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A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement

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A CANADIAN PERSPECTIVE ON U.S. ADMINISTERED PROTECTION AND THE FREE TRADE AGREEMENT

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I. INTRODUCTION

The negotiation of the Canada-United States Free Trade Agreement over the 1986-1988 period builds upon over 130 years of bilateral trade and investment policy. With Canada's economy being roughly one-tenth the size of that of the United States, the negotiation of commercial arrangements to govern the bilateral trade and investment relationship assumes great importance in the smaller partner. The size asymmetry means that Canada, as the smaller nation, needs to secure a rules-based system rather than a power-based system in its trading relationship with the United States, which accounts for nearly 80% of its exports. Canada is also the largest trading partner of the United States, taking about 25% of all United States exports.

The innovative legal framework of the new bilateral free trade agreement, signed by President Reagan and Prime Minister Mulroney on January 2, 1988, is of significant interest to lawyers as well as economists. There are important extensions of the concept of national treatment and right of establishment that will affect investment decisions by businesses in both the goods and service sectors.[1] There are also new dispute settlement procedures and legal processes to be implemented; these can have major implications for the United States-Canadian commercial relationship. In this paper the trade-related measures will be described in detail.

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1. The principle of national treatment is defined in article III of the General Agreement of Tariffs and Trade. It provides that imported goods be accorded treatment, in terms of internal taxes, laws and regulations no less favourable than that accorded to domestic goods. The Right of Establishment extends this principle to investment. Under this rule foreign investors are given the right to establish and acquire firms on the same basis as nationals. *See* D. STEGER, A CONCISE GUIDE TO THE CANADA-UNITED STATES FREE TRADE AGREEMENT 111, 120 (1988). This paper will deal principally with market access issues related to trade and not with investment. Investment issues have been discussed in A. RUGMAN, TRADE LIBERALIZATION AND INTERNATIONAL INVESTMENT (Economic Council of Canada Working Paper No. 347, 1988).

II. Bilateral Trade and Investment Policy: Searching for Free Trade

The first attempt at bilateral free trade between Canada and the United States was the Reciprocity Treaty of 1854.[2] This treaty lasted until 1866 when it was abrogated by the United States.[3] The termination of the treaty resulted in a loss of ready access to the U.S. market for Canada. This was a factor leading to the confederation of some of these provinces into the Dominion of Canada in 1867. Successive Canadian governments attempted to renegotiate a free trade treaty, for example, in 1869, 1871 and 1874, but these attempts were turned aside in Washington.[4] In 1879, partly in response to these failures, Canadian Prime Minister John A. Macdonald introduced a protectionist "National Policy."[5]

In 1911, free trade seemed to have been achieved when Canadian Prime Minister Sir Wilfrid Laurier and U.S. President Taft concluded an agreement.[6] However, this "reciprocity" treaty failed to be implemented when the ruling Canadian government was defeated in a general election. The issue became one of economic nationalism and Canadian sovereignty versus free trade and efficiency. The debate is symbolized by the rallying cry of the victorious opposition to free trade, "No truck nor trade with the Yankees!" The Canadian Manufacturers' Association, which supported the tariff protection of

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2. This treaty actually involved the six British North American provinces of Canada (present day Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland). It provided for free trade in primary products and for the reciprocal use of the Atlantic fisheries and St. Lawrence-Great Lake Waterways. *See* Granatestein, *Free Trade Between Canada and the United States: The Issue That Will Not Go Away*, in The Politics of Canada's Economic Relationship with the United States 13-14 (D. Stairs & G. Winham eds. 1988).

3. The Americans chose not to renew the ten-year agreement partly because of increased Canadian duties on manufactured goods under the Cayley-Galt tariffs of 1858-1859. The U.S. government claimed that these tariffs violated the spirit of the Treaty. Although the Treaty had covered mainly primary products, the Canadian manufacturing tariffs were viewed by the Americans as limiting the expansion of its coverage to manufacturing products in successive rounds. Some American leaders were also upset with Great Britain for aiding the confederate states during the American Civil War. *See* S. Lea, A Canada-U.S. Free Trade Arrangement: Survey of Possible Characteristics 86-87 (1963).

4. *See* J. Whalley, C. Hamilton & R. Hill, Canadian Trade Policies and the World Economy 35 (1985) [hereinafter Whalley, Hamilton & Hill].

5. The National Policy used tariffs to protect the nascent Canadian manufacturing industry of central Canada from cheaper U.S. products which enjoyed economies of scale. This "infant industry" argument for tariffs remained popular in Canada until recent years. Other aspects of the National Policy included support for the construction of a national railway and active support for western settlement. *See* S. Lea, *supra* note 3, at 88.

6. The 1911 agreement consisted of four schedules. Schedule A provided for reciprocal trade for some goods; Schedule B provided lower duties on some goods; and Schedules C and D dealt with tariff reductions on specific goods from each country. *See id.* at 89.

the National Policy, played a major role in defeating the 1911 agreement. With the failure of this agreement, both countries were plunged into the Great War and the subsequent period of protectionism.[7] Despite the protectionist atmosphere, geographic and economic factors continued to push Canada towards closer economic ties with the United States.

In 1910 the U.S. share of total foreign investment (portfolio and direct) in Canada was 19%, but by 1926 this had risen to 53%. Over the same period the British share declined from 77% to 44%. The U.S. share of foreign direct investment (FDI), i.e., assets which are controlled through equity ownership, in Canada was 79% in 1926, and in successive years accounted for over 80% of all foreign investment.[8] Clearly, the Canadian economy was becoming more integrated into a North American market for trade and investment.[9] By 1935 these economic links were further strengthened as the tide of protectionism began to ebb when U.S. Secretary of State Cordell Hull negotiated tariff reductions with Canada and repeated this in 1938.[10] These tariff reductions marked an end to the protectionist thinking in government in both Canada and the United States. The new Canadian policy was to integrate the Canadian economy into the world economy.

Today's bilateral free trade agreement is an extension of these last fifty years of trade liberalization. The Canadian and U.S. commitment to free trade was embodied in the key roles played by both nations in the formation of the General Agreement on Tariffs and Trade (GATT) in 1947. In 1948 a potential trade agreement with the United States was rejected by the Canadian Prime Minister Mackenzie King.[11] Despite the rejection of this bilateral agreement,

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7. In 1922, after the imposition of the Fordney-McCumber tariffs, Canada followed with tariff increases. Similarly, after the passage of the Smoot-Hawley tariffs of 1930, Canada raised its tariffs with the United States. *See* WHALLEY, HAMILTON & HILL, *supra* note 4, at 36.

8. In recent years the importance of U.S. direct investment has decreased. As portfolio investment from Europe and Japan has increased, the ratio of U.S. FDI to total foreign investment has decreased to its 1933 level of 26%. U.S. FDI, however, still accounts for over 70% of all foreign direct investment in Canada. *See* STATISTICS CANADA, CANADA'S INTERNATIONAL INVESTMENT POSITION (Series No. 67-202, 1986) (FDI data for 1982-1985); STATISTICS CANADA, CANADA'S INTERNATIONAL INVESTMENT POSITION (Series No. 67-202, 1985) (FDI data for 1981-1984); STATISTICS CANADA, CANADA'S INTERNATIONAL INVESTMENT POSITION (Series No. 67-202, 1979) (FDI data for 1977). Data for 1986 were obtained directly from Statistics Canada, Balance of Payments Division.

9. In 1926 the U.S. share of Canadian merchandise exports was 37%. For data sources, see *supra* note 8.

10. Cordell Hull used the Reciprocal Trade Agreements Act of 1934, passed as part of the Roosevelt "Good Neighbor Policy," to negotiate the agreements with Canada. *See* Granatestein, *supra* note 2, at 30.

11. The putative 1948 agreement allowed for free entry of goods across both sides of the border after a phase-in period of five years for adjustment. *See* WHALLEY, HAM-

the policy of liberalizing trade through the GATT continued. In 1965 the two countries concluded an agreement for managed trade in the largest manufacturing sector, the automobile industry.[12]

Evidence of the success of the fifty-year policy of trade liberalization can be gained by an analysis of relevant trade and investment statistics. Between 1945 and 1985 the ratio of duties collected to total imports fell from 11% to 4%.[13] In terms of trade flows, the U.S. share of Canadian merchandise exports rose from 33% in 1945 to 76% in 1987. However, over the same period the U.S. share of FDI fell somewhat from 85% to 73% in 1987.[14]

The path towards closer bilateral economic links has led to political problems in Canada. Beginning in the early 1960's political concern over the extent of FDI in Canada was expressed by a movement towards Canadian economic nationalism as there was an increase in the extent of foreign, particularly U.S., control of the Canadian economy. For example, over half of Canada's manufacturing industry was foreign-owned throughout the last twenty-five years, and virtually the entire oil industry was foreign owned until very recently.[15] The concern over economic domination was popularized by several government studies[16] and culminated with the creation of the Foreign Investment Review Agency (FIRA) in 1973.[17] In 1980

ILTON & HILL, *supra* note 4, at 37; Granatestein, *supra* note 2, at 36-43.

12. The Auto Pact allowed for duty-free trade in automobiles and parts between the two countries, subject to local content and production safeguards. The U.S. auto firms producing in Canada, first, have to meet a target of 60% value-added on cars sold in Canada and, second, produce approximately as many cars in Canada as they sell in Canada. *See* Wonnacott, *The Auto Pact: Plus or Minus*, in FREE TRADE: THE REAL STORY 54-65 (J. Crispo ed. 1988). These safeguard targets have been easily met in recent years, partly due to the competitive nature of the Canadian auto sector and a favourable exchange rate.

13. *See* CAN. DEP'T OF FINANCE, THE CANADA-U.S. FREE TRADE AGREEMENT: AN ECONOMIC ASSESSMENT 16 (1988).

14. For data sources, see *supra* note 8.

15. *See* STATISTICS CANADA, CORPORATIONS AND LABOUR UNIONS RETURNS ACT (Series No. 61-210, Dec., 1987) (Tables 1-4: 1985); STATISTICS CANADA, CORPORATIONS AND LABOUR UNIONS RETURNS ACT (Series No. 61-210, Apr., 1987) (Table 4: 1977-1984); STATISTICS CANADA, CORPORATIONS AND LABOUR UNIONS RETURNS ACT (Series No. 61-210, Feb., 1979) (Table 3.3: 1970-1976).

16. These studies, which occurred during the Trudeau era, were WATKINS, FOREIGN OWNERSHIP AND STRUCTURE OF CANADIAN INDUSTRY (1968) (the Watkins Report); WAHN, ELEVENTH REPORT TO THE HOUSE OF COMMONS OF THE STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENCE RESPECTING CANADA-U.S. RELATIONS (1970) (the Wahn Report); and GRAY, FOREIGN DIRECT INVESTMENT IN CANADA (1972) (the Gray Report). For a critical analysis of this issue, see A. RUGMAN, MULTINATIONALS IN CANADA: THEORY, PERFORMANCE AND ECONOMIC IMPACT 121-31 (1980).

17. The Foreign Investment Review Agency (FIRA) was empowered to review mergers, acquisitions, and new establishments by "non-residents." The threshold for review was set at assets over Can.$250,000 and sales over Can.$3,000,000. *See* A. SAFARIAN, FIRA AND FIRB: CANADIAN AND AUSTRALIAN POLICIES ON FOREIGN DIRECT INVESTMENT (1985). The FIRA based its acceptance of each case on the test of "signif-

additional performance requirements were added to the review process. In 1982, however, the United States challenged the local procurement and export content provisions of the FIRA regulations before a GATT panel. The GATT panel found that the procurement requirements were unfair but allowed the export requirements to remain.[18]

In 1981 another interventionist policy, the National Energy Policy (NEP), was implemented by the Trudeau government. This policy aimed at increasing Canadian control of the energy sector to 51%. Under the administration of this policy, the FIRA acceptance rates in the energy field over 1980-1982 fell to 18% for acquisitions and to 53% for new ventures.[19] Although foreign control of the oil industry was reduced, there was a high price to pay. Between 1980 and 1985 these policies led to a net capital outflow exceeding Can.$15 billion.[20] This contributed to a longer recession in Canada than in the United States. Recognizing these economic inefficiencies in 1984, the newly elected government of Brian Mulroney replaced FIRA with Investment Canada[21] and abandoned the NEP. The Canadian Manufacturers' Association also ended its century-old support of tariffs and government regulation and in 1983 called for a bilateral free trade agreement.

Despite periodic deviations due to the cyclical political clout of the economic nationalists, Canadian policy has recognized the eco-

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icant benefit" to Canada, and final decisions were made by the Cabinet on the advice of the Minister. *See* Rugman, *Canada: FIRA Updated*, 17 J. WORLD TRADE L. 352 (1983).

18. Canada accepted the GATT panel's findings and amended FIRA's procedures to comply with it. *See* A. SAFARIAN, *supra* note 17, at 51. In testing for significant benefit to Canada, FIRA examined the performance of the foreign investor in terms of employment, resource processing in addition to domestic sourcing (local content), and exports. The foreign investment was also assessed for the degree and significance of Canadian participation in the enterprise and for the contributions to research and development. *Id.* at 26.

In 1980 the government announced its intention to initiate periodic performance reviews of the larger existing foreign-owned firms. This proposal, however, was never really implemented due to the response to the National Energy Policy (NEP) and the GATT challenges to the export and local content performance requirements. *See* A. SAFARIAN, GOVERNMENT AND MULTINATIONALS: POLICIES IN THE DEVELOPED COUNTRIES 19 (1983).

19. See A. RUGMAN, MULTINATIONALS AND CANADA-U.S. FREE TRADE (forthcoming in 1989).

20. *Id.*

21. Investment Canada is designed to attract foreign investment to Canada, rather than to deter it, as occurred under FIRA. As of 1985 new establishments are no longer subject to review and acquisitions are tested for "net benefit" to Canada rather than the harder test of significant benefit. Since Investment Canada was formed, few foreign acquisitions have been denied. *See id.* It should also be noted here that the Investment Canada Act maintains the same performance requirements. The test, however, has changed from "significant" to "net" benefit to Canada.

nomic benefits of a gradual economic integration into a North American market for trade and investment. This trend is now reflected in the increasing amount of Canadian direct investment in the United States. Between 1975 and 1985 such Canadian investment has been growing at three times the rate of similar U.S. investment in Canada. By the early 1990's Canadians will have as much FDI in the United States as Americans have in Canada.[22]

The historic path towards the current free trade agreement is built on the economic and geographic realities of Canada and the United States. As explained in elementary textbooks in international economics, policies that reduce the scope for free trade and investment flows between neighbouring countries are inefficient. The economic interests of both countries are served by the reduction of barriers to trade and an open door for foreign investment. The Canada-United States Free Trade Agreement recognizes the economic realities of the existing degree of North American integration and provides a legal framework to enhance the prosperity of citizens of both nations.

Given this historical review of the nature and extent of bilateral economic integration, it is now necessary to develop in detail a specific Canadian rationale for the Free Trade Agreement. Since the United States is the largest market for Canadian exporters, Canadians have become very concerned over the last few years with an increase in the use of U.S. trade remedy law actions against them. Canadian industries, especially in resource-based sectors, such as fishing, forestry and agriculture, have experienced the application of U.S. countervailing and anti-dumping penalties and investigations. Anti-dumping penalties are additional duties imposed by an importing country when the price of the import is less than the "normal" price charged in the exporter's domestic market, such that it causes material injury to the importer's domestic industry. Countervailing penalties are duties imposed by an importing country to offset government subsidies from the exporter's country that cause material injury to the importer's industry.[23] The extensive use of these trade remedy laws led the Canadian government to insist on secure access to the U.S. market as an integral part of the Free Trade Agreement. It is to this Canadian perception of the rise of U.S. "administered"

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22. *See* A. RUGMAN, OUTWARD BOUND: CANADIAN DIRECT INVESTMENT IN THE UNITED STATES 4 (1987).

23. GATT authorizes the use of anti-dumping and countervailing duties only when material injury to the domestic industry has been established. The term should be distinguished from serious injury which is a more stringent requirement to authorize the use of safeguard emergency actions. *See* D. STEGER, *supra* note 1, at 104, 108, 116. Safeguards and emergency actions refer to duties or import quotas applied to fairly traded imports that cause or threaten serious injury to a domestic industry. The imposition of these measures are authorized under article XIX of the GATT. *See id.* at 124.

protection that we now turn.

III. U.S. ADMINISTERED PROTECTION

The Canadian perception is that over the last six years the United States has developed a system of "administered" protection.[24] American producers are believed to be using the countervailing duty and anti-dumping provisions of U.S. trade law as a type of competitive strategy aimed at foreign corporations. The quasi-judicial nature of the process of U.S. trade law hearings seems to be biased in favour of U.S. plaintiffs and against rival importers.[25] The operation of the system is decentralized and its use is often in conflict with official U.S. trade policy.

In defence of such regulatory trade measures, the argument is made that the United States is merely applying the GATT principle that actions can be taken against export subsidies which cause injury to American industry.[26] Yet recent changes in the administra-

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24. As used here, "administered protection" is a generic term for the application of penalties against imports justified by a quasi-judicial process in which domestic petitioners can seek legal remedies against allegedly subsidized foreign products. The penalties imposed are a form of protection which is contingent upon the application of trade remedy laws by government. Agencies created by statute investigate and determine injury and sanctions to be imposed in the areas of countervailing duty, anti-dumping, and other trade-related actions. The concept of "contingent" protection was first used by Rodney Grey, the Canadian trade ambassador at the Tokyo Round of the GATT, at which the GATT principles governing the use of such actions were determined. *See* R. GREY, UNITED STATES TRADE POLICY LEGISLATION: A CANADIAN VIEW 8 (1982).

25. For example, under section 702(b)(1) of the Trade Agreements Act, the petition is required to be filed "on behalf of" a U.S. industry. Instead of the petitioner having to prove this, the Commerce Department relies on petitioner's representations that it has, in fact, filed on behalf of the domestic industry, until it is affirmatively shown that this is not the case. This situation shifts the burden of proof from the accusing party to parties who, although they have neither the inclination nor the desire, are drawn into a case due to one or a few companies filing a petition with the Department of Commerce.

26. Dr. Charles Colgan has defended the American process:

> The American process is consistent with mutually agreed upon rules of adhesion to the General Agreement on Tariffs and Trade (GATT). The private access to the government that the Canadians complain about is part of those rules. There is review of the decisions, albeit through a national process. There is the opportunity to take the decision to GATT, although such a provision is obviously not binding.

Alternative Dispute Resolution in International Trade and Business, 40 MAINE L. REV. 42 (1988) (statement of Dr. Colgan). G. Hufbauer and J. Shelton Erb also defend the American system of administered protections:

> While the system is far from perfect, the absence of meaningful discipline would stimulate a competitive race-to-the-bottom in the realm of subsidies; country-by-country exceptions would prove unmanageable; and a less refined approach to "unfair" trade problems would, in the end, prove more protective than the present cumbersome mechanisms.

G. HUFBAUER & J. ERB, SUBSIDIES IN INTERNATIONAL TRADE 17 (1984).

tion of U.S. trade law procedures have led Canadians to believe that there is now a broader definition of subsidy. This has been used to attack foreign domestic subsidies and internal transfer payments in nations such as Canada. The new dispute settlement mechanisms of the Canada-United States Free Trade Agreement are considered to be a means of shielding Canadian business from some of the negative impacts of U.S. trade law. Whether this is true remains to be seen, but it was an important incentive for Canada to pursue the free trade negotiations. The economic and legal implications of this Canadian perception now need to be explored.

A. The Rise of Administered Protection.

The last fifty years of economic growth have been fostered by the gradual liberalization of trade, especially among members of the triad powers: the United States, the European Community and Japan.[27] Smaller nations like Canada and the newly industrialized nations have also prospered due to the enhanced global trading system. If postwar trade liberalization is being replaced by increasing protectionism, it presents new challenges to corporate planners. The methods by which the strategic management teams of corporations respond to changes in trade policy will become a key factor in the determination of their profits, survival, and growth.

The most significant environmental factor now facing corporate planners is trade policy. In particular, the new type of administered protection has become of great importance, especially in the United States. Under U.S. trade law, domestic producers can launch actions to have countervailing duty and antidumping investigations made against rival foreign producers. In addition, U.S. firms can request more general investigations when their industries are perceived to be suffering from import competition. Since the Trade Agreements Act of 1979[28] made this type of process protection possible, there have been nearly 300 separate countervailing duty cases and close to 350 anti-dumping cases in the United States.[29] An increasing proportion of these, now about 70%, results in positive preliminary determinations of "material injury," and a substantial proportion, now 30%, results in penalties being imposed to offset alleged foreign subsidies.

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27. *See* CAN. DEP'T OF FINANCE, *supra* note 13, at 3.

28. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§ 2501-2582 (1982 & Supp. IV 1986)), *reprinted in part in* G. HUFBAUER AND J. ERB, *supra* note 26, at 195-211 app. E.

29. These figures are derived from information provided by the U.S. International Trade Commission, Annual Reports, 1980-1986. *See* INT'L TRADE COMM'N, ANN. REP. (1986); INT'L TRADE COMM'N, ANN. REP. (1985); INT'L TRADE COMM'N, ANN. REP. (1984); INT'L TRADE COMM'N, ANN. REP. (1983); INT'L TRADE COMM'N, ANN. REP. (1982); INT'L TRADE COMM'N, ANN. REP. (1981); INT'L TRADE COMM'N, ANN. REP. (1980). During 1980-1986 there were at least 281 countervail and 348 antidumping cases reported by the ITC.

This aggressive use of U.S. trade law procedures by U.S. companies has created great difficulties for corporations exporting to the United States.

B. The Nature of U.S. Trade Law.

United States trade policy, as it exists today, has little to do with the principles of free trade, despite the commitment of the executive branch to the rhetoric and ideology of free market values. Instead, American trade policy is determined in an uneasy alliance between the Administration and Congress, where both parties need to respond to powerful sectoral interests. In order to ensure that the administration of American trade law reflects such a partnership, a bureaucratic structure has evolved that is supposed to provide an impartial, technical appraisal of petitions from industries for trade "remedies." The two principal organizations that are responsible for carrying out this action are the International Trade Commission (ITC) and the International Trade Administration (ITA) in the Department of Commerce.

The ITC is empowered to test for "material injury" and to recommend relief for American producers from "unfair," e.g., subsidized imports in countervail and antidumping cases.[30] It is also responsible for the determination of section 201 "Escape Clause" or "fair" trade actions against foreign producers and for recommending remedies for American industries suffering from import competition.[31] In terms of the bureaucratic process of compiling facts, undertaking analysis and placing reports on file, the ITC is the key player in the current administration of U.S. trade law.[32]

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30. 19 U.S.C. § 1671(a)-(b) (1982 & Supp. IV 1986).

31. The ITC also carries out a number of investigations whose results are submitted to the President for action. Under section 203(i) of the 1974 Trade Act, a review of all section 201 actions is carried out once every twelve-month period. Section 22 of the Agricultural Adjustment Act requires the ITC to investigate complaints of foreign acts which materially interfere with programs of the Department of Agriculture. Section 603 of the 1930 Tariff Act allows for the instigation of preliminary investigations to determine if a full section 337 (mainly patent infringements) investigation of unfair import practices is warranted. *See* A. RUGMAN & A. ANDERSON, ADMINISTERED PROTECTION IN AMERICA 10-20 (1987).

32. The ITC is also empowered to carry out general investigations under section 332 of the 1930 Tariff Act. In 1987 there were 14 investigations completed and another 23 pending. A new addition to the 1984 Trade and Tariff Act is section 305, which requires the Trade Remedy Assistance Office of the ITC to act as a trade information clearing house, as well as to provide information concerning available remedies and procedures for obtaining relief to anyone who requests information on companies that import into the United States. Investigations under section 332 and the supplying of information under section 305 may, in fact, lead to subsequent trade actions and practices. This occurred with the hogs and pork countervail action launched against Canada in 1984 resulting in a duty on live swine, *see* Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 24,097 (Int'l Trade Admin. 1985), and the groundfish countervail case in 1985-1986 which resulted

The Trade Agreements Act of 1979 outlines the basis of how the ITC is supposed to go about reaching its decision of "material injury" in a trade law case.[33] The Act specifies that the ITC is to consider a number of economic factors: whether the volume of imports is significant; whether the price of the imported products is significantly undercutting or depressing the price of "like" products in the United States; and what impact the imports have on the affected industry.[34] While "not [being] limited" in its choice of factors to consider, the ITC "shall" consider all relevant economic factors which have a bearing on the state of the industry, including output, sales, market share, profits, productivity, return on investment, utilization of capacity, factors affecting domestic prices, actual and potential effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital and investment.[35]

The Commerce Department's ITA is responsible for substantiating charges of unfair pricing and subsidization in dumping and countervailing cases, respectively, and for assessing the value of the subsidy in a countervailing case and of a custom duty in a dumping case.[36] As part of the executive branch of government, the Commerce Department is accountable to the President. However, the President himself has no direct responsibility for countervailing duty and antidumping cases. He is only involved in decisions on voluntary export restraints, import quotas, and other trade remedies arising from the trade practices of foreign nations.

C. The Application of U.S. Trade Remedy Law.

Perhaps the area of greatest concern about U.S. protectionist laws in the last few years has resulted from the application of section 201 of the Trade Agreements Act of 1979, the "Escape Clause," to cases. In particular the steel, footwear, and apparel disputes affected many nations. A tariff of 35% for five years imposed in 1986 against the cedar shakes and shingles industry of British Columbia generated much discussion and retaliatory tariffs by Canada. Yet, in fact, the use of section 201 actions is quite rare. In 1985 there were two cases completed and in 1986 there were five cases completed. Over the 1979 to 1986 period there were twenty-two cases in total.[37]

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in a 5.82% duty on whole fresh fish. *See* Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (Int'l Trade Admin. 1986). In fact, under the 1984 Trade and Tariff Act all agencies charged with administering U.S. trade law have been told to provide technical assistance if it is required by the petitioning party. *See* A. RUGMAN & A. ANDERSON, *supra* note 31, at 23.

33. *See* G. HUFBAUER & J. ERB, *supra* note 28, at 209.

34. *See id.*

35. *See id.*

36. *See supra* note 28.

37. *See* INT'L TRADE COMM'N, ANN. REP. (1986); INT'L TRADE COMM'N, ANN. REP. (1985); INT'L TRADE COMM'N, ANN. REP. (1984); INT'L TRADE COMM'N, ANN. REP.

The use of the "Escape Clause," and also section 301 of the Trade Agreements Act of 1979, by American producers to directly attack foreign producers is generally rarer than the use of antidumping or countervailing duty procedures, since the President, or more generally the Administration, has the ability to overrule or overturn these actions.[38] In contrast, once injury is found and the duty assigned by the ITC and ITA, a tariff or duty becomes automatic in a countervail or antidumping case. The President is not involved. For this reason the American producer often finds it preferable to file a countervail or antidumping action with the ITC or the ITA, rather than risk any international political compromise when the President becomes involved with foreign interests and political considerations begin to temper protectionist desires. The proliferation of American trade law actions has been most noticeable in the areas of countervail and antidumping.

D. Canada's Experience with U.S. Protectionism.

As further evidence of the escalation of American trade law practices, let us consider the number of ITC investigations directed towards Canada, the largest trading partner of the United States, with only a modest bilateral trade surplus compared to Japan and some European nations. Between 1980 and mid-1987 at least twenty antidumping investigations and eleven countervailing duty cases were brought against Canadian exporters by American producers. In addition, between 1980 and mid-1987 the ITC was petitioned to rule on thirteen safeguard cases.[39]

As of September 1987, there were nineteen Canadian antidumping measures in effect and seven such U.S. measures.[40] There is only one

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(1983); INT'L TRADE COMM'N, ANN. REP. (1982); INT'L TRADE COMM'N, ANN. REP. (1981); INT'L TRADE COMM'N, ANN. REP. (1980).

38. *See* Horlick, *The Canada-U.S. Trade Negotiations and the U.S. Trade Laws: Possibilities for Reform*, in CANADA-U.S. TRADE NEGOTIATIONS 14 (1986).

39. *See* INT'L TRADE COMM'N, ANN. REP. (1986); INT'L TRADE COMM'N, ANN. REP. (1985); INT'L TRADE COMM'N, ANN. REP. (1984); INT'L TRADE COMM'N, ANN. REP. (1983); INT'L TRADE COMM'N, ANN. REP. (1982); INT'L TRADE COMM'N, ANN. REP. (1981); INT'L TRADE COMM'N, ANN. REP. (1980).

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Table 1

Contingent Protection Measures in Effect in Canada and the United States as of September 1987 (percentiles)

Canada	Tariff Measure	United States	Tariff Measure
Anti-dumping			
Photo albums	41.6	Cholide chlorine	9.1
Charcoal briquettes	60.5	Red raspberries	2.4

Canadian countervail measure in place, but there are five such U.S. measures. Similarly, while there is one Canadian safeguard measure in place, there are two U.S. safeguard measures in effect. At first glance it appears that the United States has been less protectionist than Canada. Some simple analysis, however, demonstrates that this is a misperception.

There have been as many investigations undertaken by Canada as by the United States (forty-four) between 1980 and mid-1987. Over

Graphite electrodies	18.0	Salted codfish	16.3
Porcelain insulators	13.6	Iron construction castings	10.2
Electric motors	12.0	Oil country tubular goods	19.4
Potatoes	23.0	Brass sheet and strip	6.0
Vehicle washing equipment	26.0	Fresh cut flowers	0.6
Sodium carbonate	2.0		
Nickel and nickel alloy pipe	22.1		
Abrasion resistant pipe	18.0		
Plate coil	17.8		
Oil and gas well casing	14.0		
Stainless steel pipe	22.0		
Band saw blades	36.2		
Gas-powered chain saws	33.3		
Yellow onions	38.6		
Metal storage cabinets	n.a.		
Frozen pies and dinners	n.a.		
Tile backer board	n.a.		
Countervail			
Corn	65.0	Swine	20.5
		Oil country tubular goods	0.7
		Fresh Atlantic groundfish	6.8
		Softwood lumber	15.0
		Fresh cut flowers	0.6
Safeguard			
Women's and girls' footwear	10.6	Wood shakes and shingles	35.0
Pending final decision		Special Steel	3.0
(Anti-dumping)			
Fertilizer equipment	8.0	Colour TV tubes	n.a.
Recreational vehicle doors	n.a.	Potash	36.6

CAN. DEP'T OF FINANCE, *supra* note 13, at Table A.2.2.

the period Canada has acted in response to these investigations twenty-six times, but the United States has acted only nineteen times.[41]

The United States acted in six out of eleven (55%) of the countervail cases against Canada. This represented Can.$4.2 billion of Canadian exports in 1986. The one Canadian countervail case upon which action was taken represented Can.$9 million. Similarly, the United States took action against Canadian businesses in four out of thirteen safeguard investigations (31%) over the period. However, the value of these Canadian exports was Can.$1.8 billion in 1986. The two Canadian cases represented only Can.$19 million of imports from the United States.

In the antidumping arena, Canada initiated more than twice as many investigations and actions as the United States. The nine American cases in which action was taken represented Can.$295 million, an average of Can.$33 million per case. The twenty-three Canadian actions represented Can.$375 million of imports from the United States, or an average of Can.$16 million per case. Thus the

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Table 2

Summary of Bilateral Contingent Protection Measures Taken by Canada and the United States from 1980 to Mid-1987

	Measures taken by Canada		Measures taken by the United States	
	Number of cases	Value of imports from the U.S. in 1986 ($ millions)	Number of cases	Value of exports to the U.S. in 1986 ($ millions)
Countervail Cases				
Investigations	1		11	
Action Taken	1	9	6	4,172
Anti-dumping Cases				
Investigations	41		20	
Action Taken	23	375	9	295
Safeguard Cases				
Investigations	2		13	
Action Taken	2	19	4	1,758
Total Cases				
Investigations	44		44	
Action Taken	26	403	19	6,225

CAN. DEP'T OF FINANCE, *supra* note 13, at Table 3.

average value of each U.S. anti-dumping case is over twice the value of the average Canadian case.

Certain antidumping, countervailing duty, and other actions aimed at producers in Europe, Japan, and elsewhere also effect Canadian exporters since the penalties are imposed on all nations trading with the United States. This occurred in some of the cases involving restrictions placed on steel imports to the United States. In addition, a much higher proportion (100%) of the preliminary ITC findings in the 1985-1986 period have gone against the importer, sometimes leading to provisional duties being imposed (and bonds posted) for several months by the U.S. Commerce Department before a final determination was made.[42]

E. The Economics of U.S. Trade Law Procedures.

It appears that there is an escalating trend towards the use of the ITC procedures by American industry, leading to the erection of a series of precedents in which material injury is being voted against Canadian exporters based more on the existence of a comparative advantage in resource-based products rather than on any serious analysis of subsidization of exports. This is illustrated by the fact that only subsidies paid to foreign producers are evaluated. The subsidies received by American producers are not considered under current procedures, even though it would make more economic sense to examine the net difference in subsidies.[43] Due to these failings, American producers are increasingly able to win actions.

Furthermore, the ITA and ITC do not test for linkage between subsidies and injury; instead, they are required by U.S. law to investigate these issues separately, an absurd situation when economic tests are being used. Although American trade law exists for a mixture of political and economic reasons, the concept of injury to American producers inflicted by subsidized imports is an economic one. Furthermore, the ITC and ITA are required to utilize economic tools of analysis in their work, so their performance should be examined on economic grounds.[44] From the viewpoint of the overall economic welfare of American consumers, the country's laws are inefficient, for they restrict trade and reduce consumer welfare.

If, in fact, the ITC and ITA are independent agencies, separate from the political process, they should be able to pass and administer trade action from all proponents who believe that they have been wronged by a trade-related injustice. This, however, is not the case since consumer interests and considerations of economic efficiency are largely ignored in the "technical" administration of American

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42. *See supra* note 29.

43. For a more detailed analysis of this issue, see A. RUGMAN & A. ANDERSON, *supra* note 31, at 46.

44. *See generally id.* at 1-55.

trade law.[45] Furthermore, the ITC and ITA are restricted to investigations and penalty actions against foreign producers. They cannot explore the competitiveness of domestic industry, nor remove trade barriers, other than those which they have put in place themselves. They often do not hear petitions by American consumers, processors and producers who want cheaper imports and easier access to foreign-made inputs. In this regard the ITC and ITA, by their very nature, are protectionist bodies.

In practice, therefore, the administration of U.S. countervail actions is far removed from the economics-based tests outlined in the GATT Subsidies Code. Virtually all that is required for the ITC to find material injury and the ITA to assess a duty (in separate investigations) is evidence of an increase in imports; little cost, price, productivity or other performance data are studied, especially by the ITC, and little explanation is advanced by the ITA to substantiate its rulings.[46]

The argument is similar to one raised previously against the administration of policy in Canada's Foreign Investment Review Agency (FIRA). This agency was responsible, in the 1973-1984 period, for screening foreign investment, mostly American, using economic criteria on a cost-benefit basis to test for a significant net benefit to Canadians. In general, this was easy enough to do, since the criteria established by the Government of Canada were very broad in nature, including inter alia, provision of jobs, increased resource processing, enhanced technological development, beneficial impact on competition, and increased exports. Yet some 10% of investments were not approved and the rejection rate doubled in 1980-1981, decisions which may be attributed to the agency bending to political pressures.[47] In the same way, "material injury" in the ITC is a technical concept which has taken on broad connotations in order to please the ITC's political constituency in Congress. Just as

45. The very existence of institutions where American firms can bring their grievances about "unfair" trade practices encourages illegitimate cases where uncompetitive firms (in declining industries or those who lack comparative advantage) can petition for protection. *See* Finger, Hall & Nelson, *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 3 (1982).

46. Rugman and Anderson examine in detail the investigations of various cases carried out by the ITC and the ITA. These include fresh Atlantic groundfish; hogs and pork; softwood lumber; potatoes; and other cases involving Canada. Their findings were that: (1) there is virtually no connection between the alleged subsidies and determination of injury; (2) key economic factors are frequently ignored in ITC determinations of "material injury"; and (3) most of the economic and financial data collected by the ITC to reach its decisions are insignificant, due to extremely poor response rates on questionnaires mailed out by the ITC to collect data. *See* A. RUGMAN & A. ANDERSON *supra* note 31, at 56-87. *See also* Rugman & Anderson, *A Fishy Business: The Abuse of American Trade Law in the* Atlantic Groundfish *Case of 1985-1986*, 13 CAN. PUB. POL'Y 152 (1987).

47. *See* A. RUGMAN, *supra* note 16, at 123-131; Rugman, *supra* note 17.

the uncertainty surrounding FIRA made it a substantial barrier to foreign investment, the ITC is creating similar barriers to foreign firms, both Canadian and non-Canadian, exporting to the United States.

Today, American producers face few risks in bringing actions against a foreign firm or industry. Their own costs and productivity will not be rigorously examined and American subsidies cannot be considered by the ITC. Although the ITC and ITA appear to be technical trade bodies, their mandate and performance actually ignore economic principles. As further evidence, consider several observations supporting this point. First, questions must be raised about the management and administration of the ITC. The six ITC commissioners are all political appointees answerable to Congress. The tradition of appointing independent academics with economic or legal expertise in the trade field, as well as experts on the staff of the commission, was not followed at all during the period 1968 to 1983.[48] The ITC commissioners are now subject to clientele lobbying by U.S. domestic producer groups, though the manner in which the interests of these groups is exercised is in the nature of congressional politics. The inevitable conclusion is that the work of the ITC has little economic justification. Some would argue that the ITC has a political justification and that it may even act as a lightning rod to defuse the even greater protectionist tendencies of Congress. This argument ignores the fact that the ITC uses economics-based criteria to conduct its investigations, but the record shows that it does not use economics in a scientific manner.

Another of the key problems which bedevils current American trade law is the great legal costs of fighting ITC/ITA actions. In most instances, they are usually over Can.$1 million for a major countervail case, such as the *Atlantic Groundfish*[49] case of 1985-86, and can go up to Can.$5 million, as in the *Softwood Lumber*[50] case of 1983. The U.S. plaintiffs also have legal costs, but the U.S. agencies bear most of the cost of the investigations launched by the plaintiffs.

To these direct legal costs must be added the indirect costs of foregone company time. Usually the senior executives of the foreign corporation are involved in preparation of the defence in an ITC/ITA investigation. For up to a year, or for several consecutive years

48. R. BALDWIN, THE POLITICAL ECONOMY OF U.S. IMPORT POLICY (1985). Balancing this lack of expertise by the ITC commissioners is the ITC staff of over 470 economists, lawyers, and investigators who may possess personal professional competence, but whose scientific objectivity is confined by the ITC's mandate to police unfair imports. *See* A. RUGMAN & A. ANDERSON, *supra* note 31, at 44.

49. Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (Int'l Trade Admin. 1986) (final affirm. countervailing duty determination).

50. Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (Int'l Trade Admin. 1983) (final neg. countervailing duty determination).

in the cases of Canadian fish and softwood lumber, there is a high opportunity cost of senior executives' time in briefing defence lawyers and making trips to Washington, D.C., to defend their major market. In addition, the strategic planners of the foreign corporations must make critical investment and staffing decisions in an environment of uncertainty and under harassment from such trade actions initiated by their rival American producers.[51]

IV. The New Dispute Settlement Mechanism

In the Free Trade Agreement with the United States, Canada has made considerable progress towards resolving the problem of U.S. administered protection by insisting on a form of binding dispute settlement mechanism. From January 1, 1989, Canada and the United States have agreed to a new binational appeals mechanism which can be used to offset abusive trade law procedures in either country. No other free trade agreement in the world has similar restrictions on the ability of a member country to take action under its countervailing duty and antidumping laws.[52]

How this binational panel works in practice will depend upon the cases referred to it. The mere existence of the tribunal should deter frivolous and dubious U.S. petitions. To cases appealed from the U.S. legal system, the panel will apply the U.S. standard of judicial review while cases appealed to the panel from the Canadian system will have the Canadian standard of judicial review.[53]

The new binational panel puts in place a mechanism for Canada to influence, and potentially reverse, the questionable investigative practices of the U.S. International Trade Commission and the U.S. Commerce Department in their gathering of data and analysis. Article 1904(2) of the Free Trade Agreement provides for a panel review based upon the "administrative record" which is defined in article 1911 as including "all documentary or other information presented to or obtained by the competent investigating authority."[54] Mem-

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51. *See* Horlick, *supra* note 38.

52. For example, in the United States-Israel Free Trade Agreement of 1985, the two parties to the agreement explicitly retained their ability to impose duties or equivalent measures on the other as permitted by the GATT. The Agreement states that its general dispute settlement provisions do not apply to antidumping or countervailing duty cases. *See* Letter from Fraser & Beatty, Barristers & Solicitors to Business Council on National Issues, Ottawa, at 22 (Nov. 18, 1987) (legal analysis of dispute settlement provisions of Canada-United States Free Trade Agreement).

53. Since the scope of U.S. judicial review takes in the administrative record, while Canadian judicial review, by the federal court, is limited essentially to the narrower questions of natural justice and due process, Canada obtains a slight advantage over the United States when utilizing the new review process.

54. *See* Canada-United States Free Trade Agreement, Jan. 2, 1988, *reprinted in* 27 Int'l Legal Materials 281 (1988) [hereinafter Free Trade Agreement]. For the Canadian publication of the Free Trade Agreement, see Can. Dep't of External Affairs, The Canada-U.S. Free Trade Agreement (1988). Paragraph 14 of article 1904

bers of the panel will be able to review the administrative practice used to deal with material constituting the administrative record and bring their expertise to bear on the question of whether this information was dealt with properly.[55] In this way economic evidence, already put on the administrative record by defence lawyers, can be reviewed by the binational panel.[56]

Other benefits arise from the creation of this binational panel. A panel will be held to a strict timetable for hearing a dispute and must issue a decision within 300 to 315 days from the time a request for a panel is made.[57] The binational nature of the panel should also result in an increased perception of fairness and impartiality in the application of trade laws.[58] Finally, smaller businesses on both sides

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of the Agreement indicates that the panel review will be limited to errors alleged by the parties to the Agreement, i.e., by the two governments, or by private persons. This is potentially significant in that the scope of review to be exercised by the panel will, to a certain extent, be limited by the arguments put before it.

55. One questionable administrative practice of the Commerce Department that could be addressed by the panel concerns the measurement of industry support for a petition. Currently, it is the practice of the Department to send out questionnaires to industry members to determine whether, as is required by U.S. law, producers comprising a major proportion of domestic production support the petition. In tabulating questionnaire responses, the Commerce Department has developed the highly questionable presumption that those firms that do not return questionnaires support the petition.

56. There is some question regarding how aggressive the panels will be in reviewing the decisions that come before them. John Quinn states, "Since binational panels will apply U.S. law, and employ the same permissive standards for review as U.S. courts, there is no rational basis for expecting any material improvements in the administration of U.S. AD/CV duty laws as a result of the Agreement." 2 NATIONAL CONFERENCE ON THE FREE TRADE AGREEMENT, CONFERENCE MATERIAL 13-16 (March 17-19, 1988) (statement of John Quinn). What Quinn fails to recognize is that the binational panel is in a position to consider the economics-related decisions of the ITC and the Commerce Department. With relevant economic data on the administrative record, it will become possible for the binational panel to challenge the decisions of the ITC and Commerce Department. For example, the 1986 preliminary softwood lumber decision by the Commerce Department, *see* Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37, 453 (Int'l Trade Admin. 1986) (prelim. affirm. countervailing duty determinations), would certainly have been overturned, and other decisions on potash, Atlantic groundfish, and related cases could have been seriously challenged. This is a material improvement for Canadian producers who have perceived a lack of objectivity in the application of U.S. trade procedures in recent years.

57. Free Trade Agreement, *supra* note 54, art. 1904, para. 4.

58. With the dispute settlement provisions in place, it is highly likely that the October 1986 Commerce Department *Softwood Lumber* decision would not have been affirmed on appeal. *See* Rugman & Porteous, *The* Softwood Lumber *Decision of 1986; Broadening the Nature of U.S. Administered Protection*, 2 REV. INT'L BUS. L. 35-38 (1988). In this article the authors examine the U.S. Commerce Department's final 1983 negative countervailing duty determination and the preliminary 1986 affirmative countervailing duty determination of certain softwood products from Canada. The article analyzes the rationale for the reversal in the decision based on two key findings: general availability (specificity) of provincial stumpage programs and the provision of goods at preferential rates. The illogical and political nature of the

of the border, which previously could not afford to appeal decisions, will find the new system of government representation before the panel more accessible.[59]

The benefits gained from the new panel system are substantial and should ensure greater objectivity in the application of U.S. trade law procedures against Canada. Negotiations between the two countries will continue over the next five years to develop a new subsidies code which will improve trade laws in even more fundamental areas. The disproportionate weight currently given to the protectionist desires of domestic producers must give ground to the voices of the national interest and consumers. It is inefficient to allow a domestic producer who supplies only a small proportion of the country's market for a product to improve its position by raising the cost to intermediate processors and consumers of like foreign products.[60] What is needed in U.S. and Canadian law is a clear assessment of the impact of these trade law actions, not only on domestic producers, but also on domestic consumers and processors as well. A mechanism must be developed through the new binational subsidies codes to balance these interests.

The negotiation of new trade laws will also provide an opportunity to incorporate the net subsidy analysis suggested by Rugman and Anderson.[61] A net subsidy analysis would require the relevant decisionmaking authority to consider not only subsidies conferred upon the foreign producers, but also subsidies utilized by domestic producers or manufacturers. In this way a superior economic determination of any "unfair" advantage claimed can be made.

V. CONCLUSIONS

The problems that Canada is experiencing with the administration of current American trade law also affect other countries. Indeed, the main thrust of American trade policy measures is against Japan, the newly industrialized countries such as South Korea, and the European community. Therefore, there are lessons for multilateral trade relations to be drawn from this bilateral case study. All nations trading with the United States will suffer from the escalation of decentralized American trade law. Foreign firms will find it increasingly difficult to retain markets in the United States and foreign governments will find it more and more exasperating to deal

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1986 decision is demonstrated.

59. *See* Horlick, Oliver & Steger, *Dispute Resolution Mechanisms*, in THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE GLOBAL IMPACT 17 (1988).

60. For an analogous case, see Potassium Chloride from Canada, 52 Fed. Reg. 32, 151 (1987) (affirm. prelim.), where American farmers and ultimately food consumers suffered an increase in the price of fertilizer to improve the position of a few small producers in the domestic U.S. potash industry.

61. *See* A. RUGMAN & A. ANDERSON, *supra* note 31, at 13-14.

with the United States in trade negotiations.[62]

The reason why the world in general and Canadians in particular are concerned about the current application of American trade policy is the decentralized protectionist nature inherent in its administration—a quasi-judicial system which is legal but inefficient. The result is an administrative practice in countervailing duty and antidumping investigations which penalizes foreign companies even when they may receive subsidies not significantly different from the subsidies paid, often indirectly, to the American plaintiffs who launch the legal action.

Worst of all, the current administration of U.S. trade law involves a transfer of power to producer interest groups and away from consumers. The current structure and process of American trade law is neither in the interests of the United States nor the world at large. The dispute mechanism negotiated in the Canada-United States Free Trade Agreement offers Canada some relief from the current abuses of U.S. trade law procedures.[63] Soon other nations will need to seek similar accommodations with their trading partners. The United States itself will need to reconsider the use of domestic legal processes by aggressive U.S. corporations which must learn to compete internationally on economic grounds rather than in the courtroom.

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62. *See* Vernon, *Old Rules and New Players: GATT in the World Trading System*, in GLOBAL DILEMMAS 227 (1985).

63. Professor David Cluchey argues that the new dispute settlement mechanism in Chapter 19 "is unlikely to lead to any significant change" or "lead to the reversal of any significant number of United States trade law actions." Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 MAINE L. REV. 346 n.92 (1988). As mentioned earlier, *see supra* note 56, some Canadian lawyers have reached the same premature conclusion. Only time will tell whether the new binational panel, even with a majority of lawyers serving, will be able to address the underlying economics-related issues in countervail and antidumping actions. It would seem likely, however, that the two or three Canadian experts serving on a five member panel would bring a new and broader perspective to the review of U.S. trade law procedures than would otherwise occur upon appeal to U.S. courts. Such a binational panel would have found a variety of precedents in the *Softwood Lumber* case, *see supra* note 58, which could have been used to require the Department of Commerce to reverse its decision of 1986. The central issue will be the extent to which the binational panels use the powers of Chapter 19, particularly article 1911(b), of the Agreement to conduct a broad review of the economic evidence produced by the investigative agencies or put on record by defense lawyers in future cases. To the extent that they do, the process of administration of U.S. trade remedy law will be changed.