1997

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NAFTA — THE BROAD STROKES: A CANADIAN LAWYER’S PERSPECTIVE

Lawrence L. Herman*

I. INTRODUCTION

Because Canada is a country heavily dependent on trade — and much of it with the United States — there is a wide-spread sensitivity to the impact of bilateral (and multilateral) trade rules on Canadian interests; commercial, cultural, and political. It is interesting to compare the current situation with that of a decade or so ago, when trade policy and law was considered an esoteric subject and almost nobody apart from the cognoscenti paid much attention to the arcane deliberations of the GATT in Geneva. Today in Canada the GATT, the WTO, and the NAFTA are part of the business jargon. Canadians are talking the NAFTA talk.

This focus is partly the result of the globalization of business and the impact of multilateral rules and rule-making on international commerce. Heightened public awareness of trade law in Canada is reflective of a variety of new trade-liberalizing rules that affect Canadian commerce in a direct way. Similarly, the impact of NAFTA and of WTO dispute settlement panels on Canadian laws and policies has now become imbedded in public consciousness. A trio of major trade disputes with the United States in the fields of softwood lumber, agricultural tariffs, and Canadian taxes on periodicals has brought this to the fore recently and gained for the NAFTA and the WTO an unprecedented prominence in public debate and media reporting.

An interesting aspect of this phenomenon is the remarkable contrast in attitudes and perceptions between Canada and the United States insofar as the NAFTA is concerned. In addressing the “broad strokes” of the NAFTA — avoiding a technical, dry, legal discussion — two items are examined that bring out these differences. The first is the NAFTA dispute settlement process itself and the contrasting views about the merits

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of that process on each side of the Canada-U.S. border; the second concerns anti-dumping remedies and the differences in public attitudes and private sector approaches in the two countries.

Considering the NAFTA dispute settlement system first, this Article looks at the growing number of negative references being voiced in legal and political circles in the United States. At the end, it suggests how some steps might help to alleviate these concerns and, at the same time, help to fill a legal vacuum at the centre of the NAFTA. Regarding the second item, the use of anti-dumping remedies, the Article enters into some discussion of this recurring problem in Canada-U.S. trade. While this is a "broad strokes" Article, some suggestions are offered for ameliorating the more egregious aspects of the anti-dumping system through a NAFTA-inspired procedure that would test the "legitimacy" of an anti-dumping action in the context of North American business reality.

This does not mean that Mexico has been forgotten in the equation. It is only because much of the discussion in Canada is geared to what takes place in the United States and because the vast bulk of intra-NAFTA trade, as far as Canada is concerned, is with the United States. This Article concentrates on the Canada-U.S. issues.

II. DISPUTE SETTLEMENT UNDER THE NAFTA

A. The Softwood Lumber Legacy

It is not the intention of this Article to review the Softwood Lumber case in any detail. This has been done in abundance elsewhere. However, for the sake of understanding, the following is a brief summary.

At the core are different views in Canada and the United States of the concept of the term "subsidy." From the perspective of many in Canada (not all, it should be emphasized, and it is a generalization to speak of a "Canadian" view), it was inconceivable a few years ago that Canadian provincial stumpage programs could be fitted within the definition of the term. In Lumber I in 1983, the Commerce Department agreed and said that under U.S. law at that time stumpage was not countervailable because it was generally available to all within the sector that wished to acquire timber. Canadian producers sighed relief. The


2 Final Negative Countervailing Duty Determinations; Certain Softwood Products from Can-
decision seemed to make good sense and comport with Tokyo Round notions of the concept of subsidy — that is, a grant or money payment or some other form of financial contribution, directly or indirectly, to a specific enterprise or industry, as opposed to a government facility or measure that was sector-wide and in the nature of a licence or provision of access by way of rent.  

Then came Cabot Corporation, and the rules on specificity changed. Lumber II began. This time, based on substantially the same facts, provincial stumpage programs were found to be countervailable by the Commerce Department. The case was settled prior to final determination by way of a Memorandum of Understanding (MOU) between the Canadian and U.S. governments, dated December 30, 1986. The MOU envisaged increases in provincial rates and, pending those increases, Canada agreed to apply a fifteen percent export tax on softwood exports to discount the effect of the lower stumpage rate.

The MOU was terminated by Canada in October, 1991, in accordance with its terms, as a result of progressive increases in provincial stumpage rates since 1986. The Canadian government considered that because of these increases, the MOU no longer served its purpose.

There had been no GATT consensus on the precise meaning of the term “subsidy” as concluded in the Report of the Working Party on Subsidies, Operation of the Provisions of Article XVI, adopted 21 Nov. 1961 (B.I.S.D. 105/201) but the deliberations of the Working Party suggest that it was actual payments or measures “having equivalent effect” that fell within the provisions of Article XVI. There is no suggestion in the various Working Party documents that any provision of a service or good by a government (such as roads, waterways, harbours, paid access to resources such as timber, or medicare) was considered to be within the definition of the term.


Pursuant to the MOU, Canada enacted the Softwood Lumber Products Export Charge Act, S.C. 1987, c. 15, under which all softwood lumber exports of the type covered by the MOU were subject to a federal export tax at the time of export.

Clause 5 of the MOU provided that the export charge may be reduced or eliminated on the basis of increased stumpage charges. Given these increases in the five-year period of the MOU, the Canadian government informed the U.S. government of its intention to terminate the
Following termination, under pressure from U.S. interest groups and influential members of the Congress, the U.S. government self-initiated a countervailing duty investigation in *Lumber III* which resulted in subsidies being found, not only for stumpage, but also for log export restrictions in British Columbia. It was this part of the Commerce Department’s final determination in *Lumber II* that went the full route of NAFTA panels, right through to an Extraordinary Challenge procedure under Chapter 19 of the NAFTA. It is the result of that case and the dissenting views of U.S. Judge Malcolm Wilkey that, in large measure, have engendered current American dissatisfaction with the NAFTA and, indeed, with the WTO dispute settlement process as well.

Under Chapter 19 of the NAFTA, panelists are chosen for their objectivity, reliability, sound judgment, and knowledge of trade law and are required to be of good character, high standing, and repute. They are obligated to adhere to codes of conduct and to act impartially and in their best judgment, untainted by prejudice. I know of no case where this has not been so. In fact, NAFTA panel decisions are so thorough and so carefully reasoned that they add enormously to the credibility of the system as well as to the corpus of international trade law in general.

In the *Lumber III* panel reviewing the Department of Commerce’s determination of subsidies, accepting in full the good faith, high expertise, and professionalism of all the panelists, there was a problem: the panel split on national lines, with the three Canadian panelists finding that the Department of Commerce incorrectly applied U.S. law — or, in legal terminology — reached conclusions on the countervailability of Canadian stumpage programs that were “not supported by substantial evidence on the record.” The two U.S. panelists dissented and would...
have upheld the Commerce Department's finding.

While the lawyers' debate over the rightness or wrongness of the majority's finding goes on, to the lay observer it might reasonably appear that the NAFTA system had allowed three Canadians to tell the U.S. government how to apply its own laws in a matter involving Canadian interests. Even accepting that the *Lumber III* majority was entirely right in making such a finding, the result was bound to be seen as just plain wrong in the eyes of many Americans. It must be accepted that if the opposite had occurred and three American panelists had out-voted a minority of Canadians, the effect would have been similar in Canada. The case has left an unfortunate legacy, the implications of which are only now being fully felt.

It is the thesis of this Article that Judge Wilkey's dissent was a watershed and that whether it was the source or simply the articulation of concern, from that dissent seems to flow much of the current U.S. dissatisfaction with the NAFTA panel system and with international dispute settlement generally. As a result of that case, the record shows many Americans seriously questioning the legitimacy of the NAFTA panel system. Reference has been made to the "fragility" and "low level" of public confidence in the panel process in the United States. Strong expressions of concern and dissatisfaction have been voiced in the U.S. Congress by seasoned and influential members about the threat of the NAFTA dispute settlement to U.S. sovereignty. In recent months, political opposition to both the NAFTA and the WTO panel systems seems to have escalated. Several U.S. senators have threatened to block any renewed Fast Track authority for the President to negotiate NAFTA accession for Chile resulting from, among other reasons, dissatisfaction with the outcome of the NAFTA panel on Canadian agricultur-

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16 Id. at 559.
17 See Lawmakers Blast Canada Lumber Ruling, Urge Solution to Flaws in Panel System, 11 INT. TR. REP. 1308 (Aug. 24, 1994). On May 4, 1995, a coalition of major U.S. companies and industry associations sent a letter to U.S. congressional leaders urging that the Chapter 19 process be eliminated or, at the very least, not extended to other NAFTA parties, pointing to the Softwood Lumber case as an example of how panels allegedly exceed their mandate and arguing that the system offends the U.S. constitution. See also Industry Coalition Urges Elimination of Chapter 19 in Letter to Lawmakers, 12 INT. TR. REP. 814 (May 10, 1995). Much of this same U.S. concern over the effect of international dispute resolution mechanisms was targeted to the WTO Agreement and its Dispute Settlement Understanding. To gain Congressional approval, sections 122-125 of the U.S. Uruguay Round Agreements Act, HR 5110 (103rd Congress, 2d Sess., House Doc. 103-516, Vol. 1), provides for continued oversight and review of WTO panel decisions and possible U.S. withdrawal from the WTO on joint resolution of the Congress.
This same negative attitude toward international dispute settlement has been sharpened recently in the dispute over the so-called Helms-Burton Act, particularly Title III thereof, which allows persons in the United States to bring civil actions against other parties for acts outside the United States that are alleged to constitute "trafficking" in confiscated Cuban property. Because of its extra-territorial reach (making actions that are legal in other jurisdictions and that occur outside the United States subject to law suits in the United States), the Helms-Burton Act has become a major international trade issue, seriously separating Canada and the European Union, on the one hand, from the United States, on the other.

The European Union, with Canadian support, has invoked the dispute settlement procedures under the WTO Agreement to challenge the Act. At the same time as the European Union officially commenced WTO proceedings, officials of the Clinton administration warned that the E.U. action was strengthening arguments of Congressional opponents of open trade and global cooperation through the WTO, who say the body threatens U.S. sovereignty. In a serious departure from accepted international practice, the United States has refused to cooperate in the naming of a WTO panel, forcing the WTO Secretary General to name the appointment on its behalf. The U.S. government then announced that it

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18 In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, CDA-95-2008-01, Final Report of the Panel, Dec. 2, 1996. The U.S. dairy and poultry industry spokespersons expressed predictable outrage at the decision claiming that the "Canadians have found a way to wiggle off the hook," FIN. POST (Toronto), Dec. 4, 1996. Secretary of Agriculture Glickman stated that the panel decision was wrong. TORONTO GLOBE & MAIL Jan. 16, 1997 (notwithstanding that it was a unanimous decision, including the two U.S. panelists). The battle over renewed Fast Track authority between the Administration and the Congress involves many of the same Congressional interests that refuse to accept the result of the NAFTA panel decision. Clinton Fights Free Trade Foes, FIN. POST (Toronto), Mar. 6, 1997.

19 Cuban Liberty and Democratic Solidarity ( Libertad) Act of 1996, 19 USCA § 6081.

20 Under section 306 of the Act, the President has the authority to suspend Title III for periods of six months where he determines that "such suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." The President exercised this suspension authority three times since the passage of the law, the latest being on July 16, 1997. 14 INT'L TRADE REP. 1317 (July 30, 1997).

21 Canada has intervenor status in the WTO complaint. It had stated earlier that it would have initiated separate proceedings against the Helms-Burton legislation under Chapter 20 of the NAFTA, but announced that it would put this in suspension pending the outcome of the U.S.-E.U. dispute in the WTO and, in particular, whether the parties are able to reach some settlement. Canada Delays NAFTA Helms-Burton Case Pending E.U. Negotiations with United States, 14 INT' TR. REP. 307 (Feb. 19, 1997). In light of recent developments, it appears that a U.S.-E.U. settlement is only a distant possibility.

would boycott the WTO panel proceedings and not accept the result of any findings. The Helms-Burton Act has put the WTO and the NAFTA dispute settlement process under extreme pressure.

Returning to the Softwood Lumber case — the latest chapter, Lumber IV — has been settled by means of another Memorandum of Understanding that, among other things, caps Canadian exports in terms of volume through use of quotas, enforced through an export tax system. Part of the leverage behind the conclusion of this agreement was the fact that, in implementing the Uruguay Round, U.S. law was changed to make it easier for the Department of Commerce to determine the existence of a countervailable subsidy on the basis of de facto specificity. The Clinton administration made it a term of the political settlement that it would not initiate a threatened trade action under Section 301 of the Trade Act of 1974 and Canada insisted that the U.S. lumber producers withdraw their constitutional challenge and not file a further countervailing duty petition.

Notwithstanding that agreement, a new constitutional challenge has been initiated by another American interest group, aiming to strike down U.S. adherence to the NAFTA panel system. The case was filed in January 1997 in the U.S. Court of Appeals by a group called the American Coalition for Competitive Trade. As with the U.S. lumber producers’ earlier challenge, the essence of the claim is that by ratifying

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24 It is not the purpose of this Article to delve into the issues surrounding the Canadian and E.U. challenges over the international legality of the Helms-Burton Act. It is important to note, however, that at issue is the extent of the national security exception under Article XXI of the GATT and Article 2102 of the NAFTA. The U.S. position is that these provisions recognize the right of any State to take actions that “it considers necessary for the protection of its national security interests . . . taken in time of war or other emergency in international relations.”


26 Under the pre-existing version of Title VII of the Tariff Act of 1930 (19 U.S.C. § 1677) and the Department of Commerce’s own Regulations (54 Fed. Reg. 23375) as interpreted by the courts, the Commerce Department was required to find the existence of all four factors specified in section 771(5). The amendments in the Uruguay Round Agreement Act (URAA) now require only one of four factors to exist in order in order for a foreign government program to be specific and hence countervailable. As provided in section 251 of the URAA, “(iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist . . .” (emphasis added).

27 Complaint and Petition for Declaratory Judgment, Civil Action No. 97-1036, filed January 16, 1997. A previous constitutional challenge has been initiated by a group calling itself the Coalition for Fair Lumber Imports (Complaint and Petition for Review for Declaratory and Injunctive Relief, Civil Action 94-1627, filed on 14 September 1994), but this action was withdrawn on the basis of the settlement reached in Lumber IV.
and applying Chapter 19 of the NAFTA, the U.S. Congress and the President unlawfully ceded judicial power to a non-American body that, under the U.S. constitution, exclusively resides in U.S. domestic courts.

Whether directly or indirectly related to the Softwood Lumber case, the constitutional challenge to U.S. adherence to the NAFTA panel system is indeed worrisome and it cannot be excluded that this case may achieve some success in the U.S. courts. At the point of writing, it is not clear when the first round of written arguments will be filed and when the case will be heard by the U.S. Court of Appeals. Final disposition of the case by that Court is many months away and it can be expected that it will ultimately go to the U.S. Supreme Court. The potential significance of this case, notwithstanding limited media attention, should not be under-estimated. The submissions will be decided on purely U.S. constitutional law considerations and not on foreign relations or trade policy grounds. It is impossible to know how U.S. courts will deal with the issues, but it would be a mistake to assume that the NAFTA panel system is home-free.

Should this challenge succeed, the effects on the NAFTA would be devastating. The Chapter 19 process has been an integral part of the deal consummating both the FTA and the NAFTA from Canada’s standpoint. Mexico, too, accepted the NAFTA package with Chapter 19 as an integral part of the compromise. Should the U.S. courts find the panel system to be *ultra vires* the U.S. constitution, the entire NAFTA edifice will likely crumble. Without the ability to legally implement Chapter 19, the United States would be in fundamental breach of its treaty obligations. The Canadian government would almost certainly face relentless pressure to withdraw from the treaty under Article 2205.

When standing back and considering the “broad strokes” of NAFTA from a legal perspective, then one of the chief concerns relates to the political and legal pressures on the Chapter 19 process from within the United States. As noted above, there is a growing view among elements in U.S. political leadership that holds that treaties, such as the WTO and the NAFTA, that limit U.S. freedom of action through a process of third-party adjudication cannot be tolerated. This concern was the motivation behind legislation introduced by then-Senator Bob Dole that would have established a WTO dispute settlement review commission to review all adverse WTO panel decisions which could have ultimately led to U.S. withdrawal from the WTO itself.28 For the United States to

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be forced into a process of external adjudication is seen by this constituency as not being consistent with U.S. sovereignty and national values, notwithstanding that by their very nature, treaty engagements limit state sovereignty to a greater or lesser degree.

At the risk of sounding self-righteous (and apologizing in advance for it) one does not find the comparable attitude, or at least not to the same extent, in Canada. The recent WTO periodicals case is an example. While Canada appears to have lost on most of the issues before the panel, and while there has been extensive public comment and discussion about its implications for Canadian cultural policies, the reaction has been one of internal examination as opposed to condemnation of the panel process itself. None of the comments in the media suggested that the WTO process was offensive or that Canada should reconsider its position in that body. This reaction, of course, illustrates the position of a smaller power. Conversely, comparing the two situations also shows that a large and powerful nation, with vast resources and unrivaled economic might, does not take lightly to losing in third-party dispute settlement. Whatever the explanation, the apparently hostile attitude in some quarters in the United States to the legitimacy of NAFTA (and WTO) dispute settlement processes is a cause for concern.

B. Some Suggestions — A Permanent NAFTA Panel System

One of the defects of the NAFTA as a free trade agreement is the lack of a permanent core and the absence of a centralizing body, in the sense of the executive institutions of the European Union in Brussels and the European Court of Justice and European Parliament in Strasbourg. While this is possibly a heretical proposition in the pres-

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29 See Canada-Certain Measures Concerning Periodicals, complaint by the United States (WT/DS31). The panel's interim findings have not been made public at the time of writing, but have been an issue to the two governments. However, the findings of the panel have been leaked and are widely available. INSIDE U.S. TRADE, Jan. 24, 1997.
31 This is not to say that the reaction in Canada was benign. While there appeared to be an absence of WTO-bashing in public comments, there has been strong condemnation of U.S. policy toward Canada by politicians and media representatives. Copps Sets Stage for War Over Culture, TORONTO GLOBE & MAIL, Feb. 11, 1997.
32 It is accepted that NAFTA Article 2001 creates the Free Trade Commission, theoretically charged with the supervision of the implementation of the Agreement and the overseeing of its further elaboration. As well, Article 2002 creates a secretariat, composed of national sections. In reality, these bodies are no more than a periodic meeting of the respective ministers of interna-
ent Canada-U.S. climate and goes against the grain of the current politics in Washington, there is, in this writer's view, value in considering an element of permanency in the Chapter 19 and Chapter 20 panels as a means of restoring some of that very faith in the dispute settlement process that seems of have been dissipated in the wake of the Softwood Lumber case.

Consider how the panels function under the NAFTA. Under Chapter 19 (as well as under Chapter 20), the panel system is purely _ad hoc_. Panels are appointed from the roster under Article 1904 for a particular case. Once that case ends, they return to private law practice or their other callings. Even during the life of a panel, the five panelists meet as a group only infrequently and often not before the hearing day itself. Following the hearing, much of the panel’s deliberations are by means of telephone conference calls and long-distance exchanges of drafts of their report. There is no permanent clerking system or legal assistance available to the panel itself. Rather, individual panelists bring with them junior members of their law firms, students, or other research assistants as might be available. While these persons perform a necessary and valuable service, the absence of permanent assistants and a legal research staff reinforces the inherently transitory nature of the process. The same criticisms apply to Chapter 20 panels, whose operations parallel those of Chapter 19.

Hence, unlike an appellate court, there is no institutional longevity in any meaningful sense in the NAFTA. While prior panel decisions offer guiding jurisprudence which helps to bind the system, this cannot really substitute for the benefits of a permanent institution in terms of continuity and in ensuring a kind of central core to the Agreement.

It is appreciated that permanency will not alleviate all of the dissatisfaction flowing out of the United States. But it could meet some of the concerns leveled at the panel process by Judge Wilkey in the Softwood Lumber case who stated, among other things, that because FTA (and now NAFTA) panels are comprised of private practitioners in the trade law field who come from and return to practice at the end of their

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33 NAFTA Annex 1901.2.

34 The NAFTA Article 1904 Panel Rules, adopted by Canada, the United States, and Mexico pursuant to Article 1904.14 of the Agreement, do not deal in any detail with the internal functioning of panels, allowing each individual panel to adopt its own internal procedures. But the point is that inherent in the Chapter 19 system is that panels are both _ad hoc_ and each panel will be composed of completely different members. The same factors apply in Chapter 20 panels.
duties, they have a psychological disposition not to show deference to the administrative agency whose decision is under review. While many of Judge Wilkey's immediate criticisms may not be met by a permanent tribunal — which he would no doubt find as abhorrent to U.S. sovereignty as the present ad hoc system — it is submitted that a permanent system would be of considerable, longer-term value. It would help smooth out some of the aberrations in panel decisions under the present regime and ensure an element of consistency and continuity that is lacking.

The politics of North American trade and the various interests at play clearly make it impossible to renegotiate the NAFTA to establish central treaty bodies such as those under the Treaty of Rome. There are, moreover, difficult issues of national sovereignty that prevent the creation of full-fledged trilateral institutions. The Treaty of Rome was a product of a purely European experience following World War II which cannot be transposed to the North American context. On the legal level, the NAFTA is not, as is the case of the European Union, a customs union with a common external tariff and common trade policy. Finally, the NAFTA functions extremely well as a free trade agreement and there is no cause to create new institutions where none are called for.

In the case of the NAFTA panels, however, it would seem that some form of permanency would help to ensure consistency in jurisprudence and, at the same time, create at least one central body with an ongoing, vested interest in the NAFTA system at large, as opposed to national secretariats each with a particular point of view and ad hoc panels whose members meet, decide, and then disappear back into their respective callings, never to meet again.

There is a modest precedent for such a permanent body — the International Joint Commission (IJC), created under the 1909 Boundary Waters Treaty. While not a perfect precedent, the IJC does have a permanent staff and its own offices and, importantly, has plenary jurisdiction over the use, obstruction, or diversion of waters flowing between Canada and the United States. While it has separate Canadian and

See dissenting opinion of Judge Wilkey, supra note 12.

Interestingly, the U.S. industry coalition advocating the elimination of Chapter 19, referred to earlier, also criticized the system as being "ad hoc and fragmented." 12 INT'L TRADE REP., 814.


See Boundary Waters Treaty, Article VIII. S. Wex, The Legal Status of the International Joint Commission under International and Municipal Law, XVI CAN. Y.B. INT'L. L., 276; THE
U.S. sections, it has plenary jurisdiction as a full commission over the matters conferred on it by the Treaty. While politics are not absent from its decision-making, it has a juridical independence from governments and an independent role in applying the treaty regime.

Thus, as a modest but practical suggestion, it is proposed that in the one case of Chapter 19 and 20 panels there be a permanent NAFTA body, with members appointed on tenure for a fixed term, that would function without regard for or reference to national interests. This, it is submitted, would help fill a central vacuum and provide an ongoing element of treaty coherence. In the longer term, this very permanency would lead to restoration in the faith of the NAFTA panel system as a treaty institution.

II. THE OPERATION OF THE NORTH AMERICAN TRADE REMEDIES SYSTEM ANTI-DUMPING AS A CASE IN POINT

The second issue to examine in the context of "broad strokes" is the operation of anti-dumping processes in Canada and the United States (not forgetting Mexico). One of Canada's chief objectives going back to the FTA negotiations was to reach agreement with the United States on a common set of remedial measures and disciplines to be applied bilaterally on the use of subsidies and countervailing measures and on the use of dumping remedies in Canada-U.S. trade.39

In terms of dumping, the core consideration for Canada was that, as an export-oriented country, it faced uncertainties (some said harassment) through the litigious use of anti-dumping petitions by U.S. industries.40 Indeed, the setting for the FTA negotiations in 1985-1988 was a period when several major trade cases had been initiated in the United States involving major Canadian sectors, including the softwood lumber industry in the case already referred to.41 The theory embraced by Canadian

39 For a review of the background and the details of the deal-making that lead to the conclusion of the FTA and the Canadian concern over American "contingency protection," see M. HART, W. DYMOND & C. ROBERTSON, DECISION AT MIDNIGHT, 192-94 (1994).


41 Together with the softwood lumber investigation in 1986, countervailing duty cases were launched against Canadian exports of groundfish and of live swine and pork products, resulting in findings of material injury in each case: Final Affirmative Countervailing Duty Determination; Live Swine and Fresh, Chilled and Frozen Pork Products from Canada (C-122-404), Vol 50 Fed. Reg. 25097 (June 17, 1985); Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish from Canada (C-122-507), Vol 51 Fed. Reg. 10041 (March 24, 1986).
The use of anti-dumping remedies to counter less-than-cost or less-than-home-market pricing (i.e., pricing below normal value) was more appropriately dealt with through competition law enforcement.\textsuperscript{42}

It is not the purpose of this Article to review the history or the merits of this debate. Suffice it to say that, largely due to difficulties raised by the U.S. side, the FTA working group that was created to examine a possible replacement regime for dumping remedies got nowhere. For the same reason, the successor working group under NAFTA Article 1504 made little progress.\textsuperscript{43}

In the meantime, over the 1985-1997 period, Commerce Department investigative procedures under its Regulations\textsuperscript{44} in combination with changes to the \textit{Tariff Act of 1930}\textsuperscript{45} brought about through the Uruguay Round amendments\textsuperscript{46} have turned a dumping investigation into a process that is, for any caught up in it, an ordeal of major proportions, more onerous than the most scrupulous corporate audit and more burdensome than the most exacting securities commission reporting require-

\textsuperscript{42} There have been many articles and publications on this theoretical debate. Some of the arguments in this respect are found in T.M. \textit{Boddez & M.J. Trebilcock, Unfinished Business: Reforming Trade Remedy Laws in North America} (1993); M. J. Trebilcock and R. C. York, \textit{Fair Exchange: Reforming Trade Remedy Laws} (1990); P. L. Warner, \textit{Canada-United States Free Trade: The Case for Replacing Anti-Dumping with Anti-Trust}, 23 \textit{Law & Pol'y. in Int'l. Bus.}, 791 (1991-92).

\textsuperscript{43} Article 1504 of the NAFTA established a Working Group on Trade and Competition. The mandate of that Working Group was "to report, and to make recommendations of further work, as appropriate [to the NAFTA government within five years]. . . on relevant issues concerning the relationship between competition laws and policies in the free trade area." Work on this subject proceeded sporadically following the NAFTA entering into force. While an interim report was to be ready by December 31, 1995, this was delayed because of U.S. government shutdowns due to budgetary problems and intrinsic philosophical differences of approach. When finally produced, the report did nothing concrete in terms of proposing common measures that could be eventually adopted by the NAFTA governments on competition law remedies in the NAFTA area to cover unfair pricing issues. \textit{Interim Report of the NAFTA 1504 Working Group to the NAFTA Commission}, December 1996. The reason for not making further progress in this area has been attributed to the reluctance of the U.S. government to make any changes to its anti-dumping laws, regulations, or policies. \textit{NAFTA Talks Yield Little}, \textit{Toronto Globe & Mail}, Jan. 18, 1996. Interestingly, while not much of substance has come from the NAFTA working group, the WTO ministerial meeting in Singapore, Dec. 9-13, 1996, created its own working group on trade \& competition policy. 

\textsuperscript{44} 19 CFR Parts 351, 353 \& 355; Notice of Proposed Rulemaking.

\textsuperscript{45} 19 U.S.C. 1673, 1675, as amended.

\textsuperscript{46} \textit{Uruguay Round Agreements Act}, supra note 26.

\textsuperscript{42} Published by Case Western Reserve University School of Law Scholarly Commons, 1997
ments. It is open to question whether this onerous application the rules of the GATT and the 1994 WTO Anti-Dumping Agreement is either fair or reasonable.

These aspects of the U.S. system affected the Canadian steel industry in a direct way as a result of its being caught up as respondents in the 1993 flat-rolled steel cases. The problems, from the industry's viewpoint, were compounded by the fact that: (a) there was no reasonable possibility of the Canadian and U.S. (and Mexican) governments reaching agreement on a replacement regime for, or a moderation of, the use of anti-dumping remedies under the NAFTA; and (b) the Canadian anti-dumping laws, regulations, and policies were much less exacting than those in the United States when it came to investigations or re-investigations of U.S. steel producers in Canadian dumping cases. The imbalance in this regard was aptly described by F.H. Telmer, Chairman of Stelco, in a speech in Toronto in February of 1996.\(^4^7\)

As a result of industry pressure, not only from the Canadian steel producers but from other sources, the Canadian government has tightened up the administration of its anti-dumping laws to a major degree, requiring strict compliance with deadlines and with the required format and content for submission of information and, as in the U.S. system, severely penalizing responding companies for non-compliance, even where the defects are of a technical nature. Among the recent policy changes are the following:

- Requests for information from exporters will require data on all domestic sales, not just domestic sales of a comparable volume as sales to Canada in the period of investigation;
- Failure to respond within the strict deadline for submission will result in use of best available information;
- Non-submission of an exact non-confidential version of the document, within the same deadline, replicating the confidential RFI page-by-page, will render the entire submission invalid;
- Failure to have material ready in the precise format and type as


\(^{49}\) This change in conduct and administration of SIMA investigations is embodied in Revenue Canada's more detailed requests for information (RFIs) and the policy regarding submission of competed RFIs, formulated in late 1996 and modeled largely on the format used by the U.S. Commerce Department. See Annex A, in LAWRENCE L. HERMAN, CANADIAN TRADE REMEDY LAW & PRACTICE (1997).

http://scholarlycommons.law.case.edu/cuslj/vol23/iss/12
requested for verification by Revenue Canada officers will lead to rejection of the entire submission.

All of the foregoing changes are designed to render the Canadian investigatory process under SIMA on a par with that in the United States. The rigours of this approach have been borne head-on by U.S. steel producers and exporters in the ongoing re-investigations in Cold-Rolled Steel Sheet and Corrosion-Resistant (Galvanized) Steel Sheet.

The purpose of this Article is not to examine the detailed ingredients of the anti-dumping systems of Canada and the United States. Rather, the above illustrates some facts of Canada-U.S. trade relations, and intra-NAFTA trade at large, that have emerged over the last number of years. First, deployment on anti-dumping actions in each country against the goods of the other under the FTA and NAFTA regimes in the period from 1988 to date have continued unabated. Second, the system has become both entrenched and exceedingly complex, partly due to the degree to which home market sales and production costs are scrutinized by both the Commerce Department and Revenue Canada. Finally, because of the integration of the U.S. and Canadian economies under the NAFTA, and because of concern expressed by domestic industries in Canada, the system in Canada is following more and more of the onerous aspects of the U.S. system. This fact will inevitably make any modifications more difficult to accomplish and, in the eyes of some, has simply ratcheted-up North American trade to a higher level of protectionism.

III. WHERE FROM HERE? SOMETHING LESS THAN FULL-SCALE REPLACEMENT

Accepting that development of a replacement regime for anti-dumping remedies is not legally or politically feasible in the near term, can something less radical be considered among the parties? If the objective of the NAFTA is to promote the free flow of goods, is there a possibility of mitigating the undue harshness of the anti-dumping rules, while at the same time accepting the political reality that there are strong forces

50 Revenue Canada, Final Determination of Dumping of Certain Cold-Rolled Steel Sheet from Germany, et al., June 29, 1993 (4258-89; AD/998).
51 Revenue Canada, Final Determination of Dumping of Certain Corrosion-Resistant Steel Sheet Products from Australia, et al., June 29, 1994 (4258-93; AD/1014).
52 See The Review of the Special Import Measures Act: A Background Paper, FIN. CAN. 8, May 1996, prepared for the Parliamentary Sub-Committee on Trade Disputes which examined Canada's Special Import Measures Act in the fall of 1996.
at work to preserve them?

One possible approach in intra-NAFTA trade would be to allow for a "defense" to a dumping complaint where it can be demonstrated that export pricing has been a legitimate, market-based response to North American business factors. This would recognize the fact of economic integration brought about by the NAFTA and that pricing of goods is often determined by market forces and have nothing to do with "unfair" or predatory-type behavior on the part of the producers. This is particularly true in commodities trade and in primary manufacturing where it is the free play of the business cycle that determines pricing. 53

A. Less-Than-Domestic-Price Dumping

One of the two categories of dumping under GATT Article VI and the Anti-Dumping Agreement is where the exporters sell goods at a price in the import market that is less than the price of same goods are sold in the ordinary course of trade to the same level of purchasers in the home market. This less-than-domestic-price dumping is a typical case that comes before Canadian and U.S. investigators.

There are theoretical arguments that question whether international price discrimination is a bad thing, given that it is the exporter's market that bears the brunt of the higher-priced product and, correspondingly, the importer's market that gains the benefit of the lower-priced good. 54 An additional argument against dumping laws is that theoretically such dumping should not occur — or at least should not occur over an extended period sufficient to cause injury in the import market. In the NAFTA context, the trans-border flow through the open market should ultimately prevent the long-term continuation of any such cross-border discriminatory pricing. The return of the low-priced product to the exporter's market through international arbitrage will force price reductions in that market and eliminate the pricing differentials. 55

However, economic models often betray commercial reality. In the normal course of business it often transpires that goods are sold in

53 There have been various proposals made to moderate the rigourous and overly technical impact of dumping remedies by "filtering" out the bona fide cases, without necessarily doing away with the entire system. See, e.g., M. Bronckers, Rehabilitating Anti-Dumping and Other Trade Remedies Through Cost-Benefit Analyses, 30 J. World Trade L. 5 (1996).


55 Id. at 114. See also B. Hindley & P. Messerlin, Anti-dumping Industrial Policy: Legalized Protectionism in the WTO and What To Do About It, unpublished manuscript, Sep. 1996, prepared for the Centre for International Studies, Toronto.
Canada or in the United States at a price that is less than the price charged by that exporter in its home market and these goods do not find their way back to that exporter’s market. This is due to a variety of factors related to the patterns of trade and distribution channels and not necessarily due to market segmentation. Often, goods imported at less-than-domestic prices in the exporter’s market are re-sold into the distribution chain in the import market and on-sold to lower trade levels, without being available for purchase and re-sale back into the exporter’s market, so a theoretical price equilibrium is never established. Where less-than-domestic-price importing occurs with enough regularity to cause lost sales or downward price effects in the import market, the effects may lead to a legitimate complaint and subsequent investigation by national trade agencies, notwithstanding the theoretical possibility that such pricing must eventually cease due to the effects of arbitrage.

Given that short-term, market-driven pricing may entail technical dumping and expose an exporter to the full harshness of the investigative regime, the question arises whether it is possible to devise a means of allowing consideration of such market-driven pricing factors as a legitimate counter to a dumping complaint. One of the possible avenues could be to allow a “defense” to a complaint where pricing in the export market is to merely meet the competition in that market, is not predatory in nature (as that term is understood in competition law), and does not entail acts designed to injure or eliminate competition.56

This would be akin to permitted defenses in the competition law area. In U.S. anti-trust law, a claim of price discrimination can be rebutted by a seller demonstrating that the lower price “was made in good faith to meet an equally low price of a competitor; or the services or facilities furnished by a competitor.”57 Under section 50(1)(c) of the Canadian Competition Act, it is an offense to engage in such pricing — i.e., selling at prices in one part of the Canadian market less than prices sold in another — where such person “engages in a policy of selling products at prices unreasonably low, having the effect or tendency of substantially lessening competition or eliminating a competitor, or designed to have such effect.”58 To constitute an offense, all elements must be present. In other words, there must be: (a) a policy; (b) goods

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56 This idea has, of course, been mooted before now. Others have suggested that anti-dumping laws only apply where there is evidence of acts that are aimed at wiping out competition. D. Palmeter, A Commentary on the WTO Anti-Dumping Code, 30 J. OF WORLD TRADE L. 43, 68 (1996).
must be sold at unreasonably low prices; (c) the practice or activity must have the effect of substantially lessening competition or eliminating a competitor or designed to have such effect.\(^5\)

It is not suggested that there be an injection of these identical competition or anti-trust concepts into the dumping laws. Rather, the references to these aspects of Canadian and U.S. competition law are made to illustrate the point that, in cases where a supplier legitimately responds to North American-wide market conditions and where there is an absence of evidence of a pattern of actions designed to eliminate competition (borrowing from the “good faith” element of U.S. law), a means could be devised to put a halt to an anti-dumping investigation. Thus, if a U.S. exporter supplies a product at the market price in Canada, even where that price may be less than the comparable price in the United States, under the appropriate set of conditions, the American exporter should be allowed to continue to do so, notwithstanding that it is engaging in dumping under the technical interpretation of that term.

The foregoing paragraph makes reference to market-based pricing and the “the appropriate set of conditions” that would allow a defense to a dumping complaint to be met. These conditions could be such things as: (a) “good faith” pricing; (b) an absence of evidence of or a pattern indicating predation; (c) prevalent market conditions in the export market that require prices to meet the competition in that market; and (d) an absence of market distortion as a result of such practices. All of these factors would be a matter of evidence.

The effect of permitting such a defense where these conditions are established would enhance competition in the import country and allow customers a wider choice of supplies at the same or substantially the same price. In addition, it would accord advantages to the import economy based on market efficiencies, by allowing a supply of lower-priced goods to enter into commerce relative to the economies that were the source of the higher-priced goods. The exporter’s economy, not the importer’s economy, would bear the costs of such inefficiencies. And finally, a defense as suggested above would curtail the use of dumping remedies in cases where the pricing is the result of free-market forces.

\(^5\) A thorough examination of the elements in competition (anti-trust) and dumping laws and of the possibility of creating a North American regime based on competition principles is also found in I. R. Feltham et al., *Competition (Antitrust) and Anti-dumping Laws in the Context of the Canada-United States Free Trade Agreement*, 17 CAN-U.S. L. J. 71 (1991) [hereinafter *Competition and Anti-dumping Laws*].
B. Less-Than-Cost Dumping

One of the harsher aspects of anti-dumping remedies is the use of fully absorbed cost methodology for determining home market prices in cases where price-to-price comparisons are not employed. Requiring export prices to recover all of the exporters' fully allocated costs means, by definition, that all fixed and variable costs must be recouped, even though in standard business practice, from time-to-time, this is not achievable or necessarily desirable. As a matter of commercial reality, pricing may not always recover all marginal or variable costs, depending on where one is in the business cycle.60

As where the exporter engages in good-faith pricing to meet the competition in the import market but sells at less than comparable prices in the home market, a similar "defense" to a dumping complaint could be allowed where the export price is less than the exporter's variable-costs-plus-profit for the same reasons. Looked at another way, given that the blanket use of fully absorbed-cost-plus-profit methodology in agency investigations can lead to the application of anti-dumping duties in situations where the business circumstance and the reality of the marketplace (particularly in cases of a cyclical downturn) make less-than-cost pricing inevitable, it is suggested that some modification of the remedy is warranted in these circumstances. Where it is shown to have been in response to the North American market factors and provided all relevant ingredients are carefully tested by a third party, less-than-cost pricing should not incur dumping penalties.

In such circumstances, the defense would have to show that: (a) less-than-cost pricing has been of a short-term nature; (b) economic factors common in the North American market have brought about excess capacity; (c) similar factors pertain in the import market — than is, that the domestic industry represented by the complainants are facing similar conditions; and (d) as with U.S. law, the export pricing complained of has been engaged in merely to meet competition, is of good faith, and is not designed to reduce or eliminate competition in the market, much like the factors set out above for cases of less-than-do-

60 In a prosecution under the discriminatory pricing provisions of the Competition Act in R. v. Consumers Glass Co. [1981] D.L.R. (3d) 274, the Ontario High Court refused to convict the accused stating that, where the price reductions were "loss minimizing," then the accused was not selling at unreasonably low prices. Price reductions and sales below average costs were geared to minimizing losses due to excess capacity. While this was a criminal prosecution under a different legal regime than the dumping laws, the views of the court are an interesting comment on the relationship between excess capacity, market factors, and pricing decisions.
mestic-price dumping. 61

C. Consistency With the Anti-Dumping Agreement

Both the foregoing defenses to complaints of less-than-domestic-price dumping and less-than-cost dumping can readily be adapted to the framework of the WTO Anti-Dumping Agreement. As already noted, Article 2.1 of the Agreement sets out the central rule that:

[A] product is to be considered dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another country is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

A suggestion is that the NAFTA be changed to provide that, for purposes of Article 2.1 of the Anti-Dumping Agreement, pricing in the import market below domestic prices in the exporter’s market, even if “in the ordinary course of trade,” will be accepted as a defense to a trade action where such prices are for purposes of meeting competition where the factors suggested above are found to exist.

Alternatively, the term “ordinary course of trade” could be defined for NAFTA purposes to mean trade in the profitable end of the business cycle. 62 To cover less-than-cost dumping situations, the NAFTA could be amended so that recourse to constructed costs under Article 2.2 of the Anti-Dumping Agreement would be excluded under the term “ordinary course of trade” where there is excess capacity in the industry and a common pattern of below-cost pricing throughout North America as a result of economic conditions pertaining to that industry.

Thus, where sales are not profitable in both the exporter’s and the importer’s markets because of a cyclical downturn and where there is the North American industry-wide practice of pricing below marginal cost: (a) such a situation will be deemed not to be “in the ordinary course of trade”; and (b) recourse to constructed cost methodology under Article 2.2 would be prohibited. There would be limits placed on the

61 These recommendations are offered as a more limited but realizable approach than the technically complex method of attempting to harmonize competition and antitrust remedies in the fashion that has been suggested in previous studies. See Feltham et al., Competition and Anti-dumping Laws, supra note 59.

62 That is, normally profitable trade in North America in the product at issue, taking into account all pertinent factors.
use of below-cost pricing as a defense, however, to ensure that only legitimate counter-arguments are available. As shown above, these additional elements would require the exporter to reasonably demonstrate that it is not engaging in bad faith behavior designed to lessen competition or to gain undue market advantage, but is rather directed only to meeting competition in the export market.

There is nothing in the WTO Agreement or the NAFTA that would prevent the Parties agreeing, inter se, as to how they would apply anti-dumping remedies. Indeed, the premise of the working group under Article 1504 of the NAFTA is that agreed changes to the manner in which these laws are applied would be legal, notwithstanding the provisions of the Anti-dumping Agreement.

It is worth noting that Article 2.2.1 of the Agreement itself recognizes that below-cost sales occur as a matter of normal business practice as part of the “ordinary course of trade.” Thus, it constrains domestic agencies from excluding such sales-increasing the normal value and potentially magnifying the dumping margins — except under certain carefully defined circumstances, that is, where sales are made within an extended period of time and in substantial quantities. The point here is that permitting a defense to a dumping investigation in cases of less-than-cost dumping is consistent with elements in the Anti-Dumping Agreement that pay heed to such realities of the market place.

D. Procedural Aspects

There are several ways in which the foregoing measures could be implemented in procedural terms. None of these would entail radical surgery to present anti-dumping laws in the NAFTA countries. A mini-process could quite easily be added to the present domestic laws in respect of any complaint involving the dumping of goods from a NAFTA member to determine if any of the defenses suggested above has merit. There are three possible options that could be considered.

One would be to provide that this issue could be the subject of a hearing by the domestic agencies under current laws at the commencement of an investigation as part of the present preliminary determination of material injury. Both Canada and the United States have a such a...
proceeding under their current laws. In the United States, the process entails an automatic determination by the United States International Trade Commission as to whether there is a *prima facie* case of injury. Canada requires a party to refer the matter to the Canadian International Trade Tribunal for a preliminary finding. These procedures could lend themselves to refinement so as to permit a further determination at that same time as to the merit of defenses to an investigation such as the one outlined above.

A second option would be to establish a separate body (perhaps a single judge or arbitrator) who would hear the defense at an early stage in the investigation process and make the appropriate determination. This would have to be "Fast-tracked," to allow a rapid resolution of the issue and only a short period of suspension pending the outcome. If the decision on the defense were negative, the proceeding would continue as before.

An additional option would be to permit this separate kind of "mini-proceeding" at the commencement of injury hearing itself. The disadvantage with this option is that it moves the determination to the back end of the process, where the exporters and importers have already undergone the investigative burdens already discussed (responding to detailed questionnaires and undergoing verification audits).

Thought will need to be given as to how the above criteria would be applied in the case where a NAFTA-based exporter is involved in a multi-country dumping investigation. An option would be to allow this issue to be side-tracked for a separate finding, somewhat analogous to the separate track for judicial reviews of final determinations under the NAFTA panel system. While this would treat NAFTA goods separately, such differential treatment is inherent in the present system.

A final point to be considered is whether any of the foregoing would offend that non-discrimination provisions of GATT Article III:4. While this may warrant some examination, it would seem that a determination of any such defense would be fully consistent with the NAFTA itself and with the permitted preferential system inherent in the free trade area, which itself is permissible under GATT Article XXIV as

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64 19 U.S.C. 1673(b). The jurisdiction of the ITC is to make a preliminary determination, based on the information available to it at the time, whether there is a "reasonable indication" of material injury or threat thereof to a U.S. industry by reason of the dumped imports.

65 Similar to the U.S. situation, a reference to the Tribunal under section 34(1)(b) of SIMA by one of the parties following the initiation of an investigation requires the Tribunal to determine from the written record whether the evidence discloses a "reasonable indication" that the alleged dumping has caused or is threatening to cause material injury.
a deviation from the universality of the WTO regime. As noted, the very objective of a free trade area is to permit discriminatory or preferential treatment of goods from the treaty parties notwithstanding the national and most-favoured nation obligations under the WTO Agreement.

IV. CONCLUSIONS

The purpose of the foregoing was to examine some of the broad strokes of the NAFTA based on different attitudes and perceptions, depending on which side of the Canada-U.S. border one stands. One of the points of concern is that the NAFTA panel system appears under attack in the United States and will need careful nurturing in terms of ensuring its longer-term acceptability. The current challenge in the U.S. courts regarding the constitutionality of the panel system bears careful watching and should not be taken for granted. A negative decision — that is, a decision striking down U.S. adherence to Chapter 19 — would devastate the NAFTA and likely lead to its abrogation. While the political current in the United States seems to be decidedly anti-NAFTA at the present time, it is suggested that a longer-term solution to enhance the credibility of the system, to avoid unusual or idiosyncratic panel decisions, and to help fill a vacuum at the centre, would be to change NAFTA so as to create a permanent NAFTA court with members appointed on tenure for a fixed term.

The second part of the Article reviewed the problems with anti-dumping. It suggested that the rigours of the present anti-dumping system lead to perverse results that betray the realities of the North American marketplace. These anomalies can be partly ameliorated through a process that combines some of the permitted defense of the competition law regimes in Canada and the United States, while at the same time not completely attempting a replacement regime for the use of anti-dumping remedies. The thesis is that, if carefully devised, such changes would maintain the legitimate core of the anti-dumping regime among the NAFTA parties, while simultaneously ensuring that legitimate defenses to less-than-cost and less-than-domestic-price dumping can be assessed through an impartial, third-party process.