COMMENTS

DISPUTE SETTLEMENT UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT: WILL THE POLITICAL, CULTURAL AND LEGAL DIFFERENCES BETWEEN THE UNITED STATES AND MEXICO INHIBIT THE ESTABLISHMENT OF FAIR DISPUTE SETTLEMENT PROCEDURES?

ABSTRACT

The impending North American Free Trade Agreement (NAFTA) will bring order to the growing interdependence in trade relations between Mexico and the United States. However, before Mexico will ratify NAFTA important political, cultural and legal differences affecting the trade relations between the respective nations must be addressed, resolved and reflected in the resultant Agreement. This Comment examines one of the issues of the impending NAFTA that will be affected by these legal differences: the establishment of fair dispute settlement procedures. It is suggested that the establishment of these procedures can be achieved by using the dispute settlement procedures from the Canada-U.S. Free Trade Agreement as a model. However, these existing procedures must be reviewed and tailored for use in NAFTA in order to address and mitigate the political, cultural and legal differences affecting the trade relations between Mexico and the United States. This Comment concludes that the existing dispute resolution procedures from the Canada-U.S. Free Trade Agreement can be successfully adapted for use in NAFTA and makes recommendations for tailoring these existing procedures to respond to the political, cultural and legal differences affecting the trade relations between Mexico and the United States.

INTRODUCTION

Trade between different areas of the world has occurred throughout history to the mutual advantage of the participants. In an effort to encourage such trade, nations have entered into international agreements that established the ground rules and parameters under which the various aspects of trade between the individual nations were to be conducted. Recently, however, due to an increase in world regionalism and the convergence of economic sources and resources, multinational trading blocs have been established

throughout the world.[1] Under the auspices of these trade blocs, the member nations have established the ground rules and parameters for trade between each other in which tariffs are removed or reduced on products of members but remain unchanged on products traded with non-member nations.[2] Currently, the most prominent and formidable of these trading blocs is the European Community (EC).[3]

Partly because of the economic success of the EC, the United States and Canada have formulated their own trading bloc under the Canada-U.S. Free Trade Agreement.[4] Further, using the Canada-U.S. agreement as a starting point, the United States, Canada and Mexico are currently negotiating the establishment of a three-nation (trilateral) agreement—the much-vaunted North American Free Trade Agreement (NAFTA).[5] However, before Mexico can or would be willing to ratify NAFTA, important political, cultural and legal differences affecting the respective nations must be addressed, resolved and reflected in any resultant Free Trade Agreement.[6]

This Comment examines one of the issues of the impending NAFTA that will be affected by these political, cultural and legal differences: dispute settlement procedures. While dispute settlement procedures exist in the Canada-U.S. Free Trade Agreement,[7] these procedures can be used and adapted for application to the NAFTA. Therefore, it is indispensable to understand the political, cultural and legal differences that affect the trade relations between Mexico and the United States[8] in order to review and

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1. Tape of seminar by B. Timothy Bennett, former Deputy Assistant U.S. Trade Representative for Mexico and currently Vice President, SJS Strategies, held by Center for U.S-Mexico Studies, University of California, San Diego (Jan. 20, 1991) (on file with the Center).

2. *The Case for Opening World Markets*, BUS. AM., Mar. 11, 1991, at 7.

3. Treaty of Rome, Mar. 25, 1957, 298 U.N.T.S. 411 (1958).

4. Canada-U.S. Free Trade Agreement, 27 I.L.M. 281 [hereinafter Canada-U.S. FTA] (1988).

5. *Gist: North American Free Trade Agreement*, U.S. Dept. of State Dispatch, March 25, 1991, at 214. On February 5, 1991, President Bush announced that the governments of the United States, Canada, and Mexico are preparing to negotiate a historic free trade and investment agreement. *Id.*

6. Sidney Weintraub, *The Impact of the Agreement on Mexico, in* MAKING FREE TRADE WORK: THE CANADA—U.S. AGREEMENT 102, 116-20 (Peter Morici ed., 1990).

7. Canada-U.S. FTA, *supra* note 4.

8. The difference between the trade policies of Mexico and the United States is based on their disparate degrees of political, economic, cultural and legal development within the international trading community. These differences have made tensions in trade relations between the two countries inevitable. SIDNEY WEINTRAUB, A MARRIAGE OF CONVENIENCE: RELATIONS BETWEEN MEXICO AND THE UNITED STATES 69-72 (1990).

Such tensions often result in trade disputes between Mexico and the United States. For example, trade dispute arose between the two countries over the treatment of U.S. pharmaceutical companies operating in Mexico. In 1975, Mexico revised its Law on Inventions and Trademarks to remove patent protection in Mexico for products and processes for U.S. pharmaceuticals, jeopardizing this industry's property rights. Initially, the U.S. pharmaceutical industry exerted substantial pressure on Mexico to have the revised laws repealed. Officials in Mexico, resenting this pressure, reacted negatively and reiterated their resolve to retain the new law. Next, the U.S. government, because of pressure from the U.S. pharmaceutical industry, retaliated against Mexico by reducing some of the trading preferences extended to Mexico. This made Mexican officials even firmer in their resolve to not reinstate patent protection. The trade

tailor the existing dispute settlement procedures for incorporation into the NAFTA.

This Comment begins with a presentation of the circumstances that have led to the creation of the NAFTA. Section I first describes the economic and political theories supporting the creation of free trade areas and agreements in order to optimize international trade. It then describes change and growth in the trade relations between Mexico and the United States that have led to formulation of the NAFTA.

Section II provides an overview of the Canada-U.S. FTA. It specifically details the parameters of the existing dispute resolution procedures in this Agreement. This section also discusses the jurisprudence which is beginning to emerge from the use of these procedures between Canada and the United States.

The next section, Section III, explores the political, cultural and legal differences between the United States and Mexico that will shape the use of the Canada-U.S. FTA dispute resolution procedures in the NAFTA. While there are recognized political, cultural and legal differences between Canada and Mexico, these differences are not nearly as great as those between the United States and Mexico. Therefore, a detailed discussion of the Canada-Mexico differences is beyond the scope of this comment.

Finally, Section IV makes recommendations for tailoring these existing dispute resolution procedures for inclusion in the NAFTA. The Comment concludes that the existing Canada-U.S. dispute resolution procedures can be successfully tailored to respond to the political, cultural and legal differences affecting Mexico and the U.S. The inclusion of fair dispute settlement procedures will greatly aid in achieving the ratification of the North American Free Trade Agreement to the mutual benefit of all parties.

I. THE CREATION OF A NORTH AMERICAN FREE TRADE AGREEMENT

A. Free Trade Areas and Agreements

Economists believe that free international trade is beneficial to a nation because when each nation specializes in the products that it can make most

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dispute escalated further when the U.S. pharmaceutical industry requested action under section of the U.S. Trade Act of 1974 which permits the president of the United States to unilaterally impose restrictions on imports if he is under any trade agreement or if foreign practices are judged to be unjustifiable, unreasonable, or discriminatory. Fausto C. Miranda, Issues in Current United States-Mexico Negotiations on a Bilateral Trade and Investment Framework Agreement, Remarks at the Conference on Current Legal Issues in U.S./Trade and Investment (Oct. 9, 1987) (Transcript available through the American Bar Association, Section on International Law and Practice).

This trade dispute simmered between the two countries until 1985 when the United States was able to secure a revision to Mexico's Law on Inventions and Trademarks that protected the patent rights of the U.S. pharmaceutical industry by coercively withholding its approval on an agreement covering subsidies and countervailing duties practices between the two countries. WEINTRAUB, *supra*, at 21 & 83.

efficiently and trades for the other products it needs, overall welfare is increased for all nations, consumers and businesses.[9] Thus, free trade allows each nation to reap maximum benefits from its economic potential, and, in the end, maximum global wealth is attained as well.[10] Moreover, it is thought that a free trade area, a limited regional arrangement in which associated nations eliminate trade barriers on each others' goods and services, is one of the steps towards reaching this desired general global trade liberalization.[11]

A Free Trade Area is defined in Article XXIV of the General Agreement on Tariffs and Trade (GATT) as a group of two or more nations in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the associated nations.[12] To establish a free trade area, two or more nations negotiate and enter into a bilateral or multilateral Free Trade Agreement (FTA) in which the associated nations agree to ultimately abolish all trade barriers, including quotas, tariffs, subsidies and non-tariff barriers such as license fees, on goods and services traded between them.[13] Such an agreement is considered to be a catalyst

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9. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 17 (2d ed. 1986).

Under the law of comparative advantage, an economic theory developed by David Ricardo to explain what goods would be traded between two countries, a nation exports the good it produces more efficiently than another nation and imports the good that it produces less efficiently. As a result, both nations only produce those goods in which they have the greater advantage and, thus, both gain from this specialization and exchange. *Id.* at 12-13.

However, the application of tariffs and other trade barriers conflict with the principles of the law of comparative advantage. On no other subject are economists—notorious for their failure to agree about anything—so close to unanimity. Tariffs and other trade barriers raise prices in the domestic market, imposing a burden on consumers and allowing firms to continue production in areas in which they are inefficient. Jobs are temporarily preserved, but at a cost that increases unemployment later. *Why Trade Barriers Will Fall*, THE ECONOMIST, Apr. 30, 1988, at 65.

10. Winfried Ruigrok, *Paradigm Crisis in International Trade Theory*, 25 J. WORLD TRADE 77, 77-78 (1991).

11. JACKSON & DAVEY, *supra* note 9, at 454-55. In order for a free trade area to aid in trade liberalization, trade barriers must not be increased for those nations outside the regional free trade area.

12. General Agreement on Tariffs and Trade Oct. 30, 1947, 55 U.N.T.S. 188, 268 (1950) [hereinafter GATT]. Under Article XXIV of GATT, a free trade area has been traditionally recognized as an exception to the requirements of the Most Favored Nation (MFN) principle, exempting the members of a free trade agreement from having to grant the same advantages, favors, privileges or immunities ratified under the free trade agreement equally to the other GATT members as required by Article I.

13. Ronald C. Griffin, *The Free Trade Agreement: It Muddles the Law*, 28 WASHBURN L.J. 205, 213 (1988).

The trade policy of the United States since World War II has been primarily to reduce trade barriers. Its objective has not been absolute free trade, but freer trade. WEINTRAUB, *supra* note 8, at 69-70.

In contrast, Mexico has traditionally pursued its industrialization objectives through the employment of import substitution trade policy. Under this policy, the Mexican government erected and enforced both trade and non-tariff barriers in order to encourage the domestic production of manufactured goods and to restrict the importation of such goods—goods that otherwise could have been imported from the United States. These barriers included high tariffs, quotas, large domestic subsidies, import licensing requirements and official import

for economic growth and development in the associated countries,[14] stimulating competition and driving inefficient businesses from the market place.[15]

Within the past seven years, the United States has entered into FTAs with two countries. In 1985, the United States entered into a free trade agreement with Israel.[16] In 1988, President Reagan of the United States and Prime Minister Mulroney of Canada signed the Canada-United States

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reference prices (duties).

However, in the 1980s, Mexican began a trade liberalization program and, during this same time period, Mexico acceded to GATT. Both the trade liberalization program and accession to GATT have caused Mexico to greatly reduce or eliminate many of its trade and non-tariff barriers on imported goods. Nevertheless, a variety of trade and non-tariff barriers are still being imposed by Mexico on exports from the United States, particularly those exports from the agricultural, petrochemical, electronics, automotive, apparel, and pharmaceutical sectors. United States International Trade Commission Publication 2275, *Review of Trade and Investment Liberalization Measures By Mexico and Prospects for Future United States-Mexican Relations*, Apr. 1990, at 1-1 and 4-1-4-12.

However, during the 1980s, the direction of each country's trade policies began to change, with the United States retreating towards greater protectionism and Mexico becoming increasingly more open. WEINTRAUB, *supra* note 8, at 69.

14. *Gist: U.S.-Mexico Free Trade Agreement*, U.S. Dept. of State Dispatch, Dec. 31, 1990, at 363. The benefits that result from the free trade within the associated countries enhance productivity and wealth sufficiently to cause even more trade with nonmembers. This increased trade with nonmembers further contributes to the economic growth and development of the associated countries. JACKSON & DAVEY, *supra* note 9, at 17 & 455.

15. Griffin, *supra* note 13, at 213. Free trade among the associated countries promotes a mutually profitable division of labor, greatly enhances the potential real national product of each of the members and makes possible higher standards of living because it encourages people to think about business ventures in terms of comparative advantage (specialization), competitive advantage, and profits. *Id.* and *see* JACKSON & DAVEY, *supra* note 9.

16. Israel-United States: Free Trade Area Agreement, signed April 22, 1985, 24 I.L.M. 653 (1985).

The Israel-U.S. Free Trade Area Agreement (FTAA) was negotiated in response to the political and economic concerns of both Israel and the United States. Israel, aware of internal political pressure by hostile groups on the U.S Government to limit (or cut off) outright foreign aid, approached the U.S. regarding a more favorable trade relationship—the FTAA. Israel had three (3) goals for the creation of a FTAA. Israel was anxious preserve its preferential access to U.S markets for its imports and exports, it needed to counteract the effects of the boycott imposed against it by the Arab States of the Middle East and North Africa and it had to offset the scarcity of saleable natural resources.

On the other hand, the United States' prime motivation for entering into the FTAA was economic—it was eager to wean an ally from aid to trade and to regain some of its international market share lost to the EEC—as part of its overall policy of liberalizing trade.

The FTAA provides for the staged reduction of duties on imports into the respective Parties' territories, over a ten-year period, so that by January 1, 1995, all trade will be duty free. The agreement will also cover non-tariff barriers.

Overall, the principle U.S. and Israeli objectives under the FTAA have been met. Trade between the two countries has increased and will probably continue to do so. Further, the U.S. has used the FTAA to show its other trading partners that intends to achieve greater international market share through the establishment of trading relationships for mutual benefit. *See* Nicholas A. Aminoff, *The United States-Israel Free Trade Area Agreement of 1985: In Theory and Practice*, 25 J. WORLD TRADE 5 (1991).

Free Trade Agreement which entered into force on January 1, 1989.[17] Most recently, in February 1990, President Bush, Canadian Prime Minister Brian Mulroney, and Mexican President Salinas de Gortari announced plans to commence negotiations in 1991 for the North American Free Trade Agreement.[18]

B. Formulation of the NAFTA

For most of the twentieth century United States foreign policy has

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17. Canada-U.S. FTA, *supra* note 4, at 281.

January 1, 1989 was the beginning the ten-year phased implementation period of the Canada-U.S. FTA which will ultimately result in the elimination of all tariffs and many non-tariff measures that affect trade between the two countries on tangible goods, services and direct foreign investment. Rachel McCulloch, *The United States-Canada Free Trade Agreement*, 37 INT'L TRADE: THE CHANGING ROLE OF THE UNITED STATES 79, 79-80 (1990).

In the United States, the FTA easily received congressional approval from a mostly uninterested United States Congress. The focus of the United States regarding the FTA was on its economic advantages, including: general trade liberalization benefits, greater access to the Canadian market for U.S. goods, and the enhance competition with the EC. *Oversight of the United States-Canada Free Trade Agreement: Hearings before the House Committee on Foreign Affairs*, 100th Cong. 2d. Sess. 83, 85-93 (Mar. 16, 1988) (statement of Ambassador Clayton Yeutter, United States Trade Representative).

In contrast, the required parliamentary approval in Canada was received only after a period of unprecedented national debate and disunity (The Great Trade Debate), resulting in a bitter federal election. The Canadian opposition to the FTA primarily centered around, not the economic issues surrounding of tariff and non-tariff barrier reductions on Canadian goods and services, but rather the emotional fear of losing the "Canadian way of life"—the political, cultural and legal implications of the treaty. Maureen A. Farrow & Robert C. York, *Economic, Social, and Cultural Policy Independence in the Post-free Trade Era: A View From Canada, in* THE CANADA-U.S. FREE TRADE AGREEMENT 117 (Daniel E. Nolle ed., 1990). Nevertheless, Prime Minister Mulroney's Progressive Conservatives Party was reelected by a majority and the FTA was approved by the Canadian Parliament on Dec. 30 1988, just 2 days before the FTA entered into force on Jan. 1, 1989. Rebecca A. Sanford, *The Canada-U.S. Free Trade Agreement: Its Aspects, Highlights, and Probable Impact on Future Bilateral Trade and Trading Agreements*, 7 DICK. J. INT'L L. 371, 381-82 (1989).

Since the FTA has only been in effect for a little over two (2) years, it may be a little too early to tell whether it is completely living up or down to the expectations of both countries. On one hand, some experts have estimated that Canada has lost 300,000 manufacturing jobs (13% of its total), primarily to lower-wage plants in the United States. Harry Bernstein, *Opposition to Free-Trade Pact Grows*, L.A. TIMES, Feb. 4, 1992, at D3. On the other hand, other experts have cited examples of accelerated tariff reductions, significant increases in exports from Canada into the United States and increased business development along both sides of the Canadian-U.S. border as indicating the success of the Canada-U.S. FTA. Paul Bucher, *U.S.-Canada Free Trade Agreement Encourages Bilateral Business*, BUS. AM., Apr. 8, 1991, at 14-15.

18. *Gist: North American Free Trade Agreement*, *supra* note 5.

The Bush administration has received an extension of the so-called "fast-track" authority authorized under the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. §§ 2902, 2903). Karen Tumulty, *Senate Clears Way for Talks with Mexico on Trade Pact*, L.A. TIMES, May 25, 1991, at D-1.

Under the fast-track procedure, the President can proceed to negotiate the agreement and present it to Congress for approval. Congress then has 90 legislative days either to accept or to reject it (on a straight yes-or-no vote), but not to amend specific provisions of the negotiated package. *Id.*

Negotiations of the NAFTA commenced June 12, 1991. Stuart Auerbach, *U.S., Canada, Mexico Begin Free-Trade Talks: Disparities Expected to Complicate Efforts*, WASH. POST, June 13, 1991, at A40.

focused on distant more than neighboring countries.[19] As a consequence, United States trade policy, particularly since World War II, has been based primarily on relations with the European Community and Japan.[20] But in recent years national attention has started to shift toward the south.[21] One result of this shift is that Mexico has become the third ranking U.S. trading partner after Canada and Japan.[22] Further, the United States accounts for 70 percent of Mexico's annual $50-billion trade.[23] According to the U.S. International Trade Commission, "This interdependence means that neither country can avoid being affected by the other's economic, social and political climate."[24] Until recently, neither Mexico nor the U.S. would publicly recognize the economic and political consequences of their growing interdependence.[25] However, the agreement between U.S President Bush and Mexico's President Salinas de Gortari to work toward an agreement on free trade indicates that the two countries are finally willing to publicly recognize their mutual interdependence.[26] "A free trade agreement would bring order

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19. Bruce K. Maclaury, *Foreword* to SIDNEY WEINTRAUB, FREE TRADE WITH MEXICO AND THE UNITED STATES? vii (1984).

20. JACKSON & DAVEY, *supra* note 9, at 198.

21. Bruce K. Maclaury, *supra* note 19, at vii.

22. Victor B. Bailey & Joanne Tucker, *U. S. Foreign Trade Highlights 1989*, U. S. Dept. of Commerce, International Trade Administration, Office of Trade and Investment Analysis, at 48 (Sept. 1990).

23. Richard Johns & Robert Graham, *Drawing Closer to Mexico*, WORLD PRESS REV., Aug. 1990, at 58.

24. United States International Trade Commission Publication 2326, *Review of Trade and Investment Liberalization Measures By Mexico and Prospects for Future United States-Mexican Relations*, Oct. 1990, at ix [hereinafter USITC].

25. *Id.*

26. *Fact Sheet: U.S.-Mexico Economic Relations*, U.S. Dept. of State Dispatch, Nov. 26, 1990, at 293. "President Bush notified Congress on Sept. 25, 1990 that he and Mexican President Salinas intended to negotiate a free trade agreement (FTA) which would eliminate the restrictions on the flow of goods, services and investments between the United States and Mexico." *Id.*

United States proponents of a free trade agreement that includes Mexico believe that such an agreement will be advantageous to the United States. These advantages are summarized below:
1) Enhancement of U.S. international competitive advantage, especially with the increase in world regionalism and emerging trading blocs;
2) Provide greater U.S. access to a growing Mexican consumer market;
3) Creation of jobs in the United States;
4) Aid in the further development of the U.S. border areas;
5) Provide greater stability and predictability for U.S. investors in Mexico; and
6) Decrease the number of illegal immigrants coming into the United States.
USITC Publication 2326, *supra* note 24, at 1-12-16.

Mexican proponents of such an agreement also believe that a free trade agreement with the United States would be advantageous to Mexico, as follows:
1) Provide a guaranteed access for its exports to the U.S. market;
2) Return flight capital;
3) Attract foreign investment;
4) Increase Mexican productivity and international competitiveness; and
5) Increase employment.
USITC Publication 2326, *supra* note 24, at 1-12-16.

to the two countries' interdependence."[27]

While negotiations as to the scope of the pending NAFTA has not yet been concluded,[28] the provisions of the Canada-U.S. FTA will be used as the model.[29] Just as in the Canada-U.S. FTA, NAFTA will encompass the gradual and comprehensive elimination of trade barriers between the three countries, including:

1. phased-in elimination of all import tariffs,
2. elimination of, or greatest possible reduction, on non-tariff barriers, such as import quotas, licenses, and technical barriers to trade,
3. establishment of clear and binding protection for intellectual property rights,
4. means to improve and expand the flow of goods, services and investment between the United States, Canada and Mexico, and
5. fair and expeditious dispute settlement procedures.[30]

Mexico has two main objectives in the negotiations: (1) eliminating present barriers to trade and (2) preventing the creation of future ones.[31]

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27. Carlos Ramirez, *MEXICO: President Salinas Wants A Free-trade Agreement With the United States Because the Success of His Controversial Economic Policy Depends On It. But Washington Has Doubts*, L.A. TIMES, June 17, 1990, at M-5.

28. It is anticipated that negotiations of the NAFTA will conclude sometime during the summer of 1992. Guy Gugliotta, *Talks on North American Free Trade Pact Advance: Prospects of Heated Battle with Congress During Election Year May Lead to Delay*, WASH. POST, Jan. 16, 1992, at A28.

> Negotiations on a North American Free Trade Agreement are moving ahead without major complications, but a quick conclusion to the pact could depend on President Bush's willingness to undertake a potentially ugly new trade battle with Congress during an election year.
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> Bush, Mexican President Carlos Salinas de Gortari and Canadian Prime Minister Brian Mulroney are on record favoring a prompt and successful conclusion to the negotiations, and U.S. trade officials said the agreement could arrive in Congress as early as July [1992].

Id.

29. USITC Publication 2326, *supra* note 24, at 1-9.

30. USITC Publication 2353, *The Likely Impact on the United States of a Free Trade Agreement With Mexico*, Feb. 1991, at xix-xx.

Although Mexico has significantly reduced its trade barriers, some barriers remain. Import licensing requirements still affect about 6% of the value of U.S. exports to Mexico. Further, 40% of U.S. agricultural exports to Mexico require import licenses. Imports into Mexico are also affected by discriminatory government procurement policies, standards, testing, and certification requirements, limited intellectual property protection, and exclusive sales rights and distribution contracts. There and other limitations are exacerbated by the lack of transparency of the procedures through which exporters into Mexico can apply for the proper license, certificate or test. Office of the United States Trade Representative, *1991 National Trade Estimate Report on Foreign Trade Barriers*, at 155-63.

31. Herminio Blanco, Chief Negotiator for the Free Trade Agreement, Mexico, *Setting the Agenda for Free Trade Negotiations in North America*, Address at a Joint Conference sponsored by the Overseas Development Council and the Center for U.S.-Mexican Studies (Oct. 25, 1990).

With a secure market access for its exports through an FTA coupled with sound internal economic development, Mexico seeks to foster growth and employment, and to attract both

Herminio Blanco, Chief NAFTA Negotiator for Mexico, has stated that the objective to prevent the erection of future barriers can be achieved, in part, through the establishment of dispute settlement procedures that are fair and judicious, such as the ones in the Canada-U.S. FTA.[32]

II. DISPUTE SETTLEMENT PROCEDURES UNDER THE CANADA-U.S. FREE TRADE AGREEMENT

A. Overview of the Canada-U.S. Free Trade Agreement

The objectives of the Canada-U.S. FTA are to:

1. eliminate barriers to trade in goods and services between the territories of the Parties;
2. facilitate conditions of fair competition within the free trade area;
3. liberalize significantly conditions for investment within this free trade area;
4. establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and
5. lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.[33]

One of the most contentious aspects of the Canada-U.S. FTA negotiations involved the dispute settlement procedures.[34] "The maintenance of a harmonious relationship between nations bound by an international agreement requires procedures to avoid conflicts and, should they arise, to resolve them quickly and effectively to the satisfaction of the Parties involved."[35] The lack of an efficient and effective method of enforcing the rights and obligations established under the Canada-U.S. FTA would have raised serious doubts as to FTA's viability as a whole.[36]

The Parties needed to develop dispute settlement procedures that would effectively address and mitigate the political, cultural, and legal differences affecting the two Parties in their trade relations under the FTA.[37] Specifically, the political differences the Parties had to address were:

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foreign private investment and the return of flight capital. *Id.*

32. *Id.*

33. Canada-U.S. FTA, *supra* note 4, art. 102, at 293.

34. Keith B. Ferguson, *Dispute Settlement Under the Canada-United States Free Trade Agreement*, 47 U. TORONTO FAC. L. REV. 317, 318 (1989).

35. J.G. Castel, *The Settlement of Disputes Under the 1988 Canada-United States Free Trade Agreement*, 83 A.J.I.L. 118 (1989).

36. Ferguson, *supra* note 34, at 318-19.

37. Peter Morici, *The Environment for Free Trade, in* MAKING FREE TRADE WORK: THE CANADA-U.S. AGREEMENT 1, 14-6 (Peter Morici ed., 1990).

1. preservation of each Party's national sovereignty,[38]
2. elimination of (or, at least a reduction in) the bias against Canada in the administration of U.S. trade law,[39]
3. foreclosure of the protectionist amendment of domestic trade legislation,[40] and
4. elimination of political interference in the dispute resolution process.[41]

The cultural differences that had to be addressed were potential loss of Canada's cultural identity,[42] and preservation of each Party's cultural policies.[43]

The Parties also needed to address the legal issues involved in dispute resolution, including consistent and predictable application of domestic trade law remedies,[44] procedural neutrality, efficacy and efficiency,[45] and enforcement of the FTA.[46]

The Canada-U.S. FTA broke new ground in devising dispute settlement procedures[47] because the procedures do address and reasonably mitigate the political, cultural and legal differences, as listed above, which affect the trade relations between Canada and the United States. Central to the FTA's achievement in this area is that, for the first time, an international agreement recognizes and enables the nations named in a trade dispute to actually participate in the dispute resolution process—a binational dispute settlement mechanism.[48]

The specific ways in which these dispute resolution procedures address the political, cultural and legal differences are closely interconnected and overlap to some extent—so that one procedure often addresses and mitigates more than one of the factors. For example, the national sovereignty and

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38. Maureen A. Farrow & Robert C. York, *Economic, Social, and Cultural Policy Independence in the Post-free Trade Era: A View From Canada, in* THE CANADA-U.S. FREE TRADE AGREEMENT 121-25 (Daniel E. Nolle ed., 1990).

39. RICHARD G. LIPSEY & ROBERT C. YORK, EVALUATING THE FREE TRADE DEAL: A GUIDED TOUR THROUGH THE CANADA-U.S. AGREEMENT 102 (1988).

40. *See* Ferguson, *supra* note 34, at 327 and 333; Ince & Sherman, *infra* note 47, at 137.

41. Ferguson, *supra* note 34, at 331.

42. *See* Peter Brimdlow, *The Free Trade Agreement: Implications For Canadian Identity?, in* THE CANADA-U.S. FREE TRADE AGREEMENT 105-15 (Daniel E. Nolle ed., 1990) and Farrow & York, *supra* note 38, at 127-30.

43. Farrow & York, *supra* note 38, at 125-27.

44. *See* A.M. Apuzzo & W.A. Kerr, *International Arbitration—The Dispute Settlement Procedures Chosen for the Canada-U.S. Free Trade Agreement*, 5 J. INT'L ARB. 7, 9 (1989); LIPSEY & YORK, *supra* note 39.

45. Apuzzo & Kerr, *supra* note 44, at 8.

46. *Id.* at 7.

47. William K. Ince & Michele C. Sherman, *Binational Panel Reviews Under Article 19 of the U.S.-Canada Free Trade Agreement: A Novel Approach to International Dispute Resolution*, 37 FED. B. NEWS & J. 136 (Mar./Apr. 1990).

48. Andrew Anderson & Alan Rugman, *The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms*, 6 J. INT'L ARB. 65, 67 (1989).

cultural identity and policies of the Parties are maintained and preserved through the establishment of the Canada-U.S. Trade Commission, a binational political apparatus. The Commission is charged with the responsibility for the FTA's overall management, the resolution of disputes, and to generally act as a guardian of each Party's national political and cultural interests under the FTA.[49] Through the Commission, the Parties are provided with a forum in which potential disputes can be preempted.[50] However, if a dispute does arise, the Commission can refer it to a binational dispute settlement panel of experts or binding arbitration panel.[51] By settling disputes in these binational panels, both Parties retain the ability to assert their national sovereignty and cultural identity and policies under the FTA.

In addition, the FTA helps to foreclose the protectionist amendment of domestic trade legislation by providing that existing Canadian and U.S. trade laws will be applied to the other. The FTA also stipulates that any changes to these existing laws will not apply to the other Party unless the amending legislation explicitly so states and there has been prior notification and consultation.[52] This precludes either Party from amending their trade laws for protectionist purposes.

Disputes regarding the application, amendment and administration of domestic trade laws by either Party are subject to review by binational arbitration panels, replacing domestic judicial review and appeal procedures.[53] By settling disputes through these binational arbitration panels, both Parties gain the ability to influence the other's trade law decisions (a kind of legislative watchdog function[54]), ensuring a reduction in the biased application of U.S. trade law against Canada and in political interference in the dispute resolution process itself.

Moreover, use of binational panels increase the consistency and predictability of the application of trade law remedies, increase the procedural neutrality, efficiency and efficacy, and enhance the legitimacy and legality of the dispute resolution process under the FTA.[55] These advantages are attained because the panels are binational in character, composed of trade experts, operate on strict timetables, use domestic standards of review and can make binding and enforceable decisions.

B. Canada-U.S. Free Trade Agreement Dispute Settlement Procedures

Under the Canada-U.S. FTA dispute settlement procedures have been

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49. *See infra* notes 68-70 and accompanying text.
50. *See infra* notes 64-66, 70-71, and accompanying text.
51. *See infra* notes 72-83 and accompanying text.
52. *See infra* notes 96-102 and accompanying text.
53. *See infra* notes 103-112 and accompanying text.
54. LIPSEY & YORK, *supra* note 39, at 95.
55. Anderson & Rugman, *supra* note 48, at 69-70.

established for disputes involving:

1. the interpretation or application of the Agreement itself (Institutional Provisions),[56] and
2. countervailing duties and antidumping.[57]

These procedures are discussed below.

1. Institutional provisions

The Institutional Provisions, found in Chapter Eighteen of the FTA, apply to avoidance or settlement of all disputes regarding (1) the interpretation and application of the Agreement itself, or (2) whenever a Party[58] believes that an actual or proposed measure of the other Party is or would be inconsistent with the Agreement.[59] The only disputes not settled under this chapter are those regarding financial institutions, antidumping or countervailing duty cases.[60] However, if a dispute arises under both the FTA and GATT,[61] the complaining Party can, at its discretion, elect to have the dispute settled in either forum.[62] Once the dispute procedure under one forum has been chosen for a specific complaint, that forum shall be used to the exclusion of any other.[63]

To begin the dispute settlement process under Chapter Eighteen, the complaining Party must first provide written notification to the other Party

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56. Canada-U.S. FTA, *supra* note 4, ch. 18, at 383-86.

57. *Id.* at 386.

58. Under section 202(f)(6) of the United States-Canada Free Trade Agreement Implementation Act of 1988 (19 U.S.C.A. § 2112 (West 1980 & Supp. 1990)), the term 'Party' means Canada or the United States. As a result, in the United States Government vernacular, the governments of Canada and/or the United States are referred to as "the Capital P Party(s)."

In addition, under section 102(c), no person other than the United States Government has a cause of action or defense under Chapter 18 of the Agreement. Also, a challenge to any action or inaction by any department or agency of federal, state, or local government on the grounds of inconsistency with the Agreement is prohibited. Thus, there are no private rights to challenge Government action allegedly inconsistent with the Agreement. However, there are private rights to challenge the implementation of the binational review system under Chapter Nineteen concerning constitutional issues. United States-Canada Free Trade Agreement Implementation Act of 1988, sec. 401(c), 19 U.S.C.A. § 1516a(g)(4) (West 1980 & Supp. 1990).

59. Canada-U.S. FTA, *supra* note 4, art. 1801, at 383.

60. *Id.* at 383. Disputes regarding financial institutions, which is not a subject of this comment, are settled under procedures set forth in Chapter Thirteen. *See* Canada-U.S. FTA, *supra* note 4, art. 1704, at 382.

Disputes regarding antidumping and countervailing duty cases are settled under procedures set forth in Chapter Nineteen. *See* Canada-U.S. FTA, *supra* note 4, art. 1904, at 387, and *infra* notes 94-114 and accompanying text.

61. For a comparison of the dispute settlement procedures under the GATT and the Canada-U.S. FTA, *see* Robert P. Parker, *Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement*, 23 J. WORLD TRADE 83 (1989).

62. Canada-U.S. FTA, *supra* note 4, art. 1801, at 383.

63. *Id.*

of the proposed or actual measure[64] considered to materially affect the operation of the Agreement.[65] After receipt of the notification, the Parties may make an attempt to arrive at a mutually satisfactory resolution of the issue through consultations.[66] If consultations are unsuccessful in resolving the dispute within thirty days, either Party can refer the dispute to the Canada-U.S. Trade Commission.[67]

The Canada-U.S. Trade Commission is a political body composed of representatives of both Parties.[68] The principal representative of each Party is the cabinet-level officer or Minister primarily responsible for international trade.[69] The Commission supervises the Agreement's implementation, resolves disputes and oversees its operation.[70] If the Parties refer a dispute to it, the Commission may call on such technical advisors it deems necessary, or on the assistance of a mediator acceptable to both Parties, in an effort to reach a mutually satisfactory resolution of the dispute.[71]

If the dispute has not been resolved by the Commission within thirty days, the Commission has two options available: (1) the Commission may refer the dispute to binding arbitration,[72] or (2) on request of the Parties, decide the matter through the use of a panel of experts.[73]

Both the arbitration panel and the panel of experts are chosen by the Commission from a roster of panelists from both countries who have expertise in the specific matter under dispute and are not affiliated with or take instructions from either Party.[74] The panels are composed of five

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64. *Id.* at 294. A measure is defined as including any law, regulation, procedure, requirement or practice. *Id.*

65. *Id.* at 384.

66. *Id.* at 384.

There have been over a dozen Chapter 18 disputes which have gone before the Commission to arrive at a mutually satisfactory resolution of the issue through consultations. However, there is no formal register of all these matters. These include: tariff reductions for plywood panels, wool re-classification, wine and beer pricing and shelving practices, plywood panel standards, cable retransmission of border-area broadcasting and meat-reinspection, just to name a few.

To determine the success or failure of this consultation process is difficult since the Commission is not a public body and, thus, has no reporting requirements. All interested parties have to go on assurances from the respective governments that "matters are well in hand." *See* Kalnay, *infra* note 92-94 and accompanying text.

67. Canada-U.S. FTA, *supra* note 4, art. 1805, at 384.

68. *Id.* at 384.

69. *Id.* In 1992, the United States Trade Representative on the Canada-U.S. Trade Commission was Ambassador Carla A. Hills and the Canadian Trade Representative was Michael Wilson, Minister of Trade.

70. *Id.*

71. *Id.* at 384.

72. *Id.* art. 1806(1)(b), at 384-85. If the dispute involves actions taken pursuant to Chapter Eleven (Emergency Action), the Commission must refer the dispute to a binding arbitration panel.

73. *Id.* art. 1807(2), at 385.

74. *Id.* art. 1807(1), at 385.

members and are binational in character.[75]

The decisions of the arbitration panel are final and binding.[76] If a Party fails to implement in a timely fashion the findings of a binding arbitration panel and the Parties are unable to agree on appropriate compensation or remedial action, then the other Party shall have the right to suspend the application of equivalent benefits of the Agreement to the non-complying Party.[77]

An expert panel, however, can only make recommendations to the Commission; it does not have the power to bind the Parties.[78] The expert panel submits an initial report of its preliminary findings and recommendations within three months and, where feasible, the Parties are to be given an opportunity to comment.[79] Then, the expert panel has an additional thirty days to reconsider its initial report and issue a final report to the Commission.[80] Normally, the Commission agrees to a resolution of the dispute that conforms to the recommendations of the expert panel.[81] Whenever possible, the resolution is to be either non-implementation or removal of a measure not conforming with the Agreement or, failing such a resolution, compensation.[82] If the Commission is unable to reach an agreement on a resolution to the dispute within thirty days and a Party considers that its rights or benefits under the agreement are being impaired by the implementation or continuance of the measure at issue, then that Party may suspend the application of equivalent benefits until a resolution is reached.[83]

To date, only two complaints, one by Canada and one by the United States, have been initiated and completed under Chapter Eighteen dispute resolution procedures.[84] Coincidentally, both these complaints involved a legislative measure taken by each Party to protect a fish product within their respective fishing industries which had the effect of economic protectionism.

The first complaint was brought to a binational dispute resolution panel of experts for adjudication under Chapter Eighteen by the United States.

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75. *Id.* At least two of the panelists shall be citizens of Canada and at least two shall be citizens of the United States. Each Party shall choose two members of the panel and the Commission shall endeavor to agree on the fifth who will chair the panel. In all cases, panelists are to be chosen strictly on the basis of objectivity, reliability and sound judgment and, where appropriate, have expertise in the particular matter under consideration. *Id.*

76. *Id.* art. 1806(3), at 385.

77. *Id.*

78. *Id.* art. 1807(8), at 385-86.

79. *Id.* art. 1807(5), at 385.

80. *Id.* art. 1807(6), at 385.

81. *Id.* art. 1807(8), at 385-86.

82. *Id.*

83. *Id.* art. 1807(9), at 386.

84. United States-Canada Free Trade Agreement, Binational Secretariat, U.S. Section, Status Report for January 1992 [hereinafter Status Report].

This case, *In re Canada's Landing Requirements for Salmon and Herring*,[85] resulted when Canada adopted new legislation that required specified fish to be landed in Canada prior to their exportation. The United States' position was that this measure was an export restriction contrary to Canada's obligations under the GATT (which is incorporated into the FTA by reference).[86] In a unanimous decision, the panel held that Canada's landing requirement was an export restriction in violation of Canada's GATT obligations and thus, in violation with its FTA obligations.

The second complaint, *Lobsters from Canada*,[87] was initiated by Canada. In this case, Canada argued that a U.S. measure, that imposed size limitations on live lobsters imported from Canada, was an import restriction contrary to the United States' FTA and GATT obligations because it placed an absolute ban on the importation of Canadian lobsters below the specified size limitation. The expert panel, in a contentious 3-2 vote,[88] determined that the size limitation was not an import restriction in violation of either GATT or FTA obligations.

With only two cases having been settled before binational panels under Chapter Eighteen dispute resolution procedures, it is premature to draw firm conclusions regarding their success. For example, neither of the above controversies ended with the submittal of the panels' decisions. Rather, both governments continued to negotiate the respective issues. Ultimately, these issues were settled as a result of further compromises reached during these subsequent negotiations. Nevertheless, it does appear that the binational panels are consistently interpreting, implementing, and/or Canada-U.S. FTA obligations by applying developed GATT principles, precedents and obligations.[89] However, while the panels seem to be helping any subsequent negotiation by resolving legal questions, it is not clear whether the use of binational panels of experts hastens or retards the final resolutions of disputes.[90] Because of the politicized nature of disputes arising under this Chapter, it remains to be seen how important a role binational panel dispute resolution will play in government-to-government disputes.[91]

Beyond the dispute resolution activities of the panels themselves, it

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85. *In re Canada's Landing Requirements for Salmon and Herring*, 12 I.T.R.D. 1026 (BNA) (Binat'l Panel 1989).

86. *See* Canada-U.S. FTA, *supra* note 4, art. 407, at 310.

87. *Lobsters from Canada*, 12 I.T.R.D. 1653 (BNA) (Binat'l Panel 1990).

88. The decision was reportedly split along national lines. Judith Bello, et al., *U.S. Trade Law and Policy Series No. 18: Midterm Report on Binational Dispute Settlement Under the United States-Canada Free Trade Agreement* [hereinafter *Midterm Report*], 25 INT'L LAW. 489, 498 (1991).

89. Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement, An Interim Appraisal* 67-77 (Dec. 1990), FORUM on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement held by the Administrative Conference of the United States (April 23, 1991).

90. *Id.* at 84-85.

91. *Id.* at v.

appears that the Canada-U.S. Trade Commission is assuming the more important role as the arbiter of Canada-U.S. trade disputes[92] Although there is no formal register of all the matters put before the Commission, over a dozen disputes have been discussed before the Commission.[93] Perhaps, because each government is represented on the Commission, on an equal basis, by its own trade representative, the Parties believe that their interests or concerns are better addressed and resolved through the Commission than referred to the panel process. Regardless of which methodology is used, it appears that progress has been made because assurances have been received from both governments that matters regarding Canada-U.S. trade disputes "are well in hand."[94]

2. Binational panel dispute settlement in antidumping and countervailing duty determinations

Chapter Nineteen contains the dispute procedures for antidumping[95] and countervailing duty[96] actions. Initially, the Agreement does not change the existing domestic substantive laws of either Party on antidumping and countervailing duties.[97] However, the Agreement does oblige the Parties, within five to seven years, to develop a new system of rules for dealing with the use of government subsidies and unfair anti-competitive pricing practices (such as dumping) as applied to their bilateral trade[98] in order to stop the

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92. Michael Kalnay, *Dispute Settlement Mechanisms and North American Free Trade: Prospects and Portents* 1, FORUM on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement held by the Administrative Conference of the United States (Apr. 23, 1991).

93. *Id.* at 5.

94. *Id.*

95. Article VI of GATT defines dumping

> as the act where products of one country are introduced into the commerce of another country at less than the normal value of the products. A product is considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported form one country to another (1) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or (2) in the absence of domestic price, is less than either a) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or b) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

In order to offset or prevent dumping, a country may levy a duty on any dumped product an anti-dumping duty. GATT, *supra* note 12, at 212.

96. Under Article VI of GATT, the term "countervailing duty" is understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, on the manufacture, production or export of any merchandise. GATT, *supra* note 12, at 212.

97. Canada-U.S. FTA, *supra* note 4, art. 1902, at 386.

98. *Id.* arts. 1906 & 1907, at 390.

use of domestic trade laws as protectionist weapons.[99] Once the Parties have agreed to the new set of trade rules, use of the Chapter Nineteen will no longer be required.[100]

Until the new system is in place, each Party has the right to apply its antidumping and countervailing duty laws to goods imported from the territory of the other Party.[101] Also, each Party's legislature may subsequently change these laws during the interim period.[102] However, there is a requirement to notify the other Party of any proposed changes to domestic antidumping and countervailing duty laws and each Party will be exempted from such legislative changes unless otherwise specifically stated in the legislation itself.[103]

During the interim period, should disputes arise from final decisions by domestic administering authorities[104] under national antidumping or countervailing duty applications, the complaining Party[105] can choose to

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99. Ferguson, *supra* note 34, at 327. Because tariffs are agreed to up front, the exporter is able to factor the additional costs of a tariff into his or her decision-making process. However, with antidumping and countervailing duty laws, the exporter is less able to include these costs into his or her decision-making process since the application of these laws are a result of a number of different factors that cannot be determined in advance. The uncertainty generated by this process affects existing trade and also impairs future trade. *Id.*

100. Canada-U.S. FTA, *supra* note 4, art. 1906, at 390.

The new system of rules are to be developed by a bilateral Working Group. This Working Group met in November 1989, and again in May 1990. As of this writing, no further meetings have been scheduled. *Midterm Report*, *supra* note 88, at 512.

101. Canada-U.S. FTA, *supra* note 4, art. 1902, at 386.

102. *Id.*

103. *Id.*

104. Domestic petitions requesting antidumping and countervailing duty actions in the United States are initiated by an interested party, including a trade association, firm, certified or recognized union or group of workers, which is representative of the industry that is claiming to be injured by the imported good. These petitions are filed with the International Trade Administration (ITA) of the U.S. Dept. of Commerce and the International Trade Commission (ITC); the U.S. domestic administering authorities. The ITA determines whether a good from Canada is being sold in the United States at less than fair value (dumped) or whether a subsidy exists as required. Simultaneously, the ITC determines whether a dumped or subsidized good from Canada is being imported in such increased quantities so as to constitute material injury to the domestic industry. If both the ITA and the ITC make affirmative determinations, then either an antidumping duty or countervailing duty is assessed against the imported goods. Tariff Act of 1930, secs. 731-740, as amended by the Omnibus Trade and Competitiveness Act of 1988, secs. 1316-1311, 19 U.S.C. § 1673-1673i (1988).

It is this final decision by either the ITA or ITC that a party can choose to appeal to a binational dispute settlement panel. United States-Canada Free Trade Agreement Implementation Act of 1988, sec. 401(c), 19 U.S.C.A. § 1516a(g)(2) (West 1980 & Supp. 1990).

Canada's domestic procedures for antidumping and countervailing duty actions are similar to those detailed above. Debra P. Steger, *The Dispute Settlement Mechanisms of the Canada-U.S. Free Trade Agreement: Comparison with the Existing System, in* UNDERSTANDING THE FREE TRADE AGREEMENT 49, 58 (Donald M. McRae & Debra P. Steger eds., 1988).

105. In the United States, a party who was an interested party to the domestic administering agency determination on the antidumping or countervailing duty action may request binational panel review under Chapter Nineteen of such determination by filing a request with the United States Secretary. Receipt of the request by the United States Secretary is deemed to be a request for binational panel review by the United States and the Government is obligated to represent this interested party before the binational panel. Absent a request by an interested party, the

appeal such a decision to a binational dispute settlement panel instead of judicial review by domestic courts.[106] These binational panels are established separately from the general panel of experts under Chapter Eighteen, Article 1806 discussed above, although the procedures for selection and function are similar.[107]

Detailed procedures are specified within the Agreement itself to provide the mechanics of review by a binational panel.[108] Essentially, a binational panel determines whether the national trade law remedies of the importing country were applied correctly and fairly by the domestic administering authorities.[109] If the panel finds that the domestic trade law remedies have been correctly and fairly applied, using the same standards of review as would have been applied by a reviewing court in the importing country, then the original determination made by the domestic administering authorities stands.[110] However, if the panel finds that the domestic administering authority erred, the panel can remand the dispute back to the administering authority to correct the error and make a new determination.[111] The Panel's final decision must be issued within 315 days from the date on which the request for a panel was originally made.[112] The panel's findings and decisions are binding on both Parties.[113]

If after the panel's final decision is issued, a Party alleges that a member of the panel violated the rules of conduct, the panel seriously departed from a fundamental rule of procedure or the panel exceeded its authority or jurisdiction, a Party can invoke an extraordinary challenge procedure.[114]

United States Government may not request binational panel review of such determination. United States-Canada Free Trade Implementation Act of 1988, sec. 401(c), 19 U.S.C.A. § 1516a(g)(8) (West 1980 & Supp. 1990).

In the United States Government vernacular, the interested party requesting binational panel review is referred to as "the little p party."

106. Canada-U.S. FTA, *supra* note 4, art. 1904, at 387.

107. William J. Davey, *Dispute Settlement Under the Canada-U.S. Free Trade Agreement, in* TRADE-OFFS IN FREE TRADE 173, 177 (Marc Gold & David Leyton-Brown eds., 1988). Panelists are chosen from a roster of fifty willing persons developed by both Parties, twenty-five are to be citizens of Canada and twenty-five are to be citizens of the United States. The panelists included on the roster shall be of good character, high standing and repute and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. Panels must not be affiliated with or take instructions from either Party.

A majority of the panelists on each panel are to be attorneys in good standing. Each Party appoints two panelists from the roster, in consultation with the other Party. Each Party has the right to exercise four peremptory challenges of panelists chosen by the other side. The Parties shall agree on the selection of the fifth panelist, or chose one by lot. *Id.* art. 19, Annex 1901.2, at 393.

108. Canada-U.S. FTA, *supra* note 4, art. 19, Annex 1901, 1901.2, 1903.2, at 393-94.

109. *Id.* arts. 1904, 1911, at 387, 391.

110. *Id.* art. 1904(8), at 388.

111. *Id.*

112. *Id.* art. 1904(14), at 389.

113. *Id.* art. 1904(9), at 388.

114. *Id.* art. 1904(13), at 388-9.

Under this procedure, a committee of three judges or former judges reviews the panel's decision and issues a binding determination on the allegations and on whether a new panel will be required to review the issues.[115]

At the time of this writing, a total of twenty-two complaints and one extraordinary challenge proceeding, by both Canada and the United States, have been initiated under the Chapter Nineteen dispute resolution procedures.[116] Seventeen of these complaints are completed, while five complaints and the extraordinary challenge proceeding are pending.[117] Of the seventeen completed cases, panel review of seven cases were terminated by mutual consent of the Parties and panel review of one case was consolidated with another case. The remaining nine completed cases involve:

(i) Red Raspberries from Canada[118]

The first request for binational panel review was filed by Canadian complainants, asking review of an ITA determination that Canadian berry producers were dumping. The panel unanimously found that the ITA had erred in its dumping determination and remanded the case to the ITA to redo its calculations using a methodology directed by the panel. The ITA redid the calculations and found no dumping.

(ii) Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada[119]

Canadian complainants requested two panel reviews. The first panel reviewed an ITA scope determination and the second panel reviewed a determination that Canadian manufacturers were dumping replacement parts for this type paving equipment in the United States. Each panel unanimously confirmed the respective ITA's determinations, upholding the duty imposed on the Canadian goods. However, because the amount of duty imposed was less than the U.S. party thought it should be, this party requested an extraordinary challenge to the decision. This first request for an extraordinary challenge was ultimately rejected.

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115. *Id.* art. 19, Annex 1904.13, at 395. The members of the extraordinary challenge committee are selected from a ten-person roster comprised of judges or former judges of a federal court of the United States or a court of superior jurisdiction of Canada. Each Party shall name five persons to this roster. Each Party shall select one member from this roster and the third shall be selected from the roster by the two members chosen by the Parties or, if necessary, by lot from the roster.

116. Status Report, *supra* note 84.

117. *Id.*

118. *In re Red Raspberries from Canada*, 12 I.T.R.D. 1259 (BNA) (Art. 1904 Binat'l Panel 1989).

In re Red Raspberries from Canada, 12 I.T.R.D. 1652 (BNA) (Art. 1904 Binat'l Panel 1990).

119. *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, 12 I.T.R.D. 1297 (BNA) (Art. 1904 Binat'l Panel 1990).

Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, 12 I.T.R.D. 1461 (BNA) (Art. 1904 Binat'l Panel 1990).

(iii) New Steel Rails, Except Light Rail, from Canada[120]

Canadian complainants requested two separate panel reviews of an ITA affirmative countervailing duty and anti-dumping determinations, respectively. One panel unanimously affirmed the ITA's finding of subsidization of the Canadian steel rail industry, but not to the extent originally found. This panel remanded the issue to the ITA for redetermination. The ITA redetermination reduced the countervailing duty. The other panel, with a four-to-one majority, upheld the ITA's dumping determination and the antidumping duty as assessed remained in place.

(iv) New Steel Rails from Canada[121]

Both Canadian and U.S. complainants requested panel review of different aspects the ITC's material injury determination in antidumping and countervailing duty investigations. The panel affirmed, with one dissent in part, the affirmative determination of material injury, challenged by the Canadian complainants, and the negative material injury determination, challenged by the U.S. complainants.

(v) Fresh, Chilled or Frozen Pork from Canada (The Pork Case)[122]

Of all the cases that have been completed under the Chapter Nineteen procedures, the most controversy surrounded two Canadian complaints, one involving dumping and the other involving material injury, regarding pork. Canadian complainants requested separate panel reviews of ITA determination that found Canadian pork to be subsidized and an ITC determination of material injury.

The first panel unanimously upheld the ITA's countervailing duty determination, but remanded the case back to the ITA to revise downward

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120. *New Steel Rails, Except Light Rails, from Canada*, 12 I.T.R.D. 1412 (BNA) (Dept. of Com. Countervailing Duty Determination 1989).

New Steel Rails, Except Light Rails, from Canada, 12 I.T.R.D. 1433 (BNA) (Dept. of Com. Dumping Determination 1989).

New Steel Rails, Except Light Rails, from Canada, 12 I.T.R.D. 1753 (BNA) (Art. 1904 Binat'l Panel—Countervailing Duty 1990).

New Steel Rails, Except Light Rails, from Canada, 12 I.T.R.D. 2231 (BNA) (Art. 1904 Binat'l Panel—Dumping and Material Injury 1990).

121. *New Steel Rails from Canada*, 12 I.T.R.D. 1550 (BNA) (USITC Final Determination—Material Injury 1989).

New Steel Rails from Canada, 12 I.T.R.D. 1980 (BNA) (Art. 1904 Binat'l Panel 1990).

122. *Fresh, Chilled, and Frozen Pork from Canada*, 12 I.T.R.D. 2299 (BNA) (Art. 1904 Binat'l Panel 1990).

Fresh, Chilled, and Frozen Pork from Canada, 12 I.T.R.D. 1302 (BNA) (Dept. of Com., Int'l Trade Admin. 1989).

Fresh, Chilled, and Frozen Pork from Canada, 12 I.T.R.D. 2119 (BNA) (Art. 1904 Binat'l Panel 1990).

Fresh, Chilled, and Frozen Pork from Canada, 12 I.T.R.D. 1380 (BNA) (USITC Final Determination - Material Injury 1989).

Fresh, Chilled, and Frozen Pork from Canada, 13 I.T.R.D. 1024 (BNA) (Remand of USITC Material Injury Determination 1991).

Fresh, Chilled, and Frozen Pork from Canada, 13 I.T.R.D. 1291 (BNA) (Art. 1904 Binat'l Panel 1991).

Fresh, Chilled, and Frozen Pork from Canada, 13 I.T.R.D. 1453 (BNA) (Re-remand of USITC Material Injury Determination 1991).

the overall duty calculation. The second panel totally rejected the ITC determination of material injury, remanding the case back to the ITC for redetermination. The ITC's redetermination again found material injury. Again, the panel reversed and remanded. "[F]inally, the ITC bowed to the decision of the panel, but made clear that it regarded the Panel's decision as 'contrary to the facts and the law,' and vowed not to change its practice or procedure to conform to the view of the Panel."[123]

At the time of this writing, while these complaints are deemed completed, the U.S. government petitioned, and was granted, the right to invoke the Extraordinary Challenge procedure. This challenge procedure is currently pending.

(vi) Integral Horsepower Induction Motors[124]

Both American and Canadian complainants requested panel review of the Canadian International Trade Tribunal's (CITT) determination which continued a finding a material injury on induction motors imported into Canada. The majority of the panel affirmed the CITT's decision, with one panel member dissenting in part.

With the completion of the above cases, it appears that the Chapter Nineteen dispute settlement procedures are successful. Generally, the process has functioned smoothly with panel disputes being conducted expeditiously.[125] The panel decisions have been nearly all unanimous, quelling fears that a voting bloc based on nationality would develop. As importantly, panel opinions have been thoughtful, thorough, articulate, and have drawn conclusions that are persuasive.[126] However, as a result of *The Pork Case*, some experts believe that legal principles, independent of the laws of the importing countries and the FTA, are beginning to evolve out of the panels.[127] The new principles involve standards of review, standing, exhaustion of administrative remedies, reliance on the GATT and GATT codes authority, and the precedental value of prior panel decisions.[128] Other experts dismiss this notion, believing that, *The Pork Case* notwithstan-

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123. Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement, An Interim Appraisal* 1 (Update, Apr. 1991), FORUM on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

124. *Integral Horsepower Induction Motors*, (CITT Continuation of Injury Finding 1990).
Integral Horsepower Induction Motors, __ I.T.R.D. ___ (BNA) (Art. 1904 Binat'l Panel 1991).

125. One trade expert has stated that the Chapter Nineteen panel decisions have, on average, taking less than half the time as similar review undertaken by the Court of International Trade. *See* Lowenfeld, *supra* note 89, at ii.

126. *Id.* at iv.

127. James R. Cannon, Jr., *Summary of Views* 2, FORUM on Binational Dispute Resolution under the U.S.-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

128. James R. Cannon, Jr., *U.S.-Canada FTA Article 19 Panels: Are the Binational Panels Following Their Mandate* 1-22, FORUM on Binational Dispute Resolution under the U.S.-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

ding,[129] the panels are not creating independent legal principles.[130] Thus, overall, it appears that the panels are fairly applying national trade laws, generating binational confidence in the efficiency and efficacy of the FTA's dispute settlement procedures.[131]

Apart from the development of legal principles by Chapter Nineteen binational arbitration panels, the existence and use of these panels to resolve disputes generates a United States constitutional issue that remains unresolved. The Canada-U.S. FTA provides that the binational panel reviews will replace domestic judicial review of antidumping and countervailing duty determinations made by the administering authorities in the importing country (either the United States or Canada).[132] The binational panel system is considered to be unconstitutional by some U.S. legal experts, principally on the ground that reviews of antidumping and countervailing duty actions must be undertaken in Article III courts, *i.e.* in courts where judges have the salary and tenure protection afforded by Article III of the Constitution.[133] Other U.S. legal experts do not believe this system to be unconstitutional because the Constitution created only a Supreme Court and the establishment of appellate jurisdiction was left to Congressional discretion.[134]

To date, this controversy remains unresolved. Because the Chapter Nineteen dispute resolution procedures are intended to be an interim system until the Parties have agreed to the new set of trade rules, immediate resolution is not mandatory. However, it has been suggested that an amendment to the Canada-U.S. FTA to allow importers to seek appellate review of panel decisions in the U.S. Supreme Court would assure compliance with the constitutional requirements.[135]

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129. "In the eyes of United States officials, this [*The Pork Case* panel] was a rogue panel." Lisa B. Koteen, *U.S.-Canada FTA Chapter 19 Dispute Settlement: What is the Verdict and Can it be Applied to NAFTA* 9, FORUM on Binational Dispute Resolution Procedures Under the U.S-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

130. William K. Ince & Michele C. Sherman, *Observations on the Binational Panel Process Under Chapter 19 of the US-Canada Free Trade Agreement* 3, FORUM on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

"On balance, while it may be too early to put the matter to rest, it does not appear that panels are creating a new body of jurisprudence." *Id.* at 4.

131. *Midterm Report*, *supra* note 88, at 516.

132. Canada-U.S. FTA, *supra* note 4, art. 1904, at 387.

133. Davey, *supra* note 107, at 179.

134. 134 CONG. REC. S16084-92 (daily ed., June 28, 1988) (CRS Reports regarding The Dispute Settlement Mechanism of the United States-Canada Free Trade Agreement, submitted for publication by Sen. Domenici).

135. Karen H. Albright, *Chapter 19 of the Canada-United States Free Trade Agreement: An Unconstitutional Preclusion of Article III Review*, 5 CONN. J. INT'L L. 317, 351 (1989).

III. POLITICAL, CULTURAL AND LEGAL DIFFERENCES AFFECTING THE USE OF CANADA-U.S. DISPUTE RESOLUTION PROCEDURES IN THE NAFTA FREE TRADE AGREEMENT

A. Differences Affecting Mexico-U.S. Trade Relations

"No two nations with such disparate cultures, economic prosperity, and global power share as long a border as Mexico and the United States."[136] Although the United States also shares a long frontier with Canada, it also shares a cultural and historical affinity.[137] Therefore, unlike Canada, Mexico-U.S. relations, particularly their trade relations, must be understood in the context of mutual suspicion. Mexico and the U.S. have differing interests and a significant disparity in strengths and needs.[138]

One methodology that has been suggested to address the cultural and historical differences affecting the trade relations between the United States and Mexico is the implementation of an improved dispute resolution mechanism.[139] A first step was taken in this direction when Mexico acceded to the GATT in 1986.[140] A second, and even more important, step in the direction of improved dispute resolution was taken when the United States

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136. Michael W. Gordon, *Mexico and the United States: Common Frontier-Uncommon Relationship*, 18 CAL. W. INT'L L.J. 171 (1987).

137. *Id.* at 172.

138. Frank J. Macchiarola, *Mexico as a Trading Partner*, 37 INT'L TRADE: THE CHANGING ROLE OF THE UNITED STATES 90 (1990). Historically, the relationship between the United States and Mexico has not been a warm one. This lack of warmth can be traced to the two countries' stormy past. "For instance, every Mexican schoolchild learns that the United States invaded Mexico more than a century ago and seized half of the country's territory, and Mexican history books are replete with references to U.S. economic exploitation." Therefore, most Mexicans tend to view the United States as the culprit whenever something unfortunate happens to Mexico.

Conversely, most Americans know little of the real Mexico, seeing it only as corrupt, antidemocratic and inefficient. Mexico gains attention in the United States only when its internal problems threaten to impact the United States, as with illegal immigration, or its foreign policies tent to frustrate U.S. foreign policy goals, Mexico's policies toward Central America. Regardless of whether these American beliefs about Mexico are accurate or not, they influence attitudes and policy.

What Mexico wants most from the United States is cooperation with its goals of achieving economic growth and improving its political and social situation. Towards reaching these goals, Mexico wants access to the U.S. market for its goods and services with minimum trade restrictions.

On its side, the United States wants Mexico to remain a socially stable country, as a buffer between it and the politically and socially restless countries in Central America. WEINTRAUB, *supra* note 8, at 52-63.

139. Rachel McCulloch, *The United States-Canada Free Trade Agreement*, 37 INT'L TRADE: THE CHANGING ROLE OF THE UNITED STATES 79, 87 (1990).

140. For general discussion of Mexico's accession to the GATT, *see* Richard D. English, *The Mexican Accession to the General Agreement on Tariffs and Trade*, 23 TEX. INT'L L.J. 339 (1988).

and Mexico signed the U.S.-Mexico Framework Agreement.[141] However, as U.S.-Mexico trade relations have continued to evolve toward free trade, it has become evident that neither the dispute resolution mechanisms in the GATT or the Framework Agreement would be sufficient.[142]

The dispute resolution mechanisms under both the GATT and the Framework Agreement are insufficient to address U.S.-Mexico trade relations as they evolve toward free trade because both use ad hoc mechanisms that rely only on consultations and consensus to achieve the resolution of disputes.[143] In addition, any recommendations that result from the use of either of these procedures are either not binding on the Parties or are rarely enforced.[144] Because of the comprehensiveness of the obligations, a free trade agreement requires sharply defined dispute resolution procedures that are less politicized, more procedurally consistent and objective, and are binding on the Parties.[145]

"Not long ago, free trade was considered a very American idea that good Mexicans didn't promote in public. More often, they denounced it as a U.S. plot to undermine Mexico's economy."[146] The debate in Mexico on bilateral free trade is a combination of concerns about dependency and domination, its political, economic and legal ramifications, compounded by a historical cultural animosity toward the United States and the practical concern about who wins and who loses from free trade.[147]

Mexico's concerns regarding the creation of the NAFTA are similar to those of Canada during the creation of the Canada-U.S. FTA.[148] Speci-

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141. Mexico-United States: Framework Understanding on Bilateral Trade and Investment, signed Nov. 6 1987, 27 I.L.M. 438 (1988). This Framework Agreement was important because it served as the first formal bilateral agreement for resolving disputes specifically between the United States and Mexico on trade issues.

For a further discussion on the evolution and accomplishments of the U.S.-Mexico Framework Agreement's consultative mechanisms, *see* Guy C. Smith, *The United States-Mexico Framework Agreement: Implications for Bilateral Trade*, 20 L. & POL'Y INT'L BUS. 655 (1989).

142. SIDNEY WEINTRAUB, FREE TRADE WITH MEXICO AND THE UNITED STATES? 1 (1984).

143. For a discussion of the GATT dispute resolution procedures, *see generally* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT ch. 8 (1969); I. Bael, *The GATT Dispute Settlement Procedure*, 22 J. WORLD TRADE 67-7 (1988); J. Waincymer, *GATT Dispute Settlement: An Agenda for Evaluation and Reform*, 14 N.C.J. OF INT'L AND COM. REG. 121-33 (1989); William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L LAW J. 51-109 (1987).

144. *See supra* note 143.

145. Robert P. Parker, *Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement*, 23 J. WORLD TRADE 83, 93 (1989).

146. Marjorie Miller, *Salinas is Eager to Nail Down a Pact*, L.A. TIMES, June 9, 1990, at A-3.

147. WEINTRAUB, *supra* note 142, at 24. Interestingly, there has been a shift in public sentiment toward free trade. Recent national surveys show that 62% of all Mexicans favor a free-trade agreement with the United States. They believe that it will create jobs and give them greater access to more and better quality goods and services. Wayne A. Cornelius, *Mexico's New Revolution: Economic Reform is Remaking Mexico, But Political Liberalization is Needed to Guarantee the Results*, SAN DIEGO UNION-TRIBUNE, Feb. 2, 1992, C-5.

148. *See generally* Macchiarola, *supra* note 138.

fically, the political, cultural and legal differences of concern to Mexico include:

1. maintenance of national sovereignty,
2. eliminating the arbitrary amendment and biased application of U.S. domestic trade laws,
3. reduction on political interference in a dispute resolution process,
4. loss of cultural identity,
5. procedural neutrality, efficacy, and efficiency, and
6. enforcement of rights and obligations under a FTA.

Therefore, one aspect of the Canada-U.S. FTA that could be applied profitably to Mexico to address these political, cultural and legal differences is the dispute resolution procedures.[149] However, these differences are considered to affect the United States and Mexico more profoundly than they did the United States and Canada.[150] Thus, the existing Canada-U.S. FTA dispute resolution procedures will have to be reevaluated to determine whether they currently address and resolve the political, cultural and legal differences affecting Mexico-U.S. trade relations or whether they need to be revised and tailored for application to the NAFTA.

B. Political Differences

Traditionally, the style of U.S. official conduct toward Mexico tends to follow the pattern of a superior dealing with an inferior.[151] As a result, Mexicans are deeply concerned that a movement toward free trade with the United States is that nation's latest attempt to exercise political hegemony over Mexico.[152] Mexico fears that free trade would inevitably and ultimately lead to U.S. political domination over Mexico, or, at the very least, allow the United States to intrude on Mexico's national sovereignty

149. *See* McCulloch, *supra* note 139.

150. *Id.* "The United States is a world power, and Mexico is a struggling developing country. Annual per capita income in the United States is now about $18,000; in Mexico less that $2,000. The Mexican culture is hispanic, and that of the United States, while complex, derives much of its sustenance from British, Western Europe, non-Latin traditions. Mexico was the territorial loser and the United States the gainer in the nineteenth century war. WEINTRAUB, *supra* note 8, at 5.

151. WEINTRAUB, *supra* note 142, at 19. Officials of the United States often denigrate Mexican authorities in ways that they would never do with other allies. For example, John Gavin, U.S. ambassador to Mexico from 1981 to 1986 regularly and publicly lectured the Mexican government on its policy shortcomings. William van Raab, commissioner of U.S. customs, openly charged Mexican officials with complicity in drug trafficking during a Senate hearing. In 1985, a U.S. senate vote threatened reprisals against Mexico based on an unconfirmed, unverified (and ultimately false) report that a Soviet warship was about to visit a Mexican port. WEINTRAUB, *supra* note 8, at 7.

152. WEINTRAUB, *supra* note 8, at 1.

through interference with the domestic political system and policy decisions.[153] For example, many Mexicans believe that a free trade agreement would allow the United States to meddle with Mexico's sovereignty by demanding, or at least trying to influence, national political system reform out of American perceptions of non-democratic electoral dominance, fraud and intimidation.[154] Further, surveys of Mexican attitudes suggest that the United States is seen as treating Mexico unfairly in trade.[155] Many Mexicans envision that a free trade agreement would not give Mexico much influence over U.S. decision-making on trade issues or the help to eliminate the biased application of U.S. trade laws against Mexico. In fact, it appears that many Mexicans actually expect the reverse to occur—that U.S. authorities would obtain greater influence over Mexican trade policies such as Mexican oil and gas production.[156]

On the other side, U.S. labor unions and producers, both agricultural and manufacturing, are concerned that the NAFTA would entice some U.S. companies to move to Mexico, resulting in competition with more cheaply produced Mexican goods and causing the loss of American jobs.[157] In

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153. *Id.* at 180.

154. M. Delal Baer, *Salinas's Achilles' Heel*, THE CHRISTIAN SCIENCE MONITOR, Dec. 5, 1990, at 19. Mexico is a federally organized republic composed of thirty-one states and a Federal District. However, in Mexico, as opposed to the United States, the total dominance of the federal government over all facets of Mexico's political, economic, cultural and legal systems is overwhelming.

While powers of the federal government are constitutionally separated into three independent branches, executive, legislative and judicial, the executive branch is the real center of Mexican political power. At the head of the executive branch and holder of this undisputed power is the president. The power and influence of the president derives from his influence over Mexico's one official political party—the Partido Revolucionario Institucional (PRI). The PRI controls all branches of the federal government and almost all state governments. While other political parties do exist, their combined strength and influence is only a fraction of that of the PRI. Harry K. Wright, *Mexican Government, Foreign Enterprise in Mexico* 12 (1971).

Since its founding over sixty years ago, the PRI had never lost a presidential or gubernatorial election. The PRI has been accused of retaining its dominance over the Mexican government through electoral manipulation, coercion and outright fraud. Participants on both sides of the border have stated that Mexico's political system needs reform to become more democratic, eliminating electoral fraud and holding "free elections." USITC Pub. 2326, *supra* note 24, at 1-4.

However, the political winds in Mexico are starting to shift significantly. In 1988, the PRI lost four senatorial seats and, in 1989, it lost one governorship. WEINTRAUB, *supra* note 8, at 6. Most recently, in the national elections held in August, 1991, the PRI lost another senatorial seat and the PRI governor-elect in the state of Guanajuato had to resign over vote fraud protests. A member of one of the opposition parties took over as interim governor. James W. Silver, *The PRI is Losing its Iron Grip on Baja California*, SAN DIEGO UNION-TRIBUNE, Feb. 2, 1992, at C-5. Ultimately, the PRI does retain control of the presidency and the two houses of the legislature, but it is a more tenuous, a more shared control, than at any time during the past sixty years. WEINTRAUB, *supra* note 8, at 6.

For a in-depth discussion on Mexico and the Mexican political system, *see generally* ALAN RIDING, DISTANT NEIGHBORS (1984).

155. WEINTRAUB, *supra* note 142, at 17.

156. *Id.* at 180.

157. Benjamin Shore, *Bush, Salinas Schedule Talks on Trade Pact*, SAN DIEGO UNION, Mar. 26, 1991, at A-11. Mexico's average wage is about one-seventh that of the United States'. *Id.*

addition, U.S. environmental groups argue that, even though Mexico has environmental laws comparable to those in the United States, Mexico's lax enforcement of these laws would attract American industries and farms who don't want to bear the costs of pollution control and/or stop using pesticides banned in the United States.[158]

Moreover, in the past few years U.S.-Mexican relations have been strained by public accusations in the United States that the Mexican Government is corrupt from top to bottom.[159] A certain amount of corruption is found all countries.[160] But, in Mexico, corruption is essential to the operation and survival of the political system—the system has never lived without corruption and would disintegrate or change beyond recognition if it tried to do so.[161] However, the United States, after recent U.S. government scandals such as Abscam, Iran-Contra affair, Keating Five (the Savings and Loan debacle) and HUD-gate, does not have clean hands with regard to corrupt practices. Sometimes what the United States calls corruption in Mexico is acceptable practice at home. For example, the practices that protect the seats of incumbents in the U.S. House of Representatives is not considered corruption. Nor is the practice of accepting campaign contributions and then voting in favor of those interests considered corrupt. Thus, this criticism implies a moral superiority that the United States should not assume.

The inclusion of the dispute resolution procedures from the Canada-U.S. FTA into NAFTA would help to mitigate these political differences affecting the trade relations of the United States and Mexico. First, the inclusion of Mexico in a trilateral (Mexico-Canada-U.S.) Trade Commission would

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158. Benjamin Shore, *Environmental Issues Enter Free-Trade Talk*, SAN DIEGO UNION, Mar. 21, 1991, at E-1. The U.S. was supposed to be pursuing the setting of environmental standards with Mexico under a binational commission created in November 1990, but nothing has been done yet. *Id.*

159. Keith S. Rosenn, *Corruption in Mexico: Implications for Foreign Policy*, 18 CAL. W. INT'L L.J. 95, 96-100 (1987-88).

160. *Id.* at 95.

161. ALAN RIDING, DISTANT NEIGHBORS 113 (1984). Corruption is defined as an act done with an intent to give some advantage inconsistent with official duty and the rights of others. BLACK'S LAW DICTIONARY 311 (5th ed. 1979).

In Mexican culture, the lines between corrupt and non-corrupt behavior are blurred by long established traditions and cultural values. ALAN RIDING, DISTANT NEIGHBORS 114 (1984).

Mexican officials have difficulty in admitting, especially to foreigners, that corruption is essential to the operation and survival of the Mexican system. *Id.* at 113. However, a number of Mexican writers have explored various aspects of the corruption within Mexico. For example, Octavio Paz, one of Mexico's leading essayists, has written about the role of corruption within the Mexican "psychie" in *The Labyrinth of Solitude* (1961). Also, Jose Gonzales revealed, in a short book, *Lo Negro del Negro Durazo*, (which became one of the biggest best sellers in Mexican history) the extent of corruption within the Federal Judicial Police. *Id.* at 113-20. Even Mexican political figures have finally had to acknowledge the problem of corruption within the system. For example, in his 1982 presidential campaign, Miguel de la Madrid stressed the theme that "moral renovation" would be one of the cornerstone goals of his administration. Also, Carlos Salinas de Gortari, Mexico's current president, removed two high officials within his government because of alleged corruption. WEINTRAUB, *supra* note 8, at 58.

address Mexico's national sovereignty concerns because it would provide a permanent forum for communication and consultation between the governments to avoid disputes and generally act as a guardian of each Party's national interests under the NAFTA. As importantly, each Party would be represented on the Commission, on an equal basis, by their own appointed cabinet-level officer or minister responsible for international trade.

Second, Mexico could gain influence over U.S. decision-making on or application of trade laws because the dispute resolution procedures would allow a Party to notify the other in writing whenever actual or proposed legislation, regulation, governmental procedures or practice of the other Party's is or would be inconsistent with FTA's goals, rights or benefits. This procedure provides an early warning system of potential and latent trade problems between the Parties. Thus, if either Party believes that any such action taken by the other is inconsistent with the FTA, such as interference in non-FTA matters like domestic political elections, the other party can be officially notified of the inconsistency and the Parties can attempt, through consultations, to resolve the issue amicably up front.

Third, if a dispute does arise over the interpretation or application of the provisions of the agreement, national sovereignty would again be protected because the complaining Party can choose, at their discretion, to resolve the dispute using either GATT or the FTA's dispute resolution procedures.

Fourth, should the complaining party choose to resolve the dispute under the FTA's procedures, the trilateral Trade Commission would have the power to appoint either binding arbitration panels or panels of experts, composed of unaffiliated experts from both nations to arbitrate or adjudicate the dispute. By settling disputes through these panels, the national interests of Mexico are preserved because the panels provide a neutral forum in which the Parties can assert their respective national trade policies.

Fifth, the inclusion of dispute resolution procedures from Chapter Nineteen of the Canada-U.S. FTA would protect Mexico from the arbitrary amendment and biased application of U.S. domestic trade laws for protectionist purposes. Mexico would have to be consulted in advance regarding proposed U.S. trade law amendments and the U.S. would have to be consulted about Mexican trade law amendments. Moreover, disputes regarding the application and amendment of these trade laws by either Party are subject to review by binational arbitration panels, replacing the allegedly biased domestic judicial review and appeal procedures. Therefore, Mexico's influence on U.S. trade decisions would increase while its influence on non-FTA domestic decisions would remain unaffected. The same would be true for the United States.

Lastly, national sovereignty would, again, be protected when a decision of the binational panel went against one of the Parties since that Party can choose how to conform to the recommendations made by the panel. The panel's recommendations can be implemented by either (1) non-implementation of or removing the measure or domestic determination, or (2) by paying the other Party compensation, keeping the measure or determination in place.

The inclusion of the dispute resolution procedures from the Canada-U.S. FTA into the NAFTA would not as easily address the concerns of the United States. The concerns of both labor and environmental groups involve fundamental "social charter" issues that many trade analysts believe should be dealt with outside of a free trade agreement.[162] As a result of this opposition to the free trade agreement with Mexico, the Bush administration is discussing with Mexican officials the possibility of negotiating a separate agreement covering workers' wages, rights and safety as well as environmental controls.[163]

However, the United States' concern over corruption would be effectively addressed by the inclusion of the dispute resolution procedures from the Canada-U.S. FTA into the NAFTA. Because the binational panels would be composed of panelists selected by the Parties from a roster of persons who were included on that roster because of their objectivity, reliability, sound judgment and non-affiliation with either Party, the chances of corruption influencing any decisions is greatly reduced. Also, in disputes resolved by a panel of experts rather than by binding arbitration, it would be the trilateral Trade Commission's responsibility to implement any panel recommendations, further insulating the dispute resolution process from potential corruption. Finally, where a binational arbitration panel settles a dispute regarding the amendment or application of domestic trade laws, if either Party alleges that a panel member violated any rules of conduct, that Party could invoke an extraordinary challenge procedure under which a binational committee of three judges or former judges would review the panel's decision and issue a binding determination on the allegations and remand the dispute back to another panel for reconsideration if necessary.

In summary, the inclusion of the dispute resolution procedures from the Canada-U.S. FTA in the resultant NAFTA would address and be an affirmative step toward mitigating the political differences that affect the United States and Mexico in their trade relations. While each side would lose some national sovereignty under the resultant NAFTA, they would gain bilateral influence over and parity in their trade relations.

C. Cultural Differences

The fear in Mexico is that in an unbalanced triad such as would exist under a free trade agreement with the United States and Canada, Mexico would lose its cultural identity.[164] Many Mexicans cannot come to terms with the growing cultural penetration of the American way of life into Mexican society and believe that free trade would render them powerless to

162. Bennett, *supra* note 1.

163. Shore, *supra* note 157, at A-11.

164. WEINTRAUB, *supra* note 142, at 123.

prevent total U.S. domination of Mexico's cultural identity and policies.[165] More critically, many Mexicans believe that the cultural differences between the United States and Mexico in history, religion, language, and race would complicate Mexico's relationship with the United States under the NAFTA.[166] Because of these differences the United States does not see Mexicans as they really are, but rather as caricatures which represent mythical stereotypes learned in Saturday morning cartoons, movies and comic books.[167] This view of Mexico has led U.S. trade officials to conduct their trade relations with and to apply domestic trade laws to Mexico with an attitude of disdain—the superior dealing with an inferior.[168] As a result, there is a basic distrust of the United States in Mexico, making Mexicans wary that the NAFTA will only serve to continue this unbalanced relationship and never allow Mexico to achieve the cultural respect and parity with the United States it feels it should be accorded.[169]

On the other side, U.S. trade analysts believe that free trade would strengthen Mexico's economy by promoting industrial efficiency and job creation, thus, making Mexico's cultural identity stronger than it is now.[170] U.S. trade analysts have also stated that because "[M]exico's 'culture is so strong and distinctive,' its fear of U.S. domination should be minimal."[171] Further, these analysts regard the impact of different languages, history and customs of Mexico as having a negligible affect on any resultant FTA. Mexico already conducts its trade relations with the United States in English and, since most Mexican trade officials were educated in the United States, they have a basic understanding of the American culture and practices.[172]

The inclusion of the dispute resolution procedures from the Canada-U.S. FTA into the NAFTA cannot, by itself, preserve Mexico's cultural identity or mitigate cultural differences and racial stereotypes. However, these

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165. RIDING, *supra* note 161, at 316. Many Mexican analysts believe that the cultural penetration of American way of life has adversely affected the Mexican language, values, consumption, aspirations, living habits and social mores. This cultural infection most often results from flow of ideas across the media and from the flow of people across the border. American television and radio programs are available in most of Mexico. In addition, a large number of Mexican are educated at U.S. universities and colleges. WEINTRAUB, *supra* note 8, at 14, 164-65.

166. RIDING, *supra* note 161, at 316.

167. Gordon, *supra* note 136, at 172. Examples of such caricatures include "Speedy Gonzales," "The Frito Bandito," "The Cisco Kid," and an innumerable list of "bad guys" in American westerns.

168. D. ROSS GANDY, TWENTY KEYS TO MEXICO: DOOR TO LATIN AMERICA 39-42 (1991). "For a century Mexicans have moaned that they are 'too far from God and too close to the United States'." *Id.* Probably the main generator of U.S. protectionist policies toward Mexico is the U.S. Congress. "Protectionist proposals made in the U.S. Congress are limited only by the imaginations of members of Congress and their interested constituents." WEINTRAUB, *supra* note 8, at 83-84.

169. GANDY, *supra* note 168, at 39-42.

170. WEINTRAUB, *supra* note 142, at 123.

171. USITC Pub. 2326, *supra* note 24, at 1-6.

172. *Id.*

procedures would aid in reducing Mexico's concerns by helping to build and strengthen the respect and trust between the United States and Mexico that would be mandatory for successful trade relations under the NAFTA. For example, the establishment of a trilateral trade Commission would provide Mexico with a permanent forum in which it could assert its concerns over cultural identity or policies affected by any U.S. measures taken under the NAFTA on a equal basis. If a dispute did arise over a measure taken or over the amendment or application of domestic trade laws, the use of binational dispute settlement panels, composed, in part, of Mexican trade experts, would ensure that the cultural differences between the Parties would not affect the fair implementation and application of the NAFTA's rights and benefits. Also, if Mexico believed that a panel member violated any rules of conduct, Mexico could invoke an extraordinary challenge procedure. Moreover, if a binational panel decided that Mexico had implemented a cultural measure not in conformance with the NAFTA, Mexico could choose to pay compensation rather than removing it. This would allow Mexico to preserve important cultural policies if need be and, yet, uphold its rights and benefits under the NAFTA.

In summary, the inclusion of the dispute resolution procedures from the Canada-U.S. FTA into the NAFTA would aid in protecting Mexico's cultural identity and policies and eliminating the unbalanced trade relationship between the United States and Mexico because these nations would be required to manage their free trade obligations and resolve disputes on an equal basis. The tradition of distrust can be overcome because of the equal representation and cooperation on both sides engendered by the dispute resolution procedures.

D. Legal Differences

The trade relationship between the United States and Mexico has been one of constant friction, with each nation making mutual recriminations about each other's trading practices and, in particular, about the implementation and application of their respective trade law remedies.[173] Although the trade laws in both the United States and Mexico are similar, as they are based on principles adopted in the GATT, it is the interpretation and weight given the economic and legal differences reviewed and applied during the trade action proceeding that can differ between the two counties.[174]

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173. WEINTRAUB, *supra* note 142, at 39.

174. Ernesto Rubio del Cueto, *Countervailing Duties Affecting United States-Mexican Trade*, 12 HOUSTON INT'L L.J. 323, 327-30 (1990). The Mexican trade laws are the result of a combination of international legal institutions, such as GATT, and Mexican tax and customs laws. The main component of these trade laws is the *Ley Reglamentaaria del Articulo 131 de la Constitucion Politica de los Estados Unidos Mexicanos en Material de Comercio Exterior (Ley Reglamentaria)*. The *Ley Reglamentaria* contains the standing requirements, formal prerequisites, and procedures which allow an interested party to obtain relief dumped or subsidized imports. It also provides procedures for the review and revocation of dumping/subsidy and

Mexico perceives the legal administration and application U.S. trade law, both within the domestic administering agencies and within the judicial appeal process, as biased against Mexican firms.[175] Specifically, Mexican officials believe the U.S. domestic process for settling bilateral trade disputes is unpredictable, time consuming, expensive, and lacks objectivity and neutrality due to political interference.[176] The United States holds similar opinions regarding Mexico's implementation and application of its domestic trade law remedies, most often complaining of inadequate or unfair procedures and unenforced decisions.[177]

Unlike the United States, Mexican law has no threshold constitutional problems to overcome before the dispute resolution procedures contained in the NAFTA could be included into the domestic legal system. Although the 1917 Mexican Constitution establishes a Federalist system with three separate branches of government, it also fosters the transfer of centralized power from the other two branches to the Executive branch, in particular the president.[178] Thus, the Mexican president can, arguably, more easily amend the Constitution or enact changes to Mexican law by executive decree in order to implement domestically an international agreement.[179] This means that, in Mexico, the lack of judicial review of panel decisions does not have the same fundamental constitutional implications as it does in the United States. However, in all likelihood, neither the Mexican Constitution nor domestic trade laws will require fundamental change as Mexico's substantive and administrative laws already recognize the right of parties to use and enforce the settlement of disputes through arbitration panels, often without the same possibility of judicial review by the higher Mexican courts as in the U.S.[180]

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material injury determinations made by the domestic administrating authorities—the Ministry of Commerce and Industrial Development (SECOFI) and the Ministry of Finance and Public Credit (SHCP).

The *Reglamento contra Practicas Desleales de Comercio Internacional* is the body of administrative regulations apply the *Ley Reglamentaria*, including investigative procedures that are to be followed in order to determine the existence of dumping and subsidies, the application of the injury test, and the implementation of antidumping and countervailing duties. Andres Gonzalez Sandoval, *A Mexican Perspective on Unfair Trade Laws* (1991) (unpublished paper on file with the American Bar Association, Section of International Law and Practice).

175. Cueto, *supra* note 174, at 330-33.

176. *Id.*

177. *Id.*

178. GUILLERMO FLORIS MARGADANT S., AN INTRODUCTION TO THE HISTORY OF MEXICAN LAW 288 (1983).

179. *Id.* at 287-90. Rodolpho Sandoval, *Legal Issues with Respect to Free Trade Between United States and Mexico*, 19 I.J.L. I. 91, 96 (1991).

180. Eduardo Siqueiros T., *Legal Framework for the Sale of Goods into Mexico*, 12 HOUSTON INT'L L.J. 291, 321-22 (1990). The Mexican trade laws are very young when compared to those of the United States. However, despite having emerged from a different legal scheme, Mexico has incorporated into its trade laws many of the same basic concepts found in the U.S. laws. It also imposes rights and burdens on the parties in substantially the same way as the United States.

In the first six years since the inception of the *Ley Reglamentaria* and its accompanying regulations, the Mexican authorities have processed or taken some sort of administration action

The inclusion of appropriate dispute resolution procedures from the Canada-U.S. FTA into the NAFTA would address the legal factors affecting the United States and Mexico their trade relations. First, one of the primary, although often forgotten, goals of an effective dispute resolution process is to avoid disputes in the first place. The establishment of a trilateral trade commission would provide a permanent forum for communication and consultation between the governments to avoid disputes. The Commission would encourage the Parties to notify and consult each other up front on potential trade issues, preempting the development of full-fledged trade disputes in the future. As a result, the number of disputes would be reduced, reinforcing the equal level of cooperation and trust between the United States and Mexico.

Second, if a dispute did develop, the use of either the binational panels of experts or the binational arbitration panels, as determined by the nature of the dispute being settled, would reduce the bias in the administration and application of the respective trade laws. For example, the domestic administering agencies, knowing that their decisions could be subject to binational panel review, would be forced to be more objective in their decision-making process on trade law actions. Also, the review of domestic trade law implementation and application by the binational panels instead of the domestic court systems would increase the predictability, consistency, and neutrality because 1) the panels would conduct their review under common and mutually agreed to procedures that are both adequate and fair, 2) the panels' decisions would allow convergence of both nation's legal precedents and trade law remedies, eliminating the disparity among the respective domestic judges on the interpretation and application the trade laws, and 3) the binational composition of the panels of trade experts from both nations, along with the extraordinary challenge procedures, would help to eliminate perceptions of bias and political interference in each nations' domestic decision-making and judicial appeal processes.

Third, use of the dispute resolution procedures under the NAFTA would be a more expeditious method for the settlement of disputes than what is currently available in the domestic legal systems of either nation or under the GATT. A dispute brought under the NAFTA procedures would have to be resolved within 315 days. However, in both domestic judicial systems and in the GATT, the review and appeal process can drag on for years.

Fourth, since the dispute resolution procedures would be initiated and conducted under the auspices of the respective governments of the Parties,

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in 61 cases. However, with the increasing use of these trade laws by domestic industries and the additional complications posed by the administrative investigations, Mexico has either amended or is considering amending these trade laws to better cope with the sophistication and complexities of international trade. Some of these amendments include: (1) more adequate time frames between procedural stages, (2) better notification and service of process methods, (3) more intense verifications proceedings, (4) more expeditious reviews, and (5) more involvement of Mexican government officers and commercial attaches abroad. Sandoval, *supra* note 174.

the costly financial burden of challenging the interpretation and application of domestic trade laws, which under the judicial system or the GATT would have been paid for by the firms bringing the challenge, would be shifted to the respective federal governments. This would allow smaller importers, producers, and/or other interested parties access to the dispute resolution process under the NAFTA which would not have access to the domestic judicial systems or the GATT because of the expense.

Lastly, the use of the dispute resolution procedures from the Canada-U.S. FTA in the NAFTA would improve the ability of the respective Parties to enforce the rights and obligations of the NAFTA. Both Parties would be aware going into the NAFTA that the decisions of the binational arbitration panels are binding. Penalties for non-compliance would be a certainty. But the specific sanction imposed, be it removal, modification or non-implementation of the offending measure, suspension of equivalent benefits (retaliation), or compensation, is flexible, allowing the method of enforcement to focus on the issue of the dispute. This possibility of direct and prompt sanctions would encourage mutual resolution and avoidance of disputes.

E. Recommendations For Tailoring The Canada-U.S. FTA Dispute Resolution Procedures For the NAFTA

While the dispute resolution procedures from the Canada-U.S. FTA would improve the dispute resolution process under the NAFTA, there are several areas in which these procedures could be tailored to address and mitigate specific concerns that uniquely affect the trade relations of the United States and Mexico.

One of the U.S. complaints regarding Mexico's administration of its trade laws, is that often U.S. firms are not notified that they are the subject of an antidumping or countervailing duty action in Mexico until after the domestic proceeding is completed. This precludes the U.S. firm from participating in and protecting its interests in the domestic proceeding. This occurs because, unlike the United States which notifies interested parties of impending domestic action by administrating agencies through the Federal Register, Mexico does not have an effective domestic notification procedure. Mexico does have an equivalent publication to the Federal Register entitled Diario Official, but this publication is difficult to get in the United States. Therefore, for all intents and purposes, no notice is available. One way this situation could be remedied would be to require both governments to notify the other of impending domestic action affecting any rights and obligations under the NAFTA through the trilateral Trade Commission. This would provide each government with the responsibility to notify their own interested parties of actions being taken in the other nation that would affect them.

Another area in which the dispute resolution procedures could be modified would be to extend the availability of the extraordinary challenge procedures to the binational panel of experts used under the Chapter Eighteen procedures. Currently, the extraordinary challenge procedures can only be

invoked when one Party alleges misconduct by a member of a binational arbitration panel convened under Chapter Nineteen procedures. The extension the use of these extraordinary challenge procedures to binational panels of experts under Chapter Eighteen could aid in alleviating national sovereignty and political interference concerns in the dispute resolution process.

The existing dispute resolution procedures could also be modified to allow disputes involving a "separate agreement"[181] concerning, for example, labor standards, or environmental protection, that might be appended to (but not part of) the NAFTA. If this separate agreement materializes, the use of the dispute resolution procedures from Chapter Eighteen, making use of the trilateral Trade Commission and the binational dispute settlement panels, would be effective in managing, and policing the rights and obligations created therein by alleviating national sovereignty and political interference concerns.

A final recommendation involves the implementation of a training program to familiarize U.S., Canadian and Mexican panelists with the respective legal systems of each others countries and, Mexican panelists, with international trade dispute settlement; Mexico having only acceded to GATT five years ago. Mexico, Canada and the United States have fundamentally different legal systems. The United States and Canadian legal systems are built upon common law, *stare decisis*, principles, a process by which law is created by judges through case decisions. In contrast, the Mexican legal system is based on codes which set forth broad principles of law which are applied to specific instances through the use of deductive reasoning.[182] While the systems, particularly in trade law areas, appear to be evolving, making them more and more comparable; there is still is concern among trade experts that panelists would feel incompetent to construe and apply the other's laws. There is an appalling lack knowledge, particularly on the U.S. side, of Mexican law.[183] Therefore, before panelists can effectively apply each other's antidumping and countervailing duty laws under Chapter Nineteen dispute resolution procedures, they must understand the fundamental principles behind these different systems and how the respective laws work. With the establishment of a training program, the panelists can gain the knowledge, confidence and experience necessary to successfully carry out

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181. "As a result of congressional opposition to a free trade agreement with Mexico, the Bush administration is discussing with Mexican officials the possibility of negotiating a separate agreement covering worker's wages, rights and safety as well as environmental controls." Shore, *supra* note 157.

182. Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717, 720 (1991).

183. Remarks of Michale H. Stein, *Panel Concerning Applicability of the Dispute Settlement Procedures to a North American Free Trade Agreement*, at 2-5, FORUM on Binational Dispute Resolution Procedures Under the U.S.-Canada Free Trade Agreement, held by the Administrative Conference of the United States (Apr. 23, 1991).

their responsibilities under the Chapter Nineteen dispute resolution procedures.

CONCLUSION

The inclusion of dispute resolution procedures, as tailored, from the existing Canada-U.S. FTA into the NAFTA would address and mitigate the political, cultural and legal differences affecting the United States and Mexico in their trade relations. These procedures would be specifically designed to verify and secure the rights and obligations of a FTA. The creation of a trilateral Trade Commission and the use of a dispute settlement panel of experts would encourage initial notification and consultation on trade problems, preempt the development of trade disputes and expedite the resolution of disputes that do occur between the United States and Mexico on an equal basis. In particular, the provisions for binding dispute settlement arbitration panels in antidumping and countervailing duty disputes would promote predictability, consistency, objectivity, and neutrality in the application of trade laws, removing a major source of discord in trade relations.

Under a free trade agreement that includes efficient and effective dispute resolution procedures, the United States and Mexico could internationally recognize and cement their interdependent trade relations. No longer would Mexico and the United States be distant neighbors, but they would become equal partners in a regional trading bloc formulated for the mutual benefit of both parties.

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