DISPUTE SETTLEMENT PROVISIONS IN THE NAFTA AND THE CAFTA: PROGRESS OR PROTECTIONISM?

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Introduction

The success of the U.S.-Canada Free Trade Agreement (CAFTA) is often cited as proof that the United States should continue negotiating free trade agreements with its hemispheric partners, such as the North American Free Trade Agreement (NAFTA). The past and potential success for these two agreements cannot be disputed. However, progress is never without its growing pains. This paper will discuss one particular aspect of the NAFTA and the CAFTA: the provision for dispute settlement for antidumping (A.D.) and countervailing duty (C.V.D.) matters.

The CAFTA and the NAFTA share three elements in common in their A.D./C.V.D. dispute settlement chapters. First, they include a so-called "escape clause" for antidumping and countervailing duty laws. The escape clause provides that each country may retain its own antidumping and countervailing duty laws under the free trade agreement. Second, the agreements provide for a dispute settlement panel review, upon request, of any signatory's antidumping or countervailing duty orders. Finally, each agreement includes a provision for an extraordinary challenge of the dispute settlement process where there is an abuse of discretion on the part of the panelists. In addition to these shared elements, the NAFTA includes a new "Special Committee to Safeguard the Panel Process," which is designed to prevent interference of domestic law with the dispute settlement process.[1]

Implementation and interpretation of these provisions will determine whether they help or hinder the achievement of free and fair trade in North America. This paper will discuss the benefits and risks of each provision and

1. Chapter Nineteen. Review and Dispute Settlement on Antidumping and Countervailing Duty Matters. North American Free Trade Agreement, 17 December 1992, in 32, *International Legal Matters* (hereafter *I.L.M.*) 605 (1993).

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suggest in the conclusion ways in which dispute settlement can become an implement for progress, rather than for protectionism.

The "Escape Clause"

Article 1902(1) of the NAFTA and Article 1902(1) of the CAFTA provide for the retention of domestic antidumping law and countervailing duty law. With virtually the same language, save a reference to more than two signatories in the NAFTA, the clause reads as follows:

> Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.[2]

At face value, this clause seems contrary to the spirit of a hemispheric free trade agreement. Indeed, other regional trading arrangements, most notably the European Economic Community, do not allow trading partners to use countervailing duty or antidumping laws against one another.[3] Nevertheless, the parties to both the CAFTA and the NAFTA felt it was necessary to retain their recourse to antidumping and countervailing duty laws.

Several reasons may be advanced to explain the parties' reluctance to give up these laws, even under a hemispheric free trade agreement. Both countervailing duty and antidumping laws have enjoyed enormous popularity in the United States. Countervailing duty laws are designed to counteract the effects of unfairly priced imports which have benefitted from foreign government subsidies. Many competitive nations (Japan, for example) endorse some form of industrial policy, where government works more cooperatively with the private sector to promote exports in key industries. To this end, they employ some form of government incentive, often in the form of a subsidy. The United States (at least since the beginning of the Reagan administration) has rejected industrial policy, preferring instead to let the free market choose its winners and losers. Save for a few concentrated industries (agriculture, and perhaps defense-related industries), the United States has not promoted a policy of awarding subsidies to chosen industries. Therefore, U.S. manufacturers, with the help of the International Trade Administration and the International Trade Commission, have not been shy about "leveling the playing field" by imposing countervailing duties against unfairly priced imports.

Likewise, U.S. companies have been quick to take advantage of antidumping laws. Antidumping duties are additional duties imposed by the United States in instances where imports are priced at less than the "normal" price charged

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2. *Id.*, at art. 1902(1). See also U.S.-Canada Free Trade Agreement, 2 January 1988, art. 1902(1), 27 *I.L.M.* 281 (1988).
3. Treaty Establishing the European Economic Community, 1957, art. 113, I.E.L.V.-A-1(b).

in the foreign country's domestic market. Foreign countries sometimes "dump" goods in the United States at less than fair price (i.e., below the home market price) to gain market share, and, in some cases market domination. This is an especially grave concern for manufacturers in market sectors where the cost of entry into the market is significant (for example, steel, semiconductors, and automobiles). If domestic producers are driven out of the market by foreign competitors' dumping, it would be difficult, if not impossible to reenter the market.

Furthermore, no substantive agreement was reached by the Chapter 19 working group under the U.S.-Canada Free Trade Agreement regarding a workable definition of what constitutes a "subsidy" or how antidumping regimes might successfully be replaced with an integrated anticompetition policy.[4] Therefore, with an ongoing source of dispute and no multilateral or regional solution in sight, the parties to the NAFTA have decided to retain domestic remedies for unfair trade.

Finally, domestic antidumping and countervailing duty laws in the United States, Canada, and Mexico may be the only game in town at the moment. Although work is ongoing in the Uruguay Round of the General Agreement on Tariffs and Trade (GATT),[5] there is currently no multilateral regime for dealing with anticompetitive behavior or for defining what constitutes a "subsidy."

Although few alternatives to domestic unfair trade laws present themselves at the present time, inequities still exist under current unfair trading laws, particularly in the United States. Since the United States makes the most frequent use of these remedies, this paper will focus on problems with U.S. antidumping and countervailing duty laws and their application.

The U.S. countervailing duty system dates back to 1890, when the United States first realized that foreign governments were subsidizing certain products to offset U.S. tariffs, thus negating the decision of Congress to give certain levels of tariff protection to particular industries.[6] The countervail system has contin-

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4. The CAFTA, in article 1907, established a working group to:

   a) seek to develop more effective rules and disciplines concerning the use of government subsidies;

   b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and

   c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.

   The working group was instructed to report to the parties "as soon as possible", and to "use their best efforts to develop and implement the substitute system of rules within the time limits established in Article 1906," which was five years, plus a two-year extension if necessary. Failure to implement a new regime at the end of the period would be grounds for either party to terminate the CAFTA on six-months notice, according to Article 1906.

5. The Uruguay Round of the GATT has proposed a scheme for classifying subsidies in a "green light, yellow light, and red light" scheme, whereby states would be allowed to protect against the effect of foreign subsidies falling into the red light category, and would be able to enter into negotiations regarding the effects of subsidies falling into the yellow light category. Subsidies falling into the green light category would be permissible, and not actionable. Although the scheme is appealing in terms of its simplicity, the negotiators have not yet been able to agree on strict category definitions, or on which subsidies would go into these categories.

6. Rodney de C. Grey, *United States Trade Policy Legislation: A Canadian View*, (Montreal: The

ued to the present, and is currently enshrined within the GATT structure.[7] Countervailing duties are defined under U.S. countervail law:

> A countervailing duty can be imposed only if the International Trade Administration (I.T.A.) determines that an imported good is being subsidized and the International Trade Commission finds that imports of the goods in question are hurting the competing U.S. industry.[8]

The U.S. countervailing duty system has a fairly long history, governed by strict administrative procedures. On the surface, at least, it appears to be well-regulated, stable, and dependable.

Several aspects of the U.S. process, in its application, however, are vulnerable to criticism from foreign nations. Although many destabilizing elements exist, three problems stand out: tight scheduling, the difficulty of understanding foreign market forces, and the problem of defining subsidies.

First, there is an extremely tight schedule under which the countervailing duty investigation must be conducted. There is, by law, a limit of only 270 days from the time a party files the petition with the U.S. government until a decision must be rendered.[9] Thus, any sort of in-depth analysis is very difficult for the government agencies involved (the International Trade Administration and the International Trade Commission, among others).

Consequently, U.S. government agencies are often forced to rely on information provided by the petitioners in order to determine the merits of the case.[10] These petitioners are often representatives of industry coalitions, which have access to enormous resources. Under this system, the respondent is burdened with proving his innocence, which often proves prohibitively expensive in the face of wealthy U.S. industry coalitions. In the absence of the respondent's participation, the International Trade Commission and the International Trade Administration often make their decisions based only upon biased information provided by the petitioner.

Second, determining whether a foreign industry's advantage is due to government intervention or market forces is difficult. Given the time constraints mentioned above and the enormous complexity of world economics, any result is bound to be ambiguous. Such determinations can be manipulated to reflect either government invention or market forces — whichever is politically or economically convenient for any given case. For example, the volume of coun-

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Institute for Research on Public Policy, 1982):37.

7. Rules that delineate the scope of countervailing duties are listed in Article VI of the GATT. Further refinements of countervailing duty laws were made during the course of the Tokyo Round, 1973-1979.
8. Michael B. Percy and Christian Yoder, *The Softwood Lumber Dispute and Canada — U.S. Trade in Natural Resources*, (Montreal: The Institute for Research on Public Policy, 1987):21.
9. 15 CFR § 2006.12 (1992).
10. Interview with Andrew McGilvray, Antidumping Analyst, Import Administration, International Trade Administration, Washington, D.C., 23 October 1992.

tervail cases pending against Mexico dropped precipitously right before early negotiations on the NAFTA.[11]

The third and most complicated problem involves the question of what exactly constitutes a subsidy. The United States describes actionable subsidies in the Trade Agreements Act of 1979:

> Section 771(5)(B) The following [are] domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
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> (i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
>
> (ii) The provision of goods or services at preferential rates.
>
> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (iv) The assumption of any costs or expenses of manufacture, production, or distribution.[12]

Within these provisions, several pitfalls exist for foreign competitors which are worth mentioning.

One such pitfall is the notion of "specificity." If the U.S. government finds that a certain advantage is generally available and not bestowed upon a "specific" industry or group of industries, the United States will not pursue the case because this advantage is not a countervailable subsidy. Ironically, however, specificity is broadly interpreted by U.S. trade officials. Specificity also includes the notion of "preference." If the U.S. government determines that a group is receiving preference over another group, it will decide to pursue the case, even if the benefits conferred are generally available but not generally useful.

This phenomenon is illustrated well by the Carbon Black case in Mexico.[13] Carbon Black, a sludge by-product of oil processing, was sold cheaply by the Mexican government to whomever would buy. Thus, *de jure*, it was "generally available." However, not many buyers would have a use for oily black sludge. Two industries, tires and ink, used this sludge as an input. The U.S. government determined that even if it was "generally available," since it was not used by another industry, the benefits of this low-cost input were "specific" to the tire

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11. Both cases pending against Mexico during the early stages of the NAFTA negotiations were postponed. These cases concerned *Gray Portland Cement and Clinker From Mexico* (postponement announced Friday, 20 April 1990, 55 Fed. Reg. 14,989 (1990); and *Certain Steel Rails From Mexico* (postponement announced 7 December 1989, VSITC Pub. 2205, Ind. No. 731-TA-435(P)(July 1989)).
12. Trade Agreements Act of 1979, Pub. L. No. 96-39 sec. 1677, par. 5(b), 93 Stat. 144.
13. *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order Carbon Black from Mexico* 48 FR 295 64-03.

and ink industries. Thus, *de facto*, the government was bestowing its preferential treatment, or "subsidy," to the tire and ink industry. In effect, the ITA in this case determined that since it could not prove there was no subsidy, it would have to find that a subsidy existed.[14] This type of regulation-juggling is an example of the inequitable *application* of U.S. countervailing duty laws.

As mentioned above, antidumping duties are additional duties imposed by the United States in instances where imports are priced at less than the "normal" price charged in the foreign country's domestic market. However, many of the inequities discussed above with regard to countervailing duty law apply to antidumping law as well.

First, like countervailing duty law, antidumping law must be carried out under tight time constraints. Worse yet in the antidumping area is the frequent use of questionnaires to gather information about costs of production, pricing, and other aspects of foreign companies. There is no official limit on the length of the questionnaires, and they often extend up to 100 pages.[15] Furthermore, the detailed record-keeping required to complete the questionnaires is often not available. Many, if not most, of the antidumping petitions are directed to companies in less developed countries, where record-keeping is not standardized and not often computerized. Even if the records do exist, the cost of completing the questionnaires, and then hosting U.S. trade officials who come to verify the answers given, is often prohibitive.

In many cases, therefore, the respondent foreign company answers inadequately or not at all. In these cases, the International Trade Administration is allowed to apply the "best information available" rule. The I.T.A. may then use the information supplied by the petitioner, information from similar markets, or other relevant information to determine "fair market value" for the product in question. Although some broad guidelines are observed, the policy in this area is largely unwritten and informal,[16] giving an inordinate amount of power to lower-level trade officials. This lack of transparency has prompted allegations that the application of antidumping law in the United States is a non-tariff barrier to trade, and is inconsistent with the U.S. notion of procedural due process.[17]

Therefore, although the escape clause in the NAFTA seemed necessary in view of the lack of a workable multilateral or regional regime to regulate unfair trade practices, it is debatable whether retaining antidumping and countervailing duty laws in the context of a NAFTA was such a good idea. These "unfair trade" laws often cause more unfair treatment than relief.

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14. Interview with Dave Layton, analyst for the *Carbon Black* case, I.T.A., U.S. Department of Commerce, Washington, D.C., 25 April 1992.
15. Telephone Interview with antidumping analyst, Import Administration, I.T.A., U.S. Department of Commerce, 23 October 1992.
16. *Id.*
17. Leslie Glick, "The Problems and Prospects of a North American Free Trade Agreement," address at the U.S.-Mexico Law Institute, 3 October 1992.

NAFTA Dispute Settlement Panel Review

Significant progress in the depoliticization of countervailing duty and antidumping findings has been achieved in the context of Chapter Nineteen of the NAFTA. The NAFTA gives the signatories many different ways to air their grievances in the dispute settlement process without resorting to the kind of trade wars seen in the past among the three parties.

Chapter Nineteen allows each signatory to challenge amendments to the other signatories' countervailing duty and antidumping laws which may affect it directly.[18] The affected signatory may request a declaratory statement from the NAFTA panel regarding one of two inquiries:

1. Is the amendment consistent with GATT codes on the subject, or with the more general purpose of the agreement, which is to promote "fair and predictable conditions for the progressive liberalization of trade" among the parties?[19] Or,
2. Does the amendment have the "effect or function of overturning a prior decision of a [NAFTA dispute] panel" made pursuant to final review of antidumping and countervailing duty determinations?[20]

The possibility of these challenges represents progress in depoliticizing the antidumping/countervailing duty process in several ways. First, the challenges are related to a larger, multilateral organization — the GATT. Second, the challenges allow signatories to challenge amendments to countervailing duty and antidumping laws on an almost equitable basis, appealing to the "fairness" in trade which is the purpose of this agreement. Third, the challenges ensure that changes in domestic law, initiated by internal pressures, do not affect past decisions by the NAFTA and CAFTA dispute settlement panels.

Where a NAFTA panel decides that modification of an amendment is warranted based on the above considerations, the two parties involved have 90 days to work out a solution — usually corrective legislation.[21] If no corrective legislation or other mutually satisfactory solution presents itself within the time period, the other party has the right to take equivalent action or comparable legislation or terminate the Agreement.[22] Although on its face, this provision would appear to "repoliticize" a more neutral dispute settlement decision, it must be judged according to the history of trade disputes among the signatories. In the past, contentious trade disputes were often fought in the media, with curt diplomatic notes, and public lists of retaliation.[23] The consultations set out in

18. NAFTA, art. 1903.
19. *Id.* at arts. 1903(1)(a), 1902(2)(d)(ii).
20. *Id.* at art. 1903(1)(b).
21. *Id.* at art. 1903(3).
22. *Id.*
23. Many disputes have resulted in the adoption of Congress of the "Super 301." This tool allows the U.S. Trade Representative to compile a list of the worst "trade offenders," and to publicize this list in the GATT and the media. Being on this list means that it is legal, according to U.S. law, to retaliate on any of the products made by a listed country. Both Canada and Mexico have

Chapter Nineteen would likely be less political and less public than the disputes of the past. Although it is not specifically indicated in the text of the NAFTA, the consultations would probably take place among lower-level trade officials, rather than elected representatives. This dynamic would allow more substance than rhetoric, and negotiations would probably culminate in a solution, rather than a diatribe.

The Chapter Nineteen provision for reviewing the application of countervailing duty and antidumping laws is one of the most important depoliticizing elements in the NAFTA dispute settlement mechanism. A review may be requested by any signatory to a particular investigation, within a certain time period. The purpose of the review is to determine whether the investigating country correctly applied its own antidumping and countervailing duty laws. To determine this issue, the NAFTA panel has broad authority to look at "relevant statutes, legislative history, regulations, administrative practice and judicial precedents."[24] This binational review replaces national judicial review of final antidumping and countervailing duty determinations, and is binding on the parties.[25] If the investigating country did not correctly apply its own law, the panel may remand the case for action consistent with the panel decision, to be taken within a reasonable time.

This provision is important as a "watchdog provision" for the application of antidumping and countervailing duty laws. The panel should ensure that countervailing duties and antidumping orders are imposed for good reason, not in response to domestic political pressure. If the dispute settlement mechanism can render the application of U.S. antidumping and countervailing laws more transparent, it will have moved the NAFTA in a much more progressive direction.

Under the CAFTA, binational panel review has been relatively successful at resolving disputes between the U.S. and Canada. According to a biennial report released by the U.S.-Canada F.T.A. Binational Panel,

> [F]ifteen cases have been filed to date, of which ten have been resolved. The majority of panel decisions have been unanimous, although individual panelists have written dissenting opinions in two recent cases. The F.T.A. panel review process has proven to be an expeditious and impartial mechanism for resolving bilateral AD/CVD disputes.[26]

One of the most interesting examples of dispute settlement under the CAFTA is the case regarding fresh, chilled, or frozen pork from Canada. It is worthy of note that this was a highly political dispute at its inception. A large U.S. trade

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appeared on this list in the past.

24. NAFTA, art. 1904(2).

25. *Id.* at arts. 1904(9) and 1904 (11).

26. U.S.-Canada F.T.A., Binational Panel, 1991 Biennial Rep., at 16.

association, the National Pork Producers Council, had alleged that Canada's subsidization of live swine production conveyed an unfair subsidy to Canadian producers of fresh, chilled, and frozen pork.[27] After the International Trade Administration determined that there was a countervailable subsidy, the International Trade Commission determined that the U.S. industry was threatened with material injury by subsidized Canadian pork.[28] Following this decision, equally large Canadian trade associations, the Canadian Meat Council, Canada Packers, Inc., and Moose Jaw Packers, appealed the U.S. International Trade Commission's decision to a CAFTA binational panel.[29] The CAFTA binational panel then remanded the I.T.C. decision for reconsideration. After reopening the record to get additional information to comply with the panel's remand request, the I.T.C. reiterated its view that the U.S. pork industry was threatened with material injury.[30] Again, the I.T.C.'s decision was appealed to the CAFTA binational panel, which remanded again because the I.T.C. erred in considering information "outside the scope" of the original remand.[31] Finally, the I.T.C. concluded unanimously that the U.S. industry was not threatened by Canadian pork.[32] This time, at the request of U.S. National Pork Producers Council, the United States requested the formation of an Extraordinary Challenge Committee to review the binational panel's second remand to the I.T.C.[33] Ultimately, the U.S. request for an extraordinary challenge was dismissed for failure to meet the standards of an extraordinary challenge.[34] (More details regarding the extraordinary challenge will be discussed in later sections.) Despite complications and political wranglings, the dispute settlement process worked.[35] Each aspect of the dispute settlement mechanism was tested, and passed with flying colors.

In spite of the progress cited above, Chapter Nineteen of the NAFTA still enshrines many protectionist practices. Although the dispute settlement mechanism depoliticizes and renders more transparent the application of countervailing duty and antidumping law, it is no panacea for the unfair application of countervailing duty and antidumping law by the United States. This area of administrative law remains largely discretionary, unwritten, and unavailable to the public and foreign governments. Therefore, their inclusion in this trade agreement poisons somewhat an otherwise sound and progressive dispute settlement process.

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27. United States-Canada F.T.A., Art. 1904.13 Extraordinary Challenge Committee in the Matter of: Fresh, Chilled, or Frozen Pork from Canada, ECCD-91-1904-01USA, 1991 WL 153112, at *2 (U.S.-Canada F.T.A., Binational Panel).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*

Extraordinary Challenge under the CAFTA and the NAFTA

Chapter Nineteen of the NAFTA includes a safety valve for the dispute settlement mechanism known as the extraordinary challenge provision. The provision is the same for both the NAFTA and the CAFTA. Within a reasonable time after a panel's decision is made, an involved party may allege that:

1. 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,
2. The panel seriously departed from a fundamental rule of procedure, or
3. The panel manifestly exceeded its powers, authority, or jurisdiction set forth in Chapter Nineteen.[36]

The involved party must allege, in addition to one of the grounds listed above, that the error "has materially affected the panel's decision and threatens the integrity of the . . . panel review process."[37]

Once these allegations are made, an extraordinary challenge committee is formed to consider the allegations. The committee will examine the factual and legal analysis made by the panel below to determine whether the allegations are valid. If the committee decides the allegations are valid, it may vacate the panel decision, or it may remand the case for further action not inconsistent with the committee's decision (in which case, a new panel is formed). If the allegations are groundless, the original decision will be upheld and affirmed by the extraordinary challenge committee. All committee decisions are binding upon the parties.[38]

This type of provision is important, as mentioned previously, as a safety valve for the dispute settlement process. The signatories have ceded an important area of national sovereignty — review of final determinations on countervailing duty and antidumping investigations — to a supranational judiciary panel. The checks and balances for domestic review are not available in this process. Therefore, the extraordinary challenge provision is a crucial procedural safeguard, and ensures that dispute settlement will continue in a progressive direction.

Experience under the CAFTA suggests that the extraordinary challenge provision is susceptible to abuse. The first case tried so far under the extraordinary challenge process is the "Matter of Fresh, Chilled, or Frozen Pork from Canada" (see above). Canadian officials sharply criticized the U.S. decision to use the extraordinary challenge, claiming that "the extraordinary challenge will encourage industry groups to ignore panel rulings and lead to the politicalization of the dispute resolution process."[39] According to some Washington observers,

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36. NAFTA, art. 1904(13)(a).
37. *Id.* at art. 1904(13)(b).
38. *Id.* at Annex 1904.13(3).
39. "Dispute Resolution Procedures for US-Canada F.T.A. Run Into Trouble," *Global Financial Markets*, 9 April 1991.

U.S. Trade Representative Carla Hills was under strong pressure from Congress to move against Canada, and the administration decided to trade the decision for votes for the needed "fast-track" treaty approval for the NAFTA.

Although the committee finally settled the dispute by rejecting the U.S. allegations precipitating the extraordinary challenge, the attempt was seen by Canada as an abuse of this procedural safeguard. In this case, the extraordinary challenge committee was used simply as a final appeal on the substance, rather than as a procedural review.

Special Committee to Safeguard the Panel Process

The provision for a special committee to safeguard the panel process was adopted to prevent interference of domestic law with the NAFTA panel process.[40] This provision was not part of the CAFTA dispute settlement process. This provision calls for consultations where it is found that domestic interference with the panel process has taken place.[41] If consultations fail to produce a satisfactory solution, the complaining party may suspend the operation of panel review privileges vis-à-vis the offending party, or may deprive the offending party of appropriate benefits granted by the NAFTA.[42]

Nothing in the NAFTA itself suggests a rationale for this new provision. However, the vast differences in domestic and constitutional law among the three signatories provides some explanation of the new provision. A few legal features of each nation's constitution are worth mentioning in connection with this newly formed committee. As we shall see, each party had good motive to ensure that the other parties' constitutional or domestic problems did not interfere with the panel review process.

Concerns about the constitutionality of the dispute settlements under the CAFTA and the NAFTA have been raised in the United States. One observer summarized possible problems:

> The Customs and International Trade Bar Association . . . finds that the denial of the right to judicial review in United States courts by an aggrieved party, if either the United States or Canada desires to refer the matter to the binational panel, is repugnant to both the Constitution and to our national experience.[43]

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40. North American Free Trade Agreement, art. 1905(1): A committee may be formed "where a Party alleges that the application of another Party's domestic law:
    a) has prevented the establishment of a panel requested by the complaining Party;
    b) has prevented a panel requested by the complaining Party from rendering a final decision;
    c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel; or
    d) has [otherwise] resulted in a failure to provide opportunity for review of a final determination by a panel or court of competent jurisdiction that is independent of the competent investigating authorities'. . ."
41. *Id.*
42. NAFTA, art. 1905(8).

No formal challenge to the constitutionality of binational panels has been made to date. However, the other two parties are aware of these lurking issues, and had good cause for insisting on the special committee.

The U.S. and Mexican constitutions are quite similar in terms of basic structure (a republican and federal national government with three branches of government: executive, legislative, and judicial). However, the differences between the Mexican constitution and those of the United States and Canada are a cause for concern with regard to the preservation of the NAFTA dispute panel process. First, the Mexican constitution is much more ideological than that of the United States or Canada.[44] It refers to broad economic and social goals, as well as detailed provisions regarding those goals. That in itself, however, does not appear to threaten the panel process. What is more disturbing is the ease with which the Mexican constitution may be amended. Mexico has amended its constitution 350 times in less than half the time that the United States has accepted 26 amendments.[45] The combination of these two factors could threaten the panel process if a panel review touched upon a sensitive area for Mexico, such as control over its natural resources.[46]

Probably the most highly publicized constitutional controversy is taking place within Canada. Canada has often struggled with its identity and constitution. This struggle has intensified over the last few years, with the Meech Lake debate and the latest failed referendum.[47] According to one report,

> The provincial repudiation of the deal [i.e., the lack of unanimity among the provinces regarding the adoption of constitutional amendments] does not immediately mean the breakup of the Canadian confederation. But Quebec's leaders have said they would interpret a rejection as a mandate for some form of sovereignty within Canada.[48]

Needless to say, the instability evidenced by this constitutional experimentation could threaten the smooth functioning of the NAFTA and the dispute settlement panel process. Therefore, in light of uncertain Canadian constitutional issues, the new special committee was clearly necessary.

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43. Statement of Andrew P. Vance in 134 Cong. Rec. S8650, S8653 (daily ed. 28 June 1988).
44. James F. Smith, "The Mexican Constitution, Mexican Law, and NAFTA: Traps for the Unwary U.S. Lawyer," *N.M.L. Rev.* (forthcoming 1993)(manuscript at 6, on file with author).
45. *Id.* at 8.
46. Mexico nationalized its petroleum industry shortly after the adoption of its constitution in 1917. This represented an important ideological step forward, and is memorialized in the constitution.
47. The proposed constitutional amendments included elements such as parliamentary reform and native self-government, in addition to the more contentious issue of the terms of Quebec's participation in the 125-year-old federation. The proposed legislative guarantees and "distinct society" status for Quebec apparently proved insufficient for Quebecers and intolerable to Canadians elsewhere. Charles Trueheart, "Canadian Voters Reject Constitutional Reforms Sovereignty-Minded Quebec Leads Defeat," *The Washington Post*, 27 October 1992: A1.
48. *Id.* at A1.

The Future of Dispute Settlement: How can we promote more progress than protectionism?

Official working groups should play an important role in the implementation of the NAFTA dispute resolution process. Article 1907 of the CAFTA set up an official working group to consider three things:

1. development of more effective rules and disciplines concerning the use of government subsidies;
2. development of a substitute system of rules for dealing with unfair pricing and government subsidization; and
3. problems arising with respect to the implementation of Chapter Nineteen, and subsequent solutions.

This working group was charged with completing the substitute system of rules within a five to seven year period.[49]

The NAFTA includes similar provisions regarding consultations, but formal references to a standing "working group" and any deadline have been omitted. Instead, the negotiators have fleshed out what is meant by "consultations," designating the type of information which is to be exchanged on an annual basis, and the type of notice required upon the initiation of any countervailing duty or antidumping investigation.[50]

The intent behind these changes is unclear. However, it is possible that the signatories felt it was more important to expend energy in consultations on concrete matters, and leave the more abstract matters (definition of subsidies and models for anticompetition law) to consultations in multilateral forums, such as the GATT.

Under the CAFTA, private working groups also played an important role. Academic groups such as the Canada-U.S. Law Institute have been helpful in discussing such difficult questions as the transition within the free trade area from regulating anticompetitive behavior with antidumping laws to regulating this behavior with antitrust laws.[51] Similar efforts are being undertaken with respect to the NAFTA, even though it has not yet even been ratified, with the founding of the U.S.-Mexico Law Institute.

Trilateral attempts to depoliticize and regulate antidumping and countervailing duties do not preclude multilateral efforts to resolve these disputes. Work on the multilateral level continues, primarily in the Uruguay Round of the GATT. However, given the recent bickering between the United States and the European Community regarding the elimination of farm subsidies, it is unclear how successful the current round will be.

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49. U.S.-Canada F.T.A., art. 1907.
50. NAFTA, arts. 1906, 1907.
51. Proceedings of the Canada-United States Law Institute Conference, "Canada-United States F.T.A. Implementation of Chapter Nineteen," *Canada-United States Law Journal*, Vol. 17, No. 1 (1991):71.

Conclusion

The retention of antidumping and countervailing duty laws within the NAFTA structure is no doubt an evil, but a necessary one, given the lack of alternatives for dealing with unfair trade practices. The implementation of a dispute settlement mechanism will help eliminate many of the inequitable elements of these regimes. With regular consultations, cooperative ongoing work among the signatories, and continued efforts on the multilateral level, there is a good chance that antidumping and countervailing duty laws can be replaced by a more uniform, and less punitive system for regulating unfair trading practices.