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A Mexican Perspective on NAFTA and the Regulation of Unfair Trade Practices

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A MEXICAN PERSPECTIVE ON NAFTA AND THE REGULATION OF UNFAIR TRADE PRACTICES

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INTRODUCTION

This paper will analyze the problem of unfair trade practices from the Mexican perspective and, therefore, I will first provide a brief summary of Mexican Antidumping ("AD")[1] and Countervailing Duty ("CVD") Laws.[2] I will also review Chapter 19 of the North American Free Trade Agreement ("NAFTA"),[3] and will address some of the implications this Agreement may have on the Mexican legal system in AD and CVD matters.[4]

The importance of the analysis of Mexican domestic Antidumping and Countervailing Duty Laws in regard to NAFTA is that the negotiators of NAFTA have decided that each of the three countries involved—Mexico, Canada, and the United States—will apply domestic AD and CVD laws to imports from the other countries. The draft of the NAFTA treaty establishes a panel system for the review of final AD and CVD determinations by the administrative authorities of the three countries similar to the one adopted by the Free Trade Agreement between United States and Canada.[5]

I. MEXICAN AD LAW AND CVD LAW

First, I will discuss the relationship between the different laws and treaties Mexico has entered into and is about to enter into regarding AD law and CVD law. Hopefully, this will clarify which statute will prevail over the other because, as will be shown, there are contradictions between Mexican domestic laws and the treaties Mexico has entered into.

A. Mexican Laws Regarding AD and CVD

The first law that was enacted in Mexico regarding dumping and subsidies was the Ley Reglamentaria del Articulo 131 de la Constitucion

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1. General Agreement on Tariffs and Trade, Apr. 10, 1947, 55 U.N.T.S. 194, Antidumping Code, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT].

2. *Le Reglumentaria del Articulo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*, DIARIO OFICIAL DE LA FEDERACIÓN, Jan. 13, 1986 [hereinafter Mexican Foreign Trade Law]; *El Reglamento Contra Practicas Desleales de Comercio Internacional*, DIARIO OFICIAL DE LA FEDERACIÓN, Nov. 25, 1986 (*Regulations against Unfair Trade Practices*; amended May 19, 1988).

3. Oct. 7 draft, 1992, U.S.-Mex.-Can., ch. 19 [hereinafter NAFTA].

4. One clarification I would like to make at the outset is that I have only reviewed the Spanish version of the NAFTA draft, and therefore it is likely that the expressions I use in English are not the ones that will ultimately appear in the treaty.

5. NAFTA, supra note 3, art. 1904.

Politica de los Estados Unidos Mexicanos,[6] which will be referred to as the Mexican Foreign Trade Law. The regulations for the Foreign Trade Law were enacted by the Executive Branch on November 25, 1986.[7] Mexico is a party to the AD Code of the General Agreement on Tariffs and Trade ("GATT")[8] which was published in the official gazette of Mexico on April 21, 1988, and came into force on May 10, 1988. Mexico is not a party to the GATT Code on Subsidies.

NAFTA should be adopted by Canada, the United States, and Mexico in the near future. The question is which legal statute will prevail, taking into account that there are contradictions among the different legal bodies.

Article 133 of the Mexican Constitution[9] establishes that the Constitution, the laws of Congress, and all treaties that are in accordance with the Constitution and that are signed by the President with the approval of the Senate, are the supreme law of the country. The Mexican Federal Laws and the International Treaties have the same position in the legal hierarchy; therefore, treaties entered into by Mexico after a Federal Law is issued will automatically amend the Federal Law to the extent it is in conflict with the treaty. There is no need for an amendment by Congress to the Federal Law. Consequently, Mexican treaties entered into by the President and signed by the Senate are self-executing and will not require implementing legislation. Due to this fact, NAFTA will obviously prevail over the AD Code of GATT and over the Mexican Foreign Trade Law with regard to issues of AD and CVD law related to the importation of American and Canadian products covered under NAFTA. The AD Code will prevail over the Mexican Foreign Trade Law in relation to countries such as the United States and Canada which have adopted the GATT AD Code.

B. Elements of AD Under Mexican Law

According to the Mexican Foreign Trade Law and AD Code, there are three elements which must be fulfilled for the existence of a dumping practice: (1) the existence of a price discrimination; (2) an injury or the likelihood that an injury will be suffered by the national industry; and (3) a relationship between the two above-mentioned factors.

1. Price Discrimination

Under Mexican law, price discrimination occurs when the exporter of goods into Mexico sells the goods at a lower price than the normal price at which it sells its products in the country of origin. For Mexican law purposes, "normal price" is defined as a price fixed under free market

6. DIARIO OFICIAL DE LA FEOERACIÓN, Jan. 13, 1986.
7. These regulations were amended on May 19, 1988.
8. GATT, *supra* note 1, Antidumping Code.
9. MEX. CONST. art. 133.

economy conditions. In order to establish whether a dumping practice exists, the normal price must be compared with the price of the imported products.

There are four methods used to compare the normal price with the price of the imported products. The method of comparison is between the price of the same products sold by the exporter in its country of origin against the price of the imported products. This is the most commonly used method in antidumping investigations in Mexico. Second, if the exporter does not sell in the country of origin, the comparison will be made with the price at which the exporter sells its products in a third country. Third, if the exporter does not sell to a third country, or if parties have not provided sufficient elements to make the comparison, the Mexican Ministry of Commerce and Industrial Development (Secretariat de Comercio y Fomento Industrial or SECOFI) may reconstruct the price, taking into account production costs, administrative costs, and profit. Finally, in countries with centrally planned economies, the price to be compared will be the price of a similar product in a free market economy or the price of the product to be exported from a country with a free market economy.

2. Injury or Likelihood of Injury

According to Mexican law, an injury is the loss in the assets of Mexican companies or the inability to obtain a legal profit that the Mexican producers may suffer due to the dumping practice. Under Mexican Foreign Trade Law[10] there is no requirement that there be an injury or likelihood of injury for the existence of a dumping practice. Under the GATT AD Code,[11] however, a finding of injury is a condition for determining that there is dumping. Because the United States and Canada are parties to the code, the existence of the injury or likelihood of injury must be proven.

There is a likelihood of injury under Mexican law where the establishment of a new industry or the development of existing industries is jeopardized. To prove the injury or the likelihood of injury, three main elements must be established under Mexican Law. The first is an increase in the volume of imports. The second is the price of the importations in dumping conditions, i.e., a difference between the export price and the home country or reconstructed price. The third is accounting, economic, and financial elements such as a decrease of domestic production, a decrease in the utilization of installed capacity, a decrease in domestic business participation in the market, or a decrease in prices and profits of domestic businesses. The price discrimination must be the direct cause of the injury or likelihood of injury to the Mexican industry.

C. The AD Procedure Under Mexican Law

The antidumping procedure under Mexican law may be divided into four different parts, which are discussed below.

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10. Mexican Foreign Trade Law, *supra* note 2, art. 14.
11. GATT, *supra* note 1, Antidumping Code.

1. Denunciation by Affected Parties or by Decision of SECOFI

Usually the AD procedure starts with a complaint to SECOFI by the Mexican industrialist affected by the importation of goods into Mexico under dumping conditions. Mexican Foreign Trade Law requires that companies representing more than twenty-five percent of the national production of the goods involved in the investigation, or a chamber or similar organization that represents the industry of such products, file the complaint with SECOFI.

An example of a complaint is that filed on July 19, 1989, by the Asociación Nacional de la Industria Química, A.C., against exportations from the United States of "fibra acrílica" made by Monsanto and Cyanamid International Sales Corporation.[12]

According to the GATT Antidumping Code,[13] the request for investigation must be made by a majority of the producers of the product which is imported under dumping conditions. As mentioned earlier, this requirement will prevail in the case of imports from Canada and the United States; therefore, a majority of the producers will be required in order to file a claim, not the twenty-five percent as required by the Mexican Foreign Trade Law. The AD Code requires that the claim refer to the difference in price as well as to the proof that the importation of the products under dumping conditions causes severe damage to the Mexican industry or that it affects the establishment of new industry.

Once SECOFI receives the claim within five days it may: (1) start the administrative investigation by imposing a duty; (2) start with the administrative investigation without imposing a duty; or (3) reject the claim, giving the factual and legal grounds for doing so.

2. Starting the Investigation

SECOFI may begin the administrative investigation with or without imposing a provisional duty. The commencement of an administrative investigation must be published in the official gazette in order to permit importers, exporters, representatives of foreign governments, or any third parties with a legal interest in the result of the investigation to file their arguments in order to protect their rights. In the event that SECOFI imposes a provisional countervailing duty at the start of the investigation, it has a six-month period either to cancel the provisional duty if the result of the investigation shows that no dumping occurred, to establish a definitive countervailing duty at the same or different level from the provisional duty established at the start of the investigation, or to terminate the investigation canceling the provisional duty.

If a provisional duty is established at the start of the investigation, SECOFI may authorize the importation of the goods under investigation without the payment of a countervailing duty, provided that the importer

12. DIARIO OFICIAL DE LA FEDERACIÓN, Sept. 25, 1989.
13. GATT, *supra* note 1, Antidumping Code.

posts a bond which guarantees payment of the duties and interest for the following twelve months. If the provisional duty is confirmed by a definitive duty, the Ministry of Finance may collect the duties from the importations which were made during the period of investigation and which were secured by the bond.

Calculation of the interest charges, penalties, and so on, are referred by the Mexican Foreign Trade Law to the tax laws.[14] Because there are no specific rules for this purpose, many problems of interpretation regarding the payment of AD duties in these circumstances have occurred. For example, under the tax laws the interest on a past due tax is limited to one year, without the imposition of sanctions if the payment is voluntarily made. The question is whether, in case of the confirmation by SECOFI of the provisional duty, the payment by the importer as a result thereof is voluntary or not.

Article 11 of the GATT AD Code[15] establishes the possibility that under certain circumstances, SECOFI may establish an antidumping duty retroactively to the date of which the provisional measures were established. Under the Mexican Constitution, a law may not be applied retroactively against the will of the affected person.[16] The debatable question is whether Article 11 of the GATT Antidumping Code provides for retroactive application or not, as the duties were already established by the provisional decision.

Coming back to the investigative procedure, SECOFI must review the representative period of the dumping, which period may not be less than six months. In contrast to the United States system, SECOFI is the agency that decides the existence of dumping and the amount of damage caused. In the United States, on the other hand, the Commerce Department establishes whether a product is being sold under its normal price and the International Trade Commission determines the damage caused to the industry.

3. Termination of the AD Procedure

The AD Procedure may be terminated for three reasons: (1) lack of elements for the existence of a dumping practice; (2) an agreement is reached between the exporters and SECOFI; or (3) the imposition of a final AD duty.

a. Lack of Elements For the Existence of a Dumping Practice

If SECOFI finds that there was no price discrimination, no injury or likelihood of injury, or no relationship between the above-mentioned elements, it will terminate the investigation and cancel the provisional duty if it was established at the start of the investigation. There have been many cases in Mexico which began with the imposition of a pro-

14. Mexican Foreign Trade Law, *supra* note 2, art. 11.
15. GATT, *supra* note 1, Antidumping Code art. 11.
16. MEX. CONST. art. 14.

visional duty but that were ultimately canceled at the end of the investigation.

b. Agreement Between the Exporters and SECOFI

According to Mexican Foreign Trade Law, SECOFI may hold conciliatory meetings with importers, exporters, foreign governments, and any other interested parties. The investigation may terminate if the exporters commit themselves before SECOFI to terminate their dumping practice in their exports to Mexico. There have been approximately four cases in Mexico that were terminated for this reason.[17]

c. The Imposition of a Final AD Duty

If SECOFI finds the existence of a dumping practice and that damage has been suffered, it shall send the matter to the Commission of Duties for Foreign Trade (Comision de Aranceles y Controles al Comercio Exterior), and the Commission will establish the final AD duty. Entities represented in this Commission include: the Undersecretary of Foreign Trade of SECOFI; three representatives of the Ministry of Finance; one representative of the Ministry of Agriculture and Hydraulic Resources; the General Director of duties of SECOFI; and the General Director of Foreign Trade of SECOFI. Once the definitive duty is established by such a Commission, it will be published in the official gazette.

4. SECOFI is Obligated by the Foreign Trade Law

SECOFI is obligated by the Foreign Trade Law to review the level of the AD duty every year after the date of its final determination. At any time after the imposition of the final duty, any interested party may request a review of the level of such AD duty. An importer of products may file a request for review (*recurso de revocacion*) with SECOFI for it to review the file in order to decide whether the imposition of the AD duty was properly established by the corresponding authority within SECOFI. The request for review must be filed within forty-five working days after the final determination. If SECOFI rejects the request for review filed by the importers, the importers may file a nullity action before the Fiscal Court (*Tribunal Fiscal de la Federacion*) within forty-five days after SECOFI's final resolution denying the request.

The Tax Court is an administrative court created primarily to review claims of private parties regarding decisions by the tax authorities. It was, however, also given the authority to review AD and CVD decisions of SECOFI.

The final decision of the Fiscal Court may be challenged before a Constitutional Court (Tribunal Colegiado de Circuito) within fifteen days after the final resolution by the Tax Court.

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17. *See, e.g.*, Industria de Baleros Intercontinental, S.A. de C.V. and Rodamientos Conicos, S.A. de C.V. vs. Nippon Seido KK, Nach., Fujicoch, Corp., NTN Togo Bearing Co. Ltd. and Koyo Co. Ltd., DIARIO OFICIAL DE LA FEDERACIÓN, June 25, 1990 (regarding ballbearings originating in Japan).

It is important to note that under Mexican law, only the importer has the right to challenge the imposition of an antidumping duty. This right is not available to any other party such as the exporter, consumers, or competitors.

As established in the AD Code, the government of the country of the exporter that is affected by the imposition of an antidumping duty may file an action against the government that imposed the duty, before a GATT Committee based in Geneva, Switzerland.

Article 14 of the AD Code establishes the procedure for this action. There is a Mexican case in which the United States government brought this type of action against Mexico and GATT decided that the AD duty was not properly imposed and was therefore declared null and void.[18]

D. Subsidies

Mexican Foreign Trade Law defines a subsidy as the unfair practice by a foreign government or its public entities of granting directly, or indirectly, incentives, premiums, subsidies, or help of any other nature to producers, transformers, traders, or exporters of merchandise that is exported into Mexico, with the purpose of strengthening in an unequitable manner its international competitiveness.

As mentioned earlier, Mexico is not a part of the GATT Subsidies Code. Mexico, however, ratified the Agreement for the Interpretation and Application of Articles VI, XVI, and XXIII of GATT, which lists in a nonexclusive manner which acts are considered to be subsidies granted by governments. In Mexico there has been only one such case in which the Mexican Government imposed a countervailing duty (CVD) against exports into Mexico on aluminum from Venezuela.[19] Although the authorities imposed a provisional duty at the beginning of the investigation, the final resolution which concluded the investigation canceled the CVD provisional duty and did not impose one definitively. The procedure for the imposition of the duties, and the defenses against the same, are identical to the ones previously described for the AD cases. Therefore, it is not necessary to review this procedure.

II. DISPUTE SETTLEMENT IN ANTIDUMPING (AD) AND COUNTERVAILING DUTY (CVD) CASES UNDER NAFTA

As mentioned at the beginning of this paper, the NAFTA negotiations have retained the same solution as that of the U.S.-Canada Free Trade Agreement ("FTA") in that each country will apply its own AD and CVD Laws, but in a form consistent with the provisions of NAFTA. The provisions of the North American Free Trade Agreement on Review

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18. JORGE WALKER & GERARRO JARAMILLO, EL REGIMEN JURIDICO DEL COMERCIO EXTERIOR DE MEXICO DEL GATT AL TRATADO DE LIBRE COMERCIO 127 (1991) (legal structure of Mexican Foreign Trade from GATT to the North American Free Trade Agreement).

19. Aluminiol S.A. de C.V. v. Venezolana de Aluminio, C.A. y Aluminio del Caroni, S.A.

of AD and CVD Matters[20] have been heavily influenced by the provisions of the FTA agreement, and some new aspects hopefully were enriched by Mexico's participation in the negotiations. I will analyze the system under the new draft of NAFTA and will make reference to Mexican AD and CVD Laws.

A. Retention of Domestic AD Law and CVD Law

Each party reserves the right to apply its own AD and CVD laws to goods imported from the territory of any of the other parties. AD laws and CVD laws include, as appropriate for each party, the relevant status, legislative history, regulations, administrative practice, and judicial precedents. The first question that arises under Mexican law is which of the legal provisions referred to are applicable in Mexico. As previously described, the Mexican legal system includes only the relevant status, regulations, and, to a certain degree, judicial precedents, but does not include legislative history and the administrative practice.

Each party reserves the right to change or modify its AD law or CVD law, provided that in the case of an amendment to a party's AD or CVD statute:

(1) such amendment shall apply to goods of the other parties only if it is specified in the amendment that it will apply to the other parties;

(2) the amending party notifies the other parties in writing of the amendment as far in advance of the date of enactment of such statute as possible;

(3) following notification, the amending party, upon the request of any other party to which the amendment may apply, must consult with the other party prior to the enactment of the amending statute; and

(4) such amendment, as it applies to any of the other parties, is not inconsistent with the GATT AD Code or Subsidies Code, the succeeding codes entered into by the original parties to NAFTA, or the object and purpose of NAFTA and its chapter on AD and CVD, which is to establish fair and predictable conditions for the progressive liberalization of trade between the parties to the Agreement.

B. Review of Statutory Amendments

1. Referral for a Declaratory Opinion

A party to which an amendment of another party's AD law or CVD law will be applied may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether: (1) the amendment does not conform to GATT, its Codes, and NAFTA; or (2) such amendment has the function and effect of overturning a prior decision of a panel and does not conform to GATT, its Codes, and NAFTA.[21]

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20. NAFTA, *supra* note 3, ch. 19.
21. *Id.* art. 1903(1)(a) & (b).

2. Modifications to the Amending Statute

In the event that the panel recommends modifications to the amending statute in order to remedy a non-conformity that it has identified in its opinion, two possibilities exist:

(1) Both parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within ninety days of the issuance of the panel's final declaratory opinion. Such solution may include seeking remedial legislation with respect to the statute of the amending party.

(2) If remedial legislation is not enacted within nine months from the end of the ninety day consultation period referred to in (1) above, and no other agreement has been reached, the party that requested the panel may either take comparable legislative or equivalent executive action, or terminate the Agreement with respect to the party that made the amendment, upon sixty days notice to the other party.[22]

C. Review of Fiscal AD and CVD Determinations

The parties shall replace judicial review of final AD and CVD determination with binational panel review. Under Mexican law the question arises whether the judicial review is the one made by SECOFI, the Federal Tax Tribunal (Tribunal Fiscal de la Federación) or by the court (Tribunal Colegiado de Circuito) that is in charge of reviewing decisions of the Fiscal Tribunal. The Fiscal Tribunal is an administrative tribunal and is therefore not part of the judiciary. Strictly speaking, the panel's review would be of the Fiscal Tribunal determination, although the intention of NAFTA is for the panel to review the SECOFI decision, since it is the determination of the competent investigating authority that is under review.

An implicated party may request a panel review, based upon the administrative record, of a final AD or CVD determination by a competent investigation authority of one of the parties to decide whether such determination was in accordance with the AD or CVD law of the importing party. The panel shall apply the standard established in the Agreement and the general legal principles that a court of the importing party would otherwise apply to a review of a determination of the competent investigating authority. The request for a panel review shall be made in writing to the other party within thirty days from the date of publication or notification of the final determination.

An implicated party may request a panel where the importing party has imposed provisional measures. An implicated party may request a review on its own initiative or upon the request of a person who would be entitled to request the review under the law of the importing party. Where both implicated parties request a panel to review a final deter-

22. *Id.* art. 1904.

mination, a single panel shall review that determination. The competent investigating authority and the parties that would have standing in a domestic judicial review may appear before the panel.

The panel may uphold a final determination or remand it for action consistent with the panel's decision. The decision of a panel shall be binding on the implicated parties. The Agreement shall not affect judicial review with respect to determinations other than final determinations. A final determination shall not be reviewed under any judicial review procedures of the importing party if an implicated party requests a panel. Neither party shall provide for an appeal from a panel decision to its domestic courts in its domestic legislation.

It is obvious that the Mexican AD law will have to be amended so that a panel may review the final decisions of SECOFI in AD and CVD matters, if an implicated party or a person who would be entitled to a review requests the establishment of a panel under Article 1904 of the Agreement.

The implementation of a decision by the Mexican authorities in compliance with a final determination of a panel established under these circumstances may be challenged by the affected person in Mexico with a constitutional Writ of Amparo procedure. The NAFTA treaty may not limit a right which is established by the Mexican Constitution. As mentioned earlier, under the Mexican Constitution an international treaty that violates the Constitution is not considered the supreme law of the country.

The panel review shall not apply where implicated parties do not seek panel review of a final determination. An implicated party may request the review of a panel decision by an extraordinary challenge procedure if a member of the panel was guilty of misconduct, the panel departed from fundamental rules of procedure, or the panel manifestly exceeded its powers, and if any of these actions materially affected the panel's decisions.[23]

To implement the provisions of Article 1904 of the Agreement,[24] the parties shall agree on rules of procedure by January 1, 1994, and shall include, among other provisions, that the decision by the panel must be rendered within 315 days from the date on which a request for a panel is made. The parties shall, in order to achieve the objectives of Article 1904 of the Agreement,[25] amend their statutes and regulations as necessary with respect to AD or CVD involving goods of the other parties.[26] In particular, the parties shall:

(1) amend their laws to ensure that paid duties and their interest shall be reimbursed if the decision of the panel decides to do so;

(2) amend their laws so that their courts recognize sanctions imposed by the laws of the other parties concerning commitments of confidentiality

23. *Id.* art. 1904(13)(a) & annex 1904(13).
24. *Id.* art. 1904.
25. *Id.*
26. *Id.* art. 1904(14).

and privileged information assumed in the panel procedures.[27] This provision is interesting because parties must include in their laws provisions that will recognize the application of foreign laws in their own territory regarding sanctions for violation of confidentiality commitments; and

(3) shall amend internal laws to prevent parties from initiating judicial procedures before the expiration of the deadline to establish a panel. Before starting a judicial procedure against a final determination, the party or private party shall inform and send a notification to the implicated parties ten days before the expiration of a deadline to establish a panel.[28]

D. Safeguard to the System of Review Before a Panel[29]

The following procedure was not established under the U.S.-Canada FTA and is an improvement of the system. If one party considers that another party is interfering with the establishment procedures or enforcement decision of a panel, it may request consultations with the other party. If the matter is not resolved within forty-five days from the request for consultations, the requesting party may request the establishment of a special committee. If the request is accepted by the special committee, the defendant and claimant must carry out consultations to resolve the dispute within sixty days. If no mutually satisfactory solution is reached within this period, the claimant may suspend application of Article 1904 (regarding panel jurisdiction over AD and CVD decisions) or suspend benefits under the Agreement against the other party as the circumstances may dictate. If a claimant decides to suspend the application of Article 1904, a defendant may do the same.[30]

The defending party in the procedure before the special committee may, at any time, request that the special committee decide whether the suspension of benefits to the other party is excessive and whether it has corrected the problems confirmed by the decision of the special committee. The special committee will render its decision within forty-five days. If the claim is successful, the suspension of benefits and/or suspension of Article 1904 will be canceled.

E. Final Determinations[31]

The provision of the NAFTA chapter on AD and CVD will be applied only in the future to final determinations after the entry into force of the Agreement.

F. Consultations[32]

The parties will make consultations annually or upon the request of one of the parties in order to examine any problems regarding the execution or operation of the AD and CVD provisions and to recommend

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27. *Id.* art. 1904(15).
28. *Id.* art. 1904(15)(a), (b), (c)(i), & (c)(ii).
29. *Id.* art. 1905.
30. *See supra* note 23 and accompanying text.
31. NAFTA, *supra* note 3, art. 1906.
32. *Id.* art. 1907.

appropriate solutions. The parties will make consultations about the feasibility of developing more effective rules on the use of subsidies. The investigating authorities will make consultations yearly upon the request of any party and will eventually provide information to the Commission.

In light of these consultations, the parties agreed that it is desirable in applying AD and CVD Laws:

- to publish the initiation of an investigation in the official gazette;
- to notify the deadlines for filing information;
- to grant written instructions regarding requested information from interested parties;
- to provide reasonable access to information;
- to grant opportunity to file proofs and arguments;
- to protect confidential information;
- to prepare files to include recommendations for official consulting bodies;
- to provide the relevant information upon which provisional or final decisions were based;
- to base the final resolutions in law and merits; and
- to base the final resolutions in law and merits with regard to the material damage affecting the national industry and the material interference with the establishment of national industry.

The above mentioned points shall not guide the decision of the panels in resolving the question of whether or not a decision was based on the AD or CVD law of the importing party.

G. Secretariat[33]

The parties will establish a section within the Secretariat established by the Agreement in order to facilitate the operation of the provisions regarding AD and CVD. The secretaries of the Secretariat will support all decisions of the panels and special committees. Each section will receive and file all the applications and correspondence related to the procedures of a panel or special committee. Each section will send to the Secretariat of the other implicated party copies of all official documents and correspondence received and filed in its office related to the panel or special committee proceeding, with the exception of the administrative file.

The remuneration of panelists, members of special committees, and their assistance will be shared by the implicated parties proportionally. The commission will fix the amount of renumeration to be paid to the panelists and members of the special committees.

H. Code of Conduct[34]

The parties will establish, at the latest, by the date of entry into force of the Agreement, a code of conduct to be followed by the panelists and members of the special committees.

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33. *Id.* art. 1908.
34. *Id.* art. 1909.

CONCLUSION

Once NAFTA comes into effect, Mexico will have to amend its internal AD and CVD laws as previously described. Although NAFTA establishes the permanent application of AD and CVD laws in the three countries, the legal systems within the area will move closer together over time, and one day Mexico, Canada, and the United States will have similar laws in AD and CVD matters. The complexity of the AD and CVD chapters of the NAFTA draft, and of the internal laws on the subject, will require a detailed analysis by lawyers of the three jurisdictions, once the Agreement comes into effect, in order to understand fully all of its implications.

COMMENTS ON THE ADMINISTRATION OF U.S. UNFAIR TRADE PRACTICE LAW: MISSED OPPORTUNITIES IN NAFTA

LESLIE GLICK*

My topic is one about which I have particularly strong feelings; consequently, I probably should begin with a disclaimer, as my views are not necessarily objective. Since 1979, I have represented Mexican exporters into the United States. I have been involved in numerous Mexican countervailing duty cases involving textiles, bricks, tiles, polypropylene film, and other goods. I have represented the CYDSA Group, LEMOSA, and Industrias Monterrey. I have represented clients in antidumping cases on fresh-cut flowers and circular welded pipe and tube. Therefore, my views are those of a practitioner who has represented Mexican companies on one end of the U.S. countervailing and antidumping laws. I have seen particular abuses and problems with the law that we had hoped might be resolved in the North American Free Trade Agreement ("NAFTA"),[1] but in many cases were not.

There are many procedural problems with the American unfair trade laws that make them particularly onerous when applied to developing countries such as Mexico. I, along with others, had hoped that NAFTA would address, at the minimum, the procedural aspects of the antidumping and countervailing duty laws to achieve some level of harmonization and procedural due process.

I have testified on behalf of Mexican clients at various hearings before the Office of the United States International Trade Commission and the United States Trade Representative to request changes in the antidumping laws. These include relatively simple procedural changes, such as reform of the lengthy and complex antidumping questionnaires, which are difficult to understand even if English is your native language. They are almost impossible to understand if Spanish is your native language. I do not understand why these questionnaires cannot be simplified and translated into the language of the country of the people who must answer them. Very often the time limits for responses are relatively short and companies that do not answer in time have been penalized by being excluded from submitting information.

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

This brings me to what I consider one of the most unfair elements in the American dumping law, the "best information available" rule.[2] This rule literally allows the U.S. Commerce Department to throw out an entire questionnaire response of a foreign respondent and use separate data which may contain either information from the petition or information from another exporter. If an exporter fails to comply with any of the procedural requirements, the questionnaire may be thrown out. An exporter may only be a day late in answering the questionnaire, or he may have had some problems with the computer presentation that must be submitted to the Commerce Department. The "best information available" rule is a very powerful tool and, in my view, it has been abused. Often the Commerce Department applies it in a punitive way and uses what is not really the best information, but rather penalizes Mexican and other exporters from developing countries because of their less sophisticated finance and accounting practices. Companies in these countries often do not have the record-keeping facilities and access to other types of information that the Commerce Department is accustomed to.

I have represented a number of companies in the Mexican agricultural sector. Many of these companies in the past did not have to pay income tax under Mexican law, but rather only a sales tax. Therefore, they never kept records for things such as depreciation. For example, Mexican flower producers, who are often rural ranchers, typically keep their records of cash sales on scrap pieces of paper. Nevertheless, the U.S. Commerce Department applies Generally Accepted Accounting Procedures ("GAAP") to them.

I remember my first visit to Mexico, a verification investigation, in the countervailing duty case on fresh cut flowers from Mexico back in 1984.[3] I think the Commerce Department people were a little surprised when we drove for two or three miles down dirt roads in Baja, California, to get to the so-called office of the Mexican producer. The office did not even have electricity or phones, just a gasoline-operated generator.

The question that I pose is should these kinds of producers be treated in the same way as Hatachi or Nissan Steel? American antidumping law does not make any distinction about how big you are, your level of development, or your type of industry. It has one questionnaire, one set of rules, and very little flexibility for developing countries.

In my opinion, the American antidumping and countervailing duty laws have been unduly harsh in their application to Mexico and have, themselves, become a non-tariff barrier. They will remain a non-tariff barrier under NAFTA because this issue was not adequately addressed. This is an argument that I and others made to the United States government during the NAFTA review process.

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2. This is a procedural practice of the U.S. Department of Commerce. *See* 19 C.F.R. § 353.37 (1991).

3. See Fresh Cut Flowers From Mexico, 49 Fed. Reg. 500 (1984) (final negative countervailing duty determination).

The answer that was given by the government—admittedly, a not altogether unreasonable answer—was that changes under the antidumping and countervailing duty rules should be part of the negotiations under the General Agreement on Tariff and Trade ("GATT").[4] Consequently, this is a multilateral issue and should be dealt with in a multilateral context, not in terms of a bilateral or trilateral agreement such as NAFTA. There is some logic to this.

The flaw with this, however, is that many issues are being dealt with in a trilateral context in NAFTA that differ from the treatment that other countries will get under GATT. Why not antidumping and countervailing duty rules? Even if the United States did not want to address the substantive issues, why not at least harmonize the procedures, the forms of the questionnaires, the time limits, and the definitions of what is the "best information available." I believe that there are many areas where there could have at least been an effort to move toward some type of harmonization, more openness, and more due process than the antidumping and countervailing duty procedures now provide. Unfortunately, I think this opportunity was missed.

Many of the U.S. Commerce Department rules in the United States on antidumping and countervailing duties are unpublished and unwritten. The amount of discretion in their administration is almost unbridled. The United States Court of International Trade has given the Commerce Department a fairly free hand to interpret their own rules and to make policies. I feel that the failure to address this issue in NAFTA was a major mistake.

As is well known, the filing of unfair trade practice cases alone often has a chilling effect on trade and commerce. Dumping and countervailing duty cases in America are very easy to bring. The cost for the American producer is very minimal. All he has to do is put together a petition and file it with the International Trade Administration of the Commerce Department and the International Trade Commission. If he meets a minimal standard of compliance with the rules, all of the different work and the investigations are done by the American government. It is the foreign respondents and their lawyers that have all of the expense of answering the questionnaires and of participating in the verifications. So the procedures themselves, sometimes, are as costly and onerous as the penalties. I have seen cases where very high antidumping or countervailing duty rates were imposed, not because the exporters were engaged in unfair trade practices, but because they could not afford to participate fully in the lengthy and costly proceedings in the United States. This to me is something that, in the long run, needs to be addressed if NAFTA is really to be successful in promoting freer trade. You cannot have freer trade if a large amount of antidumping or countervailing duty cases are

4. Apr. 10, 1947, 55 U.N.T.S. 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990).

being brought against each country, under three different laws and sets of rules.

For many years countervailing duty cases in the United States were a major obstacle to exports into Mexico. Mexico did, in fact, have a number of subsidy (*estimulas*) programs. Mexico, however, is a developing country and many of these programs were designed to help foster development. The fact that Mexico was not a signatory to the GATT Subsidies Code, and had not adopted substantially similar obligations, meant that there was no injury test applied by the United States International Trade Commission to Mexican exports for many years. All American businesses had to do was to allege a subsidy and show that it existed to prove a sufficient basis for a countervailing duty. This eventually changed after Mexico adopted rules similar to the GATT Subsidies Code. For many years programs such as the Certificados de Devolucion ("CEDI's"),[5] now abolished, were considered export-oriented programs. Many exporters in Mexico received the CEDI's. At one point, as many as eighteen or twenty countervailing duty orders were outstanding against Mexico. There are other programs, however, such as the CEPROFI Program, which have been held subject to countervailing duty orders. The CEPROFI program, which is still in existence, provides a domestic tax incentive that is not clearly related to exports, but under the test applied by the Commerce Department and the Court of International Trade it has been held countervailable depending on the general availability or on how it was applied.[6]

The more recent countervailing duty cases against Mexico have even included such programs as the Programaide Importaciones Temporal ("PITEX") Program. The United States takes a somewhat ambiguous position on PITEX. It does not countervail against raw materials physically incorporated into the exported product from Mexico, but it does countervail against the exports of equipment and machinery that are used to make these products, even though the machinery is eventually re-exported. This is a distinction that in my mind is somewhat questionable. Many Mexican companies have criticized the American countervailing duty law as being somewhat hypocritical because many of the programs in Mexico that are attacked as subsidies exist in a similar form in the United States. The United States has an extensive program of foreign subsidies. It has various temporary importation schemes and government-assisted financing programs, many of which are similar to Mexico.[7] This has never been an issue, though, under the American countervailing duty laws. The fact that American products are subsidized does not prevent an American company from bringing an action against Mexico for doing something similar. Again, NAFTA does not really address these issues.

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5. *See* Leslie A. Glick, Doing Business in Mexico. ' 34.03, , 1.

6. *Id.* § 34.03, ¶ 3.

7. For example, financing by the Export Import Bank, and agricultural subsidies targeted to certain industries.

There are also problems with the safeguard provisions in NAFTA.[8] Given the tariff reductions and eliminations of trade barriers, it is not unreasonable to expect that there may be some surges in imports. To remedy any harm that may occur from such surges in imports, the Agreement provides for safeguards both on a bilateral and a global basis. For example, suppose that due to a significant reduction or elimination of a duty in the Agreement, a NAFTA country, such as Mexico exports into another NAFTA country, such as the United States, a product in such increased quantities and under such conditions as to cause serious injury or threat of injury to a domestic industry producing a like or competitive product. The United States could then, in order to prevent this injury and after certain procedural requirements are met, suspend the further reduction of any rate of duty provided for under NAFTA for such goods, or increase the rate of duty on such goods to a level not to exceed the most favored nation rate applied at the time the action is taken.

This is an example of a bilateral safeguard. These apply to emergency actions taken against surges of imports that result from tariff reductions under NAFTA. The bilateral safeguards may only be taken once, and for a maximum period of three years. In cases of extremely sensitive goods, the safeguard may be extended to a fourth year. The global safeguards operate in the same manner as the bilateral safeguards, but apply to import surges to all countries, not just NAFTA countries. In essence, where a NAFTA partner undertakes a safeguard action on a global basis, according to Article XIX of GATT each NAFTA partner must be excluded from the action unless its exports account for a substantial share of total imports of the goods in question and contribute importantly to the serious injury or threat thereof. The Agreement provides that a NAFTA country normally will not be considered accountable for a substantial share of total imports unless it falls among the top five suppliers of the good.

There were some other alternatives discussed during the negotiations. At one time, the United States had proposed using a tariff rate quota mechanism instead of safeguards. This was ultimately not accepted. The safeguard provisions under the U.S.-Canada Free Trade Agreement ("FTA")[9] are similar to, though not the same as, the ones under NAFTA. Most experts agree that as far as bilateral safeguards are concerned, NAFTA is probably somewhat less stringent than the provisions under the FTA. NAFTA states that the emergency safeguard should be used to the minimum extent necessary to remedy or prevent injury.[10]

Some may find it somewhat hypocritical for the governments totally to eliminate tariffs on the one hand and then impose safeguards on the

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8. *See* NAFTA, *supra* note 1, ch. 8 (Emergency Actions).

9. Jan. 2, 1988, U.S.-Can., *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 353 (Stephen Zamora & Ronald A. Brand eds., 1990).

10. *See* NAFTA, *supra* note 1, art. 801(1).

other. It is like simultaneously giving and taking away. People are creating an expectation that NAFTA is going to eliminate duties, but there is not much publicity about the fact that the safeguard provisions can put the duties back on.

There also is, however, a political problem. President Bush never would have obtained the fast track authorization from Congress for the NAFTA negotiations unless he promised to include safeguard provisions. American domestic industries were very much concerned about surges of imports from Mexico. Safeguards are necessary evils, even though they somewhat denigrate the nature of the Agreement as a truly free trade agreement. On the other hand, they deal with some of the fears and concerns of U.S. domestic industries and labor unions. There has to be some device to control these possibly unfair surges in imports, and the safeguard mechanism is one way to do it.

The last issue I will address is the review of the antidumping and countervailing duty cases through the special panels that are provided by NAFTA.[11] As under the FTA, NAFTA provides for binational panels that will substitute for domestic judicial review. The main difference is that the panels are permanent under NAFTA while they were only temporary under the FTA. The panels will be comprised of five individuals, with each country selecting two panelists and the fifth panelist being selected by the remaining country. The panel must apply the domestic law of the importing country. It can either uphold the determination of the administrative agency or remand it to the administrative authority for further action.

One difference in NAFTA that was not in the FTA is the procedure for the so-called special committee. This committee is composed of three members who are chosen from a fifteen-person roster comprised of judges or former judges of any federal or judicial court in the United States, Canada, or Mexico. If the application of another party's domestic law prevents the establishment of a panel, if another party's domestic law prevents a panel from rendering a final decision, or if another party's domestic law results in failure to provide for judicial or panel review, this special committee may impose certain sanctions against the offending country. It may recommend, for example, a suspension of benefits under NAFTA against one of the parties.

In conclusion, the coverage of unfair trade practices in NAFTA is not as extensive as it could have been. On the other hand, we have made a beginning. There has at least been a dialogue on these issues. We have established reviewing mechanisms. It is my hope that the countries will continue, through different working panels, to move towards the day when there is a complete harmonization of the regulations, and maybe

11. *Id.* art. 1901(2), annex 1901(2) (Establishment of Binational Panels) and annex 1903.2 (Panel Procedures under Article 1903).

even of the substantive provisions of the dumping and countervailing duty laws in the three countries. This would really facilitate the free movement of goods and services between the countries.

COMMENTS ON UNFAIR TRADE PRACTICES

MICHAEL W. GORDON*

I would like to take a look at the areas of dumping subsidies and safeguards under the escape clause of the North American Free Trade Agreement ("NAFTA").[1] From time to time, I will put this in the context of the sneaker industry in Mexico, Brazil, and Italy and the footwear manufacturers in Taiwan, and take a look at how NAFTA attempts to treat Mexico as a special case in that industry.

These areas—subsidies, countervailing duties, dumping, and the safeguards—are highly restricted in terms of what NAFTA can do because these are areas which are already outlined in GATT.[2] There are relatively few areas in NAFTA which are not restricted because of the GATT, such as investments and service areas, where GATT is attempting to govern but has failed to do so. Thus, NAFTA is a little freer to work with in those areas. Finally, NAFTA is very free in the areas of specific industries, which GATT does not make any serious attempt to govern.

I would like to see the dumping rules abolished totally in the United States. Having been trained partially as an economist, I am not at all convinced that it is appropriate to attack dumping. In the case of a manufacturer of footwear, we are going after manufacturers, private individuals, who are selling goods in the United States at less than fair value.

It seems that the U.S. dumping law has two functions. One is to provide a basis to attack the alleged evil of dumping and to correct it through bringing dumping actions. If we can prove sales at less than fair value, we ought to be able to impose antidumping duties. One of the problems with that approach is the difficulty of applying the mechanism of the dumping rules. There are significant difficulties in calculating dumping, and there are a number of horror stories arising from it. One example deals with woodwind pads for woodwind instruments. The government could not find the exact same size pads, so they used one of another size from another woodwind instrument, found a very narrow margin of dumping, but nevertheless went ahead and applied dumping duties. We do not really need that kind of action.

The second function is the use of dumping, which also applies to subsidies, as a protective measure to coerce the parties to sit down and talk about accepting a voluntary restraint agreement which is not at all

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

2. General Agreement on Tariffs and Trade, Apr. 10, 1947, 55 U.N.T.S. 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990).

covered in the law. Thus, we have these complex rules of dumping and subsidies and escape clause provisions where what we really end up with, with steel, electronics, and so many other products, is a negotiated agreement, or voluntary restraint agreement ("VRA"). Why don't we simply say, "When there is a problem with trade, let's get the parties to sit down and talk about measures to be taken. Let's have a VRA."

I suspect there will be more dumping cases brought, both by Mexico against the United States, and by the United States against Mexico. A good many of them will be under the second category, where they are brought really as a trade barrier. To date, there have been fourteen cases of dumping brought by the United States against Mexico and fifteen brought by Mexico against the United States. There has been relatively little use of the rules against subsidies.

Before 1985, there were a number of cases brought by the United States against Mexico, some twenty-nine based on subsidies, but Mexico has begun to dismantle its subsidization program substantially . I do not believe that there have been any cases brought since that time. It is interesting how we spend so much time thinking of complex rules for a small number of cases, when we really have not addressed the issue of how we are going to provide harmonization of rules dealing with the settlement of private commercial disputes. There are some provisions in NAFTA for private investment disputes, and I think that is extremely healthy.[3]

GATT has made some proposals in both the dumping and subsidies area.[4] GATT has had a difficult time, however, in reaching any conclusion. The GATT negotiators remind me of economists; if you lay all of them end to end, they would not reach a conclusion. There are two sides in the dumping issues. One is the importers' side, which the United States tends to take, and that is where they would like to have harder rules. The United States is concerned with companies that change the nature of the product, just a little bit, after a dumping claim has been brought against them, so they will not be challenged again, or must be challenged for the problems with the modified product. Canada and Mexico are more likely to take the position of the exporter, which wants changes in the dumping rules making it easier to measure dumping, and probably to increase the de minimus, substantially.

The subsidies proposal has also come to a point where we have no real final determination. We have a view that certain subsidies should be prohibited. The United States likes that. Certain subsidies should be permissible, but actionable, and certain ones permissible and not actionable. The United States is stuck on that. How do we solve all of this? One way perhaps would be the European Community approach, in which there are no internal dumping or subsidy actions.

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3. NAFTA, *supra* note 1, arts. 1115-38.

4. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, UR-91-0185, GATT Secretariat (Dec. 20, 1991).

I believe we eventually will see dumping and countervailing duty laws somewhat harmonized. NAFTA does not address a great deal with the subsidy and dumping rules. It does address dispute resolution. Also, there is a substantial protection in the safeguard area. The difficulty is that GATT requires any protective action to be taken against all GATT members. If we now have a surge of sneakers coming from all of those nations that I mentioned including Mexico, what do we do with Mexico? In subsidies you are going after the *subsidizing nation*; in dumping you are going after the company that has *dumped*. But in a response under the escape clause provision of Section 201, which picks up on Article 19 of GATT, you must go against all nations. The process that has been chosen in NAFTA is to have a transitory provision; you may only go against other NAFTA parties for a period of ten years.[5] Presumably, the way the language reads, at the end of that ten years, no more safeguard actions will be permissible against Mexico. One might look at this and conclude that you fall back solely on the use of GATT.

Essentially we have said in NAFTA that when we are going against the sneaker industry we will *exclude* Mexico *unless* Mexico is a party that, considered individually, accounts for a substantial share of those imports of the sneakers. So we are essentially trying to move Mexico and Canada out of the ambit of GATT. This is interesting because this is exactly what we have argued for in GATT. The United States would like to be able to target countries specifically. If Brazil is giving us trouble with a surge of footwear imports, we do not want to have to go against Italy. Under the U.S. escape clause version, however, we must. So what we have been unable to achieve in multilateral negotiation, we have been able to achieve in the NAFTA negotiations.

5. NAFTA, *supra* note 1, ch. 19.

DISCUSSION OF NAFTA AND UNFAIR TRADE PRACTICE LAWS

QUESTION: NAFTA requires Mexico to make substantial changes in its trade laws, especially in the area of antidumping and countervailing duties. Yet there are no time limits by which Mexico is required to make the changes. How soon do you anticipate that the changes will take place?

ANSWER, *Lic. Von Wobeser*: There is no time limit in the Agreement. I think it was purposely done this way. Nevertheless, I believe that there will be substantial changes in the Mexican laws and I expect them to be adopted before the treaty comes into force, probably in 1993. I think we can see in which areas the changes will be made because there is a requirement for consultation on different issues, and we have the issues well defined. I think principal issues concern the transparency of the process and limitation of the discretion of regulatory authorities. I think the laws were not changed earlier because it was a negotiating tool of the Mexican government. I think the Mexican government is now prepared to change them and, although there is no time limit for the change, there is a commitment to get together on a yearly basis. The guidelines on what the changes should be are in the Agreement. It does not specifically state that those guidelines are for changes in laws of all three countries, but I think some will be made in the American system. I mentioned in my presentation that the six-month time period for rendering a final determination has never been respected. Procedures usually take on average nineteen months. I expect that we will have more clear rules on that in 1993.

QUESTION: Should we conclude from the presentation of Mr. Glick that the disparity of economic conditions between Mexico and the other parties provides a viable argument for differences in treatment of Mexican imports under American antidumping law?

ANSWER, *Mr. Glick*: Throughout the entire NAFTA negotiations, there was debate as to whether or not the differences in the economic level of development of Mexico should be taken into consideration. In general, however, the same standards have been applied to Mexican goods as to goods of the other parties. My personal view is that there should have been a little more consideration given to these factors. I think there could have been at least more transparency, more harmonization, and more clarity in the American domestic procedures in antidumping and countervailing duties cases that would have made it more fair and more open, without necessarily having a special set of rules for Mexico.

QUESTION: Is a foreign company permitted to contest the imposition of a provisional duty by Mexico in an antidumping action?

ANSWER, *Lic. Von Wobeser*: Yes. It is really the Mexican company, the one that is importing, that may file the action protesting the imposition of the duty. The provisional duty may be paid, and if it is cancelled or revoked a request for reimbursement may be made. Alternatively, a bond may be posted if SECOFI authorizes the company to do so in lieu of payment of the duty. The bond secures the eventual payment of the duty, but it is always the importer who contests and pays the duty.

QUESTION: Do Mexican duties always have to be paid prior to a final determination of the propriety of their imposition?

ANSWER, *Lic. Von Wobeser*: The duties have to be paid, or a bond posted, in advance. There is an option, but in case a bond is posted, there is a requirement of prior approval by SECOFI. I think that this is very likely to change, and I think we will see the Mexican law authorizing the posting of a bond become automatic so that prior approval will no longer be required as a condition for posting bond.