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NAFTA CHAPTER 19: HOW WELL DOES IT WORK? HOW MUCH IS NEEDED?

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Admittedly, the title of my presentation differs somewhat from the title of this panel as described in the conference brochure. The brochure title states: "Chapter 19 --- Private Party Appeals from Government Rulings: A Dispute Settlement Procedure in Operation, How Effective Is It in the Resolution of Disputes, Are Changes Needed or Possible?" I must confess that after sending in the outline for my talk, I began to have some sleepless nights over that difference. Some might say that my situation is reminiscent of the famous story involving the Humorous Bob Benchley. When Benchley was studying at Harvard, he designed his class schedule so that none of his classes began earlier than 11:00 a.m. on Tuesdays and ended no later than 3:00 p.m. on Thursdays. As a consequence of his creative scheduling, he took a course in U.S.-Canadian relations in which he had very little interest. He attended no classes and read no books on the subject. On the day of the final exam for the course, he was confronted with a single question. The question asked him to discuss in detail the U.S.-Canada fisheries dispute from the standpoint of either (A) the United States or (B) Canada. He thought hard for a moment and then began his answer as follows: "The question, as posed, does not sufficiently probe my knowledge of the subject and so I will discuss it instead from the standpoint of (C) the fish."

I would like to think that my reason for varying the title of my talk from that of this panel is better than Benchley's reason for varying his final exam answer. My reason is that the question posed by the brochure is somewhat limited in scope. At this stage in Chapter 19's development that question yields a clear answer; while Chapter 19 is in need of some minor tinkering, it is on the whole functioning well.

What seems of equal or greater importance to address at this panel discussion is whether Chapter 19 is still needed at all. Is it still effective as a discipline on domestic enforcement of import relief laws? How does it compare with, and in specific cases interrelated with, the discipline now available under the WTO Dispute Settlement Understanding ("DSU")? How does the extension of the process to Mexico – a nation with as-yet-

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undeveloped import relief laws and a different (civil law, not common law) jurisprudence – affect these issues?

In answering these questions, this presentation begins by examining the genesis of this procedure and its early (and, in a few cases, highly controversial) history under the Canada-United States Free Trade Agreement ("FTA"). Next, two major changes in the early 1990s will be analyzed: the negotiation of the NAFTA, with limited buy significant changes in binational panel procedures, and the creation in the Uruguay MTN Round of newly detailed disciplines on anti-dumping and countervailing duties, together with a "true" dispute settlement mechanism. The presentation will then analyze the special issues and problems arising from the extension of the bilateral panel review process to Mexico. Finally, conclusions will be drawn as to the continued vitality of this unique experiment in disciplining import relief measures on a regional basis.

I. The Genesis and Early History of the Binational Panel Review Process

During the negotiations, which ultimately produced the FTA, Canada was insistent upon the elimination of anti-dumping and countervailing duty enforcement. Canada took the position that if the goal of the negotiations was to create a free trade area, then anti-dumping and countervailing duty enforcement on transactions occurring within that area should be completely eliminated. Not suprisingly, U.S. Trade officials responded to Canada's posture with a complete stonewall. Anti-dumping and countervailing duties and import relief proceedings, in general, are near and dear to the American political heart, and Canada's proposal was imply politically infeasible for the U.S. government.

An ingenious compromise broke the impasse. While the concept of eliminating anti-dumping enforcement would continue to be discussed throughout the negotiations, a binational panel process was proposed to act as a discipline on enforcement of the anti-dumping and countervailing duty laws in both countries, but especially aimed at the United States.

Why did the U.S. compromise? It is important to understand the context of the negotiations. At that time (pre-Uruguay Round), the GATT did not provide an effective discipline on import relief proceedings. The disciplines set forth in the Anti-dumping Agreement and the Agreement on Subsidies and Countervailing Measures were not sufficiently detailed. There was no binding dispute settlement mechanism. Moreover, the losing party could block adoption of an adverse panel report. As a consequence, the general assessment was that GATT panels would be willing in some cases to deal with procedural unfairness in domestic enforcement, but would rarely, if

ever, address significant substantive issues. In politically-charged cases, a panel report condemning a determination by a domestic authority could (and probably would) be blocked.

The Binational Panel Concept in FTA Chapters 1902 and 1904

The binational panel appeal procedure provided in NAFTA Chapter 19 is reminiscent of the wag's definition of a camel: a horse designed by a committee. Explicitly created in the FTA as a discipline on enforcement of domestic anti-dumping and countervailing duty laws, it equally explicitly does not look to any external or international principles, but instead is limited exclusively to ensuring that a country's administering authorities "properly" apply domestic law.[1]

A brief description of some of the major features of the panel process provides a sense of its workings. It is important to note that only parties to the domestic administrative proceeding may bring an appeal to a binational panel. Governments are not involved in the representation of the parties' interests. This feature, as described in more detail later in this presentation, distinguishes the Chapter 19 process from the WTO dispute settlement mechanism, which only allows government representation.

Chapter 19 also outlines the procedure for panel formation. Each panel is comprised of panelists chosen from a pre-approved roster of candidates, mostly international trade law practitioners and academics. Each side chooses two panelists, then the four panelists thus chosen pick the fifth.[2]

The source of the law to be applied by the panel is, as already mentioned, domestic.[3] The panel applies and interprets the national law of the country whose administrative determination is being appealed. This includes the appropriate standard of review. The panel does not base its decision on GATT law or any other supranational body of law, although such authority can be persuasive, particularly where the WTO Agreements are self-executing as is the case with Mexico.

Panels have the power to either affirm the administrative determination in question or remand it.[4] While there is no explicit power to reverse or to order a different administrative decision, the panel can continue to remand again and again. Moreover, it can give instructions that may be the functional equivalent of a reversal by leading the administering authority to one

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[1] North American Free Trade Agreement, Chapter 19, Article 1904. U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993).

[2] *Id.* at annex 1901.2.

[3] NAFTA, *supra* note 1.

[4] *Id.*

particular conclusion. However, a panel determination creates no precedent in domestic law. At most, a domestic court can look to the intrinsic persuasiveness of a panel decision.

There is no explicit requirement that a panel's decision be consistent with that of a prior panel on the same issue.[5] Indeed, in the event of an intervening domestic court decision, legislative amendment or administrative rulemaking contrary to a prior panel decision, the later panel is not to follow the prior panel decision. There is also no appellate review of panel decisions. However, there is an extraordinary challenge procedure under which a panel report can be overturned on the basis of a panelist's misconduct, a serious procedural violation, or a blatant exceeding of the panel's authority. In my opinion, this provision is the most ill-considered element of the binational panel system.

At first blush, the logic of replacing a domestic court with a binational panel that applies domestic law with no presidential effect may seem dubious. Nevertheless, Canada's negotiators saw the value of such panels in ameliorating two problems; (i) the perceived excess by U.S. administrators, especially in the substance of countervailing duty decisions and in procedures of International Trade and the Court of Appeals for the Federal Circuit to the decisions of U.S. administrative agencies. It was believed that a binational panel would counter the twin problems because it would possess a different outlook on the administration of anti-dumping and countervailing duty laws. Removed one step from national allegiance and bias, the panel would act impartially to correct aberrations in the application of domestic law in a manner domestic courts might not be willing to do. This was an arguable proposition, but and ingenious one that was necessary to save FTA negotiations.

In the end, Canadian FTA negotiators viewed binational panels as the best obtainable partial solution, offering the following additional potential benefits: First panelists, being experienced trade lawyers and academics, would render decisions on a more educated (and possibly less deferential) basis. Second, pressure on the panel of non-U.S. Perspectives could make decisions more objective (again, less deferential). Third, in cases presenting novel, first impression issues, panels would be freer to reach rational decisions than would U.S. courts. Fourth, the ability of private parties, rather than governments, to bring cases to panels would permit issues to be raised even where the exporting country government might share the importing county government's view on the issue.

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[5] *Id.*

The Record Under the FTA

By and large, the panel process under the FTA has worked smoothly and without undue controversy. It has worked well even in very controversial cases, namely the three appeals of U.S. countervailing duty decisions in the softwood lumber[6], pork[7] and live swine[8] cases. In my opinion, the three controversial countervail appeals reflect a sporadic tendency of the Unity States to adopt subsidy interpretations wildly divergent from international trade norms. In addition, it has become clear that the U.S. administering authorities feel free to accord no precedential weight whatsoever to panel determinations inconsistent with their desired policies or interpretations.[9]

Despite the generally successful record of the panel process, a few particular areas of concern are worth noting. The first area involves the manner in which the Commerce Department has defined the meaning of "subsidy" in difficult or novel cases. A few examples illustrate this point. The first involves the Softwood Lumber case. In that case, the industry's concern was that provinces in Canada, particularly western Canada, were charging a lower stumpage fee than were U.S. governmental entities, particularly the U.S. federal government. In short, the same tree cost more in the United States than in Canada. The U.S. softwood lumber industry petitioned the Commerce Department to determine that Canadian practices constituted a subsidy that could be met with countervailing duties. In addition, the industry lobbied congress hard on the matter and Congress was more than willing to lend its political support.

Persuaded by political pressure and perhaps the genuine belief that a subsidy argument existed, the Commerce Department took on the industry's cause. While Commerce could not explicitly adopt the industry's argument that Canada's lower-than-U.S. stumpage fees were a subsidy, it reached the same result in a series of decisions using rationale that twisted the generally

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[6] In re Certain Softwood Lumber Products from Canada, ECC-94-1904-01-USA (Appeal of USA-92-1904-01) (Aug.3, 1994).

[7] In re Fresh, Chilled or Frozen Prok from Canada, ECC-91-1904-1-USA (Appeal of USA-89-1904-11) (June 14, 1991).

[8] In re Live Swine from Canada, ECC-93-1904-01-USA (Appeal of USA-91-1904-03) (Apr. 8, 1993).

[9] *See, e.g.*, Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria (General Issues Appendix) 58 Fed. Reg. 37, 217, 225 (1993), in which the Department of Commerce failed to follow the holding of the FTA binational panel decision in In re New Steel Rails from Canada; Algoma Steel Corp. v. U.S. Int'l Trade Commission, Nos. USA-89-1904-09, USA-89-1904-10 (Aug. 13, 1990), on the issue of recurring versus nonrecurring subsidies.

accepted meaning of "subsidy" as well as the concept of general availability in an effort to develop a viable theory for imposing countervailing duties on softwood lumber imports.

Under these circumstances, the Chapter 19 panel process serves a useful role. The panel, in its unique role, can take the position that the novel issue should be decided in accordance with traditional anti-dumping and countervailing duty law concepts. And that is precisely what the panel did.

Another example involves subsidies and privatization. The Commerce Department has taken the position that a privatization, even with new owners who paid market value for the entire company, did not in any way change the continuing countervailability of pre-privatization subsidies.[10] The irrationality of this position is clear when one considers a simple hypothetical. Suppose that Company A receives on million dollars from its government to build a steel mill. Company A operates the steel miss for a few months and then decides to sell it. Company B purchases the steel mill for one million dollars. After the sale, which party is subsidized? Most people would conclude that Company B is not subsidized because it paid one million dollars for a steel mill that was worth one million dollars. Company B would seem to have suffered no disadvantage at all. Company A, on the other hand, may appear to be subsidized because it still has one million dollars more than it had before it received its government grant.

Suprisingly, the Commerce Department has argued that Company B is in fact the subsidized company. The rational is based on the premise that "subsidies travel will assets to their new home."[11] While this position initially stood up in U.S. courts[12], after it was overruled by the WTO, the U.S. courts abandoned it.[13] Nevertheless, the Commerce Department's approach to subsidies in this case demonstrates once again that in difficult or novel cases the U.S. government tends to develop views aberrant from the international trading community's conception of countervailing duty law.[14]

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[10] Final Affirmative Countervailing Duty Determination, *supra* note 9, at 259-65.

[11] Final Affirmative Countervailing Duty Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, 58 Fed. Reg. 6237, 6240 (Jan. 27, 1993).

[12] *See* Saarstahl v. U.S., 78 F.3d 1539 (Fed. Cir. 1996).

[13] *See* Delverde v. U.S., 202 F.3d 1360 (Fed Cir. 2000).

[14] Indeed a WTO panel in 1999 found that the privatization of a government-owned company in an arm's length, fair market value transaction eliminates any "benefit" from pre-privatization subsidies and, therefore, no "benefit" from those subsidies can be attributable to the successor privatized company. Panel Report on United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R, 39-50 (Dec. 23, 1999) [hereinafter *Leaded Bar case*].

Again, in such cases, the panel process can provide an effective discipline on enforcement of domestic anti-dumping and countervailing duty laws.

The second area of continuing concern is the extraordinary challenge procedure.[15] The extraordinary challenge has unfortunately provided a vehicle for the worst kind of personalization of trade disputes. Shooting the messenger rather than contesting the merits of a panel decision seems an illogical approach to the resolution of the trade disputes. In particular, the extraordinary challenge in the Softwood Lumber case represented the darkest hour of the binational panel process. One of my strongest recommendations is to eliminate the extraordinary challenge procedure or at least modify it so it is available only in cases where the panel has exceeded its jurisdiction or has seriously violated the standard of review.

Finally, certain FTA panel cases raised a concern (which continues today under NAFTA Chapter 19) that panels occasionally reach decisions inconsistent with the decisions of previous panels. I believe that forcing panels to be consistent, with the consequent evolution of an independent, panel-derived jurisprudence, would be contrary to the fundamental concept of binational panels and, at least in the United States, would be the political death knell of this system.

II. Changes in the 90s: NAFTA and the WTO

The 1990s brought many changes in international trade law. There have been three significant changes in the binational panel process under NAFTA Chapter 19. First, grounds for extraordinary challenge have expanded to include "failing" to apply the appropriate standard of review.[16] In my opinion, this is a good provision for fighting a war that seems to be over. Second, Annex 1901.2 now admonishes that the "roster [of panelists] shall include judges or former judges to the fullest extent practicable." In general, this provision is a good idea, but it has not been effectively implemented to date. Third, Article 1905 establishes a procedure to determine whether application of a party's domestic law has prevented the establishment of a panel, prevented the panel from rendering a final court decision, prevented implementation of a panel decision, or frustrated review by a panel or court of an administrative ant-dumping or countervailing duty determination. This has potential utility with respect to the problems posed by applying the panel system to the different judicial system of Mexico, as discussed in more detail below.

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[15] NAFTA, *supra* note 1, at annex 1904.13.

[16] *Id.*

In addition, the Uruguay Round of Multilateral Trade Negotiations resulted in two important changes that have created a viable new method of challenging U.S., Canadian and Mexican anti-dumping and countervailing duty decisions. The substantive rules governing import relief proceedings were elaborated somewhat as to anti-dumping cases and made much more detailed and specific in the area of subsidies and countervailing duties. More significant was the transformation of the GATT into the WTO with a new and radically different Dispute Settlement Understanding. The DSU, with time limits, procedural niceties and "non-blockable" decisions creates a truly viable mechanism for challenging import relief case decisions and has begun to be used with increasing frequency since its inception in 1994.

III. NAFTA Chapter 19 Problems Peculiar to Appeals from Mexican Decisions

Extension of the binational panel appeal process to Mexico introduced numerous complexities, arising primarily from the following factors. First, Mexico's anti-dumping law is new, and thus there is little in the way of settled administrative practice. On the other hand, unlike the situation in the U.S. and Canada, treaties – and thus the WTO Anti-dumping Agreement and Agreement on Subsidies and Countervailing Measures – are part of the domestic law of Mexico. Consequently, a panel can invoke those agreements as governing law to an extent not possible in appeals from U.S. and Canadian decisions. In my view, reliance on WTO provisions may be increasing in the United States. In a recent reversal of a Commerce Department countervailing duty determination, the court of appeals for the Federal Circuit invoked a recent WTO panel decision in support of its conclusions.[17] Also, the U.s. brief to a recent WTO panel considering the 1916 Anti-dumping Act emphasized the judicial doctrine established in *Murray v. The Charming Betsy*[18] that U.S. law should, to the extent possible, be construed consistent with international (in that case, WTO) agreements.[19]

Second, there has been no judicial precedent construing the Mexican import relief laws. The Fiscal Tribunal, a Mexican administrative tax court, had not reviewed any import relief decisions. Moreover, Mexico has a very

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[17] Delverde v. U.S., 202 F.3d 1360, 1369 (Fed. Cir. 2000) (referring to the WTO panel decision in the *Leaded Car case* in concluding that Commerce's countervailing determination was not in accordance with the definition of a "subsidy" as stated in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A, Agreement on Subsidies and Countervailing Measures, Pt. I, Art. 1 (1994).

[18] Murray v. The Charming Betsy, 6 U.S. 64 (1804).

[19] Second Submission of the United States, United States – Anti-dumping Act of 1916 in response to the Complaint of the European Union, paras. 28-31 (Aug. 6, 1999).

different concept of judicial precedent that do the U.S. and Canada. A precedent is created only where five consecutive judicial decisions have adopted the same interpretation, without any intervening contrary decision.[20]

Third, Mexico has a unique concept of the standard of review. For example, Article 238 of Mexico's Federal Fiscal Code establishes a hierarchy of five grounds (which must be considered in order) on which an administrative determination may be overturned. These grounds are (I) lack of jurisdiction or authority, (ii) omission of formal legal requirements, (iii) procedural violation, (iv) erroneous analysis of the facts, or (v) a discretionary determination outside the lawful scope of that discretion.[21]

Fourth, in Mexico the possibility of a collateral attack on a panel decision exists. At least in theory, a panel determination may be challenged under Mexico's *amparo* procedure, in which an individual may raise constitutional challenges to actions affecting her or his individual rights.[22]

Fifth, nullification of an agency decision is possible in Mexico. The first case involving a Mexican decision found that, consistent with the powers of a Mexican reviewing court, the panel has authority to nullify the agency decision.[23]

In addition to these substantive complexities, there have been practical problems that have arisen in panel consideration of appeals from Mexican decisions. First, access to the administrative record has been difficult. In early cases, parties seeking to review the record were confronted with a demand for a large bond. This issue has now been resolved. Second, content of the record has been an issue. On several occasions, there has been controversy concerning documents that appeared in the record presented to the panel, of which parties were previously unaware. Third, delay is a major problem. There have been delays in appointing panelists, difficulties in finding panelists without conflicts and several cases in which panelists withdrew in mid-case because of newly arisen conflicts.

Despite the substantive complexities and practical problems – the different legal system, the absence of precedent and the significant delay problems – the panel system is working in Mexican cases. Indeed, success is important at this stage because the Mexican panel process represents the only vehicle used for review of Mexican import relief decisions.

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[20] For a more detailed discussion of the concept of precedent in Mexican law, *see* Robert E. Lutz, *Law, Procedure and Culture in Mexico Under the NAFTA: The Perspective of a NAFTA Panelist*, 3 SW. J.L. & TRADE AM. 391, 400-01 (1996).

[21] *Id.* at 402-404.

[22] *Id.* at 400.

[23] In the Matter of Mexican Anti-dumping Investigation into Imports of Cut-to-Length Plate Products from the United States, MEX-94-1904-02 (Aug. 30, 1995).

IV. Conclusion – Does This Process Have a Future?

In light of the fact that there now exists another effective vehicle for challenging anti-dumping and countervailing duty decisions, the WTO's DSU, one may question the continuing relevance of the Chapter 19 panel process. A fair argument could be made for relying solely on the WTO for the resolution of disputes concerning the enforcement of anti-dumping and countervailing duty laws. Still, there are compelling reasons to maintain the Chapter 19 panel process as an alternative.

To be sure, the WTO provides several distinct advantages over the Chapter 19 panel process. The WTO process is significantly more expeditious that binational panel appeals from Mexican decisions, where the process is subject to serious delays. It is less costly for private litigants since the government trade agency (USTR or its equivalent) bears much of the burden. The WTO procedure also incorporates an Appellate Body, which enhances the quality of decisions and provides a discipline on the occasional aberrant panel. Most importantly, the WTO process is not limited to ensuring compliance with domestic law, but instead imposes a true external discipline.

Notwithstanding the foregoing WTO advantages, the chapter 19 panel process provides a useful alternative to the WTO DSU. With relatively few exceptions, the binational panels have reached well-reasoned decisions. Unlike the WTO system, in which private parties must persuade their governments to initiate dispute settlement, the Chapter 19 system gives aggrieved private parties the power to bring their won challenges. Thus, under Chapter 19, the aggrieved parties are not inhibited by external politics or the government's own internal policies. A good example of this is the Mexican High Fructose Corn Syrup case. There, a binational proceeding was the only viable alternative to raise a "like-product" issue because the International Trade Commission ("ITC") was wary of the U.S. government taking that issue to the WTO for fear that a WTO decision would restrict the ITC's flexibility in dealing with "like product" questions.

Most importantly, the Chapter 19 panel process serves a valuable function with respect to Mexican import relief decisions, as to which it represents the only viable means of ensuring compliance with domestic law and procedures.

Although the Chapter 19 panel process remains viable, there are areas in which improvement is needed. For example, the extraordinary challenge process has not worked. The U.S. challenge in the Softwood Lumber case, on thoroughly nasty conflict allegations, was the darkest hour in the history of binational panels. Also, conflict of interest strictures should be made less

strict not more strict. This would help ease the major cause of delays in Mexican appeals. A back-up panelist would also be useful so that the entire process would not be halted by the disqualification of one panelist. Additionally, time limits on selection of panelists should be enforced, perhaps by giving the other side the right o appoint the panelist where a selection is not made in time. That said, and appellate body is not a good idea. It would simply lead to relitigation of decided issues. Finally, the argument that decisions should be made more consistent is in fact contrary to the binational panel concept. The procedure is not intended to establish precedents that bind domestic courts or administering authorities in future cases.

In sum, my view is to keep the binational process with certain modifications. However, for serious violations of trading norms the WTO may provide the better forum for relief.