DISCIPLINING ANTI-DUMPING IN NORTH AMERICA: IS NAFTA CHAPTER NINETEEN SERVING ITS PURPOSE?

Gustavo Vega-Canovas

I. INTRODUCTION

As trade barriers have been eliminated, more industries have resorted to trade remedy laws in order to protect themselves from legitimate international competition. Unfortunately, this trend will most likely accelerate once the Uruguay Round agreements are fully implemented and industries begin to experience the subsequent effects of liberalization. The primary trade remedy laws are the anti-dumping duty laws, intended to protect domestic interests from "unfair" foreign competition.[1] Disciplining this trade instrument will be an important market-access issue facing policy-makers in the post-Uruguay Round world.[2]

In this Article, the author will analyze how the special dispute settlement mechanism established in Chapter 19 of the NAFTA has fared during its first three years of existence. Chapter 19 was created with the specific purpose of disciplining the use of anti-dumping duty laws in North America. In Part II this Article will discuss the economic impact of anti-dumping laws in North America. The relevance of the unfair trade practices negotiated under the Canada-U.S. Free Trade Agreement (CUSFTA), and for Mexico under the NAFTA will be explained. Also provided is a summary of this negotiation and its accomplishments. This section also contains an evaluation of NAFTA's Chapter 19 operation. The section will focus on the results of the last two years' panel cases, particularly those between Mexico and its partners. This section argues that Chapter 19 is producing unexpected tensions between the NAFTA countries. In Mexico, in particular, some perceive that Chapter 19 has failed to serve its stated purpose of resolving cases in an expeditious, fair, and reliable manner. This section will be followed by Part V recommending some of the kind of reforms necessary for Chapter 19 to better fulfill its purposes.

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1. Extensive literature has been produced criticizing the protectionist bias of anti-dumping procedures, regulations, and statutes. *See, e.g.*, JAGDISH BHAGWATI, PROTECTIONISM (1989); DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS (Richard Boltuck & Robert E. Litan eds., 1991); TRADING PUNCHES: TRADE REMEDY LAW AND DISPUTES UNDER NAFTA (Beatriz Leycegui et al. eds., 1995) [hereinafter TRADING PUNCHES]; Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491 (1993).

2. Bernard M. Hoekman & Petros C. Mavroidis, *Dumping Antidumping and Antitrust*, 30 J. WORLD TRADE 27 (1996). Nearly 2000 anti-dumping cases have been initiated since 1980 by OECD countries. *Id.*

II. CHAPTER NINETEEN BINATIONAL PANELS OF REVIEW: A LOOK AT THE NEGOTIATION HISTORY AND THEIR OPERATION

A. The Economic Impact of Trade Remedy Laws in North America

With respect to the impact of unfair trade laws' application within the North American region, it is worthwhile to highlight that, although the proportion of total trade affected by unfair trade law disputes between any two NAFTA partners is rarely more than five percent,[3] major distortions have occurred in specific sectors (*e.g.* agricultural products, steel, and other metals, chemicals, and forest products). Moreover, the aforementioned figures do not take into account the negative impact produced on trade as a consequence of the imposition, or mere threat of the imposition, of duties. Finally, those numbers do not reflect the damage imposed on downstream producers and consumers of the products in question, whose access to the affected goods is denied.[4]

B. Negotiating Dumping Under the NAFTA

It is unnecessary to stress the relevance of the unfair trade practices negotiation for Canada under the CUSFTA, and for Mexico under the NAFTA. In addition to gaining enhanced market access (by the elimination of tariff and other barriers to trade), both nations sought to secure access to the U.S. market. In sharp contrast, the U.S. did not share this same concern in the negotiations. It was not until the eleventh hour in both negotiations that a compromise was reached and an agreement became possible.

As their first negotiating position, Canada and Mexico suggested suspending the application of their respective anti-dumping (AD) and countervailing duty (CVD) laws between trading partners. As a second-best option, they requested

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3. The proportion is often less than one percent.

4. William B.P. Robson et al., *What's the Fight About? An Overview of Trade Disputes in North American, in* TRADING PUNCHES, *supra* note 1, at 11 (citing data published in ECONOMIST, June 3, 1995). "[A]s of mid-1994, Mexico had 27 AD measures—either duties or promises from exporters to keep prices up—in place, making it fourth in the world, according to the WTO." *Id.* This trend has declined in the past two years due to the effect of the devaluation of the peso on trade. *Id.* For the economic impact of the application of trade remedy laws within the NAFTA, see also Jorge Miranda, *An Economic Analysis of Mexico's Use of Trade Remedy Laws from 1987 to 1995, in* TRADING PUNCHES, *supra* note 1, at 137-60; Thomas J. Prusa, *An Overview of the Impact of U.S. Unfair Trade Laws, in* TRADING PUNCHES, *supra* note 1, at 183-205; Daniel Schwanen, *When Push Comes to Shove: Quantifying the Continuing Use of Trade "Remedy" Laws Between Canada and the United States, in* TRADING PUNCHES, *supra* note 1, at 161-82.

several changes to U.S. trade remedy law and practice.[5] The compromise solution ended up being very similar under both the CUSFTA and the NAFTA. It is summarized as follows:

First, the parties agreed to retain their own AD and CVD laws and practices, however, they accepted that amendments to such statutes would be subject to the constraints of notification and consultation. In addition, their laws and practices would be consistent with the GATT, other multilateral accords, any successor agreement to which they are all parties, and the CUSFTA or the NAFTA itself.[6] They further agreed to refer the proposed modifications to a binational panel, at a party's request, for an advisory opinion as to the laws' consistency with existing obligations under international law. A review of statutory amendments by a binational panel, however, was never requested under the CUSFTA and, until today, has never been solicited by the NAFTA parties.

Second, the centerpiece of the negotiation was the creation of sui generis binational review panels. Driven by independent ad hoc panelists binational panels replace judicial review by domestic courts of final AD and CVD determinations, at a party's request. The panelists' mandate is to review whether the final determination was made in accordance with domestic law. They are to apply the same standard of review and the general legal principles as would the importing party's reviewing court.[7] However, it is important to note that Canada and Mexico believed that, despite the Agreement, the five experts would be "generalists" and would be more rigorous in applying domestic law. They,

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5. The concerns about imposing greater discipline on the way the U.S. had been administering their unfair trade laws, was in great part a response to the lack of success of the Uruguay Round multilateral trade talks. In fact, these negotiations terminated after the NAFTA was completed.

6. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., arts. 1902, 1903, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; Canade-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., arts. 1902, 1903, 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter CUSFTA].

7. NAFTA, *supra* note 6, art. 1904, 32 I.L.M. at 683-84; CUSFTA, *supra* note 6, art. 1904, 27 I.L.M. at 387-90. Pertaining to the history, functioning, and evaluation of Chapter 19 binational panels under the CUSFTA and the NAFTA, see Guillermo Aguilar Alvarez et al., *NAFTA Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations, in* TRADING PUNCHES, *supra* note 1, at 24-42; Alan F. Holmer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, in The North American Free Trade Agreement-A New Frontier in International Trade and Investment in the Americas*, 1994 A.B.A. SEC. INT'L L. & PRAC. 291-314 (Judith H. Bello et al. eds.); Gary N. Horlick & F. Amanda Debusk, *Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 27 J. WORLD TRADE, at 21-41 (1993); Gilbert R. Winham & Heather A. Grant, *Antidumping and Countervailing Duties in Regional Trade Agreements: Canada-U.S. FTA, NAFTA and Beyond*, 3 MINN. J. GLOBAL TRADE 1, 11 (1994); Gilbert R. Winham, What Mexico Can Expect From NAFTA Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, Public Address delivered at the Colegio de México, Mexico City (May 21, 1994).

therefore, expected these experts would overturn those decisions that had been influenced by politics. On the other hand, U.S. negotiators intended that Chapter 19 panels operate and decide in the same way as domestic courts. This fundamental divergence in viewpoints still persists.

Incorporating the review panel into the NAFTA was not an easy task for Mexico. Canadian and U.S. negotiators perceived that Mexico's AD and CVD legal framework was problematic in both procedural and substantive terms.[8] Although Chapter 19 of the NAFTA is, in essence, identical to Chapter 19 of the CUSFTA, Mexico was obliged to accept certain amendments in order to be granted access to binational review panels. First, to appease U.S. concerns that constitutional constraints in Mexico might interfere with the panel process, a new mechanism was incorporated for the "safeguard of the panel review system."[9] Second, Mexico acceded to the implementation of several procedural changes in its trade law. The procedural amendments, in general, increase the level of transparency of AD and administrative practices, thus, significantly reducing the potential arbitrariness of the administrative agency.[10] Third, Article 1907(3) of the NAFTA provided new rules dealing with consultations. These rules were designed to further increase the transparency in the administration of AD and CVD laws.[11]

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8. Regarding procedure, it was thought that jurists from Canada or the U.S. would not be able to apply Mexico's civil law correctly, nor would Mexican jurists be able to adapt to Canadian or U.S. common law practices. As for substance, there were a number of differences between Mexican trade law, and U.S. or Canadian trade law, that made the latter countries unwilling to move on Chapter 19.

9. NAFTA, *supra* note 6, art. 1905, 32 I.L.M. at 684-85; Horlick & Debusk, *supra* note 7, at 34. In essence, if a party alleges interference in the panel process:

> [T]hat party can request consultations. If consultations are not satisfactory, a party can request the formation of a special committee. The special committee will make a finding on the charge of improper interference with the panel process, after which the parties will try to seek a mutually satisfactory solution within 60 days. If no solution is reached, the complaining party can suspend the operation of the AD/CVD panel system with respect to that party or suspend any other benefits under NAFTA.

Id.

10. NAFTA, *supra* note 6, Annex 1904(15), Schedule of Mexico (incorporating Mexico's specific commitments), 32 I.L.M. at 689; Beatriz Leycegui, *A Legal Analysis of Mexico's Antidumping and Countervailing Regulatory Framework, in* TRADING PUNCHES, *supra* note 1, at 64-66 (listing the specific provisions that were amended or introduced in Mexican law in order to conform to the aforementioned Schedule).

11. NORTH AMERICAN FREE TRADE AGREEMENT, TEXTS OF AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 103-159, at 663 (1993) (discussing other innovations incorporated in Chapter 19 of the NAFTA, *supra* note 6, art. 1904(13), para. 3,

In sharp contrast to other dispute settlement mechanisms provided for in the CUSFTA and the NAFTA, the binational panel procedures for the review of final agency determinations have been extensively used, first under the CUSFTA, and now under the NAFTA. A total of forty-nine cases were filed under the CUSFTA; thirty reviewed U.S. investigating authorities, and nineteen Canadian investigating authorities. As of December 1996, a total of twenty-four requests for binational panel review had been filed under the NAFTA, eight relating to U.S. agency determinations, nine to Canadian agency determinations, and seven to Mexican agency determinations.[12]

Third, and last, parties agreed to establish a working group that would seek to develop a substitute system of rules for dealing with unfair trans-border pricing practices and government subsidization. However, under the CUSFTA, the group was contemplated under the AD and CVD provisions of Chapter 19. It was given a maximum time-limit of seven years to come up with an alternate system that would replace the binational panel review procedure described above. Such a commitment was so fundamental to Canada that the CUSFTA contemplated that failure to reach an agreement in this respect would "allow either Party to terminate the Agreement on six-month notice."[13] Nothing similar was accomplished under this fora. The U.S. and Canada's attention was focused on revising the Tokyo Round Antidumping Code[14] and the Subsidies Code[15] under the Uruguay Round multilateral negotiations, as well as on negotiating the NAFTA in the years following the CUSFTA's entry into force.

In contrast, the commitment to creating a substitute system was, to an extent, watered-down in the NAFTA. It establishes that the Working Group on Trade and Competition (contemplated in Chapter 15—Competition Policy,

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Annexes 1901(2) para. 1, & 1904(13) para. 2, 32 I.L.M. at 683, 687-89). In relation to the establishment of binational panels, the Agreement provides that the roster of panelists "shall include judges or former judges to the fullest extent practicable." *Id.* Incorporated by initiative of the U.S., the negotiators believed that "panels containing judges are less likely to create an independent jurisprudence in AD/CVD cases than would otherwise be the case." *Id.* This confirms what was said above pertaining to the U.S. intention that panels shall resolve disputes in the same manner as domestic courts. With the purpose of clarifying the scope of review of the extraordinary challenge review procedure, the NAFTA included that failure by a binational panel to apply the appropriate standard of review would qualify as a ground for extraordinary challenge committee review. In addition, the period of review of the extraordinary challenge committees was extended from 30 days, as contemplated in the U.S.-Canada's FTA, to 90 days. *Id.* Annex 1904(13), 32 I.L.M. at 688.

12. NAFTA SECRETARIAT, MEXICAN SECTION, RESUMEN ESTADÍSITICO DE LOS CASOS DE SOLUCIÓN DE CONTROVERSIAS DEL FTA Y DEL TLCAN (1 de julio de 1996).

13. CUSFTA, *supra* note 6, arts. 1906, 1907, 27 I.L.M. at 390.

14. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 171 (1980).

15. Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, GATT B.I.S.D. (26th Supp.) at 56 (1980).

Monopolies and State Enterprises), shall "report" and "make recommendations on further work as appropriate, to the Commission within five years of the entry into force of the Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area."[16] No specific sanction relative to the right of termination was incorporated.

However, in December 1993, the three NAFTA parties issued a joint statement in which they agreed to "seek solutions that reduce the possibility of disputes concerning the issues of subsidies, dumping and the operation of the trade remedy laws regarding such practices" and to set up a working group to complete this task by December 31, 1995.[17] This group was established at the request of Canadian Prime Minister, Jean Chretien, as part of his commitment to implement the NAFTA. The deadline has been met, but the work is far from being completed. Nevertheless, the parties have extended the group's work beyond the December deadline.[18]

As of December 1996, the Working Group on Trade Law has met on six occasions.[19] It is interesting to note that, although the group was created in December of 1993 with the specific mandate of concluding its work by December of 1995, the first meeting was not held until February of 1995.[20] In addition, considering the complexity of its task—to limit the use of unfair trade laws among the three countries—the group convened very few times. According to certain informed sources, the parties intended to issue a common statement by the deadline date. However, such a statement was never forthcoming.[21] Since the group convened once again on June 1996, it is evident that its mission has not expired.

The group has primarily centered its attention on the following issues: 1) the revision of how each country implemented the results of the Uruguay Round; 2) the review of how Chapter 19 binational panels have operated and the negotiation of specific amendments to Chapter 19, particularly in relation to the extraordinary challenge review process; 3) the modifications to the Rules of

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16. NAFTA, *supra* note 6, art. 1504, 32 I.L.M. at 664.

17. *Statement by the Governments of Canada, Mexico and the United States, Future Work on Antidumping Duties, Subsidies and Countervailing Duties, reprinted in* INSIDE U.S. TRADE, Dec. 3, 1993, at 18.

18. In Part IV of this Article, information is provided relating to the occasions on which the working groups referred to above have met and discussed the main issues.

19. Interview with Alvaro Baillet, Head of the International Commercial Practices Section of the Ministry of Commerce and Industrial Development (SECOFI), and Gustavo Uruchurtu, SECOFI (June, 1996) [hereinafter Baillet Interview]. In Mexico City, Feb. 16, 1995; in Washington D.C., May 17, 1995; in Ottawa, Sept. 6, 1995; in Washington, D.C., Sept. 10 and 12, 1995; in Mexico City, Nov. 7, 1995; and in Ottawa, June 25 and 26, 1996.

20. In relation to its creation and objectives, see discussion *supra* Part I..

21. *U.S. Budget Crisis Thwarts Work of NAFTA Trade Law Working Group*, INSIDE NAFTA, Jan. 10, 1996, at. 3-4 [hereinafter *U.S. Budget Crisis*].

Procedure; 4) the negotiation of changes in administrative practices and regulations governing AD cases; and 5) the study of the possible substitution of AD laws by competition laws.

According to information provided by Canadian, Mexican, and U.S. negotiators, under the best scenario the group will, in the short run, produce recommendations for changes in administrative practices and regulations governing AD cases. It will not recommend legislative changes. Consequently, little if any progress has been achieved in the area of "dumping" AD laws. Canada is heading the initiative, but has neither elaborated on nor tabled any specific proposal. It has been voiced that to confront the U.S.'s uncompromising position, Canada and Mexico could negotiate a bilateral arrangement. Possible U.S. reaction to this is still hard to predict.[22]

As an important complement to Canada and Mexico's group work, the Working Group on Trade and Competition has met, as of December 1996, on five occasions.[23] These meetings have been oriented towards the presentation of papers on each party's legal systems' treatment of competition, as well as comparative studies of concrete aspects of the three NAFTA party's competition laws (*e.g.* national treatment, export and import cartels, vertical and horizontal monopolistic practices, concentrations, dominant position, deregulation). Other relevant documents prepared by other organizations, dealing with the relationship between competition and trade laws and policies, have also been the subjects of analysis (*e.g.* the American Bar Association,[24] the OECD).[25]

As we can deduce from the previous discussion, the working groups are carrying out their tasks under the assumption that Chapter 19 is the best framework to deal with the "unfairness" of unfair trade laws. But, is this the case? In the following section the author offers an evaluation of NAFTA's Chapter 19 in the last few years.

C. The NAFTA's Chapter Nineteen in Operation

Before presenting an evaluation of the operation of Chapter 19 of the NAFTA, it is well to remember the system's intended advantages embedded in

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22. Baillet Interview, *supra* note 19; *U.S. Budget Crisis, supra* note 21; *NAFTA AD Working Group Likely to Fall Short of Canada's Demands,* INSIDE NAFTA, Nov. 15, 1995, at 19-20.

23. Interview with Adrian Ten Kate, General Director of Economic Studies of the Federal Competition Commission (July, 1996). In Washington D.C, May, 1994; in Ottawa, Sept. 1994; in Mexico City, Mar. 1995; in Washington D.C., Sept. 1995; and in Ottawa, Mar. 1996.

24. *The Competition Dimension of the North American Free Trade Agreement,* 1994 A.B.A. SEC. ANTITRUST REP.

25. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, WORKING PARTY NO. 1 ON COMPETITION AND INTERNATIONAL TRADE (Oct. 16, 1995).

NAFTA Chapter 19 and the record of Chapter 19 of the CUSFTA, its predecessor.

An important advantage expected from the process established in Chapter 19 was the reduction of the amount of time that judicial review normally takes in AD, subsidies, and CVD cases. Hastening the judicial process, in turn, would result in pecuniary savings to the parties involved. This financial savings would include less fees paid to attorneys (who charge by the time dedicated to the case), and a reduction of costs due to the certainty that the panel will reach a final, unappealable decision in a fixed period of time. Furthermore, there would be extra savings for private individuals because the costs would be transferred to the governments.[26] This transfer is, in effect, a government subsidy, further reducing the legal fees of private individuals and companies.[27]

This most important goal of reducing time and costs to private individuals and companies should also be achieved through improved and enhanced access to judicial review (especially for small and medium-size companies), discouragement of unfair claims, and unjustified and frivolous administrative resolutions in trade remedy cases. Under the former system, attorneys frequently discouraged their clients from appealing an administrative resolution in AD and subsidy cases due to the high costs and the uncertainty of the outcome.[28] The fact that there was little probability that their resolutions would be appealed created an incentive for administrative authorities to apply the law in a lax and flexible way.[29]

On the other hand, the advantage provided by improved access to judicial review will depend on the fairness and objectivity of the panel decisions. Frivolous claims and lax resolutions will be discouraged by the realization of private individuals and administrative authorities that their claims and resolutions will either be rejected or remanded and amended, respectively, if they are not in accordance with the law.[30]

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26. It is the government that carries out the process and assumes the main bulk of the costs of the procedure.

27. *See* Gary N. Horlick et al., *Improvements in Trade Remedy Law and Procedures Under The Canada-United States Free Trade Agreement, in* UNDERSTANDING THE FREE TRADE AGREEMENT 108 (D. McRae & Debra Steger eds., 1988); Debra Steger, *The Dispute Settlement Mechanism of the Canada-United States Free Trade Agreement: Comparison with the Existing System, in id.*, at 59.

28. Horlick, *supra* note 27, at 108.

29. Steger, *supra* note 27, at 59.

30. An indicator that serves to measure the fairness and objectivity of the panel decisions is the recognition by the relevant governments and parties that the panel had correctly applied the law and that the decision did not reflect a bias for or against trade remedy legislation, or a nationalistic bias. In short, panel decisions should be taken without major controversy. For instance, failure to use the extraordinary challenge mechanism would imply recognition by the governments of the objectivity of the decisions.

D. The CUSFTA's Chapter Nineteen Record

There is no doubt, that the main reason Mexico accepted the basic framework of the dispute resolution system implicit in Chapter 19 of the CUSFTA (which became Chapter 19 of the NAFTA) is the binational panel's positive record in the AD and CVD disputes between Canada and the U.S. to date.

Most of the evaluations of the CUSFTA's Chapter 19 panel process had concluded that it had worked effectively when the FTA entered into force in 1989. The majority of cases were considered to have met the expectations of being relatively expeditious, non-controversial, fair, and high quality decisions.[31] A recent study mentioned that the panels had generally adhered to the Chapter 19 315-day timetable in issuing their initial decisions.[32] Furthermore, the majority of the completed cases up to 1995 (seventy-five percent) had been decided unanimously and had not split along national lines.[33]

These perceptions, however, have changed in the last two years. The panel system has failed to provide a solution to several high-profile disputes relating to products and sectors involving the highest value of trade between Canada and the U.S. within politically powerful industries. In the U.S., sharp criticism arose relating to the panel decisions in the *Pork, Swine,* and *Softwood Lumber* cases. More recently, the Mexican government and business elite have been dissatisfied with the results of the first binational panel decisions involving Mexico.[34] In Mexico, criticisms have been addressed to the system's lack of speed. Furthermore, Mexico considers two of the first three panels reviewing Mexican AD determinations to have failed to properly interpret the powers of the panel and of the NAFTA's Chapter 19 standard of review and its Rules of Procedure.

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31. *See* Alvarez, *supra* note 7, at 32; Gary Horlick & F. Amanda DeBusk, *Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One Half Years,* 37 McGILL L.J. 574 (1992); David Huntington, *Settling Disputes Under the North American Free Trade Agreement,* 34 HARV. INT'L. L.J. 407 (1993); Andreas Loewenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-US Free Trade Agreement: An Interim Appraisal*; 24 N.Y.U. J. INT'L L. & POL. 269 (1991); John Mercury, *Chapter 19 of the U.S.-Canada Free Trade Agreement, 1989-95: A Check on Administered Protection?,* 15 NW. J. INT'L L. & BUS. 525 (1995); Debra Steger & J. Robichaud, Chapter 19 of the Canada-U.S. Free Trade Agreement: The First Five Years (October 18, 1993) (unpublished paper prepared for a symposium on international trade, Universidad Nacional Autónoma de México, Mexico City, Mexico) (on file with author).

32. *See* Alvarez, *supra* note 7.

33. *Id.*

34. *See* U.S. GENERAL ACCOUNTING OFFICE, U.S.-CANADA FREE TRADE AGREEMENT FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS 66-67 (1995). All three U.S.-Canadian cases were so controversial that they split along national lines, with a U.S. judge issuing a strong dissent. *Id.* For information regarding the Mexican Case *see infra* notes 50-52.

III. LACK OF SPEED OF BINATIONAL PANELS INVOLVING MEXICO

It cannot be denied that the binational panels involving Mexico have not been as timely as those between Canada and the U.S. had been. Of the active or completed cases reviewing either U.S. or Mexican agency determinations, more that eighty percent of them have been suspended and/or postponed past the original 315 day limit (see Tables 1 and 2). In addition, in the first binational panel case between Mexico and the U.S., *Flat Coated Steel Products*, the initial decision was postponed three times and was finally rendered on September 27, 1996, more than a year late.

Since the NAFTA negotiations, it was predicted that Mexico was going to have difficulty adjusting to a system created to solve disputes between two countries with very different legal traditions from its own. This argument has some weight and no doubt explains the delays in part. However, in the author's opinion, there are other more important reasons that account for the difficulties in reaching timely decisions. To these we now turn.

Table 1
ACTIVE NAFTA PANELS
(Cases between Mexican and the United States)

Rule		Flat Coated Steel Products (AD)	Crystal and Solid Polystyrene	Gray Portland Cement and Cement Clinker	Oil Country Tubular Goods	Fresh Cut Flowers (AD)
R.34	Request for panel review	Sept. 1, 1994	Dec. 9, 1994	June 16, 1995	July 26, 1995	Oct. 26, 1995
R.39	Claim	Oct. 3, 1994	Jan. 9, 1995	July 17, 1995	Aug. 25, 1995	Nov. 27, 1995
R.40	Notice of appearance	Oct. 17, 1994	Jan. 23, 1995	July 31, 1995	Sept. 11, 1995	Dec. 11, 1995
1901.2(3) Parties	panel installation	Oct. 26, 1994	Feb. 2, 1995	Aug. 10, 1995	Sept. 19, 1995	Dec. 20, 1995
R.41	Administrative file	Nov. 2, 1994	Feb. 7, 1995	Aug. 15, 1995	Sept. 26, 1995	Dec. 26, 1995
R.57(1)	Claimants briefs	Jan. 2, 1995	Apr. 10, 1995	Jan. 18, 1996	Nov. 27, 1995	Apr. 10, 1996
R.57(2)	Invest. auth. briefs to participants in favor	March 3, 1995	Dec. 4, 1995	Apr. 1, 1996	Feb. 21, 1996	June 10, 1996
R.57(3)	Response briefs	March 20, 1995	Dec. 19, 1995	Apr. 15, 1996	March 7, 1996	June 25, 1996
R.57(4)	Annex to the briefs	March 30, 1995	Dec. 29, 1995	Apr. 17, 1996	Mar. 17, 1996	July 5, 1996
R.67(1)	Public hearing	Apr. 20-21/ June 3, 1996	Apr. 18-19, 1996	May 2, 1996	Apr. 15, 1996	July 15, 1996
1904.14	Decision	Sept. 20, 1996	Sept. 12, 1996	Aug. 30, 1996	July 31, 1996	Oct. 23, 1996

Suspended: July 25-Nov. 7, 95 Apr. 28-Oct. 23, 95 Aug. 16-Oct. 17, 95 Feb. 5-22, 96
Jan. 23-Mar. 25, 96

Table 2
ACTIVE NAFTA PANELS
(Cases between Mexican and Canada)

Rule		Rolled Steel Plate (AD)	Hot Rolled Steel Plate (AD)
R.34	Request for panel review	Jan. 29, 1995	Jan. 29, 1996
R.39	Claim	Feb. 28, 1996	Feb. 28, 1996
R.40	Notice of appearance	March 14, 1996	March 14, 1996
1901.2(3) Parties	panel installation	March 25, 1996	March 25, 1996
R.41	Administrative file	March 29, 1996	March 29, 1996
R.57(1)	Claimants briefs	May 28, 1996	May 28, 1996
R.57(2)	Invest. Auth. briefs to participants in favor	July 29, 1996	July 29, 1996
R.57(3)	Response briefs	Aug. 13, 1996	Aug. 13, 1996
R.57(4)	Annex to the briefs	Aug. 23, 1996	Aug. 23, 1996
R.67(1)	Public hearing	Sept. 12, 1996	Sept. 12, 1996
1904.14	Decision	Dec. 9, 1996	Dec. 9, 1996

*It wasn't until September 1996, that both governments were able to install the panels.

A. Conflicts of Interest

One important factor that clearly accounts for the delays in reaching decisions in panel cases involving Mexico has been the withdrawal of several panelists due to conflict of interest concerns. Withdrawal of a panelist has occurred in the *Cement, Fresh Flowers,* and *Cookware* cases. In two cases two panelists have had to withdraw. In one of these cases the withdrawal explains the long delay in reaching the original decision of the panel.[35]

As we know, the Chapter 19 panels have depended on private individuals who are experts in international trade law to participate as panelists. These private individuals can act as panelists in binational revisions and as attorneys in similar investigations before investigating authorities whose actions they themselves are reviewing as panelists. This practice has led to the criticism that the system is susceptible to conflicts of interest. An individual could have an interest in deciding a case—in his role as a panelist—in a particular way due to the impact of the decision on other cases in which he participates as an attorney. Furthermore, the attorney's participation as a panelist in Chapter 19 cases may bring him customers seeking potential advantages.

The criticism of private individuals' participation is frequently linked to the preference for judges. The debate essentially revolves around the choice between the justice provided by judges and that provided by private individuals. Judges are considered more impartial because, among other things, they do not face conflicts of interest and because their appointment is permanent.

The NAFTA anticipated this problem by requiring that the roster of panelists "include judges or former judges to the fullest extent practicable."[36] This provision was not part of the CUSFTA. This provision, however, has had and will have limited application because there may be domestic legal impediments to appointing judges as panelists.[37] Moreover, despite this new provision in favor of judges, the NAFTA specifies a preference for attorney panelists and thus the potential for conflicts of interest will remain in place.[38]

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35. *See Imports of Flat Coated Steel Products from the United States,* Panel No. MEX-94-1904-01 (Sept. 27, 1996). This is the case of Flat Coated Steel Products from the U.S where the original decision had been rescheduled for the 20th of September, 1996.

36. *See* NAFTA, *supra* note 6, Annex 1901(2)(1), 32 I.L.M. at 687.

37. *See* MEX. CONST. art. 101. In fact, in the Mexican case, Article 101 of the Mexican Constitution expressly prevents federal judges from accepting any other appointment during their tenure. The limited applicability of this provision is demonstrated by the fact that, to date, Mexico has not included any former judges on its roster, the U.S. has named only one to its roster of sixty-eight candidates, and Canada has named two to its roster of forty-nine candidates.

38. *See* NAFTA, *supra* note 6, Annex 1901.2(2), 32 I.L.M. at 687. "A majority of the panelists . . . shall be lawyers in good standing." *Id.* It must be said that the most likely reason why this preference for attorneys has been kept in the NAFTA is

It must be recognized, however, that most of the situations where conflicts of interest can occur have been contemplated in the NAFTA Code of Conduct for Proceedings Under Chapter 19 and 20. These provisions require panelists to adhere to a relatively strict Code of Conduct. The Code of Conduct attempts to avoid panelist conflicts of interest and, at the same time, ensure that the most highly qualified candidates are not discouraged from participating in Chapter 19 panels through overly rigid rules.[39] Thus far, the provisions respecting conflicts of interest have served their purpose in cases involving Mexico.[40] The rules worked, but resulted in a tremendous cost to the speed of the process. This is unfortunate as timeliness was supposed to be one of Chapter 19's main objectives.

B. Language Differences

A second important factor preventing the efficient and speedy working of the binational panels involving Mexico and the U.S. is the obvious language difference.

We have already mentioned that Mexico's participation in Chapter 19 aroused particular concerns in the U.S. and Canada. In order to participate in the NAFTA, Mexico had to address some of those concerns. However, even though during the NAFTA negotiation, language differences were identified as a potential obstacle to the prompt and proper working of the panel system, no concrete steps were taken to surmount this hurdle.

There is no doubt that language differences can become an important barrier in the resolution of trade disputes between different nationalities. It is equally true that language is a barrier that is frequently surmounted in the arbitration of trade disputes that regularly take place throughout the world.[41] Language differences could have been overcome in the instrumentation of Chapter 19. Chapter 19 could have provided additional support in the Secretariats for translations of complaints, briefs, motions, and critical documents of the administrative record. However, these services are not provided for as a matter of procedure, *i.e.*, on a regular basis. This situation has enormously complicated the job of those

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that, until recently, the system had functioned relatively well with attorneys acting as panelists. In general, such individuals have a commanding knowledge of anti-dumping law and this knowledge is seen as a contributing factor to the quality of the panel decisions.

39. *See* Code of Conduct for Dispute Settlement Procedures Under Chapters 19 and 20 of the North American Free Trade Agreement, 59 Fed. Reg. 8720 (1994).

40. In the case of *Aceros Planos*, where two panelists withdrew, the first withdrawal occurred after one of the parties recused the panelist. The second occurred after the panelist realized that his continuation on the panel might create an appearance of impropriety.

41. *See* Loewenfeld, *supra* note 31, at 430-31. Loewenfeld argues that his experience as an international arbitrator has shown him that language and culture barriers are easily surmountable. *Id.*

panelists who do not speak the language of the country whose decision they are reviewing.[42] One may argue that this problem could have been solved by requiring bilingual members of the roster, and many of them are. However, even in such cases, specialized translation services are required for panelists who are fluent in both languages. This is necessary because, on many occasions, the debates among panelists center around the meaning of crucial legal terms and concepts which only an expert in the legal systems of that nation can translate and interpret correctly. In short, absence of specialized translation in panel reviews is, no doubt, preventing efficient communication among panelists. This encumbered communication has significantly impacted on the speed of the process.[43]

C. Lack of Qualified, Available, and Non-Conflicted Panelists

The third important variable clearly affecting the proper functioning of binational panels involving Mexico is the growing difficulties that the three countries seem to be having finding qualified, available, and non-conflicted panelists. Two of the fourteen panels initiated since the NAFTA entered into force between Mexico and the U.S. have been suspended because the two countries could not assemble the panel in the period set by the Rules of Procedure. In addition, in the first two cases between Mexico and Canada, the countries have failed to convene the panel in due time (see Tables 1 and 2).

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42. The only exception to this is the public hearings where translation is provided by the Secretariats as a matter of procedure. Sometimes the Secretariats also prepare courtesy translations, but these are not regularly prepared and therefore do not provide the solution. The panels have reacted to this lack of official translations, asking the different participants in the review process to provide courtesy translations of every document, brief, claim, or motion they introduce. However, few have satisfied this petition to date. Likewise, non-bilingual panelists have been forced to hire assistants who serve as translators of documents and not as legal assistants to the panelists, as is their purpose. Likewise, the panels have been asked to prepare translations of the final resolutions, putting extra pressure on the panel members. In the worst of cases, some panels have refused to provide these translations and the translations of the final resolutions have not been published at the same time as the resolution.

43. This is particularly true when one remembers that most of the deliberations among the panelists are done through telephone conference calls which require fluid and efficient communication among the panelists.

IV. CONTROVERSY ABOUT THE PANEL'S JURISDICTION AND STANDARD OF REVIEW

Another more relevant problem that has surfaced in the first three decisions adopted by panels reviewing Mexican agency determinations has been a conflict of interpretation about the powers of the panel and the NAFTA's Chapter 19 standard of review. [44]

At the first three reviews of Mexican final determinations, the panels were obliged to consider their own status and scope of authority.[45] In these three cases, this question was considered critical for the proper functioning of Chapter 19. The question for the three panels to address was whether the binational panel's jurisdiction under the NAFTA is limited or whether it encompasses the same powers of the tribunal it replaces.[46]

Under Mexican law, the Federal Taxation Court, like its counterparts in the U.S. and Canada, enjoys ample powers to review administrative agency determinations and to grant a variety of remedies. In Mexico, Article 239 of the Federal Tax Code stipulates that the Federal Taxation Court has the power: 1) to recognize the validity of a challenged determination; 2) to declare the nullity of the challenged determination; and 3) to declare the nullity of the challenged determination for certain effects, defining clearly the way and manner in which the authority must comply with it, except when discretionary powers are involved.[47] In other words, as a reviewing body the Mexican Taxation Court has the unquestioned power, under certain conditions, to nullify a decision of the SECOFI.

However, Article 1904(8), which defines the binational panels' powers, states that the: "panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision." In deciding the cases, the panels had to deal with the question of whether the power to remand a decision extended to include the power to nullify.

In the cases, the complainants argued that the panel has the powers of the Mexican court it replaces. They cited Articles 1904(2) and 1904(3) of the NAFTA which contemplate that Chapter 19 panels must apply the AD and CVD law, the standard of review, and general legal principles of the importing country

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44. Our comments should not be taken as critical of any of the panel's decisions in these three cases.

45. *See Imports of Flat Coated Steel Products from the United States,* Panel No. MEX-94-1904-01 (Sept. 27, 1996); *In the Matter of the Mexican Anti-Dumping Investigation into Imports of Cut-to-Length Plate Products from the United States,* Panel No. MEX-94-1904-02 (Aug. 30, 1995); *In the Matter of Poliestereno Crystal e Impacto from the United States and Germany,* Panel No. MEX-94-1904-03 (Sept. 12, 1996).

46. "Ley Organica del Tribunal Fiscal de la Federación," D.O., 15 de diciembre de 1995, art. 11, sec. XI. The Federal Taxation Court is charged with the domestic judicial review of final determinations of anti-dumping matters.

47. CÓDIGO FISCAL DE LA FEDERACIÓN [C.F.F.] art. 239 (Mex.).

to the same extent as would the appropriate domestic court in reviewing the determination of the agency. In the case of Mexico, the standard of review was identified in Annex 1911 of the NAFTA as Article 238 of the Federal Taxation Code which states:

> An administrative determination shall be declared illegal when any of the following grounds are demonstrated:
>
> I. Lack of competence of the official who issued, ordered, or carried out the proceeding from which said resolution is derived;
>
> II. Omission of the formal requirements provided by law, which affects an individual's defenses and impacts the results of the challenged resolution, including the lack of legal foundation or reasoning, as the case may be;
>
> III. Procedural errors which affect an individual's defenses and impact the result of the challenged resolution;
>
> IV. If the facts which underlie the resolution do not exist, are different or were erroneously weighed, or if (the resolution) was issued in violation of applicable legal provisions or if the correct provisions were not applied;
>
> V. When an administrative determination issued in an exercise of discretionary powers does not correspond with the powers for which the law confers said powers.
>
> The Federal Taxation Court may declare sua sponte, because it is a matter of public order, the incompetence of the authority to render the challenged determination and the total absence of basis or motivation of this determination.[48]

According to the complainants, the consequences for breaching Article 238 are contemplated in Article 239, quoted above. They, therefore, concluded that the Mexican Federal Taxation Court and the binational panels contemplated under Chapter 19 of the NAFTA have the power to nullify a determination of the SECOFI under certain circumstances.

In sharp contrast, the Mexican investigating authority (SECOFI) argued that when discharging its functions under Chapter 19, a panel exercises only those powers granted to it by the NAFTA's Article 1904(8). The intention of the NAFTA parties was to preserve the discretion and autonomy of the investigating authority by expressing the panel's power solely in terms of remand. It conceded that the practical effect of a panel finding could be to require the administrative authority to revoke an AD order, but that was a decision to be made in light of

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48. The last paragraph of Article 238 was inserted through amendment published in the Official Gazette (Diario Oficial) on December 15, 1995, and entered into force on January 1, 1996. Under the new amendment, therefore, the Federal Taxation Court may review on its own motion, and if the case merits, it may declare the incompetence of the authority that issued a resolution.

multiple remands.[49] It was not, the SECOFI argued, a power that the panel could exercise in the first instance, even though the Fiscal Court could do so. Furthermore, they added that in neither the U.S. nor Canada do panels possess the powers of the court they "replace."[50]

When addressing the powers of the panels, however, two of the panels reached the conclusion that the panel exercises the same jurisdiction of the court it replaces and must apply the AD and CVD laws, the standard of review, and the general legal principles to the same extent as the Federal Taxation Court would in reviewing the determination of the agency.[51] This conclusion has generated a heated debate in Mexico.

The debate flared when, in the *Cut-to-Length Steel Products* case, the majority of the panel remanded the final determination to the SECOFI with the instruction that the decision be declared illegal and null pursuant to Article 239 of the Federal Tax Code. The panel, with two dissenters, found that several officers who had conducted the investigation at its initial stages lacked jurisdiction in clear violation of section I of Article 238. Therefore, the SECOFI's decision had to be declared illegal and null. To some observers, in claiming the power to effectively order a nullity, the majority of the panel expanded its powers beyond those expressly conferred upon a panel by Article 1904(8). Consequently, this decision leaves Mexico in an unequal situation with respect to its two trading partners, where panels only have limited powers to uphold the determination or to remand it back to the authority.

The concern about the expansion of the panel's powers was further increased when the panel in the *Crystal and Solid Polystyrene* case decided that it had powers under Article 238 of the Fiscal Code to review *sua sponte* whether certain authorities that acted during the investigation had jurisdiction. According to the SECOFI, this decision clearly violated Rule Seven of The Rules of Procedure for

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49. Such was the situation that occurred in the softwood lumber cases.

50. To support its argument, SECOFI referred to the powers that Federal Court judges have in Canada, such as equitable jurisdiction, which permits them to make and enforce certain type of orders (such as certiorari, mandamus, etc.) or to award monetary damages and legal costs. Conversely, the only power to fashion a remedy conferred on a binational panel was the power to uphold the determinations or remand it back to the investigating authority "for action not inconsistent with the panel's decision." Likewise SECOFI referred to the legal situation in the U.S. where binational panels did not possess the powers of the courts they were to replace, namely, The US Court of International Trade.

51. *See In the Matter of the Mexican Antidumping Investigation into Imports of Cut-to-Length Plate Products from the United States,* Panel No. MEX-94-1904-02 (Aug. 30, 1995); *In the Matter of Poliestereno Crystal e Impacto from the United States and Germany,* Panel No. MEX-1904-03 (Sept. 12, 1996). This conclusion was reached in these cases. The decisions in these two cases were published in August 1995 and in September 1996, respectively. Despite being Case Nos. 02 and 03, the conclusions were reached before Case No. 01 on account of the suspension of this case due to of the withdrawal of panelists.

Article 1904 of the NAFTA. This rule limits the panel's jurisdiction to issues raised in a complaint or as a defense.[52] The controversy arose because none of the complainants challenged the jurisdiction of the authority.[53]

By the time the third panel in the *Flat Coated Steel Products* case issued its final opinion on September 27, 1996, a new dimension had been added to the debate over the powers of panels and the proper application of the standard of review of Chapter 19. In this case, the panel unanimously decided that the scope and authority of the panel is not the same as the court it replaces nor does it have the same characteristics, attributions and jurisdiction as does the Federal Taxation Court. The panel defined its status as an arbitral panel whose jurisdiction is limited both by the wording of the "agreement or treaty under which the panel was constituted," *i.e.*, the NAFTA, and by Mexican law to the extent that the NAFTA so provided. According to the panel, under the NAFTA the panel's jurisdiction was limited to a review of: a) the claims and defenses that are set out in the complaints and defenses filed in the panel review process; b) the standard of review to be applied to those complaints and defenses; and c) the remedies that may be granted in the review.

Regarding the remedies that a panel may grant in the review, the panel in *Flat Coated Steel Products* expressly recognized those authorized by the NAFTA Article 1904(8) and rejected the notion that those include the jurisdiction to "declare a challenged resolution to be a nullity."[54] On the basis of this interpretation, the panel upheld the final determination. It remanded, however, for the purpose of ordering the authority to declare illegal all of the administrative determinations under Article 238, section I of the Federal Tax Code.[55] It also

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52. NAFTA Rules for Article 1904 Binational Panel Reviews, 59 Fed. Reg. 8686 (1994). Rule 7 states: "A panel review shall be limited to: a) the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the complaints filed in the panel review; and b) procedural and substantive defenses raised in the panel review." *Id.*

53. However, it must be mentioned that this controversy subsided somewhat when the panel issued its final opinion. In clear contrast to the *Cut-to-Length Steel Products Case*, it recognized the jurisdiction of the investigating authority during the periods of time when it was supposed to have been without jurisdiction according to the majority of the panel. Nonetheless, according to many observers, the panel, in deciding to review its own motion on whether the authority had jurisdiction, clearly surpassed its powers. Needless to say, all the controversy arose because the panel interpreted its powers to be similar to those of the Federal Taxation Court.

54. C.F.F. art. 239, § II.

55. The panel found unanimously that one SECOFI official, who rejected evidence from the Inland Steel Company early during the investigation, was an authority without jurisdiction and therefore his administrative actions were to be declared illegal and without legal effect. The panel further instructed SECOFI to consider on remand the evidence Inland had presented; to give Inland an opportunity to present additional evidence; to comment on the investigating authority's analysis of Inland's evidence; and to make a new administrative determination with respect to Inland taking into account the evidence Inland presents. The panel also found illegal

ordered other changes in the determination on the basis of other sections of Article 238 of the Federal Tax Code.

This new decision reignited the debate, but with a new element of complexity. To some, the panel properly interpreted its powers. To others, especially some of the complainants, the panel, in having recognized the lack of jurisdiction of the authority and in having failed to declare a nullity, violated their constitutional guarantees and merited resort to the *juicio de amparo (*suit of protection*)*. Consequently, on October 18, 1996 two of the companies filed an *amparo* suit which is presently under review. This development, of course, has not only added new momentum to the debate about the panels' role, but has also jeopardized Mexico's participation in Chapter 19.[56]

V. CONCLUSION

In conclusion, even though it should be recognized that three cases are too few to justify any generalization, one can observe from the experience of the first binational panels reviewing Mexican government decisions, that panelists in such cases seem to be having difficulties establishing a consensus about the status of

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the determinations of dumping with respect to the other complainant company, namely New Process Steel Co., on the basis of Sections III and IV. Therefore, SECOFI was to modify the final determination taking into account new facts. This case is still pending.

56. *See* NAFTA, *supra* note 6, arts. 1904, 1905, 32 I.L.M. at 683-85. As mentioned before, the inclusion of Mexico in Chapter 19 posed difficult procedural and substantive question, one of the most important being the existence in Mexican law of the *juicio de amparo*. The *amparo* covers a variety of procedural instruments and has become, for many historical reasons, the judicial review mechanism of *all* Mexican proceedings. For example, it functions as the equivalent of habeas corpus: as an instrument to challenge laws; as a remedy to challenge the final decisions of all judges; as an administrative suit with respect to acts or determinations of administrative authorities; and as an instrument that establishes procedural advantages for peasants subject to agrarian reform. The existence of the *amparo* was the reason to include the safeguard mechanism contemplated in Article 1905 of the NAFTA. Also Section 11 of Article 1904 was added to preclude any jurisdictional review of a panel decision. However, according to the complainants in the *amparo* suit under review, Section 11 of Article 1904 should be interpreted to mean that no ordinary jurisdictional defense is available against a panel decision. It is to be interpreted to deny the constitutional defense (the *amparo*) against any act of any authority that violates the individual rights of a person (including those of legality), except when the same constitution states otherwise. *See* J.C. Thomas & Sergio Lòpez Ayllòn, *NAFTA's Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common Law and Civil Law Systems in a Free Trade Area,* 1995 CAN. Y.B. INT'L L. 111-113.

the panel and the scope of its powers. Panels are also struggling to define what constitutes the standard of review.[57]

Unfortunately, these three first cases raised very complex questions of constitutional law. In addition, they all involved AD investigations that had been conducted under an old AD law. The law was no longer in effect at the time the panels reviewed the determinations. Furthermore, the panelists did not find guidance in Mexican jurisprudence. Mexico promulgated its first trade remedy law in 1986, after its accession to the GATT. As a result, there has only been a decade of trade remedy actions and hardly any judicial review at all.

In light of the previous discussion, the experience of the NAFTA's Chapter 19 is worth briefly reviewing.

First, even though the binational panels' record in the disputes between Canada and the U.S. under the CUSFTA was positive, (in terms of being relatively expeditious, uncontroversial, and fair) the NAFTA's Chapter 19 record shows that it is clearly not serving its purpose of providing expeditious and non-controversial decisions. Between Canada and the U.S. several high-profile disputes remain to be solved.[58] Between Mexico and its trading partners, the system seems to have growing difficulties serving its original purpose.

Second, the initiation rate of AD determinations has not significantly decreased and may have increased as of January 1994. The existence of the binational panel review process has had little or no deterrent effect on the initiation of trade remedy actions. Even though there is no systematic evidence of the cost of the binational panel review process, it appears to be very expensive to the participants.[59]

Finally, even though one cannot deny the discipline Chapter 19 laws provide, the uncertainty surrounding the invocation and application of these laws has not secured predictable access to the North American markets, one of the original objectives of Chapter 19. Only eradicating the market distortions and commercial uncertainty caused by trade remedy laws will provide North American exporters with secure access to the NAFTA markets. But how can these distortions and commercial uncertainties of trade remedy laws be eliminated?

Gary Horlick has suggested a variety of changes to North American AD laws with which the author basically agrees.[60] Most of his proposed changes to the

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57. This uncertainty, it must be noted, has not occurred in the binational panels that have reviewed U.S. agency determinations where panel decision have been reached without controversy.

58. By saying "remain to be solved," the author means that even though Chapter 19 has helped an exporter to have a duty removed, after one review by a panel (as was the case in *Softwood Lumber*), the Chapter 19 system cannot preclude the initiation of a future trade remedy action against the same exporter(s). *See* Mercury, *supra* note 31, at 604. Mercury states that there is evidence to suggest that the U.S. softwood lumber industry is preparing to initiate a new CVD case against Canadian exporters. *Id.*

59. *See* Michael Trebilcock & Thomas Bodez, *The Case for Liberalizing North American Trade Remedy Laws*, 4 MINN. J. GLOBAL TRADE 6 (1995).

60. *See* TRADING PUNCHES, supra note 1.

NAFTA countries' laws or practices have to do with initiating issues (*e.g.*, pre-initiation consultations, and higher standards for initiating cases); injury issues (*e.g.*, higher preliminary injury standard, meeting competition defense, causation standard, de minimis market share/negligible imports, cumulation, threat of material injury); dumping calculation issues (*e.g.*, price comparisons, profit, cost of production); etc. To these suggested changes, however, the author believes there should be added important reforms to Chapter 19 of the NAFTA and the NAFTA Rules of Procedure for Article 1904 aimed at correcting some deficiencies in the binational panel process and at eradicating the commercial uncertainty of North American AD laws. Some important reforms the author recommends are the following:

a) To eliminate the language barriers that have prevented efficient communication between Mexican and U.S. panelists, the three NAFTA countries should provide simultaneous translation of all panel proceedings involving Mexico. For this purpose, a permanent staff of translators should be provided to the Secretariats.[61]

b) To address the growing problem of finding qualified panelists and eliminate the potential for conflicts of interests, the three countries should establish a permanent full-time binational roster of panelists. This roster could consist of fifteen members serving for fixed terms.[62]

c) To eliminate the commercial uncertainty that the application of North American AD laws are producing in regional trade, the three countries should be prepared to amend national AD laws to mandate reimbursement of all legal expenses born by the exporter if the demand is rejected. This would raise the costs of domestic companies that initiated processes without basis, thereby contributing to reducing the number of cases.

d) To further increase commercial certainty, the three countries should include the principle of stare decisis for determinations made by binational panels.

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61. Canada, we assume, should be interested in avoiding the language barrier problems that have prevailed in the case of Mexico and the U.S., and should support this proposal.

62. *See* Trebilcock & Bodez, *supra* note 59, at 7. The author has taken this suggestion from Trebilcock and Bodez, who have recommended that the panel of 15 members could terminate their terms only for cause. Cause would be determined by an Extraordinary Challenge Committee. In their opinion, two panelists in each case would be chosen from the 15 permanent roster members, and the chairperson would be elected by agreement of the nominated panelists or otherwise by lot from other panelists on the roster. One other possible way to eliminate the potential for conflict of interest among panelists would be to require that all private panelists be prevented from taking other cases while they act as panelists. Of course, this would require a raise in their fees to facilitate their acceptance of foregoing other cases.

Currently under the NAFTA, a panel cannot resort to determinations made by other panels as precedents. Consequently, inconsistencies may arise, without necessarily bringing about a "codified law." The legal principle stare decisis would require panels to make use of precedents and to explain the reasons why, in a specific case, a precedent was not followed. The principle would prevent affirmative dumping determinations in those cases in which the authority knows that a similar determination was revoked.