²² As a result, the panel ordered the ITC to reword its conclusions, and thus affected the way that the Commission interpreted and applied American trade laws. If price suppression was to form the basis of a new affirmative determination, the panel required the ITC to indicate the actual price suppressing effect of the Canadian imports.¹²³

¹²¹ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 18-19.

¹²² Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 53.

¹²³ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 77-78.

(2) *The Impact of Canadian Spruce-Pine-Fir Imports on the Potential Increases in Softwood Lumber Prices in the United States*

The ITC justified its conclusion that Canadian imports were suppressing American prices by pointing to the volume of SPF that entered the United States. The ITC's determination found that SPF imports limited the potential price increases in the United States. The panel rejected the ITC's findings because they were not substantiated by evidence on the record. In fact, the panel maintained that the evidence did not indicate what effect, if any, SPF had on the market. In the absence of evidence demonstrating the price effects of SPF, the panel could not accept the ITC's finding that SPF prices influenced lumber prices generally, or the consequent finding that imports of Canadian SPF would limit the potential increased in American prices in the future.

(3) *The Legality of the ITC's Cross-Sectoral Comparisons*

The ITC suggested that a cross-sectoral comparison would demonstrate the injurious effects that Canadian imports had on the American lumber industry even further. The Commission determined that softwood lumber producers were performing worse than producers in the American wood products and building materials industry because of Canadian imports. The Canadian complainants suggested that the cross-sectoral comparison was outside of the ITC's legal authority and was not in accordance with U.S. law for three reasons:

- (1) The ITC lacked the information necessary to know whether the financial comparison isolated the effect of Canadian imports;
- (2) The ITC's information demonstrated that significant differences between the cost and demand conditions affected lumber and industries producing other building products; and
- (3) The ITC failed to verify the financial data showing comparable performance between the lumber and plywood industries even though the plywood industry was the best benchmark against which to compare the lumber industry's performance.¹²⁴

Essentially, the Canadian complainants attacked the methods by which the ITC collected information for its investigation (e.g., the questionnaires). They alleged that information was collected and analyzed in an ad hoc manner during the investigation. Direct, comprehensive investigations of other industries were not undertaken by the ITC

¹²⁴ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 57.

even though it relied on information about them in the cross-sectoral comparison. According to the Canadian complainants, the ITC was aware that it was unable to cite evidence to support the assumption that lumber and building products were equally affected by increased timber costs, the recession, and the downturn in housing starts. Moreover, the Canadians alleged that the ITC did not collect the information necessary to enable it to know whether its assumptions were valid or not.

The panel accepted the Canadian arguments and raised a number of its own concerns regarding the ITC's legal authority to conduct cross-sectoral comparisons in the injury investigation. Concurring with Canadian counsel, the panel found that the ITC's cross-sectoral comparison of an investigated industry with a non-investigated industry was "seriously flawed," and "laden with data collection and methodological problems." The cross-sectoral comparison "neither produced substantial evidence of significant price suppression by reason of Canadian imports, nor reliably confirmed the Commission's finding of such suppression."¹²⁵ More importantly, the panel rejected the use of the cross-sectoral comparison because it was outside the ITC's legal authority. After reviewing the 1979 and 1988 trade acts, the panel held that it was "not Congress' intent to have the ITC engage in ad hoc examinations of one or more non subject industries to justify or support a determination with respect to an investigated industry." The panel insisted that "when an agency uses data, developed largely on an ad hoc basis, from a non-investigated industry to support a determination made with respect to an investigated industry, it is engaged in a process that is statutorily unconfined, judicially undisciplined, and potentially susceptible to serious error."¹²⁶ Since the wood products and building materials industries were never formally investigated nor properly defined by the Commission, they were not subjected to the same scrutiny as the lumber industry was. Consequently, the ITC was unable to measure "with any degree of precision, as it plainly could for softwood lumber, the extent to which the financial performance of these other industries had been affected by increased timber costs, the recession, and the downturn in housing starts."¹²⁷ Therefore, the panel remanded the ITC's use of the cross-sectoral comparison. It reminded the Commission that it had to establish statutory authority before employing cross-sectoral comparisons in the future.

¹²⁵ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 20.

¹²⁶ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 65-66.

¹²⁷ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 69-70.

(4) *The Quebec Finding*

The final issue that the binational panel considered was the ITC's refusal to grant lumber producers from Quebec a separate injury determination. The Government of Quebec, the Quebec Lumber Manufacturers Association, and members of the Canadian Lumbermen's Association argued that the imports of softwood lumber from Quebec were entitled to a separate injury determination for two reasons: (1) the ITC had determined that Quebec imports were not subsidized, and (2) Quebec was a "country" for purposes of U.S. countervailing duty laws. The binational panel argued that it was unable to review the merits of the ITC's finding or to address the substantive arguments raised by the Canadian parties in any detail. The panel deferred to the ITC's authority when it decided that American law permitted the Commission to refuse Quebec's request for a separate injury determination. However, the panel noted that the ITC erred by not providing an adequate, reasoned explanation for its actions. While the ITC was not required to make a "perfect statement" justifying the reasons for its determination, it was required to provide an explanation that was sufficient enough to allow the panel to discern the ITC's path of reasoning. Therefore, the panel instructed the Commission to articulate a satisfactory explanation of its finding with respect to the treatment of lumber imports from Quebec.¹²⁸

The ITC's Remand Determination: October 25, 1993

The ITC issued a Determination on Remand on October 25, 1993 in compliance with the binational panel's orders. The Commission was not united in its views. Three of the five commissioners issued an affirmative remand determination, while two rendered a negative decision.¹²⁹ The majority maintained that the Remand Determination centered on the question of whether injury was caused by declining demand and timber supply constraints as the Canadian parties argued, or by the high volume of subsidized imports as American lumber producers alleged. Even though it felt that much of the record evidence

¹²⁸ Binational Panel Review, *Decision of the Panel Reviewing the Final Determination of the U.S. International Trade Commission In the Matter of Softwood Lumber from Canada* (July 26, 1993), 73-77.

¹²⁹ Chairman Newquist, Vice Chairman Watson, and Commission Rohr issued an affirmative determination on remand. Commission Crawford attached a concurring opinion which also found evidence to support an affirmative remand determination. Commissioners Brunsdale and Nuzum issued separate negative remand determinations. *Softwood Lumber from Canada*, Investigation No. 701-TA-312 (Remand), USITC Pub. 2689 (October, 1993).

was ambiguous and could have supported either view, the majority of the ITC held that “the evidence more fully supports the domestic industry’s proposition.”

The majority of commissioners discussed the issues that were raised by the binational panel. For example, the panel ordered that the ITC consider whether price increases would have occurred if the volume of Canadian imports had not as been as high as they were during the period of investigation. In response, the majority pointed to Section 1677 (7) (c) (ii) (1) of the Trade Act of 1930 to suggest that it had to evaluate whether “the effect of imports ... prevents price increases, which otherwise would have occurred to a significant degree.” The Commission reasoned that the punctuation and wording of the statute simply required it to determine if there was significant price suppression by reason of imports. The statute did not oblige the ITC to assess whether prices would have increased significantly without them.¹³⁰ To defend its position, the majority repeated its original view that the volume of Canadian imports was substantial enough to suppress the price of American lumber. During the period of investigation, 28 percent of the American market was captured by Canadian lumber imports. The entire 28 percent was “unfairly traded” in the majority’s estimation. Consequently, the majority felt that it had to consider what effect the unfairly traded goods had on the domestic industry. If, as the Canadian respondents contended, “supply and demand determined market prices, it was inconceivable as a matter of economic logic that prices would have been higher were it not for the significant volume of subsidized imports.”¹³¹

The ITC also considered the panel’s view of the cross-sectoral comparison. The majority held that the panel misunderstood the nature and purpose of the comparison. In particular, the commissioners insisted that they did not compare the performance of the lumber industry with the performance of other industries to determine whether the lumber industry was materially injured. Furthermore, they argued that they did not rely on the cross-sectoral comparison to “confirm” that Canadian imports caused the price suppression suffered by the domestic industry as the panel alleged. Instead, the majority maintained that it compared financial data regarding the softwood lumber operations and the “wood products with other building operations” of the domestic softwood lumber producers who responded to the Commission’s questionnaires. The purpose of the comparison was to disprove the Canadian proposition that timber supply constraints and the downturn in

¹³⁰ Views of Chairman Newquist, Vice Chairman Watson, Commission Rohr, *Softwood Lumber from Canada*, Investigation No. 701-TA-312 (Remand), USITC Pub. 2689 (October, 1993), 5.

¹³¹ Views of Chairman Newquist, Vice Chairman Watson, Commission Rohr, *Softwood Lumber from Canada*, Investigation No. 701-TA-312 (Remand), USITC Pub. 2689 (October, 1993), 3.

housing starts were the sole causes of material injury to the domestic industry. The ITC also defended its use of the comparison by insisting that the information was not collected in an ad hoc manner. The questionnaires were administered and analyzed in the proper manner, just as those answered by Canadian and American lumber producers were.¹³² In this way, the ITC defended its practices as fully within its legal authority despite the panel's arguments to the contrary. The ITC, under influences of protectionist sentiments and longstanding practices of shielding domestic producers, resisted the efforts of the binational panel to change its traditional ways of interpreting and applying American trade remedy laws. Correspondingly, the ability of the institutionalized panel to propel the process of change was placed in jeopardy .

Notwithstanding the ways that ITC justified its "protectionist" final determination, the Commission complied with the panel by offering a more detailed explanation of why it refused to grant lumber producers from Quebec a separate injury determination. The majority argued that American trade laws required the ITC to conduct an injury determination of the industry included in the DOC's investigation. Section 1671 d (b) (1) of the Trade Law of 1930 explicitly granted the authority to determine whether imports were subsidized to the DOC. Because the DOC did not make a separate subsidy determination with respect to Quebec, "the Commission has no authority to go behind Commerce's affirmative final determination which includes imports from Quebec, and conclude for itself that imports from Quebec are fairly traded." The majority went on to argue that "the bifurcated [trade remedy regime] cannot operate effectively if one agency revisits determinations that the statute delegates to the other."¹³³ Similarly, the ITC noted that the DOC had the sole authority to define "country" during an AD/CVD investigation. Therefore, because the DOC rejected the argument that Quebec constituted a "country" within the meaning of American trade laws, the ITC was required to do so as well.¹³⁴

¹³² Views of Chairman Newquist, Vice Chairman Watson, Commission Rohr, *Softwood Lumber from Canada*, Investigation No. 701-TA-312 (Remand), USITC Pub. 2689 (October, 1993), 12-15.

¹³³ Views of Chairman Newquist, Vice Chairman Watson, Commission Rohr, *Softwood Lumber from Canada*, Investigation No. 701-TA-312 (Remand), USITC Pub. 2689 (October, 1993) 17-18.

¹³⁴ Binational Panel Review, *Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission in the Matter of Softwood Lumber from Canada* (January 28, 1994), 19-20.

***The Binational Panel's Opinion of the ITC's Remand Determination:
January 28, 1994***

The Government of Canada, the provinces of Alberta, B.C., Ontario, Quebec, the Canadian Forest Industries Council, the Quebec Lumber Manufacturers' Association, and members of the Canadian Lumbermen's Association filed briefs in opposition to the ITC's Remand Determination on November 22, 1993. Briefs supporting the Remand Determination were submitted by the ITC itself and the CFLI for Fair Lumber Imports on December 12, 1993. Following oral arguments, the binational panel issued a unanimous decision regarding the ITC's Remand Determination on January 28, 1994.

The binational panel examined three issues in its decision. First, the binational panel considered the ITC's refusal to grant softwood lumber imports from Quebec a separate injury determination. As explained, the binational panel remanded the ITC's refusal to grant the request on the grounds that the Commission failed to provide an adequate explanation for its decision in July, 1993. In its decision of January, 1994, the binational panel affirmed that the ITC's Remand Determination complied with the order, and found that the ITC's decision to refuse a separate injury determination was supported by substantial evidence and was in accordance with law. The panel concurred with the ITC that American law required it to consider all imports to which the DOC had made an affirmative determination in an injury investigation. Because the DOC found that imports of softwood lumber from Quebec were subject to a countervailable subsidy, the ITC was committed to consider the injurious effects of them as well. Furthermore, the DOC had placed a "country-wide" CVD on all of the softwood lumber imports from Canada, including those from Quebec. Therefore, the panel argued that the ITC could not be faulted for accepting the DOC's determination of the country whose products were subject to investigation. Even though American trade laws defined "country" as including the political subdivisions of a foreign state, the panel concurred with the ITC that it was not required to modify the DOC's determination and grant the imports from Quebec a separate injury investigation.¹³⁵

Second, the binational panel rejected the ITC's Remand Determination for finding that Canadian exports suppressed American prices. The binational panel argued that the Remand Determination did not meet the substantial evidence test. The ITC used supply and demand curves to reason that the prices of American lumber should have increased because the recession of 1991-1992 suppressed demand. However, prices for softwood lumber

¹³⁵ Binational Panel Review, *Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission in the Matter of Softwood Lumber from Canada* (January 28, 1994), 4-7.

did not rise: other factors which affected the lumber market (e.g., the substitution of plywood lumber for softwood lumber) came into play. The binational panel rejected the ITC's original and remand determinations for not accounting for the inaccuracies of ideal supply and demand models. In addition, the binational panel questioned why the ITC used "cross-sectoral" statistics to demonstrate the suppressing effects that plywood lumber had on American softwood products. Consequently, the binational panel ruled that the ITC had not met the substantial evidence standard when it reached the conclusion that significant price suppression in the American market had been caused by Canadian products.¹³⁶

Third, the binational panel considered the issue of causation. In the remand determination, the ITC concluded that the price of American softwood lumber increased less over the period of investigation than would have occurred if Canadian imports had not penetrated the U.S. market to such a degree. The majority of commissioners held that price suppression was caused by Canadian imports because of three factors: (1) Canadian prices tended to rise more slowly and fall more rapidly than American prices; (2) the price of subsidized Canadian imports (especially spruce-pine-fir) had a dominant impact on lumber prices in the American market; (3) the weighted average composite U.S. price in the northern market where Canadian import penetration was highest was lower than the price in the southern market where import penetration was lower. The ITC's remand determination relied on the volumes of Canadian softwood lumber imports in the American market to justify the conclusion that American producers incurred injury at the hands of their Canadian competitors. The ITC argued that the large volume of imports of subsidized lumber had a significant impact on both the domestic industry and the domestic price of softwood lumber because it was "inconceivable as a matter of economic logic that prices would not have been higher were it not for the significant volume of subsidized imports."¹³⁷

The binational panel accepted some of the tools the ITC used to assess causation in the remand determination. For example, the panel argued that a fully developed, rational price trends analysis could have been a useful tool for the ITC to use. With appropriate factual support and methodology, it could have been used to demonstrate the sufficiency of the information on record. Nevertheless, the panel found that the ITC's use of price trends data and methodology did not constitute substantial evidence and was not in accordance with law. Similarly, the panel found that "dominant" impact of Canadian SPF on American

¹³⁶ Binational Panel Review, *Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission in the Matter of Softwood Lumber from Canada* (January 28, 1994), 8-11.

¹³⁷ U.S. International Trade Commission, *Softwood Lumber From Canada*, Investigation No. 701-TA-312 (Remand), Publication 2689 (October, 1993), 5-7.

prices was not proven conclusively either. Finally, the binational panel raised a well-established rule that causation could not be proven by volumes of imports alone. Therefore, the panel reprimanded the ITC for using evidence and methods with a relatively low degree of statistical certainty that had been previously rejected or inadequately explained to support their causation and price suppression claims. Consequently, the binational panel remanded the ITC's affirmative remand determination for further consideration. The ITC was directed to produce a new report within 45 days of the panel's decision.¹³⁸

***The ITC's Second Remand Determination:
March 1994***

The ITC reached another affirmative injury determination in response to the binational panel's order of January, 1994. The majority of commissioners abided by their original conclusions that the American lumber industry was materially injured by softwood lumber from Canada.¹³⁹ Nevertheless, all five commissioners fully acknowledged that the binational panel's orders had to be respected and adhered to. Commissioners Newquist and Rohr maintained:

Although we disagree with the panel's conclusion, we accept, as we must, the panel's ruling that the information does not constitute probative evidence that the price of the subsidized Canadian imports was related to the injury being experienced by the domestic industry. However, in doing so, we must also accept the corollary conclusion that the information cannot constitute probative evidence that the price of the imports was unrelated to the injury being experienced by the domestic industry. There is no proof either way. We cannot find a way in which such proof could be obtained. The absence of proof is the heart of the problem.¹⁴⁰

In light of the binational panel's orders, Commissioners Newquist and Rohr looked to other parts of the record for evidence to establish grounds for an affirmative injury determination. Therefore, even if they did not accept all of the panel's order, the majority of the commissioners did concede the fact that the panel had the power to cause the ITC to change the ways that it interpreted and applied American trade laws. In other words, the Commissioners deferred to the new reality that Chapters 19 institutions could change the

¹³⁸ U.S. International Trade Commission, *Softwood Lumber From Canada*, Investigation No. 701-TA-312 (Remand), Publication 2689 (October, 1993), 12-13, 36.

¹³⁹ Commissioners Newquist (Chair), Rohr and Crawford formed the majority. Commissioners Watson (Vice-Chair) and Nuzum formed the minority.

¹⁴⁰ U.S. International Trade Commission, *Softwood Lumber From Canada*, Investigation No. 701-TA-312 (Second Remand), Publication 2753 (March, 1994), 3.

administration and interpretation of domestic trade remedy laws after the FTA and NAFTA came into effect.

On behalf of the majority, Commissioners Newquist and Rohr held that they were entitled to make a number of findings according to U.S. law and the binational panel's order:

- (1) the domestic industry is currently experiencing material injury;
- (2) the market for lumber is a commodity market supplied almost exclusively by U.S. and Canadian producers;
- (3) subsidized Canadian imports account for over one quarter of the American softwood lumber market, and have an even larger share in some local markets;
- (4) the volume of Canadian imports was "significant";
- (5) the effect, if any, of the price of the subsidized Canadian imports on the price of softwood lumber in the United States cannot be determined on the basis of the information on the record; and
- (6) no other causes fully explain the injury being experienced by the industry.¹⁴¹

Based on those findings, they indicated that injury was linked to Canadian imports. Even though a conclusive link could be not proven, they concluded that American statutes permitted them to reach an affirmative injury determination. They held that American trade law and practice required the ITC to perform a two-step analysis in an injury investigation. The ITC's role was to "determine whether an industry is currently experiencing material injury," and then to determine "whether imports are a cause, not the only cause, not an important cause, not even a material cause, merely a cause of that injury."¹⁴² Moreover, they argued that Congress had only intended the ITC to consider the causes of injury. Insofar as the ITC could point to a number of seeming causes of injury, it was required to make an affirmative determination. Congress did not intend that the Commission make any specific findings either affirmative or negative with regard to any one specific factor. Considering causes was to be its only role in administering American trade remedy laws.

The Aftermath of the Binational Panel Process - American Request for an Extraordinary Challenge Committee

The USTR asked that an Extraordinary Challenge Committee (ECC) be convened to review the binational panel's order of the DOC's affirmative determination on April 6, 1994. On behalf of the CFLI, the USTR requested that an ECC either vacate the binational

¹⁴¹ U.S. International Trade Commission, *Softwood Lumber From Canada*, Investigation No. 701-TA-312 (Second Remand), Publication 2753 (March, 1994), 7-8.

¹⁴² U.S. International Trade Commission, *Softwood Lumber From Canada*, Investigation No. 701-TA-312 (Second Remand), Publication 2753 (March, 1994), 3. Emphasis in the original.

panel's decision or find it inconsistent with an ECC decision. The USTR's official request for an ECC stated:

Pursuant to Article 1904 of the United States-Canada Free Trade Agreement, the United States requests the convening of an Extraordinary Challenge Committee to review the underlying Panel decision in the above-captioned manner. Two members of the Panel materially violated the FTA Rule of Conduct by failing to disclose information that revealed at least the appearance of partiality or bias, and with regard to one of the Panelists, a serious conflict of interest. Moreover, the Panel (and the three person majority in the December 17, 1993 decision) manifestly exceeded its powers, authority, and jurisdiction by ignoring the Chapters 19 standard of review, including substantive law and the facts in overturning the Department of Commerce's finding that the subsidies at issue in the case were provided to a specific industry or group of industries and inventing a legal requirement that Commerce examine whether the subsidies distort the market. These actions materially affected the Panel's decision and threaten the integrity of the binational panel review process.¹⁴³

An ECC was convened to review the American allegations. The ECC was chaired by Retired Judge Malcolm Wilkey (American) and included the Hon. Herbert B. Morgan (Canadian) and Mr. Justice Gordon L.S. Hart (Canadian). The ECC released a split decision on August 3, 1994. The two Canadians formed the majority and affirmed the binational panel's orders. Judge Wilkey attached a dissenting opinion which supported the American allegations.

The Decision of the Majority ¹⁴⁴

Hart and Morgan began their opinions by explaining the role of an ECC. They argued that an ECC was not intended to be a routine appellate court, but was to be a committee of limited jurisdiction to protect the integrity of the binational panel system instead. Its role was an extremely limited one. Article 1904 (13) of the FTA permitted an ECC to simply address matters concerning the conduct of panelists, the procedures used by a binational panel, and the power and authority exercised by a panel to fulfill its mandate. Consequently, an ECC's jurisdiction was restricted to correct an "aberrant panel decision"

¹⁴³ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 12.

¹⁴⁴ Mr. Justice Hart and the Hon. Herbert Morgan released separate opinions which upheld the panel's decisions. Because they were very similar, the two opinions will be analyzed together as the "decision of the majority."

and any “aberrant behaviour of panelists” that would threaten the integrity of the binational panel system when such action was unwarranted.¹⁴⁵

The USTR suggested that the binational panel had exceeded its power, authority, and jurisdiction by failing to apply the American standard of review and general legal principles when it held that the DOC’s determination was not supported by substantial evidence or was in accordance with law. Although the panel referred to the American standard of review, the USTR insisted that the panel failed to conscientiously apply it. Furthermore, the USTR maintained that the panel did not accord the DOC the traditional amount of deference when examining its affirmative determinations. Instead of abiding by longstanding American practice, the panel created new law that was not supported by statutory language, congressional intent, administrative practice, or judicial precedent. Specifically, the USTR insisted that the panel did not adhere to the standard of review by:

- (1) reversing the DOC’s determination regarding preferentiality of provincial stumpage programs and substituting an effects test that was not required by U.S. law; and
- (2) reversing the DOC’s specificity determination without a proper analysis of the Department’s findings as required under the appropriate standard of review and imposing new requirements on Commerce that went beyond the panel’s mandate.¹⁴⁶

Hart and Morgan dismissed the American allegations. They felt that the panel did not violate the American standard of review when assessing the way that the DOC examined the issues of market distortion and preferentiality. For example, Hart explained that American case law was unclear with regards to the tests the DOC was to use to assess preferentiality and market distortion. Because the case at hand was one of “first impression,” another appeal court or binational panel could have reached an alternate conclusion about the subsidies on Canadian lumber. Arguments on both sides of the DOC’s assessment of preferentiality and market distortion had a solid foundation. Furthermore, Hart insisted that the amount of deference that the panel extended to the

¹⁴⁵ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 16-17; Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 9.

¹⁴⁶ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 17; Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 10, 15.

agency was in tune with the novelty of the exercise. He stressed that a binational panel did not have to always defer to the DOC. When Canadian and American negotiators agreed to replace domestic judicial review with a binational panel process, “they must have realized and intended that a review of the actions of Commerce or the Canadian agency would be more intense.” Therefore, he argued that the binational panel followed an appropriate standard of review and properly interpreted American law. He commended the panel for requiring the DOC to assess whether the Canadian subsidies gave a competitive advantage or caused market distortion before determining if a countervailable subsidy existed. Having determined that there was no comparative advantage or market distorting effect according to the evidence, Hart held that the panel was correct in directing the DOC to remove the CVDs that it had imposed.¹⁴⁷

Similarly, Hart and Morgan affirmed the binational panel’s conclusions about the ways that the DOC had inappropriately assessed the specificity of the subsidy. Morgan cited Section 1677 (5) of the Trade Act of 1930 to show that the DOC was required to consider if a subsidy was provided to “a specific enterprise or industry, or a group of enterprises or industries.” Morgan also explained that the statute was silent on how the DOC was to do so. Therefore, he noted that American law and practice required that reviewing courts give the DOC a measure of deference when it applied the specificity test during a CVD investigation. In particular, reviewing courts were only to assess whether the DOC’s application of the test was “sufficiently reasonable” and had a rational basis which complied with the object and purpose of the statute. However, he accounted for the fact that reviewing courts and/or binational panels were free to reject the agency’s determination in the event that the DOC contravened statutory objectives. Morgan insisted that the panel’s decision was full of instances in which it deferred to the DOC’s determination. For example, the panel affirmed the DOC’s conclusion that the LERs in B.C. could have yielded a countervailable subsidy if they would have been found to be specific, despite strong arguments by the Canadians to the contrary. Nevertheless, Morgan demonstrated that the panel repeatedly remanded the DOC for not providing a rational, legal basis for its conclusions that Canadian stumpage programs and LERs were indeed specific. Moreover, he upheld the panel for directing the DOC to employ the factors included in the proposed regulations of 1989. He noted that the DOC had devised the regulations in order

¹⁴⁷ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 27-28. Morgan made similar arguments - see Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 13-15.

to give itself a basis for determining specificity. Therefore, Morgan held that “in requiring Commerce ... to consider all the factors set out in the Proposed Regulations, it cannot be said, as alleged by the USTR, that the panel did not conscientiously apply U.S. law,” and violate the American standard of review.¹⁴⁸

Besides alleging that the binational panel had erred in applying the American standard of review, the USTR alleged that two members of the panel were guilty of gross misconduct, bias, or a serious conflict of interest. In particular, the USTR argued that Panel Chair Richard G. Dearden (Canadian) and Panelist Lawson Hunter (Canadian) had materially violated the FTA’s rules of conduct by failing to disclose information about their personal clients and those that their law firms represented. Consequently, the USTR maintained that the two panelists were guilty of a serious conflict of interest and placed the integrity of the panel in jeopardy. Justice Hart explained that the FTA’s rules of conduct required panelists to submit a disclosure statement before serving on a panel.¹⁴⁹ The purpose of the disclosure statement was to reveal any interests or relationships that could affect the panelist’s independence and impartiality or that might reasonably create the appearance of bias. Once appointed to a panel, members were required to make a reasonable effort to become aware of, and to disclose, any interests or relationships that could affect their ability to serve impartially. Hart explained that the disclosure obligations were not to be so severe that it would be impractical for members of the legal or business community to serve as panelists, and deprive the Parties and participants of the services of those who might be best qualified to serve as members. Panelists were therefore only required to disclose relationships or interests that could have bearing on the impartiality or integrity of the process.¹⁵⁰

Hart and Morgan dismissed the American allegations about the conduct of the two panelists. They demonstrated that Dearden and Hunter had submitted the proper disclosure statements when being considered for the panel. Moreover, the Canadian and American governments approved them both when forming the binational panel in 1992. Indeed, Hart held that “allegations were not raised against Dearden or Hunter until after the panel had

¹⁴⁸ Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 17-19.

¹⁴⁹ For example, panelists were required to disclose: (1) any direct or indirect financial or personal interest in the outcome of the proceeding; (2) any existing or past financial, business, professional, family or social relationship, or any such relationship involving family member, current employer, partner, or business associate; (3) public advocacy of a position on an issue in dispute in the proceeding that was not in the normal course of legal or other representation.

¹⁵⁰ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 44-45.

twice decided the issue against the position of the United States although there was ample opportunity to do so.”¹⁵¹ He hinted that political interference and lobbying efforts were behind the USTR’s charges. Indeed, Hart reprimanded the USTR for bringing misconduct allegations against the two panelists without waiting for all of the facts to be disclosed.¹⁵² Hart and Morgan acknowledged that the firms that Dearden and Hunter worked for had represented Canadian lumber groups in the past. However, they insisted that the American allegations about conflict of interest were unfounded because neither of the two panelists had a direct link to those other groups when serving on the panel that reviewed the DOC’s subsidy determination. Hart and Morgan did note that Dearden and Hunter may have been negligible in their responsibility of disclosing any interests or relationships that could have affected their ability to serve on a panel once it had been formed. Nevertheless, Hart and Morgan concurred that a serious conflict of interest did not result from Dearden’s and Hunter’s actions.

In summary, Hart and Morgan rejected all of the American allegations against the authority of the binational panel. They dismissed the American request for an ECC and directed that the binational panel decision of December 17, 1993 remain in effect. Hart and Morgan thus affirmed that the panel’s role was to change the North American trade regulatory process into a fairer system that was based on substantial evidence. Their majority decision ended the third round of the softwood lumber dispute.

The Dissenting Opinion of Judge Wilkey

Judge Wilkey disagreed with the other two members of the ECC, and agreed with all of the allegations that were made by the Americans. Specifically, he criticized the panel for going beyond its authority, for not adhering to the American standard of review, and for developing an alternate means of determining specificity. He pointed to the Court of Appeals’ decision in *Daewoo* (1993) to argue that when there was a “gap” or ambiguity in a statute, it was the agency and not the reviewing court that was authorized by Congress to fill it. In other words, deference to the administrative agency was the most important consideration for review courts or binational panels to consider. In the context of the

¹⁵¹ Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 46.

¹⁵² Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 46-49; Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 25-28.

lumber dispute, Wilkey insisted that American law authorized the DOC, and not the panel, to stipulate how many factors it would use when considering the issues of specificity, preferentiality, and market distortion. Because the panel attempted to do this by pointing to the proposed regulations of 1989, Wilkey accused it of wrongly usurping the function of the DOC.¹⁵³

In contrast to the other two members, Wilkey found that the DOC had complied with the panel's remand order in a "thorough, complete, and workmanlike way." Wilkey insisted that the DOC's remand determination was reasonable, substantiated, and in conformity with U.S. law and administrative practice. Consequently, Wilkey did not find that the DOC had violated U.S. law as the other two members of the ECC had. Instead, he argued that "the panel proceeded to violate almost every one of the canons of review of an agency action."¹⁵⁴ In particular, the panel attempted to redo and re-evaluate the evidence, to redetermine the technical issues before the DOC, and to insist on its own methods. Consequently, he suggested that the ECC must affirm the DOC's determination and reject the panel's decision for going beyond its authority.

Wilkey noted that the only members of the panels who truly understood and applied U.S. law correctly were the two dissenting members who issued a minority opinion on December 17, 1993. He criticized the majority of the panel for not complying with American law and practice. For example, he reprimanded the majority for not employing the legislative history of laws such as the one regarding specificity. While ignoring that the legislative history may have been an "English or Canadian" practice, Wilkey insisted that it was not an American one. American courts had always deferred to the legislative history of a statute. Failure to do so was "highly unjudicial by American, though maybe not by Canadian, standards."¹⁵⁵

Wilkey used this argument to insist that neither binational panels nor ECCs were appropriate or effective substitutes for domestic judicial review. He was dismayed by the seeming failure of the binational panel and other two members of the ECC to apply the American standard of review and administrative practices properly. He warned that binational panels and ECCs were dangerous because they produced "erroneous results and

¹⁵³ Opinion of Retired Judge Wilkey, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 30.

¹⁵⁴ Opinion of Retired Judge Wilkey, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 34.

¹⁵⁵ Opinion of Retired Judge Wilkey, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 56-57.

created a body of law divergent from U.S. law applied to non-NAFTA countries.”¹⁵⁶ He justified his concerns by arguing that panel members were only experts in trade, and tended to be unfamiliar with American laws, administrative practices, and standards of review as a result. Similarly, he lamented the fact that while ECC members were general experts in the standard of review, they knew nothing of technical trade issues like CIT judges did. He found this to be especially true of Canadian panelists in general, and the two Canadians who served with him on the ECC. Finally, Wilkey objected to the replacement of domestic judicial review with binational panels and ECCs because international bodies were subject to political biases and could split according to national lines.¹⁵⁷

Analysis

A hypothesis about the process of change in North American trade was developed in Chapter Two. The hypothesis proposed that changes in the character of the three regimes were caused by the degree to which socio-economic factors were reduced by Chapters 19 panel decisions. In other words, the presence of Chapters 19 panels affected the influence that beliefs in economic protectionism, hegemonic relationships, and concerns with state sovereignty had in the three domestic regimes, and therefore over the process of change. Drawing from new-institutionalist theories, Chapters 19 panels became a “channel” that the three socio-economic variables had to “flow through” when AD/CVD determinations were reviewed. The hypothesis proposed that changes in the character of the domestic regimes would be measured in terms of the fairness, transparency, and speed of judicial review.

The softwood lumber case confirms the hypothesis by illustrating that change in the character of the American trade remedy regime occurred only when political and socio-economic factors such as beliefs in economic protectionism, the presence of hegemonic relationships, and concerns with state sovereignty were not strong influences in the resolution of the dispute. Stated another way, the U.S. trade regime began to change when influential lumber groups (e.g., CFLI), policy-makers, and administrative agencies turned away from their concerns with economic protectionism and state sovereignty and conceded the authority of the institutionalized panels of Chapter 19. The softwood lumber dispute demonstrates that some change did occur. As the forthcoming analysis will demonstrate, certain panels were able to begin to encourage fairness, transparency, and

¹⁵⁶ Opinion of Retired Judge Wilkey, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 57.

¹⁵⁷ Opinion of Retired Judge Wilkey, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 58-62.

speed within the process of judicial review. However, the dispute also clearly emphasizes that longstanding traditions, practices, and beliefs remained firmly entrenched in the U.S. regime. Factors such as the independent variables were strong influences in the softwood lumber dispute before and after 1989 and subsequently slowed the process of change.

(A) Evidence of Change - Observations of the Dependent Variable

(1) Fairness

Chapter Two explained that the degree to which the character of the domestic regimes became fairer would be measured by the unanimity of the panel decisions. Prior to 1989, Canadian exporters lamented that the DOC, ITC, and CIT frequently issued decisions that were biased in favour of U.S. producers. Furthermore, they argued that agency decisions often contradicted one another because members of the ITC and CIT, for example, made decisions independently of one another and often defended narrow political or economic interests. Therefore, they hoped that panels could issue more cohesive, unbiased, and fairer decisions because they were made up of members of both countries, and were required to make decisions collectively.

More than half of the panel decisions that were issued during the softwood lumber dispute were unanimous. Of the two decisions that were split, only the panel that reviewed the DOC's remand determination and the ECC divided across national lines. In the case of the panel on the DOC's remand determination, the dissenting members (Richard Dearden, Michael Reisman, Morton Pomeranz) offered partial dissents. In other words, they only disagreed with the majority on a few issues, and concurred with the majority on most issues under consideration. Dearden simply disagreed with the majority's finding that B.C.'s LERs conferred a countervailable subsidy.¹⁵⁸ Reisman and Pomeranz concurred with the majority in regards to Dr. Lange, the propriety of directing the DOC to exclude the Quebec companies, and the conclusion that B.C.'s LERs conferred a subsidy to B.C. lumber manufacturers. However, they dissented from the majority's decision with regard to specificity and preferentiality in various Canadian stumpage programs, specificity of the LERs, and to certain aspects of the majority's use of the standard of review.¹⁵⁹

¹⁵⁸ Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 8.

¹⁵⁹ Dissenting opinion of Michael Reisman and Morton Pomeranz, Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 1.

Furthermore, the panel which reviewed the DOC's remand determination only partially split according to national lines. Reisman and Pomeranz were the two Americans on the panel. Their partial dissent caused them to disagree with the three Canadians on a number of issues under review. However, Dearden's partial dissent reduced the appearance that the panel completely split according to national lines. Dearden, a Canadian, sided with the two Americans on the issue of B.C.'s LERs. Consequently, the perceived fairness of the panel process was not sacrificed to the extent that it could have been had Dearden not sided with the two Americans on the issue.

In contrast, the ECC completely split according to national lines, and caused many Americans to question the fairness and legitimacy of the panel process. Wilkey, the only American, vehemently disagreed with his Canadian counterparts on every issue under review. As will be discussed, many have interpreted Wilkey's dissent as the direct result of his biases toward economic protectionism and the preservation of U.S. state sovereignty.

Therefore, the very presence of binational panels was able to reduce the strength of socio-economic factors and thereby encourage change to occur in the U.S. trade regime. Panels generally issued unanimous decisions, and gave the impression (especially in Canada) that the review process was fairer than the American process of judicial review. From a Canadian perspective, the uniform, unanimous decisions allowed Canadian exporters to understand how their softwood lumber products would be treated. Provided that the DOC and ITC complied with the panel decisions, lumber producers could be more confident that their goods were not subject to countervailable subsidies and were free to circulate in the American market. In addition, because most of the panels were unanimous, national biases were somewhat removed from the process of review. Panelists, regardless of their nationality, generally acted together to assess the propriety of CVD and injury determinations on softwood lumber from Canada. Only the panel's remand determination and ECC opinion raised the possibility that national biases may have distorted the unanimity and fairness of the panel process. In this way, the presence of binational panels helped to begin to change the ways in which administrative agencies applied American CVD laws because they were consistent and unanimous. Fairness and impartiality were thereby added to the American trade remedy regime in the eyes of Canadian producers. It must be noted, however, that the two divided panels reduced the perceived fairness of the binational panel process of review in the U.S. As will be discussed, many Americans capitalized on the ECC's split decision to challenge the Chapters 19 process and advance other concerns of economic protectionism and state sovereignty.

(2) *Transparency*

Chapter Two explained that a transparent legal system is one in which decisions are fully disclosed and explained to interested parties in an open, accessible manner. It also noted that transparency would be assessed in terms of how detailed panel decisions were, how actively panels employed the standards of review, how administrative agencies clarified their determinations on remand, and how agencies uncovered more of their reasoning because of a panel's orders.

The softwood lumber dispute confirms that the presence of binational panels allowed changes in the transparency of the U.S. trade regime to occur. The panels and ECC provided cohesive, collectively determined, detailed opinions in every instance, even if minority decisions were attached. The decisions, amounting to more than 80-100 pages each, chronicled the history of the dispute, the agency's decision and reasoning, and the panel's methodology and logic.

Furthermore, all of the panels took an active approach to the American standard of review. While they acknowledged that deference to the agencies' expertise was a central feature of judicial review in the United States, they demanded that substantial, reasonable evidence had to be provided for every finding and conclusion that the agencies made. In contrast to the CIT which had often quickly deferred to American agencies even though they did not provide substantial evidence for their conclusions (e.g., *Chevron USA Inc. v National Resource Defence Council*),¹⁶⁰ the softwood lumber panels were uncompromising in their use of the American standard of review. For example, the Panel which responded to the DOC's remand determination recalled the principles set out by the Federal Circuit Appeals Court in *Daweco* to justify its ability to overturn the agency's decision. It stated:

Although review under the substantial evidence standard is by definition limited, application of the standard does not result in the wholesale abdication of the Panel's authority to conduct a meaningful review of the [agency's] determination. Indeed a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering

¹⁶⁰ In *Chevron* (1984), the CIT upheld an agency's determination as within its discretion even though the determination directly violated a previously announced policy. Commentators explained *Chevron* as a case of an overworked judge. For example, Lowenfeld remarked that in all likelihood, the CIT judge was so overworked that he ruled "agency discretion" without fully reviewing the facts at hand. Andreas Lowenfeld, "Reflections on Dispute Settlement Under the FTA: Where Do We Go From Here?" The Hyman Soloway Lecture (Ottawa: Center for Trade Policy and Law, May 18, 1993), 7-8.

the appeal process superfluous. The deference to be afforded to an agency's findings and conclusions is therefore not unbounded.¹⁶¹

Similarly, the panel which reviewed the DOC's affirmative CVD determination unanimously: (1) remanded the DOC to reconsider the entire body of record evidence when determining specificity; (2) ordered that the number of enterprises that were actually receiving benefits from the subsidies be reconsidered; (3) remanded the DOC because it unreasonably abandoned its examination of *de jure* specificity and did not present enough substantial evidence to justify *de jure* specificity; and (4) demanded that the DOC provide more clarification and substantial evidence on a number of other issues. The panel which reviewed the ITC's injury determination also remanded the agency's conclusions about price suppression, the impact of Canadian SPF, cross-sectoral comparisons, and the two Quebec industries because they were not supported by substantial evidence on the record.

Interestingly, the DOC and ITC complied with some of the panels' requests for more evidence, thereby allowing change to occur in their behaviour by increasing the degree of transparency in the American trade regime. Indeed, the DOC complied with the panel's orders by analyzing the record evidence with respect to the four factors related to *de facto* specificity, and complied by considering the number of enterprises that received benefits by undertaking an analysis of the market distorting effects of Canadian stumpage programs. The DOC also complied with the panel's orders for more information on a number of other smaller issues such as the log purchase price index, the species grade adjustment, economic adjustment to export price, within grade adjustments, even though it did not agree with the panel's findings on those issues. In a similar manner, the ITC provided more information and adequate reasoning for the Quebec finding as the panel had ordered.

However, the DOC and ITC did not respect all of the orders given by the two panels. Consequently, the panels ordered both agencies to provide more evidence for their affirmative determinations in the opinions on remand. The panel criticized the DOC for not providing a transparent, rational basis for concluding that provincial stumpage programs were specific in the remand determination. The panel also held that the DOC's remand determination did not present substantial evidence for the distorting effect of provincial stumpage programs on competitive markets, for the conclusion that B.C.'s LERs were specific, and for the refusal to grant the two exclusion orders. Moreover, the ITC required

¹⁶¹ Binational Panel Review, *Decision of the Panel on Remand In the Matter of Certain Softwood Lumber Products from Canada* (December 17, 1993), 16-17.

two remand determinations before it complied with the panel's orders for more substantiated evidence to support the affirmative determination.

The majority of the ECC joined the panels in encouraging transparency in the American trade regime by flatly rejecting the USTR's allegations against the panel which reviewed the DOC. ECC members Hart and Morgan criticized the USTR for appealing the panel's decision without substantial evidence. In effect then, the ECC also demonstrated that administrative agencies had to act in a transparent manner in the U.S. trade remedy regime. For example, the USTR quickly responded to the CFLI's demand for an ECC, and insisted that panelists Dearden and Hunter were guilty of conflict of interest charges. However, the USTR publicly condemned the panelists without waiting for all of the facts to be disclosed, and departed from diplomatic practices by not permitting legal counsel for the two governments to discuss the issue behind closed doors.

ECC members Hart and Morgan implied that the USTR's actions were the result of political pressure from the U.S. lumber industry. Hart and Morgan acknowledged that the firms that Dearden and Hunter worked for had represented Canadian lumber groups in the past. Nevertheless, they held that the American allegations about conflict of interest charges were unfounded because neither of the two panelists had a direct link to those groups when serving on the panel that reviewed the DOC's CVD determinations. Furthermore, they felt that it was ironic that the USTR brought conflict of interest charges against Dearden when he had also done legal work for the office of the USTR itself. Dearden had earned approximately \$25,000 after providing the American government with legal advice on FTA-19 during the FTA negotiations. In addition, Hart and Morgan observed that the two American panelists in the softwood lumber case had provided legal counsel to the American government as well. One American panelist had billed an American governmental agency \$3.8 million in 1992-1993. The other had been a sitting member of the Advisory Committee on International Law for the U.S. Department of State while serving on the panel. Both Hart and Morgan questioned why those facts had not been raised by the USTR in the conflict of interest charges against Dearden and Hunter - surely their activities with the U.S. government were just as informative and prone to conflict of interest charges as Dearden's were.¹⁶²

¹⁶² Opinion of Mr. Justice Gordon L.S. Hart, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 46-49; Opinion of the Hon. Herbert Morgan, *United States - Canada Free Trade Agreement Article 1904.13 Extraordinary Challenge Proceeding In The Matter of Certain Softwood Lumber Products from Canada* (August 3, 1994), 44-46.

In this way, the ECC acted with the panels to insist that unsubstantial, politically motivated accusations were not sufficient enough to sustain an affirmative CVD or injury determination in the post FTA/NAFTA regime. Because the DOC, ITC, and USTR adhered to some of the requests for more information and retreated from some of their questionable accusations following the panel and ECC reviews, the presence of the binational panels set the context for changes to occur in the character of the U.S. trade regime by making agency determinations more transparent. Administrative agencies learned that openness, accessibility, and reasoned decisions based on substantial evidence had to be part of their determinations in the future.

(3) Speed

The third way that the hypothesis proposed that the character of the regimes would change is that they would become faster systems of judicial review. In general, the CIT has taken two-four years to release an initial decision about the propriety of an administrative agency's decision. Remands and appeals would come after that period. In contrast, the panel which reviewed the DOC issued its initial decision within 11 months of being requested, even though the panel process was suspended for one month to replace a panelist. The entire process of review, including two remands and an ECC, was completed 26 months after the request was made for panel review on May 28, 1992. Similarly, the panel which reviewed the ITC issued its initial decision 12 months after the request. The entire procedure, with three remands, was completed within 23 months of the panel request.

Consequently, the panels fully completed the process of review by issuing remand decisions at a faster pace than the CIT usually took to release an initial decision. The presence of Chapters 19 panels thereby allowed the review process to become faster because they required the DOC and ITC to rework their affirmative CVD and injury determinations at a much earlier stage than they would have been required to do if the domestic process of judicial review (e.g., the CIT) had been used. A faster process of judicial review benefited the Canadian lumber producers because the CVDs were revoked quickly, and the flow of trade liberalized sooner than if the domestic process of judicial review had been used.

***(B) Evidence of the Impediments to Change - Observations of
the Independent Variables***

Notwithstanding the changes that the presence of Chapters 19 panels precipitated, the softwood lumber case illustrates that change was not complete. Other factors such as the independent variables of the hypothesis inhibited the degree to which longstanding penetrating changes could be made to the character of the regime. Under the influence of economic protectionist beliefs, hegemonic relationships within and between the three political systems, and concerns over state sovereignty, the DOC, ITC, and USTR resisted many of the changes that could have been made in the context of Chapters 19.

(1) Economic Protectionism

The variable of economic protectionism refers to the belief that domestic producers need to be protected or insulated from competitive foreign imports. Chapter Two explained that its influence would be assessed by the arguments of interest groups and policy-makers in the four disputes, the use of domestic trade laws for protection, public denouncements of panel decisions, how policy-makers or administrative agencies used those denouncements in the remand process, and the speed and ease at which panel decisions were fully accepted and implemented.

In general, the independent variable of economic protectionism was evident throughout the entire softwood lumber dispute. Indeed, each “round” of the dispute was sparked when the U.S. lumber coalition asked for CVDs to insulate its producers from competitive Canadian imports. For example, the CFLI filed the second CVD petition immediately after Congress instructed DOC officials to use the concepts of *de facto* and *de jure* specificity in 1986. Similarly, the U.S. administration began the third round of the dispute with a Section 301 action after the Canadian government withdrew from the MOU. It stands to reason that the Section 301 action was a measure that would please the CFLI and protectionist members of Congress who fiercely fought to obtain the MOU and reduce the volume of Canadian lumber in the mid-to- late 1980s.

Arguments about the need for protection were made throughout the lumber dispute as well. Indeed, the Canadian stumpage policies were singled out as one of the most important reasons why U.S. lumber producers were faring badly in the early 1980s. Furthermore, the *raison d’être* of each CVD petition was to obtain protection, and to insulate U.S. producers from competitive Canadian imports. Finally, the CFLI demanded

that extra tariff barriers or tariff-rate quotas be instituted to limit Canadian lumber during the MOU negotiations of 1986 and the negotiations of 1996.

Congress demonstrated its willingness to use domestic trade laws to protect domestic lumber groups by enacting legislative amendments to “encourage” and/or enable the DOC to reach affirmative determinations. For example, Congress made it easier for the DOC to determine that Canadian stumpage policies were countervailable subsidies in response to protectionist cries during the *Carbon Black* case, and by changing the definition of “subsidy” in 1993 to remove the need to prove market distortion when defining a subsidy.

Some members of the American public denounced the panel decisions during the softwood lumber dispute by publicizing Judge Wilkey’s dissenting opinion in the ECC. Indeed, Wilkey himself repeated many of the arguments he had made in the ECC before the House Ways and Means Committee in the spring of 1995. Taken together, Wilkey’s ECC opinion and testimony became banners for economic protectionism, and renewed interests in keeping Canadian lumber out of American markets. The CFLI rallied around Wilkey’s arguments and threatened to initiate a fourth round of litigation against Canadian softwood lumber if Congress did not ensure that they would be protected from their competitors.¹⁶³

Congress became very attentive to Wilkey’s claims and the CFLI’s threats during the summer and fall of 1995. Senator Craig (R-Idaho) delivered a passionate speech in the Senate extolling the woes of the American lumber industry. He argued that environmental regulations in the United States, curtailment of supply by Canadian imports, and Canadian subsidies made the American lumber industry extremely vulnerable. He demanded that the Clinton Administration put more pressure on Canada to adopt a fair market-based approach to timber pricing to begin to level the playing field. He alleged that the binational panel and ECC were subjected to political biases because the Canadian members banded together to override their American counterparts. Furthermore, he suggested that the USTR should enter into the dispute by calling for a consultative process so that the problems, loopholes, and political biases of the process could be exposed to the public. He warned that if significant action was not taken to relieve the stresses placed on the American industry, he was “one Senator who would rally other senators and members of [Congress] to resolve this problem legislatively like we had to do in the late 1970s.”¹⁶⁴

Similarly, five senators including Max Baucus and Robert Dole wrote to the USTR on September 27, 1995 to express their concerns about the serious impact that subsidized

¹⁶³ “Softwood Lumber Dispute With Canada Flaring Up Again,” *The Canadian Free Trader*, Vol. 8, No. 10 (October, 1995), 77-78.

¹⁶⁴ Senator Craig (R-ID), “Subsidized Canadian Lumber,” LEGI-SLATE Report for the 104th Congress, *Congressional Record*, Tuesday August 8, 1995, 11810.

Canadian lumber was having on the U.S. lumber industry. They blamed falling lumber prices, poor market conditions, and massive job losses in the American lumber industry on the increased market penetration of subsidized Canadian lumber products. While they affirmed the principles behind a consultative process, they objected to the fact that consultations might not produce any significant commitments by Canadian governments (federal or provincial) to institute a market-based system for pricing timber in Canada. The letter argued that the U.S. industry should not be forced to wait for relief any longer. If consultations could not remedy the situation, they demanded that the USTR take other actions to “ensure that our industry is not left in a disadvantaged position.”¹⁶⁵

Senator Max Baucus introduced “Emergency Timber Legislation” into the Senate on November 3, 1995. His bill proposed “three tough but fair measures.” First, it proposed that a temporary 25 percent tariff be levied on Canadian lumber. The 25 percent tariff was based on the “best estimates” of the value of Canadian subsidies to Canadian timber exporters. Second, the bill directed the DOC to investigate Canadian subsidies. If the DOC found subsidization and injury, the ITC would be required to impose a permanent CVD at a level appropriate to the damage. If the DOC failed to find a subsidy, the temporary 25 percent duty would be revoked and damages refunded. Third, the bill proposed that NAFTA-19 be renegotiated so that domestic judicial review would remain in the hands of American, and not international, courts. Baucus justified his bill as a reasonable response to the plight of American lumber producers. He argued that American trade remedy laws such as Section 301 authorized Congress and the USTR to take emergency relief measures to protect domestic industries from foreign competition.¹⁶⁶

Economic protectionist beliefs were not only apparent in the American public and Congress, but in the responses of administrative agencies to the panels as well. For example, the ITC held to its original affirmative injury determination which protected U.S. lumber producers even though the evidence was shaky and unsubstantiated. Indeed, Commissioners Brunsdale and Nuzum issued separate negative remand determinations because they did not agree that they could reach an affirmative opinion based on the record evidence. As they concluded in their original negative determinations, Commissioners Brunsdale and Nuzum repeated that, “the evidence does not support a determination of present injury primarily because there is no discernible price or volume effect on the domestic industry by reason of subsidized imports.”

¹⁶⁵ Letter from Max Baucus et al to USTR Mickey Kantor, September 27, 1995.

¹⁶⁶ Senator Max Baucus, “Statements on Introduced Bills and Joint Resolutions - Emergency Timber Legislation,” SRXPRESS, November 3, 1995, 16663.

Judge Wilkey's dissenting opinion in the ECC is another example of where economic protectionism impeded the process of change. Observers at the ECC hearing were taken back by Wilkey's statements, conduct, and obvious leanings toward the U.S. lumber coalition. Canadian counsel and officials in the Department of Foreign Affairs and International Trade concluded that Wilkey's opinions were reflective of the lumber coalition's demands for protection. Unlike members of the binational panels, Wilkey chose to defer to the administrative agency even though it could not supply evidence to justify its conclusions.¹⁶⁷

Finally, the strength of economic protectionism was evident by the speed and ease at which panel decisions were accepted and implemented. Panel decisions were not treated as binding as they were intended to be under Chapters 19 of the FTA and NAFTA. Instead, the DOC and ITC were very slow to accept and adhere to them, and required two remands each before reluctantly putting them into practice.

(2) Hegemonic Relationships within and between Interest Groups, Policy-makers, and Administrative Agencies of the Three Countries

Chapter Two explained that the variable of hegemonic relationships would consider the relative distribution of power among interest groups, policy-makers, and administrative agencies within and between the three countries. The variable would consider the amount of power those actors had in each dispute, and the amount of influence they had over the process of change. Measuring the presence of hegemonic relationships can be very subjective because it requires an understanding of the official and unofficial relationships between actors in the dispute.

Nevertheless, in spite of research constraints, it can be concluded that hegemonic relationships were a formidable factor in slowing the process of change in the softwood lumber case. Indeed, hegemonic relationships between congressional officials, interest groups and administrative agencies were a major reason why economic protectionism was so deeply engrained in the behaviour of the DOC and ITC before and after 1989. The American political system has been built on "give and take." It has been a process where a particular individual or institution can pressure another to accomplish a certain agenda in return for a political favour.¹⁶⁸ The same give and take phenomenon is apparent in the American trade regime. Members of Congress have often represented a certain interest

¹⁶⁷ Interview with Christianne Laizner, Legal Counsel, Trade Law Division (JLT), Department of Foreign Affairs and International Trade, September 23, 1996.

¹⁶⁸ See, for example, Morris P. Fiorina, *Congress: Keystone of the Washington Establishment 2nd Ed.* (New Haven: Yale University Press, 1989).

group's agenda in return for assurances of political support. Those officials have then used their positions on congressional committees to control the purse strings of administrative agencies such as the DOC and ITC. As Chapter Three indicated, controlling the budgets of administrative agencies has thereby allowed Congress to influence the policies and predispositions of the DOC, ITC, and CIT. In the context of the softwood lumber case, powerful coalitions such as the CFLI petitioned members of congress, who in turn, exercised their leverage in the U.S. trade regime.

The hegemonic linkages between interest groups, congressional officials, and administrative agencies have made the American trade regime very biased toward domestic producers. For example, the CFLI used key regional members of Congress to change domestic trade laws into more stringent forms of protection between 1983 and 1986. Members of Congress and senators also used their powerful positions to force the executive branch to link the resolution of the softwood lumber dispute with FTA fast-track negotiating authority. Furthermore, the CFCLI and CFLI used their bargaining power with Congress and the DOC to convince administrative officials that a CVD investigation was warranted in the first and second rounds of the dispute even though a significant number of U.S. lumber producers did not support the petition. Percy and Yoder suggested that the DOC had no choice but to reopen the case and begin the second round of the dispute on June 11, 1986 because of the intense political pressure that Congress placed on DOC officials. Congress was ready to take legislative action against Canadian softwood lumber if the DOC and ITC did not. On October 7, 1986, 37 members of Congress wrote to USTR Clayton Yeutter and stated that "failure to resolve the softwood lumber problem through established administrative procedure will only increase the pressure for a legislative resolution."¹⁶⁹ Similarly, Congress passed a number of pieces of legislation which included new definitions of natural resource subsidies and the way in which they were to be interpreted. Following an unusual briefing session, the DOC explained the new approach to *de facto* specificity to satisfy members of Congress and senators from lumber producing states. The new approach to natural resource subsidies was entrenched into the 1986 House Trade and International Economic Reform Bill. Therefore, "given this political atmosphere, it would have been politically outrageous, and possibly foolhardy, for the [DOC] to dismiss such a high-profile petition without excellent cause. As it was, the law only established fuzzy prerequisites for those petitions, all of which the U.S. Coalition met."¹⁷⁰

¹⁶⁹ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 148-149.

¹⁷⁰ Charles Doran, Timothy Naftali, *U.S.-Canadian Softwood Lumber* (Washington: The Johns Hopkins Foreign Policy Institute, 1987), 22.

Not only did political pressure and hegemonic relationships encourage the DOC to reopen the CVD investigation, but they affected the DOC's final determination as well. The DOC's 1986 determination has been widely criticized for being economically unjustifiable and politically motivated. Rugman and Porteous noted that the DOC's use of the third component of the Preferentiality Appendix was irrational. When discussing the Preferentiality Appendix in *Carbon Black*, the DOC suggested that a government's cost of producing the goods "may not be workable for certain goods, especially natural resources." Stumpage was clearly a natural resource. Therefore, the use of the third standard did not correspond to the DOC's intended use of the appendix as laid out by *Carbon Black*. Rugman and Porteous also argued that the DOC added the direct cost of production with the indirect cost of the value of the standing timber stumpage when calculating the cost to the provinces. In spite of the DOC's admission that the provinces did not incur direct costs for either the trees or land upon which they were situated, the DOC felt it necessary to add this indirect cost to the direct costs it had calculated. Finally, Rugman and Porteous argued that the DOC acted irrationally by using the private sale prices in New Brunswick as a surrogate for the intrinsic value of trees in Quebec and Ontario. The DOC had rejected the use of cross-border comparisons in 1983 because of differences in stumpage quality and accessibility. However, the Department compared the forest industries in the three Canadian provinces despite the fact that the forests were over a thousand miles apart and differed significantly in criteria such as accessibility and access to markets.¹⁷¹

The DOC's faulty economic reasoning has been explained as being the direct result of political pressure from Congress and the CFLI. For Percy and Yoder, the DOC's preliminary determination "illustrated the extent to which the legal and economic concepts were stretched to achieve a desired political outcome," to protect domestic producers from competitive foreign imports.¹⁷² The adoption of the CIT's decision in *Cabot* was "obviously" a reaction to the enormous amount of political pressure for protection that the U.S. administration faced at the time of the Senate Finance Committee's hearings on bilateral trade negotiations in April of 1986.¹⁷³

In conjunction with the variable economic protectionism, domestic hegemonic relationships were very influential in the process of change, and prevented true changes

¹⁷¹ Alan Rugman, Samuel Porteous, "The Softwood Lumber Decision of 1986: Broadening the Nature of U.S. Administered Protection," *Review of International Business Law*, Vol. 2 (1988), 51--54.

Percy and Yoder reached similar conclusions in *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 52.

¹⁷² Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), xxix.

¹⁷³ Alan Rugman, Samuel Porteous, "The Softwood Lumber Decision of 1986," *Review of International Business Law*, Vol. 2 (1988), 50.

from being made to the character of the U.S. regime. For example, acting on the protectionist demands of powerful members of congress and the CFLI, the USTR requested the ECC, and alleged that certain panelists acted inappropriately, even though just grounds for such charges did not exist. Similarly, the CFLI resorted to lobbying techniques to inhibit the effects that the presence of Chapters 19 could have had during the third round of the softwood lumber dispute. The CFLI successfully lobbied Congress to change key provisions of American trade remedy laws to almost guarantee that they would be successful before a binational panel in the future. Congress amended the definition of subsidies in Section 771B of the Tariff Act of 1930 so that the DOC and ITC could impose border duties against allegedly subsidized imports even if they did not have direct evidence that shipments had distorted the market. The American government used the NAFTA's Statement of Administrative Action to dictate how they wished their subsidy laws to be interpreted and applied after the NAFTA came into effect.

International hegemonic relationships between Canadian and American officials were also factors that reduced degree of change in the character of the U.S. trade regulatory process. In 1989, the CFLI pushed Canadian officials to conclude the MOU by making the end of the second round of the dispute contingent on a 25 percent export tax. In essence, the MOU was concluded by the Canadian government for pragmatic reasons. For Percy and Yoder, "the agreement could best be viewed as a salvage operation."¹⁷⁴ Canada was in a no-win situation. The DOC seemed to favour the demands of the CFLI in the CVD investigation. Even if the investigation had been in Canada's favour as in 1983, Congress was ready, willing, and able to take strong legislative action against Canadian products in American markets. It is interesting to note that the Canadian Forest Industries Council also saw the principles behind the MOU as the only way out for the Canadian industry. According to A.H. Zimmerman, chairman of the Council:

In an effort to maintain some order, and in recognition of the politics at work in the U.S., the Canadian lumber industry formulated Plan B in July of 1986. This suggested a quiet diplomacy at the highest level, in which as a counter to some of the political pressure in the U.S., Canada might put in place some form of export tax or levy that could be funneled back to the benefit of the timber industry.¹⁷⁵

Similarly, between 1994 and 1996, Canadian and American officials met to end the softwood lumber dispute diplomatically, in spite of the binational panel process. Indeed,

¹⁷⁴ Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 123-125.

¹⁷⁵ A.H. Zimmerman as cited in Michael Percy, Christian Yoder, *The Softwood Lumber Dispute* (Halifax: The Institute for Research on Public Policy, 1987), 125.

diplomatic efforts were undertaken to manage trade of lumber products even though the DOC reversed its affirmative CVD determination and ordered the repayment of \$800 million in duties in response to the binational panels' decisions. Following the release of the ECC's decision in 1994, the two governments turned their attention from judicial institutions to political channels to ensure that the dispute would be ended for good. Under the leadership of Trade Minister MacLaren and USTR Kantor, the Canadian and American governments agreed to establish the Canada-U.S. Consultative Process on forestry issues. The overall mandate of the process was to enhance on going bilateral cooperation in areas of mutual concern within a cooperative, conciliatory, non-litigious environment.

The trade ministers agreed that the process would begin on or before March 1, 1995. The consultations were to be carried out at the governmental level. Opportunities would be given for provincial/state governments, industry officials, and interest groups to provide input and factual information. Key issues for discussion during the process included: (1) the creation of a market-based system for pricing timber in Canada; (2) barriers that affected the trade of softwood lumber; and (3) challenges facing lumber industries in both countries. The participants in the consultative process were required to set out an agenda and schedule for the first year, and to report periodically to their trade ministers on the progress of the consultations.¹⁷⁶

A number of meetings were held between Canadian and American officials to discuss lumber issues in accordance with the consultative process. The first two plenary meetings, held on May 24-25 in Washington and on July 11-12 in Kelowna, B.C., involved governmental officials from both levels of government and private sector representatives. The sessions covered information exchanges for improved understanding of supply and demand issues and forest practices in both countries, as well as issues affecting the competitiveness of the Canadian and American lumber industries. A third meeting was held in Washington on September 18-19, 1995. It sought to avoid future litigation by focusing on American proposals regarding the market-orientation of provincial forestry practices.

The consultative process clearly demonstrates the lingering presence of economic protectionism and hegemonic relationships in the North American trade remedy regime. The CFLI planned to file a CVD petition on February 15, 1996 to challenge Canadian stumpage programs once again. At the request of American trade officials, the CFLI

¹⁷⁶ The Hon. Roy MacLaren, "MacLaren Welcomes U.S. Announcement of a Full Refund of Softwood Lumber Duties," *Communiqué* No. 248 (December 15, 1994); Office of the USTR, "U.S. and Canada Establish Consultative Process on Softwood Lumber" (December 15, 1994); Office of the USTR, "Elements of a Consultative Process" (December 15, 1994).

refrained from acting on its complaint, and agreed to give diplomatic negotiations a chance to settle the dispute. Timber producing provinces made a number of offers to avoid a trade dispute with the United States. In return for a guarantee that trade actions would not be taken for five years, British Columbia proposed to combine export taxes and quota systems on its producers. Quebec, Ontario, and Alberta offered to raise stumpage fees to increase the prices that Canadian producers paid for harvesting rights.

Canadian and American officials reached an agreement in principle on February 17, 1996. Canada agreed to place an export tax on 20 percent of the exports from British Columbia over nine billion board feet, and to double the tax for exports over 9.25 billion board feet. The Canadian government also agreed to reduce exports from Quebec, Ontario, and Alberta by 10 percent through stumpage fee increases. Provincial representatives from the four provinces consented to consultations with the U.S. in the event that exports increased beyond the agreed upon levels in the future. The United States promised not to launch another trade war against the Canadian industry for five years. However, USTR Mickey Kantor warned that a trade action would be initiated if the agreement did not reduce Canadian exports as intended. The agreement stipulated that Canada's share of the American market would be reduced from 36 percent to 30 percent.¹⁷⁷

The agreement in principle was scheduled to take effect on April 1, 1996. However, political conflicts between federal and provincial officials in Canada endangered the terms of the February accord. British Columbia, Alberta, Ontario, and Quebec could not agree on how much each province would have to reduce its share of total Canadian exports by to reach the required level of 15 billion board feet. In February of 1996, British Columbia agreed to reduce its exports from 10.5 to 9 billion board feet to help reduce total Canadian exports. However, American officials and the other Canadian provinces feared that British Columbia did not export more than 9.5 billion board feet in 1996. Some of the shipments passed through border points in Ontario, making it difficult to track how much exported woods originated in British Columbia. In response, American officials demanded that Alberta, Ontario, and Quebec reduce their exports even further than had

¹⁷⁷ Department of Foreign Affairs and International Trade, "Eggleton Welcomes Settlement on Lumber," News Release No. 23 (February 16, 1996); Drew Fagan, "Softwood showdown: U.S. plays hardball," *Globe and Mail* (February 10, 1996); B1; Drew Fagan, "Softwood export cap looms," *Globe and Mail* (February 16, 1996), B1; Jeffrey Simpson, "When it comes to trade, the Americans just never give in or give up," *Globe and Mail* (February 16, 1996); Chris Morris, "Canada, U.S. look for peach in lumber dispute," *Ottawa Citizen* (February 16, 1996); B8; Chris Morris, "Canada, U.S. hammer out deal on lumber dispute," *Ottawa Citizen* (February 17, 1996), A3; Drew Fagan, "Canada to cut softwood lumber exports," *Globe and Mail* (February 17, 1996), A1; Peter Cook, "A slippery customer on trade," *Globe and Mail* (February 22, 1996), B16; Peter Morton, "Election drives U.S. to tough trade stance," *Financial Post* (February 21, 1996), 1.

been agreed to in February to compensate for the difficulties in tracking the amount of lumber that was exported from British Columbia. The three provinces objected to the further cuts and argued that the entire agreement threatened their lumber industries. Conflicts between American and Canadian governmental officials also endangered the February agreement. Canadian negotiators feared that a mutually agreed upon mechanism had not been achieved to ensure that a CVD suit would not be filed against Canadian producers for five years.¹⁷⁸

The last minute conflicts were resolved when the Canadian government agreed to place a nation wide export tax on softwood lumber destined for the United States. In other words, the conflicts were resolved when Canadian officials conceded American hegemony even though Canada's stumpage practices were upheld by the binational panels and ECC as within Canada's rights and NAFTA obligations. In exchange for a guarantee that the DOC would not initiate a CVD suit for five years, the Canadian government agreed to place a two-tier tax on softwood lumber from British Columbia, Alberta, Ontario, and Quebec. If lumber exports exceeded a threshold of 14.7 billion board feet, the next 650 million board feet would be subject to a border fee of \$50 per 1000 board feet. Amounts above 650 million would face a prohibitive tariff of \$100 per 1000 board feet. The Canadian government agreed that border fees would be collected by the federal government and remitted to the provinces. Canadian lumber producers would not be eligible to receive any benefits from them. However, the federal government agreed to allocate export quotas to individual companies to ensure that producers could not assume an unfair share of tax-free exports and that existing export patterns were maintained.

Canadian lumber producers and governmental officials were dismayed that an export tax had to be used to settle the dispute, but suggested that the agreement was necessary to ward off another round of costly litigation. American producers welcomed the agreement because they felt it would keep enough Canadian lumber out of their markets to allow them to be more competitive. More than half of the lumber producers in the United States indicated their support for the agreement, and promised to refrain from a trade action for five years. The CFLI also agreed to withhold a CVD petition that was to be filed on April 4, 1996 if an agreement had not been reached.¹⁷⁹

In many respects, the agreement detracts from the changes that the presence of Chapters 19 panels promised to make to the character of the North American trade remedy

¹⁷⁸ Drew Fagan, "Progress slow on trade deal in lumber dispute," *Globe and Mail* (April 1, 1996), A2; Drew Fagan, "Softwood deadline looms," *Globe and Mail* (March 30, 1996), B3.

¹⁷⁹ "Softwood tax best deal in a bad situation," *Globe and Mail* (April 3, 1996), B1; Drew Fagan, "Softwood exports to carry tax," *Globe and Mail* (April 2, 1996), A1.

regime. The agreement is almost identical to the MOU that Canada agreed to in 1986 to avoid a CVD investigation. Moreover, the agreement is more indicative of the trade regime that existed before 1989 because it placed political agreements, export taxes, and the hegemony of American producers and officials over the institutions of Chapter 19. In the words of an American trade negotiator, "the agreement symbolizes a return to the days of managed trade - negotiating trade deals to regulate imports - and the specter of political interference overriding sound principles."¹⁸⁰ The Chairman of the Business Council for National Issues (BCNI) criticized the Agreement because "it is a dangerous precedent, demonstrating an increased tendency for private party actions to force governments to act and a shift towards managed trade."¹⁸¹ Indeed, the Canadian government considered fighting another trade case by letting the American coalition file the CVD petition. However, the odds of victory were reduced by the changes that were made to American trade laws after the ECC's decision. Similarly, while Canada could have used Article 1902-1903 of the FTA/NAFTA to challenge the amendment, Canadian officials decided that political negotiations were the better course of action to ensure that Canadian producers were not forced to endure the litigation process again.¹⁸² Consequently, the federal government concurred with the provinces and Canadian lumber industry that diplomacy should be used instead of the Chapters 19 process. Jake Kerr, co-chairman of the Canadian Forest Industries Council stated "[T]here is no question it would be harder to win another [CVD] case. We're not saying we definitely couldn't win. But we have the potential for a negotiated solution now that we think would be livable."¹⁸³

(3) *Concerns with State Sovereignty*

The final independent variable which inhibited the process of change is state sovereignty. State sovereignty was conceptualized in Chapter Two as the willingness of the three governments to allow their state's domestic laws and practices to be changed by international laws. Chapter Two proposed that state sovereignty would be measured in terms of governmental statements which supported or opposed Chapters 19 in general and panel decisions in particular, the extent to which panel decisions were accepted and acted upon, the number of remand determinations that administrative agencies required before

¹⁸⁰ "How committed is Ottawa to principles of free trade?" *Financial Post* (February 23, 1996), 12.

¹⁸¹ BCNI Chairman as quoted in "International Trade Reporter," 24 April, 1996.

¹⁸² Interview with Joanne Osendarp, Legal Counsel, Office of Trade Negotiations - Department of Foreign Affairs and International Trade, May 6, 1996.

¹⁸³ Drew Fagan, "Softwood showdown: U.S. plays hardball," *Globe and Mail* (February 10, 1996); B3.

complying with panel orders, and the number of times the three governments resorted to appeal procedures to challenge panel decisions in the process of judicial review.

The softwood lumber dispute is a clear example of how concerns over state sovereignty and independent decision-making ability impeded the effects that an international institution could have had over the application of domestic laws. Governmental agencies released decisions to convey their disdain for the decisions of the panels and the ECC. A DOC official conveyed that "the U.S. government is extremely disappointed with the ECC decision. We are in the process of reviewing the decision and will not comment on specifics until the decision has been thoroughly analyzed." Senator Max Baucus, who had led many of the congressional actions against Canadian lumber, stated that the panel and ECC decisions were a "grave disappointment," and ignored the fact that Canadian subsidies were unfair and threatened the U.S. industry and jobs.¹⁸⁴ The U.S. government ultimately signaled its discontent with the panel process when the USTR requested the ECC because it believed that one of the panels was guilty of gross misconduct. The USTR also conveyed its displeasure when responding to the ECC's decision, by insisting, "[O]bviously we believe our case was meritorious and that the ECC should have stepped in and taken action."¹⁸⁵

Concerns with state sovereignty were also displayed by the way that panel decisions were accepted and implemented. Interest groups who did not agree with the panel decisions tried to bypass the Chapters 19 process and use domestic review courts to obtain their desired results. The CFLI tried to challenge the jurisdiction of the binational panels in both the DOC and ITC reviews because it did not feel that an international institution should replace a domestic court in the process of judicial review. American laws were seen as superior to international procedures in the binational panel system. John Ragosta, lawyer for the CFLI, maintained that "the ECC's decision tells U.S. industries that even if unfair trade injures your industry and even if U.S. trade laws have been violated, you can be denied your legal rights [by using the panel system instead of domestic courts]. This is a sad day for free trade."¹⁸⁶

Similarly, administrative agencies were very slow to adhere to some of the panels' orders, and in some cases accepted them only grudgingly and reluctantly. The ITC, for instance, was very slow to adhere to the panel's orders, and needed two remands to finally

184 Bruce Odyssey, "U.S. Loses Challenge on Canadian Lumber Subsidy Case," *Washington Post* (August 3, 1994).

185 USTR Statement concerning Softwood Lumber Extraordinary Challenge Committee Decision, August 3, 1994.

186 Bruce Odyssey, "U.S. Loses Challenge on Canadian Lumber Subsidy Case," *Washington Post* (August 3, 1994).

accept the panel's orders. The majority of commissioners clung to their original affirmative determinations, and only very grudgingly accepted the panel's conclusions in the second remand. Indeed, the ITC refused to defer completely to the panel's orders by arguing that the Canadian softwood lumber products constituted "a" cause of material injury even if solid evidence could not be used to prove such a conclusion. Furthermore, the ITC refused to completely defer to the power of the binational panel by stalling the process of revoking the countervailing measures. The ITC recognized that the DOC had issued a negative CVD determination in accordance with a separate binational panel. However, the ITC reasoned that the DOC's order could have been reversed because that binational panel's order was being challenged before an ECC. If the DOC's negative determination was affirmed during the ECC proceeding, the ITC's affirmative determination would become moot. Nevertheless, the majority of commissioners eventually insisted that "we must issue a determination now, and in so doing, must continue to rely on Commerce's earlier findings that import of softwood lumber from Canada are subsidized."¹⁸⁷ The number of remands that were required before the DOC and ITC finally accepted the panel decisions illustrates that they did not wish to allow themselves to be bound by an international institution.

Perhaps the extent to which concerns with state sovereignty penetrated the American trade regime in spite of Chapters 19 panels was most clearly demonstrated in Judge Wilkey's opinion in the ECC. Despite his place on the ECC, Wilkey's decision conveyed that he did not wish to see an institutionalized panel of Chapters 19 change American laws and practices. He indicated his strongly-held belief that American laws and administrative practices should be left as they had been before 1989. Unlike the two Canadian judges on the ECC, Wilkey argued that international panels which included non-Americans could not assess American laws and practices as well as American courts could.

The softwood lumber dispute raised another interesting dimension of the state sovereignty debate. Wilkey's dissenting opinion inspired like-minded American policy-makers and interest groups to fight the power of binational panels over American trade policy procedures, laws, and administrative behaviour in the interests of state sovereignty. In a true "patriotic" spirit, Wilkey used his position to re-energize constitutional arguments against Chapter 19. Alleging that the Chapters 19 process of panel review was unconstitutional, Wilkey roused others to demand that binational panels were encroaching on American sovereignty and individual decision-making ability. In so doing, Wilkey and his supporters ironically conceded the influence that the presence of Chapters 19 panels

¹⁸⁷ U.S. International Trade Commission, *Softwood Lumber From Canada* Investigation No. 701-TA-312 (Second Remand), Publication 2753 (March, 1994), 1.

were having on the behaviour of administrative agencies as they interpreted and applied American trade laws.

Judge Wilkey's dissenting opinion gave strength to the arguments of those who objected to Chapters 19 for reasons dealing with economic protectionism and state sovereignty. Wilkey's role in the ECC helped those who wanted to stifle the effects that Chapters 19 panels had on the evolution of trade remedy laws in the United States and North America. Since 1989, protectionist members of Congress and interest groups have argued that Chapters 19 are not legitimate and/or compatible with American laws because they violate the U.S. Constitution. Because of its alleged unconstitutionality, many in the U.S. have implied that the Chapters 19 process inappropriately causes domestic laws to change outside American decision-making circles. Critics have charged that Chapters 19 are unconstitutional because they allow panelists, who are not appointed according to the appointments clause of Article II, Section 2, to exercise the power of judicial review, instead of reserving that power for Article III courts. Furthermore, critics have argued that the Fifth Amendment's guarantee of due process has been endangered because binational panel members may be unfamiliar with the American standard of review. If binational panels were to survive a due process challenge, the Chapters 19 process had to assure litigants of an independent, impartial forum, and afford them an adequate opportunity to present their case.¹⁸⁸

Administrative officials, constitutional scholars, and various representatives of the international trade bar have concluded that the Chapters 19 process does not offend Article II, Article III, or the due process clause of the Fifth Amendment. Indeed, the House Judiciary Committee which considered the constitutionality of Chapters 19 in 1989 closed the issue by approving the Chapters 19 process as sound, constitutional, and legitimate.¹⁸⁹

¹⁸⁸ Interestingly, Congress responded to those who feared that Chapter 19 was not compatible with the U.S. Constitution by permitting exclusive domestic judicial review of AD/CVD investigations in cases which involved constitutional issues. The implementing legislation of the FTA and NAFTA enabled a participant to challenge a final AD/CVD determination on constitutional grounds before a three judge panel of the Court of Appeals for the District of Columbia Circuit. Congress took this measure to ensure that binational panels did not decide constitutional issues which fell under the exclusive jurisdiction of Article III courts. One court was permitted to hear constitutional issues in order that challenges to the dispute settlement mechanisms of Chapter 19 could be settled quickly, and so that confidence in the process could be restored. It must be noted that Congress acted to limit the ability to use domestic review courts in lieu of binational panels by stipulating that frivolous constitutional claims would result in dismissal and substantial sanctions.

James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 109-110.

¹⁸⁹ The debate over compatibility of Chapter 19 and the Constitution is explained in: Demetrios G. Metropoulos, "Constitutional Dimensions of the North American Free Trade Agreement," *Cornell International Law Journal*, Vol. 27, No. 1 (Winter, 1994);

Nevertheless, protectionist members of Congress and interest groups have continued to use constitutional challenges as a smoke screen for their discontent with the Chapters 19 process. For Christenson and Gambrel, "hidden in the constitutional question is distrust over a perceived protectionist bias of the International Trade Court and the Court of Appeals for the Federal Circuit in their judicial review function."¹⁹⁰ In other words, some American groups have continued to use constitutional arguments to foil fears that their protectionist interests and concerns with state sovereignty could be sacrificed because negotiators of the FTA and NAFTA wished to have impartial binational panels review AD/CVD orders outside of the review courts in the United States. For example, the American lumber coalition argued that the Chapters 19 process was an unconstitutional ceding of American sovereignty after the binational panels and ECC upheld Canadian stumpage practices. In 1994, the CFLI filed a suit in the District of Columbia Circuit Court of Appeals alleging that FTA-19 denied them due process and equal protection before the law, and violated Articles II and III of the U.S. Constitution. The suit stemmed the ECC's decision. The Coalition argued that the ECC's 3-2 decision resulted from a "gross misinterpretation of U.S. law" and implied that it was rooted in power politics.¹⁹¹ The suit was withdrawn by the Coalition on January 6, 1995 after the Canadian and American

Gordon A. Christenson, Kimberly Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 2 (Summer, 1989); Stewart A. Baker, Shelly P. Battram, "The Canada-United States Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 1 (Spring, 1989); James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994); Joseph R. Griffin before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice Committee on the Judiciary, April 28, 1988; Committee on International Trade of the Association of the Bar of the City of New York, "The United States/Canada Free Trade Agreement: Binational Review Procedures for Antidumping and Countervailing Duty Cases," April 25, 1988; Thomas W. Bark, "The Binational Panel Mechanism for Reviewing United States-Canadian Antidumping and Countervailing Duty Determinations: A Constitutional Dilemma?" *Virginia Journal of International Law*, Vol. 29 (1989); Gilad Y. Ohana, "The Constitutionality of Chapter Nineteen of the United States-Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review," *Columbia Law Review*, Vol. 89, No. 4 (May, 1989); Homer E. Moyer, "Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort," *The International Lawyer*, Vol. 27, No. 3 (Fall, 1993); James R. Cannon Jr., "U.S.-Canada FTA Article 19 Panels: Are the Binational Panels Following Their Mandate?" Presentation to the Forum on Binational Dispute Resolution Under the US-Canada Free Trade Agreement experience to Date and Portents for the Future - Administrative Conference of the United States, Washington, 1991.

¹⁹⁰ Gordon A. Christenson, Kimberly Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement," *The International Lawyer*, Vol. 23, No. 2 (Summer, 1989), 402.

¹⁹¹ Robert P. James, "Lumber Groups Challenges Binational Trade Dispute Panels," *Journal of Commerce* (October 31, 1994), 12; James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 257-258.

governments introduced the new consultative process for softwood lumber in December, 1994.¹⁹²

Therefore, powerful policy-makers and interest groups used protectionist, national-oriented issues and traditions to minimize the effects that the presence of Chapters 19 could, or did, have on the character of the American trade remedy regime.¹⁹³ Interestingly, they used Judge Wilkey's dissenting opinion in the ECC process to do so. For example, a coalition of American companies that had traditionally sought protection from imports under American trade remedy laws (e.g., steel, cement, footwear, lumber, machine-tool makers, and producers of wheat, garlic, salmon, and honey) sent letters to USTR Mickey Kantor on April 28, 1995 and June 9, 1995 which argued that the Chapters 19 process was unfair, ineffective, breached American sovereignty, and violated Articles II and III of the Constitution and the due process clause of the Fifth Amendment. The CFLI suggested that binational panels had not properly applied the domestic laws of the United States or complied with the proper standards of review in cases such as softwood lumber. The coalition therefore demanded that Chapters 19 be excluded from the FTA and NAFTA altogether. If such drastic action was not possible, the coalition insisted that the Chapter be substantially revised or not extended to new members of the NAFTA such as Chile.¹⁹⁴ Similarly, 45 companies and associations, including the Southeastern Lumber Manufacturers Association, the National Association of Wheatgrowers, Bethlehem Steel Corporation, USX Corporation, and the Coalition for Fair Atlantic Salmon Trade, sent a

¹⁹² John Maggs, "Business Coalition Wants An End To NAFTA's Arbitration Procedure," *The Journal of Commerce* (April 19, 1995).

¹⁹³ The only other challenge to the constitutionality of Chapter 19 was filed with the United States District Court for the District of Columbia by the National Council for Industrial Defense Inc. and the American Engineering Association in 1992. The two groups alleged that FTA-19 violated Articles II and III of the Constitution as well as the Fifth Amendment. Furthermore, the groups argued that the exclusive jurisdiction that the Court of Appeals for the District of Columbia Circuit had over AD/CVD disputes denied their rights of due process and equal protection before the law. Finally, the groups attacked the constitutionality of the FTA implementing legislation which required them to pay punitive damages if their challenge was unsuccessful. In its decision in *National Council for Industrial Defense Inc., and American Engineering Association v United States* (1993), the District Court for the District of Columbia dismissed the action for lack of jurisdiction. It upheld the provisions in the FTA implementing legislation which expressly provided that any action challenging the binational panel system had to heard "in the United States Court of Appeals for the District of Columbia Circuit." The Court also rejected the requests of the two groups that they not incur punitive sanctions for bringing their suit before an improper forum.

National Council for Industrial Defense Inc., and American Engineering Association v United States, Civil Action No. 92-1898, United States District Court for the District of Columbia, 827 F. Supp. 794 (1993); James R. Cannon Jr., *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 256-257.

¹⁹⁴ Letter from Lauren R. Howard et al to USTR Mickey Kantor, April 28, 1995, 1-4, 6. Letter from Lauren R. Howard et al to Ms. Carolyn Frank, Executive Secretary, Trade Policy Staff Committee, Office of the USTR, June 9, 1995, 1.

letter to Congress on May 1, 1995, recommending that hearings be held on the constitutionality of NAFTA-19 and its necessity in light of the new dispute settlement mechanism of the WTO. Taken together, the three letters referred to Judge Wilkey's dissenting opinion in the ECC's hearing of the softwood lumber dispute and to Judge Wilkey's testimony before the House Ways and Means Committee. Judge Wilkey argued that binational panels increased the opportunities for conflicts of interest, rendered binding decisions on American agencies even though they may have been unfamiliar with American laws, practices, and standards of judicial review, and were often confused about the role of ECCs. Consequently, he maintained that Chapters 19 did not work properly, detracted from independent decision-making ability and U.S. sovereignty, were contrary to American interests, and violated the Constitution.¹⁹⁵

In spite of the fact that Congress settled the constitutional debate when it passed the FTA in 1989, congressional officials have begun to bow to the most recent wave of political pressure and have raised the constitutional issue once again. Senator Craig (R-Idaho) mourned the "fate" of American softwood lumber producers because of the rulings of a number of binational panels during the 1991-1993 round of the bilateral lumber dispute. He pointed to the constitutional infirmities of the Chapters 19 process to suggest that it be significantly improved. For Senator Craig, "because these rulings by non elected, non-United States panelists are binding under the United States-Canadian Free Trade Agreement, and now under the NAFTA, serious constitutional and procedural issues arise. Reform is needed to assure that future panels do not and cannot ignore U.S. law in order to protect unfair trade practices."¹⁹⁶

Similarly, nine prominent senators, including Max Baucus, Robert Dole, and Chuck Grassley, sent a letter to the USTR on August 9, 1995 suggesting that if NAFTA-19 could not be abolished and replaced with the WTO process, substantial attention should be given to the Chapter's reform. The nine senators argued that the original three purposes of NAFTA-19 had not been met.¹⁹⁷ Furthermore, the nine senators insisted that the softwood lumber dispute demonstrated that the Chapters 19 process was seriously inadequate and prone to problems such as conflicts of interest and misapplications of domestic standards of review. Their letter stated:

¹⁹⁵ Joanne Osendarp, "NAFTA Chapter 19" (Ottawa: Unpublished, October 1995), 1.

¹⁹⁶ Senator Craig (R-ID), "Subsidized Canadian Lumber," LEGI-SLATE Report for the 104th Congress, *Congressional Record*, Tuesday August 8, 1995, 11812.

¹⁹⁷ In their view, the original three purposes of Chapter 19 included: (1) Chapter 19 would be limited to Canada and quickly phased out; (2) Panelist conflict-of-interest rules would be strictly enforced; and (3) Panels reviewing American determinations would be bound, like the CIT, by U.S. law and its deferential standard of review.

Under Chapter 19, ad hoc panels of private individuals rule in place of judges on whether antidumping and countervailing duties have been imposed consistent with the domestic law of the importing country. This requires Chapter 19 panels to interpret and apply national law itself, rather than resolving disputes over the interpretation of international agreements as would normally occur in international dispute settlement mechanisms in the WTO. These panel decisions are automatically implemented without judicial or political review by accountable government officials.¹⁹⁸

In this way, the letter highlighted the cries of protectionist lobby groups, and challenged the legitimacy of Chapters 19 by raising constitutional issues focusing on the appointments clause of Article II, on the process of judicial review in Article III courts, and on due process.

Senator Max Baucus continued on with his efforts to defend the protectionist interest of powerful lobby groups by tabling emergency timber legislation in the Senate on November 3, 1995. Baucus justified the protectionist measures against Canadian softwood lumber exports on the basis that Chapters 19 panels had not treated American producers fairly when they considered the bilateral dispute between 1991-1993. Senator Baucus declared that, "no American judicial function or authority can be delegated to an international body under any trade agreement." Senator Baucus ordered the renegotiation of Chapters 19 because he felt that it violated the Constitution and compromised state sovereignty by granting binational panels (i.e., non-Article III courts) the power of judicial review.¹⁹⁹

The bills that Congress proposed against Canadian softwood lumber and Chapters 19 have not gone far, despite receiving some support in Congress and with protectionist lobby groups. Nevertheless, they do illustrate the fact that protectionist sentiments exist in the United States, and can be expected to only get stronger in the run up to the next set of presidential and congressional elections. President Clinton's administration remains strongly in favour of NAFTA-19. Deputy Trade Representative Barshefsky argued that "our view is that [Chapter 19] has worked very well and very smoothly."²⁰⁰ USTR Mickey Kantor responded to the senatorial letters of August 9, 1995 and September 27, 1995 by stating that the NAFTA-19 process has functioned smoothly, and provided "real protection for U.S. producers and exporters."²⁰¹ However, several Republican presidential candidates, as well as important Republican congressional leaders, have been taking a very

198 Letter by Senator Max Baucus et al to USTR Mickey Kantor, August 9, 1995.

199 Senator Max Baucus, "Statements on Introduced Bills and Joint Resolutions - Emergency Timber Legislation," SRXPRESS, November 3, 1995, 16663.

200 Joanne Osendarp, "NAFTA Chapter 19" (Ottawa: Unpublished, October 1995), 2.

201 Letter by USTR Mickey Kantor to Senator Max Baucus, October 6, 1995.

protectionist approach to trade. Notwithstanding the executive's support for NAFTA-19, the ways in which Congress has been sympathetic to protectionist interest groups could add to the pressure of maintaining aggressive American trade remedy laws and limiting the effects NAFTA-19. Consequently, the ability of NAFTA-19 panels to continue to change the North American trade remedy regime into a somewhat fairer, more transparent, faster system could be endangered by beliefs in economic protectionism, the strength of policy-makers and interest groups, and concerns with state sovereignty in the United States.

Conclusion

The ways that Canadian and American governmental officials, interest groups, courts, and administrative agencies responded to the binational panels and ECC during the lumber dispute illustrates that international agreements affect domestic laws and practices in so far as the governments who created them agree to bind themselves and their nationals by their provisions. By using the powers granted to them by Chapters 19 of the FTA and NAFTA, the binational panels and Extraordinary Challenge Committee ordered the DOC and ITC to apply American CVD laws fairly and in compliance with the laws and principles of the new North American trade remedy regime as the hypothesis proposed would occur. Some of the orders of the panels and ECC were eventually put into practice, and \$800 million in CVDs were refunded, even though the decisions conflicted with the protectionist sentiments of congressional officials and American lumber producers.

Nevertheless, the softwood lumber dispute is indicative of how power politics (i.e., hegemonic relationships), and concerns with economic protectionism and state sovereignty have dominated the Canadian-American trade relationship in general, and the administration of domestic trade remedy laws in particular. Both governments, particularly the U.S. government, have continually suggested that they must be allowed to exercise their right as sovereign states to create laws and policies to meet the needs of their citizens. At the same time, governmental officials and interest groups in both countries have fervently pressured the DOC, ITC, and binational panels to interpret AD/CVD laws in a manner that would enable them to respond to developments in the international political economy. Canadian governments at the federal and provincial levels and lumber groups have promoted policies aimed at subsidizing natural resources within a rule-based, equitable, free trade environment, while American players have advocated protectionism under the guise of fair trade. Therefore, the presence of economic protectionism, hegemonic relationships, and concerns over state sovereignty remained central in the softwood lumber dispute in spite of the institutions of Chapters 19, and prevented significant changes from being made to the

character of the U.S. trade regime. Indeed, the U.S. government only returned the \$800 million in CVDs after the Canadian government agreed to political negotiations to settle the long standing differences over the two lumber industries between 1994-1996 even though the panels had ordered that the duties were contrary to U.S. law and administrative practice.

New-institutionalist theorists explain that rules and institutions influence the ways that political systems operate and produce public policies. Rules and institutions limit, channel, and control the behaviour of certain actors for the good of the political system as a whole. Their ability to constrain political behaviour stems from the degree to which they reflect the historical structures, traditions, beliefs, and ideologies of a society and the interests of dominant policy-makers and interest groups. New-institutionalist theorists also suggest that rules and institutions change slowly in response to political and socio-economic developments. Change occurs slowly because longstanding traditions, practices, beliefs, and ideologies give rules their authority and longevity.

The softwood lumber dispute illustrates the applicability of new-institutionalist theories to the evolution of trade remedy laws in North America and confirms the hypothesis that was created out of them. The hypothesis reflected certain beliefs of the rational choice school. Those beliefs were supported because the very presence of Chapters 19 panels did allow some aspects of the American trade regulatory process to change. Before Chapters 19 came into effect, AD/CVD determinations could only be challenged in domestic review courts and/or administrative tribunals. Consequently, trade remedy laws were administered in a very slow, politically oriented, unilateral, and often biased forum where decisions were based on unsubstantiated evidence and issues in a non-transparent manner. Powerful interest groups were able to dominate the agendas of trade policy-makers and tribunals. They were able to use their hegemony to dictate that their interests be upheld at the expense of other producers. For example, punitive damages were granted by American trade agencies in response to the pleas of interest groups such as softwood lumber producers and their sympathetic congressional representatives even though there was not always sound evidence to confirm that Canadian stumpage programs were countervailable subsidies and caused injury. Therefore, trade remedy laws were executed in a protectionist manner to serve American interests before 1989. Congress, the DOC, the ITC, and the CIT interpreted American laws to protect themselves and constrain the ability of Canadian producers from exporting softwood lumber into the United States.

However, the character of the American trade regulatory process began to change after Chapters 19 came into effect. New, binational rules were built into the FTA and NAFTA because Canadian governmental officials and interest groups convinced American

officials in the executive branch that the administration of trade remedy laws had to change. Older, politically motivated practices that privileged powerful and wealthy groups were intended to give way to a more integrated free trade environment. A binding process of binational panel review was placed into Chapters 19 of the Agreements as a result. Therefore, international rules began to take precedence over domestic laws and practices to influence the ways that the trade regime operated and public policies were produced. Change occurred so that producers and governments on both sides of the border could export their goods confidently in the North American market. The decisions of binational panels were designed to make the American trade regime fairer, more transparent, and faster than the domestic process of judicial review, and in some important respects they did. Decisions were, for the most part, unanimous and agreed to by Canadian and American panelists. All of the panels, whether unanimous or not, demanded that the DOC and ITC provide sound evidence for their determinations, and ordered that action be taken when sound evidence was not given. Finally, panel decisions were reached faster than domestic review courts had traditionally done, which thereby ended the dispute in a more timely fashion.

However, the softwood lumber dispute illustrates some of arguments of members of the structural-sociological school as well. The structural-sociological school of new-institutionalism argues that real, lasting change occurs slowly. Even though the presence of binational panels improved the administration of American CVD laws, they could not weaken the role of socio-economic factors completely. Traditional protectionist beliefs and practices, hegemonic relationships, and concerns with state sovereignty were able to override the presence of Chapters 19 panels and thereby allowed power politics to remain central in the American trade regulatory process after 1989. For example, the DOC and ITC clung to some of their traditional ways of interpreting and applying CVD laws without sound evidence even after the binational panels remanded them for doing so. Similarly, influential interest groups and certain members of Congress used their power to capitalize on selected parts of Judge Wilkey's dissenting opinion. They argued that Chapters 19 were unconstitutional and violations of state sovereignty even though many scholars and a congressional committee upheld the legitimacy of the panel process in 1989. Finally, the power of the CFLI and American government forced Canadian producers and governments to return to older, traditional political negotiations to settle the dispute in April of 1996. The April Agreement illustrated that hegemonic relationships, domestic interests, and the perceived legitimacy of older protectionist rules slowed the process of change. It returned the softwood lumber dispute to pre-1989 conditions in spite of the presence of Chapters

19. Therefore, older political practices, narrow interests, and agendas mitigated the effects that international rules had on domestic laws and practices.

Chapter Two suggested that new-institutionalist theories need to be expanded beyond domestic policy, and applied to the area of international law as well. Concepts such as state sovereignty and the binding nature of international laws must also be addressed to appreciate the resilience and authority of rules in the face of social, political, and economic pressures. International laws, while binding and authoritative to some extent, may not be able to change domestic traditions, practices, and beliefs completely. International rules may be altered or disregarded more easily than domestic ones because of the concept of state sovereignty. International laws and institutions such as those in Chapters 19 of the FTA and NAFTA are only as strong, effective, and binding as member states desire them to be. The softwood lumber dispute clearly demonstrates that the rules of Chapters 19 were effective and binding when the administrative agencies, interest groups, and Canadian and American governments allowed them to be. They encouraged change when issues of economic protectionism, hegemonic relationships, and state sovereignty were not a major concern. However, the ability of Chapters 19 panels to change the character of the U.S. trade remedy regime was placed in jeopardy when issues of state sovereignty, constitutionality, and the economic viability of American producers surfaced in the dispute. For example, American policy-makers used state sovereignty as an excuse to challenge the authority of Chapters 19 to protect their constituents. Many members of congress, who had conceded to the authority of FTA-19 in 1989, later ignored their previously stated convictions, and acted in response to their constituents to call for the abrogation or weakening of NAFTA-19 in 1995.

Consequently, the full commitment of American and Canadian governments, interest groups, and administrative agencies is absolutely necessary if the character of the U.S. regime will continue to change in the context of Chapters 19. Indeed, the recent agreement to place an export tax on Canadian softwood lumber illustrates that older practices of political negotiation within hegemonic relationships could return if producers and governments on both sides of the border are not confident in the new rules of Chapters 19. Therefore, the softwood lumber dispute demonstrates that Chapters 19 may be in danger. Chapters 19 have begun to change the North American trade regulatory process gradually, but have not changed it enough to capture the degree of legitimacy and authority that domestic trade remedy rules had before 1989.

CHAPTER SIX-
THE DISPUTE OVER FRESH, CHILLED, AND FROZEN PORK
BETWEEN CANADA AND THE UNITED STATES

Chapter Six examines the dispute over fresh, chilled, and frozen pork to address the hypothesis about the process of change in the North American trade remedy regime. The dispute raged between Canada and the United States during the 1980s and affected millions of dollars of pork exports. The dispute was chosen for the dissertation because it had significant legal implications for the provisions of FTA-19. It made exhaustive use of the mechanisms of FTA-19; it employed two binational panels and invoked an Extraordinary Challenge Committee (ECC) for the first time in the history of the Agreement. The dispute also represented the first time that a binational panel had to interpret a statute that had not previously been interpreted by an American court or administrative agency. As a result, the pork case set a number of important precedents for future binational panels to consider when rendering their decisions. Most importantly, the dispute was chosen because it supports the hypothesis that the character of the U.S. trade remedy regime began to change when political, socio-economic factors waned in significance in the context of Chapters 19. The character of the American trade regulatory process began to change when dominant policy-makers and interest groups recognized the utility and authority of Chapters 19 panels in the new trade environment. As the negotiators of the FTA desired, the panel decisions began to usher in a fairer, more transparent, faster trade regulatory process than the system which existed in the United States prior to the FTA. Notwithstanding the changes, however, the pork dispute also confirms the hypothesis by illustrating that rules, customs, and practices do not change quickly or easily. Older, traditional practices of shielding domestic producers from foreign competitors lingered in the actions of the Department of Commerce (DOC) and International Trade Commission (ITC) during the dispute. Beliefs in economic protectionism, the power of hegemonic relationships, and concerns with state sovereignty compelled American policy-makers and interest groups to override the potential effects that FTA-19 had over the American trade regulatory process, thus making the American regime less susceptible to change after 1989.¹

¹ See Appendix I for a summary of the pork dispute.

The Dispute over Fresh, Chilled, and Frozen Pork from Canada

Overview of the Canadian Pork Industry

Canada's pork industry consists of hog producers and processors of fresh, chilled, and frozen pork products. The industry contributes to the health of Canada's agricultural sector in particular, and the economy in general. In the midst of the pork dispute, sales of meat producing livestock totaled CDN \$6.17 billion (1990). Of that \$6.17 billion, \$2.02 billion was generated by the pork industry. Approximately 26,000 Canadians were directly employed in the pork industry in 1992.

The industry is national in scope but regionally concentrated. Over 60 percent of hogs were processed in central Canada during the 1990s, with Quebec accounting for almost 50 percent of Canada's total pork exports. Regional concentration emerged because of a trend towards developing intensive hog production in areas that had competitive advantages, offered primarily low-cost land and feeds, and were close to major population centers.

Canada's pork industry has been assisted by the National Tripartite Stabilization Plan (NTSP). Introduced in 1986, the NTSP was designed to protect hog farmers against severe swings in hog prices, feed prices, and market downturns. Premiums have been contributed by federal and provincial governments as well as by the producers themselves. Benefits have been administered as direct deficiency payments and have been referred to as producer subsidy equivalents (PSEs). They have been made widely available to Canadian producers and have varied according to market returns and provincial assistance programs.²

American Protectionism and Canadian Exports of Pork Products during the 1980s

Canada relies on its ability to export agricultural products, such as pork, around the world. Canada is one of the largest exporters of fresh, chilled, and frozen pork, ranking third behind the European Union and China/Taiwan. During the 1980s, exports of hogs and pork products were Canada's second largest agricultural export. Exports of fresh, chilled, and frozen pork totaled \$500-600 million per annum from 1992-1995. Most of

² Industry, Science, and Technology Canada, *Industry Profile: Hog Processing* (Ottawa: Industry, Science, and Technology Canada, 1993), 2-3; Leonard Christie, "Livestock: Issues in the Canadian Pork Industry" (Ottawa: Library of Parliament Research Branch, 22 November 1991), 3.

Canada's pork exports are directed to the American market. By 1991, 75 percent of Canada's pork exports went to the United States. In comparison, Canada's second most important export market (Japan) accounted for 12 percent of Canadian pork exports. The average value of pork exports to the United States was approximately CDN \$500 million during each year between 1986 and 1995.³

The value of Canadian pork exports to the United States increased by 33 percent between 1984 and 1993. Growth was seen each year with the exception of 1989, when a countervailing duty (CVD) was levied on Canadian pork by the DOC. The steady growth of Canadian pork exports to the United States was due to a number of interrelated factors. First, American swine production declined during the 1980s. Second, a rationalization of the American packing industry subjected it to temporary economic hardships. Third, many Canadian pork producers were closer to U.S. markets and transportation networks than some American producers, and enjoyed a competitive edge as a result. Fourth, Canadian producers were favoured in the American market and demand for their products was high. Canadian pork products tended to be leaner and more desirable than American pork products. Fifth, Canadian exporters were favoured by the increasing American exchange rate during the early 1980s. The exchange rate allowed their products to be more competitively priced than American goods. Finally, pork production increased because provincial subsidy programs required Canadian producers to place a greater emphasis on productivity and efficiency in order to receive benefits.⁴

Access to the U.S. market was, and is, extremely important to Canadian pork producers. However, Canadian pork producers faced a wave of protectionism that jeopardized their ability to increase the number of exports to the United States. For example, the Canadian Meat Institute noted that prices of Canadian meat and livestock were

³ Statistics were compiled from a variety of sources including: Industry, Science, and Technology Canada, *Industry Profile: Hog Processing* (Ottawa: Industry, Science, and Technology Canada, 1993); Canadian Meat Council, "Highlights and Comments: Canadian Livestock and Meat Industry" (Ottawa: Canadian Meat Council, January 1996); Canadian Pork International, "Canadian Pork Production, 1991-1995" (Ottawa: Canadian Pork International, December 1995); International Markets Bureau, "Canada Exports of Pork and Products," (Ottawa: Office of Trade Evaluation, International Markets Bureau, Agriculture Canada, 1995); *The Canada-U.S. Free Trade Agreement and Agriculture: An Assessment* (Ottawa: Minister of Supply and Services, 1989), 31; Leonard Christie, "Livestock: Issues in the Canadian Pork Industry" (Ottawa: Library of Parliament Research Branch, 22 November 1991), 1-2; United States International Trade Commission, *Industry and Trade Summary: Live Swine and Fresh, Chilled, and Frozen Pork* (Washington: Office of Industries ITC, March 1992), Tables A-5, A-6, A-13, A-18).

⁴ United States International Trade Commission, *Conditions of Competition Between the U.S. and Canadian Live Swine and Pork Industries* (Washington: November 1984), ix; Industry, Science, and Technology Canada, *Industry Profile: Hog Processing* (Ottawa: Industry, Science, and Technology Canada, 1993), 4-7.

determined by artificial price floors and ceilings instead of being determined by market forces in the United States. American officials set prices to ensure that American producers were protected in their home market. As a result, Canadian exporters faced problems when exporting into the U.S. because prices fluctuated beyond their control.⁵

Canadian pork producers faced a number of significant non-tariff barriers when selling their goods in the United States during the 1980s as well. Canadian exports of fresh, chilled, and frozen pork were impeded by unevenly applied health and sanitary regulations of the Federal Meat Inspection Act. Similarly, additional border inspection stations were slated to be built to increase the ability of American customs officials to selectively enforce measures of the Act on Canadian pork entering the U.S. prior to the conclusion of the FTA negotiations. Canadian truckers were sometimes forced to completely unload at these new inspection stations at an estimated cost of \$350 per load. If there was something in the load to which the American inspectors objected, the trucks were reloaded and returned to Canadian producers, thereby adding a further impediment to the trade of pork.⁶

Perhaps the most harmful forms of protectionism that were aimed at Canadian pork producers during the 1980s were CVDs. Indeed, the only year that exports did not increase was 1989; Canadian exports decreased by almost 10 percent in 1989 after the United States imposed a CVD against Canadian fresh, chilled, and frozen pork. A host of American pork producers launched petitions alleging that Canadian pork producers received unfair subsidies, stabilization payments, loans, and grants which made them more competitive in the U.S. market. They also argued that even though American production levels had been voluntarily cut back to prevent excess production of pork, Canadian producers had increased their exports to the United States, thereby offsetting the reduction. Consequently, the growing number of Canadian exports allowed them to capture a large share of the American market. Capturing a large part of the market allowed Canadian producers to gain access to American distribution networks, thereby strengthening their position to an even greater degree.

In conjunction with their CVD petitions, American pork producers reacted to Canadian imports by pressuring Congress to strengthen the countervail and subsidy

⁵ United States International Trade Commission, *Industry and Trade Summary: Live Swine and Fresh, Chilled, and Frozen Pork* (Washington: Office of Industries ITC, March 1992), 11.

⁶ Bill Vaags, Testimony to the Standing Committee on External Affairs and International Trade, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade* (November 24, 1987), 46-15.
The inspection systems of Canada and the U.S. were harmonized to facilitate trade between the two countries under the FTA.

measures on imported agricultural products. Congress was receptive to their demands for protection. Senator Robert Dole, Chairman of the Senate Finance Committee, requested that the International Trade Commission (ITC) conduct an investigation of the "competitive position of Canadian live swine and pork in the United States' market," on May 15, 1984. The investigation was designed to assess the degree to which Canadian products threatened American goods.⁷ Congress also amended Section 771 of the Tariff Act of 1930 to include the concept of upstream subsidies in American CVD law to satisfy the demands for protection. The concept of upstream subsidies was designed to address the situation where "the exporter of a processed or manufactured product did not itself receive a subsidy, but benefited from a subsidy accrued to an important input through cost savings not available to the domestic competitor."⁸ In other words, upstream subsidies were those offered to unprocessed, raw materials (e.g., live swine) that were also seen to benefit the processed products of which they were inputs (e.g., fresh, chilled, frozen pork products). The amended Section 771A of the Tariff Act of 1930 authorized the DOC to take a more stringent approach in a CVD investigation. It required that the DOC:

... include in CVDs imposed on merchandise the amount of subsidies conferred on "input products" for the merchandise, where the subsidy bestows a "competitive benefit" on the merchandise and has a "significant effect" on the cost of manufacturing or producing the merchandise.⁹

The 1984-1985 Dispute over Live Swine and Fresh, Chilled, and Frozen Pork from Canada

Shortly after the amendment to Section 771A was passed, the National Pork Producers Council (NPPC) filed a CVD petition suggesting that material injury had been caused by live swine, and fresh, chilled, and frozen pork from Canada. The petition made use of Section 771A and the concept of "upstream subsidies." It singled out a number of federal and provincial programs that conferred benefits to growers of live swine. The petition reasoned that because live swine was an "input" into the production of fresh, chilled, and frozen pork, the subsidies given to swine producers automatically conferred benefits to Canadian pork producers. Therefore, the NPPC's petition alleged that Canadian

⁷ Letter written by Senator Robert Dole to ITC Chairman Alfred Eckes as cited in United States International Trade Commission, *Conditions of Competition Between the U.S. and Canadian Live Swine and Pork Industries* (Washington: November 1984), 64.

⁸ Andreas 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), 52.

⁹ United States-Canada Binational Panel, *In the Matter of Fresh, Chilled, and Frozen Pork from Canada: Memorandum Opinion and Order* (September 28, 1990), 15.

pork producers had either directly or indirectly received benefits which constituted a countervailable subsidy within the meaning of Section 701 and 771A of the Tariff Act of 1930. The Canadian imports materially injured, or threatened, American pork producers in their home market.¹⁰

The petition was initially questioned by the DOC because the NPPC was a trade association which only represented American swine growers. Consequently, pork producers were not part of the NPPC. Citing Section 771(4) of the Tariff Act of 1930, the DOC stated that petitions had to be filed on behalf of an "American industry," and hesitated to include swine growers in the industry affected by Canadian imports of Canadian fresh, chilled, and frozen pork. However, the DOC accepted the NPPC's petition on November 23, 1984, because it felt that "Congress had recognized the special nature of agriculture and apparently contemplated the inclusion of growers and packers in one industry." In addition, the DOC accepted the NPPC's petition after seven American pork producers joined the trade association as co-petitioners in the CVD investigation.¹¹

***The DOC's Affirmative Determinations:
April 1, 1985 and June 17, 1985***

The DOC issued an affirmative preliminary CVD determination on April 1, 1985, and a final affirmative CVD determination on June 17, 1985.¹² The DOC found that 22 federal and provincial programs benefited Canadian producers and constituted a countervailable subsidy under U.S. law. The net benefit of the subsidies was calculated to be CDN \$0.3272/lb.¹³

¹⁰ United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50, (June 17, 1985), 5.

¹¹ United States Department of Commerce, "Initiation of CVD Investigation: Live Swine and Fresh, Chilled, Frozen Pork Products from Canada," *Federal Register*, Vol. 49, No. 232 (November 30, 1984), 47079-80; United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50, (June 17, 1985), 4.

¹² The DOC was to issue its preliminary determination on January 26, 1985. However, it concluded that the investigation was "extraordinarily complicated," and extended the preliminary investigation for 65 days. The preliminary and final determinations will be analyzed together because they reached the same conclusions.

¹³ The 22 programs included: the Agricultural Stabilization Act, the Record of Performance Program, BC Swine Producers' Farm Income Plan, Manitoba Hog Income Stabilization Plan, NB Hog Price Stabilization Program, Nfld Hog Price Support Program, NS Pork Price Stabilization Program, PEI Price Stabilization Program, Quebec Farm Income Stabilization Insurance Program, Saskatchewan Hog Assured Returns Program, NB Swine Assistance Program, NB Loan Guarantees and Grants under the Livestock Incentives Program, NB Hog Marketing Program, NS Swine Herd Health Program, NS Transportation Assistance Program, Ontario Farm Tax Reduction Programs, Ontario Livestock Programs, PEI Hog Marketing and Transportation Subsidies, PEI Interest

The NPPC's petition argued that live swine was an "input" into the production of fresh, chilled, and frozen pork. Consequently, it insisted that the DOC apply the upstream subsidies concept of Section 771A to determine whether benefits enjoyed by live swine producers were passed along to Canadian pork producers as well. When considering the relevance of Section 771A, the DOC argued that an upstream subsidies investigation was not required. The DOC did not agree that live swine was an "input" into fresh, chilled, and frozen pork. The DOC employed two characteristics that were written into Section 771A to justify why it did not feel that live swine was an "input" into fresh, chilled, and frozen pork. First, the DOC examined the value that was added to live swine during the production process. The DOC noted that the "packing stage consisting of immobilizing, stunning, dehairing, eviscerating, and spitting did not contribute significantly to the value of the live swine." The DOC estimated that the packing stage only added ten percent to the value of the unprocessed swine. Second, the DOC considered the role that Canadian producers had during the production process to reach the conclusion that live swine was not an "input" into fresh, chilled, and frozen pork. It held that "[T]he salient criterion is the degree to which the demand for the prior stage product was dependent on the demand for the latter stage product." In the case of fresh, chilled, and frozen pork, the DOC noted that the role of the processor was simply to make the swine ready for the next consumer (i.e., the consumer of pork meat). It stated, "the consumers are wholesale purchasers of pork meat for resale as pork, such as grocery chains, and further processors who produce bacon, hams, etc. The demand for the slaughtered and quartered swine is by far the predominant determinant of the demand for live swine."¹⁴ Therefore, the two characteristics of Section 771A led the DOC to reject the NPPC's argument that live swine was an "input" into fresh, chilled, and frozen pork products. The DOC insisted that a Section 771A upstream subsidies investigation was unwarranted and unnecessary.

Even though it found that live swine was not an "input" into fresh, chilled, and frozen pork, the DOC concluded that the subsidies enjoyed by live swine producers were also offered to pork producers because the two industries were one and the same.¹⁵

Payments on Assembly Yard Loan, Quebec Meat Sector Rationalization Program, Quebec Special Credits for Hog Producers, Saskatchewan Financial Assistance for Livestock and Irrigation.

Those programs are summarized in: United States United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50. (June 17, 1985), 9-25.

¹⁴ United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50. (June 17, 1985), 6-7.

¹⁵ United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50. (June 17, 1985), 9.

Moreover, the DOC concluded that each of the 22 federal and provincial programs was either *de jure* or *de facto* specific, and was limited to a specific industry, enterprise, or group of industries and/or enterprises.¹⁶ Consequently, a CVD of CDN \$0.3272/lb was levied on imports of live swine and fresh, chilled, and frozen pork from Canada that entered into the United States, or were withdrawn from warehouse for consumption, after April 3, 1985.

***The Canadian Response to the DOC's Affirmative Determination:
Appeal to the Court of International Trade***

The Canadian Meat Council appealed the DOC's final determination to the U.S. Court of International Trade (CIT) on behalf of the Canadian pork processing industry. The Canadian Meat Council argued that an upstream subsidy investigation should have been conducted by the DOC under Section 771A of the Tariff Act of 1930. Had such an investigation been conducted, it would have been proven that the subsidies given to Canadian swine producers did not provide a competitive benefit to pork producers.

The CIT reversed the DOC's final determination in *Canadian Meat Council v. the United States* (1987). The Court found that the DOC should have conducted an upstream subsidy investigation under Section 771A. The DOC was obligated to apply the upstream subsidy provision to agricultural products because the Court could not find an exception to the provision in either the statute itself or its legislative history. The CIT reasoned that Congress had intended Section 771A to be the statutory mechanism which dealt with allegations that products were benefiting from subsidies conferred at earlier stages of production. The CIT held that "by limiting the applicability of the upstream subsidies provision, [the DOC] automatically imputed early stage subsidies to later stage products on the grounds that the products are essentially the same at all stages of production."¹⁷ The CIT thereby instructed the DOC to conduct an upstream subsidy investigation in accordance with Section 771A if it believed that swine subsidies were also bestowed on Canadian pork producers. It stated that "if the statutory approach to upstream subsidies is inadequate, it is not the role of Commerce or the Court, but of Congress to remedy any deficiency."¹⁸

¹⁶ United States Department of Commerce, "Final Affirmative CVD Determination: Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada," *Federal Register*, Vol. 50. (June 17, 1985), 9-25.

¹⁷ *Canadian Meat Council v. the United States* 661 F Supp. 622 (Court of International Trade 1987), 404-412.

¹⁸ *Canadian Meat Council v. the United States* 661 F Supp. 622 (Court of International Trade 1987), 408.

***Termination of the 1984-1985 Dispute:
The ITC's Negative Injury Determination***

The ITC rendered a preliminary negative injury determination in December, 1984, and a final negative injury determination in July, 1985. The ITC determined that Canadian imports of fresh, chilled, and frozen pork did not threaten American producers with material injury.¹⁹ The negative determination was issued because the ITC failed to find a causal link between the injury to domestic producers and the "subsidized" imports of pork. Consequently, the investigation of Canadian fresh, chilled, and frozen pork was terminated, and CVDs were not levied on Canadian pork imports. Furthermore, the termination of the investigation relieved the DOC of its obligation to conduct the upstream subsidy investigation that had been ordered by the CIT.

***The Continued Efforts to Impede Canadian Imports of Pork:
Section 771B of the Tariff Act of 1930***

Congress continued to restrict the freedom with which Canadian pork producers could access American markets after the termination of the 1985 dispute. An amendment to Section 771B was introduced into the Senate on behalf of American pork producers one month after the CIT's decision (June 26, 1987). The amendment was backed by influential senators such as Baucus, Grassley, Pryor, and Bentsen (Chairman of the Senate Committee on Finance). It sought to ensure that any benefit given to a raw agricultural product would automatically apply to the processed agricultural product as well. When supporting the amendment from the floor of the Senate, Senator Max Baucus stated:

A recent U.S. Court of International Trade decision held that the Commerce Department had no statutory authority to impose duties on processed agricultural products if the raw agricultural product was being subsidized. This means that even if the ITC determines that pork processors are being injured by subsidized Canadian hogs, the Commerce Department would not be able to impose any countervailing duties on pork. A foreign nation could avoid a U.S. [CVD] on an agricultural product merely by doing some minor processing of the agricultural product before it is exported to the United States ... That is why Senator Grassley and myself, with the support of Senator Pryor, are today offering an amendment to the trade bill that directs the Commerce Department to place duties on processed agricultural products if the raw agricultural product is being subsidized.²⁰

¹⁹ However, the CIT found that Canadian imports of live swine did injure American producers. A CVD of CDN\$0.044/lb was levied on imports of Canadian live swine because of the affirmative determinations by both the DOC and ITC.

²⁰ Statement made by Senator Max Baucus in the Senate on June 26, 1987 as cited in United States-Canada Binational Panel, *Memorandum Opinion and Order In The Matter of Fresh, Chilled, and Frozen Pork From Canada* (September 28, 1990), 18-19.

The amendment sought to protect American pork producers by legally linking live swine with fresh, chilled, and frozen pork. Political pressure was used by the American pork industry to encourage Congress and the DOC to uphold the industry's interests at the expense of its Canadian competitors. Congress stipulated that Section 771B was designed to provide clear guidelines for the DOC to use in order that measures would be taken to "sufficiently discipline" foreign competitors on a regular basis. The new rule was to "notify foreign producers that they would not be insulated from liability" any further in the U.S. trade regime.²¹ Upon its adoption into the Omnibus Trade and Competitiveness Act of 1988, Section 771B stipulated:

In the case of an agricultural product processed from a raw agricultural product in which (1) the demand from the prior stage product is substantially dependent on the demand for the latter stage product, and (2) the processing operation adds only limited value to the raw commodity, subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.²²

The 1989 Dispute over Fresh, Chilled, and Frozen Pork from Canada

The NPPC filed a second petition against Canadian fresh, chilled, and frozen pork immediately after Section 771B and the Omnibus Trade and Competitiveness Act were passed in 1988. The NPPC alleged that Section 771B required that subsidies provided to swine growers be recognized as measures which provided benefits to Canadian fresh, chilled, and frozen pork products as well. The petition also suggested that those benefits threatened American pork producers with material injury in their home market.²³

The DOC's Affirmative Determinations: May 8, 1989 And July 24, 1989

The DOC launched a CVD investigation against Canadian fresh, chilled, and frozen pork after reviewing the information in the NPPC's petition. It concurred that there was a reasonable indication that an American industry was threatened with injury because of

²¹ *Canadian Meat Council v. the United States* 661 F Supp. 622 (Court of International Trade 1987), 409.

²² Section 771B of the Tariff Act of 1930 as amended by the 1988 Omnibus Trade and Competitiveness Act of 1988.

²³ United States Department of Commerce "Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada," *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30774.

subsidized imports. The DOC issued a preliminary affirmative determination on May 8, 1989 and a final affirmative determination on July 24, 1989.²⁴ The final determination found 18 federal and provincial programs to be either *de jure* or *de facto* specific, preferential, and countervailable as a result.²⁵

The DOC's determination centered around Section 771B of the Tariff Act of 1930. In particular, the DOC examined whether the benefits offered to the primary industry (e.g., Canadian swine producers) were extended to the secondary industry (e.g., Canadian pork producers). The DOC ruled that Section 771B implied that two characteristics had to be met to conclude that secondary industries received benefits from subsidies offered to primary ones: (1) demand for the primary product must depend substantially upon demand for the processed/secondary product, and (2) the processing stage of production must only add limited value to the primary product. The DOC concluded that the first characteristic of Section 771B was met because "the demand for live swine depends substantially upon the demand for fresh, chilled, and frozen pork." It also held that the second characteristic of Section 771B was met because the processing operation for fresh, chilled, and frozen pork added only a limited value of 20 percent to the live swine.²⁶ Therefore, the DOC determined that the "subsidies found to be provided to live swine shall be deemed to be provided with respect to the manufacture, production, or exportation of fresh, chilled, and

²⁴ The two determinations will be analyzed together because their contents were very similar.

²⁵ The programs found to confer subsidies included: Tripartite Stabilization Programs under the Agricultural Stabilization Act, Feed Freight Assistance Program, Western Diversification Program, Western Transportation Program, Western Transportation Industrial Development Program, Canada/Quebec Subsidiary Agreement on Agri-Food Development, Alberta Crow Benefit Offset Program, Alberta Economic Development and Trade Act, Alberta Grant to Fletcher's Fine Foods, Ontario Farm Tax Rebate Program, Ontario Marketing Assistance Program for Pork Producers, Ontario Livestock Improvement and Transportation Assistance Programs, Ontario Pork Industry Improvement Program, Quebec Farm Income Stabilization Insurance Program, Quebec Productivity Improvement and Consolidation of Livestock Production Program, Quebec Regional Development Assistance Program, Saskatchewan Hog Assured Returns Program, Saskatchewan Livestock Investment Tax Credit Program. The programs are summarized in: United States Department of Commerce, "Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada," *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30776-30782. It should be noted that the NCCP's petition argued that an additional 11 federal and/or provincial programs also represented countervailable subsidies. However, the DOC rejected these programs stating that they did not offer subsidies to Canadian pork producers.

²⁶ United States Department of Commerce, "Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada," *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30775-30776.

frozen pork in accordance with [the two characteristics of] Section 771B of the Tariff Act.”²⁷

After it linked the subsidies offered to live swine growers and the pork industry, the DOC used a conversion factor of 79.5 percent to calculate the percentage of pork yielded from live swine.²⁸ That percentage was then used to calculate the benefits that were given to Canadian pork producers. The DOC felt that 79.5 percent was comparable to the conversion factor that provincial marketing boards used when they determined the final price of live swine.²⁹ The conversion factor enabled the DOC to estimate that a net subsidy of CDN \$0.08/kg was conferred to Canadian fresh, chilled, and frozen pork by the 18 programs in question. The DOC decreased the benefit of the subsidy to CDN \$0.077/kg in the final determination.

***The ITC's Affirmative Injury Determinations:
March 2, 1989 and September 13, 1989***

The ITC issued a preliminary affirmative injury determination on March 2, 1989, and a final affirmative injury determination on September 13, 1989. The ITC unanimously found that American pork producers had not been materially injured by Canadian imports during the period of the investigation. However, the ITC determined that Canadian fresh, chilled, and frozen pork posed an imminent or future threat of injury to the American industry in a three-two decision.³⁰

The majority of the ITC based its determination of threat of injury on the ten factors of Section 1677(f) of the Tariff Act of 1930.³¹ The ITC rejected four out of the ten factors

²⁷ United States Department of Commerce, “Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada,” *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30776.

²⁸ When processed, a live swine is 79.5% pork. The DOC calculated the subsidy to hog producers per pound of swine, then converted the “live weight” of swine to a “dressed weight” using the conversion factor, thereby allocating all of the hog producers’ subsidies to the pork producers.
Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 126.

²⁹ United States Department of Commerce, “Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada,” *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30776.

³⁰ The ITC did not feel that producers of live swine and pork could be placed into one industry. Consequently, it defined the domestic industry as including pork packers only.
United States International Trade Commission, *Final Determination: Fresh, Chilled, Frozen Pork from Canada* (Washington: September, 1989), 4-10.

³¹ The ten factors included: (1) the nature of the subsidy, (2) the actual or potential increase in production, (3) an increase in market penetration, (4) a substantial increase in inventories in the U.S., (5) demonstrable adverse trends to indicate that importation will cause actual injury in the future, (6) probability that imports will have a price suppressing effect, (7) presence of underutilized capacity for production in exporting

of Section 1677(f) with little justification for its actions. It then based its findings of a real and imminent threat of injury on the other six. The first factor that the ITC considered was the nature of Canadian subsidies. The ITC noted that subsidies had decreased the cost of producing hogs and pork in Canada. Consequently, the subsidies allowed Canadian production levels to increase. Because Canadian production was largely dependent on export sales to the United States, the nature of the subsidies enhanced the likelihood that Canadian imports of fresh, chilled, and frozen pork would increase in the American market.

Second, the ITC considered the likelihood that Canadian imports would increase in the American market. The majority of commissioners concluded that imports would not only increase because of the nature of Canadian subsidies, but would increase because of the underutilization of Canadian production capacity as well. Fletcher's Fine Foods, a large Canadian pork packing plant, closed because of a strike in 1988-1989. The ITC determined that the closure contributed to the underutilized capacity in Canada and decline in pork imports during 1988-89. After the strike at Fletcher's Fine Foods ended in March of 1989, the ITC assumed that Canadian pork production and exports to the U.S. would automatically increase.

Third, the majority of the ITC examined whether market penetration rates were likely to rise and threaten American producers with injury. They argued that Canada's share of the market was likely to increase to an injurious level even though market penetration rates had decreased in the years leading up to the investigation. The ITC argued that market penetration rates would increase because of the settlement of the strike at Fletcher's Fine Foods. In addition, the ITC pointed out that Canadian pork exports to Japan had declined, and reasoned that those exports would be rechannelled into American markets. Canadian pork exports to Japan increased during the spring and summer of 1988 because pork from Taiwan, Japan's normal source of supply, was experiencing problems with drug residue. However, when Taiwan was able to solve the problem, the ITC claimed that Canadian pork exports declined slightly, and were replaced by those from Taiwan. Finally, the ITC noted that consumption of pork had decreased in the United States during the period of investigation. It charged that Canadian exports could not be easily absorbed into the market and would thereby replace American pork already in the market.

country, (8) potential for product shifting, (9) likelihood of increased imports by reason of product shifting, and (10) actual and potential negative effects on the existing development and production efforts of the domestic industry.

Fourth, the majority of the ITC considered whether prices would be suppressed by Canadian imports. They noted that Canadian and American pork prices were relatively equal because of the highly competitive market in which pork was sold. They argued that because the pork market was price sensitive, "the likely increase in imports will have a price suppressing effect," which would be "particularly significant in light of the vulnerability of the industry."

Fifth, the majority of commissioners looked for other demonstrable adverse trends to substantiate their affirmative injury determination. They argued that Canadian producers were no longer restricted when exporting to the U.S. because they had developed effective means of transporting, distributing, and selling their products in American markets. They noted that other trends also affected the American industry and made it vulnerable to Canadian pork. For example, the counter cyclical nature of the hog cycle endangered American producers in the face of rising levels of Canadian pork.³² The majority declared that Canadian swine and pork producers were aided by governmental subsidies which alleviated the stress of downturns in the hog cycle. Canadian producers were able to increase their rates of production and exportation while American producers were not. Therefore, Canadian producers were given an advantage over their American counterparts, because parallel relief was not offered during the corresponding downturn in the hog cycle when the U.S. industry was most vulnerable.

Finally, the ITC examined the potential for product shifting in the Canadian and American industries.³³ The ITC predicted that an increase in swine subsidies would lead to a higher CVD, making prices for swine even higher. As a result "the imposition of a [CVD] on imports of subsidized Canadian swine ... will give Canadian growers an extraordinary economic incentive to slaughter increasing quantities of swine in Canada and then ship the resulting pork products to U.S. consumers."³⁴ Therefore, the CVD would have the effect of harming American producers in the future by encouraging product shifting in Canada.

³² The hog cycle refers to the change in population/inventory of live animals and a concomitant but opposite change in pork production. It reflects decisions of growers of live swine to increase or decrease production in response to economic signals given by the market and to natural/biological constraints on their animals (e.g. reproduction capabilities). Therefore, the hog cycle has natural peaks where swine production is high but pork production is relatively low. It also has natural troughs where swine production is low but pork production is relatively high. The cycle lasts approximately four years from peak to peak.

³³ Product shifting referred to the ability of a producer to shift his/her modes of production and produce another related product.

³⁴ United States International Trade Commission, *Final Determination: Fresh, Chilled, Frozen Pork from Canada* (Washington: September, 1989), 19-25

The majority of the ITC noted that the American pork industry was extremely vulnerable and was facing harsh economic conditions. It argued that an increase of Canadian pork imports would severely challenge the industry's ability to compete. From its examination of the six factors of Section 1677(f), the ITC concluded that "an industry in the United States is threatened with material injury by reason of imports of fresh, chilled, and frozen pork from Canada which [the DOC] has found to benefit from countervailable subsidies."³⁵

Following the affirmative decision of the ITC, a CVD of CDN \$ 0.08/kg was levied on Canadian fresh, chilled, and frozen pork products as they entered the United States. The CVD proved to be extremely costly to Canadian pork producers. Horlick and DeBusk estimated that the CVD investigations of 1988-89 affected \$350-400 million of Canada-U.S. trade in fresh, chilled, and frozen pork.³⁶ The Royal Bank of Canada estimated that the CVDs cost Canadian producers CDN \$580 million.³⁷

As stated, the ITC's finding of threat of injury was not unanimous. Commissioners Brunsdale and Cass disagreed with the findings of the majority. They did not feel that the ITC could absolutely prove that a threat of injury was real or imminent. They stated "[W]e do not agree that the record before us presents sufficient evidence that an industry in the United States is materially injured or threatened with material injury by reason of subsidized imports of fresh, chilled, and frozen pork from Canada."³⁸

³⁵ United States International Trade Commission, *Final Determination: Fresh, Chilled, Frozen Pork from Canada* (Washington: September, 1989), 26.

³⁶ Gary Horlick, Amanda DeBusk, "Dispute Resolution Panels and the U.S.-Canada Free Trade Agreement: The First Two Years and One-Half Years," *McGill Law Journal*, Vol. 37 (1992), 594.

³⁷ Royal Bank of Canada, "Free Trade Agreement: One Year Retrospective," *Econoscope* (Special Issue, 1990), 23.

³⁸ Dissenting Views of Chairman Brunsdale and Vice Chairman Cass cited in United States International Trade Commission, *Final Determination: Fresh, Chilled, Frozen Pork from Canada* (Washington: September, 1989), 37.

***The Canadian Responses to the Affirmative Determinations of the
DOC and ITC***

The DOC's and ITC's affirmative determinations angered Canadian pork producers. They alleged that the two agencies had unfairly ruled against them by using unsubstantiated evidence. The perceived unfairness and lack of explicit reasoning dismayed Canadian producers because they were unable to challenge the affirmative determinations outside of the American trade process before 1989. Canadian producers argued that a binational institution was necessary to change the administration of American trade laws into a fairer, more transparent, and faster process of judicial review in order that they could challenge the costly CVDs that were levied against them.

***(1) Request for a Chapter 19 Binational Panel to Review the DOC's
Affirmative Determination***

The Canadian government responded to the affirmative CVD determinations in three ways. First, it requested an Article 1904 binational panel to review the DOC's affirmative determination on August 22, 1989. The Canadian government requested the panel on behalf of the Canadian Meat Council, the Canadian Pork Council, and the provincial governments of Quebec, Alberta, and Ontario. The Canadian parties objected to the DOC's determination on three grounds: (1) almost all of the programs found to be countervailable only conferred benefits to Canadian swine producers and not to Canadian producers of pork; (2) the benefits provided by seven of the 18 programs under investigation were not countervailable; and (3) the DOC's use of the 79.5 percent conversion factor was inappropriate.

The binational panel issued its decision on September 28, 1990.³⁹ It acknowledged that it was to apply the standard of review of Section 516A (b) (1) (B) of the Tariff Act of 1930 because it was reviewing an American agency's final determination. The standard of review required it to ensure that the determination was supported by substantial evidence. However, deference had to be accorded to the administrative agency during the process of review. The panel recognized that it was not permitted to reject the DOC's determination if it was supported by substantial evidence on the record. Furthermore, the burden of proof fell on the parties challenging the final determination. Nevertheless, the panel insisted that deference to the administrative agency was not "limitless." Panels, like domestic review courts, had to demand that the DOC respected the

³⁹ The panelists included: Joel Davidow - Chair (American), Mark R. Joelson (Canadian), A de Lotbinière Panet (Canadian), Margaret Pretis (American), Herbert C. Shelley (American).

intent that Congress had for the laws in question and reached a decision based on the record as a whole. The panel deemed that it had the authority to remand a determination if it lacked a well-reasoned, factual basis.⁴⁰

The panel responded to the first Canadian objection (i.e., that the subsidies did not confer benefits to pork producers) by affirming the DOC's determination. The panel agreed that the DOC had applied the concept of "upstream subsidies" in accordance with U.S. law and based its conclusion on record evidence. Consequently, the binational panel affirmed the DOC's determination that subsidies enjoyed by swine producers offered benefits to Canadian pork producers as well.

The binational panel noted that it was the first one that had to interpret a statute that had not previously been interpreted by U.S. courts. The panel reviewed the rules and principles that had been used in the United States to interpret statutes. It noted that when the wording of a statute was ambiguous, the relevant legislative history was to be considered. In addition, administrative agencies were to be accorded deference during the process of review. Furthermore, statements made in Congress were to be studied to uncover the congressional intent behind the law. Finally, unless there was a conflict between the two, American laws were to be interpreted so as not to derogate from international obligations.

American rules and traditions of statutory interpretation led the binational panel to conclude that the DOC's treatment of Section 771B was "supported by substantial evidence in the record and otherwise in accordance with law."⁴¹ The binational panel commended the DOC for applying the two characteristics of Section 771B of the Tariff Act of 1930.⁴² The Canadian parties argued that the demand for live swine was more dependent on the demand for further processed products such as ham, bacon, sausage, than on the demand for fresh, chilled, and frozen pork. However, the binational panel rejected this argument, noting that because swine had to be converted into fresh, chilled, and frozen pork before it could be processed further, the demand for swine was still dependent on the demand for pork.⁴³

⁴⁰ United States-Canada Binational Panel, *Memorandum Opinion and Order In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (September 28, 1990), 9-11.

⁴¹ United States-Canada Binational Panel, *Memorandum Opinion and Order In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (September 28, 1990), 34.

⁴² The two characteristics were: (1) demand for the primary product must depend substantially on the demand for the processed/secondary product; and (2) the processing stage of production must only add limited value to the primary product.

⁴³ United States-Canada Binational Panel, *Memorandum Opinion and Order In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (September 28, 1990), 25-26; Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 125.

The Canadians argued that the two characteristics of Section 771B did not apply because the processing stage of production added a value of 20 percent to the processed pork products. They insisted that the value of 20 percent did not fall within what Congress had meant when it included the phrase “limited value” in Section 771B. The Canadians argued that Congress had intended that the phrase “limited value” would apply to minor finishing operations, such as the freezing of produce. They argued that a value-added of 20 percent should not have been considered to be “limited,” and one that did not change the essential character of the swine.

The binational panel rejected the Canadian arguments by pointing to the legislative history of Section 771B. It illustrated that Congress intended the phrase “limited value” to be ambiguous so that the DOC could exercise discretion when applying the concept in a CVD investigation. Furthermore, the panel explained that the process of transforming swine into fresh, chilled, and frozen pork was mentioned as a situation to be covered by the amendment during the Senate debates. The binational panel also noted that the DOC was correct to insist that the pork producers had added the 20 percent value through a low-cost operation that did not change the product’s composition; removing the pork from the swine carcass did not change its essential character. Therefore, the binational panel concurred with the DOC that the second characteristic of Section 771B applied to the case at hand. Consequently, the binational panel upheld the DOC’s determination that the subsidies conferred on live swine producers also benefited the producers of fresh, chilled, and frozen pork.⁴⁴

The binational panel examined only five out of the seven programs cited by the Canadians when responding to their second complaint, because the DOC remanded two of the seven programs on its own prior to the panel’s decision. Of the five remaining programs cited by the Canadians, the binational panel upheld the DOC’s finding of subsidy for two, and remanded the DOC’s finding of subsidy for the other three. The DOC’s findings of *de jure* specificity for the Feed Freight Assistance Program,⁴⁵ and of *de facto* specificity for the Alberta Department of Economic Development and Trade Act, were affirmed by the panel.⁴⁶ In both cases, the DOC had been forced to rely on best-information-available (BIA) to make its subsidy determination. The binational panel

⁴⁴ United States-Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce’s Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 27-33.

⁴⁵ United States-Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce’s Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 59-60.

⁴⁶ United States-Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce’s Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 74.

affirmed the information as justifiable and substantial evidence, and therefore accepted the determinations of specificity and subsidy.

However, the binational panel remanded the DOC's findings for the Tripartite Benefits Programs under the Agricultural Stabilization Act, the Quebec Farm Income Stabilization Insurance Program (FISI), and the Crow Benefit Offset Program (CBOP). The binational panel objected to the DOC's application of the three-pronged specificity test to the Tripartite Benefits Program,⁴⁷ and the FISI.⁴⁸ In both cases, the binational panel noted that the DOC had failed to provide adequate reasoning for its decision that the three prongs of the specificity test were met. Instead, the DOC simply identified the three-pronged specificity test to be used, stated the facts with respect to the subsidies granted, and concluded that there was *de facto* specificity. Concrete supporting evidence had not been given.

With respect to the CBOP, the binational panel rejected the DOC's use of the BIA. Instead of relying on information provided by the Alberta government, the DOC chose to rely on a short caption and a picture in a brochure entitled "Agriculture in Alberta." American trade remedy laws authorized the DOC to use BIA insofar as it was reasonable and justified in a particular circumstance. However, American trade remedy laws also provided that BIA could be rejected in an unreasonable situation. The binational panel argued that the DOC's use of BIA was inappropriate, unreasonable, and unjustifiable. As a result, the panel remanded the subsidy determination in light of the questionable information used by the Department. The binational panel instructed the DOC to reconsider its findings based on more appropriate evidence on the record.⁴⁹

The binational panel accepted the Canadian argument that the 79.5 percent conversion factor was inconsistent with American CVD laws and the GATT. Both American laws and the GATT required the DOC to allocate the benefits of a domestic subsidy over all of the commercial products to which the benefits were tied. Consequently, international and domestic laws prevented the DOC from allocating the benefits of a domestic subsidy to the primary product alone. The binational panel stated "[I]t is unreasonable and not in accordance with law for [the DOC] to allocate the entire subsidy

⁴⁷ United States-Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce's Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 51-54.

⁴⁸ United States-Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce's Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 80.

⁴⁹ United States-Canada Binational Panel, *Memorandum Opinion and Order In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (September 28, 1990), 69; Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 130-131.

conferred on hogs to pork products when other commercial products resulting from hogs are also benefiting from the subsidy.” The panel therefore required that if the DOC chose to “allocate the subsidy on a weight basis ... the subsidy should be allocated by weight over all of the commercial products resulting from the hog.”⁵⁰

***The DOC's Remand Determination:
December 7, 1990***

The DOC was instructed to provide a Remand Determination to the panel in 60 days, and issued a remand determination on December 7, 1990. It modified the final determination by using a conversion factor of 95 percent in response to the binational panel's order.⁵¹ However, even though it applied the new factor, the DOC argued that the higher percentage led to “an understatement of the benefits bestowed on pork products,” because it effectively treated non-pork products as being equal in value to pork products on a per pound basis. Nevertheless, the DOC applied the new factor to comply with the binational panel's demands.⁵²

The DOC upheld other parts of its final determination even though it complied with the binational panel's ruling regarding the benefit conversion factor. In the remand determination, the DOC reasserted that the Tripartite Program was *de facto* specific and constituted a countervailable subsidy. It argued that “hundreds” of separate agricultural products and industries in Canada were able to receive benefits. However, only nine recipients were found to have benefited from the program between 1986-1990, thereby making it *de facto* specific.⁵³ Similarly, the DOC also reaffirmed its conclusions that the CBOP represented a countervailable subsidy even though it used different information on which to base its conclusions.⁵⁴ Instead of relying solely on the pamphlet entitled “Agriculture in Alberta,” the DOC averaged statistics provided by the Alberta government with those provided in the pamphlet to reach its estimate of subsidy. Finally, the DOC

⁵⁰ Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 39-40.

⁵¹ The DOC had used a conversion factor of 79.5% in its final determination.

⁵² United States Department of Commerce, *Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada* (Washington: December 7, 1990), 3.

⁵³ United States Department of Commerce, *Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada* (Washington: December 7, 1990), 11.

⁵⁴ United States Department of Commerce, *Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada* (Washington: December 7, 1990), 15.

upheld its subsidy determination of the FISI based on the same information it used in the final determination.⁵⁵

***The Binational Panel's Opinion of the Remand Determination of the DOC:
March 8, 1991***

The binational panel issued a response to three aspects of the DOC's remand determination on March 8, 1991. First, the binational panel reviewed the DOC's finding that payments under the Agricultural Stabilization Act were specific and limited to a group of enterprises or industries. The binational panel upheld the DOC's remand determination on this issue. It concluded that the DOC had supplied sufficient facts and legal reasoning to justify its finding of *de facto* specificity. The panel noted that it was not unreasonable for the DOC to conclude that a program, which benefited only nine out of 100 or more producers over a four-year period, was a *de facto* specific subsidy. Furthermore, the binational panel felt the program was countervailable under American law because it was predominately designed for the Canadian hog and cattle industries.⁵⁶

Second, the binational panel reviewed the methods by which the DOC recalculated the benefits offered by the CBOP. The DOC averaged two figures (10 percent and 15 percent) to calculate the benefits given by the CBOP. As it had during the original hearing, the binational panel remanded the DOC for relying on the information from the Alberta government and a pamphlet entitled "Agriculture in Alberta." Even though the government of Alberta had supplied the DOC with other estimated percentages of the benefits offered by the CBOP (5.48 percent, 11.4 percent, 10 percent), the DOC refused to consider the entire body of evidence on the record, and argued that it had the ability to chose the information it would use. Therefore, the binational panel ruled that the DOC "failed to base its determination on substantial evidence on the record." Accordingly, the binational panel remanded the DOC's re-determination for further reconsideration based on the evidence on the record."⁵⁷

⁵⁵ United States Department of Commerce, *Remand Determination of Final Countervailing Duty Determination on Fresh, Chilled and Frozen Pork from Canada* (Washington: December 7, 1990), 18.

⁵⁶ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Fresh, Chilled, and Frozen Pork from Canada. Memorandum Opinion and Order Regarding Commerce's Determination on Remand* (Washington: December 7, 1990), 12.

⁵⁷ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Fresh, Chilled, and Frozen Pork from Canada. Memorandum Opinion and Order Regarding Commerce's Determination on Remand* (Washington: December 7, 1990), 18.

Third, the binational panel examined the benefits given to hog and pork producers by the FISII. In both the final and remand determinations, the DOC concluded that the FISII was a *de facto* subsidy because it only offered benefits to a selected group of agricultural producers. The binational panel remanded the DOC's conclusions for a second time because it "had done little more than to reiterate its earlier statements." The binational panel found that the evidence on the record was insufficient to support a decision that a number of recipients of FISII was small enough to be considered a *de facto* subsidy.⁵⁸

(2) Canadian Request for a Dispute Settlement Panel under the GATT

The second way that the Canadian government responded to the affirmative determinations of the ITC and DOC was to take them before the GATT. On September 19, 1989, the Government of Canada requested consultations under Article XXIII:I to review the legitimacy of the American CVDs on fresh, chilled, and frozen pork. Consultations between Canada and the United States were held on October 11, 1989 but failed to produce an amicable settlement. Correspondingly, a GATT panel was established on December 4, 1989.

The GATT panel issued a decision on August 3, 1990. It ruled that the sole issue in dispute was whether the United States acted consistently with Article VI:3 of the GATT.⁵⁹ The panel concluded that the DOC was not able to automatically levy a CVD on Canadian pork under Article VI:3 of the GATT, because it determined that the two characteristics of Section 771B of the Tariff Act of 1930 had been met. However, the GATT panel felt that it should not recommend that the CVDs be revoked and/or reimbursed immediately. Instead, the panel:

... decided to recommend that the CONTRACTING PARTIES give the United States the option of either reimbursing the amount of the countervailing duties designed to offset the subsidies granted to producers of swine or making a subsidy determination which meets the requirements of Article VI:3 and reimbursing the duties to the extent that they exceed the amount equal to the subsidy so determined to have been granted to the production of pork.⁶⁰

⁵⁸ United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, *In the Matter of Fresh, Chilled, and Frozen Pork from Canada. Memorandum Opinion and Order Regarding Commerce's Determination on Remand* (Washington: December 7, 1990), 19.

⁵⁹ Article VI:3 of the GATT requires that CVDs may not be levied in excess of the amount of benefit offered directly or indirectly by a subsidy.

⁶⁰ "Countervailing Duties on Fresh, Chilled, and Frozen Pork from Canada," *Basic Instruments and Selected Documents 38th Supplement* (Geneva: The Contracting Parties to the General Agreement on Tariffs and Trade, 1992), 4.9-4.11.

Canada asked the GATT Panel to recommend that the United States withdraw Section 771B of the Tariff Act of 1930 because of its seeming inconsistency with Article VI of the GATT and the 1979 Subsidies Code. However, the panel denied the request because it felt that the request was outside of its mandate. The panel noted that its mandate was simply to examine the complaint regarding the CVDs that were levied on pork imports from Canada. The panel's mandate did not involve an assessment of the compatibility of Section 771B with American obligations under the GATT. Accordingly, the GATT panel argued that it was limited to making recommendations that were solely confined to the pork case.⁶¹

The Government of the United States reluctantly accepted the decision of the GATT panel on July 11, 1991. While the GATT panel did rule that the CVDs were outside the bounds of Article VI:3, it did not offer relief to Canadian pork producers. It did not indicate that CVDs should be removed from Canadian fresh, chilled, and frozen pork exports. Furthermore, it did not require that the CVDs be repaid to Canadian producers and exporters. Therefore, it merely upheld the status quo. A binding decision was not forced on either party to ensure that the spirit of the GATT was preserved and promoted.

(3) Canadian Request for a Chapter 19 Binational Panel to Review the ITC's Affirmative Injury Determination

The third way that the Canadian government dealt with the CVD determinations was to request that an Article 1904 binational panel review the ITC's affirmative injury determination. On behalf of Moose Jaw Packers, the Canadian Pork Council, the Canadian Meat Council, and the governments of Alberta and Quebec, the Government of Canada issued its request on October 13, 1989.

The Canadian parties highlighted four aspects of the ITC's final determination as unlawful and not supported by substantial evidence on the administrative record.⁶² The binational panel set out three specific issues that it deemed were central to the case when responding to the four arguments. All three issues pertained to the ITC's use of substantial evidence during the final injury determination. They included:

⁶¹ "Countervailing Duties on Fresh, Chilled, and Frozen Pork from Canada," *Basic Instruments and Selected Documents 38th Supplement* (Geneva: The Contracting Parties to the General Agreement on Tariffs and Trade, 1992), 4.12.

⁶² Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 3-4.

- (1) whether the ITC's determination that the Canadian subsidies increase Canadian pork production and exports is supported by substantial evidence on the Record;
- (2) whether the ITC's determination that the U.S. domestic pork industry is threatened with material injury by reason of imports from Canada is supported by substantial evidence on the Record; and
- (3) whether the ITC's determination that the U.S. domestic pork industry was vulnerable to the threat of increased pork imports from Canada is supported by substantial evidence on the Record.⁶³

The binational panel issued its decision on August 24, 1990.⁶⁴ The panel affirmed its obligation to apply the standard of review that the CIT or Court of Appeals for the Federal Circuit would have used during the process of domestic judicial review. It recognized that the basis of the American standard of review was the substantial evidence test. The test required that determinations be made on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Furthermore, deference had to be afforded to the administrative agency. The panel noted that when reviewing the ITC's affirmative determination, it was unable to substitute its judgment for that of the agency, or to reweigh the agency's evidence on the record. Instead, the panel was to assess the evidence to establish whether there was substantial support for the ITC's final determination. The binational panel discussed the ITC's obligations during an investigation of threat of material injury. The Senate Finance Committee had stated that an ITC determination must be "based on evidence showing that the likelihood [of injury] is real and imminent and not on mere supposition, speculation, or conjecture."⁶⁵ In *Alberta Gas Chemicals v. United States* (1981), the CIT ruled that if the record showed "simply a mere possibility that injury might occur at some remote future time, then such showing compels the conclusion that the record lacks substantial evidence of a threat of injury."⁶⁶ The panel thereby concluded that the American standard of review permitted it to remand the ITC's final determination if it was not supported by substantial evidence. Similarly, the panel was able to remand the ITC if the agency did not explain why it reached an affirmative injury determination.⁶⁷

⁶³ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 4.

⁶⁴ The panelists included: S.V. Potter - Chair (Canadian), K.F. Patterson (American), T.M. Schaumberg (American), E.D.D. Tavender (Canadian), J. Whalley (Canadian).

⁶⁵ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 8.

⁶⁶ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 8.

⁶⁷ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 8.

Drawing from its status in international law, the binational panel rejected the ITC's evidence as insufficient and unconvincing. The panel did not believe that the evidence clearly demonstrated that an American industry was faced with a real and imminent threat of material injury. For example, the binational panel rejected the statistics used to substantiate the ITC's claim that the Canadian subsidies would lead to an increase in exports to the United States. The ITC alleged that Canadian exports of pork had increased by 600 million pounds between 1987-1988. However, the binational panel noted that Canadian pork exports increased by only 150 million pounds in 1987-1988 because Agriculture Canada and Statistics Canada changed the methods of counting and reporting pork production.⁶⁸ Similarly, the binational panel rejected the ITC's assertion that exports to the United States would increase because Canadian exports to Japan had begun to decrease following the resolution of the Taiwanese problem. The binational panel explained that, in all but one month of the ITC's investigation, Canadian exports to Japan had continued to increase after the resolution of the Taiwan problem, and was displeased that the ITC had based its conclusions on that one month.

The binational panel maintained that it possessed the authority to remand the ITC's determination when substantial evidence was not offered to support a finding of threat of material injury. The panel argued that its authority stemmed from American case law and Article 1904(8) of the FTA. Under domestic law, the CIT had deemed a remand to be appropriate "when the Court is in substantial doubt regarding whether the agency would change its ultimate finding if a mistake of fact that figured in its determination were removed," in *Kurzon v. United States Postal Service* (1976).⁶⁹ The binational panel cited another binational panel in the red raspberries dispute to confirm its authority under international law. In *Red Raspberries* (1990), the panel remanded a final AD determination because the DOC failed to provide an adequate explanation of why it rejected certain evidence on the record as the basis for its determination. The red raspberries panel also remanded the DOC for a second time because the DOC's explanation was "legally deficient" and inconsistent with evidence on the record.⁷⁰ In light of its belief that it possessed the authority to remand the ITC's final injury determination, the binational panel held:

⁶⁸ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 20.

⁶⁹ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 12.

⁷⁰ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 10.

The Panel is of the view that the ITC's findings on the nature of Canadian subsidies, the likelihood of increased Canadian pork exports, the likelihood of an increase in market penetration ratios, price suppression, distribution channels, the imminence of threat of material injury due to the counter cyclical nature of the hog cycle and the vulnerability of the U.S. domestic industry are all coloured by the questionable finding of greatly increased Canadian pork production, and therefore, the Panel must remand the ITC's final determination for reconsideration.⁷¹

***The ITC's Remand Determination:
October 23, 1990***

The ITC issued a Remand Determination on October 23, 1990. The majority of commissioners confirmed their original determination, and found that a threat of material injury faced the American pork producing industry.⁷² The binational panel remanded the ITC's final affirmative injury determination because faulty statistics were used to support the claim that an American industry was faced with a real and imminent threat of material injury. The panel ordered the ITC to base its conclusions on more substantial and reasonable information. In the remand determination, the ITC argued that it had to reopen the administrative record to collect more accurate information about Canadian pork and comply with the binational panel's order. The ITC thereby issued a Notice in the *Federal Register* to announce its intention of reopening the record on September 19, 1990. The notice explained that the record would be reopened on three narrow aspects of the injury investigation:

- (1) Canadian production, imports, exports, and apparent consumption;
- (2) the production capacity and utilization of the Fletcher's Fine Foods pork packing plant in Red Deer, Alberta and of the Canadian pork packing plant as a whole; and
- (3) Japanese imports of pork from Taiwan and Canada.

The data sought will cover only the period of the Commission's original investigation. No new factual material may be submitted to the Commission other than that relating to [the three narrow aspects]. No new legal or economic arguments, other than those raised in the panel order, may be raised by the parties of the investigation.⁷³

⁷¹ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 16.

⁷² Only three ITC Commissioners (Brunsdale, Rohr, Newquist) participated in the remand determination. The remaining two that had participated in the final injury determination resigned prior to the ITC's remand determination investigation.

⁷³ ITC's Notice for reopening the administrative record as cited in Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada: Memorandum Opinion and Order Regarding ITC's Determination on Remand* (January 22, 1991), 10-11.

The ITC justified its authority to reopen the record by citing *Federal Communications Commission v. Pottsville Broadcasting Company* (1940). In *Pottsville*, the Supreme Court pointed out that administrative agencies differed substantively and procedurally from federal courts. While federal courts were not permitted to reopen the record, administrative agencies were. On behalf of the Court, Justice Frankfurter ruled that administrative agencies “should not be too narrowly constrained by technical rules as to the admissibility of proof ... and should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”⁷⁴ Therefore, the Court ruled that administrative agencies such as the ITC had the authority to reopen the administrative record to correct any defects and problems that were incurred during a remand investigation.

Commissioners Rohr and Newquist reaffirmed their findings of threat of injury after the record was reopened. The new evidence led them to believe that the increase in Canadian imports would be less than anticipated in 1989. However, they felt that the increase would still be substantial enough to contribute to a threat of material injury. The domestic industry would still be jeopardized during the imminent downturn of the hog cycle.⁷⁵ Commissioners Rohr and Newquist also echoed their initial conclusions that Canadian pork exports would steadily increase in the United States. Similarly, they predicted that Canada’s share of the American market would increase as well, because of the nature of Canadian subsidies, the resolution of the strike at Fletcher’s Fine Foods, the resolution of the Taiwan pork problem, and excess pork production in Canada. Consequently, the vulnerability of American producers would continue to rise.⁷⁶ Furthermore, they reasserted their belief that product shifting would be undertaken by Canadian hog producers to alleviate the stress that was caused by the American CVD. Product shifting would automatically increase the amount of pork produced in Canada and directed into the United States. Commissioner Newquist argued:

Based on ... the expectation that increased CVD rates will lead to product-shifting from swine exports to pork exports, in conjunction with the significant increase in pork imports from Canada in the first quarter of 1989, I find, in light of the current phase of the hog cycle portending

⁷⁴ *Pottsville* as cited in Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada: Memorandum Opinion and Order Regarding ITC’s Determination on Remand* (January 22, 1991), 12-13.

⁷⁵ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Remand*, (Washington: October 1990), 1, 6, 27.

⁷⁶ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Remand*, (Washington: October 1990), 31-32.

negative margins for [American] packers, that the threat of injury is real and imminent.⁷⁷

In contrast, Commissioner Brunsdale upheld her original finding that the ITC did not have enough demonstrable evidence on record to clearly prove that a real and imminent threat of material injury faced American pork producers. She also affirmed the binational panel's decision regarding the questionable and unsubstantial evidence used by the ITC to prove its findings in the final determination. She argued "[I]n my view, the meaning of the Panel decision is plain. I therefore hold to my original negative determination."⁷⁸

***Binational Panel's Opinion of the ITC's Remand Injury Determination:
January 22, 1991***

The Canadian Meat Council, Moose Jaw Packers, and the Government of Alberta challenged the ITC's remand determination on two grounds. First, they argued that the ITC's remand determination was inconsistent with the panel's decision. In addition, they insisted that the determination was not in accordance with law because the ITC violated its own notice about reopening of the record. Second, the Canadian parties maintained that the ITC did not provide enough substantial evidence to support the conclusions regarding the nature of Canadian subsidies, the likelihood of increased imports, product shifting, vulnerability of the domestic industry, price suppression, or other demonstrable adverse trends even though it reopened the record to do so.⁷⁹

In its January 22, 1991 decision, the binational panel remanded the ITC for not supporting its injury determination with substantial evidence. The binational panel considered three major issues to do so. The first issue dealt with the extent of the panel's authority in reviewing a determination on remand. The binational panel demonstrated that FTA-19 panels did not have the authority to do anything other than affirm or remand administrative agency determinations in appropriate circumstances. However, the binational panel felt that its role was to issue a "final decision" pursuant to Article 1904 (8). It insisted that:

Clear direction from the Panel is essential if the Panel is to answer the FTA's insistence on a "final decision" ... and its repeated calls for

⁷⁷ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Remand*, (Washington: October 1990), 42.

⁷⁸ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Remand*, (Washington: October 1990), 49.

⁷⁹ Binational Panel Review, *Memorandum Opinion and Order Regarding ITC's Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 4-5.

expedition in the settling of matters such as these ... and in light of the need for respect of Panel review as an institution brought by the FTA into the domestic laws of Canada and of the United States not as an indicative suggestion but as “binding” under Article 1904(9).⁸⁰

Therefore, the binational panel felt that it was to issue a decision that would not contemplate or permit successive remands. Its role was to address the ways that the DOC or ITC deviated from American trade laws and practice when ADD/CVDs were applied. In other words, the panel insisted that it was authorized by FTA-19 to change the trade regulatory processes of Canada and the United States. It was to make the North American trade remedy regime a fairer, more transparent, faster system for producers on both sides of the border.

Second, the binational panel responded to the Canadian claims that the ITC did not have the authority to reopen the record and violated legal principles by doing so. The ITC insisted that it reopened the administrative record to gather new information and to correct the statistical errors identified by the binational panel on September 28, 1990. It justified its ability to do so by citing the Supreme Court’s decision in *Pottsville*. The panel acknowledged that it had instructed the ITC to “reconsider the evidence on the Record.” However, the panel argued that its instructions required the ITC to examine the existing evidence on the record. The instructions did not require the ITC to reopen the record to adduce new substantial evidence to support its claims of injury.⁸¹

Furthermore, the binational panel argued that it was not satisfied that *Pottsville* completely applied to the case at hand in particular or to the FTA in general. Nevertheless, because the binational panel noted that the FTA was silent on the issue, it did not feel that it was required to consider or define the limits of the ITC’s authority to reopen an administrative record.⁸² However, the binational panel did find legal error with the new evidence that was considered by the ITC in the remand determination. In particular, the ITC had considered new evidence that was not enumerated in the remand record of the *Federal Register*. For example, the ITC cited statistics regarding livestock and meat between 1984-88. The binational panel noted that those statistics were not part of the

⁸⁰ Binational Panel Review, *Memorandum Opinion and Order Regarding ITC’s Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 7.

⁸¹ Binational Panel Review, *Memorandum Opinion and Order Regarding ITC’s Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 16-17.

⁸² The binational panel noted that the only way that the FTA might have indirectly considered the issue was by setting out strict time limits to govern the dispute settlement process. The strict guidelines required that a line be drawn to limit the new evidence and issues considered by the parties and binational panels.

original record and were not directly responsive to the three narrow areas cited by the ITC in the pork case. However, the ITC relied on the statistics in the remand determination to conclude that Canadian imports of swine and pork steadily rose each year between the late 1970s and 1989.⁸³

By failing to follow its own notice about the administrative record, the ITC removed the fundamental principles of fair play and due process from its remand investigation. Both of those principles had been well established and incorporated into American legal traditions and Article 1911 of the FTA. Even if the record was reopened and new information developed, the principles of fair play and due process required that the participants be afforded notice and an opportunity for a hearing on those matters. This opportunity had not been given to the Canadian parties by the ITC. Consequently, “the ITC violated both of these principles in its remand proceedings by not adhering to the terms of its own Notice.”⁸⁴

The third issue that the panel considered was the ITC’s concept of product shifting. The ITC concluded that the domestic industry was imminently threatened with material injury in the remand determination. Commissioners Rohr and Newquist made extremely bold predictions about the likelihood of product shifting in Canada. Commissioner Newquist went so far as to substitute his own opinion after he found the U.S. Department of Agriculture’s prediction of decreasing pork imports to be unpersuasive. He stated “[D]ue to the impending increase in the duty of hogs ... I believe there is an imminent likelihood of a significant shift from the export of live swine, to the export of pork ... The potential magnitude of such a shift ... is substantial.”⁸⁵ The binational panel did not accept the ITC’s premises that Canadian exports of fresh, chilled, and frozen pork would absolutely increase in the American market. In so doing, it pointed to the fact that there was an administrative time lag of about three years before CVDs were imposed in response to increased subsidies. In the case of the CVDs imposed on Canadian live swine, the panel noted that the CVD rates would have actually declined during 1991-1993, because they were based on the review of the years prior to 1989. Thus, the earliest that product shifting would have been likely to occur as a result of the higher CVDs was in 1992. Based on the

83 Binational Panel Review, *Memorandum Opinion and Order Regarding ITC’s Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 17-18.

84 Binational Panel Review, *Memorandum Opinion and Order Regarding ITC’s Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 20-21.

85 United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Remand* (Washington: October 1990), 31-32, 42.

remoteness of the threat, the panel could not accept the ITC's theory that a significant shift from swine to pork was imminent.⁸⁶

***The ITC's View of the Second Remand:
February 12, 1991***

The ITC rendered a View on Second Remand on February 12, 1991. The second remand unanimously confirmed the binational panel's finding that the American pork industry was not threatened with material injury, and reduced the CVD from CDN \$0.08/kg to \$0.03/kg.⁸⁷ Even though the majority of commissioners did not agree with the panel's findings, the ITC acknowledged the authority of the binational panel and its ability to render binding decisions. They stated "[W]e have no choice but to determine on remand that the domestic industry is not threatened with material injury," as panel decisions are legally binding.⁸⁸ In so doing, the ITC affirmed the effective and binding nature of the binational panels, in that it allowed itself to be changed by the institutionalized panels of FTA-19.

***The American Response to the Binational Panel's Ruling on the ITC's
Injury Determination***

United States Trade Representative (USTR) Carla Hills requested that an ECC review the binational panel's decision regarding the ITC's determination on remand on March 29, 1991. Hills' actions were supported by the American government, the NPPC, and the ITC. On behalf of the American parties, Hills justified her request by advocating that the binational panel, "seriously departed from a fundamental rule of procedure or manifestly exceeded its powers, authority, and jurisdiction." Specifically, she alleged that:

- (1) the panel created a due process principle independent of U.S. Law;
- (2) the panel improperly considered non-record evidence;
- (3) the panel improperly applied a procedural rule of finality;
- (4) the panel effectively applied a "*de novo* standard of evidentiary review" instead of the correct standard of "substantial evidence on the record"; and

⁸⁶ Binational Panel Review, *Memorandum Opinion and Order Regarding ITC's Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 27-28; Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 145.

⁸⁷ Michael A. Meyer, Gary N. Horlick, "U.S. Trade Developments," *Canada-U.S. Trade*, Vol. 4, No. 4 (May, 1991), 31.

⁸⁸ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Second Remand* (Washington: February, 1991), 3.

(5) the panel reweighed evidence in a manner contrary to the U.S. Law by requiring the International Trade Commission find price underselling in order to find a likelihood of negative impact on the U.S. pork prices.⁸⁹

The Canadian government, along with Canada Packers, Moose Jaw Packers, and the Government of Alberta, objected to the use of the ECC. They argued that the American allegations failed to satisfy the standard for an extraordinary challenge under Article 1904 (13) of the FTA. Even if the panel had violated parts of American law or practice, the Canadians insisted that its decision was not materially affected by such errors. As a result, there was no threat to the integrity of the binational review process as a whole. In addition, the Canadians argued that if the panel applied American law, there was no basis for an extraordinary challenge, because it was outside the jurisdiction of the ECC to substitute its judgment for that of a panel on matters of American or Canadian trade law. The Canadian brief demonstrated that binational panels and the strict time limits were designed to eliminate political pressures and bring some timeliness and predictability to the North American trade remedy regime. Invoking an ECC in a case where it was unwarranted would jeopardize such changes. Finally, the Canadians argued that it was not the actions of the binational panel which threatened the integrity of the process. Instead, the integrity of the process was threatened by the politically-motivated resort to the ECC by American parties who were unhappy with the panel's decision.⁹⁰ Canadian Prime Minister Brian Mulroney exclaimed "[T]his was an abuse of the process by the Americans, and that is the message I conveyed to the President of the United States."⁹¹

*The Decision of the Extraordinary Challenge Committee:
June 14, 1991*

The ECC was made up of Arlin M. Adams (American), Willard Z. Estey (Canadian), and Gregory T. Evans (Canadian), and rendered its unanimous decision on June 14, 1991. It began by reviewing the function of an extraordinary challenge committee. In essence, the ECC summarized that its function was to "determine whether a panel or panel member violated the three-prong standard of the extraordinary challenge

⁸⁹ United States-Canada Article 1904(13) Extraordinary Challenge Committee, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. - Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 14.

⁹⁰ Barry R. Campbell, "Dispute Resolution Mechanisms in a North American Free Trade Agreement- Repercussions from the first extraordinary challenge under the Canada-United States Free Trade Agreement," (Toronto: Tory Tory DesLauriers and Binnington, 1992), 3-4.

⁹¹ The Right Honourable Brian Mulroney, *House of Commons Debates*, April 11, 1991, 19331.

procedure.” In other words, the panel was only to comment on whether: (1) a panel or panel member was guilty of gross misconduct, bias, a serious conflict of interest, or a violation of the rules of conduct; (2) such action “materially affected the panel’s decision”; and (3) such action “materially threatened the integrity of the binational panel review process.” Therefore, the ECC held that its role was not to conduct a traditional appellate review of the merits of the panel’s decision. Because an ECC was not authorized to review the record evidence that formed the basis of the panel’s decision. Instead, “an extraordinary challenge committee was only to review binational panels decisions in exceptional circumstances. Only upon evidence of egregious error that achieved the threshold requirements set forth in FTA Article 1904 (13) may an extraordinary challenge be maintained.”⁹²

Upon reviewing the binational panel process, the ECC concluded “[T]he [American] allegations do not meet the threshold for an extraordinary challenge that is set forth in Article 1904(13).”⁹³ The ECC rejected the first allegation by pointing to passages in the binational panel’s decision that clearly indicated that it had been based on principles of due process established in American jurisprudence.⁹⁴ The second allegation was dismissed because the ECC found that the binational panel’s decision had been primarily based on evidence on the record. Nonrecord evidence had simply played a supporting role. The panel’s use of nonrecord evidence did not threaten the integrity of the panel’s decision.⁹⁵ The third allegation was flatly rejected because the ECC affirmed the binational panel’s ability to limit the ITC’s ability to reopen the record in order to comply with the strict timelines of the FTA.⁹⁶ The ECC rejected the fourth American allegation that the binational panel had applied a new standard of review outside of its jurisdiction. The ECC highlighted examples where the binational panel had conscientiously applied the correct standard of review throughout the decision.⁹⁷ Finally, the ECC rejected the fifth allegation on the basis that the binational panel’s statement which said that the absence of

⁹² Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 13-14.

⁹³ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 3.

⁹⁴ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 15-17.

⁹⁵ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 17-18.
The ECC did however caution binational panels from using nonrecord evidence in the future.

⁹⁶ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 18-20.

⁹⁷ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 20-22.

underselling was “troubling” had not amounted to an assertion that a finding of underselling was required. It therefore had not exceeded its powers by requiring a finding of underselling to support the ITC’s finding of price suppression.⁹⁸

Therefore, the ECC did not agree with the Carla Hills’ assertion that the binational panel had acted inappropriately and/or threatened the integrity of the panel review process. Because it did not accept any of the American allegations, the ECC dismissed the request for an extraordinary challenge and affirmed the decision of the binational panel of January 22, 1991. Consequently, the ECC contributed to the changes that FTA-19 was able to make to the American trade regulatory process. It upheld the binding decisions of the panel that had been convened to assess the compatibility of the ITC’s injury determination with American trade remedy laws.

Aftermath of the 1989 Dispute over Fresh, Chilled, and Frozen Pork from Canada

The aftermath of the pork dispute illustrated that the FTA required the respect and commitment of both Parties if it was to operate as intended. Once the American government respected and upheld the rulings of the binational panels, both countries were placed on a more level trading ground. USTR Carla Hills illustrated her government’s acceptance of the ECC’s decision by commenting “[W]e used the rules that were in place, we got a decision, and we will live with that.”⁹⁹

The aftermath of the extraordinary challenge process also represented a victory for Canadian pork processors and exporters. Canadian pork producers had paid \$25 million in CVDs during the investigation. The panel decisions revoked the duties, and the CVDs were refunded to Canadian exporters. Larry Campbell, Secretary of the Canadian Meat Council, maintained that Canadian pork producers were extremely satisfied with the outcome of the two binational panel review processes. He stated:

The satisfying aspect of the victory was that the provisions of the Canada-U.S. Free Trade Agreement (CUSTA) worked as we expected they should. In addition, the appeal process took less time going the route of the CUSTA and the Extraordinary Challenge than the earlier 1984 case did when the appeal went to the U.S. Court of International Trade in New York City. All in all, we were satisfied with the way the appeals functioned under the

⁹⁸ Extraordinary Challenge Committee, *Memorandum Opinion and Order Regarding Binational Panel Remand Decision II* (June 14, 1991), 22-23.

The five American allegations and the ECC’s treatment of them are summarized in Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 149-151.

⁹⁹ Keri Puthon, Randy Schwartz, “Canada Brings Home the Bacon in Pork Dispute,” *Canada-U.S. Trade*, Vol. 4, No. 6 (July/August, 1991), 47-48.

CUSTA and that common sense, not political expediency, prevailed once it got to the level of the Extraordinary Challenge.¹⁰⁰

Analysis

The dispute over fresh, chilled and frozen pork, even moreso than the softwood lumber case, demonstrates that character changes occurred in the U.S. trade remedy regime when other political and socio-economic factors lessened in significance. As Campbell's statement clearly indicates, the presence of binational panels allowed changes to occur in the process of judicial review to make it fairer, more transparent, and faster than the domestic system which Canadian producers had to use before 1989. Indeed, the presence of the panels in the pork dispute was able to produce greater change in the character of the U.S. system because panel decisions were not superseded by political negotiations as occurred in the softwood lumber dispute. However, notwithstanding the changes that were made to the fairness, transparency, and speed of the process of review, the pork case confirms the hypothesis' contention that economic protectionism, hegemonic relationships, and concerns with state sovereignty remained a part of the U.S. trade regulatory process and inhibited the process of change as a result.

(A) Evidence of Change - Observations of the Independent Variable

(1) Fairness

Chapter Two noted that fairness would be conceptualized in terms of the unanimity of the panel decisions. Because one of the key objectives of the negotiators of FTA-19 was to provide a more equitable, level playing field which benefited both Canadians and Americans, the fairness of the panel system should be based on the degree to which Canadian and American panelists acted cohesively and put their nationalities aside to generate a decision about the use of AD/CVD laws.

The pork case confirms that fairness was achieved by all of the panels and the ECC. Each and every panel issued a unanimous decision, whether it was an initial or remand opinion. Similarly, the ECC issued a unanimous decision, and united the Canadian and American members. Therefore, the FTA-19 panels gave Canadian producers more confidence in the post-FTA process of judicial review. Consequently, a measure of

¹⁰⁰ Letter written by L.M. Campbell, Secretary of the Canadian Meat Council to Ann E. Penner, October 21, 1991.

fairness was injected into the U.S. trade regime because members of the two countries (and not just U.S. judges on the CIT) acted together to affect how CVDs were levied against Canadian producers.

(2) *Transparency*

In Chapter Two, a transparent legal system was defined as an open, accessible system in which legal decisions were well-explained and based on sound evidence. Chapter Two stated that transparency would be measured in terms of how detailed panel decisions were, the standards of review that were used, and how administrative agencies clarified their determinations on remand and provided more evidence for their conclusions.

All of the panels during the pork dispute issued very detailed, lengthy decisions that fully outlined the history of the dispute, the agency's decision, and the panel's logic and methodology. Both panels issued initial decisions of more than 125 pages and remand opinions of more than 50 pages. By contrast, the CIT's (1987) decision was a very brief eight pages, and gave a very rudimentary overview of the case and the Court's logic. Similarly, the panels explained the nature of the American standard of review and how they felt that it was to be applied. For example, the panel that reviewed the DOC gave a brief summary of the standard, and acknowledged that deference had to be accorded to administrative agencies. However, it also recognized that substantial evidence was a central part of the standard of review and had to be demanded of administrative agencies in the process of review. The panel that reviewed the ITC also went into great detail about how the standard of review was to be applied to injury determinations in order that administrative agencies were expected to explain precisely how they reached their conclusions.¹⁰¹ Conversely, the CIT only referred to the U.S. standard of review in a very indirect manner.

One of the major themes that ran throughout all of the panels' decisions during the pork dispute was the need for substantial evidence. Repeatedly throughout each decision, the panels actively employed the U.S. standard of review and remanded the DOC and ITC for not providing enough evidence to warrant affirmative subsidy and injury findings. For example, the panel reprimanded the DOC for not supporting its conclusions that a number of Canadian programs were countervailable subsidies in the 1989 determination. When the DOC applied the specificity test to the 18 programs under question, it simply concluded that there was either *de jure* or *de facto* specificity because the number of beneficiaries "clearly

¹⁰¹ William Davey, *Pine and Swine - Canada-U.S. Trade Dispute Settlement: The FTA Experience and NAFTA Prospects* (Ottawa: Center for Trade Policy and Law, 1996), 98.

indicated” a preferential exercise of governmental discretion. However, no reasons were offered for the conclusions about the 18 programs. The DOC found that while any agricultural product could be covered by the Tripartite Programs “only nine out of an innumerable number of agricultural commodities were incorporated under such agreements.” Furthermore, the DOC illustrated that “not all producers who requested tripartite agreements for their commodities obtained such agreements.”¹⁰² In other words, the DOC insisted that Canadian pork producers were a select group that enjoyed governmental favour and subsidies. Nevertheless, the DOC did not examine why only nine commodities had been included in the programs. The DOC simply presented its findings as though the number of beneficiaries made the practice of governmental exercise of discretion self-evident.¹⁰³

The DOC’s failure to provide substantial evidence was sharply remanded by the panel. Specifically, the panel remanded the DOC’s finding of subsidies for the Tripartite Benefits Programs under a number of federal and provincial acts, and stipulated that the DOC must “enunciate clear standards and explanations as to why a particular program is or is not being administered in a manner which will or will not make it *de facto* countervailable. [The DOC] has not done so here.”¹⁰⁴ Similarly, the panel argued that the DOC’s use of BIA about the CBOP was questionable, inappropriate, unreasonable, and unjustifiable. If the DOC upheld its conclusion that the CBOP was countervailable, it would have to rely on more substantial evidence in the remand determination. Therefore, the panel’s orders demonstrated that institutionalized FTA-19 panels would subject American trade laws to a more disciplined application of the U.S. standard of review’s substantial evidence test in order that CVD determinations would be made in a more transparent manner in the post-FTA regime. According to Boddez and Trebilcock:

The pork panel continued the trend toward procedural fairness, primarily through a strict application of the substantial evidence test. The [DOC] was forced to provide valid justification and supporting evidence for each and every determination it made if faced with a remand and, effectively, a reversal of its decision in every case where it failed to show a rational

¹⁰² United States Department of Commerce, “Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada,” *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30777-30778.

¹⁰³ Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 48.

¹⁰⁴ United States - Canada Binational Panel, *Memorandum Opinion and Order Regarding The Department of Commerce’s Determination on Remand in the Matter of Fresh, Chilled, and Frozen Pork from Canada* (March 8, 1991), 80.

connection between the methodology and reasons offered and the conclusions reached.¹⁰⁵

Interestingly, the DOC remanded some of its findings before the panel released its initial decision. In the DOC's CVD determination of 1989, it had found that seven of the 18 Canadian programs under investigation were countervailable. However, the DOC remanded its findings for two of the seven programs because they could not be substantiated by evidence on record. In this way, the very presence of an institutionalized panel allowed change to occur during the pork dispute because it encouraged the DOC to reconsider the transparency of its previous determinations. The DOC voluntarily withdrew two of its CVD orders because they were not in accordance with American trade remedy laws and the U.S. standard of review which required that agency decisions had to be based on substantial evidence on record, and would have been surely rejected by the panel if left in place.

As will be discussed more fully in the section on "state sovereignty," while the DOC complied with some of the panel's orders quickly (e.g., the use of the 95 percent conversion factor), it did not comply with all of the orders immediately. Instead, the DOC tried to re-assert its conclusions about the Tripartite Program, the CBOP, and the FISI by using the same information it had in the 1989 determination. It was not until after the panel issued its opinion of the remand determination that the DOC fully complied with the panel's orders for more transparency. Following the panel's second decision, the DOC completely revoked its affirmative findings and withdrew the CVDs on Canadian fresh, chilled, and frozen pork. Therefore, while it could be argued that a large part of the panel's original decision was ignored by the DOC because of its conclusions in the determination on remand, the fact remains clear that the presence of the panel encouraged change in the character of the U.S. trade regime by injecting a measure of transparency into it. The DOC finally recognized that its affirmative determinations could not be justified because of the lack of evidence to support them, and fully reversed them and refunded the CVDs. Furthermore, the fact that the DOC voluntarily remanded some of its own findings for lack of evidence underscores that it recognized that the panel demanded that administrative agencies act in a more transparent manner after 1989. Consequently, producers on both sides of the border could be more confident that administrative agencies would be required to issue clear, well-reasoned decisions that were based on substantial evidence by binational panels in the future.

¹⁰⁵ Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 136.

In a like manner, the panel which reviewed the ITC also used the U.S. standard of review actively, and demanded that substantial evidence and justified reasons be given for each conclusion about the presence or threat of material injury. For example, the panel conveyed its displeasure about the ITC's use of statistics to justify the probability that exports to the U.S. would increase because Canadian exports to Japan had begun to decrease following the resolution of the Taiwanese problem. For the panel, the ITC's use of the export statistics was "inappropriate, selective fact finding," where the ITC relied on "tidbits of information instead of on substantial evidence" as required by law.¹⁰⁶ Similarly, the panel vigorously remanded the ITC in its opinion of the ITC's remand determination because the Commission failed to offer clearer, substantiated evidence for its findings. Specifically, the panel remanded the ITC for breaching the fundamental legal principles of transparency, fair play, and due process when it re-opened the record. Even though the ITC had provided notice that it was going to re-open the record to collect new evidence, the majority of commissioners failed to follow their own notice requirements about the administrative record and considered evidence that was not published in the remand record. Moreover, the panel rejected the ITC's conclusions about product shifting because they were based on "mere speculation and fallacy." According to the panel's decision:

Without affirmative evidence on which to judge the contribution of imports to material imports, the Panel is left with an unsupported theory ... Similarly, the Panel is troubled by arguments which seek to show that Canada's share of the U.S. pork market, though at a non-injurious level at the time of the ITC's final determination, will grow ... This rests on no substantial evidentiary indication ... The product shifting hypothesis cannot buttress them ... and they stand as simple conjecture as to what might happen.¹⁰⁷

Commissioner Brunsdale, the dissenting member of the ITC, drew attention to the Commission's lack of substantial evidence in response to the panel's first remand. She argued that "[A] critical reading reveals that the panel decision in this case rests on the inability of the Commission to point to facts on the record that demonstrate a real and imminent danger of material injury to the domestic pork industry."¹⁰⁸

¹⁰⁶ Binational Panel Review, *In the Matter of Fresh, Chilled, or Frozen Pork from Canada. Memorandum Opinion and Remand Order* (August 24, 1990), 26.

¹⁰⁷ Binational Panel Review, *Memorandum Opinion and Order Regarding ITC's Determination on Remand. In the Matter of Fresh, Chilled, and Frozen Pork from Canada* (January 22, 1991), 36-37.

¹⁰⁸ Canadian Pork Council Release, "Canadian Hog Producers Urge Rejection of NPPC Complaint," March 12, 1991.

It is interesting to note that the ITC conceded that it had used faulty statistics, and moved for a voluntary remand on April 9, 1990. The panel denied the ITC's voluntary remand because it was filed too late in the binational panel process. Nevertheless, the ITC's motion signaled that some changes were occurring to the character of the U.S. trade regime after the FTA came into effect in 1989. Indeed, the voluntary remand indicates that members of the ITC appreciated that panels could change the U.S. trade regulatory process by demanding transparency and substantial evidence during the process of judicial review.

(3) *Speed*

One of the major objectives that the negotiators of Chapters 19 strove for was to speed up the process of judicial review so that North American producers would not have to unduly suffer from inappropriately levied AD/CVDs. Rigid timelines were placed in the Chapters 19 process to ensure that the process would progress faster than the domestic process of judicial review. The pork case clearly demonstrates that the presence of panels was able to change the character of the U.S. trade regime by making the process faster than what existed before 1989. The panel reviewing the DOC issued its initial decision 13 months after the Canadian government's request for a panel - two and a half months later than the FTA target. The two remand decisions were completed in another eight months, making the entire process of review 21 months in length. The panel that reviewed the ITC issued its initial decision within 10.5 months (and within the FTA timelines) after the request was made. The entire review of the ITC, including two remands and an ECC, was completed in 20 months.¹⁰⁹ Therefore, even though the panel which reviewed the DOC issued its decision outside of FTA guidelines, the process of review for the entire pork case was very timely. In comparison, the DOC's affirmative CVD determination was immediately appealed in June of 1985, and the CIT's initial decision was released on May 15, 1987, 23 months after the request was made. Remands would have followed and lengthened the entire process of review, had the ITC not reached an affirmative injury determination. Consequently, the character of the U.S. trade regime did change because it became a faster process of judicial review in the context of Chapters 19.

¹⁰⁹ William Davey, *Pine and Swine - Canada-U.S. Trade Dispute Settlement: The FTA Experience and NAFTA Prospects* (Ottawa: Center for Trade Policy and Law, 1996), 99.

(B) Evidence of the Impediments to Change - Observations of the Independent Variables

The pork case confirms the hypothesis about the process of change in North American trade after 1989. The presence of two binational panels that were created to review the affirmative determinations of the DOC and the ITC was able to encourage change to occur in certain parts of the American trade regulatory process. The panels encouraged a measure of fairness, transparency, and speed to develop in the CVD investigation. More importantly, the authority of the panels under FTA-19 compelled the DOC and ITC to reverse their affirmative determinations and to reduce the duties placed on Canadian pork products. However, the presence of the panels was not able to change the American trade regulatory process completely. Protectionist sentiments entered the pork dispute in spite of the presence of FTA-19. Powerful interest groups and policy-makers sought to curb the effects that FTA-19 had on the interpretation and application of AD/CVD laws in the United States.

(1) Economic Protectionism

Economic protectionism was defined in Chapter Two as the belief that domestic producers need to be insulated from competitive foreign imports. It was to be measured in terms of the arguments of interest groups and policy-makers during the dispute, the use of domestic trade remedy laws for protection, public or governmental denouncements of panel decisions, evidence of protectionism in agency determinations, and the speed and ease with which panel decisions were accepted.

The belief in economic protectionism was clearly evident in the U.S. pork industry during the 1980s. Bill Vaags, President of the Canadian Pork Council, insisted that "protectionism on the American side got thicker and thicker," between 1982 and 1987. Whereas Canadian pork producers enjoyed reasonably free trade with the U.S. throughout history, "we started to view trading with the Americans not as a free market any longer but actually on almost a day-to-day basis."¹¹⁰ U.S. producers attacked Canadian subsidies as countervailable, and argued that Canada's producer subsidy equivalents (PSEs) gave Canadian producers an unfair advantage. Even though they received PSEs themselves, U.S. pork producers appealed Canadian programs to the DOC and ITC in 1989. Canadian

¹¹⁰ Bill Vaags, Testimony to the Standing Committee on External Affairs and International Trade, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and International Trade* (November 24, 1987), 46:4.

producers, therefore, felt that they had no choice but to resort to FTA-19 to defend themselves against the CVD actions.

U.S. pork producers and members of Congress used domestic trade laws to protect themselves during the pork dispute as well. Changes were made to Sections 771A and 771B to re-define "upstream subsidies" in order that the DOC would virtually have to make an affirmative determination against foreign imports such as pork from Canada. Similarly, members of Congress and senators issued threats to the USTR while she considered whether to request a ECC to review the ITC. Acting on behalf of the protectionist pork lobby, the members of Congress used their statutory authority to threaten to withhold the approval of fast-track authority for the NAFTA negotiations.

Beliefs in economic protectionism were also evident in the determinations of the DOC and ITC. For example, it has been argued that the DOC "ferreted out dozens of foreign government programs and then ciphered out alleged benefits to the millionth of a percentage point," to reach desired conclusions to protect U.S. pork producers during CVD determinations, such as the 1989 inquiry into Canadian pork.¹¹¹ In 1989, the DOC noted that the analysis of Canadian programs would be "streamlined" because of the large number of programs offered to Canadian swine and pork producers. Moreover, the DOC streamlined the investigation because it felt that most of the remaining programs had already been dealt with by other CVD investigations. Therefore, it argued that the investigation would only examine the programs supporting swine and pork producers in Quebec, Ontario, Alberta, and Saskatchewan.¹¹² The DOC used the "streamlined" investigation to find that Canadian pork producers received a benefit of CDN \$0.027486/kg from the tripartite programs of the Agricultural Stabilization Act. Similarly, the DOC found that the Feed Freight Assistance Program provided a benefit of CDN \$0.000034/kg, the Canada/Quebec Subsidiary Agreement on Agri-Food Development provided a benefit of CDN \$0.000019/kg, and the Saskatchewan Livestock Investment Tax Credit Program provided a benefit of CDN \$0.000721/kg. The DOC calculated the net benefit of CDN \$0.08/kg by combining the small amounts of subsidies offered by the 18 programs. Subsequently, the DOC may have intentionally highlighted programs that it knew offered "countervailable subsidies." It may have totaled up the negligible benefits provided by each to increase the total net subsidy offered to Canadian swine and pork producers, thereby allowing it to increase the total CVD placed upon Canadian imports of those products, and protect U.S. producers from foreign imports.

¹¹¹ James Bovard, *The Fair Trade Fraud* (New York: St. Martin's Press, 1991), 172-173.

¹¹² United States Department of Commerce, "Final Affirmative Countervailing Duty Determination: Fresh, Chilled, and Frozen Pork from Canada," *Federal Register*, Vol. 54, No. 140 (Monday July 24, 1989), 30776.

Similarly, the DOC and ITC continued to rely on selective pieces of evidence to reassert their affirmative, protectionist determinations. The DOC chose to continue to use information supplied in a brief pamphlet about one of Alberta's subsidy programs because the pamphlet lent support the conclusion that the program was a countervailable subsidy. Such a conclusion allowed the DOC to sustain the protective CVDs that U.S. pork producers desired. The ITC also chose to use selective information to uphold its finding of threat of material injury. Moreover, the majority of the ITC overlooked U.S. administrative law by relying on information of which it had not notified interested parties when the record was re-opened during the remand determination.

Finally, the degree to which economic protectionism was entrenched into the U.S. trade regime could be a factor in why both the DOC and ITC required two remand determinations before they finally accepted the panel's orders. Even though FTA-19 provided that panel decisions were to be fully binding, the agencies tried to adhere to their traditional practices of shielding domestic producers until after the panels issued their second remand opinions.

(2) Hegemonic Relationships within and between Interest Groups, Policy-Makers, and Administrative Agencies of the Three Countries

Chapter Two noted that hegemonic relationships involve the power configurations and relationships within and between interest groups, policy-makers, and administrative agencies of the three countries. The variable was to be measured in terms of the connections that certain individuals had within the three domestic political systems, and in international affairs. In other words, the variable would be assessed by considering how much influence various actors had over the resolution of the dispute, and the Chapters 19 panel process. If certain individuals could influence the outcome of the dispute, it could be argued that the ability of institutionalized Chapters 19 panels to change the character of the U.S. trade regime was weakened because other actors were more formidable in process of judicial review.

The pork case illustrates that hegemonic relationships were somewhat influential factors in the resolution of the dispute. The NPPC was a powerful interest group in the U.S. during the dispute. More than 100 people were employed in its head office to contribute to the investigative process. The NPPC was extremely interested in retaining protection because it estimated that the CVD investigation involved \$5.0 billion in 1986, \$5.6 billion in 1987, and \$5.5 billion in 1988. Based on the money involved in the case, and the NPPC's wide constituency, it was able to wield power in domestic circles. For example, hegemonic relationships appeared during the panel process, when USTR Carla

Hills was pressured by the NPPC to request an ECC to review the panel's opinion of the ITC's injury determination. Political pressure played a major role in prompting Hills to request the ECC. The NPPC filed a petition with Hills urging the establishment of an extraordinary challenge on March 11, 1991. The NPPC also intensely lobbied Congress to protect their injured industry from the increase of Canadian imports in light of the DOC's and ITC's inability to do so. Between March 11 - March 29, 1991, Hills received a series of multiple signature letters from 90 members of Congress encouraging her to request an ECC. The letters from Congress were extremely significant to Hills, because they were sent when Congress was considering whether to extend fast track authority for the Uruguay Round and NAFTA negotiations. The implicit message of each of the letters was that support for fast track extension was dependent on a request for an ECC. Three Senate votes in favour of renewing fast track authority were promised to Hills in return for an ECC request. Carla Hills stated that she did not feel that an ECC was justified, warranted, or proper. Nevertheless, she succumbed to the political pressure used by the NPPC and Congress, and requested that an ECC be established to review the second binational panel's decision of January 22, 1991.¹¹³ The Canadian Pork Institute interpreted the ECC action as a "politically motivated test" for the entire FTA-19 process, given that the panels had ruled in Canada's favour much to the chagrin of U.S. agencies, policy-makers, and producers.¹¹⁴

(3) Concerns with State Sovereignty

As defined in Chapter Two, state sovereignty is the willingness of administrative agencies and governmental officials to allow domestic laws and practices be changed by international institutions. Chapter Two indicated that state sovereignty would be measured in terms of governmental statements about panel decisions, the extent to which panel decisions were accepted and acted upon, the number of remand determinations that administrative agencies required before complying with panel orders, and the number of times that a government resorted to appeal procedures to challenge panel decisions in the process of judicial review.

¹¹³ Gary N. Horlick, F. Amanda DeBusk, "The Functioning of FTA Dispute Resolution Panels," in Leonard Waverman (ed), *Negotiating and Implementing a North American Free Trade Agreement*, (Vancouver: The Fraser Institute, 1992), 19; Andreas Lowenfeld, "Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal Update," (Administrative Conference of the United States, April 1991), 18; Thomas Boddez, Michael Trebilcock, *Unfinished Business* (Toronto: C.D. Howe Institute, 1993), 147.

¹¹⁴ Interview with Martin Rice, Executive Director, Canadian Pork Institute, Ottawa, January 24, 1997.

As indicated in the section on transparency, the DOC and ITC did eventually accept the panels' orders, re-work their affirmative determinations, and revoke the CVDs on Canadian pork. However, both agencies did so very reluctantly and openly displayed their displeasure at being remanded by an international institution. For instance, the DOC did not agree with the panel that a 95 percent conversion factor should be used and argued that it led to an "understatement" of the benefits given to Canadian pork products. Members of the ITC also illustrated their discontent with having to comply with the panel's orders. In their view of the second remand, commissioners Rohr and Newquist accused the binational panel of greatly exceeding its scope of authority, and of issuing a "counterintuitive, counterfactual, and illogical, but legally binding conclusion," which illustrated a "woeful lack of knowledge about how the U.S. CVD law operates."¹¹⁵ They also criticized the binational panel for violating principles of the FTA, and the hallmarks of American law and administrative practice such as due process, fair play, and deference to the decision-making authority of an administrative agency.¹¹⁶ Furthermore, the commissioners accused the panel of rendering a decision that was intentionally biased in favour of the Canadians, in spite of the fact that the two American and three Canadian panelists acted cohesively and issued a unanimous decision each time they reviewed the ITC's determination.

The final indication that governmental officials and administrative agencies did not wish to surrender some of the authority to the binational panels was that both the DOC and ITC required two remands each before they reluctantly complied with the panels' orders. Furthermore, the USTR requested an ECC to review the panel's opinion of the ITC even though the grounds for an ECC (as set out in FTA-19) were non-existent in the panel process.

Conclusion

New-institutionalist theorists explain that rules bind policy-makers and members of society. Rules and institutions create the parameters within which individuals operate in the policy-making process. However, new-institutionalist theorists also suggest that rules can be changed in response to political, social, and economic developments. Indeed, the authority and legitimacy of rules is contingent upon the extent to which they reflect the traditions, interests, and expectations of dominant members of a society. The Canadian government argued that changes had to occur to the trade remedy laws of North American

¹¹⁵ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Second Remand* (Washington: February, 1991), 15.

¹¹⁶ United States International Trade Commission, *Fresh, Chilled, and Frozen Pork from Canada: Final Views on Second Remand* (Washington: February, 1991), 17-18.

to afford their producers with secure access to American markets. Politically motivated domestic trade remedy laws had lost their legitimacy in the eyes of the Canadian negotiators of the FTA. They insisted that binational panels and ECCs be instituted in FTA-19 to change the ways that trade remedy measures were interpreted and applied by domestic agencies on both sides of the border. However, American governmental officials were divided between the desire for a rule-based North American trade remedy regime, and a more traditional protectionist, unilateral, domestic approach. Officials in the executive branch eventually concurred with Canadian demands for a binding form of dispute settlement in the FTA. Congressional representatives, on the other hand, were preoccupied with the protectionist demands of their constituents. Members of Congress argued that the existing American trade remedy laws were effective, legitimate forms of protection for domestic producers and should not be changed.

Consequently, only small changes occurred to the character of the U.S. trade regulatory process after 1989. As the pork dispute illustrates, panels issued fair (unanimous), transparent decisions in a timely manner. However, the presence of FTA-19 was not able to completely remove political and socio-economic factors from the trade regulatory process. For example, the ITC and DOC were slow to adhere to all of the recommendations put forward by the two panels. Similarly, American pork producers lobbied governmental officials to resist the decisions of the binational panels. An ECC was convened because of the strength that those interest groups had in the American trade policy-making process. Therefore, power politics and protectionism that characterized the North American trade remedy regime before 1989 remained part of the process in spite of the rules and institutions of Chapters 19. As a result, the binational panels had to account for the traditions and practices that administrative agencies, interest groups, and policy-makers used on both sides of the border when ruling on the pork dispute. This meant that to be effective and gain legitimacy, their presence could only encourage incremental changes to the ways that AD/CVD laws were interpreted and applied.

CHAPTER SEVEN -
THE CORROSION-RESISTANT STEEL SHEET PRODUCTS DISPUTE
BETWEEN CANADA AND THE UNITED STATES

The third case that will be used to test the hypothesis about the changes that occurred to the character of the trade remedy regimes in North America is the corrosion-resistant steel sheet products dispute between Canada and the United States. It concluded the most recent round of the steel dispute that has raged between the two countries over the last two decades.

The dispute over corrosion-resistant steel sheet products was chosen because it demonstrates that beliefs in economic protectionism and the power of certain policy-makers and interest groups influenced the ways that trade remedy laws were interpreted and applied in Canada and the United States before 1989. More importantly, the certain corrosion-resistant steel sheet products dispute was chosen because it illustrates the power that institutionalized Chapters 19 binational panels gained in the trade remedy regime after the FTA came into effect. The dispute reveals how the Deputy Minister of Revenue Canada adhered to the orders of three binational panels that settled disputes under FTA-19. Similarly, the NAFTA panel that was convened to address the dispute over corrosion-resistant steel sheet products was able to remand the parts of the Deputy Minister's determination that were unsubstantiated and inconsistent with Canadian law and practice. Finally, the dispute was chosen because many of the determinations that were made by Revenue Canada and the Canadian International Trade Tribunal (CITT) about steel products were appealed not only to binational panels, but to Canadian review courts as well, thus allowing for comparisons of the two processes of judicial review.

Therefore, the dispute addresses the hypothesis because it demonstrates how the character of the Canadian trade regime became fairer, more transparent, and faster than the Canadian system of judicial review. However, the dispute also substantiates the hypothesis because the presence of Chapters 19 panels did not ensure that Canada's trade regulatory process was changed completely. Canadian and American interest groups have been calling for stronger domestic trade remedy laws to protect them from foreign competitors. Older traditions of protectionism have surfaced as some Canadians have argued that Chapters 19 have not been able to achieve their purposes and solve the problems that plagued North American trade since 1989. Consequently, the dispute links both schools of new-institutionalist theory to the evolution of trade remedy laws in North America. Institutions made a difference in the process of change as rational choice scholars alleged. However, in accordance with the structural-sociological school, older traditions

and practices were not erased completely nor quickly. Changes occurred slowly to ensure that dominant interest groups and policy-makers believed that their country's trade laws were compatible with developments in the international political economy, and upheld their country's sovereignty and independent decision-making ability.¹

The Canada - United States Steel Trade

The steel industry became a major component in Canada's economy after World War II. It accounted for 3.4 percent of Canada's total manufacturing output in 1994. More than \$8 billion in annual revenue was generated by the industry, allowing it to account for one percent of Canada's GDP. The industry employed 35,000 workers in 1994. The ability to export steel is extremely important to the health of Canada's economy in general, and to the steel industry in particular. Two-thirds of Canada's primary steel products are exported. Furthermore, two-thirds of primary steel products account for seven percent of Canada's export commodities. Indeed, the ability to export steel was the key factor that helped the steel industry recover from poor domestic sales and the recession of the early 1990s.²

Canada has been able to capture a noteworthy share of the American market since the 1970s. Canadian steel producers captured about 1 percent of the U.S. market in the early 1970s, and accounted for less than 10 percent of total steel imports into the United States. By 1984, Canadian steel producers had tripled their share of the American market to 3.23 percent. A greater number of exports entered the U.S. at a time when total import penetration peaked at 26.6 percent. The Canadian share of the American market increased to 6 percent in 1987 and accounted for 26 percent of all imports. Canada's share of the American market fluctuated during the early 1990s. It presently sits at three percent and accounts for 18 percent of total American steel imports.³ American producers have been able to increase their share of the Canadian market each year since the FTA came into effect. The American share of the Canadian market doubled in 1995 and reached a level of 18 percent.

¹ See Appendix J for a summary of the corrosion-resistant steel dispute.

² Statistics Canada, Industry Division, *Primary Metal Industries* (Ottawa: Minister of Industry, July 1995), 7-9; Tony van Alphen, "Province Steeled For U.S. Trade Blow," *Toronto Star* (January 24, 1993); Canadian Steel Producers Association, "Canadian Steel in Context: Steel in the Canadian Economy," (2-B1), January, 1996.

³ Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 21 September 1995), 9; Ian Jack, "Stelco chief calls for tighter trade regulations," *Ottawa Citizen* (February 23, 1996), B8.

The high degree of market penetration attests that Canada's steel exports to the United States are extremely high. Canada - U.S. steel trade was valued at \$5 billion in 1994. Total steel shipments from Canada to the United States totaled \$3.2 billion in 1994. Exports to the United States increased from 24 percent to 32 percent of total Canadian production between 1991 and 1992, and represented 90 percent of Canada's steel exports. In 1994, Canadian steel makers sent 4.2 million tonnes of product into the American market. The Canadian Steel Producers Association (CSPA)⁴ increased their shipments to the United States by 35 percent in 1992 even though a trade dispute was raging between the two countries.⁵ Exports of steel plates, sheets, and strips to the United States totaled \$605 million in 1990 and increased to \$1.35 billion in 1994. The value of those products ranged between 62 percent and 92 percent of Canada's total global steel exports.⁶ Canada has generally enjoyed a trade surplus with the United States since the 1980s. Canada's trade balance moved into a large surplus in high volume products such as primary steel, pipes, and tubes. Between 1992 and 1994, Canada enjoyed a surplus of over \$400 million in the bilateral steel trade. The surplus in the trade of other iron and steel products exceeded \$700 million in 1994.⁷

One of the major reasons for the high volume of trade between Canada and the United States is that the North American steel market has become increasingly integrated since the 1970s. Integration has been achieved by tariff reductions, joint ventures, and product sharing arrangements. For example, tariffs between the two countries have fallen by 70 percent since the FTA took effect and will be reduced to zero by 1998. Tariff reductions have encouraged the Canada-U.S. steel trade to increase by more than 50 percent since 1989. In addition, Canadian steel and steel-related companies have an ownership interest in 27 steel-related facilities in 14 states, while American steel producers have ownership in at least ten steel-related facilities in four Canadian provinces. Raw materials are purchased from common North American suppliers at world commodity prices. They are processed by steel mills that use the same technologies, and incur similar labour and energy costs. End products are distributed along the same transportation routes

⁴ The Canadian Steel Producers Association (CSPA) was formed in 1986. It works to enhance the long-term competitiveness of steel and the Canadian steel industry. It consists of 14 companies which melt and/or pour steel in Canada. The members of the CSPA collectively account for 95 percent of Canada's steel production and over 95 percent of employment in the industry.

⁵ "Steel Exports to U.S. Increase," *The Canadian Free Trader*, Vol. 6, No. 1 (January, 1993), 2.

⁶ Statistics Canada, "Domestic Exports by Summary Groupings and Country 1990-1994," *Exports: Merchandise Trade*, Cat. No. 65-202 (Ottawa: Minister of Industry, 1994), 115-116.

⁷ Marion G. Wrobel, "Canada-U.S. Steel Trade," *Current Issue Review* 88-2E (Ottawa: Library of Parliament Research Branch, 21 September 1995), 5.

to many of the same service centers. Steel products are often processed by firms across the border and then returned to end users in the originating country. Canadian and American steel mills use one another as sources of supply to even out production shortfall. North American mills also belong to the same trade associations such as the United Steel Workers of America.⁸

Overview of the History of the Steel Dispute between Canada and the United States

Changes in the global economy reduced the demand for steel during the 1970s and 1980s. World demand steadily declined after 1973-1974, as other products replaced the more costly, energy intensive steel goods. Despite the decline in demand, production of steel continued to increase, and whereas consumption peaked in 1973-1974, steel production and capacity did not peak until 1980-1981. The gap between supply and demand bloated the production capacities of many steel producers in the industrialized world. Canadian and American steel makers, for example, were required to restructure their operations to remain competitive with their domestic and foreign counterparts.⁹ Steel giants in the United States such as the Bethlehem Steel Corporation and the U.S. Steel Group responded to changes in global demand by either downsizing or closing many of their mills during the late 1970s and early 1980s. They also began to restructure their workplaces by concentrating on joint ventures, focusing on more profitable products such as coated and laminated steel, introducing new technologies, reshaping jobs, forcing wage concessions, and establishing new workplace rules.¹⁰

Canadian steel producers followed suit and began to restructure their facilities during the mid to late 1980s. Each of Canada's four major firms - the Steel Company of Canada (Stelco), Dominion Foundries and Steel (Dofasco), Algoma Steel, and Hawker-Siddley - worked towards gaining a new competitive edge through qualitative changes in technology and work processes. Computer-based machinery replaced three or four labourers with one. New products were developed - over half of the grades of steel that

⁸ Canadian Steel Producers Association, "North America's Integrated Steel Economy: The Basic Process," (4-C1), January, 1996; Canadian Steel Producers Association, "The Canadian Steel Industry in a North American Context," (Ottawa: Canadian Steel Producers Association, August 1995), 3-4.

⁹ Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 2-3, 8; David MacDonald, "U.S. Steel Firms Jolted," *Winnipeg Free Press* (July 29, 1993).

¹⁰ "Bethlehem Steel Corporation," *Hoover's Company Profile Database* (Austin: The Reference Press Inc., 1995); "USX Corporation - U.S. Steel Group," *Hoover's Company Profile Database* (Austin: The Reference Press Inc., 1995); Robert Storey, "Making Steel Under Free Trade?" *Industrial Relations*, Vol. 48, No. 4 (Autumn, 1993), 716.

were used by the automotive industry during the 1990s did not exist until 1989. All of Canada's steel producers also re-examined their corporate strategies. Many shifted their market focus substantially, gearing to higher-value steels or niche markets. Most Canadian companies changed their corporate structures, sold off peripheral businesses, and decentralized profit and loss responsibilities to autonomous business units as well. Similarly, many steel producers in Canada changed their management styles to reduce layers of management, and to encourage teamwork and employee empowerment. New approaches to employee training were developed to assist laid-off workers find new positions in the industry. The various attempts at restructuring allowed Canada's primary steel producers to produce the same tonnage of steel with a much smaller, more specialized workforce by the end of the 1980s.¹¹

Steel groups lobbied administrative agencies to apply domestic trade remedy laws in their favour in the wake of changes in the global economy. The recessions of the 1980s and 1990s, and reductions in the demand for steel, encouraged Canadian and American steel producers to use exports to employ their idle capacities during the restructuring process. The increase in exports prompted a corresponding rise in the number of trade disputes between steel producing countries. Higher numbers of exports led to an unprecedented number of complaints about the "unfair trading practices" of foreign competitors. American and Canadian steel makers began to pressure their governments to protect them from outside competition through antidumping and countervailing (AD/CVD) laws.

For example, the International Trade Commission (ITC) responded to the needs of American steel producers and ruled that two Canadian firms, Algoma Steel and Sysco, had injured U.S. producers when dumping new steel rails on the American market in August of 1989. A dumping duty of 38.8 percent was levied on the Canadian products as a result. In addition, the ITC's decision confirmed a 114 percent CVD on Sysco to counter the "substantial" federal and provincial grants it received.¹² On June 30, 1992, 12 American steel producers including Bethlehem Steel Corporation, Inland Steel Industries, National Steel Corporation, and the US Steel Group, filed 48 AD and 36 CVD petitions against various flat-rolled steel products. The petitions represented one of the largest filings of trade complaints in American history, and covered approximately 6.5 million tonnes of steel imports worth US \$2.5 billion. Importers from 21 countries, including Canada, were

¹¹ Robert Storey, "Making Steel Under Free Trade?" *Industrial Relations*, Vol. 48, No. 4 (Autumn, 1993), 718; Canadian Steel Producers Association, "Canadian Steel in Context - Canadian Steel Performance," (2-B6), January, 1996.

¹² Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 18.

named as the beneficiaries of subsidies of 3.42 - 79.15 percent, or as producers who unfairly dumped products into the American market at margins of 1.52 - 152.84 percent. Provisional dumping duties were levied in January of 1993, and were upheld in the Department of Commerce's (DOC) final determination in June of the same year. The final determination affected US \$3.2 billion worth of steel that entered the American market. The ruling was interpreted as a major victory for U.S. steel makers who were seeking protection from foreign competition.¹³ The DOC authorized that ADDs of 10.93 percent to 47.71 percent be levied on steel wire imports from Brazil, Canada, and Japan in November of 1993.¹⁴

Protectionist sentiments also ran high in Canada. Canadian steel producers feared that their ability to export would be placed in jeopardy unless they responded in a similar manner to their American counterparts. They insisted that the value of shipments targeted by the various American petitions in 1992-1993 accounted for over one-third of Canada's steel exports to the United States. Immediate action was required to protect them in their home market.¹⁵ The Canadian steel industry responded to the American investigations by filing AD petitions of their own. The Deputy Minister of Revenue Canada imposed ADDs of 4.5 percent - 125 percent on hot-rolled steel imports from the United States in response to a Canadian petition in January of 1993. The affirmative determination pleased the Canadian industry because it targeted CDN \$90 million worth of imports from the United States, Mexico, and Europe. Algoma Steel Inc.'s vice-president Gerry Hudson remarked "[T]he significant margins are very welcome. This will help stem the tide of unfairly traded plate being imported into Canada."¹⁶ Revenue Canada imposed ADDs on cold-rolled steel from Europe and the United States on March 31, 1993 following a number of complaints

¹³ It should be noted that the duties were dropped on July 28, 1993 following the ITC's negative injury determination. Breaking against the tide of American protectionism, the ITC denied a request to reconsider its finding that the U.S. industry had not been injured by flat-rolled imports from Canada and 20 other countries. The ITC did rule, however, that imports of galvanized steel and other types of steel plate had caused injury to American producers, and confirmed the duties placed on them by the DOC.

Gary N. Horlick, Michael A. Meyer, "U.S. Trade Developments," *Canada-U.S. Trade*, Vol. 5, No. 6 (August, 1992), 46; Mark Hallman, Peter Morton, "Steel Firms Win Partial Victory," *Financial Post* (July 28, 1993); "Steel Firms Dodge U.S. Trade Bullet," *Globe and Mail* (July 28, 1993); "U.S. Trade Body Holds Firm on Steel Ruling," *Globe and Mail* (August 10, 1993).

¹⁴ "Duties Imposed on Steel Wire Rod Imports," *The Canadian Free Trader*, Vol. 6, No. 11 (November, 1993), 124; Gail Lem, "U.S. Hits Canadian Steel," *The Globe and Mail* (June 23, 1993), A1; "U.S. Won't Face Reality on Steel," *Financial Post* (June 24, 1993).

¹⁵ Canadian Steel Producers Association, "Stronger Antidumping Rules For Canada," (Ottawa: Canadian Steel Producers Association, November 1995), 2.

¹⁶ Tony Van Alphen, "Duties Slapped On Steel Imports From 9 Nations," *Toronto Star* (January 7, 1993).

from Stelco and Dofasco. Duties of 8.7 percent - 87.3 percent were placed on foreign steel makers in response to the cries that the dumping practices had caused injury to the Canadian industry in the form of reduced market share, lost sales, price erosion, and reduced employment.¹⁷

Governmental officials joined Canadian and American steel producers to pressure their domestic administrative agencies to apply trade remedy laws in their favour before 1989. In the midst of the FTA negotiations, American trade officials threatened to initiate a Section 301 investigation against Canadian steel products if they accounted for more than 10-15 percent of total imports in the U.S. market, or if there was a surge in Canadian imports whenever Section 301 safeguard actions were taken against other countries.¹⁸ Similarly, President Reagan conceded to the protectionist demands of Congress and American steel companies by concluding Voluntary Restraining Agreements (VRAs) with 20 countries that imported steel products into the United States. The VRAs were designed to limit the total number of unfairly imported steel products in the United States between 1984 and 1989. The goal of the agreements was to decrease the total number of steel imports in the American market from 26 percent to 18.5 percent. Each country that held more than 0.3 percent of the American market was targeted for a VRA.

Despite their share of the American market, Canadian steel producers were exempted from the VRAs. Members of the CSPA banded together to persuade Congress that they were "fair" traders. John Allan, former President of Stelco, insisted that the Canadian and American steel industries were collectively hurt by the rising tide of unfairly traded steel from Europe, South America, and the Far East. North American steel producers also shared the same labour union, the same customer base, the same sources of iron ore, coal and other raw resources. Not only were Canada and the United States each other's largest trading partner in general, but they were also each other's largest export market for steel in particular. Because Canadian and American steel industries were so highly integrated, Allan pleaded that Congress grant Canadian firms an exemption from the trade restrictions. Congress partially conceded to the CSPA's demands. The privileged

¹⁷ It should be noted that the duties were eliminated in June of 1993 following a negative injury determination made by the CITT. "Revenue Canada Launches Dumping Investigation," *The Canadian Free Trader*, Vol. 6, No. 1 (January, 1993), 2-3; "Tribunal Finds No Dumping," *The Canadian Free Trader*, Vol. 6, No. 6 (June, 1993), 62; Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 14; "Dumping of Steel Plate Confirmed," *The Canadian Free Trader*, Vol. 6, No. 5 (May, 1993), 56; Ian Austen, "Canada Shoots Back A Few Darts In Steel War," *Ottawa Citizen* (January 30, 1993); Gail Lem, "Canada Ups Ante In Steel Trade War," *Globe and Mail* (April 1, 1993).

¹⁸ Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 13-14.

status of Canadian steel makers was made contingent on a reduction of total steel imports from five percent in 1984 to three percent. Furthermore, Canadians were required to agree to a limited VRA. The agreement limited Canadian exports of specialty steel products to a growth of only three percent per year between October, 1987 and September, 1989.¹⁹

All VRAs expired in 1992 and caused protectionism to rear its head in the United States once again. American producers feared the increased number of steel imports in their domestic market. Canadian governmental officials used the FTA and NAFTA to ensure that their producers were protected from restrictive American trade actions. The CSPA joined the Mulroney government in supporting the FTA and NAFTA because it felt that the Agreements could shield them from restrictive arrangements such as the VRAs or Section 301 actions for good.²⁰ The steel industry was dismayed, however, that the FTA and NAFTA negotiators had not resolved the trade remedy issue, and left contradictory trade remedy laws in place in North America. Members of the CSPA, for example, insisted that the high degree of market integration made conflicting AD laws and regulations extremely costly to producers on both sides of the border, and were antithetical to the goals of free trade.²¹

Furthermore, the Canadian government took measures to support the Canadian steel industry in June of 1993. In the wake of American protectionism, and failings of the FTA and NAFTA to address AD issues, the Canadian government indicated that it was prepared to impose a special import surtax on foreign steel if there was a surge of cheap imports in the Canadian market. Finance Minister Mazankowski argued that the Special Import Measures Act (SIMA) gave the federal government the authority to impose an immediate surtax where it determined that imports were causing or threatening to cause serious injury to the Canadian industry. In addition, the Government established a government-industry

¹⁹ J. Partridge, "Steel Makes a Stand," *The Globe and Mail Report on Business Magazine* (April, 1985), 26; Robert Storey, "Making Steel Under Free Trade?" *Industrial Relations*, Vol. 48, No. 4 (Autumn, 1993), 716-717; Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 11.

²⁰ Robert Storey, "Making Steel Under Free Trade?" *Industrial Relations*, Vol. 48, No. 4 (Autumn, 1993), 713; Marion G. Wrobel, "Canada-U.S. Steel Trade," Current Issue Review 88-2E (Ottawa: Library of Parliament Research Branch, 27 November 1995), 12-13.

²¹ Gail Lem, "Copps Vows To Seek Steel Pact With U.S.," *Globe and Mail* (December 4, 1993), B1; Canadian Steel Producers Association, "North America's Integrated Steel Economy: The Basic Process," (4-C1), January, 1996; Canadian Steel Producers Association, "The Canadian Steel Industry in a North American Context," (Ottawa: Canadian Steel Producers Association, August 1995), 3-4.

import surveillance committee to monitor prices and levels of steel imports and their impact on the Canadian market.²²

In December of 1993, Deputy Prime Minister Sheila Copps called for a bilateral agreement modeled on the Auto Pact to govern the steel trade between Canada and the United States. Canadian steel companies had lobbied for such a measure for some time, because they felt that it would give them freer access to the closely integrated North American market. The American steel industry refused to consider the idea, preferring to focus on protectionist trade laws instead. United States Trade Representative (USTR) Mickey Kantor officially rejected the proposal, and indicated that the U.S. would only address the steel dispute within a broader multilateral forum. Canadian Trade Minister Roy MacLaren resurrected the theme and argued that Canadian steel makers should be exempted from American AD suits within a single, integrated North American market.²³

Deputy Prime Minister Copps continued to assist Canadian steel producers by encouraging a national, nonpartisan steel caucus to begin meeting on a monthly basis in January of 1994. The steel caucus included 44 members of Parliament whose constituencies included steel businesses. The caucus has met to discuss issues affecting the Canadian steel industry such as techniques to promote the steel trade, ADDs, trade barriers, American trade remedy laws, and subsidies. Groups such as the Canadian Steel Trade and Employment Congress (CSTEC), Canadian Steel Producers Association (CSPA), Canadian Steel Service Centers, and Steelworkers' unions were consulted by the Caucus. The Caucus has also met with their American counterparts to discuss dumping regulations and the steel trade under the NAFTA. In April of 1994, eight caucus members traveled to Washington to meet with the Senate Steel Caucus and members of the American Iron and Steel Institute.

Governmental officials in Canada and the United States also responded to the demands for relief by granting subsidies to steel producers within the bounds of their domestic trade laws. American producers were granted government guarantees in the case of company pension fund defaults. Upon request, pension payments that could be taken over by a federal agency would be covered, if a steel company was unable to meet them. One-third of such payments were covered by the U.S. government in 1993. Furthermore, federal grants were available to American producers to fund research. For example, \$150

²² "Federal Help For Steel Industry," *The Canadian Free Trader*, Vol. 6, No. 6 (June, 1993), 62.

²³ Gail Lem, "Copps Vows To Seek Steel Pact With U.S.," *Globe and Mail* (December 4, 1993), B1; "Steel Pact With U.S. To Be Sought," *The Canadian Free Trader*, Vol. 6, No. 11 (November, 1993), 118; Rod McQueen, "U.S. Rejects Plea For Bilateral Steel Deal," *Financial Post* (May 6, 1993); Peter Morton, "MacLaren Wants Steel Harmony," *Financial Post* (July 15, 1994).

million was granted to the LTV Steel Corporation to develop a new process for making iron. Other subsidies offered to American steel producers included industrial development bonds and tax credits. On average, American steel producers were offered \$600 million in tax credits during the 1980s.²⁴ Canadian governments at the federal and provincial level also granted subsidies to their steel producers. The federal government channeled \$32 million to unemployed steel workers through the CSTEAC. An additional \$1 million was designated by the National Industrial Adjustment Agreement to create a sector training council to provide training for the unemployed workforce.²⁵

The Dispute over Corrosion-Resistant Steel Sheet Products

Following a year of consultations about the questionable trade practices of steel producers in 12 countries, Dofasco Inc. and Stelco Inc. filed a petition alleging that certain corrosion-resistant steel sheet products had been dumped into Canada and caused material injury.²⁶ The Deputy Minister accepted the petition and initiated a formal dumping investigation against corrosion-resistant steel sheet products on November 17, 1993. In total, 145 exporters were investigated between January 1, 1993 and June 30, 1993.²⁷

The Deputy Minister's Affirmative Determinations: March 31, 1994 And June 29, 1994

The Deputy Minister released an affirmative preliminary dumping determination on March 31, 1994 and an affirmative final determination on June 29, 1994. The investigation was limited to the largest volumes of imports from each country named in the petition. Each exporter who accounted for at least 60 percent of his/her country's total volume of certain steel plates was asked for information. Firms that did not export 60 percent of their

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- ²⁴ David MacDonald, "U.S. Steel Firms Jolted," *Winnipeg Free Press* (July 29, 1993).
²⁵ Bonnie Brown, MP for Oakville-Milton, "Speaking Notes to the Canadian Steel Trade and Employment Congress," Regina, Saskatchewan (March 28, 1995); Gord Brock, "Steel Producers Want A Truce," *The Leader-Post* (March 29, 1995).
²⁶ Corrosion resistant steel sheets are flat rolled steel sheet products coated with zinc or an alloy metal. They are most commonly used in motor vehicle components, farm buildings, grain bins, culverts, garden sheds, roofing materials, siding, floor and/or roof decks, doors and door framers, heating and cooling systems, flashing, and appliance components.
²⁷ The countries named in the investigation included: from Australia, Brazil, France, the Federal Republic of Germany, Japan, Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States. There were 122 exporters from the United States including LTV Steel Company, the U.S. Steel Company, Bethlehem Steel Export Corporation, and Inland Steel Company. Only one exporter was named from Australia, Brazil, France, New Zealand, Spain, Sweden, and the United Kingdom. Several exporters were identified from the Federal Republic of Germany, Japan, and Korea.

country's steel to Canada were not required to respond to the Deputy Minister's questionnaire, but were permitted to supply information if they desired. Disclosure meetings were held with various companies to clarify the information that was submitted to the Deputy Minister during the information gathering process. Others were able to make additional representations before the preliminary determination was issued.²⁸

During an AD investigation, the Deputy Minister's role is to assess whether the goods in question have been dumped into the Canadian market. If goods have been dumped into Canada, the Deputy Minister must calculate the margin of dumping and the duty required to offset the injurious effects. Canadian laws define the margin of dumping as the difference between the normal value of a good in its home market and the price it receives when exported to another country.

The Deputy Minister began to determine the margins of dumping by assessing the normal values of the corrosion-resistant steel sheets. Pursuant to Section 16 of the SIMA, the Deputy Minister calculated the normal value by using either the domestic selling price of similar goods in the originating country, or the weighted average domestic selling price during the period of investigation. Where there were no sales of the foreign goods in their home market, normal values were determined by aggregating costs of production, administrative costs, selling costs, other relevant costs, and profits as required by Section 19(b) of the SIMA. In the event that normal values could not be assessed under Sections 16 or 19 of the SIMA, the Deputy Minister determined them by adding the export price and the highest margin of dumping found in the preliminary or final determination (Subsection 29(1) of the SIMA).

After calculating the normal prices of the goods, the Deputy Minister turned to the export prices to generate the margin of dumping. Export prices were generally determined under Section 24 of the SIMA as the lesser of the exporter's selling price or the importer's purchase price. However, in cases where sales were made to related parties in Canada, and/or the use of Section 24 was inappropriate, export prices were determined by constructed values, in accordance with Section 25 of the SIMA. Section 25 allowed the Deputy Minister to determine export prices by using resale prices in Canada, less appropriate costs and profits. Profits were determined, or constructed, as the weighted

²⁸ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), 3-4.

average profit earned by Canadian vendors of the goods in question who were at the same trade level of the importer.²⁹

The margins of dumping were determined for every exporter that shipped the steel sheets directly to Canada or through a vendor/agent during the period of investigation. They ranged from 2.4 percent to 60.8 percent.³⁰ The margins of dumping were based on the information requested by, or voluntarily supplied to, the Deputy Minister. Those exporters who failed to respond to a mandatory request for information were subjected to the highest margin of dumping applied to any country in the investigation. Margins of dumping for exporters who were not required to provide information and did not make a voluntary submission were established on the weighted average margin for exporters in the same country who fully complied with the request for information. In cases where exporters were not required to provide information and where all selected exporters in the same country failed to provide a complete response, the margin of dumping was based on the weighted average margin for exporters in all other countries who fully complied with the Department's request for information.³¹

The methods that the Deputy Minister used to assess the normal values, export prices, and margins of dumping were influenced by an FTA-19 panel's decision in another round of the Canada-U.S. steel dispute. The cold-rolled steel sheet panel remanded the Deputy Minister to reconsider the way that pension costs and interest income were used to calculate normal values and margins of dumping in 1994.³² The cold-rolled steel sheet panel's ruling was delivered between the Deputy Minister's preliminary and final determinations of corrosion-resistant steel sheet plates. The Deputy Minister indicated that

²⁹ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), 5.

³⁰ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), Appendix 5.

³¹ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), 5-6.

³² Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported From the United States of America* (CDA-93-1904-08), June 14, 1994.

his department took many of the binational panel's orders into account during the investigation.³³ For example, the conclusions of the cold-rolled steel panel impacted the Deputy Minister's determination of the normal values for the products that a Korean firm, Pohang Coated Steel Co. Ltd, had shipped into Canada between January and June of 1993. The Deputy Minister indicated he had not offset the firm's interest income against interest expenses during the preliminary determination of March 31, 1994. However, the Deputy Minister adjusted the normal value of the products that Pohang Coated Steel Co. Ltd. exported to Canada in the final determination after the cold-rolled steel sheet panel ordered that interest income should be offset against interest income where it could be identified that it had stemmed from short-term investments that were related to steel production. The preliminary margin of dumping decreased from 16 percent to 15.4 percent at the final determination as a result.

Similarly, the Deputy Minister drew on the orders of the cold-rolled steel panel when determining the margin of dumping for the U.S. Steel Company in the final determination. The Deputy Minister argued that Section 19 of the SIMA permitted him to include pension costs and interest income when determining the normal value of the goods produced by the U.S. Steel Company. He considered that those expenses were directly related to the cost of the good, and therefore influenced the prices that the U.S. Steel Company charged when it exported them to Canada. However, the cold-rolled steel sheet panel's decision forced the Deputy Minister to re-examine his treatment of the U.S. Steel Company's pension costs. The panel ordered that pension credits should be used to offset pension costs. The Deputy Minister took the order seriously, and decreased the U.S. Steel Company's pension cost in recognition of the income generated by the company's pension fund during the period of investigation. Moreover, the panel's decision compelled the Deputy Minister to re-examine his treatment of interest income in calculating the costs of the goods under investigation. A review of the evidence concerning the source and nature of the interest income revealed that the income was primarily related to non-steel operations. Therefore, even though the Deputy Minister did not make an adjustment to the interest expense figure, the panel's order did prompt him to re-weigh his preliminary determination. Because the Deputy Minister felt compelled to re-examine pension costs and interest income, he adjusted the margins of dumping that were applied to the goods

³³ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), 4.

exported by the U.S. Steel Company's two subsidiaries. The preliminary margin of dumping for goods shipped from the Gary works decreased from 9.8 percent to 2.2 percent. The preliminary margin for goods shipped from the Fairless works was reduced from 24.1 percent to the final margin of 17.0 percent.³⁴

***The CITT's Affirmative Injury Determination:
July 29, 1994***

The CITT reached an affirmative injury determination on July 29, 1994. The CITT is required to assess whether a Canadian producer was injured, or threatened with injury, by foreign goods. The Tribunal must also consider if the conditions that faced the domestic industry were caused by the goods in question. The CITT exercised its mandate by reviewing the conditions that faced the Canadian steel industry between 1991 and 1993. Canadian steel producers such as Dofasco and Stelco insisted that foreign producers had increasingly turned to the Canadian market to maintain high capacity utilization in the face of declining global demand. Consequently, the prices of Canadian goods had been eroded and suppressed because of foreign imports from the countries under investigation. Indeed, Dofasco and Stelco noted that their prices had not declined in the absence of foreign competition between 1991 and 1993.³⁵

Traditionally, the CITT has considered domestic indices, such as the effect of foreign goods on domestic prices, actual or potential declines in output, sales, market share, profits, returns on investments, utilization of production capacity, and the actual and potential negative effects on revenues when assessing injury. The CITT argued that material injury had been caused by foreign imports in light of the conditions that faced the Canadian industry. All three members of the CITT agreed that Canadian producers faced

³⁴ The Deputy Minister concluded that the margins of dumping of the subject goods were not negligible. Consequently, he ordered Customs Canada to continue to apply the provisional duties that were set during the preliminary determination pending the outcome of the CITT's injury investigation. In the event that the CITT reached an affirmative injury determination, the Deputy Minister ordered that ADDs be collected. ADDs were set by multiplying the margin of dumping and the export price found during the investigation.

Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Statement of Reasons in the Matter concerning the final determination of dumping pursuant to paragraph 41(1)(a) of the *Special Import Measures Act* regarding Certain Corrosion-Resistant Steel Sheet Products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," 4258-93 AD/1014 (June 29, 1994), 14-15, Appendix 6.

³⁵ Canadian Import Trade Tribunal, "In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," Inquiry No. NQ-93-007, July 29, 1994, 8.

poor conditions during the 1990s. Volumes of foreign imports increased in proportion to domestic production. Employment, revenue, and domestic prices were down. Even though Canadian production levels had increased between 1990 and 1993, sales steadily declined. Profits had sharply declined as a result of poor domestic sales.³⁶

The CITT considered whether there was a causal link between the material injury and dumped imports. It confirmed the Canadian steel producers' evidence which alleged that a link existed. Record evidence attested that there was a close correlation between the dumped imports, price erosion and suppression in the Canadian market at the "macro" and "micro" or customer levels. Dumped imports had caused the domestic industry to lower their prices by offering substantial discounts and allowances throughout the period of inquiry.³⁷

The CITT acknowledged that the dumped imports were not the only factor that injured Canadian steel producers during the period of investigation. Factors such as the recession of 1991-1992, restructuring, capacity addition, and the exchange rate joined the dumped imports in affecting the prices of the goods in Canada. Nevertheless, the CITT explained that it was not convinced that the other factors explained the magnitude of the price erosion and suppression to the degree that the dumped imports did. The Tribunal insisted that there was a clear, causal link between the dumping practices and the material injury experienced by the domestic industry. It was convinced that the low-priced, dumped imports destabilized the Canadian market over the period of investigation. Consequently, the CITT found that the dumped imports had caused, or were threatening to cause material injury, to the domestic industry.³⁸

³⁶ Canadian Import Trade Tribunal, "In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," Inquiry No. NQ-93-007, July 29, 1994, 12-15, 20-24.

³⁷ Canadian Import Trade Tribunal, "In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," Inquiry No. NQ-93-007, July 29, 1994, 24.

³⁸ Canadian Import Trade Tribunal, "In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America," Inquiry No. NQ-93-007, July 29, 1994, 34.

The American Response to the Deputy Minister's Affirmative Dumping Determination

Four American steel producers objected to the Deputy Minister's final determination of dumping. On August 12, 1994, they petitioned the USTR to convene a binational panel to investigate the compatibility of the Deputy Minister's determination with Canadian trade remedy laws. The U.S. Steel Company, LTV Steel Company, Inland Steel Company, and I/N Kote raised five key arguments in their petition. They questioned the methods and data that the Deputy Minister used to calculate the margins of dumping placed on their Canadian-bound goods.³⁹ The American steel producers charged that the Deputy Minister had erred:

- (1) in including the following costs in his Sections 16(2)(b) and 19(b) calculations of subject goods:
 - (a) costs related to the settlement of an antitrust action against a former railroad subsidiary of USX Corporation, the Bessemer and Lake Erie Railroad (B&LE);
 - (b) an interest charge incurred on liability under the U.S. Coal Industry Retiree Health Benefit Act;
- (2) in not including LTV Steel Company's alleged receipt of funds in settlement of the B&LE litigation;
- (3) in changing U.S. Complainants' method of allocating the following costs or credits:
 - (a) the Deputy Minister did not include in the calculation of the U.S. Steel Company's 1993 costs a credit taken in 1993 to adjust for overestimating a liability in 1992 related to litigation with the Energy Buyers Corporation;
 - (b) the Deputy Minister changed the allocation of overhead costs made by Inland and I/N Kote;
 - (c) the Deputy Minister did not adjust LTV's cost of production to account for profits earned by electrogalvanizing joint ventures in which LTV was a partner;
- (4) in not including certain items in his section 16(2)(b) and 19(b) calculations:
 - (a) short term interest income (Inland) and short term interest income in excess of interest expenses (LTV);
 - (b) pension credit (Inland)
 - (c) credit for emerging from bankruptcy (LTV); and
- (5) in employing the order confirmation date as the date of sale rather than the date of invoicing/shipping (Inland, I/N Kote, LTV).⁴⁰

³⁹ The final margins of dumping for each company were: U.S. Steel Company - 4.2 percent, LTV Steel Company, 13.2 percent, Inland Steel Company - 8.1 percent, I/N Kote - 8.1 percent.

⁴⁰ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 3-4.

***The Binational Panel's Opinion of the Deputy Minister's
Affirmative Dumping Determination:
June 23, 1995***

A binational panel was created in response to the American request. It included three Americans and two Canadians: Harry First - American; Kathleen F. Patterson - American; Robert E. Ruggeri - American; William E. Code (Chairman) - Canadian; D. Michael M. Goldie - Canadian. The panel released a unanimous opinion on June 23, 1995 following a period of written briefs and oral hearings.

The panel explained that it was required to base its opinion on the standard of review of Subsection 18.1(4) of the Federal Court Act. Subsection 18 required that six things must be considered during the process of judicial review in Canada. A reviewing court or panel was obliged to assess whether the authority:

- (1) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (2) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (3) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
- (4) 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;
- (5) acted, or failed to act, by reason of fraud or perjured evidence; or
- (6) acted in any other way that was contrary to law.⁴¹

Traditionally, administrative tribunals have been protected by privative clauses in Canada, and could only be subjected to judicial review in very narrow circumstances. According to Justice Dickson in *CUPE v N.B. Liquor Corporation* (1979) "[W]here a statute contains a privative clause the courts may review for error of law only when that error is patently unreasonable - i.e., so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review."⁴² Nevertheless, in spite of the Canadian predisposition toward privative clauses, the binational panel noted that the Deputy Minister was not protected by a privative clause in NAFTA-19. The NAFTA expressly provided that the purpose of Chapter 19 was to "establish fair and predictable conditions for the progressive liberalization of trade between

⁴¹ Subsection 18.1(4) of the Federal Court Act RSC 1985 c. F-7 as amended cited in Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 5-6.

⁴² Justice Dickson, *CUPE v N.B. Liquor Corporation*, 2 S.C.R. (1979), 227.

the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices.”⁴³ The words “effective” and “fair” implied that binational panels could monitor trade relations in order that parties were afforded an adequate opportunity of stating their case or meeting what was alleged against them.

In the absence of a privative clause protecting the jurisdiction and authority of the Deputy Minister, the panel felt that it was authorized to review the Deputy Minister’s final determination according to the six grounds of Subsection 18 of the Federal Court Act. The panel explained that its role was two- fold. First, it was to ensure that the Deputy Minister exercised his jurisdiction in a correct and reasonable manner, and carried out his fact-finding process in a fair manner that upheld principles of natural justice, such as due process. Second, the panel recognized that it was also to afford the Deputy Minister with a wide degree of latitude during the fact-finding process. The panel stated that the standard of review required it to submit to the Deputy Minister’s final determination provided that it was based upon relevant, substantial evidence.⁴⁴

The Panel’s Opinion concerning the Five Arguments made by the American Steel Producers

(1) What Types of “Costs” are Included in Sections 16 and 19 of the SIMA?

The panel moved from a discussion of the Canadian standard of judicial review to comment on the five arguments of the American steel producers. The first argument concerned the factors that the Deputy Minister used to assess the costs of production and the margins of dumping in the final determination. Section 16 of the SIMA directed the Deputy Minister to determine the normal value of the goods in question by examining the actual prices in the exporting country. Section 19 came into play when the Deputy Minister was unable to do so. In other words, Section 19 set out a number of guidelines that the Deputy Minister was to use to determine normal value by constructing what the price should have been. According to Section 19(b) of the SIMA, the constructed normal value was to be “the aggregate of (i) the cost of production of the goods, (ii) an amount for administrative, selling, and all other costs, and (iii) an amount for profits.” A regulation was adopted to help the Deputy Minister implement Section 19. Section 11 (a) and (c) of

⁴³ Article 1902 (2)(d)(ii) of the NAFTA.

⁴⁴ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 9-10.

the Special Import Measures Regulations defined the “cost of production” to mean “all costs” that were “attributable to, or in any manner related to, the production of the goods.” The phrase “administrative, selling and all other costs” was defined as the sum of administrative and selling costs “that are directly attributable to the production and sale of the good.”⁴⁵

Beyond Sections 16 and 19 of the SIMA and Section 11 of the Regulations, the panel acknowledged that there was little to guide it when assessing what items of cost the Deputy Minister was to use when calculating the margin of dumping. Consequently, the panel turned to the decisions of three FTA-19 panels to help it assess which items of cost were properly attributable to the products involved in the dumping investigation. Binational panel decisions in the beer,⁴⁶ gypsum,⁴⁷ and cold-rolled steel⁴⁸ disputes were employed to deal with the definition of “cost” under Sections 16 and 19 of the SIMA. Those three panels examined whether costs such as interest expenses, maintaining a parent entity, interest on financing obligations at the parent level, bankruptcy expenses, and pension plans were connected to the costs of production. All three panels stressed that certain costs could be used by the Deputy Minister when determining normal values and margins of dumping if they were legitimately connected to the subject goods. The three FTA panels demonstrated that the overall purpose of the SIMA was to prohibit unfairly low prices in Canada. The SIMA deemed prices to be unfairly low if they were either below the exporter’s selling price in the home market, or were equal to and/or below the exporter’s cost of production.

The corrosion-resistant steel panel concluded that the goal of Sections 16 and 19 of the SIMA was to find the connection between the item in question and the cost of the good under investigation. The three FTA panels implied that the Deputy Minister or future FTA/NAFTA panels “obtain as accurate a picture as possible of the costs during the relevant period so as to compare that price to the price charged to consumers in Canada.” It was this “connection test” that the NAFTA-19 panel used to ensure that the Deputy Minister

⁴⁵ Special Import Measures Regulations, SOR 84?927, s. 11 (a), (c).

⁴⁶ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Co., Inc., Pabst Co., and the Stroh Brewery Co. for Use or Consumption in the Province of British Columbia (CDA-91-1904-01)*.

⁴⁷ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Made by the Deputy Minister of National Revenue, Customs and Excise regarding Gypsum Board Originating in or Exported From the United States (CDA-93-1904-01)*.

⁴⁸ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported From the United States of America (CDA-93-1904-08)*.

included direct and indirect costs attributed through the appropriate distribution of general corporate expenses in the corrosion-resistant steel case.⁴⁹

The panel moved from a general examination of the term “cost” under Sections 16 and 19 of the SIMA to address two specific allegations raised by the American steel producers. First, the panel examined the costs that the U.S. Steel Group incurred when settling an antitrust suit involving Bessemer and Lake Erie Railroad (B&LE) in 1993. B&LE had been sold by the U.S. Steel Group’s parent corporation, USX, in 1988. Under the terms of sale, USX remained obligated for any liability resulting from the Railroad. A number of northeastern steel producers and railroad companies initiated an antitrust suit and accused B&LE of monopolizing inland transportation and dock handling on iron ore between the 1950s and early 1980s. USX charged the settlement costs of the antitrust suit to the U.S. Steel Group, but insisted that the legal expenses were not related to the production and/or sale of its steel products. However, the Deputy Minister included the B&LE litigation fees in his calculations of the normal value of the goods produced by the U.S. Steel Group. The Deputy Minister justified his actions by arguing that even though the B&LE charges were not related to steel production, they were expenses of “a general corporate nature” and could therefore be allocated to the costs of producing corrosion-resistant steel sheets. The U.S. Steel Group argued that the Deputy Minister had erred in the final dumping determination. The litigation costs were related to the former railroad operations of the USX and were not related to the group’s steel operations. The U.S. Steel Group maintained that the legal costs were not connected or “attributable” to the costs of production, as Section 11 of the Special Import Measures Regulations required them to be if they were to influence the Deputy Minister’s calculations of the margins of dumping.

The panel concurred with the U.S. Steel Group. It held that the Deputy Minister failed to articulate why he connected the subject goods and the B&LE expense. Similarly, the panel ruled that the Deputy Minister failed to explain why he had included the legal fees in the company’s general overhead expenses. The panel recalled the gypsum panel’s order that any costs, whether of a specific or general nature, had to be directly related to the goods in question or as an overhead cost properly allocated to those goods. The corrosion-resistant steel panel insisted that the Deputy Minister had not presented sufficient evidence to support his conclusions.

After considering the compatibility of the antitrust costs with Sections 16 and 19 of the SIMA, the panel addressed the second American argument regarding the interest

⁴⁹ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 16-17.

charges related to the U.S. Coal Industry's Retiree Health Benefit Act. The Deputy Minister had included the interest charges that the LTV Steel Company encountered on its estimated liability under the U.S. Coal Industry Retiree Health Benefit At. The panel noted that the issue of the proper allocation of liabilities under the SIMA had been studied by the cold-rolled steel panel. That panel found that interest charges and liabilities costs had to be directly attributable to the costs of production. It remanded the issue to the Deputy Minister for failing to provide a reasoned justification for linking the costs of the pension plan and production of cold-rolled steel plates. Similarly, the corrosion-resistant steel panel remanded the issue to the Deputy Minister because he had not provided a reasoned justification for doing so. The panel instructed the Deputy Minister to remove LTV's interest costs from his calculations under Sections 16 and 19 of the SIMA.⁵⁰

(2) The Income Won by the LTV Steel Company in the B&LE Railroad Antitrust Suit

The LTV Steel Company was one of the beneficiaries of the B&LE antitrust suit. It argued that the settlement rewards should have been used to reduce its costs because the Deputy Minister had included the U.S. Steel Group's cost of settling the B&LE antitrust suit with its costs of production. The Deputy Minister rejected LTV's claims on the grounds that the company had not submitted evidence showing that it had used settlement proceeds to offset production costs during the period of investigation. The panel upheld the Deputy Minister's reasoning. It affirmed that LTV's financial statements did not illustrate that payment was made, recorded, or recognized between January and June of 1993. Consequently, the panel found it unnecessary to address whether the SIMA would have permitted or required the Deputy Minister to reduce LTV's cost of producing steel because settlement money was paid to it by the U.S. Steel Company.⁵¹

⁵⁰ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 21-23.

⁵¹ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 24-25.

(3) *Changes to Allocations*

The American steel producers criticized the Deputy Minister for changing three of their methods of allocating a number of costs or credits to their production capabilities. First, the U.S. Steel Group argued that the Deputy Minister erred in his treatment of the legal fees that the Group incurred during *Energy Buyers v. USX Corporation* (1992). In 1992, an arbiter issued an award against USX in *Energy Buyers v. USX Corporation*. USX transferred the charge to the U.S. Steel Group because the Deputy Minister had attributed the full charge of litigation to the cost of production for that year in another dumping investigation. The USX settled the matter in *Energy Buyers v. USX Corporation* for an amount less than the original award in 1993. Most of the amount was to be paid in 1993, and the remainder was to be given in 1994-1995. U.S. Steel argued that the savings from the settlement should have been recognized as a credit in 1993, thereby reducing the costs of its sales during the period of investigation. The Deputy Minister disagreed, and maintained that the Department had always recognized expenses when they were incurred.

The panel upheld the Deputy Minister's decision. U.S. Steel accounted for the full cost of the settlement in 1992, even though it did not pay the awards until 1993-1995. Having already determined that the predicted cost of the settlement would be treated as part of the cost of production in the year in which it was accrued, the panel insisted that it was reasonable that the change in that prediction would affect costs in that year (i.e., 1992) and not costs for some subsequent years (i.e., 1993).

Second, Inland Company and I/N Kote complained that the Deputy Minister unreasonably changed the allocations of their overhead costs. Inland allocated its overhead costs on a "per ton shipped" basis. However, the Deputy Minister allocated them on a "cost of goods sold" basis because he felt they were fixed items that were directly proportional to the cost of the goods being produced. The Deputy Minister allocated I/N Kote's costs on a "per ton shipped" basis because the company did not produce as many different products as Inland did. Therefore, the Deputy Minister reasoned that there was no concern that the "per tonnage" basis would obstruct the true cost of the subject goods. The panel upheld the reasoning of the Deputy Minister. It concluded that even if Inland's approach was reasonable, the panel was not free to substitute another approach for the justifiable decision of the Deputy Minister.⁵²

⁵² Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 26-27.

Third, the panel addressed LTV's claims that the Deputy Minister erred in excluding their joint venture profits from their costs of production. During the period of investigation, LTV paid two electrogalvanizing ventures to finish its steel products. The Deputy Minister concurred with LTV that it was appropriate to reduce those payments by the amount of profit returned to LTV. However, the Deputy Minister argued that he was unable to determine just what the profit was from LTV's books. Moreover, the amount of the profit was not supplied by the two ventures that LTV used in the production process. Therefore, the Deputy Minister was forced to exclude the profits from LTV's costs of production. The evidence was inconclusive and could not prove what the profit was. The panel agreed that the Deputy Minister had acted reasonably. It upheld the methods that had been used to assess LTV's costs of production, normal values, and margins of dumping as a result.⁵³

(4) *Income Offset*

The LTV Steel Company argued that the Deputy Minister used financing income to offset financing expenses incorrectly during the dumping determination. The Deputy Minister found that LTV's short term interest income was related to steel production. Following the cold-rolled steel panel, the Deputy Minister offset the income against LTV Steel's interest expenses. Since LTV's interest income exceeded its interest expenses, some income was not used to offset LTV's production costs to zero. LTV argued that the excess interest income should have been applied to reduce other costs such as plant or corporate overhead charges.

The panel maintained that it was reasonable to limit LTV's interest income offsets to interest expenses. However, it held that the Deputy Minister had not provided a reasoned justification for doing so. The panel considered that short term financing income was money that a company could consider in costing its products. Nevertheless, it insisted that its role was not to justify whether interest income was an appropriate offset under the SIMA. It held that it was the "responsibility of the Deputy Minister, and not a NAFTA panel, to fine-tune SIMA interpretations as they relate to specific facts."⁵⁴ Therefore, the

⁵³ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 27-28.

⁵⁴ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 32.

panel remanded the Deputy Minister's determination regarding whether LTV's interest income should have been offset against a wider category of cost for further consideration and policy formulation.

The Inland Steel Company also argued that the Deputy Minister approached the income offset issue incorrectly. Inland's short term investments interest was not used as an offset because the Deputy Minister found no evidence that the income was related to the company's steel operations. Inland argued that since the segment of Inland under investigation only produced steel, the cash used to make the investment had to have come from steel revenues and should therefore have been used as an offset.

The panel acknowledged that the facts were not entirely clear. Inland had not established whether the interest income was related to financing costs, interest costs, or the costs of production. Therefore, the panel could not determine whether any interest costs were charged to Inland's Section 16 and 19 costs. Oral briefs suggested that interest costs were not charged to costs of production, while the written record indicated otherwise. Consequently, the panel maintained that it had to address the reasonableness of the Deputy Minister's factual determination that evidence had not shown that the interest income was related to steel production. The panel found it difficult to imagine that the interest income had come from any source other than returns from steel revenues given that Inland only produced steel. Therefore, the panel remanded the issue of short-term interest income for Inland with the following instructions:

- (1) If interest expense has been charged to Inland's Section 16 and 19 costs, then it should be offset by the amount of short-term interest income, unless there is evidence on the record that the interest income is not related to steel production; and
- (2) If no interest expense has been charged to Inland's costs, then the short-term interest income (unless it is not related to steel production), should be treated in the same way that the Deputy Minister determines to treat LTV's interest income which is in expense of interest income.⁵⁵

Second, the panel examined the American allegations that the Deputy Minister should have offset Inland's pension costs during the determination. The Deputy Minister followed the cold-rolled steel panel's orders that it was appropriate to offset pension costs with pension income. In the case at hand, the Deputy Minister felt that Inland's pension costs had been completely offset by some of its pension income. Since the cold-rolled steel

⁵⁵ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 32-33.

panel approved that pension costs could be offset to, but not below, zero, the Deputy Minister did not allow Inland's extra pension credits to offset pension costs even further. The panel concurred with the Deputy Minister's action. It closely reviewed confidential evidence that Inland tried to use to prove that pension costs had not been offset by pension income. However, the panel was not persuaded by the evidence and held that the Deputy Minister acted correctly.⁵⁶

Third, LTV argued that if its bankruptcy costs were charged to the production of steel, then those credits should have been offset by a certain extraordinary credit it recorded upon emerging from bankruptcy. The Deputy Minister included LTV's bankruptcy costs in the cost of steel production. However, he declined to offset them with the bankruptcy credit. The panel recalled the cold-rolled steel panel's approach to bankruptcy costs. It had considered them to be "related directly to the general operation of the company." Consequently, the cold-rolled steel panel held that they could be attributed to the cost of steel production because they were part of a firm's general corporate overhead expenses. Drawing on the cold-rolled steel panel's decision, the panel affirmed the Deputy Minister's actions of including the bankruptcy expenses in LTV's costs of production.⁵⁷

(5) Date of Sale

Inland, I/N Kote, and LTV maintained that the Deputy Minister erred by employing a date of sale prior to the date of the actual sale of the goods when performing his cost analysis. The Deputy Minister justified his actions because the record showed that the order confirmation date was the date of sale for Inland, I/N Kote, and LTV. The panel reviewed the record and found that at no time during the investigation did any American producer advise the Deputy Minister that there was a problem with the date of sale. No one appeared to have voiced any opposition to the Deputy Minister's date of sale methodology at any point prior to the panel proceedings. Objections were never raised to the date of sale during any of the verification visits, responses to supplementary requests for information, or other meetings. Furthermore, the Deputy Minister expressly defined the "date of sale" as the date when the parties agreed to purchase and sell the goods in question, and "the date

⁵⁶ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 34.

⁵⁷ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 35-36.

of confirmation” as the date of sale in a letter to each of the American producers under investigation. Therefore, the panel upheld the Deputy Minister’s decision to consider the order confirmation date as the date of sale. The record firmly indicated that the Deputy Minister had relied on the date reported by the complainants as the date of sale.⁵⁸

Summary

The panel affirmed parts of the Deputy Minister’s determination and remanded other parts for reconsideration. The Deputy Minister was ordered to publish a Remand Determination within 45 days of the panel’s order. The Determination on Remand was required to consider the connection between the U.S. Steel Group’s legal costs and costs of production, the interest expenses incurred by LTV as a result of the Coal Retiree Act, and whether LTV’s interest income should have been offset against a wider category of cost.

The Deputy Minister’s Determination on Remand: August 4, 1995

The Deputy Minister complied with the panel’s orders and issued a determination on remand on August 4, 1995. The determination on remand focused on the three issues that the panel had ordered the Deputy Minister to reconsider. First, the Deputy Minister examined the connection between the cost of the antitrust suit and the U.S. Steel Group’s cost of the production. The panel ordered that the Deputy Minister provide a reasoned explanation for linking the two costs. If that could not be done, the Deputy Minister was to recalculate the original findings based on the evidence of the record.

The Deputy Minister noted that B&LE had transported iron ore to the steel mills of the U.S. Steel Group. He concluded that its activities were related to the production of steel and made it one component of the larger integrated steel company as a result. Furthermore, the Deputy Minister explained that B&LE had been part of the U.S. Steel Group before it was sold. Consequently, the Deputy Minister held that USX was reporting the expenses in a manner consistent with its past practices by applying the whole amount of the B&LE antitrust suit to the U.S. Steel Group. Given that the B&LE litigation expense was considered to be reasonably attributed to the U.S. Steel Group, the Deputy Minister turned to the question of whether the expense was directly attributable to a specific division

⁵⁸ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 36-37.

within the U.S. Steel Group, or whether it was to be considered a general corporate expense of the Group as a whole. The Deputy Minister determined that there was no information which illustrated that there was a specific division of the Group to which the B&LE expense should be allocated. Subsequently, the Deputy Minister attributed the expense as a general one, incurred by the U.S. Steel Group as a whole. The total cost of the suit was apportioned to all of the goods produced by the Group, including the ones under investigation. Therefore, the Deputy Minister's determination on remand argued that its reasons for linking the litigation and production costs were "reasonable and fair" and should be accepted by the panel.⁵⁹

Second, the Deputy Minister addressed the panel's instructions to remove LTV's Coal Retiree Act interest expenses from the calculations under Sections 16 and 19 of the SIMA. The Deputy Minister fully complied with the panel's orders. The determination on remand stated "[I]n accordance with the panel's direction, the charge is no longer included in the profitability analysis under Section 16, and the normal values constructed under Section 19 for LTV. The normal values and margins of dumping have been revised accordingly."⁶⁰

Third, the panel directed the Deputy Minister to formulate a more reasoned answer to the question of whether the LTV Steel Company's interest income should have been offset against a wider category of cost than interest expense. The Deputy Minister explained that he had based his treatment of interest income on the cold-rolled steel sheet panel's determination because the facts surrounding the two cases were the same. The cold-rolled steel sheet panel ruled that interest income which was related to the production of the subject goods should be used to offset a firm's interest expenses to zero. The determination on remand held that the Deputy Minister was required to ascertain the cost of the goods when determining normal values under the SIMA. The Deputy Minister noted that the SIMA anticipated that there would be a number of categories of costs which, when added together, would represent the full cost of the goods. Even if a company's income facilitated the payment of those costs, it did not negate them. Costs related to the raw material, production, and general overhead expenses of steel sheet could not be reduced to zero simply because the company had earned an equivalent amount of income from other sources. Real costs arising from the materials, production process, and sales would always arise in manufacturing industries.

⁵⁹ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Corrosion-Resistant Steel Sheet Determination on Remand," Ottawa, August 4, 1995, 1-3.

⁶⁰ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Corrosion-Resistant Steel Sheet Determination on Remand," Ottawa, August 4, 1995, 4.

While the SIMA directed the Deputy Minister to calculate costs, and not income, the cold-rolled steel panel ruled that the SIMA did not preclude him from calculating the net costs of a specific category of expenses. For example, the panel restricted the use of pension and/or interest income to offset pension and/or interest expenses by introducing the concept of “matching.” In other words, pension or interest expenses could be offset by a related item of income assuming that both items were related to the production of the goods in question.⁶¹ Based on the cold-rolled steel panel’s decision, the Deputy Minister argued that it was reasonable to consider the interest expense and interest income accounts to be one category for offset purposes, because they recorded the results of the company’s cash management transactions. Taken together, LTV’s interest expenses and interest income accounts presented a true measure of the company’s success in financing current operations and meeting obligations as they fell due.⁶² Therefore, the Deputy Minister insisted that the two general account balances were related to each other, and effectively constituted a distinct category of costs (i.e., they were unrelated to any other category of costs which arose from the production of the goods). The determination on remand revealed that it was the Department’s policy that where the producer could show that the interest income and interest expenses were related to the production of the subject goods, the Department would offset the interest expenses by the interest income. However, a credit balance on the interest accounts would not be used to offset any other category of expenses for SIMA purposes. In regards to the panel’s remand orders, the Deputy Minister insisted that LTV’s short-term interest income had been applied to offset interest expenses to zero in the final dumping determination, but was not used to reduce any other cost category associated with the costs of production.⁶³

The panel ordered the Deputy Minister to rework his conclusions regarding Inland’s interest expenses as well. If interest expenses had been charged to the goods, the Deputy Minister was to offset the expenses by the amount of short term interest income, unless there was evidence on the record that the short term interest income was not related to steel production. The Deputy Minister complied with the panel’s orders and noted that the full interest expense had been included in the final determination of Inland’s total costs. The Department had re-examined the record and found that there was no evidence to link Inland’s interest income with anything other than steel production. Accordingly, the

⁶¹ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported From the United States of America* (CDA-93-1904-08), 44-49.

⁶² Deputy Minister, Revenue Canada Customs, Excise and Taxation, “Corrosion-Resistant Steel Sheet Determination on Remand,” Ottawa, August 4, 1995, 6.

⁶³ Deputy Minister, Revenue Canada Customs, Excise and Taxation, “Corrosion-Resistant Steel Sheet Determination on Remand,” Ottawa, August 4, 1995, 7.

determination on remand offset Inland's short term interest income against interest expense as directed by the panel.⁶⁴

The Deputy Minister concluded the determination on remand by stating that the margins of dumping of the subject goods and the actual and potential volumes of the dumped goods were not negligible even after the panel's orders had been taken into account. Even though he varied the final determination's margins of dumping, the Deputy Minister affirmed that some dumping duties should remain in place.⁶⁵

***The Panel's Opinion of the Determination on Remand:
November 2, 1995***

The panel issued a 3-2 decision on the Deputy Minister's Determination on Remand. The majority was made up of William E. Code, Chairman (Canadian), D. Michael Goldie (Canadian), and Kathleen F. Patterson (American). Panelists Harry First (American) and Robert E. Ruggeri (American) issued their own dissenting opinions.

The majority upheld the determination on remand in its entirety. It affirmed the Deputy Minister's explanation of why he limited the offset of interest income to the amount of interest expense. The majority noted that the Deputy Minister had properly explained why he grouped interest accounts and limited offset costs. Furthermore, the majority felt that the explanation was grounded on the SIMA. American complainants had failed to demonstrate why the Deputy Minister's policy was not a reasonable interpretation of Canadian trade laws and regulations.⁶⁶ Similarly, the majority of panelists affirmed the Deputy Minister's approach to the B&LE litigation expense incurred by the U.S. Steel Company. The panel had instructed the Deputy Minister to review the record to find a connection between the antitrust settlement costs and the subject goods. The panel commended the Deputy Minister for relying on two types of evidence to do so in the determination on remand: (1) that which was related to accounting, including the historical reasons why the cost was assigned to the books of the U.S. Steel Group, and (2) that which attempted to relate the railroad activities to steel operations. The majority noted that the Deputy Minister was given the authority to interpret the SIMA, and was entitled to a degree of deference. Therefore, even if there were other reasonable ways of approaching

⁶⁴ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Corrosion-Resistant Steel Sheet Determination on Remand," Ottawa, August 4, 1995, 7.

⁶⁵ Deputy Minister, Revenue Canada Customs, Excise and Taxation, "Corrosion-Resistant Steel Sheet Determination on Remand," Ottawa, August 4, 1995, 8.

⁶⁶ Binational Panel Review, *Memorandum Opinion and Order RE: Deputy Minister Determination on Remand In the Matter of Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), November 2, 1995, 2-3.

the issue, the majority felt it was inappropriate to hold the Deputy Minister's reasoned approach in the determination on remand as unacceptable. It was supported by evidence that connected the cost to the subject goods. Since the litigation costs lacked a connection elsewhere in the company, it was not unreasonable to view them as general costs of doing business borne by the entire U.S. Steel Group. The Deputy Minister fully justified why he considered that the antitrust expense, while different in origin from other general corporate overhead expenses, was part of the administrative costs of the entire company. The majority felt that there was sufficient justification for the Deputy Minister's approach in the SIMA, and accepted the reasoned interpretation of the determination on remand as a result.⁶⁷

The American Response to the CITT's Affirmative Injury Determination

Bethlehem Steel Export Corp., U.S. Steel, I/N Kote, Inland Steel Co., and LTV Steel Co. requested that the CITT's affirmative injury determination be reviewed by a binational panel on September 12, 1994. The U.S. complainants argued that the CITT had committed errors of jurisdiction, law, and fact, and breaches of natural justice in its finding that injury had caused, or was likely to cause, injury to Canadian steel producers. The U.S. Steel producers alleged that:

- (1) the CITT erred in finding injury with respect to all goods from all exporters, irrespective of whether there was evidence that some of the exporters had or had not contributed to the injury or likely injury to the domestic industry;
- (2) the CITT erred in using cumulation to find that dumping had been the cause of material injury to the domestic industry where an exporter(s) presented evidence that it/they did not contribute to injury;
- (3) the CITT erred in finding that the following non-dumping factors did not derogate from its conclusion that dumped imports had caused, or were causing material injury, to the domestic industry:
 - (a) the recession;
 - (b) the entry of Sorevco, Z-Line, and DNN into the market;
 - (c) fluctuations in exchange rates;
 - (d) the closure of Dofasco's ingot steam and pension and retirement costs and in not considering the following non-dumping factors:
 - (i) the sale of excess prime materials;
 - (ii) tariff reductions under the FTA and NAFTA from eight percent to four percent.
- (4) the CITT breached natural justice in making post-hearing analyses of the effect of Z-Line and DNN on Stelco and Dofasco and of the effect of an

⁶⁷ Binational Panel Review, *Memorandum Opinion and Order RE: Deputy Minister Determination on Remand In the Matter of Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), November 2, 1995, 5-6, 8-9.

increase in the proportion of non-prime products and in failing to send a questionnaire to Z-Line and DNN;
 (5) the CITT erred in its refusal to grant the exclusions sought by the U.S. complainants; and
 (6) the CITT erred in including the U.S. complainants within its finding of a likelihood of future injury.⁶⁸

Stelco joined the American producers to challenge one part of the CITT's determination. Specifically, Stelco requested that the panel review the CITT's decision to exclude certain corrosion-resistant steel sheet products produced by the electrogalvanized process for use in motor vehicles from the investigation. Stelco alleged that:

(1) the CITT erred in granting an exclusion for subject goods produced by the electrogalvanizing process and used in the manufacture of motor vehicles; and
 (2) the CITT breached natural justice by failing to call evidence concerning Metal Koting Continuous Colour Coat Limited (CCC) as to the electrogalvanized product exclusion or by giving inadequate attention to the potential injurious effects of such as exclusion on CCC.⁶⁹

***The Binational Panel's Opinion of the CITT's Affirmative
 Injury Determination:
 July 10, 1995***

A panel was convened to examine the allegations of the U.S. steel producers and Stelco. The panel was made up of three Canadians and two Americans: E. Neil McKelvey - Chair (Canadian), Edward Chiasson (Canadian), Maureen Irish (Canadian), Timothy Harr (America), and Lauren Rachlin (American). The panel issued a unanimous decision that affirmed the CITT's entire determination on July 10, 1995.

Standard of Review

The panel identified the relevant statutes and parts of the NAFTA that referred to the Canadian standard of judicial review. It also relied on Canadian administrative law and jurisprudence to determine that it had to apply the "correctness test" to the CITT's decision. The correctness test was designed to determine whether the Tribunal acted correctly (i.e.,

⁶⁸ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 10-11.

⁶⁹ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 11.

without error) within its jurisdiction. The panel also considered the degree of deference that ought to be accorded to the CITT. It noted that “curial deference” had been the traditional approach that courts had applied to specialized tribunals like the CITT within areas of their jurisdiction or area of expertise. However, the panel noted that Canadian review courts had begun to afford tribunals “considerable deference” when their privative clauses had been repealed, as the CITT’s had been in 1993. Consequently, the panel held that, “on questions of law, the panel will not interfere with the CITT if it has a reasonable basis for its interpretation of the law, and will apply a standard of a high degree of deference which the courts have described as considerable deference.”⁷⁰ Nevertheless, the panel insisted that it would interfere with the CITT’s findings if the evidence “viewed reasonable was incapable of supporting the finding in question.”⁷¹ In other words, the panel approached the Canadian standard of review by giving considerable deference to the Tribunal, but only if and when, its determination was supported by reasonable evidence on record.

The Panel’s Opinion Concerning the Arguments Made by the American Steel Producers

(1) Issues Number One and Two

The panel considered whether the CITT erred in finding that all of the exporters had contributed to the injury of the domestic industry, and whether the CITT erred in using cumulation to find that all of the exporters contributed to injury at the same time. The panel explained that the CITT had analyzed the cumulative or combined effect of imports from all of the countries during the injury investigation. Similarly, it underscored that the CITT had conducted micro and macro analyses of economic indicators to conclude that the domestic industry had faced losses because of the dumped imports during the period of investigation. The panel noted that the CITT’s evidence led it to believe that the dumped imports had caused, or were likely to cause, material injury, and that a clear causal link existed between the dumping and the injury.

The U.S. complainants argued that the CITT should have considered the dumping practices of each individual exporter, instead of the dumping practices of all of the U.S.

⁷⁰ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 8.

⁷¹ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 9.

exporters combined. They insisted that if an exporter could present positive evidence that it did not contribute to injury, the CITT should consider the evidence; if the evidence was sufficient, the CITT should have found that the exporter did not contribute to injury and was excluded from the ADDs.⁷²

The panel rejected the American allegations. It noted that while the “cumulation methodology” was not obligatory under Canadian law, the CITT commonly considered the cumulative effect of all of the dumped imports for an entire group of exporters from one country. Moreover, it held that causation and cumulation were within the CITT’s jurisdiction. Given that the CITT had presented adequate supporting evidence for grouping the U.S. producers, the panel upheld the Tribunal’s decision as within its authority. The panel indicated that nothing in Canadian law or administrative practice required the CITT to review the evidence on an exporter-by-exporter basis in an injury determination.⁷³

(2) Issue Number Three

The panel turned its attention to the third allegation of the U.S. steel producers about the use of non-dumping factors in the injury determination. The CITT considered non-dumping factors, such as the recession, the capacity additions of certain U.S. steel companies, substantial price discounts, changes in exchange rates, and tariff reductions, as potential causes of price erosion and price suppression. While it acknowledged that non-dumping factors had some effect on the price of goods in the Canadian market, the Tribunal was not convinced that the three factors explained the magnitude of the price erosion and suppression (and injury) to the extent that the dumped imports did.

The panel held that, in spite of the American allegations, the CITT did not err in considering which non-dumping factors contributed to the injurious effects of the dumped imports. For the panel, the CITT was within its authority to consider non-dumping factors in its analysis. Moreover, the Tribunal’s conclusions were upheld because the panel found them to be supported by reasonable, substantial evidence.⁷⁴

⁷² Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 13.

⁷³ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 14-15.

⁷⁴ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 16.

(3) Issue Number Four

The panel considered the U.S. allegation that the CITT breached natural justice by conducting a post-hearing analysis of whether the domestic industry's profitability was adversely affected by a higher incidence of non-prime products that were sold at a loss. The CITT recognized that it should have used better statistics about the financial results of Stelco and Dofasco during the injury investigation. Consequently, it conducted a post-hearing analysis of the industry's income statement, and concluded that injury was still present. The U.S. steel producers argued that the CITT used non-record evidence during the post-hearing analysis, which deprived them of the opportunity to comment on the evidence during the analysis.

The panel rejected the U.S. allegations, and stated that it was satisfied that the post-hearing analysis was supported by information on the record. The panel held that "any tribunal must be free to do whatever analysis it requires to come to its decision, provided it does not use information not on the record and not available to parties. Although it might have been better for the CITT to have distributed the analysis to the participants for their comment, the fact that it did not do so is not an error or a breach of natural justice."⁷⁵ Therefore, the panel upheld the CITT's finding as within its area of expertise and as reasonably supported by evidence.

(4) Issue Number Five

The panel then turned its attention to the question of whether the CITT erred in refusing to grant the particular exclusions sought by the U.S. complainants. In the injury determination, the CITT stated that it would only grant exclusions in exceptional circumstances, and declined to grant certain exclusions. The Tribunal noted that the U.S. complainants represented 60 percent of total American exports in 1993, and that all producers (with the exception of Bethlehem Steel) were found to have unfairly dumped a high percentage of their goods into Canada and contributed to injury. Bethlehem Steel argued that there should have been an exclusion in its favour because the evidence did not show that it, as an individual exporter, contributed to injury.

The panel held that Canadian trade law did not require the CITT to exclude an exporter from an investigation even if the exporter's margin of dumping was zero. In other

⁷⁵ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 18.

words, the panel argued that “zero dumping does not necessarily mean an exclusion should be granted,” because the determination of whether exclusions should be granted was a matter within the specialized expertise and discretion of the CITT.⁷⁶

(5) Issue Number Six

The final U.S. allegation that the panel considered was the claim that the CITT erred in including the U.S. complainants in the finding of a likelihood of future injury. In coming to the conclusion that there was a likelihood of future material injury, the CITT considered factors such as the degree to which the Canadian industry had begun to rely on products that were prone to price depression, the effect of low-priced imports on export markets such as Canada, the tendency of exports to be diverted away from the U.S. and into Canada, and the degree to which Canadian price increases were substantially lower than U.S. increases. Those factors led the Tribunal to determine that if ADDs were not in place, the domestic industry would continue to have difficulty achieving prices that would provide reasonable returns, and would thereby subject Canadian producers to the risk of future material injury.

The panel rejected the U.S. allegation that the CITT erred in its findings of future injury. It held that the CITT considered sufficient factors to warrant its conclusion, and there was reasonable evidence to support the conclusion.⁷⁷

The Panel's Opinion Concerning the Arguments Made by Stelco

After it rejected all of the U.S. allegations about the CITT's injury determination, the panel considered the two issues raised by Stelco. First, the panel considered whether the CITT erred in granting an exclusion for corrosion-resistant steel sheet products produced by the electrogalvanized process for use in the manufacturing of motor vehicles. The CITT granted the exclusion at the request of U.S. producers, because the products were not sold in Canada during the period of investigation. Stelco disputed the exclusion, because it argued that its hot-dipped steel products were substitutable for electrogalvanized products. In contrast, the CITT maintained that Stelco's arguments were moot because the

⁷⁶ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 19.

⁷⁷ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 20-21.

vast majority of automotive manufacturers preferred electrogalvanized to hot-dipped steel products.

The panel affirmed the CITT's conclusion that there were physical differences between the hot-dipped and electrogalvanized products, and that consumers were generally prepared to pay premium prices for electrogalvanized steel. Therefore, the panel upheld the CITT's ability to grant the exclusion request because a change in the price of electrogalvanized steel would not have affected Stelco's products or vice versa. The panel held that "whether to grant an exclusion is a matter within the specialized expertise and discretion of the CITT. It considered the issue and did not proceed on any wrong principle."⁷⁸

Second, Stelco argued that the CITT should have requested information about electrogalvanized steel from CCC, given that it was the only producer of the product in Canada. The panel rejected Stelco's claims. It noted that the CITT had sufficient evidence to conclude that CCC's business would not be affected by the exclusion order, and had exercised its discretion. Consequently, given that reasonable evidence existed for the Tribunal's decision, the panel chose not to interfere with the CITT's specialized expertise and upheld its conclusions.⁷⁹

In this way, the panel affirmed the CITT's entire injury determination. It upheld the Tribunal's logic, methodology, and evidence. Because the CITT provided reasonable evidence to defend all of its conclusions, the panel deferred to the CITT's expertise within its area of jurisdiction.

Analysis

More than the softwood lumber and pork disputes, the certain corrosion-resistant steel sheets dispute demonstrates that the presence of Chapters 19 panels encouraged change to occur in the character of the Canadian trade regime. While beliefs in economic protectionism, hegemonic relationships, and concerns with state sovereignty remained present, they were not strong influences in the process of judicial review. Consequently, the very presence of the panels was able to make the Canadian regime fairer, more transparent, and faster than what had existed prior to 1989.

⁷⁸ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 23.

⁷⁹ Binational Panel Review, *Memorandum, Opinion, and Order In the Matter of Certain Corrosion-Resistant Steel Sheet Products Originating in or exported from the United States of America (injury)* (CDA-94-1904-04), July 10, 1995, 24.

(A) Evidence of Change - Observations of the Dependent Variable

(1) Fairness

Chapter Two explained that the variable fairness would be assessed in terms of the unanimity of panel decisions. The variable of fairness examines whether panel members split according to national lines to determine if the presence of Chapters 19 panels could ensure that perceived biases, which had reduced the integrity of the domestic process of judicial review, were overcome in the post-FTA/NAFTA context. The panel that reviewed the Deputy Minister's affirmative determination was made up of three Canadians and two Americans. Its initial decision was unanimous. Similarly, the panel that reviewed the CITT was unanimous. Both decisions, therefore, demonstrated that members of Canada and the U.S. could work together to improve the perceived fairness of the review of antidumping, countervailing or injury determinations. Steel producers from both countries could thus be more confident that their concerns were more fairly accounted for in the post-NAFTA trade regime.

It must be noted that the Revenue Canada panel's remand opinion divided the panelists, but not according to national lines. The majority included two Canadians and one of the three Americans. The other two Americans issued their own partial dissenting opinions. In their dissenting opinions, panelists First and Ruggerri agreed with the majority that the Deputy Minister had provided sufficient reasoning to justify his conclusions regarding short term interest income. However, both panelists objected to the majority's decision regarding the B&LE antitrust suit. In separate decisions, they argued that the Deputy Minister erred by attributing an allocable share of the cost of the antitrust suit to the costs of production. Even if the SIMA was unclear on the issue, they did not feel that the majority should have given the Deputy Minister so much discretion. First argued that the "panel must ensure that the Deputy Minister has engaged in reasoned decision-making, given the applicable statute and regulations."⁸⁰ Panelists First and Ruggerri felt that the Deputy Minister had not established a connection between the legal costs and the costs of production. Moreover, they felt that the majority had granted him too much discretion in its decision of the determination on remand. They insisted that the Deputy Minister had only reiterated the facts presented in the final determination.

⁸⁰ Panelist First, *Memorandum Opinion and Order RE: Deputy Minister Determination on Remand In the Matter of Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), November 2, 1995, 2.

Conclusive evidence that firmly established a connection between the two costs had not been presented in the determination on remand.⁸¹

By holding that the majority granted the Deputy Minister too much discretion, the dissenting panelists reflected fears that certain Americans had about the Canadian standard of review. Some Americans were skeptical about the provisions of Chapters 19 which required panels to use the standard of review of the importing country when determining if an administrative agency had applied domestic trade remedy laws correctly. They feared that the Canadian standard of review afforded the Deputy Minister of Revenue Canada and the CITT too much deference and/or latitude in the process of review. Moreover, because they felt that the U.S. standard of review was more rigorous, they feared that panels would uphold Canadian agencies more readily than U.S. agencies. Canadian agencies, they argued, would be granted larger measures of deference. This would in turn upset the balances of cases decided for and against Canadian or U.S. interests. In other words, they feared that a more “deferential” standard of review in Canada would jeopardize the fairness of the Chapter 19 system.

The Chapters 19 experience in general, and the certain corrosion steel sheets dispute in particular, address these concerns about the degree of deference in the Canadian standard of review. Canadian review courts have bestowed a much greater degree of deference on the CITT than Revenue Canada because of the Tribunal’s traditional privative clause. Panels have mirrored this practice as the CITT panel’s decision clearly indicates, and have generally been more deferential to the CITT than to the Deputy Minister of Revenue Canada. Nevertheless, in spite of the deference given to Canadian agencies, panels have remanded them more often than Canadian review courts have done. Four of the six cases where Chapters 19 panels reviewed a CITT determination were either partially or completely remanded. Conversely, very few CITT cases have ever been appealed to the Federal Court of Appeal, and those that were appealed have been very rarely reversed. In addition, panels have subjected the CITT to more scrutiny than domestic courts have when applying the deferential standard of review. John Coleman, Chair of the CITT stated “[P]anels have scrutinized cases more carefully and have demanded more information and

⁸¹ Panelist First, *Memorandum Opinion and Order RE: Deputy Minister Determination on Remand In the Matter of Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), November 2, 1995, 3-4; Panelist Ruggeri, *Memorandum Opinion and Order RE: Deputy Minister Determination on Remand In the Matter of Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), November 2, 1995, 6-8.

quantifiable proof than was previously required by the Federal Court of Canada.”⁸² Chapters 19 panels have applied a rigorous, exacting standard of review to Revenue Canada determinations as well. Unlike Canadian review courts, panels have either partially or completely remanded all of the cases involving Revenue Canada for re-consideration.

In this way, while they have acknowledged the importance of agency discretion and deference, the majority of panels have stressed the importance of reasonable, substantiated determinations that reflected record evidence when reviewing Canadian AD/CVD/injury determinations. Indeed, as the corrosion-resistant steel sheet dispute demonstrates, Canadian agencies were not able to make determinations without substantial evidence or logical justifications for doing so. Consequently, Canadian agencies, like their American counterparts during the softwood lumber and pork disputes, have been subjected to rigorous review within the parameters of their country’s administrative legal traditions, thus disproving the arguments of American critics about the challenges to the fairness of the panel process.

(2) *Transparency*

Transparency reflects the openness, accessibility, and comprehensiveness of a judicial decision. In the hypothesis, transparency was used to conceptualize the degree to which Chapters 19 panels issued detailed decisions that revealed their reasons, employed the standard of review, and demanded that administrative agencies based decisions on substantial evidence and offered justifiable reasons for their determinations.

The panel’s decision about Revenue Canada was well-written and full of detail about the dispute. Filling more than 70 pages, the panel explained the background of the dispute, the Deputy Minister’s decision, and its own reasoning. The CITT panel’s decision was 25 pages, and recapped the Tribunal’s decision and arguments of the interested parties. In contrast to other panel decisions, the Revenue Canada and CITT panels did not provide nearly the amount of detailed analysis or reasoning. However, in comparison to Canadian review courts, both panels went much further in uncovering their logic, and thereby increased the transparency of the Canadian system. Canadian review courts have not tended to produce such detailed decisions about the application of AD/CVD laws.

While a direct comparison cannot be drawn between the panel decisions and a Canadian review court’s decision on this specific determination, other steel determinations

⁸² William J. Davey, *Pine and Swine: Canada-United States Trade Dispute Settlement - The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Policy and Law, 1996), 142.

were appealed to the Federal Court of Appeal and can be used to show how panels increased the transparency of the Canadian trade regime after 1989. In *A.G. der Dillinger Huttenwerke v Canada* (1995), the Federal Court of Appeal dismissed a foreign steel maker's appeal of the CITT's injury determination regarding certain hot-rolled carbon steel plate and high strength low-alloy plate. The producer felt that it should have been excluded from the CITT's injury analysis because its goods were not "like" the domestic goods in the investigation. The Federal Court of Appeal upheld the CITT by referring to the "large measure of discretion" that Section 43(1) of the SIMA gave to the agency. Even though detailed reasons were not given by the Tribunal, the Court affirmed the CITT in a two-page decision because "it clearly understood the applicant's position, gave it careful consideration, and granted substantial relief."⁸³ Similarly, the Court released very brief, sketchy decisions in *Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996) and *Siderurgica Nacional v Canada* (1995).⁸⁴ In both cases, the Court deferred to the CITT's expertise and ability to withhold complex, technical information. However, the Court did not offer detailed reasoning or ask probing questions when making its decision. Instead, the Court quickly deferred to the administrative agency even though it had withheld evidence in the injury determination. Consequently, it can be argued that the issues involved did not get the kind of scrutiny that a binational panel would have offered them in the more transparent Chapters 19 process of review.

Both panels in the corrosion-resistant steel sheet dispute explained their interpretation of the standard of review. As explained above, they recognized the tradition of deference to the agency, but also affirmed the importance of substantial evidence and reasoned decisions. The Revenue Canada panel exercised the standard of review by demanding that the Deputy Minister provide more substantial evidence and justifications for a number of conclusions. The panel remanded the AD determination for not fully explaining decisions about the goods in question and the B&LE expense, the use of interest charges under the Retiree Health Benefit Act, the reasons for limiting LTV's interest income offsets to interest expenses, and the reasons why the fees for the anti-trust suit were attributed to USX's general overhead expenses. For example, in regards to the fees associated with the anti trust suit, all five panelists felt that:

[T]he mere fact that the B&LE expense was apparently charged to the books of the U.S. Steel Group does not alone, without, for example, further explanation or analysis of the corporate structure, support the treatment of

⁸³ *A.G. Der Dillinger Huttenwerke v Canada* (1995), F.C.J., No. 833, Court File No. A-375-93.

⁸⁴ *Aciers Francosteel Canada Inc. v Dofasco Inc.* (1996), F.C.J. No. 52, Court File A-432-94; *Siderurgica Nacional v Canada* (1996), F.C.J., No. 54, Court File No. A-411-94.

the railroad expenses as overhead for SIMA purposes. A connection to steel is not made merely by demonstrating payment of a liability assumed by the parent upon the sale of the subsidiary railroad. In fact, the Deputy Minister found that if the railroad were still a subsidiary during the period of investigation, no allocation of the cost of the judgment to steel would have been made. This eliminates any implicit finding of the required connection.⁸⁵

Accordingly, the panel remanded the issue to the Deputy Minister and directed him to reconsider whether evidence on the record supported the conclusion that the costs of the antitrust suit were truly connected to the goods in question. The Deputy Minister was ordered either to provide adequate justification for the original determination, or to recalculate the normal value and margins of dumping without the litigation costs.

The CITT panel was much more deferential to the agency's expertise. Even though it affirmed the CITT's evidence as substantial and reasonable, the panel underscored the Tribunal's expertise and authority to act freely within areas under its jurisdiction when responding to each and every issue raised.

Transparency was injected into the Canadian trade regime because the Deputy Minister quickly and completely complied with all of the Revenue Canada panel's orders.⁸⁶ After reviewing Revenue Canada's remand determination, the majority of panelists upheld the decision and affirmed that the Deputy Minister had provided more reasoned, substantial explanations for the affirmative findings. Furthermore, transparency was evident in another aspect. The Revenue Canada panel uncovered its reasoning by referring to other Chapters 19 panel decisions. Even though Chapters 19 panels are not bound by each others' decisions under the doctrine of *stare decisis*, they often refer to one another to reach well-reasoned, articulate conclusions. The Revenue Canada panel referred to certain aspects of the beer, gypsum, and cold rolled steel panels to define certain parts of the SIMA, and clarify its own decisions. Interestingly, the Deputy Minister also referred to other panel decisions to reach the final determination, thereby illustrating that Revenue Canada understood that Chapters 19 panels would only accept reasoned, transparent decisions that were in compliance with Canadian trade laws.

⁸⁵ Binational Panel Review, *Memorandum Opinion and Order In the Matter of Final Determination of Dumping Regarding Certain Corrosion Resistant Steel Sheet Products Origination in or Exported From the United States of America* (CDA-94-1904-03), June 23, 1995, 20-21.

⁸⁶ This aspect of measuring transparency cannot be applied to the CITT because the panel upheld the injury determination in its entirety.

(3) Speed

The hypothesis proposed that Chapters 19 panels would change the character of the domestic trade remedy regimes by making the review processes faster. Speed would be measured by examining when panel decisions were released. The request for the Revenue Canada panel was made on August 12, 1994. The panel's initial decision was issued on June 23, 1995, or 10.5 months after the request was made, and within NAFTA guidelines. The remand process was finished within another four months, making the entire process of review 14.5 months in length. Similarly, the request for the CITT panel was made on September 12, 1994 and the decision was released 10 months later on July 10, 1995, also within NAFTA guidelines.

The degree to which the panels injected speed into the Canadian trade regime can be seen by comparing the length of time that the Federal Court of Appeal took to issue decisions on other steel cases. CITT determinations regarding hot-rolled, cold-rolled, and corrosion-resistant steel sheets were appealed to the Federal Court of Appeals in 1993 and 1994. While the Revenue Canada panel and CITT processes took only 14.5 months and 10 months respectively to complete, the domestic process of review took two to four years for all of the cases to be completed.

(B) Evidence of the Impediments to Change - Observations of the Independent Variables

(1) Economic Protectionism

As the introduction to Chapter Seven explained, beliefs in economic protectionism were central in the history of the steel dispute between Canada and the U.S. Trade actions were generally taken when steel producers were in poor economic positions, and needed assistance or protection. Indeed, the majority of trade actions were initiated in Canada and the U.S. during the recession of the early 1990s. The steel dispute cooled off during the fall of 1995. Steel makers on both sides of the border were waiting for the results of the DOC's administrative review on the ADDs placed on imports of corrosion-resistant and cut-to-length plate products in 1993 before taking any further actions. The DOC released the administrative review on March 28, 1996. The Department slashed the ADDs on most Canadian steel products, and ordered that rebates be repaid to Canadian companies. Stelco, for example, will receive \$3 million in rebated duties, and Dofasco will receive

approximately \$34 million for duties it paid on steel products.⁸⁷ It remains to be seen if American firms will object to the reduction of duties by resorting to protectionist lobbying techniques and/or further AD petitions. Furthermore, it remains to be seen if AD actions will begin again once U.S. and Canadian steel producers face an economic downturn in the future.

Beliefs in economic protectionism were not as strong during the corrosion-resistant steel case as they had been during the lead-up period to the dispute, or in the softwood lumber and pork cases. Consequently, institutionalized binational panels were not inhibited to the same degree by this variable, and were able to change the character of the Canadian trade regime as a result. Nevertheless, beliefs in economic protectionism surfaced in the wake of the panel decisions. In spite of being somewhat satisfied with the decisions in the corrosion-resistant steel sheet dispute, Canadian steel producers have begun to demand that Canada's trade remedy laws be changed in order that they can take more stringent measures against foreign competitors.

On behalf of the Canadian steel industry, the CSPA has charged that serious flaws exist in Canada's trade laws. The flaws have weakened the amount of protection that is offered to domestic producers from unfair imports. Officials of the CSPA insist that Canadian trade remedy laws should be changed to resemble the more protectionist regime of the United States. Frederick Telmer, Chief Executive Office of Stelco Inc., charged that "we need a level playing field in terms of Canada - U.S. steel trade, and the only way we're going to get this is to make Canadian AD laws every bit as effective as their U.S. counterparts."⁸⁸ He stipulated that Canadian laws need to be more effective because American producers and policy-makers have not abided by Chapters 19 of the FTA and NAFTA since they took effect. Furthermore, Canadian laws need to be improved because Canadian governments have been unable or unwilling to convince the United States to act otherwise.⁸⁹

Members of the CSPA have criticized Canada's trade remedy regime for not being as effective as the American system, because it employs a "prospective" enforcement system, whereas the American regime employs a "retrospective system." The prospective system favours foreign producers because it publishes what standards have to be met to

⁸⁷ Interview with Jean Van Loon, president of the Canadian Steel Producers Association, January 12, 1996; Greg Ip, "U.S. Set To Roll Back Steel Dumping Duties," *Financial Post* (August 19, 1995), 4; Paul Waldie, "U.S. duties too low, Stelco says," *Globe and Mail* (March 30, 1996), B3.

⁸⁸ Gail Lem, "U.S. Hits Canadian Steel," *Globe and Mail* (June 23, 1993), A1; Shawn McCarthy, "Ottawa Urged To Toughen Steel Dumping Laws," *Toronto Star* (June 10, 1993).

⁸⁹ Gail Lem, "Free trade a myth, Stelco CEO says," *Globe and Mail* (February 23, 1996).

avoid an AD duty before it is actually levied by Revenue Canada. Conversely, the retrospective system of the United States informs foreigners that duties are owed to compensate for previous unfair trade practices. The CSPA has claimed that the retrospective system is much more effective because it penalizes foreign companies directly, instead of giving them the opportunity to correct their questionable trade practices to avoid a duty. Given the differences between the two systems, the CSPA has charged that Canadian exporters require greater cash reserves to cover ADDs, face greater financial risks than their American counterparts, incur greater administrative burdens, and are subjected to an "unknowable" standard of acceptable pricing. Therefore, the CSPA has maintained that Canada's system should be transformed into a retrospective regime to toughen the laws facing Americans who commit unfair trading practices. The CSPA has also suggested that should Canada amend the procedures of an AD investigation. In particular, steel producers have argued that the information collection system should be made more like U.S. requirements. The DOC places stringent requirements on Canadian firms when asking for information in the questionnaires. Fred Telmer, CEO of Stelco, illustrated that his firm had to submit a 60 000 line document consisting of 3.6 million computer entries on one product to comply with American trade regulations during a dumping investigation. He insisted that Canada's system be changed so that American producers were required to submit similar amounts of information when being investigated by the Deputy Minister and/or CITT.⁹⁰ In addition, the CSPA has advocated that expired AD orders should be entitled to an automatic review, as they are in the American system, to ensure that unfair dumping behaviour has stopped.

The CSPA has argued that strengthening Canada's AD system would be an important step in allowing steel producers to trade in a fair, open market. They have noted that major steel mills are extremely influential in the American trade policy-making process. Because American mills are becoming more sensitive to the potential impact of trade remedy laws in other countries, the CSPA has urged that strengthening Canada's laws according to the American model would pressure them to lobby U.S. officials to apply their domestic laws in a fairer, less protectionist manner.⁹¹ By demanding that domestic laws be strengthened and made more comparable to U.S. procedures, the CSPA has, in effect,

⁹⁰ Gail Lem, "Free trade a myth," *Globe and Mail* (February 23, 1996); Ian Jack, "Stelco chief calls for tighter trade regulations," *Ottawa Citizen* (February 23, 1996), B8.

⁹¹ Submission of the Canadian Steel Producers Association to the Joint Sub-Committee on the Review of the SIMA, *House of Commons Debates*, October 30, 1996; Canadian Steel Producers Association, "Stronger Antidumping Rules For Canada," (Ottawa: Canadian Steel Producers Association, November 1995), 8-9; Canadian Steel Producers Association, "The CSPA's Position," *Steel: A Quarterly Newsletter of the Canadian Steel Industry*, Vol. 2, No. 1 (January-March, 1996), 3.

indicated that it prefers to rely on domestic laws for protection rather than on international institutions to settle disputes. Consequently, the CPSA has implied that it does not wish Chapters 19 to continue to change the Canadian system, but wishes to resort to protectionist domestic laws instead.

(2) Hegemonic Relationships of Policy-Makers, Interest Groups, and Administrative Agencies within and between the Three Countries

Similar to the effects of economic protectionism, hegemonic relationships played a large role in the history of the steel dispute. Steel producers on both sides of the border were able to persuade political and administrative officials to pursue their interests. However, the powerful steel lobbies did not have a direct role to play in the two panel processes. The panels were able to discuss the behaviour of Revenue Canada and the CITT, and make necessary changes to the character of the regime free from the constraints of hegemonic relationships in the domestic and international contexts.

(3) Concerns with State Sovereignty

Chapter Two defined state sovereignty as the willingness of governments and administrative agencies to allow themselves to be changed by international institutions. State sovereignty was to be measured in terms of governmental statements in support or opposition to Chapters 19 panels in general, and panel decisions in particular. The Canadian government was extremely committed to Chapters 19 of the FTA/NAFTA. Effective dispute settlement mechanisms were a major priority in the negotiations to decrease the harassment that Canadian producers faced in the U.S. trade regime. Not surprisingly, therefore, the Canadian government was supportive of the panels' decisions. Furthermore, where a remand was issued, the panel decision was accepted quickly. Revenue Canada, unlike the DOC and ITC in the softwood lumber and pork disputes complied with panel orders completely, and changed its ruling on the first remand. Successive remands or ECCs were not resorted to in an effort to inhibit the process of change. Therefore, concerns with state sovereignty were not present in the corrosion-resistant steel sheets dispute as they were in the softwood lumber or pork cases. Consequently, changes in favour of Chapters 19 occurred more readily, because of the willingness of the interested parties to accept the objectivity, fairness, and speed of the new system of judicial review.

Conclusion

The corrosion-resistant steel sheet plate dispute was part of a longstanding struggle between Canada and the United States over the terms of a fair, level playing field for steel producers. The temperature of the dispute was raised by the nature of the global economy during the 1970s, 1980s, and 1990s. Reductions in the global demand for steel, the recessions of the early 1980s and 1990s, and the massive restructuring efforts made the ability to access markets fundamental to steel producers in Canada and the United States. However, the desire to export also raised fears that steel producers were being threatened in their home markets. Protectionist laws and restrictive AD/CVDs were looked to as strategies that allowed governments to isolate domestic producers from their foreign competitors and adverse economic conditions before 1989.

The presence of Chapters 19 of the FTA and NAFTA allowed changes in the character of the trade regime to occur by placing a binational institution into the process to encourage a fairer, more transparent, faster system of judicial review to emerge. Panels in the cold-rolled steel sheets, beer and gypsum disputes encouraged the Deputy Minister to rework some calculations and considerations during the final determination of the Corrosion-Resistant Steel Sheets dispute. Moreover, the binational panel ordered the Deputy Minister to rework the methods by which Sections 16 and 19 of the SIMA were used to calculate the margins of dumping for American steel producers. Consequently, Chapters 19 panels unanimously subjected the Deputy Minister to a faster, more intensive or transparent process of review. The broad grants of discretion the Department enjoyed prior to 1989 were limited by international institutions to ensure that Canadian and American firms fully understood why certain AD/CVD determinations were made. Given that socio-economic factors such as economic protectionism, hegemonic relationships, and concerns with state sovereignty were not present to the same degree as they were in other disputes, change was permitted to occur.

The corrosion-resistant steel sheet plate dispute demonstrates the utility of rational choice new-institutionalist theories to explain change. International institutions drew on their authority to change domestic laws and practices. Binational panels were able to change the character of Canada's trade regime because the Deputy Minister, CITT, and Canadian government consented to the panels' authority and ceded a measure of their sovereignty and independent decision-making ability to it. The lingering presence of economic protectionism also demonstrates the applicability of structural-sociological new-institutionalist theories. Rules change slowly. Rules change insofar as they are recognized as legitimate, acceptable, and authoritative by dominant policy-makers and interest groups

in a society. In spite of the changes that the presence of Chapters 19 encouraged, Canadian steel producers have begun to question the utility of Chapters 19 because American producers and policy-makers have often disregarded the provisions therein. The United States has repeatedly failed to honour its commitments to use Chapter 19 to settle AD/CVD disputes conclusively.⁹² The ability of Chapters 19 to continue to change North American trade remedy laws could be placed in jeopardy if American and Canadian policy-makers and interest groups continue to act upon their perceptions that the Chapters 19 process is not effective.

⁹² Gail Lem, "Free trade a myth, Stelco CEO says," *Globe and Mail* (February 23, 1996).

**CHAPTER EIGHT - THE CUT-TO-LENGTH PLATE PRODUCTS
DISPUTE BETWEEN MEXICO AND THE UNITED STATES**

The final dispute that will be used to test the hypothesis about the changes that were made to the characters of the North American trade regimes is the cut-to-length plate products dispute between Mexico and the United States. The cut-to-length plate products dispute was chosen because it was the first one in which a NAFTA-19 panel was used to review a Secretaria de Comercio Y Fomento Industrial (SECOFI) determination. The dispute was also chosen because it illustrates the extent to which Mexico's trade remedy regime was transformed into a faster, fairer, more transparent system of judicial review. Prior to 1993, Mexico's trade regulatory process was arbitrary, corrupt, and based on low standards of transparency and due process. Administrative officials were able to exercise a tremendous amount of discretion in their determinations. SECOFI officials changed rules and practices at will to satisfy the interests of policy-makers in the executive branch and dominant producer groups who were part of the ruling coalition. However, as the cut-to-length plate products dispute will demonstrate, SECOFI changed its practices by adhering to the panel's decision, thereby allowing the institution to make the character of the regime fairer, more transparent, and faster. Finally, the dispute was chosen because it illustrates that change was facilitated by the relative weakness of socio-economic factors vis-à-vis the panel's decision. The only independent variable that threatened to impede the panel process was state sovereignty. Concerns with economic protectionism were present, but were not promoted to a such a large extent by domestic policy-makers as occurred in the softwood lumber and pork disputes. Dominant policy-makers in Mexico and the United States used their power to ensure that the decisions of the panel were implemented so that Mexico's trade regulatory process was changed in accordance with the objectives of NAFTA-19.¹

SECOFI's Affirmative Dumping Investigation (1992-1994)

The cut-to-length plate products dispute stemmed from aggressive measures taken by American steel producers to ensure that their products were competitive at home and abroad. The dispute began when Altos Hornos de México, SA de CV (AHMSA) filed a complaint, alleging that American steel producers were dumping cut-to-length plate products into the Mexican market. The Mexican company filed an antidumping (AD) petition with the Dirección General de Prácticas Comerciales Internacionales (DGPCI), an administrative subunit of SECOFI, on December 11, 1992. Upon advice from one of its

¹ See Appendix K for a summary of the dispute.

own administrative agencies, the Dirección de Cuotas Compensatorias (DCC), the DGPCI determined that the AD petition contained a sufficient amount of information to warrant a full investigation. Consequently, the DGPCI issued a provisional duty on American cut-to-length plate products on December 24, 1992.² On behalf of SECOFI, the DGPCI notified a number of Mexican steel companies of the provisional duty in February of 1993. The DGPCI requested that they provide information regarding the effects of American steel imports in a questionnaire. Notices and questionnaires were also sent to a number of American steel producers, such as the Bethlehem Steel Corporation and the USX-U.S. Steel Group. Verification visits were conducted to assess the responses during the summer of 1993.

SECOFI issued a preliminary determination on April 28, 1993 after reviewing the questionnaires returned by domestic and foreign producers. The preliminary determination held that the imported goods had been dumped into the Mexican market and were causing, or threatening to cause, material injury to the Mexican cut-to-length plate industry. The affirmative finding led SECOFI to adjust the provisional duty according to its dumping calculations. Antidumping duties (ADDs) from 16.42 percent to 44.92 percent were placed on American imports on April 29, 1993. As required by the Foreign Trade Law of 1993 and GATT AD Code, SECOFI allowed the American steel producers to comment on the preliminary determination. Letters were sent to the Bethlehem Steel Corporation, the USX-U.S. Steel Group, and the Commercial Counselor of the American Embassy, inviting them to respond to SECOFI's finding in May of 1993. Furthermore, SECOFI hosted two disclosure meetings with American producers to discuss the reasons for its injury finding, and the methods that the agency used to calculate the margin of dumping.³

SECOFI issued a final determination on August 2, 1994. The final determination concurred with the preliminary findings. The agency held that American producers were guilty of dumping their products into the Mexican market, and had caused material injury to the Mexican industry as a result. The final determination imposed ADDs ranging from 46.2-76.0 percent on a number of American cut-to-length plate products.⁴

² As explained in Chapter Three, SECOFI was able to issue a provisional duty within five days of receiving a petition from a domestic producers under the Foreign Trade Law and Regulations of 1986. This practice was changed when the Foreign Trade Law was amended in 1993.

³ SECOFI's Preliminary Determination was published in Spanish in the *Diario Oficial* on April 29, 1993. A summary of the Preliminary Determination is given in: Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 3-6.

⁴ The Final Determination was published in Spanish in the *Diario Oficial* on August 2, 1994.

The American Response - Request for a NAFTA-19 Panel

Bethlehem Steel Corporation and the USX-U.S. Steel Group requested that a NAFTA-19 binational panel be convened to review SECOFI's final determination on September 1, 1994. The American steel producers challenged SECOFI's actions on three broad grounds:

- (1) SECOFI had committed a number of jurisdictional and technical errors during the dumping investigation;
- (2) SECOFI had calculated the dumping margin incorrectly; and
- (3) SECOFI had erred when concluding that American imports caused material injury to the domestic industry.⁵

A binational panel was formed in response to the request. It was made up of three Americans and two Mexicans - Robert E. Lutz (American), Harry B. Endsley (American), John Barton (American), José Othón Ramírez Guitierrez (Mexican), G. Vega Canovas (Mexican). The panel released a split decision on August 30, 1995. Panelists Lutz, Endsley, and Guitierrez formed the majority. The majority concluded that SECOFI failed to comply with basic constitutional and legal principles when carrying out its dumping investigation. It remanded the proceeding to SECOFI after reviewing the administrative record, Mexican trade remedy laws, and the written and oral submissions of the interested parties.

***The Decision of the Binational Panel:
August 30, 1995***

The panel understood that it was to apply Mexico's standard of review of Sections 237-239 of the Federal Fiscal Code. Article 237 required that the panel's decision was to be based on law. The panel was also to examine each of the issues raised by the complainants, when there was an omission of the formal legal requirements or an infringement of procedural norms. Article 238 provided that an agency's decision could be challenged on the broad grounds of procedural error, error of law, error of fact, and abuse of discretion. Article 239 set out what the panel could do after hearing the case. Similar to the powers granted to a domestic review court, the binational panel could uphold the decision, declare it null and void (i.e., reverse the decision), or declare the decision null

⁵ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 1-2.

and void for certain reasons and ask that the agency reconsider certain parts of its determination (i.e., remand the decision). The panel argued that it was not to develop a separate jurisprudence in AD cases. Instead, the panel insisted:

The very essence of the Chapter 19 process is one of ensuring that the procedural improvements adopted in Chapter 19 by the NAFTA Parties for the review of AD duty cases will be faithfully implemented, but not to make substantive changes in the local AD law. The three governments have reserved that option for themselves. In short, it is a fundamental obligation of binational panels to attempt to construe local AD law as a local court would construe it, and to construe the applicable standard of review as a local court would construe it.⁶

The panel acknowledged that its central task was to determine whether SECOFI's final determination was in accordance with Mexico's AD laws.⁷ It recognized, however, that assessing Mexico's AD laws meant turning to a number of domestic and international sources. According to Article 1904 (2) of the NAFTA, "the AD law consists of the relevant statutes, legislative history, regulations, administrative practices and judicial precedents to the extent that a court would rely on such materials in reviewing a final determination of the competent investigating authority." The panel explained that while Article 1904 (2) was "unambiguous on its face," a number of international and domestic provisions had to be added to it, in order that all of the sources of Mexico's AD law could be accounted for. For example, the panel noted that Article 1904 (2) did not specifically mention international treaties as a direct source of Mexico's AD law. However, the panel felt that it had to account for the GATT's AD provisions during its review, because international treaties were self-executing parts of Mexico's domestic laws.⁸ Similarly, the panel explained that Article 1904 (2) had not referred to constitutional provisions as potential sources of AD law. The panel argued that it was required to consider any constitutional laws that contained provisions, which expressly or by judicial interpretation, impacted the scope or meaning of an AD statute and the standard of review. Therefore, the panel argued that Article 1904 (2) obliged it to examine the Mexican Constitution, treaty

⁶ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 16-17.

⁷ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 12-13.

⁸ International laws are "self-executing" in Mexico because they become part of the "supreme law of the land" after receiving presidential and senatorial assent. In contrast, international law assumes the force of law in Canada and the United States after ordinary (i.e., non-constitutional) "implementing legislation" is enacted by the two federal legislatures.

law, statutes, legislative history, regulations, administrative practices, and judicial precedents to the extent that the Upper Division of the Federal Tax Court would have done. Moreover, the panel held that it was required to give each source of law the appropriate degree of authority it deserved in Mexico's legal system. Article 133 of the Mexican Constitution created a hierarchy of laws. It provided that the Constitution was to prevail over all other laws, that constitutionally-mandated laws and international treaties were to supersede ordinary federal or state laws and regulations, and that federal laws were to take precedence over state and municipal statutes.⁹

SECOFI attempted to limit the binational panel's use of the standard of review in its written brief and oral arguments. SECOFI maintained that the wording of Annex 1911 of the NAFTA implied that the binational panel had to apply a more limited standard of review than Mexican review courts would use. When setting out the standard of review that binational panels were to use in each country, SECOFI argued that Annex 1911 only made explicit reference to Article 238 of the Federal Fiscal Code. Agency officials suggested that binational panels were not entitled to apply the provisions of Articles 237 and 239 like the Upper Division of the Federal Tax Court was able to do as a result. In the absence of an explicit reference to Article 239, SECOFI insisted that binational panels could not declare a final determination to be "null and void."

The panel dismissed SECOFI's arguments. The majority recognized that the Mexican standard of review was embodied in Article 238 of the Federal Fiscal Code. However, the panel reasoned that Article 238 had to be read in conjunction with Articles 237 and 239 to the maximum extent possible within the binational review process. Furthermore, even if binational panels could not directly "nullify" a final determination, they did have the authority to instruct the agency to modify a determination that violated Mexican trade law. The panel insisted that its role was to apply the same standard of review that a domestic court would use. Panels, like domestic review courts, needed tools to remedy a situation if an administrative agency violated its country's domestic trade laws. The panel stressed that the NAFTA-19 process would result in a separate body of AD/CVD jurisprudence unless binational panels were afforded the same standard of review and powers to which domestic review courts were entitled to.¹⁰

⁹ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 13-16.

¹⁰ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 20-23.

More importantly, the panel rejected SECOFI's claims by arguing that it had constitutional authority to review final AD/CVD/injury determinations. Article 14 of the Mexican Constitution limited the jurisdiction of state organs and administrative authorities to functions expressly set out by law. Article 16 supplemented Article 14 by guaranteeing that any individual in Mexico could challenge an act of a governmental authority that was not justified or based on a relevant legal provision. Articles 14 and 16 created the "guarantee of legality" (*garantía de legalidad*), a central principle of Mexico's legal culture. The panel explained that the "guarantee of legality" protected all persons from improper state actions in Mexico. In the majority's estimation, "for panel purposes, these guarantees impact both the interpretation to be given to the standard of review and to the substance and procedures of any Mexican AD proceeding. The enforcement of these guarantees is regarded as a primary function of judicial review by Mexican courts, and therefore, is a primary function of this Panel as well."¹¹

The Panel's Opinion of the American Allegations against SECOFI

After establishing its authority to review SECOFI's final determination, the panel turned to the allegations made by the American steel producers. The two American steel producers complained that the final determination violated Mexico's trade remedy laws on three grounds: (1) SECOFI committed a number of jurisdictional and technical errors during the dumping investigation; (2) SECOFI calculated the margin of dumping incorrectly; and (3) SECOFI erred when concluding that American imports caused material injury to the domestic industry. The binational panel felt that it only needed to address the first allegation. It held that it was not required to address the other two concerns, because the majority concluded that jurisdictional errors, errors of competence, and technical errors were present in the dumping determination.¹²

The American steel producers complained that SECOFI's final determination violated Article 16 of the Mexican Constitution and Article 238 (1) of the Federal Fiscal Code because the agencies and officials who participated in the dumping investigation lacked the necessary authority to do so.¹³ The Americans insisted that the two

¹¹ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 33.

¹² Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 52, 100.

¹³ Article 16 of the Mexican Constitution states: "No person shall be disturbed in his person, family, domicile, documents or possessions, except by virtue of a written order

administrative units which conducted the investigation were not created until after the investigation had officially begun. The administrative record showed that the DGPCI and DCC had been heavily involved in the investigation process on December 24, 1992. Nevertheless, they had not been officially created by SECOFI until April 1, 1993. The Americans also charged that the visitation orders had been issued by an official who lacked competent jurisdiction and authority over the investigation. Mr. Gustavo Uruchurtu, Director of the Dirección de Procedimientos y Proyectos (DPP), signed the visitation orders even though he had not yet been legally established or empowered by the SECOFI's Internal Regulations to do so. In addition, the officials that Mr. Uruchurtu sent to carry out the verification visits lacked the necessary authority and jurisdiction to perform their tasks.¹⁴

The majority of panelists concurred with the Americans and concluded that the DGPCI and DCC were not authorized to conduct the investigation as they were permitted to by SECOFI. The DGPCI and DCC were "not duly created and established in the manner clearly required by Mexican law and therefore their actions ... must, under the applicable standard of review, be nullified."¹⁵ The panel explained that the cut-to-length plate products dispute had been directly affected by the significant number of changes that occurred within Mexico's trade remedy regime between 1985 and 1994. The Foreign Trade Law of 1986, the Organic Law of the Federal Public administration of 1976, the Internal Regulations of SECOFI, and SECOFI's Organizational Manual were amended on a number of occasions to ensure that Mexico's trade regime complied with its international obligations in the GATT and NAFTA.¹⁶ The number of changes that occurred to Mexico's

issued by a competent authority stating the legal grounds and justification for the action taken..."

Article 238 (1) of the Federal Fiscal Code states: "An administrative determination shall be declared illegal when any one of the following grounds is established: (1) lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued."

¹⁴ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 52-54.

¹⁵ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 60.

¹⁶ The Foreign Trade Law underwent massive changes in 1993. The Organic Law of the Federal Public Administration was amended on December 29, 1976 and December 28, 1994. The Internal Regulations of SECOFI were modified on August 20, 1985, March 16, 1989, April 1, 1993, September 14, 1994. SECOFI's Organizational Manual was changed on October 20, 1986, September 19, 1988, June 5, 1989, July 28, 1994. Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 62.

trade remedy regime clouded which agencies and actors were legally entitled to be involved in the dumping investigation. The authority of each of SECOFI's administrative subunits and officials was therefore directly contingent on the changes made to the applicable sources of AD law.

The binational panel reviewed Mexico's trade laws and regulations to establish whether the DGPCI and DCC were authorized to participate in an investigation between December 4, 1992 and April 1, 1993. The Internal Regulations of April 1, 1993 authorized the DGPCI and DCC to conduct AD/CVD investigations on behalf of SECOFI. However, neither the DGPCI nor the DCC were mentioned in any of the laws, regulations, presidential decrees, or manuals that SECOFI had used to administer Mexico's trade remedy regime prior to that date. The panel recognized that SECOFI had organized itself internally during the period of investigation. However, the panel criticized SECOFI for failing to enact a suitable internal regulation that would have validated the two subunits, and given them legal competence under accepted constitutional and administrative principles until April 1, 1993. Had SECOFI acted sooner, the panel would have rejected the Americans' constitutional challenge which questioned the authority and competence of the DGPCI and DCC. In the majority's estimation, "the DGPCI and DCC were nonexistent in law," prior to April 1, 1993, "and constitutionally speaking, completely incapable of acting against the rights and interests of individuals in this AD proceeding."¹⁷ Nevertheless, SECOFI's failure to give the two subunits legislative authority before April 1, 1993 gave credence to the constitutional challenge of the two American steel producers. The panel argued that SECOFI's actions "must be considered under NAFTA and Mexican law to have commensurate legal significance: the failure to enact a suitable internal regulation means that the DGPCI and DCC were never legally competent to act and that their actions in this case must, under the applicable standard of review, now be nullified."¹⁸ Therefore, the panel held that the DGPCI and DCC did not have the necessary official or legislative authority to be involved in the dumping investigation between December 4, 1992 and April 1, 1993, as they indeed were.

SECOFI defended the two Administrative subunits by arguing that the DGPCI had simply issued "two internal documents of minor consequence" in the dumping investigation. All other documents that formed the basis of the preliminary and final

¹⁷ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 79.

¹⁸ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 80.

determinations were issued by the head of the DCC, whose existence had been established as a subunit of the agency in the 1988 Organizational Manual. The majority of the panel rejected SECOFI's rebuttal. The panel argued that Mexican law did not permit an organizational manual to legally create or establish Administrative units with the power to affect the rights of individuals - only internal regulations, laws, or presidential decrees could do so. Even if organizational manuals could have been used to affect individual rights, the 1988 manual had been abrogated in its entirety by the 1989 edition, which made no mention of either the DCC or the DGPCI. Furthermore, the panel rejected SECOFI's claim that the DGPCI submitted "two inconsequential documents" during the investigation. Indeed, almost all of the letters to domestic and foreign companies and internal memoranda were under the name of the DGPCI, and were designated as being DGPCI documents. The panel did note that the DGPCI documents were issued by the head of its superior Administrative subunit, the DCC. However, the panel insisted that "the DCC was thus informing the outside world that it was entitled to issue letters and documents on behalf of the DGPCI, which ... never came into existence," during the period of investigation.¹⁹

SECOFI also tried to defend the DGPCI and DCC by explaining that they had only been involved in the investigation for a short period of time. SECOFI held that the short period of time made their actions inconsequential during the dumping investigation. The panel rejected SECOFI's arguments and maintained that the DGPCI and DCC represented the Administrative agency for a four-month period. For the panel, the four-month period represented the most critical part of the investigation because it was the time when the petition was received from the domestic producer, the scope of the information and documentation to be requested from domestic and foreign interests was determined, the questionnaires were formulated, the answers to the questionnaires were received, and the deficiencies in the questionnaires were considered. The majority exclaimed that "it is difficult to imagine a more important period in the life of any AD investigation, a period whose actions and results will dramatically impact not just the Preliminary Determination, but the Final Determination as well. The majority cannot accept SECOFI's implication that all of this activity, covering such a substantial period of time, was somehow inconsequential."²⁰

¹⁹ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 81-82.

²⁰ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 82.

Therefore, the binational panel concurred with the Americans that SECOFI had committed jurisdictional errors when it allowed the DGPCI and DCC to act on its behalf. The panel then turned to a closely related allegation that SECOFI committed “jurisdictional and technical errors” which violated Article 16 of the Constitution and Article 238 (1) of the Federal Fiscal Code. The American steel producers insisted that SECOFI’s determination was faulty because proper notice of the verification visits was not given in accordance with the GATT’s 1979 AD Code and Articles 142-145 of the Foreign Trade Regulations of 1993. Article 6 (5) of the 1979 GATT AD Code stipulated that a foreign government had to give consent before a verification visit could be conducted. However, the Mexican officials who authorized the verification visits during the cut-to-length plate products dispute did not obtain the necessary consent of the Government of the United States. Furthermore, none of the Mexican officials who carried out the visitation visits possessed the necessary authority to do so under Mexican or international law.

The visitation orders were signed by Mr. Gustavo Uruchurtu. Mr. Uruchurtu was the head of the DPP. The DPP was an Administrative subunit of the Dirección General Adjunta Técnica Jurídica (DGATJ), which was in turn an Administrative subunit of SECOFI’s Unidad de Prácticas Comerciales Internacionales (UPCI). SECOFI argued that Article 39 of the 1993 Internal Regulations allowed a director general of the UPCI to delegate authority to an area director (i.e., a director of DGATJ) in his or her absence. Similarly, a director of the DGATJ could delegate his or her responsibilities to an official in the DPP if required.²¹ In this way, SECOFI insisted that Mr. Uruchurtu had the authority to issue verification visits because his director general in the DGATJ had authorized him to do so.²²

The panel explained that a delegation of powers was a legal act under Mexican Administrative law and practice if four conditions were met: (1) it was expressly permitted by law; (2) the entity which delegated a person of its powers had to be legally authorized to delegate them; (3) the entity which received the delegation of power had to be legally authorized to receive them; and (4) the powers which were delegated had to be of a nature

²¹ Article 39 of the Internal Regulations of 1993 states, “Directors General shall be replaced during their temporary absences by their respective area director. The directors shall be replaced during their temporary absences by the sub-director to whom the matter relates. In the event that there is no relevant sub-director, the director shall be replaced during their temporary absence by the public servant, immediately following in the hierarchy designated by the director-general.

²² Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 84-85.

permitting such delegation.²³ Failing to meet one of the conditions would nullify the delegation as a matter of law because it would constitute a breach of the “legality guarantee” of Articles 14 and 16 of the Constitution. The panel emphasized that a delegation of power was lawful only if it was permitted by a legal text such as SECOFI’s internal regulations. Mexican law and practice made it clear that a delegation of power had to be established by law or regulation, and not simply by an organizational manual. The delegation of power would cease to have legal effect if the applicable law or regulation was abrogated.²⁴

The four conditions for delegating power led the panel to conclude that SECOFI erred when it transferred power over the verification visits to Mr. Uruchurtu. The Administrative subunits which attempted to exercise the powers of the UPCI (e.g., the DGATJ and the DPP) lacked competence to do so because of the lack of a published delegation agreement by SECOFI. The DGATJ and the DPP also lacked authority because the 1993 internal regulations did not grant them power to actually receive such a delegation of authority. Most importantly, the panel explained that SECOFI had only explicitly mentioned the UPCI in the internal regulations of 1993. References to the DGATJ and the DPP were not included. Therefore, the panel argued that the DGATJ and DPP were “incompetent to carry out acts which affected the rights and interests of individuals” such as the domestic and foreign steel producers under investigation.²⁵ Consequently, the majority of the panel agreed with the American steel producers that there was a violation of legal provisions applicable to the verification visits such as Article 16 of the Constitution. A state structure had inappropriately violated the rights of an individual by performing an action that it was not authorized to do.

SECOFI tried to rebut the panel’s conclusion by stating that the American steel producers could have challenged the contents of the verification order during the seven day period granted for foreign firms to clarify the information gathered in the visit. The panel rejected SECOFI’s defence. It held that the seven day period was not established in law, but was granted by SECOFI on its own accord. Even if the Americans had been able to challenge the verification orders before SECOFI, they were still entitled to raise the issue during the NAFTA-19 panel process. Indeed, the panel pointed out that Mexican law and

²³ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 86.

²⁴ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 88.

²⁵ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 89.

practice clearly permitted that an affected party could “wait until payment of an amount of money or some type of responsibility is imposed upon him as a result of the inspection to challenge the inspection order or the conduct of the inspection.”²⁶

SECOFI also tried to justify the verification order by pointing to Article 6 (5) of the 1979 GATT AD Code. SECOFI felt that Article 6 (5) allowed it to determine the way that a verification visit was conducted. Notwithstanding the grant of power made in Article 6 (5) of the GATT Code, the panel argued that Article 16 of the Mexican Constitution required that a verification order be contained in a written order, be issued by a competent authority, express the name(s) of the persons being visited, set out the purposes of the visit, and fulfill other requirements of applicable law. The panel ruled that SECOFI was required to fulfill the requirements of Article 16 because constitutional provisions took precedence over international agreements within the hierarchy of Mexico’s judicial system.²⁷

On the basis of the jurisdictional and technical errors present in the dumping investigation, the majority of the panel remanded SECOFI’s final determination as contrary to the provisions of Mexico’s AD law. The panel ordered that SECOFI must issue a new determination within 21 business days of the decision. The panel also ordered that the duties which had been imposed on the cut-to-length plate products from Bethlehem Steel Corporation and USX be removed. Any cash deposits or customs bonds that had been made or posted in relation to the ADD were to be refunded or canceled.²⁸

The Remand Process

SECOFI adhered to all of the panel’s orders in its remand determination of September 29, 1995. The panel unanimously affirmed the entire determination on October 30, 1995, and commended SECOFI for changing parts of the determination that were not in accordance with domestic laws. The documents were not available at the time of research, and will not be analyzed as a result.

²⁶ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 98.

²⁷ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 100.

²⁸ Memorandum, Opinion, and Order of the Majority, *In The Matter of Mexican Antidumping Investigation into Imports of Cut-To-Length Plate Products from the United States* (Mex-94-1904-02), Mexico City, August 30, 1995, 101.

Analysis

As predicted by the hypothesis, the character of Mexico's trade regime was changed after 1993 because SECOFI's practices became fairer, more transparent, and faster. Change was facilitated by the relative weakness of socio-economic factors such as economic protectionism in the context of NAFTA-19. Indeed, hegemonic relationships within Mexico and between Mexico and the U.S. accelerated the process of change. Only concerns with state sovereignty threatened, albeit unsuccessfully, the process of change that was occurring in the character of the Mexican process of review during the cut-to-length plate case.

(A) Evidence of Change - Observations of the Dependent Variable

(1) Fairness

Chapter Two explained that fairness would be measured by the unanimity of the panel decisions. It was intended to gauge the extent to which foreign and domestic producers were treated equitably by a cohesive binational panel, instead of by domestic review courts which had been accused of being biased towards their national producers. The panel which reviewed SECOFI's determination was made up of three Americans and two Mexicans. It issued a split decision in which two Americans and one Mexican formed the majority, and one American and one Mexican formed the minority. Even though the panel was divided (i.e., not unanimous), it did not split according to national lines. In contrast to the pre-1993 regime, fairness was injected into the panel process of review because the Mexican panelists were free to examine the compatibility of SECOFI's AD determination and Mexican trade laws, and make their decisions independently of political pressure from their government. The fact that the Mexican panelist sided with two American colleagues demonstrates that political concerns, and manipulation by the ruling party (Partido Revolucionario Institucional- PRI) did not play a role in the process of judicial review as it had done so often in the domestic regime. Consequently, even though the panel split, it prevented political biases and manipulation from entering the process, thereby making the character of the regime fairer for Mexican and American steel producers.

(2) Transparency

In Chapter Two, transparency was defined in terms of the openness and accessibility of a legal system. A transparent legal system was defined as one in which decisions were fully explained to interested parties. Chapter Two indicated that transparency would be measured by the extent to which the panel explained its reasoning, the detail of the panel's decision, the panel's use of the standard of review, and the degree to which the administrative agency clarified its determination on remand.

The most significant way that the character of the Mexican trade regime was changed during the cut-to-length plate dispute was that it became more transparent. Prior to 1993 when the Foreign Trade Law was amended, Mexico's trade remedy regime had been renowned for its arbitrariness and unfairness, because SECOFI had been able to "create" the methods and Administrative subunits that were used during AD/CVD investigations. Legal principles, such as due process and transparency, were often sacrificed to the broad scope of power that Mexican officials enjoyed in their authoritarian regime. However, NAFTA-19 forced SECOFI to modify its traditional methods of administering Mexico's trade remedy regime. Indeed, the cut-to-length plate products panel was able to have a direct and significant effect on the way that SECOFI changed its dumping investigations. The panel used its authority to order SECOFI to respect the spirit and letter of the NAFTA and Mexico's trade laws, and increased the transparency of the system as a result.

For example, the panel explained its decision in a very detailed, in-depth, 100+ page analysis of Mexico's trade regime, constitutional law, and SECOFI's determination. The panel presented its interpretation of the Mexican standard of review, and justified why it believed it had the authority to intervene in the agency's decision. The panel's detailed decision can be directly contrasted to the Mexican process of judicial review. Decisions were rarely explained by Mexican review courts because they had the right to decide whether to disclose their deliberations.

Furthermore, the panel also increased the transparency in the process of review by insisting that SECOFI's investigation had to be carried out according to legal provisions and in such a manner that all interested parties understood the investigative process. Specifically, the panel stressed that SECOFI's AD investigation had to be carried out according to trade laws and codified procedures. Similarly, the panel stressed that SECOFI could no longer deny due process by creating practices and agencies during an investigation. Indeed, the panel sharply remanded SECOFI for using the DGPCI and the DCC in the investigation because they did not possess legal competence under accepted

constitutional and administrative principles. SECOFI's defence of the DGPC and DCC was also rejected by the panel as unsubstantiated and false.

Consequently, the panel insisted that reasonable evidence, detailed reasoning, and justifiable methods had to be used to increase the level of transparency of SECOFI's determinations. Even though Mexico's authoritarian heritage had allowed SECOFI to create and/or manipulate written laws before 1993, change occurred to the character of the trade regime because the panel insisted that trade remedy laws had to be administered in a more transparent manner in the post-NAFTA environment. In accordance with the demands of Canadian and American officials during the NAFTA negotiations, the panel's decision replaced Mexican traditions with American legal principles of due process and transparency.

(3) Speed

Chapter Two noted that speed would be operationalized by comparing the length of the panel and domestic processes of judicial review. The panel in the cut-to-length plate dispute was requested on September 1, 1994, and released its decision within one year on August 30, 1994 (slightly over NAFTA guidelines). In contrast, the Mexican process of judicial review has been criticized for being extremely slow. The process is so slow because AD or CVD orders had to first undergo a lengthy administrative review where SECOFI had the discretion to delay its decision. Before 1993, the Foreign Trade Law did not contain a timetable for the administrative review process. Only after the process of administrative review had been exhausted could judicial review procedures be invoked. Therefore, Mexican courts were able to exercise discretion and delay the process as they wished. In addition, with pressure from the President through the PRI, courts could be encouraged to delay the process indefinitely if it was in the ruling party's favour. Consequently, the NAFTA-19 process in general, and the cut-to-length panel decision in particular, helped to speed up the Mexican process of review by using set guidelines to determine the length of time in which an ADD/CVD would be reviewed.

(B) Evidence of No Change - Observations of the Independent Variables

(1) Economic Protectionism

Chapter Two noted that economic protectionism refers to the belief that domestic producers need to be insulated from competitive imports. It explained that the variable would be observed by arguments of interest groups and policy-makers, the use of domestic laws for protection, public denouncements of panel decisions, how protectionist arguments were used during the remand process, and the speed and ease with which panel decisions were accepted.

Immediately following the panel's decision, some Mexican business groups began to lobby the Government to ignore the panel's finding against SECOFI. They feared that adhering to the binational panel's decision would end the privileges and economic protection they had received from SECOFI in the Mexico's authoritarian, corporatist regime. For example, Altos Hornos, Mexico's leading producer of steel plate and the firm that launched the dumping investigation, feared that the panel's decision would jeopardize the domestic industry. Executives from the firm feared that the company could lose up to two-fifths of its annual sales if the AD duties were removed.²⁹ Therefore, cries for protectionism and fears of what the panel's decision might do to the domestic industry demonstrated that some forms of economic protectionism lingered in the process of judicial review. However, other aspects of economic protectionism were not present in the cut-to-length plate dispute. Most notably, the panel's decision was accepted quickly and completely by SECOFI. Protectionist arguments were not displayed in the agency's remand determination as a result. Consequently, the changes that occurred in the character of the Mexican regime were not impeded by economic protectionist beliefs, as they were during the softwood lumber and pork disputes.

²⁹ More objective analyses indicate that Altos Hornos is an internationally competitive company that could survive the withdrawal of the protection afforded by ADDs. Altos Hornos produces 390 000 tonnes of steel plate each year and exports 320 000 of its total production. In contrast, Mexico imports only 16 000 tonnes of sheet steel each year. "Mexican Government Faces Tough Choice after NAFTA Trade Judgment," *Mexico and NAFTA Report*, RM-95-09 (September 28, 1995), 1.

(2) Concerns with State Sovereignty

Chapter Two explained that state sovereignty would be assessed by the willingness of the three governments to allow their country's domestic laws and practices to be changed. It would be measured by looking at statements which supported or opposed panel decisions, the extent to which panel decisions were acted upon, the number of remand determinations that were required before an administrative agency complied with panel orders, and the number of times that a government requested an ECC to challenge a panel's findings.

Certain statements were made in the wake of the panel's decision to oppose the new process of review. Julio Villarea, president of CANACERO, joined Altos Hornos and suggested that the Mexican government should stand by its own institutions. He insisted that SECOFI's ability to issue affirmative dumping determinations must not be challenged by an international dispute tribunal such the NAFTA-19 panel. Adhering to the panel's order could give the impression that the Mexican government was weak vis-à-vis the United States. In addition, he warned that concurring with the panel's decision could harm domestic producers "psychologically." It would demonstrate that Mexico's AD laws were unable to protect domestic producers from their foreign competitors, even if revoking the dumping duties would not harm domestic producers as much as they feared.³⁰

SECOFI displayed its opposition to the panel's ability to change the Mexican regime by refuting the American arguments and by providing rebuttals to the panel's decisions during the process of review. As demonstrated in the case study, SECOFI continually tried to deny the panel's authority, and to justify its practices and use of administrative subunits because it did not wish to lose the power and discretion it had enjoyed in the pre-1993 regime. Ironically, SECOFI's rebuttals could be interpreted as actions which reflected the authority that NAFTA-19 panels gained in Mexico's trade regulatory process. By seeking to limit the panel's authority, SECOFI demonstrated that it understood that binational panels could encourage change. If the binational panel was able to overturn administrative determinations like domestic review courts could, SECOFI officials would be required to change the ways that they interpreted and applied Mexican AD/CVD laws.

Villarea's arguments and SECOFI's rebuttals played on a major theme in Mexico's foreign and trade policies - state sovereignty. As noted in Chapter Two, the official principles of Mexico's foreign and trade policies have always tried to uphold Mexico's

³⁰ "Mexican Government Faces Tough Choice after NAFTA Trade Judgment," *Mexico and NAFTA Report*, RM-95-09 (September 28, 1995), 1.

sovereignty and independence from countries such as the United States. Article 89 of the Mexican Constitution provided that foreign and trade policies had to be opposed to intervention into the affairs of other states, insistent on the equality of all states in status and rights, opposed to the use of recognition of new governments as a tool of policy, insistent on fairness in international economic relations between strong and weak states, and opposed to the transfer of territory conquered by force. Similarly, another important principle of Mexican foreign and trade policy has been the Calvo doctrine. The Calvo doctrine requires foreigners to put themselves on the same footing as the nationals of a country in which they do business. Foreigners must abide by laws and judicial procedures and refrain from appealing to their home governments for support in cases of disputes during economic activities.³¹

In this vein, Villarea's argument and SECOFI's rebuttals demonstrated that concerns with state sovereignty were present in the Mexican regime in spite of the presence of NAFTA-19. Nevertheless, other manifestations of the variable were not present in the aftermath of the dispute. As noted above, the panel's decision was accepted immediately and in its entirety by SECOFI. Successive remands and ECC procedures were not necessary to resolve the dispute and ensure that SECOFI's findings were in accordance with Mexico's trade remedy laws. Even though older traditions (e.g., protectionism and corruptness) did not disappear from SECOFI's decision-making process quickly or easily, and SECOFI officials wanted to retain their monopoly of power over trade laws in Mexico, SECOFI officials ceded to the authority that had been given to panels during the NAFTA negotiations. Therefore, the variable of state sovereignty was not strong enough to prevent the panel from changing the character of the regime to the same degree.

(3) Hegemonic Relationships within and between Interest Groups, Policy-makers, and Administrative Agencies

Chapter Two noted that hegemonic relationships referred to the distribution of power between interest groups, policy-makers, and administrative agencies. It was to be measured by the extent to which domestic and international relationships affected administrative behaviour in the resolution of the three disputes.

Ironically, hegemonic relationships did not impede the panel from making changes, but helped to inject fairness, transparency, and speed into the Mexican regime instead. The Mexican government responded cautiously to the cries of Mexican business and producer groups for protection and to their challenges of the panel's decision based on state

³¹ Martin C. Needler, *Mexican Politics: The Containment of Conflict 2nd Ed.* (New York: Praeger Publishers, 1990), 118.

sovereignty. The Mexican government did not wish to give the impression that it was abandoning Mexico's traditional concerns with sovereignty and the Calvo Doctrine. Nevertheless, it also feared that ignoring the binational panel's decision would increase the risk that the United States would take punitive actions against Mexico, and thereby jeopardize Mexico's place in the NAFTA. Mexico's trade minister, Herminio Blanco, suggested that CANACERO's plea would only be successful if there would not be any damaging ramifications for Mexico. In a later statement, Blanco indicated that the Administration decided to adhere to the panel's orders. He insisted that the panel's finding was reasonable. SECOFI had applied Mexico's AD law hastily and had committed a number of serious errors during the investigation.³² Blanco's statements were adopted in SECOFI's determination on remand of September 29, 1995.

At the domestic level, Mexican producers appreciated the protection that SECOFI had offered them in the past. They also tolerated the questionable practices that SECOFI used during the investigation because of the ADDs that resulted from it. However, their demands for protectionism were not powerful enough to encourage SECOFI to ignore the decisions of the binational panel. International institutions were given precedence by the administrative agency over domestic interest groups. Furthermore, the executive branch of Mexico's government was able to exercise its power over domestic trade tribunals and interest groups. It was powerful enough to ensure that the binational panel's decision took effect. Domestic structures, historical traditions, and cultural ideologies such as authoritarianism, corporatism, and the single ruling party permitted the executive branch to override the questionable practices of SECOFI and the protectionist interests of Mexican steel producers and business associations.

At the international level, American producers and governmental officials were able to use their power within the hegemonic relationship to ensure that the panel's decision was accepted. American steel producers objected to SECOFI's investigation to such a degree that they requested that a binational panel be convened to investigate. The American government concurred with the request because of the strength that steel producers had in the American trade policy-making process. Moreover, the American government supported the use of NAFTA-19 because it had stressed the importance of a rule-based, transparent Mexican trade regime during the NAFTA negotiations. Mexico's membership in the agreement was contingent on the degree to which it would surrender a measure of its sovereignty and make its trade regulatory process more like those of Canada and the United States. Binational panels were given the authority to ensure that SECOFI did so.

³² "Mexican Government Faces Tough Choice after NAFTA Trade Judgment," *Mexico and NAFTA Report*, RM-95-09 (September 28, 1995), 1.

Therefore, American producers and governmental officials were able to use their power in the hegemonic, international relationship. American negotiators and interest groups ensured that Mexico's laws were made more transparent and adherent to American legal principles such as due process. Supporting the binational panel process in general, and the panel's decision in the cut-to-length plate products dispute in particular, helped them to do so.

Conclusion

The cut-to-length plate products dispute confirms the hypothesis that the presence of the NAFTA-19 panel allowed the character of Mexico's domestic trade regime to change because socio-economic factors were not as strong in relation to how they manifested themselves in other disputes. Economic protectionism was minimal, and the support that powerful policy-makers in Mexico and the U.S. gave to the panel helped to accelerate the changes. The only variable which unsuccessfully threatened to impede the process was state sovereignty.

The cut-to-length plate products dispute also illustrates the arguments of the two schools of new-institutionalism. Rational choice arguments were evident because the practices and demands of Mexican policy-makers and interest groups were not immune to the changes occurring in the international political economy. Membership in the GATT and NAFTA opened Mexico's economy to the United States. Mexican policy-makers and producers were forced to adjust to globalization, increased competitiveness, liberalization, and a more transparent, rule-based trading environment. Applying the arguments of the rational choice school of new-institutionalism, Mexican policy-makers chose to adhere to the rules and institutions of NAFTA-19 and allowed them to change domestic trade rules and practices, so that Mexico could reap from the broader, "collective" benefits that the NAFTA was expected to offer.

Lingering concerns with state sovereignty demonstrated the assertions of the structural-sociological school as well. SECOFI and certain interest groups were hesitant to discard cultural traditions and practices quickly. SECOFI officials attempted to draw on the privileges that the authoritarian, single-party system of government had afforded them in the past. Conventional forms of behaviour which were not substantiated by law were used to conduct the dumping investigation against American steel producers. The subunits and officials who conducted the dumping investigation did not have the authority required by international and domestic AD laws. SECOFI's behaviour was supported by Mexican business groups and steel producers in spite of the presence of NAFTA-19. They pleaded

that SECOFI would adhere to its traditional practices of protecting domestic producers from foreign competitors. Furthermore, Altos Hornos and CANACERO played on a theme that had been extolled in Mexico's foreign policy vis-a-vis the United States throughout the twentieth century - sovereignty. They stressed that Mexican administrative agencies and governmental officials had to be allowed to make policies that they felt were necessary. International agencies and American officials should not be allowed to order Mexican officials to act to the contrary. In this way, cultural traditions and dominant practices did not disappear quickly as members of the structural-sociological school explained.

Furthermore, members of the structural-sociological school suggest that the process of change occurs within the parameters of existing domestic structures, historical traditions, and cultural ideologies. Rules assume a myth-like character when they embody the deeply held beliefs of a society. The cut-to-length plate products dispute demonstrates that domestic laws and traditions combined with international rules to influence the context within which the problem was settled. The two American steel producers challenged SECOFI's determination on the basis that it violated Articles 14 and 16 of the Mexican Constitution. Governmental structures were not allowed to restrict the rights of individuals by acting outside of their statutory authority. In addition, the panel confirmed its authority to review SECOFI's determination by referring to the Mexican Constitution. Constitutional law held that international treaties such as the NAFTA were self-executing and directly integrated into Mexico's legal system upon receiving the Senate's consent. Given that the NAFTA had been approved by the Senate, the binational panel justified its ability to examine SECOFI's investigation pursuant to both provisions of the NAFTA and the Mexican Constitution. Therefore, domestic and international rules meshed to create the environment within which Mexico's trade remedy regime evolved. The NAFTA-19 panel's ability to encourage change in SECOFI's practices stemmed from its use of international and domestic laws. Drawing on constitutional provisions central to Mexico's legal system gave its decision more credence and authority in Mexico's trade remedy regime. In this way, the panel bolstered its authority in Mexico's trade regime by using domestic, constitutional traditions. Consequently, the panel was able to ensure that SECOFI would have to change its practices, and make the character of the trade regime fairer, more transparent, and faster.

CHAPTER NINE - CONCLUSION

The purpose of the dissertation was to understand whether, and how, the character of the three trade regimes of North American changed. Specifically, four case studies were used to discuss a hypothesis that proposed that the presence of Chapters 19 panels would allow the character of the three domestic regimes to be changed by injecting fairness, transparency, and speed into the process of judicial review. The hypothesis projected that having the institutionalized binational panel process in place would reduce the extent to which economic protectionism, hegemonic relationships, and concerns with state sovereignty influenced the three trade regimes. When those political and socio-economic factors remained strong, change to the character of the three systems occurred minimally. However, when administrative agencies, interest groups, and policy-makers conceded the authority of Chapters 19 panels, real change in the character of the three regimes occurred. The hypothesis was created from new-institutionalist theories to propose that institutions (e.g., FTA-19 and NAFTA-19 panels) were extremely important in the evolution of the North American trade remedy regime. Socio-economic and political factors, such as economic protectionism, hegemonic relationships, and concerns with state sovereignty, affected the character of the three domestic systems before and after 1989. Nevertheless, changes to the character (i.e., fairness, transparency, and speed) of the three regimes began only after institutionalized panels came into the process of administering and applying antidumping and countervailing (AD/CVD) laws of Canada, Mexico, and the United States.

Chapter Nine is divided into three parts. The first part synthesizes the four case studies to compare and contrast the presence of the variables and to assess the validity of the hypothesis. The second part places the hypothesis back into new-institutionalist theory to discuss the relevancy of the theoretical framework, and to determine whether institutions did indeed matter in the process of change. The third part of Chapter Nine considers how the dissertation can contribute to new-institutionalist theory by addressing the linkages between international and domestic laws and institutions. The process of change was related to beliefs in economic protectionism, hegemonic relationships within and between the three countries, and concerns with state sovereignty. Those factors determined the extent to which the three sovereign states allowed themselves to be bound by international laws and institutions, and the amount of authority that was given to panel decisions. The factors also affected the degree to which policy-makers and interest groups wished to have international laws and institutions override their narrow, protectionist interests. Finally, the three factors raised concerns about the compatibility of domestic and international laws.

PART THREE - CONCLUSIONS

Part Three puts forward a number of conclusions. Chapter Nine synthesizes the four cases, and compares and contrasts the way that the variables of the hypothesis were manifested in them. It then places the hypothesis back into the context of new-institutionalist theory, to determine if institutions did indeed matter in the process of change. Chapter Nine concludes by examining the linkages between domestic and international laws. The linkages between domestic and international laws demonstrate why new-institutionalist theories are applicable to the evolution of trade remedy laws in North America. They also suggest ways that new-institutionalist theories could be strengthened in the area of international law. Chapter Nine concludes by arguing that the continued success of Chapters 19 captures the paradoxical nature of international law. Chapters 19 will only be able to continue to affect the three trade regulatory processes if they receive the support of governments and dominant actors in the three countries. Change can continue to occur if dominant policy-makers and interest groups view Chapters 19 to be complementary to their domestic political systems, necessary in the face of economic developments, and compatible with state sovereignty and national interests.

How desirable was it that Chapters 19 panels had a role to play in the domestic processes of judicial review? How similar should Chapters 19 have made the three trade remedy regimes? Which trade remedy regime should have been changed the most, and according to whose plans? Chapter Nine concludes by arguing that the linkages between domestic and international laws require that new-institutionalist theories need to be developed more fully in the area of international law to appreciate the ways that hegemony and state sovereignty affected the process of change. The ability of Chapters 19 panels to continue the process and reality of change is contingent on the extent to which the three countries submit to the authority of panel decisions and act to resolve the paradoxical nature of international law.

(1) Synthesis of the Four Case Studies

Four case studies were used to discuss whether and how the character of the trade regimes of Canada, Mexico, and the United States changed. The cases were used to discuss whether the presence of Chapters 19 panels could allow fairness, transparency, and speed to be developed in the process of judicial review, in spite of the inhibiting influences of economic protectionism, hegemonic relationships within and between domestic and international actors, and concerns with state sovereignty. The disputes over softwood lumber, fresh, chilled and frozen pork, certain corrosion-resistant steel sheet, and cut-to-length steel plate confirmed that Chapters 19 panels decisions played decisive roles in the process of change. Certain decisions were able to increase the fairness, transparency, and speed of judicial review by uniting panel members regardless of their nationality, by demanding that AD/CVD determinations had a solid foundation on substantial evidence and clear, justifiable logic, and by ending the disputes in a more timely fashion.

(A) Transparency

All of the disputes demonstrated that changes in transparency were the most evident and dramatic means by which panel decisions were able to affect the character of the regimes. Prior to the creation of Chapters 19, domestic review courts often deferred to agency determinations and did not require them to provide justifications for their decisions. Furthermore, domestic review courts did not always provide detailed explanations about their decisions during the process of judicial review. This was most evident of the Mexican

regime, where the legal principles of transparency and due process were not as deeply engrained as they were in Canada and the U.S.

In contrast, all of the panels provided lengthy, detailed decisions. The majority of the decisions in the four disputes were over 80 pages in length. The panels also recognized that while the three domestic standards of review required review courts to defer to agency discretion, they should refuse to grant deference if, and when, substantial evidence was not provided to support an AD/CVD determination. Similarly, the panels did not allow agencies to hide behind “traditional practices” or unwritten conventions if they were not known to the public, as the Secretaria de Comercio Y Fomento Industrial (SECOFI) did by creating administrative sub-units during the cut-to-length steel plate dispute. All administrative actions and agency decisions had to be grounded on written laws, and justified by evidence on the record to ensure that the review process was transparent for all interested parties. The panels also continued to remand agency decisions until they were in accordance with domestic law, as demonstrated in the softwood lumber and pork disputes. In this way, all of the panels made consistent and deliberate efforts to inject transparency, openness, and accessibility into the post-FTA/NAFTA process of judicial review.

It should be noted that all Chapters 19 panels, and not just those in the four disputes, have injected transparency into the domestic trade regimes since 1989. According to Lowenfeld:

The consideration given by panel members to the issues and the contentions of the parties has been careful ... and the opinions have been well thought through and well crafted. Though no one can be expected to agree with all of the opinions in every detail ... as a whole the opinions are of high quality and should leave even losing parties - including the government agencies concerned - confident that they received a full and fair hearing.¹

The well thought out decisions, have therefore allowed all interested parties to understand the reasons for a panel’s decision. Consequently, the very presence of Chapters 19 panels have allowed transparency to become a larger part of the process of review by encouraging administrative agencies to fully disclose their logic and reasoning.

(B) Fairness

Unlike the way that all four of the panels injected transparency into the process of review, the degree to which panel decisions increased the level of fairness needs to be

¹ Andreas 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), 78-79.

reviewed for each of the four case studies. Fairness was measured in terms of the unanimity of panel decisions, and was to gauge how national biases played a role in the post-FTA/NAFTA process of review. As the following chart indicates, not all the panels in the four case studies were unanimous. Panels were divided in the CVD portion of the softwood lumber case (i.e., investigation of the DOC), the ECC phase of the softwood lumber dispute, the remand phase of the certain corrosion-resistant steel sheet case, and the cut-to-length steel plate dispute. However, of all the panels that were divided, only two split according to national lines (i.e., panel on DOC's remand in the softwood lumber dispute, ECC in the softwood lumber dispute).

Panel	Unanimous/Divided	Divided Across National Lines?
Softwood Lumber Dispute - DOC panel's initial decision	Unanimous	N/A
Softwood Lumber Dispute - DOC panel's first remand decision	Divided	Yes
Softwood Lumber Dispute - ITC panel's initial decision	Unanimous	N/A
Softwood Lumber Dispute - ITC panel's first remand decision	Unanimous	N/A
Softwood Lumber Dispute - ECC decision	Divided	Yes
Fresh, Chilled and Frozen Pork Dispute - DOC panel's initial decision	Unanimous	N/A
Fresh, Chilled and Frozen Pork Dispute - DOC panel's remand decision	Unanimous	N/A
Fresh, Chilled and Frozen Pork Dispute - ITC panel's initial decision	Unanimous	N/A
Fresh, Chilled and Frozen Pork Dispute - ITC panel's first remand decision	Unanimous	N/A
Fresh, Chilled and Frozen Pork Dispute - ECC decision	Unanimous	N/A
Certain Corrosion-Resistant Steel Sheets Dispute - Revenue Canada panel's initial decision	Unanimous	N/A
Certain Corrosion-Resistant Steel Sheets Dispute - Revenue Canada panel's first remand decision	Divided	No
Certain Corrosion-Resistant Steel Sheets Dispute - CITT panel's initial decision	Unanimous	N/A
Cut-to-Length Steel Plate Dispute - SECOFI panel's initial decision	Divided	No
Cut-to-Length Steel Plate Dispute - SECOFI panel's first remand decision	Unanimous	N/A

In general, most panels in the four case studies helped to increase the objectivity of the panel decisions by issuing unanimous decisions, and not allowing national biases to taint their reasoning. Consequently, exporters, regardless of their national origin, could be more confident that their concerns would be given a fairer hearing from a binational panel, than from a purely domestic court made up of judges from one country only.

Widening the analysis to all Chapters 19 panel decisions, the vast majority of panel decisions have been unanimous. 27 of the 37 panels that completed their reviews of AD/CVD disputes were unanimous between January, 1989 and July, 1996. Panels were unanimous in almost all of the opinions on remand as well. Partial dissents were issued in seven of the ten instances where panels divided. In other words, a panelist completely disagreed with the majority's decision in only three out of 37 cases of Chapters 19 review. In the other 34 cases, the five panelists agreed with each other on all, or most, of the issues that were brought before them. Similarly, the majority of ECCs (two out of three) have also been unanimous.

(C) Speed

Finally, all panels in the four case studies injected speed into the process of review. The degree to which panels made the review process faster can be seen clearly by comparing the total time for Chapters 19 disputes to be resolved (including remands and ECCs), with the average length of time for judicial review in domestic courts.

Panel	Initial Decision	Entire Process of Review
Softwood Lumber Dispute - ITC panel	12 months	23 months (with three remands)
Softwood Lumber Dispute - DOC panel	11 months	26 months (two remands and an ECC)
Fresh, Chilled, and Frozen Pork Dispute - ITC panel	10.5 months	20 months (two remands and an ECC)
Fresh, Chilled, and Frozen Pork Dispute - DOC panel	13 months	21 months (one remand)
Certain Corrosion-Resistant Steel Sheets Dispute - Revenue Canada panel	10.5 months	14.5 months (one remand)
Certain Corrosion-Resistant Steel Sheets Dispute - CITT panel	10 months	10 months
Cut-to-Length Steel Plate Disputes - SECOFI panel	12 months	14 months (one remand)

As the chart indicates, the longest period of time that a panel needed to release an initial decision was 13 months (or 390 days), and the longest period of time that a panel needed to complete the review process (including two remands and an ECC) was 26 months (780 days). In contrast, the average American review process (without remands) is 734 days, and the average Canadian process (without remands) is 462 days. Precise figures are not available for the Mexican system. However, experts say that the Mexican system is extremely slow and either equal to, or longer than, the U.S. and Canadian systems because of the discretion that courts enjoy. Therefore, because the longest time frame for a Chapters 19 review process (without remands) in the four disputes was 390 days, it can be concluded that the binational panel process was much faster than the American, Canadian and Mexican domestic systems.

Another means to illustrate the degree to which Chapters 19 panels injected speed into the process of review is to look at the average time frames for cases when panel and review court decisions have been appealed. When decisions were appealed further, the average time for a panel/ECC review in the softwood lumber and pork cases was 690 days, while the average time for a CIT/Court of Appeals for the Federal Circuit review has been 1210 days in the United States, and 1062 days for a Court of Appeals/Supreme Court review in Canada. Once again, the binational panel system has proven to be a much faster system. Because the panel system was used to resolve the four disputes, the character of the domestic regimes became much faster to the benefit of producers who challenged the AD/CVD determinations made against them.

Interestingly, domestic review courts in Canada and the United States have amended their rules of procedure which may speed up the domestic processes of review, and make them comparable to the Chapters 19 process. The CIT modified some of its rules of procedure to replicate the timelines of the binational panel process. The CIT Clerk's Office indicated that the Court acted to significantly increase the speed at which it released AD/CVD decisions after Chapters 19 came into operation.² Effective on January 1, 1993, CIT Rule 56.2 incorporated time limits similar to those of Chapters 19 of the FTA/NAFTA. While time limits were not imposed on the judges, oral arguments must now be limited to 30 days after the closing of the briefing schedule, and proposed judicial protective orders and motions to enjoin liquidation must be filed within 30 days of the complaint. Rule 56.2 also provided for detailed judicial management of the progress of a matter, including the briefing schedules and the required filing of status reports with the court. In addition, the CIT adopted some of the procedural simplifications of the panel process. Parties before a binational panel do not need to file a motion for intervention or an answer. Instead, the panel rules simply provide for the filing of a Notice of Appearance by interested parties. The CIT changed its rules of procedure to parallel the binational panel rules. The amendments to the rules in 1993 eliminated the requirement for an answer for actions before the Court.³

Canada's Federal Court of Appeals is also in the process of amending its rules of procedure to implement a faster system of case-flow management. Under the proposed system, the Court's Rules will require that applications for judicial review be perfected and

² Michael Greenberg, "Chapter 19 of the US-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the CIT," *Law and Policy in International Business*, Vol. 25, No. 1 (1993), 46-47.

³ Robert E. Burke, Brian F. Walsh, "NAFTA Binational Panel Review: Should it be continued, eliminated, or substantially changed," *Brook Journal of International Law*, Vol. 20, No. 3 (1995), 532-533.

a hearing date requisitioned within 180 days of commencement, the hearing be held within 30 to 90 days of perfection, and judgment rendered within 30 days of hearing, unless the circumstances of the case or of the judge require otherwise. In other words, most applications for judicial review are to be disposed of within 240 to 300 days of commencement. Parties who consider these time limits either too long or too short may request that the proceeding be transferred to the “Specially Managed Proceedings” track. Allison Small, Executive Officer to the Chief Justice of the Federal Court of Appeals, revealed that while the proposed changes were in no way by-products of the timelines of Chapters 19, the streamlined system illustrates a movement for faster judicial proceedings that has been developing in the Canadian and American legal systems since the late 1980s.⁴

Challenges to the efficiency and timeliness of the Chapters 19 process of review have come from three sources. First, panelists have often withdrawn because of other commitments or to avoid potential conflicts of interest. Second, panels have often been slowed because of delays in depositions, motions, filing of briefs, and oral arguments. Most importantly, the remand process has slowed the panel process of review. FTA-19 and NAFTA-19 did not place a remand timetable into the process of review. Negotiators did not foresee a long remand process because their goal was to have panels issue binding decisions that were complied with quickly and without controversy. The remand process for all Chapters 19 panels has ranged from 383 to 927 days. Generally speaking, administrative agencies have complied quickly, quietly, and completely with panel decisions. However, U.S. administrative agencies in certain CVD cases required multiple remands before accepting panel decisions - of the six U.S. CVD cases heard by FTA-19 and NAFTA-19 panels, all were remanded, four were remanded twice, and two were appealed to ECCs.

At a first glance, it could be argued that the lack of a set remand timetable is a problem for the Chapters 19 system. Nevertheless, the lack of a timeframe is not the real challenge to the efficiency and timeliness of the panel system. Instead, the remand process has been plagued by a deeper problem that is endemic to international agreements - the issue of compliance and state sovereignty. The constant redetermination phenomenon is a major problem in the United States. The DOC and ITC have often refused to accept the Chapters 19 panels as valid review bodies. In the cases of softwood lumber and pork, the agencies openly displayed their displeasure of having a binational panel dictate how they were to interpret and apply American AD/CVD laws. This “cavalier” attitude has made U.S. agencies hesitant and/or resistant to adhere to panel orders, and has subjected them to

⁴ Telephone Interview with Allison L. Small, Executive Officer to the Chief Justice of the Federal Court of Appeals, August 13, 1996.

a constant string of remands when they are before panels. American agencies have tended to accept remands from the CIT more readily than from binational panels. Of the 15 cases decided by binational panels involving the ITC and DOC between 1989 and 1994, three required a remand (20 percent), six required two remands (40 percent), and one required three remands (7 percent) before U.S. agencies complied with the orders. In comparison, the CIT issued 132 decisions between 1989-1994. The DOC and ITC only required one remand in 35 cases (26 percent) and two remands in seven cases (5 percent).⁵ Therefore, the higher percentage of remands in the panel process can be explained in part by concerns with state sovereignty, and the degree to which U.S. agencies have resisted the authority of an international institution to remand administrative decisions in lieu of a domestic court.

(D) Economic Protectionism

Notwithstanding the influence that Chapters 19 panels had in the three regimes, the four case studies also demonstrated that other political, socio-economic factors were present to inhibit the process of change. For example, economic protectionism was a strong variable in all four cases. Indeed, economic protectionism is an inherent factor in all trade remedy cases. Furthermore, it is not realistic to assume that institutions such as Chapters 19 could ever eliminate the role of economic protectionism in trade dispute altogether because the *raison d'être* of AD/CVD actions is insulation (i.e., protection) from foreign imports.

The variable economic protectionism manifested itself in all four disputes through critiques of panel decisions, components of administrative agency decisions, and desires to resort to domestic trade laws. In all four cases, the character of the domestic regime changed because panel decisions were reluctantly, yet eventually, accepted in their entirety. However, because of the intimate link between economic protectionism and trade remedy cases, beliefs in economic protectionism plagued the fairness, transparency, and speed of the Chapters 19 process of review.

Looking forward, fairness and transparency could be affected in the future because biases toward certain producers are involved in protectionist decisions and AD/CVD actions. Similarly, as the softwood lumber and pork dispute demonstrated, speed could be affected in the future because of stalling techniques that protectionist groups can use to delay the panel process (e.g., need for successive remands, unnecessary ECCs). Finally,

⁵ United States General Accounting Office, U.S.-Canada Free Trade Agreement - Factors Contributing in Appeals of Trade Remedy Cases to Binational Panels (Washington: GAO, 1995), 74-75.

beliefs in economic protectionism could continue to challenge the Chapters 19 system by encouraging certain interest groups and/or policy-makers to resort to alternative measures to resolve AD/CVD disputes, such as political negotiations or requests for stronger domestic trade remedy laws, as occurred in the softwood lumber and certain corrosion-resistant steel sheets disputes.

(E) Hegemonic Relationships

The variable hegemonic relationships slowed or inhibited the process of change in all disputes except the certain-corrosion resistant steel sheets case. Hegemonic relationships clearly played a role in the softwood lumber case. In particular, the CFLI was able to convince policy-makers in Washington to create domestic laws to make it harder to export Canadian lumber to the U.S.; Congress pressured administrative agencies to apply laws in a certain way to decrease the Canadians' chance of success before a panel; the CFLI was successful in encouraging the USTR to request an ECC; and the CFLI and U.S. government were able to override the panel process by convincing the Canadian government to regulate lumber exports by a tariff-rate quota in April of 1996. It must be noted that hegemonic relationships in the softwood lumber dispute were only able to stall the process of change, because panel decisions were ultimately accepted and duties refunded. Nevertheless, the 1996 Agreement set a dangerous precedent for Canada-U.S. trade relations because it indicated that power politics, at the behest of interest groups and certain U.S. policy-makers, could trump institutionalized methods of dispute settlement.

The variable of hegemonic relationships was also relatively strong in the pork case because USTR Carla Hills was persuaded by the NPPC and Congress to request an ECC even though she did not want to do so. Hegemonic relationships were able to temporarily inhibit the effects that Chapters 19 panels had on the character of the U.S. regime, in that the ITC and DOC needed multiple remands before adhering to panel orders, and the ECC was requested without cause. Nevertheless, the variable was not able to defeat the process of change because panel decisions were eventually implemented, albeit reluctantly, and the CVDs were completely refunded.

Interestingly, the variable of hegemonic relationships manifested itself in such a way to encourage, and not inhibit, the process of change in the cut-to-length steel plate dispute. Even though certain Mexican interest groups were angered by the panel's decision and asked the Government to ignore it for reasons dealing with protectionism and sovereignty, the Mexican government exercised its power within the authoritarian regime and ordered that the panel's decision be completely accepted and implemented. One of the

reasons for the Mexican government's actions was the fear of international or American censure. Mexico understood that membership in the NAFTA required compliance with international laws, and concrete efforts to change its domestic trade regime. Mexico's decision to implement the panel's orders in the steel dispute was an indication of its willingness to uphold its NAFTA obligations. In this way, the hegemonic relationships between the U.S. and Mexico and the Mexican government and certain interest groups ensured that the panel's decision was implemented to avoid U.S. censure, in spite of public opposition in Mexico.

(F) State Sovereignty

Finally, the variable of state sovereignty temporarily inhibited or slowed the process of change in three of the four cases. During the softwood lumber dispute, policy-makers and interest groups challenged the authority of panels on constitutional grounds. They implied that domestic procedures were superior to international mechanisms for judicial review, and indicated that they did not wish domestic procedures to be replaced by international panels. Similarly, the ITC and DOC were very reluctant to adhere to the panels' orders during the pork dispute, because they did not wish an international institution to change their practices. The cut-to-length steel plate dispute recalled the traditional fear of bowing to American procedures that has been central in Mexican foreign policy since 1919. In addition, SECOFI did not wish to surrender its authority to the panel's orders and refuted many of the decisions that the panel had made during the review process.

Like the variable of hegemonic relationships, concerns with state sovereignty only slowed the process of change in the case studies, because the panel decisions were ultimately accepted and adhered to. International laws were allowed to supersede domestic procedures, and change the character of the three regimes. However, as will be discussed, the ability of Chapters 19 panels to continue to change the character of the three regimes is directly related to state sovereignty, and the willingness of the three governments and their constituents to defer to the authority of NAFTA panels in the future.

(2) Placing the Hypothesis back into New-Institutionalist Theory

The hypothesis was developed from new-institutionalist theories. New-institutionalist theorists from the two major schools of thought suggest that rules and institutions create parameters and precondition behaviour within a society. Behaviour that

deviates from accepted, longstanding traditions is often constrained by rules and institutions in the day-to-day workings of a political system. Notwithstanding the power of rules and institutions to constrain, new-institutionalist theorists insist that rules and institutions are evolutionary creatures. They are not beyond the reach of societal actors. They can be changed to address social, political, and economic developments. The majority of new-institutionalists maintain that rules and institutions change slowly. Newer rules and institutions need to be compatible with a society's domestic structures, historical traditions, and cultural ideologies. Therefore, new-institutionalist theorists suggest that rules and institutions change gradually in response to evolving needs, developments, and interests. Rules, institutions, societal interests, and modern developments, then, are linked in a close, interdependent relationship. The legitimacy, authority, and longevity of newer rules and institutions depend on the extent to which they reflect the dominant interests and historical traditions of a society. Nevertheless, new-institutionalist theorists insist that rules and institutions control the process of change, even though they are linked to society in an interdependent relationship. Rules and institutions are affected, but not controlled, by societal actors and/or economic developments. Instead, rules and institutions place some individuals into positions where they can change them, so that they (i.e., rules and institutions) remain applicable to political and socio-economic developments.

New-institutionalist theories maintain that institutions guide the process of change because of their authority and ability to affect the choices that people make. New-institutionalist theories were chosen to investigate the changes that occurred in the North American trade regime because Chapters 19 panels were added to the socio-economic forces that were at work in the resolution of trade disputes before 1989. In other words, institutionalized Chapters 19 panels were the only new addition to the three trade regimes. Political and socio-economic factors such as beliefs in economic protectionism, hegemonic relationships, and concerns with state sovereignty had always been present prior to the creation of the FTA and NAFTA. Consequently, if changes occurred to the character of the three regime after 1989, it is reasonable to conclude that they were the result of the new factor, or the institutions of Chapters 19.

The synthesis of the four cases demonstrates that panels played a decisive role in the process of change and encouraged the three regimes to become fairer, more transparent, and faster. Indeed, the presence of Chapters 19 panels was able to encourage change in spite of inhibiting political and socio-economic factors in the majority of cases. Therefore, the central assumption of new-institutionalist theories was confirmed by the four case studies. Institutions "mattered" in the process of change in that they made a difference in how AD/CVD determinations were reviewed after 1989.

In terms of the relevancy of the two schools of new-institutionalism, institutions were deliberately built into Chapters 19 of the FTA and NAFTA to address new demands for rule-based trade and the reduction of power politics in the resolution of AD/CVD disputes. As members of the rational choice school argued, policy-makers in the three countries agreed to forego some of their control, and allow the new institutions of Chapters 19 to change the trade regulatory processes of Canada, Mexico, and the United States. Institutions were chosen to bridge the “collective dilemmas” that had been caused in the resolution of trade disputes because of the political and socio-economic forces that had been at work before 1989. Demonstrating the arguments of the socio-structural school, the four trade disputes also illustrated that change was not complete. Older traditions, domestic structures, and cultural beliefs did not disappear completely from the North American trading environment. The impact that the decisions of Chapters 19 panels had on the three trade regimes was tempered by the relative power of policy-makers and interest groups as they responded to developments in international trade with traditional protectionist, nationally-oriented measures. In accordance with structural-sociological new-institutionalists, change did not occur quickly. The new institutions of Chapters 19 brought change to the character of the North American trade regulatory process slowly, in order that their authority would be accepted in the three political systems.

The case studies also help to advance new-institutionalist theories because they demonstrate that the two schools of theory need to be developed in the area of international law in spite of their applicability to the evolution of trade laws in North America. Chapter Two suggested that new-institutionalist theories are better suited to domestic laws. Domestic laws are more binding and enforceable than international laws. International rules may be altered, disregarded, or broken more easily because states are sovereign, and international laws are only “morally binding” on the signatory parties. The softwood lumber, pork, and steel disputes demonstrated that domestic structures, historical traditions, cultural ideologies, and hegemonic relationships increased the power of certain policy-makers and interest groups by placing them in positions to counter the power of Chapters 19 panels in the process of change. The new laws and institutions of Chapters 19 were binding in so far as members of the three countries ceded a measure of their sovereignty to those laws, and deemed them compatible with the structures, political interests, and traditions of their political system. Therefore, the four trade disputes confirmed that new-institutionalist theorists need to consider how hegemonic relationships, state sovereignty, and the paradoxical nature of international law condition the resilience and authority of international rules in the face of social, political, and economic pressures to change.

(3) Chapters 19 and the Linkages between International and Domestic Laws

The role that Chapters 19 played in the three trade regimes demonstrate the linkages between international and domestic laws. Chapters 19 of the FTA and NAFTA required that Canada, Mexico, and the United States adjust their domestic trade remedy laws to encourage a more uniform, liberalized trade regime to emerge. Furthermore, Chapters 19 permitted binational panels to remand final AD/CVD determinations to administrative agencies when they did not adhere to domestic laws, principles, and practices. Consequently, the rules and institutions of Chapters 19 affected the three domestic trade remedy regimes in particular, and the North American process in general. Chapters 19 could continue to have an impact on domestic trade rules if they are respected by the governments and dominant groups of the three political systems. For Cannon:

Domestic laws will change via the NAFTA's process of identifying particular modifications that must be made to domestic laws and the consultations that occur between the Parties in order to promote greater uniformity with regard to subsidies and antidumping rules ... The panel decisions may influence decisions by the administering agencies or the courts. Principles established by panels may commend themselves as better policy choices and be engrafted onto domestic law ... As a result, domestic AD and CVD laws may be expected to change gradually through persuasive force of panel decisions.⁶

The ability of Chapters 19 to continue influencing domestic trade rules is contingent on the support the Chapters receive in Canada, Mexico, and the United States. The laws and institutions of Chapters 19 are instruments of international law. They were created out of political negotiations in which sovereign states agreed to let international rules and binational panels change domestic laws governing trade. Consequently, the effects that Chapters 19 have had, and could continue to have, solicit concepts such as hegemony, state sovereignty, and the paradoxical nature of international law. How much have sovereign states allowed themselves to be bound by international laws? Have interest groups also conceded to the authority of binational panels and allowed their decisions to override their narrow, nationally-oriented interests? How much can international rules change domestic laws? Is it desirable that international laws can do so? Which country or domestic actor(s) should be able to decide what kind of changes will be brought about by international law?

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James R. Cannon Jr. *Resolving Disputes Under NAFTA Chapter 19* (Colorado Springs: Shepard's/McGraw-Hill Inc., 1994), 87.

How important are the domestic structures, historical traditions, and cultural ideologies of a political system vis-à-vis international laws governing trade?

Zamora captured the relationship between international and domestic laws by asking whether “international trade regimes should be used to further the harmonization of domestic laws covering [trade] and nontrade subjects.”⁷ Zamora implicitly highlighted the roles that hegemony, state sovereignty, and the paradoxical nature of international laws played in the process of change. He argued that many of the procedures and principles of NAFTA-19 were deliberately placed into the Agreement by Canadian and American negotiators to make Mexico’s trade remedy regime more like their own. Liberal democratic legal principles such as due process, transparency, and judicial impartiality were sought to afford Canadian and American producers a more equitable, fair, and timely hearing before SECOFI. More generally, the principles embodied in NAFTA-19 aimed to liberalize Mexico’s economic and political systems in their entirety. In other words, Canadian and American negotiators used their positions in the hegemonic relationship to pressure Mexico’s government to change its domestic laws, and thereby surrender a measure of its sovereignty to the international laws and institutions of NAFTA-19. The Mexican government complied, and used its hegemonic position in Mexico to implement the changes in its own domestic trade remedy regime.

The question then remains “how much should importing countries be allowed to use [international agreements] to promote domestic law reform in other countries?”⁸ The issue is indicative of the debate over modernization and development that challenged the field of Comparative Politics during the 1960s and 1970s. Comparative political scientists pondered over the extent that attributes of powerful, “modern, democratic” political systems should be imposed onto weaker, “non-democratic developing ones.” When should the cultural and historical traditions of developing countries take precedence over the democratic procedures and institutions found in the West?⁹ In the context of the North

⁷ Stephen Zamora, “The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement,” *Law and Policy in International Business*, Vol. 24, No. 2 (1993), 404.

⁸ Stephen Zamora, “The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement,” *Law and Policy in International Business*, Vol. 24, No. 2 (1993), 404.

⁹ The modernization school of the late 1950s, 1960s, 1970s sought to make sense out of the reconstruction of governments and economies in postwar Europe and the explosion of nations and search for modernization in the Third World. It combined the assumptions and emphases of political scientists, economists, sociologists, anthropologists, and historians. When doing so, members of the Modernization school employed three different approaches to the study of political change: (1) a systems-functionalist approach, (2) a social process approach which attempted to relate political behaviour and processes to social processes, such as urbanization, industrialization, and increasing media consumption through comparative quantitative analyses of national societies, and (3) a

American trade remedy regime, Zamora warned that even though Mexico's legal system could change for the better under the NAFTA, an "American litigious" system should not be imposed quickly onto Mexico because of the striking and important cultural differences which affected the political and economic structures and practices of the Canada, Mexico, and the United States.¹⁰ Just as new-institutionalist theorists argued, change needed to be ushered in slowly so that new rules and institutions would be compatible with older traditions, and would be able to retain their socializing power, authority, and legitimacy.

Implicit in Chapters 19 is the assumption that a uniform, democratic, transparent trade remedy regime is essential to the smooth functioning of the NAFTA. It is hoped that the Mexican trade remedy regime will continue to evolve into the system envisioned by the framers of NAFTA-19. After all, Mexican negotiators willingly committed themselves to the text of the agreement and even began to change their domestic regime before the negotiations were concluded and the agreement took effect. The Salinas administration was fully prepared to change Mexico's trade remedy laws because of domestic pressures and an ideological commitment to the tenets of economic liberalization. The NAFTA negotiations only accelerated the process.¹¹

comparative historical approach which combined a more traditional approach to development with intense efforts at systematic rigor. In general, the three approaches generated monographic studies of the third world, hypotheses and statistical analyses of the relationship between aspects of modernization and democracy, and economic-based studies which emphasized the implications of the western experience with industrialization for the third world by considering development strategies, international trade, the technology transfer, and entrepreneurship. The modernization school sought to bring their belief in progress, in the American/western sense of the word, to the Third World. The school sought to answer the question of how developing nations could find their way into the modern world when considering how "traditional" societies could be transformed into "modern," "complex," "western-like ones." The school conceptualized political change and development to be a progressive transition from a traditional society to a more differentiated, specialized, impersonal, secularized, modern one.

Classic works from the modernization school include: Gabriel Almond, James Coleman (eds), *The Politics of Developing Areas* (Princeton: Princeton University Press, 1960); Gabriel Almond, G. Bingham Powell Jr., *Comparative Politics: A Developmental Approach* (Boston: Little, Brown and Company, 1966); David Apter, *The Politics of Modernization* (Chicago: The University of Chicago Press, 1965); Leonard Binder et al, *Crises and Sequences in Political Development* (Princeton: Princeton University Press, 1971); Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971); Karl W. Deutsch, "Social Mobilization and Political Development," *American Political Science Review*, Vol. 55 (9161), 493-514; Samuel Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968); S.M. Lipset, "Some Requisites of Democracy," *American Political Science Review*, Vol. 53 (1959), 69-105; W.W. Rostow, *Politics and the Stages of Growth* (Cambridge: Cambridge University Press, 1971).

¹⁰ Stephen Zamora, "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement," *Law and Policy in International Business*, Vol. 24, No. 2 (1993), 392.

¹¹ Gilbert R. Winham, "What Mexico can expect from NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," Public Address delivered at El Colegio de México, Mexico City, May 21, 1994, 9-10.

Nevertheless, the cultural and traditional differences of the three political systems need to be respected. What must always be remembered is that the NAFTA simply created a free trade arrangement between Canada, Mexico, and the United States. It was never intended to be a political or economic union like the European Union, and was not aimed at complete economic, political, or cultural integration.¹² Canada, Mexico, and the United States only agreed to let binding judicial mechanisms settle disputes over the ways that administrative trade agencies applied domestic AD/CVD laws in the course of North American trade. The three governments retained their sovereignty and independent decision-making ability to amend their laws within the parameters of their particular constitutions and historical traditions. According to Oelstrom:

To satisfy both the need for sovereign authority and the need to represent international communal concerns, the NAFTA has taken both old and new postures. Provisions such as the review of domestic legislation, pull the participating countries into a more predictable, stable, and domestically-oriented legal realm without unnecessarily sacrificing sovereign prerogatives. Consequently, with respect to the notion that a world based on sovereign autonomy would be dangerous, while a wholly integrated system may be oppressive, the NAFTA seems to have struck an effective balance between the two conflicting concerns, and hopefully has provided a workable solution to establish profitable trade patterns between north and south and other regions as well.¹³

Chapters 19 could be interpreted as a measure which meshed international rules, domestic structures, traditions, and ideologies, hegemonic relationships, and state sovereignty to place American, Canadian, and Mexican producers on a more equitable footing within the new North American trade remedy regime. Experience has proven that the presence of Chapters 19 allowed change to occur to the trade remedy laws in Canada, Mexico, and the United States when policy-makers and interest groups accepted their authority. When panel decisions were implemented by administrative agencies, heeded by

¹² Generally, a free trade agreement is simply intended to govern the flow of goods and services between its members. Institutions are generally designed to be based on an intergovernmental model of negotiation and dispute settlement. Members of free trade agreements tend to agree to abide by a number of collective rules governing the flow of goods and services between their economies, but insist that they retain their ultimate decision-making ability and authority. Conversely, political and/or economic unions like the European Union are intended to be supranational organizations that integrate its members into a cohesive political and economic unit. The laws, dispute settlement mechanisms and institutions are thus given a great deal of authority to uphold the broader laws of the union. Union laws are given supremacy over those of the individual member states. In addition, member states generally agree to formally cede their ultimate sovereignty and decision making ability to the collective institutions of the union.

¹³ Kristin L. Oelstrom, "A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA," *Law and Policy in International Business*, Vol. 25, No. 2 (1994), 811-812.

governmental officials, and respected by interested parties, the international rules of Chapters 19 superseded domestic procedures in the three countries. In accordance with new-institutionalist theories, change occurred when dominant members of a society viewed newer rules and institutions such as Chapters 19 panels as legitimate, authoritative, and compatible with domestic traditions. For example, Mexican policy-makers used their power and influence over domestic affairs to enforce the binational panel's decision on SECOFI in the cut-to-length steel dispute. The Zedillo administration felt that Chapters 19 was a necessary measure that Mexico had to support if it wanted to remain a member of the NAFTA. Similarly, officials in Revenue Canada complied with the binational panels in the corrosion-resistant steel dispute to allow Chapters 19 to work as intended. Some American officials in the DOC and ITC also abided by panel decisions and heeded to their authority in the pork and softwood lumber disputes.

However, the Chapters' authority was limited in cases where governmental officials and interest groups hesitated or refused to implement panel decisions. Ironically, change has been resisted most in the United States where policy-makers and interest groups were afraid that Mexico's trade remedy regime and legal system would not be compatible with FTA-19 and/or the American trade regulatory process. Americans insisted that change in Mexico's regime had to occur, but have tried to prevent Chapters 19 from changing their own system. The number of panels required in the pork and softwood lumber disputes demonstrated the growing fear of Chapters 19 in the United States. Similarly, some Canadian producer groups and policy-makers have begun to turn to older political/diplomatic means to settle disputes with the United States in spite of the growing consensus behind the rule of law in international trade. The negotiated softwood lumber agreement of April, 1996 and the calls for a tougher, protectionist, unilateral trade remedy regime by Canadian steel producers have thereby threatened the continued success of Chapters 19 in Canada to a certain degree. Domestic laws and political negotiations were placed ahead of international laws in the aftermaths of the steel, pork, and softwood lumber disputes between Canada and the United States. Concerns about protectionism, sovereignty, and independent decision-making ability superseded the binding nature of Chapters 19, as powerful policy-makers and interest groups exercised their influence within and between the two countries to impede the effect of the Chapters 19 panels. Consequently, the cases where change was resisted demonstrate that new-institutionalist theorists need to appreciate the roles that hegemony, sovereignty, and the paradoxical nature of international law in the process of change.

The Future of Chapters 19 and the Paradoxical Nature of International Law

Chapters 19 have been both a success and a failure because of their status as instruments of international law. They have produced both cases of “change” and “no-change” in North American trade depending on the commitment that American, Canadian, and Mexican officials and interest groups have given to them. Consequently, the ability of Chapters 19 panels to continue to change trade remedy laws is contingent on the support they receive in the three countries. In other words, the effectiveness of Chapters 19 panel decisions lie in the paradoxical nature of international law.

Binding, judicial forms of dispute settlement have been entrenched into international trade agreements since the 1970s. On an official level, countries have been committing themselves to use the rule of law instead of power politics to settle trade disputes between them. Nevertheless, countries have remained hesitant to employ those mechanisms to their fullest potential. The reluctance to fully employ dispute settlement mechanisms creates the paradoxical nature of international law. Jackson notes that “even persons of good will and broad international perspective, have certain ambivalent feelings about the fundamental nature which an international institution regarding economic matters should take on.”¹⁴ For example, the United States feared placing an even stronger Chapters 19 into the NAFTA after seeing what it could do under the FTA. The paradoxical nature of international law and dispute settlement mechanisms such as Chapter 19 is captured well by Pescatore.

This movement at developing rules and procedures is inspired by two antagonistic tendencies which leave a rather contradictory impression. On the one hand, there is the clear will to strengthen the mechanisms [of international agreements] ... On the other hand, there is lamentably also a countervailing tendency of governments to regain control of the system ... So, this means not only a strengthening of dispute settlement but also a veiled return from genuine dispute settlement to mere conciliation.¹⁵

The need for rule-based agreements and effective dispute settlement mechanisms is becoming more pressing as the degree of interdependence and harmonization within the global trading environment increases. Consequently, the paradoxical nature of international law needs to be addressed. Countries must decide whether the rule of law will be allowed to triumph over power politics. International trade agreements are treaties between

¹⁴ John H. Jackson, “Reflections on Restructuring the GATT,” in Thomas Oppermann, and Josef Molsberger (eds), *A New GATT for the Nineties and Europe '92*. (Baden-Baden: Nomos Verlagsgesellschaft, 1991), 146.

¹⁵ Pierre Pescatore, “The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects,” in *The Journal of International Arbitration*, Vol. 10, No. 1 (1993), 38-39.

sovereign countries. International laws are only effective and binding insofar as the signatory parties are completely committed to their provisions. Governments must be willing to cede a measure of their sovereignty and decision-making ability to the mechanisms of the trade agreements to solve the paradoxical nature of international law. For Hudec, "the efficacy of a dispute settlement procedure depends upon the cooperation of governments, and cooperation in the first instance depends upon the recognition by governmental agencies of the competence of the procedure," and a willingness to abide by it. A joint statement issued by the Committee on Canada-U.S. Trade Relations suggested:

The continued success of [Chapters 19] depends not only on the elimination of tariffs and other barriers to trade, but also on the predictability of rules jointly agreed to and the effectiveness and appropriate utilization of the processes involved in the administration of the Agreement ... the governments of the three countries must fulfill their commitments to achieve the objectives of the agreements in a more transparent and consistent manner.¹⁶

In conclusion, critics ask what guarantees are there that the rule of law will be able to triumph over power politics within international trade? There are no simple guarantees in international trade as there are few, if any, in life itself. Laws, whether domestic or international, are only as good and as strong as the will of the people to uphold them. With time, however, and with many successful resolutions behind them, the more judicial, binding decisions of Chapters 19 panels could become increasingly strong. They could continue to affect the ways that trade remedy laws are interpreted and applied in Canada, Mexico, and the United States. New-institutionalist theorists maintained that laws could affect the behaviour of societal actors when they were viewed as authoritative and compatible with historical traditions and cultural ideologies. As the brief history and limited success of Chapters 19 suggests, change did occur slowly when panels were seen as authoritative institutions in the trade regulatory process. Change could continue to occur when dominant policy-makers and interest groups view the decisions of Chapters 19 panels to be complementary to their domestic political system, necessary in the face of developments of the international political economy, and compatible with state sovereignty and domestic concerns.

¹⁶ *Canadian Free Trader*, Vol. 5, No. 5 (May, 1992), 39.

APPENDIX A -
INTERNATIONAL LAWS GOVERNING ANTIDUMPING, SUBSIDIES,
AND COUNTERVAILING DUTIES

Antidumping Laws

The basic international rules governing dumping practices and antidumping duties (ADDs) are included in Article VI of the GATT, the GATT's 1979 Antidumping Code, and the World Trade Organization's (WTO) Agreement on the Implementation of Article VI of the GATT 1994. ADDs are permitted in certain circumstances. Exporters are only to be subjected to ADDs when their dumping practices "cause or threaten material injury to an established industry," according to Article VI of the GATT and Article 8 of the 1979 Antidumping Code. The use of ADDs must be constrained by: (1) detailed rules about what facts constitute "dumping"; (2) detailed rules about the "injury requirement"; (3) detailed rules about the procedures under which governments determine and apply ADDs; and (4) a causal link between the dumping practices and material injury.¹ If the dumping practices do indeed cause or threaten material injury to domestic producers, the relevant GATT, Canadian, Mexican, and American statutes permit that an ADD may be levied. The ADD must equal the margin of dumping (i.e., the price of a good in the home market minus the price of the good in a foreign market).² In summary:

Dumping requires a certain comparison of price for export with "normal" price (usually home market price). For responding duties to be permitted, there must also be found "material injury" or threat occurring to the competing domestic industry in the importing country, or preventing the establishment of such an industry. If, and only if, these two conditions are found to exist (dumping and injury), then the importing country may apply ADDs. Such country is, however, obligated to see to it that its procedures and provisional remedies for dumping are kept consistent with a number of international rules in the GATT and [1979] Code.³

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- 1 John H. Jackson, "Dumping in International Trade: Its Meaning and Context," in John H. Jackson, Edwin A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 9.
 - 2 Article 8 of the 1979 GATT Antidumping Code; Sections 3, 15-30 of the SIMA; Section 1673 of the Tariff Act of 1930; Article 7 of the Foreign Trade Law.
 - 3 John H. Jackson, "Dumping in International Trade: Its Meaning and Context," in John H. Jackson, Edwin A. Vermulst (eds), *Antidumping Law and Practice* (Ann Arbor: The University of Michigan Press, 1989), 9.

The Agreement on the Implementation of Article VI of the GATT 1994 was concluded during the Uruguay Round of Multilateral Trade Negotiations and was placed into the WTO. It clarified and expanded the GATT rules by setting out the principles that are to govern dumping investigations, and the application of duties when dumped imports cause or threaten injury in the global trade environment. For example, Article 3 clarified the determination of injury provisions by requiring that injury caused by factors other than dumping must not be attributed to dumped goods. It also required that the threat of injury had to be based on facts, and must be clearly foreseen and imminent. Article 5 demanded that a dumping investigation could only be initiated when supported by at least 25 percent of domestic producers. In addition, Article 5 stipulated that dumping investigations are to be terminated when the margin of dumping was *de minimis* (less than two percent), or if the volume of dumped goods was negligible (less than three percent of the total imports of the like product). Articles 2, 6, 8, 9 and 11 placed stricter disciplines on the conduct of administrative agencies dumping investigations. They reformed the methods used for calculating the margin of dumping, the type of information used during an investigation, how information is to be collected, when duties may be imposed, and the speed at which investigations should be conducted. In addition, a new sunset clause was added to require the termination of injury findings after five years unless the matter was reviewed by authorities in the importing country.⁴ Parties adhering to the WTO agreed that the new Agreement on dumping would co-exist with the 1979 Code for one year to provide time to settle outstanding GATT disputes. Parties agreed that the WTO's dumping code would supersede the 1979 Code when "investigations" and reviews of "existing measures" were initiated after the WTO came into effect (i.e., after January 1, 1994). The new dumping agreement completely replaced the 1979 AD Code on January 1, 1995.

Subsidy Laws

Subsidies can be divided into two general types: export subsidies; and domestic or production subsidies. Export subsidies are granted on the portion of goods destined for export. A detailed list of export subsidies is contained in the GATT's 1979 Subsidies Code. Domestic or production subsidies are granted for the manufacturing or production of goods irrespective of their ultimate destination for consumption. Research and

⁴ Department of Foreign Affairs and International Trade, "Agreement Establishing the World Trade Organization," *Canada Gazette Part I* (December 31, 1994), 4899-4901.

development grants, provision of capital, loans, loan guarantees, provision of goods or services at preferential rates are examples of domestic or production subsidies.⁵

The GATT's provisions on export subsidies are much more restrictive than the provisions on domestic subsidies. By and large, export subsidies are prohibited by Article XVI of the GATT, the 1979 GATT Subsidies Code, and Article 3 of the 1994 Agreement on Subsidies and Countervailing Measures. Domestic subsidies are permitted by Article 11(1) of the 1979 Subsidies Code, because subsidies "are widely used as important instruments for the promotion of social and economic policy objectives." Domestic subsidies are permitted inasmuch as they do not cause injury to the producers of another party of the GATT.⁶

Unlike the term dumping, the term "subsidy" was not explicitly defined in the GATT or the 1979 GATT Subsidies Code. Nevertheless, the GATT's 1979 Subsidies Code attempted to manage the use of subsidies by classifying them into three types: (1) those that were unlawful, such as export subsidies on non-primary products (Article 9); (2) those that were lawful unless they caused "serious prejudice" to the export interests of exporters to third markets ... or nullified and impaired benefits expected in the subsidizing markets (Articles 10,11); and (3) those that were lawful unless they caused "material injury" to competitors in an importing country, such as production subsidies (Articles 1-6, 11).⁷

The 1979 Subsidies Code attempted to distinguish between the lawful and unlawful use of subsidies. The lawfulness of subsidies was called into question when a subsidy caused harm.⁸ Harm was based on its effect and the type of sanction that could be authorized in response to it. The three types of harm caused by subsidies included: (1) material injury: harm in the domestic market of an importing country which may lead to a unilaterally determined and imposed countervailing duty (based on GATT Article VI); (2) nullification and impairment of expected benefits: harm in displacing imports in the subsidizing country, which may lead to multilaterally authorized countermeasures to restore

⁵ R.K. Paterson, *Canadian Regulation of International Trade and Investment* (Toronto: Carswell, 1986), 138.

⁶ Jacques H. Bourgeois, "The GATT Rules for Industrial Subsidies and Countervailing Duties and the New GATT Round- The Weather and the Seeds," in Ernst-Ulrich Petersmann, Meinhard Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations 2nd Ed* (Deventer: Kluwer Law and Taxation Publishers, 1991), 226-227; William Davey, "Overview of the General Agreement on Tariffs and Trade," in Pierre Pescatore, William Davey, Andreas Lowenfeld (eds), *Handbook of GATT Dispute Settlement* (Irvington-on-Hudson: Transnational Juris Publications Inc., 1992), 54-57.

⁷ Michael Hart, "The Canada-United States Working Group on Subsidies" (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 17.

⁸ The harm caused by subsidies was classified by Article 8 of the 1979 Subsidies Code.

the balance of benefits (based on GATT Article XXIII); and (3) serious prejudice: harm in displacing exports in third markets which may lead to multilaterally authorized countermeasures (based on GATT Article XVI).⁹

A new Agreement on Subsidies and Countervailing Measures was concluded during the Uruguay Round and formed part of the WTO in 1994. The Agreement built on the 1979 Subsidies Code in a number of ways. First, Articles 1 and 2 of the agreement provided an exhaustive definition of “subsidy” based on the notion of a financial contribution that conferred a benefit. Articles 1 and 2 also stipulated that non-trade distorting government assistance such as social programs and general labour adjustment programs could not be considered countervailable subsidies. Moreover, they provided that the definition applied equally to subsidies used by national and sub-national levels of government. Further, the definition included the concept of specificity of a subsidy to a particular industry, a prerequisite for initiating a trade action. Second, Articles 6 and 7 provided tighter, multilateral disciplines on import substitution or third-country market displacement of subsidies. Members of the WTO may seek relief from the injurious effects of these types of subsidies through consultation and panel proceedings. Third, Article 8 set out provisions for a “non-actionable” category of subsidies (i.e., those subsidies that were exempt from countervailing duties). Subsidies that were generally available to all producers within an economy, linked to research and development, associated with regional development, or part of an environmental program were included in this category. Article 9 required that consultation and multilateral review be used in the event that non-actionable subsidies cause serious adverse effects.¹⁰

Countervailing Duty Laws

Article VII of the GATT Countervailing Duties Code (1979) sought to limit the size and applicability of countervailing duties (CVDs) by keeping them equal to the amount of the subsidy that was placed on an imported good.¹¹ Articles 10-23 of the 1994 Agreement on Subsidies and Countervailing Measures strengthened the GATT’s CVD rules. Article

⁹ Michael Hart, “The Canada-United States Working Group on Subsidies” (Ottawa: Occasional Papers in International Trade Law and Policy, 1990), 17-18.

A discussion of the Nullification and Impairment Clause of Article XXIII of the GATT is given by John H. Jackson in “The Jurisprudence of International Trade,” *American Journal of International Law*, Vol. 72 (1978), 754-755.

¹⁰ Department of Foreign Affairs and International Trade, “Agreement Establishing the World Trade Organization,” *Canada Gazette Part I* (December 31, 1994), 4912-4914.

¹¹ For a summary of the GATT 1979 Countervailing Duties Code, see J.G. Castel, A.L.C. de Mestral, W.C. Graham, *The Canadian Law and Practice of International Trade* (Toronto: Edmond Montgomery Publications Limited, 1991), 31-32.

11 required that a CVD investigation had to be supported by at least 25 percent of domestic producers affected by the good. Article 11 also required that CVD investigations had to be terminated in the event of a *de minimus* margin of subsidization (less than one percent). Articles 14 and 15 clarified the methods that were to be used to calculate the subsidy and CVD (i.e., the benefit-to-recipient method),¹² and provided a more rigorous standard for assessing injury. Article 21 implemented a sunset clause whereby CVDs could only apply for five years unless injury was found once again. Article 24 established a Subsidies and Countervailing Measures Committee to oversee the operation of the Agreement and to provide assistance to panels that studied CVD disputes. Finally, Article 27 clarified the special and differential treatment relating to the CVD obligations of developing country members of the WTO.¹³ The WTO's Agreement on Subsidies and Countervailing Measures co-existed with the 1979 Subsidies and Countervailing Codes until December 31, 1995, and completely replaced them on January 1, 1996.

Both Canada and the United States are signatories to the 1979 Subsidies Code and the 1994 Agreement on Subsidies and Countervailing Measures. They have integrated their international obligations into their respective domestic laws governing the use of subsidies and CVDs (e.g., the Special Import Measures Act, The Tariff Act of 1930). Mexico did not become a signatory party to the 1979 Subsidies Code when it joined the GATT in 1985. Because the 1979 Subsidies Code did not include a clear definition of the word "subsidy," the Mexican government argued that the benefits it provided to its domestic producers did not constitute subsidies that were countervailable. For example, Mexico's Export Promotion Program (PROFIEEX) was used by Mexican governments to promote diversification of markets and products, to encourage adjustments in export lines, and to help encourage domestic production of goods for export. In other words, PROFIEEX offered export subsidies to Mexican producers to help them compete with foreign competitors. Mexican negotiators maintained that PROFIEEX was designed to place

¹² The benefits conferred by a foreign subsidy can be determined in two different ways: (1) the "cost-to-the government" standard, (2) the "benefit-to-the-recipient" standard. Most of the Contracting Parties to the GATT preferred the "benefit-to-the-recipient" standard prior to 1994, and have not used the "cost-to-the government" standard. The "cost-to-the government" standard fell into disuse because it did not always capture the full amount of the countervailable benefit attributable to the government subsidy and could compel the perverse result of a negative subsidy determination. The "benefit-to-the-recipient" standard attempts to identify and isolate the treatment that a private firm or sector would receive in the absence of any government subsidization or government intervention in the competitive marketplace. The degree of subsidization is then assessed by comparing those hypothetical, market-driven results that would prevail without subsidization to the nondistorted economic activity that actually occurs in the country of exportation as a result of government intervention.

¹³ Department of Foreign Affairs and International Trade, "Agreement Establishing the World Trade Organization," *Canada Gazette Part I* (December 31, 1994), 4914-4915.

Mexican exporters “on an equal footing with exporters of other countries.” They argued that subsidies such as the PROFLEX were essential tools that helped the Mexican economy catch up to developed counterparts.¹⁴ Therefore, Mexican negotiators refused to endanger the long standing tradition of using protectionism and subsidization to build their country’s economy. Interestingly, Mexico gradually accepted the principles included in the 1979 Subsidies Code in order to receive protection from the application of CVDs of its trading partners. The Foreign Trade Law of 1986, as amended in 1993, made Mexico’s trade remedy laws and subsidization practices compatible with those included in the Subsidies Code and Article VI of the GATT.¹⁵ In addition, Mexico adopted the principles in the new Agreement on Subsidies and Countervailing Measures when it became a member of the WTO.

¹⁴ Richard D. English, “The Mexican Accession to the General Agreement on Tariffs and Trade,” *Texas International Law Journal*, Vol. 23 (1988), 381-383.

¹⁵ Neil Longley, Terry Wu, “Mexican and U.S. Antidumping and Countervailing Duty Policies: Issues in the Free Trade Negotiations,” *Law and Policy in International Business*, Vol. 23, No. 4 (1992), 891.

APPENDIX B -
SUMMARY OF CHAPTER 19 DISPUTES
(JANUARY, 1989 - JULY, 1996)

CASE NUMBER	CASE NAME	OUTCOME
CDA-96-1904-01	Bacteriological culture media from Bector Dickenson and Company and Difco Laboratories of the United States and from the Unipath Limited of the United Kingdom (dumping determination)	Decision pending
CDA-95-1904-01	Certain Malt Beverages from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-95-1904-02	Fresh, Whole, Delicious , Red Delicious and Golden Delicious Apples, originating in or exported from the United States of America (dumping determinations)	Terminated by sole requester
CDA-95-1904-03	Machine Tufted Carpeting originating in or exported from the United States of America	Terminated by sole requester
CDA-95-1904-04	Refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America (dumping determination)	Decision pending
CDA-94-1904-01	Fresh, Whole, Delicious, Red Delicious and Golden Delicious Apples, originating in or exported from the United States of America, excluding Delicious, Red Delicious and Golden Delicious Apples imported in non-standard containers for processing (injury determination)	Terminated by joint consent of participants
CDA-94-1904-02	Synthetic Baler Twine with a knot strength of 200 lbs or less, originating in or exported from the United States of America (injury determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-94-1904-03	Certain corrosion-resistant steel sheet products from Australia, Brazil, France, the Federal Republic of Germany, Japan, the Republic of Korea, New Zealand, Spain, Sweden, the United Kingdom, and the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-94-1904-04	Certain corrosion-resistant steel sheet products, originating in or exported from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-93-1904-01	Gypsum Board originating in or exported from the United States of America (dumping determination)	Unanimously remanded the agency's determination
CDA-93-1904-02	Gypsum Board originating in or exported from the United States of America (injury determination)	Terminated by joint consent of participants
CDA-93-1904-03	Tomato Paste in containers larger than 100 fluid ounces, originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants

CDA-93-1904-04	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 (dumping determination)	Joined with CDA-93-1904-05 and CDA-93-1904-07
CDA-93-1904-05	Certain hot-rolled carbon steel sheet products originating in or exported from the United States of America (dumping determination)	Joined with CDA-93-1904-04 and CDA-93-1904-07
CDA-93-1904-06	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 (injury determination)	Joined with CDA-93-1904-04 and CDA-93-1904-05. Unanimously affirmed agency's determination
CDA-93-1904-07	Certain flat hot-rolled carbon steel sheet products originating in or exported from the United States of America (injury determination)	Joined with CDA-93-1904-05 and CDA-93-1904-07. Panel affirmed with two partial dissents the agency's determination
CDA-93-1904-08	Certain cold-rolled steel sheet originating in or exported from the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-93-1904-09	Certain cold-rolled steel sheet originating in or exported from the United States of America (injury determination)	Unanimously affirmed the agency's determination
CDA-93-1904-10	Certain soldier joint pipe fittings originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants
CDA-93-1904-11	Certain soldier pressure pipe fittings and soldier joint drainage, waste and vent pipe fittings, made of cast copper alloy, wrought copper alloy or wrought copper, originating in or exported from the United States of America (injury determination)	Panel, with one dissent, affirmed the agency's determination
CDA-93-1904-12	Preformed fiberglass pipe insulation with a vapor barrier originating in or exported from the United States of America (dumping determination)	Terminated by joint consent of participants
CDA-93-1904-13	Preformed fiberglass pipe insulation with a vapor barrier originating in or exported from the United States of America (injury determination)	Dismissed due to failure to file briefs
CDA-92-1904-01	Certain machine tufted carpeting originating in or exported from the United States of America (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-92-1904-02	Certain machine tufted carpeting originating in or exported from the United States of America (injury determination)	Remanded the determination to the agency twice in each instance affirming party of the determination
CDA-91-1904-01	Certain Beer originating in or exported from the United States of America by G. Heileman Brewing Company Inc., Pabst Brewing Company, and the Stroh Brewing Company for use or consumption in the province of British Columbia (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
CDA-91-1904-02	Certain Beer originating in or exported from the United States of America by G. Heileman Brewing Company Inc., Pabst Brewing Company, and the Stroh Brewing Company for use or consumption in the province of British Columbia (injury determination)	Unanimously affirmed in part, and remanded in part, with one concurring opinion, the agency's determination

CDA-90-1904-01	Integral Horsepower Induction Motors (injury determination)	Affirmed, with one partial dissent, the agency's determination
CDA-89-1904-01	Polyphase Induction Motors from the United States of America (dumping and subsidization determination)	Affirmed, with one partial dissent, the agency's determination
USA-95-1904-01	Porcelain-on-steel cookware from Mexico (AD administrative review)	Unanimously, with one concurring opinion of two panelists, affirmed in part and remanded in part the agency's determination
USA-95-1904-02	Gray portland cement and cement clinker from Mexico (AD administrative review)	Decision pending
USA-95-1904-03	Color picture tubes from Canada (dumping determination)	Affirmed, with one dissenting opinion, the agency's determination
USA-95-1905-04	Oil country tubular goods from Mexico (dumping determination)	Decision pending
USA-95-1904-05	Fresh cut flowers from Mexico (AD administrative review)	Decision pending
USA-94-1904-01	Live Swine from Canada (CVD administrative review)	Unanimously affirmed in part and remanded in part the agency's determination
USA-94-1904-02	Leather wearing apparel from Mexico (CVD administrative review)	Remanded determination at the request of the agency
USA-93-1904-01	Certain cold-rolled steel flat products from Canada	Proceedings stayed by panel - order pending a final resolution of the negative injury litigation before the CIT
USA-93-1904-02	Certain hot-rolled steel flat products from Canada (dumping determination)	Proceedings stayed by panel - order pending a final resolution of the negative injury litigation before the CIT
USA-93-1904-03	Certain corrosion-resistant carbon steel flat products from Canada (dumping determination)	Panel, with two dissenting opinions, affirmed in part and remanded in part the agency's determination
USA-93-1904-04	Certain cut-to-length carbon steel plate from Canada (dumping determination)	Unanimously affirmed in part and remanded in part the agency's determination
USA-93-1904-05	Certain corrosion-resistant carbon flat steel products (injury determination)	Unanimously affirmed the agency's determination
USA-92-1904-01	Certain softwood lumber products from Canada (CVD determination)	In two decision, each with two dissents, panel overturned agency's determination
USA-92-1904-02	Certain softwood lumber products from Canada (injury determination)	Unanimously remanded the agency's determination three times, in the third instance affirming part of the determination
USA-92-1904-03	Pure and alloy magnesium from Canada (CVD determination)	Unanimously affirmed in part and remanded in part the agency's determination
USA-92-1904-04	Pure and alloy magnesium from Canada (dumping determination)	Unanimously affirmed the agency's determination

USA-92-1904-05/06	Magnesium from Canada (injury determination for AD and CVD investigations)	Unanimously affirmed in part and remanded in part the agency's determination
USA-91-1904-01	Oil country tubular goods from Canada (scope exclusion request from DOC investigation)	Terminated at the requests of the participants
USA-91-1904-02	Iron Construction Castings from Canada (AD administrative review for 1985-1987)	Terminated at the requests of the participants
USA-91-1904-03	Live swine from Canada (CVD administrative review for 1988-1989)	In two decisions, panel affirmed in part and remanded in part, with one partial dissent, the agency's determinations
USA-91-1904-04	Live swine from Canada (CVD administrative review for 1989-1990)	In two unanimous decisions, panel affirmed in part and remanded in part the agency's determinations
USA-91-1904-05	Replacement parts for self-propelled bituminous paving equipment from Canada (AD administrative review for 1989)	Terminated at the requests of the participants
USA-90-1904-01	Replacement parts for self-propelled bituminous paving equipment from Canada (AD administrative review for 1989-1990)	Remanded the determination three times, in each instance, affirming part of the determination
USA-90-1904-02	Oil country tubular goods from Canada (DOC abolishment of end use certification procedure)	Terminated at the requests of the participants
USA-90-1904-03	Sheet Piling from Canada (AD duty and cancellation of suspension agreement administrative review)	Terminated at the requests of the participants
USA-89-1904-01	Red raspberries from Canada (AD administrative review for 1986-1987)	Unanimously remanded the agency twice
USA-89-1904-02	Replacement parts for self-propelled bituminous paving equipment from Canada (AD administrative review for 1986-1987)	Unanimously affirmed the agency's determination
USA-89-1904-03	Replacement parts for self-propelled bituminous paving equipment from Canada (AD administrative review for 1987-1988)	Unanimously affirmed the agency's determination
USA-89-1904-04	Dried, heavy salted codfish from Canada (AD administrative review for 1986-1987)	Terminated at the requests of the participants
USA-89-1904-05	Replacement parts for self-propelled bituminous paving equipment from Canada (AD administrative review for 1986-1987)	Consolidated with USA-89-1904-03 and terminated
USA-89-1904-06	Fresh, chilled and frozen pork from Canada (CVD determination)	In two decisions, panel unanimously affirmed in part and remanded in part, with one concurring opinion in each, the agency's determinations
USA-89-1904-07	New steel rails, except light rails from Canada (CVD determination)	Unanimously affirmed in part, and remanded in part the agency's determination
USA-89-1904-08	New steel rails, except light rails from Canada (dumping determination)	Affirmed, with one partial dissent, the agency's determination
USA-89-1904-09/10	New steel rails from Canada (injury determination)	Affirmed, with one partial dissent, the agency's determination
USA-89-1904-11	Fresh, chilled and frozen pork from Canada (injury determination)	Unanimously remanded, with one concurring opinion, the agency's determination twice

MEX-96-1904-01	Cold-rolled steel sheet, originating in or exported from Canada (dumping determination)	Terminated at the requests of participants
MEX-96-1904-02	Rolled steel plate originating in or exported from Canada (dumping determination)	Decision pending
MEX-96-1904-03	Hot-rolled steel sheet originating in or exported from Canada (dumping determination)	Decision pending
MEX-95-1904-01	Seamless line pipe originating in or exported from the United States of America (dumping determination)	Terminated at the requests of the participants
MEX-94-1904-01	Imports of flat coated steel products in and from the United States of America (dumping determination)	Decision pending
MEX-94-1904-02	Imports of cut-to-length plate products from the United States (dumping determination)	Panel, with two dissenting opinions, remanded the agency's determination
MEX-94-1904-03	Polystyrene and Impact Crystal from the United States of America (dumping determination)	Decision pending
ECC-94-1904-01-USA	Certain softwood lumber products from Canada	ECC, with one dissenting opinion, dismissed the request for failure to meet the standards of an ECC and affirmed panel decisions and orders
ECC-93-1904-01-USA	Live swine from Canada	Unanimously dismissed the request for failure to meet the standards of an ECC and affirmed panel decisions and orders
ECC-91-1904-01-USA	Fresh, chilled and frozen pork from Canada	Unanimously dismissed the request for failure to meet the standards of an ECC and affirmed panel decisions and orders

APPENDIX C-
THE AMERICAN TRADE REGULATORY PROCESS BEFORE 1989

DOC Process after Petition is Received	ITC Process after Petition is Received
DOC Determination on sufficiency of petition/ initiation of investigation (20 days)	If DOC finds petition adequate, ITC continues preliminary investigation
If ITC preliminary determination is affirmative, DOC continues AD/CVD investigation	ITC preliminary determination on reasonable indication of injury as alleged (45 days of when petition is launched)
DOC preliminary determination of reasonable basis to believe that dumping or subsidy exists. If negative, ITC investigation is terminated. If affirmative, bond or cash deposit equal to estimated margin of dumping or subsidy must be posted by foreign importer (within 85 days of CVD petition being filed; within 160 days of AD petition being filed; timelines may be extended by 50 days in complex cases).	ITC advised of DOC's preliminary determination . If affirmative, ITC begins final determination of injury. If negative, ITC investigation is terminated.
DOC final determination. If affirmative, AD/CVD duty is calculated. If negative, investigation is terminated (within 75 days of DOC's preliminary determination. May be extended by 60 days in complex cases).	ITC final determination. If affirmative, DOC is notified. If negative, investigation is terminated (within 120 days of ITC's preliminary determination or 45 days of DOC's affirmative final determination, which ever is later).
If both final determinations are positive, AD/CVD is levied against imports to be post as a cash deposit or bond.	
DOC's final determination may be appealed to the Court of International Trade (CIT) if requested by a U.S. producer of foreign government or importer	ITC's final determination may be appealed to the Court of International Trade (CIT) if requested by a U.S. producer of foreign government or importer
CIT decision may be appealed to the Court of Appeals for the Federal Circuit or U.S. Supreme Court.	CIT decision may be appealed to the Court of Appeals for the Federal Circuit or U.S. Supreme Court.

APPENDIX D -
THE CANADIAN TRADE REGULATORY PROCESS BEFORE 1989

Revenue Canada Process after Petition is Received	CITT Process after Petition is Received
Deputy Minister of Revenue Canada (DM) decides whether complaint/petition is properly documented and contains sufficient information (30 days)	
DM initiates preliminary AD/CVD/injury investigation. DM may accept an undertaking before issuing preliminary determination. Proceedings are terminated unless undertaking is violated, or terminated on request by importer	CITT may be asked to review the sufficiency of the petition and the preliminary injury determination (within 30 days).
DM makes preliminary determination of presence of dumping, subsidization, and injury (within 90 days of initiation of investigation). If affirmative, provisional AD/CVD duties may be imposed. If negative, investigation is terminated.	Investigation is referred to the CITT to conduct a final injury investigation.
DM makes final determination of dumping or subsidization (within 90 days of preliminary determination). If final determination is negative, case is terminated.	CITT makes final determination of injury (within 120 days of DM's preliminary determination). If final determination is negative, case is terminated.
If the DM's and CITT's final determinations are affirmative, DM and Dominion Customs Appraiser/Customs Official make a determination of identification, normal value, and export price of imported goods to determine the amount of ADD/CVD required.	
DM's Final determination may be appealed to the Federal Court of Appeals, or Supreme Court under very limited circumstances	CITT's Final determination may be appealed to the Federal Court of Appeals, or Supreme Court under very limited circumstances
	CITT may be requested to conduct a public interest review if injury was found.

APPENDIX E -
MEXICO'S TRADE REGULATORY PROCESS BEFORE 1993

Petition filed by Mexican Party

SECOFI determines if the petition contains sufficient information to launch an AD/CVD investigation (30 days). 30 days may be granted to clarify information. SECOFI will determine to proceed with, or quash petition.

SECOFI may issue a provisional duty by publishing a provisional resolution in the Diario Oficial (5-10 days after petition)

SECOFI will either confirm, modify, or revoke the provisional duty in the Preliminary Determination (30 days after petition)

Draft of SECOFI's final determination and findings will be sent to the CACCE for an "opinion"

SECOFI will issue a final determination based on the CACCE's recommendations (180 days after petition)

Periodic Administrative Review may be used to challenge a final AD/CVD Order

Judicial Review in the Federal Fiscal Court or under the Writ of Amparo may be used to challenge SECOFI's determination.

APPENDIX F -
THE DISPUTE SETTLEMENT MECHANISMS OF THE GATT
BEFORE 1989

If a trade dispute occurs, government level consultations will be initiated to settle the dispute under Article XXII. If the consultations are successful, the dispute is settled. If consultations fail:

- Measures under Article XXIII may be invoked if “Nullification and Impairment” of benefits occurred
- Complaining party may request GATT Contracting Parties (CPs), GATT Council, Subsidies Committee or Antidumping Committee for conciliation
- If conciliation fails, complaining party may request those same bodies for a dispute panel to be convened. Responding party may argue that panel request is unfounded
- Panel is selected from a roster of independent experts by Director-General within 30 days of request
- Panel issues initial report to disputing parties for comment. Parties consult with one another about report

If initial panel report is accepted, dispute is terminated. If panel report is not accepted, final report will be issued to GATT Council or Subsidies Committee. GATT council or Subsidies Committee will comment on panel report and decide on solution by consensus.

If panel report is accepted by GATT Council or Subsidies Committee, they will make a recommendation to disputing parties within a reasonable amount of time (30 days). If GATT Council or Subsidies Committee do not accept the panel report:

- They may issue their own recommendations to disputing parties within reasonable amount of time (30 days)
- Disputing parties will consult on the decision made by the GATT Council or Subsidies Committee. This may be done with reservations.
- If recommendations are not made by GATT Council or Subsidies Committee in a reasonable amount of time, losing party may be authorized to take countermeasures against part it was aggrieved by and/or suspend similar benefits
- GATT Council or Subsidies Committee oversee the implementation of recommended solution

If recommended solution is put into action, dispute is settled. If solution is not implemented in a reasonable amount of time, GATT Council or Subsidies Committee may authorize necessary actions and/or countermeasures to compensate aggrieved party.

APPENDIX G -
THE CHAPTER 19 PROCESS OF BINATIONAL PANEL REVIEW
IN THE FTA AND NAFTA

American, Canadian or Mexican Government may request a binational panel to review AD/CVD Determination of relevant administrative agency (Within 30 days of publication of final determination in Federal Register, Canada Gazette, or Diario Oficial).

Panel to be selected by Disputing Governments

- Within 30 days of panel request, each government to appoint 2 panelists from a roster
- Parties may request peremptory changes to appointments made by other party
- 4 members of panel must be selected within 45 days of panel request

Four selected Panelists select the fifth within 55 days of panel request.

- Chairman is selected by the five panelists

Panel investigation of final determination (Total 315 days)

- 30 days for filing of complaint
- 30 days for designation or certification of the administrative record and its filing with panel
- 60 days for complainant to file brief
- 60 days for respondent to file brief
- 15 days for filing of reply briefs
- 15-30 days for panel to convene and hear oral argument
- 90 days for panel to issue written decision

If Panel remands final determination, remand must be complied with in a period of time (not in excess of time required for the relevant agency to make the final determination.)

Panel decision may be appealed to Extraordinary Challenge Committee under narrowly defined circumstances

- ECC to be established within 15 days of panel appeal

ECC decision to be rendered within 30 days of its establishment under FTA and 90 days under NAFTA

APPENDIX H-
SUMMARY OF THE SOFTWOOD LUMBER DISPUTE BETWEEN
CANADA AND THE UNITED STATES

ROUND ONE: 1982-1983

- October 17, 1982 CFCLI filed a CVD petition against Canadian lumber.
- November 17, 1982 ITC released a preliminary affirmative injury determination - American producers were injured by Canadian softwood lumber products.
- March 7, 1983 DOC released an affirmative preliminary CVD determination.
- March, 1983 CIT rejected appeal of DOC's preliminary determination as outside of its jurisdiction.
- May 31, 1983 DOC released a negative CVD determination - stumpage fees were below the de minimus level and were not countervailable subsidies. Investigation was terminated.

ROUND TWO: 1986

- May 19, 1986 CFLI filed a CVD petition against Canadian lumber after diplomatic negotiations failed.
- June 5, 1986 Canadian Government requested a GATT dispute settlement panel to study the dispute.
- June 26, 1986 ITC released an affirmative preliminary injury determination - American producers were injured by Canadian softwood lumber products.
- October 16, 1986 DOC released an affirmative preliminary determination - Certain federal and provincial stumpage programs were countervailable subsidies. DOC imposed a 15% CVD on Canadian products.
- December 30, 1986 Adoption of the Memorandum of Understanding (MOU). A 15% export tax was placed on Canadian lumber destined for the United States. The MOU terminated Round Two of the dispute because neither the DOC nor ITC released final determinations.
- September 31, 1991 Canadian Government terminated the MOU.

ROUND THREE: 1991-1993

October, 1991	U.S. Administration imposed an interim bonding requirement on Canadian lumber under Section 301 of the Trade Act of 1974.
October 31, 1991	DOC unilaterally initiated a CVD investigation of Canadian stumpage programs and their impact on American lumber producers.
November 1, 1991	Canadian Government requested that a GATT panel be convened to investigate the legitimacy of the Section 301 action and the DOC's initiation of the CVD investigation.
December 16, 1991	ITC released an affirmative preliminary injury determination.
March 12, 1992	DOC released an affirmative preliminary CVD determination.
May 15, 1992	DOC released a final affirmative CVD determination - Canadian stumpage programs were countervailable subsidies. A 6.51% duty was placed on Canadian products when they entered the United States.
May 28, 1992	Canadian Government requested a Chapter 19 panel to review the DOC's final determination.
June 25, 1992	ITC released a final affirmative injury determination - Canadian softwood lumber injured American producers.
July, 1992	Canadian Government requested a Chapter 19 panel to review the ITC's final determination.
February 19, 1993	GATT panel ruled that the DOC had the authority to launch an investigation. Panel ruled that Section 301 action was a violation of GATT obligations and ought to be repaid to Canadian producers. American officials indicated that they would most likely comply with GATT panel's orders in May of 1993.
May 6, 1993	Panel released a unanimous decision. Panel remanded the DOC's determination and ordered that the DOC rework its conclusions re: specificity, preferentiality, B.C.'s log export restrictions, the log purchase price index, the species grade adjustment, economic adjustment to export price, the within grade adjustments, the exclusion of two lumber producers in Quebec, one of the participants in the CVD investigation.
July 26, 1993	Panel released a unanimous decision. Panel remanded the ITC to rework its findings re: price suppression, the impact of Canadian spruce-pine-fur imports on the potential increases in softwood lumber prices in the United States, the legality of the ITC's cross-sectoral comparisons, the finding about two Quebec companies.
September 17, 1993	DOC released a Determination on Remand which partially complied with the panel's orders.

October 25, 1993	ITC released a split Determination on Remand. The majority of the ITC upheld the initial view that American producers were injured by Canadian imports. Majority of the ITC did comply with the Panel decision re: the Quebec issue.
November, 1993	Congress placed a clause into the NAFTA's Implementing Legislation to allow the DOC and ITC to impose border duties against allegedly subsidized imports without direct evidence about market distortion.
December 17, 1993	Panel released a split opinion regarding the DOC's Determination on Remand. The majority remanded some of the DOC's Determination on Remand and upheld other parts that complied with the May 6, 1993 decision.
January 6, 1994	DOC released a second Determination on Remand. DOC fully complied with the panel's orders and found subsidy rates to be 0%. An estimated \$800 million in CVDs were repaid to Canadian producers between 1994-1995.
January 28, 1994	Panel released a unanimous opinion regarding the ITC's Determination on Remand. Panel remanded the ITC's affirmative finding once again.
March, 1994	ITC released another affirmative injury determination even though the majority acknowledged the panel's authority.
April 6, 1994	USTR requested an ECC to review the binational panel's review of the DOC.
August 3, 1994	ECC released a split decision which upheld the binational panel's review and dismissed the Americans' allegations.
December, 1994	Diplomatic negotiations between Canada and the United States produced the consultative process to settle lumber disputes. Meetings were held between governmental officials and industry representatives under the process on May 24-25, 1995, July 11-12, 1995, and September 18-19, 1995.
Summer - Fall, 1995	Many speeches, letters, and bills proposed by Congressmen attacking Canadian softwood lumber and demanding that the U.S. Administration take action against them.
February 15, 1996	Agreement in principle reached between Canadian and American officials to ward off a fourth round of litigation. Canadian governments at the federal and provincial levels agreed to limit Canadian exports in return for a promise that a CVD investigation would not be conducted in the U.S. for five years.
April 2, 1996	Canadian and American governments produced a final Agreement. A two-tiered tax was placed on Canadian lumber destined for the U.S. if export levels exceeded a certain value. In return, American officials promised that the DOC would not accept a CVD petition regarding softwood lumber for 5 years.

APPENDIX I-
SUMMARY OF THE DISPUTE OVER FRESH, CHILLED, AND FROZEN
PORK BETWEEN CANADA AND THE UNITED STATES

Round One: 1984-1985

- November 23, 1984 DOC accepted the NPPC's against Canadian live swine and fresh, chilled, and frozen pork.
- April 1, 1985 DOC released an affirmative preliminary CVD determination.
- June 17, 1985 DOC released an affirmative final CVD determination against Canadian pork - 22 federal and provincial programs were countervailable subsidies. Countervailing duty of CDN \$0.3272/lb placed on Canadian exports.
- July, 1985 ITC released a final negative injury determination. Investigation was terminated.

Round Two: 1989

- March 2, 1989 ITC released an affirmative preliminary injury determination.
- May 8, 1989 DOC released an affirmative preliminary CVD determination.
- July 24, 1989 DOC released a final affirmative CVD determination after receiving a petition from the NPPC. Found that 18 federal and provincial programs were countervailable subsidies. Duties placed on Canadian pork when it entered American market.
- August 22, 1989 Canadian Government requested a Chapter 19 panel to review to DOC's affirmative determination.
- September 13, 1989 ITC released a final affirmative CVD determination - Canadian pork threatened American producers with injury.
- September 19, 1989 Canadian government requested a GATT panel to review the affirmative determinations of the DOC and ITC.
- October 13, 1989 Canadian government requested a Chapter 19 panel to review the ITC's affirmative determination.
- August 3, 1990 GATT panel ruled that the DOC and ITC had violated GATT obligations by levying a CVD. However, GATT panel felt it could not order that the duties be repaid.
- August 24, 1990 FTA Panel released a unanimous decision which remanded the ITC's determination. Ruled that the determination was based on insufficient and unconvincing evidence.

September 28, 1990	FTA Panel released a unanimous decision which affirmed and remanded certain parts of the DOC's determination.
October 23, 1990	ITC released a Determination on Remand which still found that a threat of material injury faced American pork producers.
December 7, 1990	DOC released a Determination on Remand which complied with parts of the panel's orders.
January 22, 1991	FTA Panel released a unanimous opinion of the ITC's Determination on Remand. Panel remanded the ITC for reaching an affirmative injury determination with faulty evidence once again.
February 12, 1991	ITC released a view of the second remand which confirmed the panel's finding that the American pork industry was not threatened with material injury.
March 8, 1991	Panel released a unanimous opinion of the DOC's Determination on Remand.
March 29, 1991	USTR requested a ECC to review the panel's order regarding the ITC.
June 14, 1991	ECC released a unanimous finding upholding the panel's opinion. ECC dismissed all of the Americans' allegations.
June, 1991	USTR accepted ECC's decision and ordered that \$20 million in CVDs be repaid to Canadian pork producers.

APPENDIX J-
SUMMARY OF THE CORROSION-RESISTANT
STEEL SHEET PRODUCTS
DISPUTE BETWEEN CANADA AND THE UNITED STATES

November 17, 1993	Deputy Minister accepted a petition from Dofasco Inc. and Stelco Inc. and initiated a dumping investigation against certain corrosion-resistant steel sheets products from 11 countries.
March 31, 1994	Deputy Minister released a preliminary affirmative dumping determination.
June 29, 1994	Deputy Minister released a final affirmative dumping determination. Dumping duties placed on goods from 11 countries including the United States.
July 29, 1994	CITT released a final affirmative injury determination - Canadian producers were either injured, or threatened with injury, from foreign steel imports.
August 12, 1994	USTR requested a Chapter 19 panel to review the Deputy Minister's dumping investigation.
September 12, 1994	USTR requested a Chapter 19 panel to review the CITT's affirmative injury investigation.
June 23, 1995	Panel released a unanimous opinion which upheld and remanded certain parts of the Deputy Minister's dumping investigation.
July 10, 1995	Panel released a unanimous opinion which upheld the CITT's determination in its entirety.
August 4, 1995	Deputy Minister released a Determination on Remand which complied with all of the panel's orders. Duties were reduced but not eliminated because the margins of dumping still were above the de minimus level.
Fall, 1995 - Winter, 1996	Canadian and American producers considered another petition against imports. Canadian producers argued that Canadian trade remedy laws and procedures should be more like the protectionist ones in the United States.
March 28, 1995	DOC released an administrative review regarding Canadian steel imports which slashed antidumping duties that had been applied since 1993.

APPENDIX K -
SUMMARY OF THE CUT-TO-LENGTH PLATE PRODUCTS DISPUTE
BETWEEN MEXICO AND THE UNITED STATES

December 11, 1992	Altos Hornos de México, SA de CV filed a petition with SECOFI alleging that American producers had dumped cut-to-length plate products into Mexico. Administrative subunit of SECOFI (DCC) affirmed that petition had a sufficient amount of information to warrant an investigation.
December 24, 1992	Administrative subunit of SECOFI (DGPCI) issued a provisional dumping duty on American products.
February, 1993	DGPCI informed American and Mexican producers of the duty and dumping investigation.
April 28, 1993	SECOFI issued a preliminary affirmative dumping/injury determination. Dumping duties placed on American imports on April 29, 1993 (16.42-44.92%).
August 2, 1994	SECOFI issued a final affirmative dumping/injury determination. Duties increased to 46.18-76.0%.
September 1, 1994	USTR requested a Chapter 19 panel be convened to review SECOFI's determination.
August 30, 1995	Panel released a split decision remanding SECOFI's determination.
September 29, 1995	SECOFI released a Determination on Remand and completely complied with the panel's orders.
October 30, 1995	Panel unanimously affirmed SECOFI's entire Determination on Remand.

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