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NAFTA Chapter 19 Binational Panel Reviews in Mexico: A Marriage of Two Distinct Legal Systems

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NAFTA CHAPTER 19 BINATIONAL PANEL REVIEWS IN MEXICO: A MARRIAGE OF TWO DISTINCT LEGAL SYSTEMS

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I. INTRODUCTION

This paper[1] addresses certain issues related to the initial binational panel reviews of Mexican final antidumping and countervailing duty determinations under Chapter 19 of the North American Free Trade Agreement[2] (NAFTA).

This paper was initially intended to provide a broad overview of all panel decisions involving reviews of U.S. and Mexican final antidumping and countervailing duty determinations (jointly referred as "antidumping duty determinations") similar to the U.S. General Accounting Office (GAO) study[3] on panel reviews under the U.S.-Canada Free Trade Agreement (FTA).[4] The GAO concluded in its study that the twenty-three completed reviews were "too few to see if any patterns emerged."[5] Accordingly, as far fewer U.S. and Mexican panel reviews have been completed under NAFTA, the scope of this paper was narrowed to two issues: the application of national law by binational panelists, and the potential emergence of a separate NAFTA Chapter 19 jurisprudence. These issues are examined in the context of the binational panel reviews of the final antidumping duty determinations in *Steel Plate*[6] and *Polystyrene*,[7] the first two binational panel reviews completed in Mexico.

An issue that invariably arises in discussions concerning NAFTA binational panel reviews is whether foreign panelists can adequately apply the national law of the importing country. NAFTA Article 1904 provides that panel reviews must be based on the antidumping or countervailing

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1. This paper is based on the oral presentation made by Mr. Reyna at the 1996 U.S.-Mexico Law Institute. The opinions expressed in this article do not necessarily reflect those of Mr. Reyna's firm or its clients.

2. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994) 32 I.L.M. 605 (1993).

3. Gen. Acct. Office, U.S.-CANADA FREE TRADE AGREEMENT: FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS, GAO/GGD-95-175BR, (1995) [hereinafter GAO Study].

4. Canada-United States Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (1988).

5. GAO Study, *supra* note 3, at 3.

6. Certain Cut-to-Length Carbon Steel Plate from the United States, Mex-95-1904-01, published in the Diario Oficial de la Federación, 11 de Septiembre de 1995 14 [hereinafter D.O.]; FTAPD LEXIS

7. Crystal and Solid Polystyrene from the United States, MEX-94-1904-3, published in the D.O., 4 de Noviembre de 1996, 4; 1996 FTAPD LEXIS 7.

duty law of the importing country.[8] While there has been some controversy regarding the application of standard of review by binational panels, it has not been made clear whether panelists in general do not understand, or are unable to apply, the law of the importing country.[9] Indeed, the GAO reported that there was an overall satisfaction with the expertise and thoroughness of binational panelists.[10]

II. THE BINATIONAL PANEL PROCESS UNDER MEXICAN LAW

The initial Mexican binational panel reviews have raised a number of interesting issues related to whether panels apply the appropriate standard of review. As the *Steel Plate* and *Polystyrene* reviews demonstrate, the application of Mexican law by binational panels has been problematic, primarily due to the differences between the legal systems of the United States (and Canada) and Mexico and because Mexico's experience in trade matters is not as developed as that of the United States and Canada.

One of Mexico's principal NAFTA negotiating objectives[11] was the adoption of the trade dispute resolution mechanism established under Chapter 19 of the FTA which was structured in accordance with the U.S. and Canadian common law legal systems. As the FTA mechanism was incorporated in the NAFTA with little change, Mexico was obligated to make significant substantive revisions to its antidumping laws and regulations in order to implement the binational process.[12] Those revisions, however, were not sufficient to account for all the nuances that would arise as a result of the fundamental differences between the Mexican civil law code system and the common law structure of the binational panel review process.

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8. *See* NAFTA Article 1904(2) ("antidumping duty law" consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedent to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating authority).

9. Concerns over whether binational panels have applied the appropriate standard of review primarily focus on three FTA reviews involving frozen pork, live swine and lumber. *See* ECC 91-1904-01, ECC 93-1904-01, and ECC 94-1904-01.

10. GAO Study, *supra* note 3, at 55.

11. *See e.g.*, TRATADO LIBRE COMERCIO EN AMÉRICA DEL NORTE, SOLUCIÓN DE CONTROVERSIAS, Monografía 3 (SECOFI 1991).

12. Canada and the United States revised their laws in order to include "Mexico" in the FTA mechanism. By contrast, Mexico was required to adopt the due process provisions of the FTA mechanism, including those related to:

(1) affording interested parties full participation in all stages of investigations, administrative reviews, and panel and judicial reviews
(2) service of process, disclosure meetings, access to public and confidential information, *ex-parte* meetings
(3) maintenance of an administrative record, final determinations based on the administrative record, publication of preliminary and final determinations, determinations that set forth a factual and legal basis
(4) identification of the specific standard of review to be applied by binational panels.

NAFTA Annex 1904.15, Schedule of Mexico.

It is no surprise, therefore, that the initial panel reviews have involved important issues novel under both Mexican law and the binational panel process. When Mexico revised its domestic laws, it adopted a number of foreign legal concepts that have no basis under the Mexican legal system.[13] In addition, while NAFTA Chapter 19 was designed to limit the range of law applied in panel reviews, the Mexican legal system requires the application of a significantly broader range of law than applied in U.S. or Canadian reviews, a factor that has the potential to create a perception that Mexican reviews are inconsistent with the letter and spirit of NAFTA Chapter 19.

In the *Steel Plate* review, the panel ruled that the final antidumping duty determination was null and void on grounds that, among other reasons, the *Secretaría de Comercio y Fomento Industrial* [Secretariat of Commerce and Development] (SECOFI) was not competent in the early stages of the underlying antidumping investigation. This ruling raised a number of important and complex issues of first instance.

First, the panel had to determine the significance of competency in the context of a binational panel review in Mexico. The term "competent investigating authority" is used throughout NAFTA Article 1904.[14] Its meaning with respect to the United States and Canada is simple; in the case of the United States, "competent investigating authority" means the U.S. Department of Commerce International Trade Administration or the U.S. International Trade Commission, and in the case of Canada it means the Canadian International Trade Tribunal or the Deputy Minister of National Revenue for Customs and Excise.[15] Under U.S. trade law, the legal concept of "competency" is not a significant issue and, apparently, no antidumping duty determination has been remanded (or reversed) on the basis that the investigating authority was not competent.

In Mexico's case "competent investigating authority" means the designated authority within SECOFI, a definition which appears the same as that for Canada and the United States.[16] Its apparent simplicity, however, belies the significance of "competency" under Mexican law,[17] and the complexity involved in its interpretation and application. The extent of that complexity, in addition to the formalism inherent in Mexican law, is evident in the majority opinion in the *Steel Plate* review which held that the authority within SECOFI that conducted the initial stages

13. For example: the requirement that the investigating authority maintain an administrative record and base its final determination on that record and the requirement that reviews of final determinations be made on the basis of the administrative record.

14. NAFTA, *supra* note 2, arts. 1904(2) and (3), 32 I.L.M. at 683.

15. NAFTA, *supra* note 2, Annex 1911, 27 I.L.M. at 692.

16. *Id.*

17. Generally, "*competencia*" refers to capacity of an authoritative organ to undertake or conduct certain functions or legal acts. The legal interests of a person (or entity) may be affected only by a written order by a competent authority. *See* "DICCIONARIO JURÍDICO MEXICANO," Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México Editorial Porrua (1996) at 542.

of the underlying investigation had not been legally established and, therefore, did not legally exist.[18]

The *Steel Plate* panel decision on the competency issue raised two other important issues of first instance. First, the panel had to decide the extent, if any, of its authority to terminate the underlying antidumping investigation. The NAFTA provides that a panel either may affirm a final determination, or remand the determination to the investigating authority for further action not inconsistent with its instructions.[19] The panel's decision regarding the competency of the investigating authority had the effect of rendering the final determination null and void, and of terminating the investigation and revoking the related outstanding antidumping duty orders, an outcome not envisioned under the NAFTA.

Second, the panel had to determine the extent, if any, of its authority to apply Articles 237, 238 and 239 of the Mexican Federal Fiscal Code in order to give effect to its competency decision.[20] As noted above, the NAFTA provides that a panel may either affirm or remand a determination, it does not provide for termination of an investigation. The Steel panel decided that, in order to provide a remedy consistent with its decision, it was required to apply the judgement guidelines contained in Articles 237 and 239 of the Federal Fiscal Code. Since Articles 237 and 239 were invoked to give effect to a result not contemplated under the NAFTA, *i.e.*, termination, the question arose whether the application of Articles 237 and 239 violated the express provisions of Chapter 19 and constituted an improper extension of Article 238, the applicable standard of review.[21]

The *Steel Plate* panel decision generated considerable public attention in Mexico as it was widely perceived to have resulted from an application of foreign legal concepts, *i.e.* American, to a Mexican proceeding. In reality, the *Steel Plate* review involved the interpretation and application of Mexican, not American, law. To astute observers of binational proceedings, the real interest concerned the effect of the decision within the context of the NAFTA binational structure.

The *Polystyrene* review involved issues similar to those in *Steel Plate*. During the *Polystyrene* review, Article 238 of the Federal Fiscal Code was amended and a paragraph was added which, on grounds of public order, granted the *Tribunal Fiscal sua sponte* authority to review the competency of the authority that dictated the final determination.[22] The panel invoked the *sua sponte* authority and reviewed the competency of the investigating authority. In reaching that determination, the panel had

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18. In *Steel Plate*, the dissenting opinion contends that the NAFTA definition of "competent authority" limits the scope of review on competency matters to the single issue of whether the final determination was issued by a designated authority within SECOFI.

19. NAFTA, *supra* note 2, art. 1904(8), 32 I.L.M. at 683.

20. "Código Fiscal de la Federación," [C.F.F.], D.O., 31 de diciembre 1981 (as amended).

21. *See* NAFTA, *supra* note 2, Annex 1911, 32 I.L.M. at 692 (definitions for standard of review).

22. This amendment was part of the December 1995 revisions to the Federal Fiscal Code which went into effect on January 1, 1996.

to balance the requirements of Rule 7 of the Rules of Procedure[23] with the use of *sua sponte* authority set forth in the applicable standard of review. Rule 7 of the Rules of Procedure provides that the scope of a panel review shall be limited to allegations of fact and law set out in the complaint, including challenges to the jurisdiction of the investigating authority, and procedural and substantive defenses raised in the panel review.[24] Hence, the question before the panel was whether it was itself competent to review the competency of the investigating authority. The issue involved a whole range of issues of first instance under the binational process and Mexican law, especially since the standard of review was amended during the review and because the review involved the first time Article 238 *sua sponte* authority was invoked to review the competency of the investigating authority.

The difficulty inherent in the resolution of the issues presented in the *Steel Plate* and *Polystyrene* cases was compounded by the (understandable) lack of administrative determinations and judicial opinions which the panelists and parties could rely for meaningful guidance. Compared to the United States and Canada, whose unfair trade systems date back to the turn of this century, Mexico's unfair trade system is relatively young. Mexico acceded to the GATT[25] in 1986 at which time it adopted the GATT Antidumping Code. Since its accession to the GATT, the number of trade cases brought in Mexico increased steadily, and by the mid-1990's Mexico had become one of the world's leading countries in the use of antidumping duty remedies.

In U.S. reviews, the panelists and parties typically have an abundance of judicial opinions and administrative cases to apply and interpret. This is not the case in Mexican reviews. Despite the large number of antidumping investigations brought in Mexico during the 1990's, by the end of 1996, the *Tribunal Fiscal* had yet to complete a review of an antidumping duty determination. Moreover, because the NAFTA entered into effect in 1994, there is nominal administrative and judicial experience in Mexico with respect to the NAFTA requirement that final antidumping duty determinations be based on the administrative record and that reviews of final determinations be made on the basis of the administrative record.

In any event, Article 1904 provides that a panel must apply the applicable standard of review, the antidumping duty law, and the general legal principles that a court of the importing party would apply to a review of the final determination.[26] The term "antidumping duty law"

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23. *See* Rules of Procedure for Article 1904 Binational Panel Review, 59 Fed. Reg. 8686 (Dept. Comm. 1994).

24. The English version of the Rules of Procedure uses the word "jurisdiction" while the Spanish version uses the word "competency," as if the two words are interchangeable, which they are not. *See* Reglas de procedimiento del articulo 1904 y del Comite de Impugnación Extraordinaria del Tratado de Libre Comercio de América del Norte, D.O., 20 de junio de 1994, 13.

25. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

26. NAFTA, *supra* note 2, arts. 1904(2) and (3), 32 I.L.M. at 683.

includes legislative histories, administrative practices, and judicial precedents, all concepts that have a rich application in common law.

In Mexico, "legislative histories" are not as expansive as in the United States or Canada, and courts do not generally rely on legislative histories for statutory construction purposes. The concept of "administrative practices" as understood under U.S. administrative law does not exist in Mexican administrative law, and a judicial "precedent" is established when the Mexican Supreme Court, or the Federal Circuit Courts, consistently decide the same point in five consecutive separate cases. This means that there is little judicial "precedent" in trade matters.

In view of the foregoing, Mexico's initial experience under the binational process may support a perception that panel reviews in Mexico involve an irreconcilable conflict of two distinct legal systems. This renders the binational panel process meaningless. Such a perception, however, would be erroneous. While the Mexican reviews may appear aberrant to persons unfamiliar with civil code legal systems, it is unreasonable to expect Mexican reviews to mirror U.S. (or Canadian) reviews, or otherwise involve familiar sounding issues. There is no indication that different results would have been obtained had the reviews been conducted by the *Tribunal Fiscal*. Indeed, that the initial reviews involved difficult and novel issues demonstrates the characteristics of integrity and independence desired of panels, and are factors that strengthen and lend credibility to the binational panel review process.

III. A SEPARATE BINATIONAL JURISPRUDENCE

During the debate on the passage of NAFTA, considerable attention was devoted to the notion that the binational panel process should not result in a distinct jurisprudence.[27] This concern is reflected in NAFTA Article 1904, which specifies the standard of review to be applied by panels and which requires that panels apply the law that a court of the importing country would apply.[28]

The GAO addressed the issue of the development of a separate jurisprudence in its study of the FTA binational panel process.[29] To determine whether a separate jurisprudence was developing, the GAO reviewed the frequency in which panels cited other panel decisions.[30] The GAO found that panels frequently cite to other panel decisions, but it could not determine the extent to which panels were substantively influenced by other panel decisions.

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27. For example, in the NAFTA Statement of Administrative Action, the Administration explained to Congress that the NAFTA preference for judges and former judges to serve as panelists would help ensure that panels would review final determinations precisely as would the courts of the importing country, and would diminish the possibility that panels and courts will develop distinct bodies of law. H.R. Doc. 105-159, 103d Cong., 1st Sess. 644 (1993).

28. NAFTA, *supra* note 2, arts. 1904(2) and (3), 32 I.L.M. at 683.

29. GAO Study, *supra* note 3, at 80.

30. The GAO stated that the issue of the development of a "separate case law outside the scope and control of the U.S. judicial system is a complex question." *Id.* at 81.

The issue of whether the binational process will result in a distinct body of jurisprudence in Mexico is, for the moment, moot. As noted above, when Mexico implemented the NAFTA, it revised its antidumping laws to incorporate antidumping procedures almost identical to the U.S. system. To date, only binational panels have completed reviews of Mexican final determinations issued since the passage of the NAFTA. As a result, the only jurisprudence in Mexico related to Article 238 reviews of final determinations issued since the NAFTA entered into force is that contained in binational panel decisions. This circumstance will change only to the extent that parties in Mexico bypass the binational panel process and resort to reviews by the *Tribunal Fiscal*.