United States - Mexico Law Journal

Volume 4 *United States and Mexican Competition and Trade Law*

Article 13

3-1-1996

Panel Discussion Part 4: Challenges by Competitors and Governments in Response to Foreign Subsidies, Dumping and Import Surges

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PART FOUR: CHALLENGES BY COMPETITORS AND GOVERNMENTS IN RESPONSE TO FOREIGN SUBSIDIES, DUMPING AND IMPORT SURGES

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THE PROBLEM

Using the same facts as the previous hypothetical problems, consider the following: Several more years have passed. GROWFAST and AGRICOLAS have a large share of the market in Mexico. A Mexican competitor, INSECTICIDA DE JALISCO, S.A. de C.V., has discovered that GROWFAST sells Sollate™ in Mexico for what appears to be about twenty percent less than the price in the United States home market. It also believes that GROWFAST receives major tax breaks from the state of Kansas and the city of Topeka and receives farm supports from the Unites States federal government. INSECTICIDA would like the Mexican government to investigate GROWFAST.

Michael Gordon: If the successful sales in Mexico by GROWFAST are attributable to the tax breaks given to them by Kansas or the farm supports by the United States federal government, is there any action that Insecticida or the Mexican government might take to protect Mexican producers from such competition?

THE DISCUSSION

Gabriel Castañeda: In principle, there could be an action under the Mexican Foreign Trade Law.[1] INSECTICIDA or the Mexican government could use the Mexican Foreign Trade Law mechanisms if there has been an improper subsidy or if there is a major differ ence in prices between the two comparable markets.

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1. Ley Exterior de Comercio [Foreign Trade Law], Diario Oficial de La Federación [Official Gazette of the Federation - hereinafter D.O.] (July 27, 1993).

Michael Gordon: Do you distinguish between export subsidies and domestic subsidies? It does not seem terribly clear to me that the Kansas tax breaks are given only for companies doing exports.

Castañeda: Mexican law, which has a very broad definition of "subvenciónes" (subsidies), could encompass that specific concept.[2]

Gordon: What about the U.S. law and the Canadian law, would these be actionable subsidies?

Terence Stewart: The answer to the question whether it makes a difference if the subsidies are for export or domestic sale depends on whether they are perceived to be, *per se*, specific under both the World Trade Organization (WTO) agreement[3] and U.S. law,[4] and by reference, Canadian[5] and Mexican law.[6] Export subsidies are actionable if they are above de minimis amounts and if there is injury. Domestic subsidies are actionable only if other tests are satisfied, the most important of which is whether they will be viewed as limited in their nature. A tax break is the type of subsidy that could go either way depending on whether the government has wide discretion in granting it, whether it is broadly available, and whether it is available to a few sectors or industries. If the subsidy is limited, it would be viewed as specific and hence potentially actionable. If the subsidy is something that is given to all agricultural or manufacturing products, it would not be an obvious subsidy.

In the fact situation given here, there may be as many as four causes of action. One is for dumping where there is a 20% differential in price. While that 20% differential in price might be justified by differences in what are called direct selling expenses or differences in levels of trade, a 20% price difference in many products is more than sufficient to cause both harm in the market and a finding of dumping.

You hypothesize that the company is "in danger" - there are a lot of facts not stated, such as whether this is the only company that produces this product. If it is the only producer, then you have an injured industry. Under dumping methodology in all three countries, you must have an industry that is harmed, not just a single company.

If there is a rapid increase in imports, it is possible that you might also have a safeguard action. In the United States or any of the other

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2. *Id.* Art. 28. "La subvencion es el beneficio quo otorga un govierno extranjero, sus organismos públicos o mixtos, o sus entidades directa o indirectamente, a los productores, transformadores, comerzializadores o exportadores de mercancías, para fortalecer inequitativamente su posición competetiva internacional, salvo que se trata de prácticas internacionalmente aceptadas. . . ."

3. Agreement Establishing the World Trade Organization, GATT Doc. MTN/FA II-A (Dec. 15, 1993) [hereinafter WTO Agreement], in GATT Secretariat, Final Act Establishing the Results of the Uruguay Round of Multilateral Trade Negotiations (April 15, 1994), *reprinted in* 33 I.L.M. 1143 [hereinafter Final Act]; implemented by U.S. Congress in Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (Dec. 8, 1994), 19 U.S.C.A. § 3501 (West Supp. 1996) [hereinafter URAA].

4. 19 U.S.C. § 1677(5) (1994) (countervailable subsidy).

5. Special Import Measures Act, R.S.C., ch. S-15 (1985), amended by S.C., ch. 65, § 26(1) (1988) (Can.); Canadian International Trade Tribunal Act, R.S.C. 1985, ch. 47 (4th Supp. 1988), as amended. *See also* Act to Implement the Agreement Establishing the World Trade Organization, S.C. 1994, ch. 47, §§ 144-189 (Can.).

6. Foreign Trade Law, *supra* note 1.

countries, since you are dealing with a pesticide, there would also be some possibility of satisfying health and safety standards that may exist at both the state and federal levels. This might be the basis for a cause of action to restrict imports at the border or to have them banned altogether.

Gordon: In the subsidy law, I believe that the WTO agreement has adopted three categories: export subsidies which are, *per se*, unlawful; domestic subsidies which are actionable; and domestic subsidies which are non-actionable.[7]

Stewart: That is true. The "greenlight" subsidies[8] are non- actionable. If the tax breaks were subsidies for research prior to actual development, and if they were limited in amount, they might satisfy the greenlight exception.

If the tax breaks or other subsidies were for disadvantaged regions and fit certain criteria, you might also have a greenlight exception. If they constituted one-time breaks to improve environmental conditions, did not support operating expenses, or were limited in amount, they might also be greenlight subsidies. Some greenlight subsidies under the WTO have now been implemented into U.S. law.[9]

Harvey Applebaum: We have been proceeding on the assumption that GROWFAST is the only U.S. producer of this particular orchid pesticide, Sollate™. It would become very important in analyzing a possible anti-dumping or countervailing duty action to know whether there is a "like product," (that is the relevant market term in the trade laws).[10] It is necessary to determine whether your case is limited to this particular pesticide or whether there are "like products," i.e., whether the relevant market is broader. Let us assume that Sollate™ is a monopolist in the United States and is the only U.S. producer. That does not in any way foreclose an anti-dumping or countervailing duty action. As a matter of fact, we have had many successful anti-dumping petitions by either total monopolists in the U.S. market or companies that were dominant in the product. If you are going to consider an action in the United States, you have to know who the potential petitioners are and whether it is one company or many. A successful claim must satisfy the requirement of "material injury" to a domestic industry.[11] These facts suggest a possible actionable subsidy and a dumping situation. You have to analyze what the product is, who the petitioners are, whether there are several producers or one, and whether you can show injury. In these cases, arguments have been made that, by definition, a monopolist does not suffer injury within the meaning of the anti-dumping and countervailing duty laws. These arguments have been rejected.

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7. Final Act, *supra* note 3.
8. 19 U.S.C. § 1677(5B)(A)-(D) (1994).
9. URAA, *supra* note 3.
10. The terms "domestic like product" and "foreign like product" are defined in the Tariff Act of 1930. 19 U.S.C. §§ 1677(10), (16) (1994), as amended by the URAA, *supra* note 3.
11. 19 U.S.C. §§ 1671-77 (1994).

John Gero: I think Mr. Stewart's analysis is correct and applies to Canada as well. I would like to touch on two other matters. One, if it is an industrial product and there is clearly an export subsidy, then there is one other basis for a claim: that the subsidy is prohibited under the WTO agreements. In fact, a Canadian producer could go to the Canadian government and say, "Look, what the United States is doing is illegal under their WTO obligations." The Canadian government could seek a review by a WTO panel and an order to get those subsidies removed.

Second, the way Canada and the United States implement laws and the way Mexico implements its international obligations is somewhat different. In Canada and the United States, international obligations only apply to domestic law to the extent they have been implemented by domestic statutes.[12] Both Canada and the United States have adopted implementing legislation for the WTO.[13] In the Mexican context, international treaties are self-executing. Mexico has not, as yet, formally amended its Foreign Trade Law to reflect the changes that have been entered into in the context of the implementation of the Uruguay Round. Because the WTO Agreement is an international treaty, the text of WTO subsidies and anti-dumping codes have the full force of law in Mexico. If a party wishes to bring an anti-dumping or countervailing duty case in Mexico, it needs to do two things. It needs to look at the Foreign Trade Law in Mexico, as well as the anti-dumping and subsidy provisions from the General Agreement on Tariffs and Trade which are incorporated in the WTO Agreement.[14] There is not necessarily consistency between those two instruments at the present time, and, under Mexican law, it is the WTO agreements that would govern.

Gordon: For example, the Mexican Foreign Trade Law simply says "injury"[15] and the WTO says "material injury,"[16] so is the Mexican Secretaría de Comercio y Fomento Industrial (SECOFI) following the material injury test?

Castañeda: The WTO Agreement is the law in Mexico for all legal, practical purposes, so it should override whatever deficiencies the Foreign Trade Law has.

Stewart: The Mexican trade law was put on the books after Mexico became a member of the GATT in 1988, and the GATT material injury

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12. Although generally true, some international obligations under U.S. law are "self-executing" such as extradition treaties, and do not require implementing legislation.

13. Act to Implement the Agreement Establishing the World Trade Organization, *supra* note 5; URAA, *supra* note 3.

14. Foreign Trade Law, *supra* note 1; Art. VI, General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187; Agreement on Implementation of Art. VI of GATT, Apr. 12, 1979, 31 U.S.T. 4919, 18 I.L.M. 621; Office of U.S. Trade Representative, Final Act, Decisions and Declarations Relating to Agreement on Implementation of Art. VI, 401 (1994). For detailed discussion, *see* Criag R. Giesze, *Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as Well as Practical Business Risks and Realities, for United States Exporters to Mexico in the Era of the North American Free Trade Agreement*, 25 ST. MARY'S L.J. 885 (1994).

15. Foreign Trade Law, *supra* note 1, art. 39.

16. GATT material injury test: WTO Agreement, *supra* note 3, at art. 15 (determination of injury).

test is the test used to hold accountable those people who are citizens of states which are members of the GATT.[17] One of the interesting scenarios concerning dumping law history in Mexico is that the largest set of dumping cases were brought against imports from China. Presently, China is not a member of the GATT, so the obligations of the GATT and the new WTO are not applicable in the United States or in most other countries unless there is a bilateral treaty with China on the particular issue. Mexican law was modified as a result of NAFTA but before then had some provisions which were not imposed vis-a-vis the United States. One provision of the Mexican trade law permitted a preliminary decision of SECOFI to become effective within five days. This provision was, in fact, used against China. Supplemental tariffs ranging from approximately 300% up to 1100% were imposed within five days of the announced initiation of cases, covering 25% of all Chinese imports into Mexico. It was as close to an economic act of war as imaginable.[18]

Gordon: The government agencies that deal with these issues differ in each country. The International Trade Administration (ITA) is part of the Department of Commerce and deals with the determination of whether subsidies exist and whether there is dumping, or sales at less than fair value.[19] The International Trade Commission (ITC), a quasi-independent agency, makes the injury determination. Why is that? Does it make sense? Could one agency do the job? In Mexico, one agency does both tasks.

Applebaum: The United States did at one time have one agency making both dumping and subsidy determinations and the injury determination. That was the Treasury Department. Congress was unhappy with the Treasury Department's implementation of the statute, and in 1954, the injury determination was taken away and given to the then Tariff Commission, the agency that has since become the International Trade Commission.[20] At one time, the Treasury Department was directed to conduct preliminary injury reviews before going forward with a case. Later, Congress, disappointed with the Treasury Department's enforcement of the law, shifted responsibility for dumping and subsidy determinations from Treasury to Commerce. There has been little consideration of recombining the two functions again into one agency.

These responsibilities were clarified by the 1974 amendments to the antidumping law.[21] There have been occasional calls to shift all functions to Commerce or all to the ITC. Even today, as part of the Congressional momentum for dismantling or changing the Commerce Department there has been considerable debate over where the trade law functions of the

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17. *Id.*

18. Dumping Cases Against Imports from China, *see* S. CHINA MORNING POST, June 30, 1993, at 3, May 18, 1993, at 3; J. OF COM., May 14, 1993 at A1; FIN. TIMES, April 28, 1993, at 7.

19. Commerce Dep't Organization Order No. 10-3, 45 Fed. Reg. 6141 (Jan. 25, 1980).

20. Trade Act of 1974, Pub. L. 93-618, §§ 171-175 (1974) (codified at 19 U.S.C. § 2231(a) (1994)).

21. For the responsibilities of the U.S. Dep't of Commerce International Trade Administration (the "administering authority") in connection with the administration of the countervailing and antidumping laws, *see* Tariff Act of 1930, 19 U.S.C. §§ 1671-1677l (1994).

Commerce Department—determination of the existence of dumping and subsidies—should go if the Commerce Department were abolished. Possible agencies include the ITC, the Office of the U.S. Trade Representative, or a new, independent Department of Trade.

The International Trade Administration (ITA) is part of the Department of Commerce, which is an executive agency reporting to the President. The International Trade Commission is a quasi-independent agency composed of six commissioners appointed by the President; no more than three can be from either party, and the chairman rotates every two years. The ITC should probably not be viewed as entirely independent of the political process. It is not bound by the Administrative Procedure Act, nor is it required to provide full due process rights to parties before it. The Commerce and ITC decisions are subject to two levels of judicial review, based on substantial evidence on the record. One level is the Court of International Trade and the other is the United States Court of Appeals for the Federal Circuit.

Stewart: The direction internationally has been towards what could be called the U.S.-Canadian bifurcated approach.[22] The justification in part was a concern that the Treasury Department was not distinguishing determinations of existence of dumping from determinations of injury. If they decided there was a serious injury case, they might have found dumping whether the facts were strong in support of dumping or not, and vice versa. Dividing the process provided for an independent examination of the extent to which an industry was harmed, regardless of whether or not dumping or subsidization was occurring. Canada has a similar bifurcated approach. Australia and the European Union, the other historic major users, have had unitary approaches. The European Union is in the process of changing to a bifurcated approach, but within a single entity. Different departments of the same agency will be responsible for the two stages. There seems to be a movement towards a bifurcated approach for the purpose of obtaining an independent evaluation of the injury. This procedure creates hurdles and is probably not as cost-efficient as a proceeding before a single agency, but it provides certain safeguards when making the determinations.

Gero: Canada has a bifurcated system similar to that of the United States. The Canadian Department of Commerce makes the countervailing duty or anti-dumping duty findings and the Canadian International Trade Tribunal (CITT), conducts the injury determination.

Gordon: How are Mexico's dumping and subsidy determinations made?

Castañeda: There has always been a single entity in Mexico, although the 1993 Foreign Trade Law creates a second stage for review by a Foreign Trade Commission.[23] However, the Commission which conducts the second stage has no real teeth; it can only render non-binding opinions.

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22. *See* Special Import Measures Act; Canadian International Trade Tribunal Act, *supra* note 5.

23. Foreign Trade Law, *supra* note 1, arts. 2-5.

The crux of the matter is that SECOFI has the power to assess the existence of dumping and subsidies and to declare injury. Anti-dumping involves a great amount of politics. In my view, Mexico needs to tackle more basic things before it adopts a more developed bifurcated system. Mexico has quite a lot to learn from Canada and the U.S. and other countries about how to defend itself in foreign trade related matters.

Gordon: Is there an internal division within SECOFI regarding who deals with the determination of dumping and subsidies and who deals with injury?

Castañeda: In the case of the unit which handles anti-dumping in Mexico, there is a real effort by SECOFI to create a large enough entity; they have over 200 people now.

Applebaum: I mentioned that in the U.S., ITC and Commerce decisions are subject to two levels of judicial review. I want to remind everyone that is not true of the proceedings under NAFTA.[24] Cases between the three countries may go to the Article 19 bi-national panels. However, I would like to know what kind of judicial review is available in Mexico, if any, to challenge a SECOFI decision in a case which does not involve a NAFTA country.

Castañeda: SECOFI's decisions are subject to judicial review. For example, if a SECOFI decision were based on information which was not disclosed to the losing party, that party would be entitled to seek relief in a direct *amparo* proceeding before a federal judge.[25]

Gordon: I think most people aren't familiar with the various types of action. They would like some action brought to help save their market share. I have read that there are only two possible remedies under Mexican trade law, anti-dumping and subsidy remedies. However, the WTO Agreement is law in Mexico and it covers the safeguard remedy where excessive imports threaten to injure a domestic industry. Is the safeguard remedy available for SECOFI under Mexican law?

Castañeda: I would say that the answer is "no."

Stewart: The WTO does not require that a member country have a safeguard provision in its trade laws, just as it doesn't require the country to have a countervailing duty law or a dumping law. So I think there would be that distinction in terms of whether there is a remedy.

Gordon: There are concerns that the methodology within SECOFI is not as fact-specific in proving subsidies and dumping as in the United States and Canada. Is that correct in your perception?

Stewart: I think SECOFI is in the same stage of development where the Canadian, U.S. and European systems were quite a few years ago. Most countries with dumping laws start by administering those laws

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24. *See* Chapter 19 of the North American Free Trade Agreement, Dec. 17, 1992 U.S.-Can.-Mex. (effective Jan. 1, 1994), 32 I.L.M. 289, 682 (1993) [hereinafter NAFTA].

25. The *amparo* suit is a Mexican legal institution similar in its effects to such Anglo-American procedures as habeas corpus, error and other forms of injunctive relief. For a thorough and well documented study of an *amparo* in English, *see* RICHARD D. BAKER, JUDICIAL REVIEW IN MÉXICO, A STUDY OF THE "AMPARO" SUIT (1971).

through their ministry of finance or treasury department because that is usually where they have customs houses administering the tariffs. It is an evolutionary kind of process. Mexico has had to go through a very rapid learning curve because of NAFTA. In my experience, there is a fair amount of specificity in their calculations. They do not have the bureaucracy, even though 200 people is a lot of people, to review cases with the same amount of transparency and due process as in the United States, but in fact their transparency and due process are superior to that of Canada at Revenue Canada, which is basically a black box on the dumping side. That is similar to how the Europeans run their system. In Mexico you have a protective order system quite similar to that of the United States, so that at least each party can gain access to the information that is submitted by the other. This improves the opportunity of having a realistic outcome; such an opportunity is not available in either Canada or Europe.

Gero: I'm not sure that is correct; certainly not regarding Canada. What is clear is that we have agreed in NAFTA on a procedure that in essence will force all administrative agencies involved in these determinations to be able to prove that they have implemented consistently the laws of the land.

Castañeda: Chapter 19 of NAFTA really forces Mexico into a higher bracket of enforcement, clarity and specificity of regulations and criteria and standards. My only worry is the backlog. In the *Steel Case*, the Secretaría de Comercio y Fomento Industrial (SECOFI) procedures were perhaps not as detailed and as careful as they should have been.[26] Mexico is learning the hard way. I expect that to change, not just the quality of the rules but also the way they are enforced.

Applebaum: There are two issues that are coming together on the Chapter 19 bi-national panels. These panels are supposed to apply the law of the country in which the proceeding takes place, similar to what the judicial system of that country would do. When compared to the information that can be obtained from the U.S. Commerce Department, it is not easy to obtain from Revenue Canada the basis of a dumping determination. A bi-national panel applying Canadian law would thus not necessarily be in the position hypothetically to determine that the transparency required by the WTO Anti-dumping code was satisfied. If a party seeking to appeal to a bi-national panel wishes to challenge, not the decision of the agency as such under substantive U.S., Canadian or Mexican law, but contends that the proceeding was inconsistent with the WTO obligations of the country in question (and all three countries are members of the WTO), is that a bi-national panel issue, or must the aggrieved party or government pursue that with the WTO in Geneva? This has been widely discussed but not resolved. Do the bi-national panels

26. Binational panels ruled 3-2 that SECOFI had acted outside of its jurisdiction in imposing duties of 76% against USX Corp. And 76% against Bethlehem Steel Corp. BNA, *Int. Trade Rep.* 1480 (Sept. 6, 1995)

under NAFTA have the jurisdiction to deal with obligations of a member country under the WTO Agreement?

Gero: The answer is "no." There are two dispute settlement processes, two distinct processes. Unfortunately they get confused, but they are very distinct and their objectives are different. Whether a country has met its international obligations would have to be referred to a WTO panel which would decide whether Canadian law conforms with its obligations under the WTO Agreement. There is a similar provision in Chapter 20 of NAFTA regarding whether a member is living up to its obligations under NAFTA. But it must be recognized that there are no substantive anti-dumping and subsidy obligations in NAFTA. The only international obliga tions relating to dumping and subsidies that the three countries have are in the context of the WTO Agreement.[27]

The Chapter 19 process is totally different. It is designed to address the issue whether the administrative agencies of the three member countries have applied their own law consistently. It is possible to have these processes run parallel. The Canadian Softwood Lumber Case provides an example.[28] The United States government self-initiated the case and went through a normal countervailing duty process which the Canadian parties challenged under Chapter 19 of the Canada-U.S. Free Trade Agreement.[29] The issue was whether the U.S. administrative agencies carried out their functions consistently with U.S. law. At the same time, Canada took the United States government to the GATT to decide whether the action of the U.S. government was consistent with U.S. obligations under the GATT. Hence, it is possible to run parallel processes because the two processes are intended to examine two different issues.

Gordon: What about the appeal process from NAFTA panel decisions?

Applebaum: There is a growing sentiment in the U.S. Congress that the bi-national panels are undesirable. For example, there was a letter that Senator Dole and many other congressmen signed urging the United States to abstain from entering into any agreement with Chile to utilize the binational panels.[30] Their position was that the bi-national panel process was supposed to be only a temporary measure. Most of the criticism of the panels is coming from U.S. industries unhappy with the results the panels gave them. The most vocal critics of the panels claim that the panels have gone beyond their mandate of deciding whether the administrative agencies made decisions consistent with the law of their country. If a claim is brought in an anti-dumping case in any of these three countries against imports from one of the other three countries, an appeal from the final administrative determination can be made to

27. WTO Agreement, *supra* note 3.

28. In re Certain Softwood Lumber Products from Canada, No. ECC-94-1904 01OUSA (U.S.-Can. FTA Panel) (Aug. 3, 1994).

29. Canada-United States Free Trade Agreement, Dec. 12, 1987 and Jan. 2, 1988, ch. 19 arts. 1901, 1904, Annexes 1901.2, 1904.13, 27 I.L.M. 281, 386-390, 393-395 (1988) [hereinafter FTA].

30. BNA, *Int. Trade Rep.* 1410 (Aug. 23, 1995).

a bi-national panel, or to a panel established under the WTO for failure to comply with international obligations under the WTO Agreement.[31]

Stewart: There is actually another option. A party may appeal to a national court, although I do not believe this option has ever been exercised. This option requires that the other party not oppose the appeal within the 30-day period provided for requesting a binational panel review. From the cases that have gone forward, most people involved generally have found the panels to be a reasonable approach to dispute resolution, with some notable exceptions.[32] Those people who serve as panelists by and large have very limited, if any, understanding of the foreign legal system involved. Canada's roster, for example, historically has been comprised mostly of non-lawyers. Thus, non-lawyers from a foreign country attempt to construe how a U.S. court would construe U.S. law. One has to wonder, even if the system is working reasonably well, whether there is any logic in putting people to that kind of a test. Another problem concerns the number of lawyers involved in trade matters and the appearance of conflict. I believe it is a bigger problem in Canada and Mexico than in the United States. In Canada most of the major trade lawyers are in large firms and those large firms over time have represented the provinces or the Canadian government on one or more trade matters. This creates a fairly easy hunting ground for those looking for possible conflicts. That same issue has now spread to the WTO, where the United States is seeking stronger conflict provisions. Whether the binational panel process is considered good or bad, the panels in the vast majority of cases have resolved disputes more quickly than the courts.[33] That is becoming less true today than before, however.

There are some fairly legitimate concerns people raise. People who lose question the fairness of the process. Since panel decisions are theoretically not binding, one of the problems with expanding the binational panel process is the possibility of creating independent bodies of law dealing with the same statute in each participating country. Dumping law could mean different things for Canadian imports than for Mexican imports, or Japanese imports from those in the United States. There is a range of those issues that have not been sorted out. One of the justifications for the binational panel is that it represents a political compromise. From Canada's perspective, there was a concern that the U.S. court review process was both too long and too political.

Gordon: Members of the binational panels from the United States have been largely attorneys, including professors, practitioners, and judges.

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31. NAFTA, *supra* note 24, ch. 19.

32. One case challenged the constitutionality of the system: Coalition for Fair Lumber Imports v. Unites States, No. 94-1627 (D.C. Cir., docketed Oct. 4, 1994, withdrawn by voluntary motion to dismiss Jan. 5, 1995). *See also* JAMES R. CANNON, RESOLVING DISPUTES UNDER NAFTA CHAPTER 19, ch. 16 (1994) (constitutionality of Chapter 19 panel process).

33. For a thorough discussion of the dispute resolution system under NAFTA Chapter 19, as well as the controversies that served as the impetus for binational panel review, *see id.* at ch. 11 (origins of panel procedures).

Some have asserted the idea of placing more retired judges on the panels to make them more like the courts. What do you think of that?

Stewart: If there are any judges on the roster, they must be recent appointees. The original list was largely a who's who of the trade bar. One of the concerns that did not play out in terms of the voting patterns was that in this area of law it is difficult to imagine how any trade lawyer could be a panelist. Trade lawyers, almost by definition, are conflicted out because the issues are going to be the issues that are relevant to their clients.

Gordon: Licenciado Castañeda, what have been the issues concerning appointees from Mexico? Who have they been?

Castañeda: I was offered the opportunity to be on the Mexican roster but I refused. My reason was that the process is too complex, and it is subject to great political pressure.

The roster should be very well equipped with lawyers. I think the *Steel case* has taught Mexico a lesson. I think 85% of the problem was that SECOFI's procedures were not sufficiently transparent and were not conducted with sufficient care. The department of SECOFI which conducts the administrative proceedings should be staffed with lawyers, specifically lawyers who understand the economics and practical implications of the process. That will take time to develop.

Gero: It should not be surprising that Canada has strong views on this important aspect of both the Canada-U.S. Free Trade Agreement and NAFTA. The administration in the United States has pushed very hard to get judges onto the panels. It is unclear to me that this is necessary, but in any event, in the latest set of rosters, the Canadians have appointed more judges to the rosters than the Americans. Perhaps, U.S. judges have not been interested in serving for what is, in essence, almost pro-bono work.

Conflict of interest issues are very real and need to be overcome. There has been a vast improvement of the rules of the various NAFTA secretariats in all three countries in spelling out precisely how disclosures of interest should be made and dealt with. The parties have been extremely vigilant in that regard; there have been panelists who have withdrawn from panels or even been removed when a conflict of interest became apparent. That is an important issue for the credibility of the panel process that cannot be understated. Unfortunately, in one of the most high profile cases, the appearance of conflict arose.[34] Further, it arose after one of the parties lost the case. That issue went to the Extraordinary Challenge Committee which found that no confict of interest arose.[35]

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34. In Fresh, Chilled and Frozen Pork from Canada, USITC Pub. No. 2362, Inv. 701-TA-298 at 19 (Feb. 1991), a binational panel remanded an administrative determination of the USITC twice. In the subsequent extraordinary challenge under NAFTA art. 1904, the challenge was dismissed. Memorandum Opinion and Order Regarding Binational Remand Decision II, Article 1904.13 Extraordinary No. ECC-91-1904-01 USA (June 14, 1991).

35. NAFTA art. 1904 provides for safeguarding the panel review system by providing for the establishment of extraordinary challenge committees composed of judges or former judges to review panel decisions in limited circumstances. Annex 1904.13 provides procedures for selecting the members of the extraordinary challenge committees.

Another question concerns the standard of review. It has tended to arise in the larger, more politically charged cases. There have been about 70 panels since the beginning of the Canada-U.S. Free Trade Agreement. Most of the decisions were unanimous or four-to-one decisions. Standard of review has rarely been an issue. There were only three panel decisions which resulted in an extraordinary challenge. In all three cases the issue of the standard of review was raised and, in only one of the cases, was there a split vote. Unfortunately, that case was decided along national lines. Of the two unanimous cases, both Canadian and U.S. participants were involved.[36]

I think the biggest problem in the context of Chapter 19 is one of perception of what Chapter 19 is intended to be. There is a perception that the Chapter 19 process is intended to be the same as the domestic court process. It is not. It clearly was not negotiated that way. The Chapter 19 process is a unique process. The panel process is in essence an attempt to replicate, to some extent, the process of the Court of International Trade or the federal court in Canada, but the extraordinary challenge process is not intended to be a court of appeals. It is a much more restrict ed process to determine whether there has been panel misconduct which has materially affected the panel's decision and threatened the integrity of the binational review process. Many people have suggested that the extraordinary challenge committee should serve in the same manner as a court of appeals, and review the merits of the findings of the panel. However, that was not what was negotiated. There are large substantive differences between what a court of appeals can do and what an extraordinary challenge committee can do.

There was debate as to whether Chapter 19 was temporary or permanent in the context of the FTA. That ambiguity has been cleared up in the context of NAFTA. It is clear that it is now a permanent system.

There is a certain amount of discontent by people who lose. Whether that is legitimate or not is open to debate. From a Canadian perspective, Chapter 19 is a very important aspect of NAFTA because NAFTA does not contain specific obligations in the area of trade remedies. It is a second-best solution. The Canadian government would rather have adopted new trade remedy obligations, but the United States did not agree to this in the negotiations.

QUESTIONS AND COMMENTS

John Rogers, Carlsmith Ball Wichman Murray Case Mukai & Ichiki, Mexico City: I wonder if the panelists could say something about the methodology of making determinations in dumping cases. Is it a simple comparison of price at which the product is sold in one country versus price at which the product is sold in another country without taking

36. For discussion of the experience of binational panels under the FTA, *see* Moyer, Chapter 19 of the NAFTA: binational panels as the trade courts of last resort, 27 INT'L LAW. 707 (1993).

account of conditions and differences in the two countries? It could be argued that in Mexico there is a lesser degree of risk of product liability claims. Arguably a producer could take that into account in pricing products sold in Mexico. Is that something that has ever been considered?

Stewart: There are many circumstances of sale adjustments that are made. The process of price comparison can start from a simple premise that one looks at the price FOB[37] port of export or from the factory gate and compares that price with the price of first sale by the producer in the other country. But the reality in most cases is that there will be claims for virtually every imaginable type of difference. I cannot say I have been involved in a case where a claim has been made for differences based on product liability, although differences are recognized based on warranty costs. Such differences are fairly routine in cases where warranty costs are large enough to be separately tracked and modified. Most of the costs which might be called costs arising from the societal underpinning are not going to be recognized.

Rogers: There are some differences that are very concrete, like taxes. Mexico has a 15% value added tax (VAT).

Stewart: The VAT is not typically an issue in the cases. People in countries which use the VAT as opposed to income tax get the break that VAT under the GATT is netted out on export;[38] this is not viewed as a subsidy. Under the latest permutation of U.S. law in determining the "home market price" of a product being exported to the United States, a large VAT on a home market sale is no longer added. Earlier, there was a series of cases in the United States where the VAT that would have been imposed on a domestic sale was added to the "home market price" even though it was not actually imposed on the exported product.[39]

Applebaum: There is an effort in the antidumping statute to take into account all demonstrable differences between costs in the two markets. One cannot just claim the cost of doing business is higher; one must be able to show those cost differences were actually incurred during the investigation period with respect to the product in question. Warranty cost differences are clearly recognized upon a showing that as between one market and the other it was higher in one. Product liability insurance costs or actual product liability claims would potentially be eligible for adjustment. The Commerce Department takes a sort of "snapshot," a picture of a six-month period or one-year period depending on the case, to determine what costs were incurred during that period with respect

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37. Free on Board (used when delivery by the seller is to continue until the goods are placed over the ship's rail). *See* INT'L CHAMBER OF COM., INCOTERMS 1990 (1990).

38. GATT netting rules: WTO Agreement, *supra* note 3, at art. 1.1 (a)(1)(ii) n.1:

In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remissions of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

39.

to the product in question. Differences in circumstances of sale are recognized. In theory, the Commerce Department and the courts have for years tried to make comparable, "apples-to-apples" comparisons by requiring the products stripped down to FOB port or FOB factory netback, taking out all costs.

Rogers: Is the Mexican approach the same?

Castañeda: In Mexico, the written law is more general. One big box engulfs everything; it is called "general expenditures." In the case of anti-dumping, the law is rather clear. You can throw in not only the production costs but general expenditures and what is called a reasonable margin of profit. What is that? It is like comparing apples and oranges. That is one of the main weaknesses of the system itself. NAFTA should be a great achieve ment in terms of unifying criteria for comparison of costs and value but I am afraid to say that, even in the United States and Canada, this is still a theoretical and practical problem.

Applebaum: Other differentials including credit differentials, technical differences, and advertising differences, are taken into account, but these have to be directly related to the product under investigation. Those factors are fairly common in consumer product cases. The difficulty always is in demonstrating those costs and their relationship to the product under investigation.

Rogers: Another example would be the Japanese consumer who is far more choosy in taking an automobile and often rejects it because the finish is not good. If you simply introduce market studies that show Japanese consumers are fussier, and translate this into a cost analysis that shows 10% of the cars were rejected and had to be refinished, would that additional cost factor be considered?

Stewart: It depends on the fact situation. My experience in Mexico in terms of the questionnaires and decisions that have come down reflect similar types of adjustments. That is mostly true in all of the systems that we have had experience with. There are differences in transparency and in evidentiary burdens. But circumstance of sale adjustments are required adjustments for all countries which are members of the WTO system.

Applebaum: In order to compare the price in Japan to the price in the United States, some adjustment must be made for the differences. The burden would be on the Japanese seller of automobiles to demonstrate the actual cost differences reflected in physical differences between the automobile models sold in Japan and those sold for export. One cannot simply come forward with a market study and say consumers in Japan demand a different model. A showing must be made of the production cost differences, whether they are higher or lower, for those features which differentiate the Japanese home market model from the model sold in the United States.

Gero: All the anti-dumping laws tend to be the same in all three countries. But there is a great deal of minutiae and each side is attempting to interpret what is available in its own favorable light. That is why these cases become very difficult, very litigious.

Rogers: Have you detected from your perspective a difference in approach between Canada and the U.S. in interpreting the data?

Gero: No, I think there is little difference between the way the U.S. Department of Commerce would interpret the data and the way Revenue Canada would.

Boris Kozolchyk, National Law Center, Tucson, Arizona: A professor of law at the University of Arizona, David Ganz, was one of the judges on the steel panel. He was trained in the civil law in Costa Rica and, in fact, taught at the University of Costa Rica. David told me the thing that delayed panel's procedures the most was the lack of translations. The pleadings or whatever have to be translated into the three languages. An enormous amount of time was spent. In fact some of our Center people had to translate for all the sides.

Allan Van Fleet, Vinson & Elkins, Houston, Texas: Among the things that go into the calculation of price in anti-dumping cases is a reasonable return or a reasonable profit. I think it becomes quite fundamental when, in determining what is a defensible low price, you have to include the cost of capital. How do the officials deal with this cross-border? What is the reasonable profit in Mexico when you can put your money in a CD and gain 100% interest?

Gero: In the past, the United States said it was 8% across the board, period, and that is what would happen. That was not the case in Canadian law. One tended to look at the companies' financial statements and try to gather in a specified period of time, what the actual profits were. I think the U.S. law subsequently has been changed to reflect the new WTO agreements. The focus is now on actual profits. There have been very significant changes in how profits are calculated.

Applebaum: In fact, the majority of anti-dumping cases do not involve calculations of profits. In the garden variety case, the price in the United States is compared to the price in the foreign markets, and there is no reference to costs. Thus, as long as the price in the home market is higher, there can be a finding of dumping even if sales in both markets are profitable. The calculation of costs comes into play when for one of several reasons under the statute there must be developed a surrogate for the foreign market price. That surrogate is called "constructed value." Until the Uruguay Round Agreement, the United States law for purposes of calculating constructed value (the surrogate for the home market price) had a statutory minimum of 8% for profit and 10% for general and administrative costs. In fact, the United States generally applied the statutory 8% minimum for profits.[40] That was eliminated by the United States in the Uruguay Round Agreements Act.[41]

Stewart: The statutory minimums in the United States go back to about 1920;[42] they were often advantageous to respondents. Any time profits

40. 19 U.S.C. § 1677b(e)(1)(B) (1988).
41. Final Act, *supra* note 3.
42. 19 U.S.C. § 1677b(e)(1)(B) (1988).

and G&A costs[43] were higher than the 8% and 10% minimums, they were never reported because they were simply unavailable. The agency just plugged in the minimum costs. There certainly were cases where the actual profits and costs were higher, so it was the type of procedure that could cut both ways. Note that this problem generally arises only in cases where the U.S. agency must determine the "constructed value" of a product in the foreign home market. It is one of those changes made at the insistence of respondents and it is likely that there will be requests to return to the good old days, because the amount of information that is required to satisfy the WTO alternative is very clearly not going to be advantageous to many respondents.

Castañeda: Eight percent is merely a reference point to work with. There is always an arbitrary side to any such system. This is one of the main criticisms of the system. Hopefully, the rules will become more precise, such as the rules addressing antitrust within the NAFTA area. This would make the anti-dumping system a more objective system, where 8% might be considered an overall average profit acceptable for Canadian, U.S., and Mexican producers and traders.

Jimmie V. Reyna, Stewart & Stewart, Washington, D.C.: First a comment, then a question. I'm currently sitting on a binational panel that is reviewing a Mexican resolution on chemicals. Although I don't have formal training in civil law, I probably have more than a basic understanding of it, and I don't feel like I'm lacking. There are two reasons for that. First, I have the opportunity to retain an assistant, meaning a Mexican attorney, who is paid to help me whenever I encounter a problem. Second, I have my Mexican colleagues who are panel members, and I think that if a fine issue came up that required additional research or that was a sticking point, they would certainly bring up that problem and I could get my assistant to review it, if necessary. I don't think that has ever been a problem. When you review the first decision that was issued by the Mexican bi-national panel on steel, it is a well-reasoned, well-written report. I did not see anything in it that told me the American panel was remiss or that they didn't understand what they were doing. To the contrary, it seemed like the process worked fairly well.

My question goes back to the discussions regarding the interplay of antitrust and trade laws. Is there a basis for the U.S. government or U.S. producers to obtain a remedy under U.S. antitrust laws? What about the reverse of the hypothetical facts, that is, the Mexican producer is selling its products in the United states 20% below cost and is receiving tax and farm support subsidies from the Mexican government?

Applebaum: There are not enough facts on the pricing side, but one must remember the requirements for predatory pricing under the Robinson-Patman Act[44] or the Sherman Act.[45] It is unclear whether there is

43. General and administrative expenses (also referred to as SG&A—selling, general and adminstrative expenses).

44. 15 U.S.C. §§ 13-13b (1994)

45. 15 U.S.C. §§ 1-2 (1994)

price predatory discrimination, that is, whether the Mexican supplier is selling below average variable cost and has the ability to recoup his losses. In the absence of unusual additional facts, I would be very surprised if there was any basis for a Sherman Act or Robinson-Patman case based on sales by the Mexican seller.

The second half of the question about subsidies is particularly interesting. There is no simple way that I know to use the U.S. antitrust laws to challenge governmental subsidies. In fact, if predatory pricing principles are applied, it is almost certain that the foreign seller is not selling below any measure of cost under U.S. antitrust laws because of the subsidies. The U.S. antitrust laws would thus not likely provide a remedy against either the low prices or the Mexican government subsidies. The discussion of replacing the anti-dumping law with antitrust laws begs the question of the countervailing duty law. In the NAFTA context the two have always been considered in tandem. While the anti-dumping law is the more controversial in terms of overall U.S. trade, the countervailing duty law is more controversial with respect to Canada and perhaps will eventually be with respect to Mexico.

Stewart: The procedures in anti-dumping[46] and countervailing duty[47] (subsidy) cases are very similar, but they are two totally different instruments that are intended to address two different problems. It is clear that in making progress on countervailing duties, one would have to make progress on subsidies disciplines. If no progress is made on subsidies disciplines, one cannot possibly talk about eliminating countervailing duties because a basic imbalance is created. The proposals to replace trade remedies with antitrust law suggest replacing only anti-dumping law.

The question whether it would be sufficient to prohibit predatory pricing without anti-dumping laws in a free trade area becomes whether a seller could maintain a 20% price difference in a truly free market. If the seller is not engaged in predatory pricing and there is arbitrage, would the seller be able to maintain this price difference for any reasonable length of time? How do we deal with a 20% price difference between New York and Los Angeles, to the extent that this is not accounted for by freight and other transportation costs? If there is a significant and artificial price difference in a free trade area, and there are no barriers at the border, then arbitrage will set in very rapidly and the seller's ability to maintain that 20% price difference will be very limited.

46. 19 U.S.C. §§ 1673-1673h (1994) (antidumping law).
47. 19 U.S.C. §§ 1671-1671h (1994) (countervailing duty law).