Binational Panels of Arbitration: Impartial Adjudicators or Spawning Ground of New Ideas?

The Mexican Experience Under the Mechanism for Dispute Resolution of Chapter 19 of the NAFTA.

by

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ABSTRACT

This thesis analyzes Mexico’s experience under the dispute resolution mechanism of Chapter 19 of the NAFTA. It provides an overview of the main issues evidenced in the work of the Binational Panels that have applied Mexican law in antidumping and countervailing duty cases. The analysis deals with three main issues: 1) A study of specific elements of the Mexican Unfair Trade Regime in comparison with the regimes of Canada and the United States with a special emphasis is given to the standard of judicial review. This thesis seeks to demonstrate that the Binational Panels reviewing a Mexican agency determination should apply an international standard of review, i.e. the GATT/WTO standard, rather than the Mexican domestic standard. 2) An analysis of the NAFTA’s Binational Panel system in comparison with the GATT/WTO Dispute Resolution mechanism. This thesis seeks to demonstrate, from the Mexican perspective, that some improvements to the NAFTA’s Chapter 19 mechanism should be made. 3) Finally, this thesis analyzes the most important inconsistencies between the NAFTA’s Chapter 19 mechanism and the Mexican Constitution. According to this thesis, despite the discrepancies, Mexican courts would be highly unlikely to find a constitutional conflict.
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TABLE OF CONTENTS

I. Introduction........................................................................................................... 1

II. The Mexican Unfair Trade Regime and the Standard of Review.................. 10
   A. Sources of Mexican Unfair Trade Law......................................................... 14
   B. The Mexican Substantive Law...................................................................... 18
      1. Regulatory Framework and Administrative Agency............................... 18
      2. Dumping..................................................................................................... 20
      3. Subsidies..................................................................................................... 24
      4. Determination of Injury.............................................................................. 28
      5. Public Interest............................................................................................. 33
   C. Procedural Aspects of the Mexican Unfair Trade Law............................... 34
   D. The Standard of Review.............................................................................. 38
      1. The GATT/WTO Standard of Review......................................................... 40
      2. The Standard of Review in Canada and the United States....................... 42
      3. The Mexican Standard of Review.............................................................. 45
   E. Conclusion: An International Standard of Review......................................... 52

III. The NAFTA’s Chapter 19 Dispute Settlement Mechanism: Can It Be Improved? 60
   A. Origins of the Chapter 19 Dispute Settlement Mechanism......................... 61
   B. The Dispute Settlement Mechanisms of the NAFTA.................................. 68
   C. Chapter 19 of the NAFTA: Tasks and Characteristics of the
      Binational Panels.......................................................................................... 72
         1. Elements of Chapter 19.......................................................................... 72
         2. Review of Final Antidumping and Countervailing Duty
            Determinations......................................................................................... 73
         3. Panelists................................................................................................... 76
         4. Extraordinary Challenges....................................................................... 77
         5. Safeguarding the Panel System................................................................. 78
         6. Code of Conduct....................................................................................... 79
         7. The NAFTA Secretariat........................................................................... 80
   D. The GATT/WTO Dispute Settlement Mechanism.......................................... 81
   E. The Main Shortcomings of the NAFTA Mechanism: Which is the
      Better Forum?............................................................................................... 87
   F. Can Chapter 19 Be Improved?..................................................................... 103
IV. The NAFTA’s Chapter 19 Dispute Settlement Mechanism and the Mexican Constitution

A. Overview of the Constitutional Concerns in the United States .......................... 111
B. The Binational Panels’ Constitutionality in Mexico ........................................... 118
C. The Juicio de Amparo Problem ...................................................................... 126
D. Conclusions ................................................................................................. 133

V. Conclusion ..................................................................................................... 137

A. The Standard of Review Problem .................................................................. 137
B. An Improved Chapter 19 Mechanism .............................................................. 140
C. The Constitutional Problem ........................................................................... 142
D. The Future of the NAFTA’s Chapter 19 Mechanism ....................................... 143
**I. INTRODUCTION**

The purpose of this thesis is to analyze Mexico's experience with the Binational Panels of Arbitration under the dispute resolution mechanism of Chapter 19 of the NAFTA; to provide an overview of the main issues evidenced in the work of these Panels; and to determine, from a Mexican perspective, whether this mechanism for dispute resolution is the most optimal for NAFTA in the future.

On December 17, 1992, Canadian Prime Minister Brian Mulroney, U.S. President George Bush and Mexican President Carlos Salinas de Gortari signed the trilateral North American Free Trade Agreement. NAFTA reflects, as do the European Union and some other international agreements, the economic integration of regional blocs that the world is experiencing at the end of this century. The creation of customs unions and free trade areas is the most important exception to the Most Favoured Nation Principle of the General Agreement on Trade and Tariffs (GATT)\(^2\) In fact, article XXIV of the GATT authorises the creation of this type of regional blocs with two conditions: first, “trade

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\(^1\)North American Free Trade Agreement, drafted on August 12, 1992; revised on September 6, 1992; signed on December 17, 1992; published at the “Official Daily of the Federation” in Mexico on December 20, 1993; came into force on January 1st., 1994. Hereinafter in this thesis the NAFTA.

restrictions are eliminated with respect to "substantially all the trade" between the constituent territories". and second. "customs duties shall not be higher thereafter than the duties prevailing on average throughout the constituent territories prior to the formation of a customs union or free trade area".

For Mexico. the NAFTA negotiations meant the end of a long period of an extremely territorialist policy in economic and legal issues: a policy that - inter alia - kept the country isolated from the GATT until the mid-1980's and that virtually excluded the application of any foreign law by Mexican judges for over half a century. until 1988 when the Federal Civil Code was amended including very innovative rules of conflict of laws. Mexico's territorialism was a consequence of political factors such as the loss of more than half of its territory in the mid-19th century during the American invasion. In the juridical arena. the legal system failed to evolve with changing needs and perceptions. and in fact. this territorialist approach was contrary to the predominant and more liberal Mexican legal philosophy born in the last century. The NAFTA forced Mexico to redefine the traditional concepts of sovereignty and self determination: in sitting down at the bargaining table with the United States. Mexico turned its back on a past of political and economic autarky.

\[\text{Ibid.}\]


The NAFTA exemplifies not only a new approach in cooperation between developed and developing countries, but also the coexistence, for trade purposes, of different cultures and languages and diverse political and legal systems among the latter. It is possible to identify two major legal traditions: the common law system and civil legal tradition. For the first time in many years, Mexico's law would be important in the international context, and the law of other countries would be relevant in Mexico. This transformation is particularly true under the mechanisms for dispute settlement approved in the NAFTA: especially Chapter 19 whose purpose is to resolve the controversies for antidumping and countervailing duties that can arise between the parties under the NAFTA.

In addition to creating a commercial bloc of approximately 360 million consumers, the NAFTA creates a sui generis system for dispute settlement which in the area of unfair trade issues, i.e. antidumping and countervailing duties, establishes the Binational Panels of Arbitration. Because of the current world trends of increasing economic and even political interdependency of the world through trade and investment, the mechanisms to resolve international trade disputes are becoming more judicial in nature, rather than diplomatic or political, and include provisions like third-party arbitration and adjudication. The Binational Panels exemplify this trend.

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Dumping is considered as unfair trade because exporters can sell their goods to their foreign customers in a price that is less than the price that they charge to their home-market customers. On the other hand, subsidization by a foreign government is said to be unfair because it can causes harm to domestic industries.\(^8\) It is said that both actions can harm the national production of any importing country. To remedy this the GATT and its codes\(^9\) authorize the member countries to establish antidumping and countervailing duties on the dumped or subsidized imports. After the competent investigating authority of a country makes the investigation, it can determine the existence of Dumping or State Subsidies and apply countervailing duties. When a controversy arises in this respect, the interested parties (the exporters and foreign governments, or the national industries and the importers) can challenge the final determinations in the courts of the importing country.\(^10\) Nonetheless, if this unfair trade controversy affects Canada, the United States or Mexico, the establishment of a Binational Panel can be requested under the provisions of Chapter 19 of the NAFTA. As a result, instead of a domestic court, a Panel of arbitration will review the final decision of the competent investigating authority.

The Panels are an innovative mechanism with several *sui generis* characteristics:

a) They are international adjudicatory bodies of domestic law, i.e. they do not apply an *ad hoc* set of international rules but "...the importing Party’s\(^{11}\) antidumping or

\(^{8}\)See generally Michael J. Trebilcock and Robert Howse, *op. cit. supra* 2, chapters 6 and 7.

\(^{9}\)See Article VI of the GATT.

\(^{10}\)The procedural and substantive legislation in this respect, of each Party of the NAFTA is analysed in Chapter II of this thesis.

\(^{11}\)Party refers to one of the countries members of NAFTA: Canada, the United States or Mexico. An importing Party is the one that issued the final determination (Article 1911 of the NAFTA)
countervailing duty law to the facts of a specific case... That means that they can also apply, in addition to the antidumping and countervailing duty law, relevant statutes, legislative history, regulations, administrative practice and judicial precedents of the Importing Party. Nevertheless, the Panels are bound to apply a specific standard of review.

b) They replace domestic judicial review of the final antidumping and countervailing duties determinations made by the competent investigative authority of the importing party.

c) They not only involve states as most international dispute mechanisms do, but any person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of a final determination of the importing Party’s authority, can request a Panel review through the respective complainant’s government.

d) A Panel decision is not appealable to a domestic court.

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12 Article 1901 (1) of the NAFTA.

13 Article 1902 (1) of the NAFTA.

14 Articles 1904 (2) and 1911 of the NAFTA.

15 Article 1904 (1) of the NAFTA.

16 Another important exception in this respect are the provisions of Section B of Chapter 11 of the NAFTA regarding the settlement of disputes between a Party and an investor of another Party.

17 Article 1904 (5) of the NAFTA.

18 Article 1904 (11) of the NAFTA. The Extraordinary Challenge Procedure is the only form of “appeal” provided by the NAFTA (Article 1904 (13) and Annex 1904.13) This procedure is analysed in Chapter III of this Thesis.
e) Panels do not provide a relief by themselves. They can either uphold a final determination of the Importing Party's Authority or remand it for action not inconsistent with the Panel's decision. Their decisions are binding on the involved parties with respect to the particular matter; however, their decisions do not give life to any sort of precedent and their effects are not *erga omnes* but only *inter partes* and do not bind other Binational Panels or the domestic courts of the Parties. 19

f) A Binational Panel is not a standing supranational court, but an *ad hoc* adjudicatory body made up of panellists from the Parties involved: in that sense, they do not make exactly a third-party arbitration.

It is important to highlight that when a Panel reviews antidumping and countervailing duties determinations, it stands in the shoes of the domestic reviewing court that would otherwise decide the case. Without constraining the sovereignty of the parties, the panels control abusive or arbitrary application of domestic trade remedy laws. 20 However, until now the Panels established to review determinations of the Mexican competent investigative authority have demonstrated few but serious shortcomings in their proceedings. Therefore, it is the purpose of this thesis to analyse the main issues that have arisen in the application of Mexican Law to resolve an international trade dispute and to provide some solutions to the apparent problems. Among many others, the following issues are considered relevant for this paper:

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19 See Article 1904 (8) and (9) of the NAFTA.

20 Cf. Michael J. Trebilcock and Robert Howse, *op cit. supra 2.* at 407
1. **Standard of Review:** As has been mentioned, each Party of the agreement applies its own standard of review according to the provision of Article 1904 (3) "...and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority." These standards are so different to each other, and there has been inconsistency between the decisions of the different Panels. I seek to demonstrate, based on the Mexican experience, that at least the Panels reviewing a Mexican agency determination should apply the multilateral (GATT/WTO) standard of review. This could be a first step toward a greater consistency between the Panels decisions. It could be also the first step for a harmonized trade remedy jurisprudence for the NAFTA parties.

2. **Procedural Issues.** Several concerns related to the selection of the panelists, their capacity to interpret a domestic law when they are not nationals of the importing Party, the costs and delays in the procedures and even the language, have been part of the Panels' work. Some commentators in the three countries have said that it would be a better alternative to use the mechanism for dispute settlement of the World Trade Organization (WTO) rather than the Panels because the former provides a real third-party arbitration. I seek to argue that the NAFTA's Chapter 19 mechanism should not be eliminated but serious improvements should be made.

3. **Constitutional issues.** Several constitutional issues have arisen in the establishment of the Binational Panels, particularly related to the fact that one of their

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21 Article 1904 (3) of the NAFTA.

22 See generally Chapter III of this thesis.
main purposes is finality and they do not allow any further challenge to their decisions in a domestic court. Some commentators argue that this NAFTA provision is contrary to the Mexican Constitution and it becomes relevant for the Juicio de Amparo, a Constitutional provision peculiar to Mexico whose purpose is to resolving any dispute arisen by legislative, judiciary or executive authority decisions that violate the fundamental rights of any individual.\textsuperscript{23} If panels do not provide a relief by themselves but refer their decisions to the Importing Party's administrative authority, in the case of Mexico this fact represent the possibility of challenging the enforcement of the Panel's decision through the Juicio de Amparo.\textsuperscript{24} I seek to demonstrate some possibilities to make this provision of NAFTA compatible with the Mexican Law.

In the analysis of these three issues, I will mainly focus on the decisions of the three Binational Panels established up to now to review the determinations of the Mexican competent investigative authority: the Secretariat of Trade and Industrial Development (Secretaría de Comercio y Fomento Industrial: hereinafter SECOFI)\textsuperscript{25}

In Chapter II, I will analyze specific elements of Mexican Unfair Trade Law in comparison with the laws of Canada and the United States, with a special emphasis on the standards of review. In Chapter III, I will describe in depth the mechanism for Dispute

\textsuperscript{23}See Article 103, paragraph 1, of the Political Constitution of the United Mexican States (Constitución Política de los Estados Unidos Mexicanos)

\textsuperscript{24}In Chapter IV of this thesis I make an analysis of the Juridical Nature of the Binational panels under the Mexican law.

\textsuperscript{25}MEX-94-1904-01 Flat Coated Steel Products from the USA; MEX-94-1904-02 Cut to Length Plate products from USA; MEX-94-1904-03 Crystal and Solid Polystyrene from the USA.
Resolution on Antidumping and Countervailing Duties of Chapter 19 of the NAFTA, and compare it with the mechanism of the GATT/WTO. I will also make some recommendations for the improvement of the mechanism. In Chapter IV, I will elaborate on the juridical nature of the Binational Panels under the Mexican Constitution and the problem of the *Juicio de Amparo*. Finally, in Chapter V, I will elaborate on the conclusions regarding the alternatives for the dispute settlement of this area of international trade that have historically generated intense and passionate controversy.
II. **The Mexican Unfair Trade Regime and the Standard of Review**

The purpose of this chapter is to analyze the current unfair trade regime of Mexico by comparing some specific elements in its law which are relevant for the three parties of the NAFTA. Special emphasis is given to the standard of judicial review as the principal means by which the application of trade law is policed in Canada, the United States and Mexico.

As has been stated in the introduction of this thesis, the NAFTA Parties did not negotiate a common code to regulate unfair trade practices between themselves. Rather, they retained their own legislation in this respect and agreed to settle the disputes by means of the binational panels of Chapter 19 of the NAFTA, which determine whether the laws of each country are being administered in accordance with the applicable country’s laws. In this context, it is relevant to analyze the domestic antidumping and countervailing duty legislation of each country, because it is this unfair trade domestic legislation that is now applied to resolve international trade disputes.

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26 Examples of free trade areas with harmonized tariffs and trade regulations among the members (retaining its individual tariff and trade laws to be applied to third countries) are the Australia-New Zealand Free Trade Area Agreement and the European Free Trade Area Association.

27 See Article 1902 of the NAFTA.

It has been said that the unfair trade regime is relatively new in Mexico and it was adopted after decades of a protectionist policy of import substitution as a ‘response’ to the very active U.S. antidumping investigations against Mexico and, of course, given the new exposure of the country to open markets.\textsuperscript{29} The intention of this chapter is to determine to what extent the Mexican regulatory framework has conformed to practice and GATT/WTO (General Agreement on Trade and Tariffs / World Trade Organization) standards: to what extent this framework has emulated those of the United States and Canada; how broad or how narrow is the standard of review in comparison with that of the other two countries and with the GATT/WTO standard, and how this element affect the Binational Panels’ mechanism.

The standard of review is a significant area where Canada, the United States and Mexico pursue different paths. It is important to analyze to what extent the courts are overly deferential to the decisions of the administering authorities or alternatively, if courts interfere unduly in the administration of the law by the appropriate agency. If courts are deferential, then agencies may step beyond their proper roles as administrators of the law; if courts intervene broadly, the “legislative intent to create streamlined and specialized procedures for the administration of the unfair trade laws will be defeated”\textsuperscript{30}

In this context, I analyze the significance of this standard in the application of the Mexican unfair trade law in comparison with the laws of Canada and the United States


and particularly its importance under the binational panels mechanism for dispute settlement on antidumping and countervailing duties. In the analysis of these elements, I will mainly focus on the decisions of the three binational panels established up to now to review the determinations of the Mexican competent investigative authority, the Secretariat of Trade and Industrial Development (Secretaria de Comercio y Fomento Industrial; hereinafter SECOFI).\(^3\)

Because the standards of review - as well as some other elements - are so diverse in the three countries, and because there has been some incoherence between the decisions of the different binational panels, I seek to demonstrate, based on the Mexican experience, the possibility of creating a sort of "jurisprudence"\(^3\) of these panels which not only includes the legal general principles of the importing party but an application of the standard of review of the GATT/WTO Uruguay Round. The questions are: How substantial are the differences between the three unfair trade regimes? To what extent can the Binational Panels of NAFTA create coherence in their decisions by "superimposing" the international standards of GATT/WTO in the local regimes? NAFTA \textit{per se} has a harmonizing effect on North American law: nevertheless, I argue that a real harmonization in the unfair trade laws of the three parties of this agreement cannot be achieved by a process of unification of laws, which seems to me, politically at least, impossible. Alternatively, as one author argues: "Harmonization does not entail the

\(^3\)MEX-94-1904-01 \textit{Flat Coated Steel Products from the USA}; MEX-94-1904-02 \textit{Cut to Length Plate products from USA}; MEX-94-1904-03 \textit{Crystal and Solid Polystyrene from the USA}.

\(^{32}\)I use this term in both its Mexican civil law tradition, i.e. as the judicial interpretation of the statutes, and in its common law sense.
adoption of a single, model set of rules, but instead implies a wide range of ways in which differences in legal concepts in different jurisdictions are accommodated. This accommodation can take place in many ways...\textsuperscript{33} Certainly, the fact that Chapter 19 of the NAFTA specifies the standard of review that each party should apply is a factor of harmonization; however, the only way to achieve real harmonization is by providing the binational panels with the capacity to set precedents in their decisions. Even when they are applying a domestic rule as a domestic court does, the reality is that they are applying international legal reasoning, and this international reasoning is reflected in the Uruguay Round of the WTO. By applying this reasoning harmonized with the local regimes the possibility of coherence and certainty in the panels' decisions is feasible.

In section A of this chapter, I discuss the concepts of dumping and subsidization as well as the international obligations that are the basis of the Mexican and its NAFTA partners' trade laws. In section B, I analyze the Mexican substantive law in comparison with the laws of Canada and the United States. In section C, I briefly describe the most important procedural differences between the Mexican law and those of Canada and the United States. In section D, I will discuss the standard of review in Mexico: its differences from the standards of the GATT/WTO, Canada and the United States and how it has been applied by the Binational Panels established to review the determinations of SECOFI. In the final part of this chapter, I discuss the possibility of harmonization by providing consistency in the standards of review as has been already described.

A. SOURCES OF MEXICAN UNFAIR TRADE LAW

Two concepts are fundamental for this thesis: dumping and subsidies. Dumping occurs when an importer sells its product in the domestic market at a lower price than the same product is sold in the importer’s home market. A subsidy is a monetary or other grant to importers of certain goods by their governments. Both trade practices are perceived to be unfair and both are actionable according to Article VI of the GATT because they result in below-normal value pricing. However, subsidization is a distorting practice of government while dumping is the pricing policy of a private firm. Article VI of the GATT condemns dumping “...if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry”. The Agreement on Implementation of Article VI of the Uruguay Round establishes that there is dumping “...if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” In regard to subsidies, the Uruguay Round establishes three types:

34 See Michael J. Trebilcock and Robert Howse, op. cit. supra 2, chapters 5 and 6.

35 To discuss the nature of antidumping and countervailing duties is beyond the scope of this paper. Michael J. Trebilcock has said that there is “no intellectual case” for this laws and that the primary economic rationale that would seem to justify such laws is predatory pricing or cases of intermittent dumping. See Michael J. Trebilcock, “Throwing Deep: Trade Remedy Laws in a First-Best World” in Fair Exchange, Reforming Trade Remedy Laws. Edited by Michael J. Trebilcock and Robert C. York (Toronto: CD Howe Institute. 1990) at 238.

36 Trebilcock and Howse, op. cit. supra 2, at 126
37 Article VI (Antidumping and Countervailing Duties) of the GATT.

38 Article 2 (2.1) of the Agreement on Implementation of Article VI of the GATT; Final Act Embodying the Results of the Uruguay Round of Multi-national trade Negotiations. Marrakesh, 15 April 1994.
prohibited, actionable and non-actionable subsidies. Only the actionable subsidies are subject to countervailing duties and these, according to Article 10, "...may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture".39

Canadian, American and Mexican trade laws flow from the treaty obligations undertaken by these countries as contracting parties to the GATT and as signatories to the Uruguay Round Codes on Subsidies and Antidumping. Mexico, after a long period of an extremely territorialist trade policy, joined the GATT in 1986.40 Before then, no antidumping or countervailing duty law existed in Mexico; the country followed a strict regime of import substitution rather than the tenet of free trade as enshrined in Article I of the GATT. Also in 1986, as part of the process of adhesion to GATT, Mexico promulgated its first antidumping and countervailing duty law41 as the Foreign Trade Regulatory Act regulating Article 131 of the Mexican Constitution. This Article of the Constitution is the main domestic source of unfair trade law in Mexico. Article 131 provides that "The Executive may be empowered by the Congress of the Union to increase or suppress the amounts of the export or import tariffs issued by the Congress, and to create others, as well as to restrict or prohibit imports, exports, and transit of

39Article 10, Agreement on Subsidies and Countervailing Measures of the Uruguay Round.


products when it is deemed urgent in order to regulate the economy of the country, and the stability of national production.

The first Mexican unfair trade legislation of 1986 was considered rudimentary and lacking in adequate and effective procedural safeguards or administrative due process protection. Despite these shortcomings, in 1988 Mexico initiated the same number of antidumping and countervailing duty investigations as Canada, at that time the fourth leading world user of unfair trade measures. Nevertheless, Mexico gained a reputation of less-than-impartial administrator of its antidumping law and some American commentators considered that confidence in the Mexican system would only be established if Mexico’s unfair trade procedures were similar to those of the United States and Canada. These arguments would be enough to justify an amendment to the Mexican unfair trade regime, but there were more arguments on the international front. First, during the period immediately preceding the commencement of the NAFTA negotiations, two Mexican companies were subject to bitterly contested U.S. antidumping and countervailing duty proceedings already in progress. Both (...) were extremely disgruntled with the perceived arbitrary administration of the U.S. antidumping law by the competent U.S. investigating authorities.

On the other hand, Mexico was required to take into

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42 Article 131, Constitución Política de los Estados Unidos Mexicanos. Translation from Spanish by Eduardo Andere: op. cit. supra 29, at 12.

43 Cf. Craig R. Giesze, op. cit. supra 28, at 935.

44 Ibid. See note 181 and accompanying text at 934.

45 CEMEX, leading producer of cement in Latin America and VITRO, leading glassware manufacturer; both with headquarters in Monterrey, Nuevo León, Mexico.

46 Craig R. Giesze, op. cit. supra 28, at 938.
account and comply with its existing GATT obligations. Certain aspects of Mexico’s first unfair trade regime were not entirely compatible with Article VI of the GATT. Also, the Mexican government had agreed to undertake twenty-one legislative and regulatory reforms in accordance with Chapter 19 of the newly created NAFTA. With all these considerations as a background, the Mexican Congress enacted the new Foreign Trade Law on July 27, 1993, which is analyzed in the following sections of this chapter. As a signatory of the Uruguay Round described at the beginning of this section, Mexico can participate in the mechanisms for dispute resolution of antidumping and countervailing matters of the WTO. Alternatively, as a NAFTA member, Mexico can substitute its domestic judicial review for the mechanisms of Chapter 19 of the international agreement. Both GATT/WTO and NAFTA are more than sources of domestic law; they are part of the domestic law in Mexico. Pursuant to Article 133 of the Political Constitution of the United Mexican States, international treaties signed by the President of the Republic and approved by the Senate are the Supreme Law of Mexico. Moreover, in contrast to the situation in Canada and the United States, international treaties are of direct application; they are self-executing and thus directly integrated into the corpus of Mexican law without the necessity of enabling legislation or judicial action.

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47 Ibid. at 941.
48 See NAFTA Ch. 19, Annex 1904.15 Schedule of Mexico.
50 Article 133. "This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union." (Artículo 133 de la Constitución Política de los Estados Unidos Mexicanos) Translation from Spanish made by the Cut to Length Plate Binational Panel MEX-94-1904-02
In contrast with Mexico, the Canadian and American unfair trade regimes have been in effect for many years. Canada incorporated these measures in the Special Imports Measures Act 1985 (SIMA). With the amendment of its Customs Tariff in 1904, Canada became the first country in the world to establish an antidumping regime. eighty-two years before Mexico. The American regime was implemented for the first time with the Antidumping Act of 1916. The current laws are set forth in the Tariffs Act of 1930, as amended by the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984. Both Canadian and American legislations, as well as the most important GATT-Uruguay Round provisions of the Agreements on anti-dumping and countervailing measures, are compared to the Mexican regime in the next part of this chapter.

B. THE MEXICAN SUBSTANTIVE LAW

1. REGULATORY FRAMEWORK AND ADMINISTRATIVE AGENCY

As has been mentioned, both GATT and NAFTA are not only sources but part of Mexican unfair trade law. In addition to Article 133 of the Mexican Constitution, the Foreign Trade Law finds its constitutional source in Article 73 (X) which expressly provides that “[t]he Congress has the authority (...) to legislate throughout the Republic


52 Trebilcock and Howse, op. cit. supra 2, at 101

53 Ibid.

In accordance with this specific grant of authority, the Mexican Congress enacted the Foreign Trade Law whose articles 28 through 44, articles 49 through 74, and articles 94 through 98 constitute the governing antidumping and countervailing duty statutory regime in Mexico. Article 5 of the Foreign Trade Law empowers the SECOFI to make the day-to-day regulation and surveillance of dumping and subsidy practices. In addition, SECOFI issued, by way of presidential decree, the Foreign Trade Regulations which specifically implement and regulate the dumping and subsidy provisions of Mexico's Foreign Trade Law.

One of the most important differences between the Mexican regime and those of Canada and the United States is with respect to the agency that makes the determination of an unfair trade practice. Under the Canadian system the determination of dumping or subsidy is made by the Deputy Minister of National Revenue (DMNR) and the determination of material injury is made by the Canadian International Trade Tribunal (CITT). In the United States, the International Trade Administration in the Department of

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55 See Article 73 (X) Constitución... Translation from Spanish made by Craig R. Giesze, op. cit. supra 28. at 957.

56 See Ley de Comercio Exterior supra 28.

57 See Article 5 (VII) Ley de Comercio Exterior, supra 28: “Son facultades de la Secretaría [de Comercio y Fomento Industrial];(...) VII. Tramitar y resolver las investigaciones en materia de prácticas desleales de comercio internacional, así como determinar las cuotas compensatorias que resulten de dichas investigaciones; ...”

58 In addition to SECOFI, the Secretaría de Hacienda y Crédito Público (SHCP), equivalent to the National Revenue in Canada and to the Treasury in the United States, intervenes as the collector of the duties determined by SECOFI. See Article 65 Ley de Comercio Exterior, supra 28.

Commerce (DC) determines the extent or margin of a subsidy or sale at less than fair value: the U.S. International Trade Commission (ITC) makes material injury determinations. In contrast, in Mexico, the regulatory system mandates that SECOFI make both of these determinations.

In the following pages I analyze how the above mentioned Mexican regulatory framework deals with specific elements of unfair trade law: dumping, subsidy, injury to domestic industry and public interest.

2. Dumping

Antidumping has been the most common action taken by the Mexican authority against exporters. The three Binational Panels under Chapter 19 of the NAFTA that have been established up to now to review the determinations of SECOFI have dealt with antidumping duties. Consistent with the GATT Antidumping Code, Mexico’s Foreign Trade Law defines dumping as the “entry of foreign merchandise into the national market at less than fair value.”

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60 James R. Holbein et. al. op. cit. supra 30, at 876.

61 According to its regulations, SECOFI makes the investigation through the Unidad de Prácticas Comerciales Internacionales (UPCI) established in 1994. A very interesting case arose in the Import of Flat Coated Steel products from the USA Binational Panel (MEX-94-1904-01) and Imports of Cut-to-Length Plate Products from the USA Binational Panel (MEX-94-1904-02), because when the antidumping investigations started, two units of SECOFI, the Dirección General de Prácticas Comerciales Internacionales (DGPCI) and its subunit Dirección de Cuotas Compensatorias (DCC), had inadvertently not been legally created according to Mexican Law: so the Panels determined that the investigation was null and void. The Cut-to-Length Panel declared: “Based upon the foregoing, the Majority concludes that neither the DGPCI nor the DCC, which carried out essentially the entirety of this antidumping proceeding between December 4, 1992 and April 1, 1993, were ever legally established or in existence. Their existence was never established in any of the SECOFI Internal Regulations, most particularly the 1989 Regulations, nor were they established in any other law, regulation, or Presidential decree.”


63 Panels that have rendered a Decision up to February, 1997.
territory at a price below its normal value." Article 31 of the Foreign Trade Law defines normal value as the "comparable price of an identical or similar merchandise intended to the home-market country in the ordinary course of trade." 

The dumping margin is the amount by which the adjusted normal value of the merchandise subject to investigation exceeds the adjusted export price: SECOFI must determine this margin as well as the injury before action against the importer will be taken. In Canada, Section 2(1) of the SIMA, provides that margin of dumping is "the amount by which the normal value of the goods exceeds the export price thereof." In the United States, the provision refers to 'fair value' instead of 'normal value.'

SECOFI can select, in order of preference, one of three methods to calculate the normal value of the investigated merchandise: 1) home-market sales; 2) third-country sales; and 3) constructed value. SECOFI generally calculates a weighted-average

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64 See Ley de Comercio Exterior. supra 28. Article 30.

65 ibid. Article 31: "El valor normal de las mercancías exportadas a México es el precio comparable de una mercancía idéntica o similar en el país de origen en el curso de operaciones comerciales normales." Translation by author from Spanish.

66 Quoted in Trebilcock and Howse, op. cit. supra 2, at 102.

67 Ibid.

68 The home-market sales as a basis to determine the normal value was an important issue in the Panel Imports of Crystal and Solid Polystyrene from the USA (MEX-94-1904-03) (Hereinafter Polystyrene) In the antidumping investigation against the company Muehlstein, the SECOFI determined that the home-market sales of this company were not "representative" but without a criterion established in the law at the time of the investigations (only criteria established by administrative practices). The Panel concluded (with the dissent of one panelist, not divided along national lines) that the SECOFI had a "discretionary power" to establish this criterion of representative sales. See Resolución. Revisión de la Resolución definitiva de la investigación antidumping sobre las importaciones de plástico tipo cristal e impacto, originario de la República Federal de Alemania y de los Estados Unidos de América, independientemente del país de procedencia (Secretariado del TLCAN. Secretariat of NAFTA) (version in Spanish) See also in the same resolution: Voto Concurrente de la Panelista Maureen Rosch and Voto Particular (dissent) del Panelista Clemente Valdés Sánchez.

normal value for the entire period under investigation.\textsuperscript{70} The home-market method, according to Article 31 of the Foreign Trade Law, is used if a foreign exporter sells sufficient quantities of the subject merchandise in its home market; the quantity of home-market sales is sufficient when such sales constitute 15 percent or more by volume of identical or similar merchandise sold by the foreign exporter in the Mexican market.\textsuperscript{71}

Article 31 of the Foreign Trade Law provides:

\ldots When no sales of identical or similar merchandise are made in the country of origin, or when such sales do not permit a valid comparison, the following methodologies, in the order of preference, shall be employed to calculate the normal value of the subject merchandise:

1. The comparable price of identical or similar merchandise exported from the country of origin to a third country in the ordinary course of trade. This price may be the highest price, provided that it is a representative price, or

2. The constructed value of the subject merchandise in the country of origin.\textsuperscript{72}

In Canada, the DMNR uses the home-market method when it is possible to identify buyers in the exporting country who are at the same or a similar trade level to buyers in Canada. The home-market price is the preponderant price charged for the goods in the home-market within a 60 day period selected by the DMNR, or a weighted average of the prices throughout the same period.\textsuperscript{73} In the United States, if home-market sales

\textsuperscript{70} Cf. Craig R. Giesze, \textit{op. cit. supra} 28. at 965.

\textsuperscript{71} \textit{Ibid.} at 966.

\textsuperscript{72} Translation from Spanish by Craig R. Giesze, \textit{op. cit. supra} 28. at 966.

\textsuperscript{73} Cf. Trebilcock and Howse, \textit{op. cit. supra} 2. at 103.
exceed 5 percent of the total export sales of the exporter, the DC uses the exporter's weighted average home-market price.74

The constructed-cost method is the "less preferred" way to calculate the normal value in Mexico, perhaps because of the problems that this calculation represents. 75 SECOFI will use this methodology if third country sales do not exist or if this authority determines that such sales constitute fewer than 15 percent of the export sales made to the Mexican market. 76Canada uses the constructed-cost method when: 1) domestic sales of the like product are of insufficient quantity or 2) a substantial amount of home-market sales occur at a price below the 'fully allocated cost' of the goods. The DC in the United States uses this method for the second case. 77

Where the home-country has a centrally planned economy, 78 both Mexico 79 and Canada 80 use analogue country exporters as a benchmark. The benchmark, then, will be the price of identical or similar merchandise sold in a 'surrogate' third country with a

74 Ibid.

75 Ibid. at 104. "There are two main problems with the constructed-cost calculation. The first is the inclusion of minimum profits and overhead costs (...) The second (...) is the treatment of home-market sales which occur at a price below the goods’ fully allocated cost: they are deemed ‘not in the ordinary course of business’ ..."

76 Craig R. Giesze, op. cit. supra 28 at 966.

77 Trebilcock and Howse, op. cit. supra 2 at 104.

78 Although this factor seems irrelevant for the analysis of the NAFTA countries which are all market economies, it is interesting to highlight that one of the most important cases in which SECOFI issued an antidumping duty determination was against products from the People's Republic of China. See Resolución, Secretaría de Comercio y Fomento Industrial, D.O., April 15, 1993. Quoted in Craig R. Giesze, op. cit. supra 28 at 970, note 345.

79 See Article 23, Ley de Comercio Exterior, supra 28

80 Trebilcock and Howse, op. cit. supra 2 at 105
market economy. In the United States, in contrast, the DC calculates a hypothetical constructed value for exports from non-market economies.\textsuperscript{81}

According to article 35 of the Mexican Foreign Trade Law, for purposes of calculating a dumping margin, SECOFI must ascertain the export price of the investigated merchandise as sold in the Mexican market to determine the amount by which the normal value of that merchandise exceeds its export price.\textsuperscript{82} Article 2.3 of the Agreement on Implementation of Article VI of the GATT provides that "the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine."\textsuperscript{83} The Mexican law takes its provision from this GATT rule.\textsuperscript{84} The Canadian SIMA provides that the export price is the lower of the exporter's sale price and the importer's purchase price; the American provision is similar.\textsuperscript{85}

3. SUBSIDIES

The other unfair international trade practice regulated by Mexico's Foreign Trade Law is the importation into the country of foreign merchandise subsidized by a foreign

\textsuperscript{81} Ibid.

\textsuperscript{82} See Article 35, Ley de Comercio Exterior, supra 28

\textsuperscript{83} See Article 2.3 of the Agreement on Implementation of Article VI of the GATT: Final Act Embodying the Results of the Uruguay Round of Multi-national trade Negotiations, Marrakesh, 15 April 1994.

\textsuperscript{84} See Articles 35 and 36, Ley de Comercio Exterior, supra 28.

\textsuperscript{85} Trebilcock and Howse, op. cit. supra 2, at 105.
government. Thus far, very few investigations for subsidies have been initiated in Mexico.\(^6\) In contrast, subsidization has been "perhaps the biggest irritant in Canadian-American trade relations in the past decade..."\(^7\) As has been mentioned, the Uruguay Round Agreement on Subsidies and Countervailing Measures distinguishes prohibited, actionable and non-actionable subsidies: it addition, this agreement requires a standard of "specificity" in order to determine whether a subsidy "...is specific to an enterprise or industry or group of enterprises or industries..."\(^8\)

Article 37 of Mexico's Foreign Trade Law defines subsidy in the following terms:

A subsidy is a benefit granted by a foreign government, its entities, or its public or semi-public institutions, organizations, or agencies, either directly or indirectly, to producers, processors, resellers, or exporters of merchandise, in order to strengthen unfairly their international competitiveness, unless the foreign government program involves an internationally accepted practice. The benefit can take the form of inducements, incentives, premiums or bonuses, or assistance or support of any kind.\(^9\)

This definition is rather broad and is notorious for the lack of a test of specificity. SECOFI can interpret the provision as including "...any government benefit that enables the recipient to enjoy, among other artificial competitive advantages, an artificial cost

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\(^6\) In August 1995, there were in SECOFI 5 cases of subsidies and 180 of dumping; see Jorge Witker et al., op. cit. supra 40. at 92.

\(^7\) James R. Holbein et al., op. cit. supra 30. at 877

\(^8\) Article 2 of the Agreement.

\(^9\) Ley de Comercio Exterior, Article 37. Translation from Spanish by Craig R. Giesze, op. cit. supra 28. at 983
savings with respect to its production costs that it otherwise would not enjoy in the absence of government intervention in the competitive marketplace.90 The exception for "international accepted practices" in the Mexican provision may be understood as reflecting Part IV of the GATT Agreement (Non-Actionable Subsidies). Government export subsidies bestowed upon manufactured products are actionable according to the Mexican countervailing duty law, but SECOFI has also targeted domestic subsidy practices91 without an explicit requirement of specificity in the law.

The United States is almost the exclusive user of countervailing duty laws:92 in contrast with Mexico, the DC has applied a determined, albeit controversial, specificity test. Because of the result in the early Softwood Lumber case against Canada, the American Congress "expanded the definition of specificity to include subsidies that, although not directly or on their face targeted to specific industries or firms. in fact benefit only a small number of industries or firms."93 There has been some discomfort in the application of this test by the American investigative authority, especially in cases such as Live Swine from Canada in which the Government of Canada argued that the de facto specificity test requires that benefits must be intentionally targeted by the

90 Craig R. Giesze, op. cit. supra 28 at 983, quoting Jorge Miranda, El Uso de Restricciones a la Exportación de Insumos como Instrumento para Subsidiar la Producción de Bienes Finales (Mexico City: Instituto de Investigaciones Jurídicas UNAM), 1993.

91 Cf. Craig R. Giesze, op. cit. supra 28 at 984

92 Trebilcock and Howse, op. cit. supra 2 at 141

government in order to be countervailable. However, a Binational Panel determination found that the DC applied the correct legal standard.\footnote{James R. Holbein et al., \textit{op. cit.} supra 30, at 881}

In Canada, the SIMA describes a subsidy as including: "any financial or other commercial benefit that has accrued or will accrue directly or indirectly to persons engaged in the (...) export or import of goods as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada..."\footnote{Quoted in \textit{Ibid.} at 883} In a subsidies case, \textit{Grain Corn from the USA}, the Supreme Court of Canada articulated a standard for the administering authority to use to determine which programs aimed at regional development were to be targeted as countervailable.\footnote{\textit{Ibid.} at 884. It is important to mention that the Agreement on Subsidies of the Uruguay Round, determines as non-actionable subsidies the assistance to disadvantaged regions, according to the provisions of Article 8.} The position in the United States is the exact opposite: "...because regional programs are not generally available but rather are preferential, and because they confer a benefit upon the particular geographic region, they are countervailable under the specificity test."\footnote{Kevin C. Kennedy. \textit{The Canadian and U.S. Responses to Subsidization of International Trade: Toward a Harmonizing Countervailing Duty Legal Regime}: 20 \textsc{Law \& Policy in Int'l Bus.} 683, at 758.}

Article 38 of Mexico's Foreign Trade Law provides that to calculate the subsidy margin, SECOFI shall make any applicable deductions or cost adjustments.\footnote{Article 38, \textit{Ley de Comercio Exterior}. \textit{supra} 28} After having identified a countervailable subsidy SECOFI must calculate the benefit attributable to a foreign government subsidy program. In the United States, to determine the amount of
the countervailing duty, the value of the subsidy is measured with reference to the benefit conferred upon the targeted industry rather than the cost of the subsidy to the government; the SECOFI's should be similar, following the guidelines of Article 14 of the Uruguay Round Agreement.

4. DETERMINATION OF INJURY

As has been mentioned, Article VI of the GATT recognizes the right of the contracting parties to impose anti-dumping and countervailing duties upon subsidized or dumped products that cause or threaten to cause material injury to an established industry in the territory of a contracting party or materially retard the establishment of a domestic industry.100

In contrast with the American and Canadian laws, in Mexico the SECOFI is the authority that determines both the existence of dumping or subsidization and injury to domestic industry. The second paragraph of Article 29 of the Mexican Foreign Trade Law provides that the "injury or a threat-of-injury test shall be granted and applied to the merchandise subject to investigation, provided that reciprocity exists in the country of origin or the country of exportation of the subject merchandise. In cases in which such reciprocity does not exist, the Secretariat [SECOFI] may impose the corresponding antidumping or countervailing duties, without proving injury or threat of injury."101 On

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99 Trebilcock and Howse, op. cit. supra 2, at 144

100 Article VI(1) of the GATT.

its face, this reciprocity requirement is inconsistent with the plain language of Articles I and VI of the GATT.\textsuperscript{102} and Mexico does not have a 'grandfather' argument to justify this requirement. Perhaps the only justification comes from the American precedent and the will to imitate the American statute, which, like the Canadian approach, has a 'grandfather' argument. In fact, in the United States, the Tariff Act of 1930 distinguishes between two different countervailing duty statutory provisions: there is one led for countries "under the Agreement" (GATT), and another for countries who are not members. For the latter, a mere determination that a subsidy exists by the DC is sufficient without any injury determination by the ITC. Nevertheless, not all countries who are GATT members have received this status under section 1671 of the American law. For example New Zealand is a signatory of the GATT but was denied status; Mexico in contrast, received this status from the United States even prior to its enrollment as a member of the GATT.\textsuperscript{103} Although the requirement of reciprocity is unimportant in the NAFTA context, Mexico's Foreign Trade Law needs to define this crucial term. In addition, it is important to highlight that the Mexican statute does not use the word "material" and only refers to an "injury test", in contrast with Article VI of the GATT which requires "material injury to an established industry in the territory of a contracting party..."\textsuperscript{104} In my opinion, this omission does not mean that the Mexican injury test is less

\textsuperscript{102} That is the opinion of Craig R. Giesze, \textit{op. cit.} at 944-952


\textsuperscript{104} Article VI (1) of the GATT.
rigorous than the GATT threshold. The Mexican authorities have assured that what they really mean is "material injury" and that is what the true standard is.  

Article 39 of the Mexican statute defines injury (without the adjective "material") as follows:

For purposes of this Law, injury means the loss or proprietary impairment of a national asset or the deprivation of any lawful and normal profit that the domestic industry producing the merchandise subject to investigation has suffered or may suffer, or the prevention of the establishment of new industries. The threat of injury is the imminent and clearly foreseeable danger of injury to the domestic industry. The determination of the threat of injury shall be based upon facts and not merely upon allegations, conjectures, or remote possibilities.

To render an injury determination, SECOFI employs the typical three-step analysis as Canada and the United States do: First, it defines the relevant domestic industry; second, it determines whether this industry is materially injured or threatened with material injury; finally, it looks for a causal link between the injury and the unfair trade practice. Article 40 of the Mexican statute defines "domestic industry" to include at least 25 percent of the domestic industry that produces the merchandise that is identical or similar to that imported into the Mexican market under conditions involving unfair trade practices. The same article provides that when producers are related to the exporters or importers or are themselves importers of the subject merchandise, the term "domestic


107 Cf. Craig R. Giesze, op. cit. at 997
industry” may be interpreted to encompass at least 25 percent of the remaining domestic producers.\textsuperscript{108} This provision should be interpreted as in accordance with Article 4.1(i) of the Agreement on Implementation of Article VI of GATT. Also, in accordance with Article 4.1(ii) of the GATT Agreement on Dumping and Article 16.2 of the GATT Agreement on Subsidies, the Mexican statute authorizes SECOFI to define the relevant domestic industry for injury purposes on either a national or a regional basis.\textsuperscript{109}

Both Canada and the United States have adopted the GATT Agreement definition of domestic industry as domestic producers as a whole of ‘like products’. The Canadian ‘like goods’ test asks whether the goods subject to an unfair trade practice ‘closely resemble’ domestic goods. The American test is stricter and asks if the goods are ‘most similar in characteristics’ to domestic goods.\textsuperscript{110} The Mexican test refers to ‘identical or similar’ goods.\textsuperscript{111}

To determine whether the industry is materially injured or threatened with material injury, both Canadian\textsuperscript{112} and Mexican\textsuperscript{113} statutes follow the criteria of Article 3.4 of the GATT Agreement. In the United States material injury is defined negatively as a harm that is not inconsequential, immaterial and unimportant, a language “sufficiently

\begin{itemize}
  \item \textsuperscript{108} Article 40 (second paragraph), Ley de Comercio Exterior. \textit{supra} 28
  \item \textsuperscript{109} \textit{Ibid}. Article 44.
  \item \textsuperscript{110} \textit{Cf} Trebilcock and Howse, \textit{op. cit.} \textit{supra} 2, at 106.
  \item \textsuperscript{111} \textit{Sec} Article 43, Ley de Comercio Exterior. \textit{supra} 28
  \item \textsuperscript{112} \textit{Cf} Trebilcock and Howse, \textit{op. cit.} \textit{supra} 2, at 106
  \item \textsuperscript{113} Article 41(III). Ley de Comercio Exterior. \textit{supra} 28
\end{itemize}
abstract to yield varying and perhaps competing interpretations by all GATT contracting parties..."114

To ascertain whether the unfairly traded merchandise imported into the domestic market is actually a cause of the economic injury suffered by the relevant domestic industry, the Canadian SIMA requires the imports to constitute an 'important', 'significant' or 'direct' cause of injury, and considers decreases in output, sales, productivity, return on investment, and utilization of capacity.115 In the United States, the ITC's position is that the injury caused by the unfair trade practice need not to be the "principal" or a "major" or "substantial" cause of overall injury to an industry116. In Mexico, SECOFI generally must analyze the volume of imported unfairly traded merchandise to determine "whether there has been a significant increase (...) relative to the domestic output or consumption" during the investigative period.117 To determine whether a Mexican industry is threatened with future injury, the Mexican statute follows in general the provisions established in Article 3.7 of the GATT Agreement.118

114 James R. Holbein, et. al., op. cit. supra 30. at 886
115 Trebilcock and Howse, op. cit. supra 2. at 107.
116 ibid.
117 Craig R. Giesze, op. cit. supra 28. at 1000. and Article 41. Ley de Comercio Exterior.
118 Article 42. Ley de Comercio Exterior. supra 28.
5. PUBLIC INTEREST

The identification of a public or consumer interest element in the unfair trade laws of the three countries members of NAFTA is far outweighed by commercial considerations. Although trade policy should be a balance between government, commercial and consumer interests there is a continual tension between the interests of the domestic producers and the interests of the consumers. Actually, protectionism reflects the advantage of the domestic producer's interests at the expense of the consumer body.\textsuperscript{119}

Canada has introduced the public interest element in antidumping and countervailing duty proceedings: this introduction into the SIMA\textsuperscript{120} "...was a manifestation of the perceived imbalances favoring domestic producers at the expense of downstream end-users and consumers."\textsuperscript{121} In the United States, in certain instances, the Federal Trade Commission will intercede in trade matters to raise a public interest component.\textsuperscript{122} In the Mexican statute, Article 88 provides that when SECOFI imposes an unfair trade measure, this measure should be not only a defense of the domestic industry but also it should "...avoid as much as possible its negative repercussion in other

\textsuperscript{119} Cf James R. Holbein et al., op. cit. supra 30 at 889.


\textsuperscript{122} James R. Holbein et al., op. cit. supra 30, at 891.
productive processes and in the consumer public." It would be beyond the scope of this paper to discuss how fair the treatment of the consumer interests in the unfair trade laws of the NAFTA countries is, but perhaps a more definitive and stronger inclusion of this element in these statutes "...would alleviate any claim of latent protectionism inherent in unfair trade proceedings."  

C. PROCEDURAL ASPECTS OF THE MEXICAN UNFAIR TRADE LAW

Both Article 5.4 of the GATT Agreement on Dumping and Article 11.4 of the Agreement on Subsidies require unfair trade complaints to be initiated on behalf of the industry affected, i.e., "...domestic producers whose collective output of the products constitutes more than 50 percent of the total domestic production of like products produced by that portion of the industry expressing either support for or opposition to the application." The articles further provide that no investigation shall be initiated where domestic producers supporting the application account for less than 25 percent of total domestic production of the like product. 125 Both Canadian and U.S. laws incorporate provisions similar to the GATT requirement: in both countries a petitioner must represent a major proportion of producers of the goods, but different practices have arisen concerning the application of this standard. In the United States the DC assumes that a

123 Article 88, Ley de Comercio Exterior, supra 28. Translation from Spanish by author.

124 James R. Holbein, et. al., op. cit. supra 30, at 889.

125 See Trebilcock and Howse, op. cit. supra 2, at 107.
petitioner represents a major proportion of U.S. producers of the like product.\textsuperscript{126} An author argues that "[t]he effect of this rebuttable presumption is a relative disadvantage for foreign producers who may be forced to defend themselves in trade actions initiated by a substantial minority of domestic producers rather than statutorily required major proportion of producers of the like products."\textsuperscript{127} In Canada, a presumption in favour of standing for domestic producers does not exist.\textsuperscript{128}

In Mexico, SECOFI may itself initiate an antidumping or countervailing duty investigation. It may also initiate such investigation based upon the petition of an "interested party"\textsuperscript{129} A Mexican interested party embraces "natural or corporate persons" who produce "merchandise identical or similar to that being imported or attempted to be imported" into Mexico under unfair trade conditions, and who constitute "at least 25 percent\textsuperscript{130} of the [relevant] domestic industry" or "constitute legal organizations created pursuant Mexican law."\textsuperscript{131} The term interested parties for general antidumping and countervailing duty purposes also includes, according to Article 51 of the Mexican statute, "petitioning producers, the importers and exporters of the merchandise subject to investigation, and foreign corporate persons having a direct interest or stake in the investigation (...) those individuals, enterprises, or entities, public or private, that are

\textsuperscript{126} Cf. James R. Holbein et al., \textit{op. cit. supra 30}, at 892

\textsuperscript{127} \textit{Ibid.}

\textsuperscript{128} \textit{Ibid.}

\textsuperscript{129} Article 49, \textit{Ley de Comercio Exterior}. \textit{supra 28}

\textsuperscript{130} \textit{Ibid. Article 40}

\textsuperscript{131} See \textit{Ibid. Article 50}; and Craig R. Giesze, \textit{op. cit. supra 28}, at 1005-1006.
considered ‘interested parties’ within the meaning of international commercial treaties and agreements.”

Within thirty days after the filing of the petition, SECOFI must determine if the request is legally sufficient to initiate an investigation: then, the Mexican authority notifies both foreign exporters and governments as well as domestic importers by publishing the determination in the Diario Oficial de la Federación. Next, SECOFI will issue a questionnaire to the foreign entities and the Mexican importers, requesting trade data on sales, prices, costs, government subsidy programs, import volume, production capabilities, shipments, etc. Article 80 of the Foreign Trade Law establishes an administrative protective order mechanism to safeguard a responding party’s information submitted in the questionnaire response. According to Article 53, a responding party has thirty days for the completion of the questionnaire.

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132 Ibid. Article 51: translated from Spanish by Craig R. Giesze, op. cit. at 1005, footnote 485

133 See Ibid. Articles 52-56.

134 Completing the SECOFI questionnaire was an important issue in the Polystyrene Panel (See supra footnote 68) in the antidumping investigation against the company Muehlstein. SECOFI determined that the enterprise did not answer the questionnaire completely because it did not provide information about third-country sales and production costs. Muehlstein argued that it was not required in the questionnaire to provide such information. The enterprise also argued that SECOFI must have advised them that the questionnaire was responded to in an uncompelled manner and by not doing so, it violated the provisions of Article 27 of the Implementing Regulations of the Foreign Trade Law which provides that a party may submit information at any stage of the antidumping investigation. The Panel determined that this provision of the regulations was inapplicable and that “despite the existence of safeguards, there is not a legal obligation for SECOFI to assure that each party...has duly submitted its information. The existence of such obligation would entail a difficult - if not impossible task for SECOFI, especially at the final stage of the investigation.” (See Resolución del Panel MEX-94-1904-03 at 42; translated from the Spanish version by author: the translation is not necessarily identical to the English version). In dissent, the panelist Clemente Valdés Sánchez determined that SECOFI must have informed Muehlstein about the missing information in the questionnaire and not to have done so, means a violation to the fundamental rights of the enterprise. See Voto Particular (dissent) del Panelista Clemente Valdés Sánchez, version in Spanish at 66.
According to Article 57 of the Mexican statute, SECOFI has a period of 130 days from the day following the publication of the initial determination to publish its preliminary determination in the Diario Oficial de la Federación by which it can establish the provisional antidumping or countervailing duty or may terminate the administrative investigation when sufficient evidence does not exist concerning price discrimination or foreign government subsidization, injury or threat of injury or causal relation between the alleged unfair trade practice and the injury or threat of injury.

Pursuant to Article 59 of the Foreign Trade Law, within a period of 260 days from the day following the publication of the determination to initiate the investigation, SECOFI must publish its final determination in the Diario Oficial de la Federación by which it can establish and impose a final antidumping or countervailing duty, reverse and revoke the provisional antidumping or countervailing duty or declare the investigation completed without establishing or imposing an antidumping or countervailing duty.

As has been stated earlier, the main difference between the Canadian and American procedures and the Mexican procedure is that Canada and the United States provide for a bifurcated investigative regime that involves two different entities: DMNR and CITT in Canada and the DC and ITC in the United States; while in Mexico SECOFI is the only body that makes both determinations: existence of dumping or subsidization and existence of injury. The decisions in both CITT and ITC are taken by the members of these entities, while in SECOFI the decisions do not require any sort of consensus.\(^\text{135}\)

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\(^{135}\)It is important to mention however, that SECOFI must submit its projects of final resolution on antidumping or countervailing duties to the Commission of Foreign Trade; this Commission is composed of representatives of SECOFI itself and of the Secretariats of Foreign Affairs, Treasury and Public Credit, Social Development, Agriculture and Health, as well as the Bank of Mexico and the Federal Commission
In accordance with Articles 11 of the GATT Agreement on Dumping and Article 21 of the Agreement on Subsidies. Article 67 of the Mexican Foreign Trade Law provides that "final antidumping or countervailing duties shall be in effect for such time and to the extent necessary to counteract the unfair trade practice that is causing injury, or threatening to cause injury. to the domestic industry." Finally, it is important to highlight that in the three countries, Canada\textsuperscript{137}. the United States\textsuperscript{138} and Mexico\textsuperscript{139} exporters may negotiate an agreement with the relevant administering authority rather than face unfair trade proceedings.

D. THE STANDARD OF REVIEW

As has been stated before, judicial review is the principal means by which the application of trade law is disciplined in North America. Under the NAFTA mechanism for dispute settlement of Chapter 19, each Party reserves the right to apply its antidumping and countervailing duty law to goods imported from the territory of any other Party.\textsuperscript{140} Nevertheless, article 1904 provides that a Binational Panel revising a

\textsuperscript{136} Translation from Spanish by Craig R. Giesze. \textit{op. cit. supra 40}. at 63.

\textsuperscript{137} R.S.C. ch. S-15 (1985) 2. 49, 2(11)

\textsuperscript{138} 19 U.S.C. s. 1673c.

\textsuperscript{139} Article 61, Ley de Comercio Exterior. \textit{supra 28}.

\textsuperscript{140} Article 1902 (1) of the NAFTA.
determination of any of the Party's investigative authority. "...shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigative authority." These NAFTA provisions per se may be seen as a harmonizing factor between the three Parties to the treaty. Also, they can be understood as a tool to give certainty and coherence to the Panels' decisions. For these reasons, it is important to analyze the standard of review as it is articulated and applied in Canada, the United States and Mexico. It is necessary to highlight that, in addition to the standard set out in Annex 1911, the Binational Panels shall consider as domestic antidumping and countervailing duty law "...the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigative authority." Therefore, a Panel should apply in addition "...the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigative authority." In the following pages I will

141 Article 1904 (3) of the NAFTA.

142 Annex 1911 of the NAFTA establishes: "standard of review means the following standards, as may be amended from time to time by the relevant Party: (a) in the case of Canada, the grounds set out in subsection 18.1 (4) of the Federal Court Act, as amended, with respect to all final determinations; (b) in the case of the United States, (i) the standard set out in section 516A (b)(1)(B) of the Tariff Act of 1930, as amended, with the exception of a determination referred to in (ii), and (ii) the standard set out in section 516A (b)(1)(A) of the Tariff Act of 1930, as amended, with respect to a determination by the U.S. International Trade Commission no to initiate a review pursuant to section 751(b) of the Tariff Act of 1930, as amended; and (c) in the case of Mexico, the standard set out in Article 238 of the Federal Fiscal Code ("Código Fiscal de la Federación"), or any successor statutes. based solely on the administrative record.

143 Article 1904 (2) of the NAFTA.

144 Article 1904 (3) of the NAFTA.
discuss the standard of review as articulated by the GATT/WTO Uruguay Round; second, I will briefly analyze the standards applied by the courts in Canada and the United States and third, I will revise the articulation and the application of the standard of review in Mexico by analyzing the experience in the Binational Panels that have dealt with determinations of the Mexican administrative authority.

1. THE GATT/WTO STANDARD OF REVIEW

In contrast with the NAFTA, the GATT/WTO Uruguay Round Agreements do not contain the concept that unfair trade decisions must accord with the law of the country imposing the duties. While Chapter 19 of the NAFTA replaces domestic judicial review, the GATT/WTO Agreement provides for the determination of whether an antidumping or countervailing duty decision complies with the standards set forth in the Agreement itself. \(^{(145)}\) In the case of subsidies, as has been seen, the Agreement sets out a number of criteria for a subsidy to be actionable. \(^{(146)}\) In addition, according to Article 2 of the Agreement, specificity is set out as a requirement for actionability. In general, the standard in subsidies is governed by the principle that WTO dispute settlement "...serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of

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\(^{(146)}\) See Agreement on Subsidies and Countervailing Measures of the GATT/WTO, Part III.
interpretation of public international law.” On the other hand, the GATT/WTO Antidumping Agreement in Article 17.6 contains special rules concerning the settlement of disputes involving antidumping cases. With respect to issues of fact, Article 17.6 (i) provides that: “If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.” Concerning the interpretation of the Antidumping Agreement, Article 17.6 (ii) provides that

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The WTO Antidumping Agreement, with respect to the major issues in injury determinations “…imposes a standard at least as rigorous as the ‘substantial evidence on the record’ standard in U.S. administrative law.” Nevertheless, the provision of the Agreement concerning the review of facts does not specify how deeply a Panel can probe the appropriateness and objectivity of an authority’s evaluation. In regard to questions of law, the phrase “permissible interpretation” governs Panel review and it may represent a

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147 See F. Amanda DeBusk et al., op. cit. supra 145, at 37, and accompanying footnotes 36 & 37.

148 Robert Howse, op. cit. supra 93, at 31.
potential for multiple interpretations that could undermine the coherence in the Panel decisions. 149

It may be said that the WTO standard of review is less deferential than the NAFTA standard; that may be true if it is compared with the domestic standards of the United States and Canada, but in the Mexican case, as I will argue, this may not be the case. In any event, the standard set forth in the WTO Agreement is very similar to the American standard but is now a rule of international law. 150 The main difference between the WTO and the NAFTA standards is that in the former the relevant question is whether the authority’s decision is consistent with the WTO Agreement (international law), whereas in the latter the question is whether the decision is supportable under the domestic standard of review as it would be interpreted by a local court. To what extent is the NAFTA standard purely domestic? The analysis of the American and Canadian standards as compared to the Mexican can help to provide an answer.

2. THE STANDARDS OF REVIEW IN CANADA AND THE UNITED STATES

Experience with the dispute resolution mechanism of Chapter 19 under the FTA, previous to the coming into force of the NAFTA, showed that the Canadian standard of review was much narrower than the American standard, making the reversal of a Canadian agency determination much less likely than the reversal of a U.S. agency by


150 Robert Howse, op.cit., supra 93, at 32.
In the view of one author, Canadian exporters, when compared to their American counterparts, enjoyed a disproportionate amount of success in their appeal of final agency determinations during the FTA years. In the view of another author, the experience of Canada in the *Softwood Lumber* case, "...simply illustrates the inherent weaknesses of binational panel review that will return again and again to haunt the system."

According to Annex 19.1 of the NAFTA, in the case of Canada, the grounds set out in subsection 18.1(4) of the Federal Court Act are considered the standard by which a Binational Panel can set aside a DMNR or CITT final determination if the appropriate investigating authority:

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
(c) erred in law in making its decision or order, whether or not the order appears on the face of the record;
(d) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;
(e) acted or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law.

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Traditionally, the Canadian standard of review has been very deferential to the investigative authority. However, in *Grain Corn*, the Supreme Court of Canada articulated a broader standard in which judicial review may extend to deciding whether a conclusion or finding by an agency is *patently reasonable*. Thus, a judicial review of alleged errors may proceed if it is demonstrated that the tribunal exceeded its jurisdiction or committed a patently unreasonable error of law or fact. The existence in Canada of a “privative” clause did favour judicial deference and made difficult for U.S. exporters to reverse CITT final determinations. Due to Canada’s obligations under Chapter 19 of the NAFTA, the CITT’s “privative” clause was repealed by amendment of the SIMA. As a result, “…one might presume that NAFTA Chapter 19 panels would now be able to review alleged CITT errors of law by way of the ‘reasonableness’ standard instead of the highly deferential ‘patently unreasonable’.” In any event, recent Canadian case law has confirmed that in the absence of a “privative” clause, “considerable deference” is to be given to the expert agency when examining alleged errors of law.

In the United States, the standard of review to be applied in Chapter 19 panel review of an agency final determination is whether the determination is “unsupported by substantial evidence on the record, or otherwise [is] not in accordance with law.”

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157 *Cf.* James R. Holbein et al., *op. cit.* supra 30, at 895-896.

158 *See* NAFTA Annex 1904.15 (Amendments to Domestic Laws - Schedule of Canada).

159 *Cf.* ibid. at 602 (analyzing the Pezim case and the Baker Twine Panel)

160 *Tariff Act of 1930, section 516 A(b) (1) (B) as amended, 19 U.S.C. section 1516a(b)(1)(B) (1988).*
the other hand, the standard applied for decisions not to initiate an investigation, not to review a determination based upon changed circumstances, or a negative preliminary determination by the ITC, is whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."\footnote{161} At a first glance the substantial evidence standard seems less deferential than the Canadian standard.\footnote{162} Concerning the "errors of law" test, an American court should not conclude that the agency's interpretation is the "only reasonable" but only that was "reasonable", i.e., based on a "permissible" construction of the statute.\footnote{163} This principle is known as the 
Chevron\footnote{164} principle: by applying it, courts have granted U.S. agencies broad discretion in their administration of trade remedy laws.\footnote{165}

3. The Mexican Standard of Review

The standard of review in Mexico has represented many problems of interpretation for the Binational Panels and therefore has led to much inconsistency in the decisions of each of the Panels. At the entirely domestic level, a final antidumping or countervailing duty determination of SECOFI can be appealed by means of an administrative proceeding before SECOFI itself. If the party is still dissatisfied with the

\footnote{162}{Cf. James R. Holbein \textit{et al.}, \textit{op. cit. supra} 30. at 896.}
\footnote{163}{John M. Mercury, \textit{op. cit. supra} 152. at 572.}
\footnote{165}{Cf. John M. Mercury, \textit{op. cit. supra} 152. at 572.}
decision, it may appeal that decision to the Upper Division of the Federal Fiscal (Tax) Tribunal, an Executive Branch court, pursuant to a judicial proceeding of nullification. This court should apply the standard of review codified in Article 238 of the Federal Fiscal Code, which is the same standard defined in Annex 1911 of the NAFTA. If SECOFI challenges the decision of the Fiscal Tribunal, the proper appeal mechanism is the recurso de revisión, the standard appellate remedy: if a private party challenges the decision, then the proper appeal mechanism is the Juicio de Amparo, Mexico’s direct constitutional challenge apparatus.  

The standard of review for Mexico according to NAFTA is set out in Article 1904(3) and Annex 1911. It is a two-part standard of review. The first part is the standard set out in Article 238 of the Federal Fiscal Code (Código Fiscal de la Federación), or any successor statutes, based solely on the administrative record.

Article 238 of the Federal Fiscal Code states:

An administrative determination shall be declared illegal when any one of the following grounds is established: 1. Lack of jurisdiction or authority of the agency or official issuing the challenged determination or ordering, initiating or carrying out the proceeding in which the challenged determination was issued. II. An omission of formal legal requirements by the agency or official issuing the challenged determination which affects the person’s right of proper defense as well as the scope or meaning [outcome] of the challenged determination. or a failure of the agency or official to provide a reasoned determination based upon the record. III. A violation or defect of procedure by the agency or official issuing the challenged determination, which affects the person’s right of proper defense as well as the scope or meaning [outcome] of the challenged determination. IV. If the facts which underlie the challenged determination do not exist, are different from the

166 Cf. Craig R. Giesze, op. cit. supra 28. at 1015 - 1020. (Discussing the right to contest final SECOFI determinations in Mexico: administrative appeal and judicial review)

167 See NAFTA, Annex 1911.
facts cited by the agency, or were considered by the agency in an erroneous way; if the challenged determination was issued by the agency in violation of the applicable laws or rules; or if the correct laws or rules were not applied by the agency. Whenever a discretionary determination by an agency falls outside the lawful scope of that discretion. 168

As has been stated, under the second part of the standard of review are also considered the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

The three Binational Panels established up to now to review a Mexican investigative authority determination,169 have articulated and applied the Mexican standard in diverse and perhaps incoherent ways. The Flat Coated Steel Products from the USA Panel, noted the difficulty of applying the Mexican standard of review in a NAFTA Panel decision:

41. The proper application of the standard of review, and any other applicable provisions of Mexican law, is made more difficult by several factors. First, the Panel recognizes Article 238 was originally written for review of administrative decisions relating to taxation and other fiscal matters. Such fiscal matters typically involve a claim by the government against an individual regarding that individual's obligation to pay taxes to the state. By contrast, an antidumping proceeding is more complex. It involves matters affecting the entire economy of the country, trade relations between two nations, domestic producers and their employees, importers of foreign goods, and the exporters of those goods. Notwithstanding these differences, the NAFTA Parties have directed that the same standard of review, Article 238, be applied. The challenge for a Binational Panel is to apply the required standard of review to a multidimensional proceeding under Mexico's antidumping laws. 170

168 Código Fiscal de la Federación, Article 238 (December 31, 1981) Official translation from Spanish made by the Panel in Flat Coated Steel Products from the USA (LEXIS-NEXIS edition)

169 See supra 25.

170 Revisión de la Resolución Definitiva de la Investigación Antidumping sobre las Importaciones de Aceros Planos Recubiertos Originarias y Procedentes de los Estados Unidos (MEX-94-1904-01) at 19 (Spanish Version. Official translation to English taken from the LEXIS-NEXIS edition)
The first Panel that rendered a decision was the *Cut to Length Plate Products from the USA*[^1] in August 1995. This panel concluded that according to the NAFTA, the standard of review to apply was exactly the same as if it was applied by the domestic Federal Fiscal Tribunal. Therefore, like the Federal Fiscal Tribunal, the Panel had the jurisdiction "to declare a challenged resolution to be a nullity" (In Spanish: "Declarar la nulidad de la resolución impugnada"). This jurisdiction is established in the Federal Fiscal Code, Article 239/II. That would mean that a Panel does not have to limit itself to the NAFTA provision. but that it has a sort of "residual" power to extend this standard of review by applying not only Article 238 but also Article 239 of the Federal Fiscal Code as a complementary provision. It is necessary to remember that a jurisdiction to declare "nullity" does not exist under NAFTA Article 1904(8).

In support of the determination that a Panel should apply the standard exactly as the domestic courts do, the *Cut to Length Plate* Panel took the example of Canada. This country applied the "privative" clause even though it does not appear in the FTA provision. The Panel stated:

In support of the above determination. [that the Panels should apply the antidumping and countervailing duty law as a domestic court] the Panel first notes the basic policy consideration, expressed on numerous occasions by one or more NAFTA governments, that *binational panels ought not to create a separate antidumping jurisprudence from that created by the local courts*. Obviously, however, a separate jurisprudence would inevitably be created if binational panels were compelled to apply one form of the local standard of review while the local courts, in the exact same factual situation, would apply another form of that standard of review. Such a construction is plainly inconsistent with the underlying purpose and spirit of the NAFTA binational

[^1]: MEX-94-1904-02
review process. Therefore, the Panel believes that its broad obligation under the Treaty is to apply the same standard of review as would the local court, not a different one—just as it is required to examine the same body of substantive antidumping law, not a different one. 172

In Canada, therefore, despite the fact that Article 1911 of the CFTA pointed only to the pertinent clause in the Federal Court Act as being descriptive of the standard of review to be applied by panels, every Canadian panel that considered the matter concluded that the reference to the Federal Court Act alone was insufficient. The Federal Court Act provision had to be read together with the well-accepted interpretation of SIMA, despite the fact that the CFTA negotiators failed to make express reference to the latter provision when drafting Article 1911. Such reaching beyond the specific language of Article 1911 in the Canadian context appears to have been accepted by all parties; it was never challenged before an Extraordinary Challenge Committee nor. to the knowledge of the Panel, in any other CFTA or NAFTA context. 173

It is interesting to note that the existence of the “privative” clause in the Canadian legislation made its standard of review more deferential, whereas in Mexico, the strict application of the domestic law as a domestic court (applying not only Article 238 of the Fiscal Code but also Article 239 as the Fiscal Tribunal does), resulted in a much less deferential approach towards the SECOFI determinations. Actually the Mexican standard seems to be, at a first glance, rather exacting, rigorous and strict.

In contrast, the standard articulated and applied by the Flat Coated Steel Products from the USA 174 Panel was quite different. Its approach was narrower, only taking into account the provisions of NAFTA and not applying the standard as a domestic court but as an international court. In this context, the Panel concluded that their task was different

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172 Ibid. English version in LEXIS-NEXIS at 38 (Emphasis added).

173 Ibid. at 41 (Emphasis added).

174 MEX-94-1904-01. supra 170
from the task of the Mexican Federal Fiscal Tribunal. The result could be considered as being more deferential to the administrative authority, although the Panel upheld the SECOFI antidumping determination with ten important exceptions in remand.\textsuperscript{175}

In concluding that the Binational Panel does not have the same status of the Federal Fiscal Tribunal, the \textit{Flat Coated Steel} Panel stated:

The status of this Panel and the scope of its authority are critical to this opinion. Thus, it is important to note at the outset that the Panel is not the Fiscal Tribunal, and does not have the same characteristics, attributions and jurisdiction as does the Fiscal Tribunal. While the Fiscal Tribunal’s jurisdiction and competence are governed in their totality by Mexican law, including various provisions of the Fiscal Code, this Panel’s jurisdiction and competence are governed by NAFTA, and by Mexican law only to the extent that NAFTA so provides in specifying the applicable standard of review and in the requirement of Article 1904(2) that the Panel is to apply Mexican law “to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating authority.” (...)[T]his is a more specific and limited jurisdiction, which may cause the results of a review by the Panel to be different from a review by the Fiscal Tribunal.\textsuperscript{176}

To emphasize their dissent from the \textit{Cut to Length Plate} Panel, the panelists stated:

\textsuperscript{44} The jurisdiction of an international arbitration or dispute resolution panel, in this case as defined by NAFTA, may limit the powers of the panel to grant certain remedies as a result of its decision. (....)[T]he jurisdiction and powers of an international panel are defined by the agreement under which the matter was submitted to the panel, and the panel may not exercise powers that are not specified under that agreement. This Panel has jurisdiction to grant only those remedies that are authorized by NAFTA Article 1904(8). This provision of NAFTA states: 8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel’s decision.\textsuperscript{177}

\textsuperscript{175} \textit{Ibid.} at 140-143.

\textsuperscript{176} \textit{Ibid.} at 11.

\textsuperscript{177} \textit{Ibid.} at 20.
The outcome of the Polystyrene\textsuperscript{178} Panel showed a more deferential articulation of the standard of review, especially concerning the use of discretionary authority by SECOFI.\textsuperscript{179} This Panel determined that it was necessary to apply a reform of Article 238 of the Fiscal Code as part of the standard of review. By this reform, the Fiscal Tribunal can challenge automatically, without the party's initiative, the incompetence of an authority to render a decision or the lack of foundation or causation of this decision.\textsuperscript{180} This reform made the Mexican standard of review less deferential. Nevertheless, a more recent addition to Article 238 provides that this reform does not apply to cases in which a Binational Panel reviews a determination: i.e., the circumstances described in Article 238 of the Fiscal Code cannot be taken into account "automatically" by the Binational Panel, but must be part of a Party's claim.\textsuperscript{181}

In light of this analysis of the Mexican standard of review, it can be seen that the Binational Panels have found it difficult to interpret and to apply. One of the main problems comes from the fact that this standard was designed for a civil law tradition in which the interpretation of the statutes should be very rigid and rigorous. This type of

\footnotesize{\textsuperscript{178} MEX-94-1904-03, \textit{Imports of Crystall and Solid Polystyrene from the USA.}}

\textsuperscript{179} See supra 68 and 134

\textsuperscript{180} Supra footnote 168. "El Tribunal Fiscal de la Federación, podrá hacer valer de oficio, por ser de orden público, la incompetencia de la autoridad para dictar la resolución impugnada y la ausencia total de fundamentación o motivación en dicha resolución."

\textsuperscript{181} Ibid. "Los órganos arbitrales o paneles binacionales, derivados de mecanismos alternativos de solución de controversias en materia de prácticas desleales, contenidos en tratados y convenios internacionales de los cuales México sea parte, no podrán revisar de oficio las causales a que se refiere este artículo." This reform could have been made because of the lobbying of SECOFI after the experience in recent Binational Panels.
interpretation is difficult to do when resolving an international dispute even when domestic law is applied. The Mexican standard by itself is not more deferential than the WTO standard; in fact it is rather strict. However, the Binational Panels under NAFTA have rendered incoherent decisions, articulating the standard in very different ways. Perhaps there is an alternative approach the Binational Panels can use to make its decisions coherent in order to provide certainty to the parties seeking a solution in an antidumping and countervailing duty dispute. This alternative is suggested in the conclusion to this chapter.

E. CONCLUSION: AN INTERNATIONAL STANDARD OF REVIEW

After analyzing the unfair trade regime in Mexico as compared to the regimes in Canada and the United States and even with the GATT/WTO regime, it is possible to identify several differences. The first one is that the Mexican regime is fairly new compared to those of Canada and the United States and is still developing. The second one is that the Mexican local courts have not developed experience in dealing with antidumping and countervailing duty cases, as it has happened in both Canada and the United States. The third one is that in Mexico there is not a bifurcated system to make determinations on dumping and subsidies, and only one agency, SECOFI, makes both determinations: the existence of the unfair trade practice and the existence of material injury to the national industry.

Some other differences have not proved that relevant. In fact, most Mexican substantial provisions are inspired in the GATT Agreements and in that sense they are not
dramatically different from the provisions in Canada and the United States. The real difference comes from the articulation and application of the standard of review in the three countries. In Mexico, it has been a tremendously difficult task for the panelists - both Mexican and Americans - to agree on the standard of review to be applied when reviewing SECOFI determinations. In at least one panel - the Cut to Length Plate - this standard was articulated and applied in exactly the same way as the Federal Fiscal Tribunal does. Apparently, the outcome was a very broad standard. The other two Panels concluded that it is impossible to apply the standard as a domestic court because an international issue is being decided: the outcome has been a more deferential standard.

In the U.S. - Canada experience, the standard of review has been also a problem. John M. Mercury argues in an essay published in 1995:

In the eleven Chapter 19 cases where dissenting panel opinions were delivered, dissenting panelists usually took issue with the standard of review that had been applied by the majority. In such instances, dissenting Canadian panelists sought to inform their U.S. counterparts as to what standard of review was applicable under Canadian administrative law (...) [W]here U.S. panelists issued dissenting opinions, they frequently did so in order to dispute the interpretation of U.S. law made by Canadian panelists and to formulate a less deferential standard of review that could be applied to Canadian agency final determinations.¹⁸²

In the case of Mexico, the experience has been more dramatic because even the Mexican panelists have not found it easy to articulate the standard of review, a standard which is very clear in the domestic arena but still dubious when applied to resolving international disputes. I suggested earlier that NAFTA per se has a harmonizing effect on

¹⁸² John M. Mercury, op. cit. supra 152. at 541
North American law. This is because Chapter 19 specifies a standard of review that each party should apply; therefore it is a paradox that this "harmonization factor" had become a "Tower of Legal Babel." 183

I believe that despite of its shortcomings. Chapter 19 of NAFTA can still be a factor of harmonization. As I have stated before, not harmonization understood as uniformity, but as coherence and some degree of certainty in the dispute resolution mechanism. Because of the flaws of the NAFTA mechanism. Professor Robert Howse has stated that the new mechanism of WTO-Uruguay Round (Understanding on Dispute Settlement negotiated in the Uruguay Round) is better at least for Canada to resolve the antidumping and countervailing duty disputes in which the country may be involved. He argues that the law of the WTO can effectively be used especially to discipline U.S. administered protection. inter alia. because "[t]he standards and benchmarks that are employed in WTO dispute settlement are international not domestic law rules. and so the suspicions that exist where nationals of one country are interpreting the law of another are not applicable here" 185

NAFTA is a regional free trade agreement and an exception to the Most Favoured Nation principle of the GATT. It has been argued that in a regional agreement it is more feasible to implement a real free trade area, rather than in a multilateral environment such


184 See supra 33 and accompanying text.

185 Robert Howse, op. cit. supra 93, at 28.
as the GATT / WTO. In this context, I think that it is necessary to maintain the NAFTA’s own dispute resolution mechanism but with some improvements. The ideal would be to eliminate all antidumping and countervailing duty regimes in North America, or at least, to make the unfair trade legislations uniform. If it is possible to achieve harmonization in the decisions of the Binational Panels, they are going to create a sort of “jurisprudence” that eventually can lead to a deeper integration. I believe that a feasible way to achieve this goal is to incorporate the GATT/WTO standards in the articulation and application of the standard of review in the NAFTA cases.

Even when applying domestic law, according to NAFTA Article 1904 (2), the Panels are bound to take into account “...relevant statutes, legislative history, regulations, administrative practice and judicial precedents...” Is the GATT/WTO part of the domestic legislation of Canada, the United States and Mexico? The three countries have implemented this agreement, as well as NAFTA, in their domestic law. In Mexico, as has been said, an international treaty has the same status as a federal law pursuant article 133 of the Mexican Constitution. In Canada, an author has said that “...Canadian courts and tribunals will treat the decisions of international bodies with deference and will likely be persuaded to follow them. Thus international law, as developed by the new decision-making bodies established under the WTO, will become part of domestic law, or, at least, influence its development significantly.”

In the United States, legislation has been also enforced to implement both GATT and NAFTA.

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Perhaps it is impossible to imagine a scenario in which federalizing central institutions for NAFTA are accepted by the United States. On the other hand, it is difficult to imagine a common set of policies for the three countries probably imposed by the United States too. Coherence and harmony in the decisions of the Binational Panels, supported by the application of the GATT/WTO standard of review along with the domestic law of the three countries, can provide a major degree of certainty in the regional dispute settlement mechanism.

With respect to Article 1904 of the NAFTA, and the necessity to apply the GATT as domestic law, the Cut To Length Plate Panel concluded:

Although the quoted language is unambiguous on its face, one aspect of this provision deserves further mention, and that is its technical failure to specifically mention international treaties of direct application as a source of Mexican antidumping law. Treaty law, such as Article VI of the original General Agreement on Tariffs and Trade (“GATT”) and the GATT 1979 Antidumping Code, is, of course, a fundamentally important part of Mexican antidumping law and its potential “omission” as a source of antidumping law would be a serious distortion of the law as it actually exists in Mexico.

In the Supreme Court of Canada’s case National Corn Growers v. Canadian Import Tribunal, Gonthier J. stated: “The first comment I wish to make is that (...) in circumstances where the domestic legislation is unclear it is reasonable to examine any underlying international agreement.”

187 Cf. Trebilcock and Howse, op. cit. supra 2. at 95.

188 Cut To Length Plate Products from the USA. MEX-94-1904-02: from English version LEXIS-NEXIS at 19.

189 Quoted by Ivan R. Feltham, op. cit. supra 186 at 173.
It is difficult to conclude that the United States and Canada can apply international standards when resolving a dispute according to domestic legislation. Nevertheless, the case of Mexico is different. The Mexican Constitution establishes the status of international treaties as domestic law. In this context, it is my argument that a solution to the apparent problems in the application of the standard of review in cases reviewing a Mexican agency determination would be the application of the GATT/WTO standard of review. The standard for Mexico set out in Annex 1911 of the NAFTA is the one that is applied for domestic tax disputes and is not deferential to the administrative agency. Moreover, there is not a deferential principle in the Mexican law as there is in the other two Parties of the NAFTA. It seems to me that if the Binational Panels apply the domestic standard exactly as a domestic court, the outcomes would usually be disadvantageous for the agency. The decisions in the Polystyrene and the Flat Coated Steel Panels showed a less deferential and a more “international” approach in contrast with the Cut to Length Plate Panel. In sum, it seems to me that the application of the GATT/WTO standard of review would be a better alternative for Mexico. The application of the Mexican standard as a domestic court implies a less deferential approach that in the future can be disadvantageous for the Mexican administrative agency and, in some cases, for the domestic industry. The provisions of the GATT/WTO relevant codes can also be applied by the Panels reviewing a Mexican determination, in those cases involving special difficulties or apparent discrepancies between the multilateral codes and the domestic law. This approach can be taken by the Panels without any modifications to the NAFTA text, because the GATT is Mexican domestic law and Chapter 19 authorizes the
Panels to apply domestic law. Nevertheless, it would be even better if the current Mexican Fiscal Code standard is eliminated from Annex 1911 of the NAFTA and replaced by the multilateral standard.

John M. Mercury\textsuperscript{190} has said that because of the changes made to the Chapter 19 system under the NAFTA, it is possible that the Binational Panel system will come to resemble traditional domestic judicial review. At least from the Mexican experience analyzed in this paper, it can be concluded that the Binational Panels have found extremely difficult to apply the law as a domestic court and they have highlighted the distinctiveness of the panels as international adjudicators. The same author says that another limitation of the NAFTA system is that Panels can create a body of jurisprudence different from the one of the domestic courts. I think that even when panels are not bound by the interpretations of previous panels, they may be expected to consider previous decisions. In the case of the three Mexican Panels, they have rejected the views of the previous ones and that fact has been a source of incoherence. Therefore, I think that a separate body of jurisprudence guided by the inclusion of GATT/WTO standards would provide more certainty in the decisions. I argue that - even when the application of domestic law reflects the respect for the sovereignty of the countries - it is impossible to decide an international dispute exactly as a domestic dispute. In any event, the domestic courts deciding with respect to non-NAFTA exporters should also apply the provisions of NAFTA and GATT/WTO because they are also a source of domestic law in the three countries.

\textsuperscript{190} See John M. Mercury, \textit{op. cit.} supra 152. at 605
The Mexican experience analyzed in this section demonstrates how difficult is to apply domestic law to resolve international unfair trade disputes: especially when the legal traditions of the countries are so different as is the case of Mexico when compared to those of Canada and the United States. The application of the GATT/WTO standards in the panels' resolutions is not the only manner to improve this dispute settlement mechanism: I think that some changes ought to be implemented in the corpus of NAFTA and in the domestic trade remedy laws. In the next section of this thesis I analyze the current Binational Panel mechanism of Chapter 19 of the NAFTA. I compare it with the GATT/WTO dispute settlement mechanism and I discuss, from a Mexican perspective, how Chapter 19 can be improved.
III. THE NAFTA’S CHAPTER 19 DISPUTE SETTLEMENT MECHANISM: CAN IT BE IMPROVED?

The application of domestic law to resolve an international trade dispute is an essential characteristic of the NAFTA’s Chapter 19 mechanism. In the previous chapter, I have made a brief and general comparative analysis of the domestic legislation involved in the NAFTA. I have concluded that, despite differences in the substantive laws, the main difference is the standard of review applied in the three countries. This is particularly relevant in Mexico, where the standard of review has not been articulated in a consistent way for unfair trade cases. A harmonized standard of review in accordance with the international guidelines of the GATT/WTO, could provide more consistency and certainty in the resolutions of the Binational Panels. Therefore, I concluded that the Panels reviewing a Mexican agency determination should apply the GATT/WTO standard of review. But what about the mechanism itself? Is it enough to apply an international standard to eliminate all the flaws of the NAFTA’s Chapter 19 mechanism?

In this chapter, I will analyze the most important characteristics of the Binational Panel system, and its principal strengths and weaknesses. On the other hand, I will try to determine from the Mexican perspective whether this Binational Panels mechanism is still adequate to resolve antidumping and countervailing duties disputes, even though there is now an alternative and improved multilateral mechanism provided by the GATT/WTO. Section A of this chapter discusses the origins, premises and assumptions underlying the creation of the Chapter 19 dispute settlement mechanism. Chapter 19 is
not the only mechanism for dispute resolution in the NAFTA. Section B describes briefly the different mechanisms. Section C provides a brief description of the NAFTA’s Article 1904 mechanism to resolve antidumping and countervailing duties controversies. By way of contrast, Section D describes the mechanism for dispute resolution of the GATT/WTO Uruguay Round. Section E analyzes the most important shortcomings of Chapter 19 mechanism. Finally, in Section F I conclude by proposing some amendments that I believe would improve the NAFTA Chapter 19 mechanism.

A. ORIGINS OF THE CHAPTER 19 DISPUTE SETTLEMENT MECHANISM

Binational panels were first introduced in the United States - Canada Free Trade Agreement (FTA) as "...a temporary 'finger in the dike' until each party developed a unified antidumping and countervailing duty code." When the FTA came into force, several arguments supported the Binational Panels mechanism. Canada was unwilling to abide by what it perceived to be a biased and arbitrary administration of the U.S. unfair trade laws. The Americans refused to exempt Canada from the administration of those laws. The result was a Binational mechanism in which domestic law is applied. Therefore, as one author argues, "...Chapter 19's binational panel review became the

'eleventh hour' stop-gap measure of compromise." It was perceived that the system was not a radical departure from existing legal regimes in the United States and Canada because panel review would be bound by judicial precedent and because both countries share a common legal tradition. The subsequent experience proved that the mechanism was more complicated than had been anticipated and that it had several shortcomings. The expansion of the NAFTA to include Mexico made the above mentioned arguments even weaker. Mexico had almost no experience in unfair trade cases to be considered as judicial precedent, and there was no common legal tradition with the two other NAFTA members.

The Chapter 19 system was originally intended to last only for a few years, until the Parties negotiated a substantive regime to replace the domestic antidumping and countervailing duty laws. Nevertheless, with the adoption of the NAFTA, the Binational dispute settlement system was extended and made a permanent feature of the Agreement. The challenge for the Mexican negotiators was almost the same as it was for the Canadians in 1986 and 1987. It was necessary to create a dispute settlement mechanism respectful of Mexican interests and also acceptable to our strong neighbours: the United States. The traditional American perception is that it is extremely difficult to

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193 Ibid.

194 See Article 1906 of the Free Trade Agreement, January 2, 1988, United States - Canada, 27 I.L.M. 293. (cited in this thesis as F.T.A.)

195 See Article 1902 of the NAFTA.
exclude a country from the application of American domestic unfair trade law. The American antidumping and countervailing duty legislation is perceived in the American Congress as a fundamental right of the American industry in order to protect it from imports made under unfair trade conditions.196 By incorporating the Chapter 19 mechanism into the NAFTA, the U.S. expressed its willingness to relax its traditional protective posture. Chapter 19 mechanism was the only alternative acceptable to both Parties at the end of the US - Canada FTA negotiations.197 It seems to me that essentially the same scenario played itself out during the negotiations with Mexico: there was no other alternative acceptable to the three Parties.

Businessmen, policy makers and scholars in Mexico were aware of the increasing “neoprotectionism” in the world, manifested by the growth of non-tariff barriers whose economic justification is very dubious but whose legality is readily accepted.198 To face the growth of neo-protectionism it was necessary to create a check on administered protection. The Chapter 19 mechanism was accepted because it was politically impossible to eliminate the domestic protectionist rules, but at least it was possible to “watch over” that these rules were applied in a fair way.199

When Mexico was negotiating the antidumping and countervailing duty dispute settlement mechanism under NAFTA in 1993, it was very important for the negotiators to

196 Cf. Victor Carlos Garcia Moreno, El Capítulo 19 del Tratado de Libre Comercio de América del Norte. ALEGAJTOS Num. 32, Mexico City (January - April 1996) at 36.

197 Ibid.

198 Cf. Ibid. at 37.

199 Ibid.
learn from the Canada’s experience during the FTA years. The Mexican negotiators thought that the Chapter 19 mechanism, if not perfect, was the best the three NAFTA countries could agree upon, because it was the only normative mechanism acceptable to the United States. Nevertheless, during the negotiations Mexico proposed some amendments to the FTA mechanism which were not accepted. The first one was the establishment of Trinational rather than Binational Panels: this idea was not shared by the American negotiators who did not see the justification for including, for example, the Mexicans in a Canadian-American controversy. The second amendment suggested by Mexico was the establishment of a permanent and specialized jurisdictional body rather than a panel system. The Americans did not accept this suggestion because the negotiators thought it very unlikely that the American Senate would approve such a mechanism in light of its apparent supranational character. As an alternative, Mexico proposed the establishment of a permanent arbitration panel system rather than an ad hoc panel mechanism. The Americans argued that this system too, would be perceived by the American Senate as a supranational body that would eventually create a distinctive jurisprudence on antidumping and countervailing matters. In light of these concerns the

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200 Interview conducted by author with Mexican Panelist Victor Carlos García Moreno, National Autonomous University of Mexico, Faculty of Law, Mexico City, May 26th, 1997. (hereinafter: Interview with Victor Carlos García Moreno)

201 See Rodolfo Cruz Miramontes, Rechaza Washington la propuesta mexicana sobre la formación de un Tribunal Comercial, El Financiero, Mexico City, March 6th, 1992. (newspaper article in which it is informed that the US negotiators rejected the Mexican proposition to create a supra-national Trade Tribunal for NAFTA)

202 Interview with Victor Carlos Garcia Moreno, supra 200

203 Ibid.
Americans did not accept the Mexican proposition. Finally, the Mexican negotiators concluded that Mexico would accept the *ad hoc* Binational Panels mechanism but with a “reverse nomination process” in which, for example, the Mexicans would choose the American panelists and vice versa. This process would avoid the likelihood of division along national lines in the Panel decisions and increase confidence in the panelists’ impartiality. The system - although initially proposed for Chapter 19 - was implemented in the NAFTA Chapter 20 dispute settlement mechanism but not accepted by the Americans for antidumping and countervailing duties matters. It seems to me that the Mexican suggestions were not very radical and that the negotiators were interested at least in maintaining the FTA system which apparently had been fairly successful for the Canadians as the “weak” Party in the FTA context. Of course Mexico would be an even weaker Party and that is why the negotiators were concerned to obtain a clear and reliable mechanism. Nevertheless, in my view, the original Mexican proposals were still very sound in light of the shortcomings demonstrated by the NAFTA mechanism in the first three years of its operation.

By accepting the mechanism for dispute resolution of chapter 19 of the NAFTA, Mexico entered an “adventure into the unknown.” After several disappointing

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204 *Ibid*


206 The reverse nomination process is accepted in Chapter 20 of NAFTA in cases in which the disputing parties are unable to agree on the chair of the Panel and in cases where there are more than two disputing parties. *See Article 2011 1(b) and 2(b) and (c) of the NAFTA.*
experiences in international arbitration cases. Mexicans had reason to be skeptical about this type of mechanism. Nevertheless, its virtue is that without constraining the sovereignty of the Parties, the panels are able to control abusive or arbitrary application of domestic trade remedy laws.

This brief overview of the original objectives of Chapter 19, raises a fundamental question: Do the original objectives and assumptions underlying Chapter 19 still justify the existence of this mechanism? In the previous chapter. I said that the shortcomings in the NAFTA standard of review could be eliminated if the GATT/WTO standard were adopted as a benchmark. If there is now a multilateral mechanism, why do we still need the NAFTA mechanism?

Fundamental flaws in the system have been revealed during its operation between the original two partners. Canada and the United States. On the other hand. the original assumptions or justifications of the Chapter 19 binational review scheme presented for the approval of the American Congress. apparently no longer exist. Malcom Wilkey. former Circuit Judge and Ambassador of the United States who participated in the Softwood Lumber case. indicates that the three original underlying assumptions of the system no longer exist. First, the scheme was to be temporary and the two original

207 Two examples: In El Chamizal (Mexico v. United States. 1911) a Canadian arbitrator - Eugene Lafleaur - decided in favour of Mexico in a territorial dispute in the Rio Bravo (Rio Grande). The United States did not recognize the award until 1962 through an agreement between President López Mateos and President Kennedy. See Antonio Gómez Robledo. México y el Arbitraje Internacional (Mexico City: Porrua 1994). In the Clipperton Island Case (France v. Mexico 1931) the King of Italy, as an arbitrator selected by the parties. decided against Mexico. Cited in J.G. Merrils, International Dispute Settlement (Cambridge: Grotius 1996) at 81.

208 Cf. Michael Trebilcock and Robert Howse. op. cit. supra 2 at 407.

209 I deal with the main shortcomings of the system in Section E of this chapter.
Parties would negotiate substantive agreement on antidumping and countervailing duties; unhappily the negotiations were not successful.\textsuperscript{210} Second, the arrangement was to apply only to Canada, where the assumed convergence of legal traditions would make it easy for panelists of one country to interpret and apply the domestic law of the other Party. Cases like the \textit{Softwood Lumber}.\textsuperscript{211} demonstrated that the similarities were not that obvious.\textsuperscript{212} This similarity is no longer true given the inclusion of Mexico and the possibility of the inclusion of Chile, both countries with a civil law tradition. Lastly, Chapter 19 could be justified in 1987 and 1993 by the fact that there was no readily available alternative. This argument is no longer valid because in January 1995 the Dispute Settlement Understanding of the GATT/WTO came into force. The GATT/WTO provides substantive obligations with regard to antidumping and countervailing duties. Domestic law is no relevant, but the panels are to determine if the action taken by the administrative agency of a country violates an international obligation assumed by one of the parties.\textsuperscript{213}

In sum, we have a dispute settlement system designed for a special situation, expected only to last several years and whose constitutionality has been questioned under United States and Mexico law.\textsuperscript{214} Especially in the United States, the mechanism has

\begin{footnotesize}
\begin{enumerate}
\item Malcom Wilkey, \textit{When Chapter 19 Goes, What will Replace it?} Lecture presented at the Inaugural Symposium of Centro JURICI and SALED, ITESM (Monterrey Institute of Technology and Higher Studies) Monterrey, N.L., Mexico, November 1995. at 4.
\item \textit{See supra} 153
\item Malcom Wilkey, \textit{op. cit. supra} 210, at 4.
\item \textit{Ibid.}
\item I deal with constitutional issues in Chapter IV of this thesis.
\end{enumerate}
\end{footnotesize}
been "...faced with the permanent hostility of powerful U.S. business interests, and assured of no renewal or no extension by a powerful bipartisan group of United States Senators."\textsuperscript{215} The NAFTA Parties agreed upon a comprehensive system for dispute resolution that includes not only antidumping and countervailing duties but other disputes as well. Would it be possible for NAFTA Parties to agree upon a dispute settlement mechanism to replace Chapter 19? NAFTA's Chapter 19 mechanism is a part of a wider scheme of institutional arrangements under the North American treaty. Therefore, it is impossible to analyze it in isolation from the rest of the treaty. In the next section, I briefly describe the different mechanisms of NAFTA for resolution of controversies between the Parties.

\textbf{B. THE DISPUTE SETTLEMENT MECHANISMS OF THE NAFTA}

There is a decentralized system for dispute settlement under NAFTA which includes five major mechanisms devoted to resolving disputes associated with the free trade agreement. Chapter 20 is the main mechanism provided for all general disputes arising under the terms of the NAFTA. In addition to Chapter 19, there are other dispute settlement mechanisms: for investment disputes (Chapter 11) and for labour and environmental disputes (the North American Agreement on Labor Cooperation, NAALC\textsuperscript{216}, and the North American Agreement on Environmental Cooperation.

\textsuperscript{215} Malcom Wilkey, \textit{op. cit. supra 210}. at 1

NAAEC\textsuperscript{217}) Also, the main text of the NAFTA contains special provisions for international commercial arbitration. I will analyze briefly the three most important mechanisms for dispute resolution outside Chapter 19: 1) in the investment sector; 2) in the area of private international commercial arbitration; and 3) the general mechanism for dispute resolution between states in Chapter 20.

1) Section B of Chapter 11 of the NAFTA regulates the Investor - State procedure by which an investor of who is a national of a Party may submit to arbitration a claim that another Party has breached an obligation in the matter of investment and the investor has incurred loss or damage by reason of or arising out of that breach. \textsuperscript{218}

Article 1120 of the NAFTA provides that when six months have elapsed since the events giving rise to a claim, an aggrieved investor may submit the claim to arbitration under the ICSID\textsuperscript{219} Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention. If either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention, the claim must be submitted under the Additional Facility Rules of ICSID. Alternatively, the UNICTRAL\textsuperscript{220} Arbitration Rules can also be applied. There are several exceptions to these procedure, the most important being the establishment of a Consolidation Tribunal under the


\textsuperscript{218} See Articles 1116, 1117, 1102, 1103, 1106, 1109, 1110, 1503 (2) and 1502 (3)(a) of the NAFTA.

\textsuperscript{219} International Centre for Settlement of Investment Disputes, created under the \textit{Convention on the Settlement of Investment Disputes between States and Nationals of other States}, Washington, DC March 18, 1965.

UNICTRAL Arbitration Rules. In accordance with Article 1126, this Tribunal can be established when several Investor-State procedures have a question of law or fact in common and it can hear and determine together, all or part of the claims.\(^{221}\)

As the Chapter 19 mechanism, the Investor-States procedure involves the participation of private parties and it is not confined to States or government entities. There is also a close relationship between this mechanism and Chapter 20 of the NAFTA because, as established in Article 1136 (5), if a Party fails to abide by or comply with a final award, a Panel under Article 2008 can be established upon request of the investor Party.

2) The NAFTA gives prominence to alternative dispute resolution (ADR) as a means for settling controversies between nationals (individuals or enterprises) of the Parties. Among the different types of ADR mechanisms, arbitration is certainly the most important. International commercial arbitration has demonstrated salient advantages, providing certainty and speed in the resolution of international private disputes.\(^{222}\) Article 2022 of the NAFTA provides that “Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution, for the settlement of international commercial disputes between private parties in the free trade area.”\(^{223}\) In addition, the NAFTA establishes two Committees to promote

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\(^{221}\) See Article 1126 (2) (a) and (b) of the NAFTA.

\(^{222}\) See generally Jorge Alberto Silva. *Arbitraje Comercial Internacional en México* (Mexico City: Péreznieto, 1994)

\(^{223}\) Article 2022 (1) of the NAFTA.
the use of arbitration: an Advisory Committee on Private Commercial Disputes\textsuperscript{224} comprised of persons with expertise or experience in the resolution of private international commercial disputes; and an Advisory Committee on Private Agricultural Commercial Disputes.\textsuperscript{225}

3) It was critically important for the NAFTA negotiators to ensure agreement on an efficient and equitable general dispute settlement procedure. This was especially the case for the Mexican negotiators, given the economic and political asymmetry of Mexico and its northern partners. Chapter 20 of the NAFTA contains the provisions by which disputes between the Parties to the treaty - acting as States - can be resolved. According to Article 2004, the provisions of Chapter 20 "...shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004." It is important to highlight that this mechanism can be used not only when there is a perceived breach of the international agreement, but also when there is not such a breach but the implementation by one of the Parties of a measure that can cause nullification or impairment to another Party.

Canada, the United States and Mexico are all members of the GATT/WTO. With certain exceptions,\textsuperscript{226} as a general principle disputes regarding any matter arising under

\textsuperscript{224} Article 2022 (4) of the NAFTA.

\textsuperscript{225} Article 707 of the NAFTA.

\textsuperscript{226} See Article 2005 (2), (3) and (4) of the NAFTA.
both NAFTA and GATT, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.\footnote{227}

The most important exception in Chapter 20 is the mechanism for dispute resolution on antidumping and countervailing duties. In this area, which is the focus of this thesis, the NAFTA provides a special mechanism in Chapter 19 which will be analyzed in the next section.

\section{C. Chapter 19 of the NAFTA. Tasks and Characteristics of the Binational Panels.}

\subsection{1. Elements of Chapter 19}

The most important part of Chapter 19 of the NAFTA is the creation of a unique Binational panel review process. driven by independent and \textit{ad hoc} panels. established to review final antidumping and countervailing duty determinations issued by the competent investigative authorities\footnote{228} of the NAFTA Parties. Binational Panels, however. are part of a wider mechanism provided in Chapter 19. which contains four fundamental elements:

- A procedure for review of statutory amendments of national antidumping and countervailing duty provisions.\footnote{229}

\footnote{227}Article 2005 (1) of the NAFTA. Issues regarding the choice of forum - NAFTA or GATT/WTO for NAFTA Parties. are analyzed in section D of this Chapter.

\footnote{228}According to Annex 1911 of the NAFTA, competent investigative authority means, in the case of Canada: the Canadian International Trade Tribunal (CITT) and the Deputy Minister of National Revenue (DMNR); in the case of the United States: the International Trade Administration of the Department of Commerce (ITA-DC) and the International Trade Commission (ITC); and in Mexico: the Secretariat of Trade and Industrial Development (Secretaria de Comercio y Fomento Industrial - SECOFI).

\footnote{229}Article 1903 of the NAFTA.
The review of final antidumping and countervailing duty determinations by Binational Panels. 230

The review procedure by the Extraordinary Challenge Committees (EEC), to supervise the Binational process. 231

The corrective mechanism to ensure the execution of a Panel decision. 232

2. REVIEW OF FINAL ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS.

For the purposes of this thesis, the most important mechanism is the Binational Panel review. Article 1904 of the NAFTA provides that "...each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." 233 A decision rendered by a binational panel shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel. 234 The procedural mechanics of Chapter 19 establish that a request for a Panel shall be made in writing to the other involved Party, i.e. from government to government, within 30 days following the date of publication of the final determination in question in the official journal of the importing Party. 235 The Parties of NAFTA have

230 Article 1904 of the NAFTA.

231 Article 1904 (13) of the NAFTA.

232 Article 1905 of the NAFTA.

233 Article 1904 (1) of the NAFTA.

234 Article 1904 (9) of the NAFTA.

235 Article 1904 (4) of the NAFTA.
adopted rules of procedure\textsuperscript{236} designed to result in final decisions within 315 days of the date on which a request for a panel is made.

As described in the introduction to this thesis, NAFTA's Article 1904 replaces judicial review in order to establish whether an antidumping or countervailing duty determination was in accordance with the unfair trade law of the importing Party. Therefore, the Panels are international adjudicatory bodies of domestic law, i.e. they apply not an \textit{ad hoc} set of international rules but "...the importing Party's"\textsuperscript{237} antidumping or countervailing duty law to the facts of a specific case...\textsuperscript{238} It has been also indicated that the Panels apply a specific standard of review set out in Annex 1911 of the NAFTA and that they must also apply the general legal principles governing the courts of the importing party.\textsuperscript{239} The Chapter 19 Panels have a limited jurisdiction over certain final administrative determinations: if, for example, an injury determination made by the United States ITC covers imports from several countries, including Mexico or Canada, a Binational Panel would have jurisdiction only with respect to imports from a NAFTA member country.\textsuperscript{240}


\textsuperscript{237} Party refers to one of the countries members of NAFTA: Canada, the United States or Mexico. An importing Party is the one that issued the final determination (Article 1911 of the NAFTA).

\textsuperscript{238} Article 1901 (1) of the NAFTA.

\textsuperscript{239} See Article 1904 of the NAFTA.

Speed is one of the most important goals of the Chapter 19 mechanism. Article 1904 (14) of the NAFTA provides a schedule with specific deadlines: a) 30 days for the filing of the complaint; b) 30 days for designation or certification of the administrative record and its filing with the panel; c) 60 days for the complainant to file its brief; d) 60 days for the respondent to file its brief; e) 15 days for the filing of reply briefs; f) 15 to 30 days for the panel to convene and hear oral argument; and g) 90 days for the panel to issue its written decision.241

The Chapter 19 system does not restricted to complaints by states as it is the case with many international dispute settlement mechanisms,242 but any person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of a final determination of the importing Party’s authority,243 can request the review of a Panel through the complainant’s government. The participation of private parties in dispute resolution mechanisms signed between sovereign states is part of the trend for the redefinition of sovereignty in International Law is taking place. As one author argues “...sovereignty must be about how persons, who in the past have been objects of state ownership, become subjects who come to speak for themselves.” Panels can either uphold a final determination of the Importing

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241 Article 1904 (14) of the NAFTA.

242 Another important exception are the provisions of Section B of Chapter 11 of the NAFTA discussed in the previous section of this chapter, with respect to the settlement of disputes between a Party and an investor of another Party.

243 Article 1904 (5) of the NAFTA.

Party's Authority or remand it for action not inconsistent with the Panel's decision. As has been said, their decisions are binding on the parties with respect to the particular issue. However, their decisions do not create any sort of precedent and their effects are not *erga omnes* but only *inter partes* and do not bind other Binational Panels or the domestic courts of the Parties.\(^{245}\) As in a process of international arbitration,\(^{246}\) the purview of the Panels' inquiry is limited to whether the competent investigative authority, based solely upon evidence contained in the administrative record, applied its national antidumping and countervailing duty law correctly when issuing the contested final determination.\(^{247}\) Because Chapter 19 permits the intervention of private parties, it is possible to conclude that this is an *intermediate* mechanism between private and public international arbitration.\(^{248}\)

3. **Panelists**

A Binational Panel is not a permanent supranational court, but an *ad hoc* adjudicatory body made up of panelists from the Parties involved. In that sense, they are not like the traditional model of third-party arbitration. Each *ad hoc* Panel established

\(^{245}\) See Article 1904 (8) and (9) of the NAFTA.

\(^{246}\) See J.G. Merrils, *op. cit. supra* 207 at 89: "An arbitrator only has the authority to answer the question or questions referred to him and if he exceeds his jurisdiction his award can be challenged as a nullity."

\(^{247}\) Article 1904 (2) of the NAFTA.

\(^{248}\) See Yvonne Stinson Ortiz, *Mecanismos Alternativos de Solución de Controversias Comerciales Internacionales: Arbitraje Internacional Público bajo el TLCAN*. Lecture presented at the Inaugural Symposium Centro JURICI and SALED, ITESM (Monterrey Institute of Technology and Higher Studies), Monterrey, N.L., Mexico, November 1995, at 3: "La clasificación anterior nos permite afirmar que los procedimientos del Capítulo XX pueden ser considerados como estrictamente de derecho internacional público, y los capítulos restantes deben ser analizados a la luz de sus propios méritos."
pursuant to Article 1904 of the NAFTA comprises five panelists, a majority of whom "shall be lawyers in good standing". According to Annex 1901.2 of the NAFTA, the Parties shall establish and maintain a roster of individuals to serve as panelists. This roster of at least 75 candidates shall include "judges or former judges to the fullest extent practicable." The members of the roster should have familiarity with international trade law and should be citizens of Canada, the United States and Mexico. From the roster, each Party involved in a dispute shall appoint two panelists in consultation with the other involved Party. The parties shall agree in the selection of the fifth panelist or, if unable to agree, they shall decide by lot. The chair of the Panel is to be appointed from among the lawyers on the Panel by majority vote or, if necessary, by lot.249

4. EXTRAORDINARY CHALLENGES

A Panel decision is not appealable to a domestic court.250 This aspect has entailed several constitutional concerns, especially in Mexico and in the United States.251 Although one of the purposes of the Chapter 19 mechanism is finality, there does exist a form of "appeal" through the Extraordinary Challenge Procedure. A Party may avail itself of this procedure when, inter alia, a member of the Panel was guilty of gross misconduct; when the panel seriously departed from a fundamental rule of procedure; or when the panel exceeded its powers or failed to apply the appropriate standard of review. If any of

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249 Cf. Annex 1901.2 (1), (2), (3) and (4) of the NAFTA.

250 Article 1904 (11) of the NAFTA.

251 The constitutional issues will be analyzed in Chapter IV of this thesis.
these factors is alleged by one of the Parties to have materially affected the panel’s decision, the Parties are to establish an Extraordinary Challenge Committee (ECC) from a 15-person roster comprised of federal judges or former federal judges from the three countries. An ECC decision is binding on the Parties and unappealable. The ECC can take one of the following actions: a) in cases of panelist misconduct or bias, to vacate the Panel decision in question and establish a new Panel; b) remand the decision to the original Panel for further consideration; or c) deny the challenge and affirm the original Panel decision.

5. SAFEGUARDING THE PANEL SYSTEM

A fundamental element of NAFTA Chapter 19 is the corrective safeguard mechanism provided under Article 1905. This process will be applied if it is determined that the application of one of the Party’s law: a) prevented the establishment of the Binational Panel; b) denied the binding nature of the Binational Panel’s decisions; or c) evaded the judicial review of a disputed final administrative determination. An initial consultation period is established in Article 1905. If no agreement is reached, the complaining Party may request the establishment of a special committee comprised of three members chosen from the same roster as the ECC Panels. The Parties have 60 days to negotiate a solution, provided that the Special Committee has made an affirmative

252 Cf. Article 1904 (13) and Annex 1904.13 of the NAFTA.

253 See Annex 1904.13 (3) of the NAFTA.

254 See Article 1905 (1) of the NAFTA.
finding. If no solution is reached by means of negotiation, the complaining Party may suspend the operation of Article 1904 with respect to the other Party or deny that Party such benefits under the NAFTA as may be appropriate under the circumstances. In other words, the NAFTA sanctions a right of retaliation in order to safeguard the dispute settlement mechanism.

6. CODE OF CONDUCT

To protect the integrity and impartiality of the proceedings, Article 1909 of the NAFTA provides that the Parties shall establish a code of conduct for panelists, ECC members and special committees. In addition, Article 1901.2(1) provides that panelists may not be "affiliated" with a Party and cannot "take instructions" from a Party. Government employees and political appointees cannot be panelists. This restriction, however, does not apply to judges. The approved Code of Conduct establishes that a panelist or committee member "...shall observe high standards of conduct so that the integrity, fairness and independence of the dispute settlement process will be preserved." This Code requires disclosure of any present or past financial, business, professional, personal, or other interests in the outcome of the Panel proceeding. The

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255 See Article 1905 (2), (3), (4), (5), (6), and (7) of the NAFTA.

256 Cf. Article 1905 (8) of the NAFTA.

257 Cf. James R. Cannon, Jr., op. cit. supra 240 at 23.

failure to disclose became an issue in the Softwood Lumber case where the decision was challenged by the United States on the ground that two Canadian members of the Panel failed to disclose information that revealed the appearance of partiality and bias. There has not been any important problem with the Code of Conduct in the three Panels reviewing a Mexican agency determination.

7. THE NAFTA SECRETARIAT

The Free Trade Commission and the Secretariat are the two permanent institutions of the NAFTA. The Secretariat assists in implementing the dispute resolution mechanism under Chapters 19 and 20. In some respect, the Secretariat's functions are analogous to those of court clerk's office in the United States. Under Article 1908, each Party must establish a separate division within its Section (there is a Section for each country) responsible for administrative assistance to Chapter 19 Panels or committees. The Secretariat does not have a formal authority to deal with motions; this factor has been an issue in the Binational Panels experience.

In summary, the NAFTA's Chapter 19 current system is a mechanism which replaces domestic judicial review and applies domestic law to resolve an international

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260 James R. Cannon, Jr., op. cit. at 24.

261 See Articles 2001 and 2002 of the NAFTA.

262 Cf. James R. Cannon, Jr., op. cit. supra 240. at 16.

263 Cf. Victor Carlos García Moreno, El Capítulo 19 del Tratado de Libre Comercio de América del Norte, ALEGATOS Núm. 32, Mexico City (January-april 1996) at 58.
trade controversy. It is a Binational ad-hoc arbitration mechanism which is not compelled to follow any sort of precedent in its resolutions: it permits the participation of private parties in the proceedings and it is protected and regulated by strict rules of procedure, safeguard mechanisms and codes of conduct. In contrast, the GATT Uruguay Round approved an Understanding on Rules and Procedures Governing the Settlement of Disputes: this mechanism is briefly analyzed in the next section of this chapter.

D. THE GATT/WTO'S DISPUTE SETTLEMENT MECHANISM

The dispute settlement provisions of the GATT/WTO Agreement are found primarily in the Understanding of Rules and Procedures Governing the Settlement of Disputes.264 This Understanding adopted in the Uruguay Round eliminates many of the flaws of the former GATT mechanisms for dispute resolution. In contrast with the NAFTA, the GATT/WTO contains substantive antidumping and countervailing duty provisions: thus, a Panel established under the Understanding provides for a determination of whether antidumping and countervailing duty decisions are consistent with those substantive provisions.265 NAFTA, as has been stated, replaces domestic judicial review with an ad hoc mechanism, but applies the standard of review of each of the Parties. Another important difference is that the NAFTA allows for full participation

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264 See Dispute Settlement Understanding Final Act Embodying the Results of the Uruguay Round of Multi-national trade Negotiations, Marrakesh, 15 April 1994. Hereinafter the “Understanding”.

by non-governmental parties, while the WTO Agreement emphasizes government-to-government conciliation with a very limited role for non-governmental parties.\textsuperscript{266}

The Understanding emphasizes the importance of consultations in securing dispute resolution, and requires a Member to enter into consultations within 30 days of a request by another Member. If there is no settlement within 60 days from the request, the complaining party may request the establishment of a panel. Where consultations are impossible, the complaining party may move directly to request a panel.\textsuperscript{267} The parties may voluntarily agree to follow alternative means of dispute settlement, including good offices, conciliation, mediation and arbitration.\textsuperscript{268}

The WTO mechanism provides for the establishment of a Dispute Settlement Body (DSB), which is responsible for: (i) administering the rules and procedures of dispute settlement; (ii) establishing panels; (iii) adopting panel reports and appellate body reports; (iv) supervising implementation of rulings and recommendations; and (v) authorizing retaliation against member states which do not comply with rulings and recommendations.\textsuperscript{269}

\textsuperscript{266} Ibid.

\textsuperscript{267} Cf. Article 4 of the Understanding. Consultations are also an important part of the Agreements on Dumping and Subsidies of the Uruguay Round: See Article 17 of the Agreement on Implementation of Article VI of the GATT 1994; and Articles 13 and 30 of the Agreement on Subsidies and Countervailing Duties.

\textsuperscript{268} See Articles 5 and 25 of the Understanding.

Where a dispute is not settled through consultations, the Understanding requires the establishment of a panel, at the latest at the meeting of the DSB following that at which the request is made unless the DSB decides by consensus against establishing a Panel. Panels consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat maintains a list of experts satisfying the criteria. Panel procedures are set out in detail in the Understanding. A panel will normally complete its work within six months or, in cases of urgency, within three months. Panel reports must be considered by the DSB for adoption within 20 days after they are released to Members. A Panel report will be adopted within 60 days of their issuance unless the DSB decides by consensus not to adopt the report or one of the parties notifies the DSB of its intention to appeal. This norm of consensus is an important change from the previous dispute settlement mechanism of the GATT, in which the consensus was necessary to adopt the report, including the consent of the losing Party.

In contrast with the NAFTA, the WTO mechanism has a formal appeal process. An Appellate Body has been established, composed of seven members, three of whom serve on any one case. An appeal is limited to issues of law addressed in the panel report and legal interpretations developed by the panel. Appellate proceedings must be

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270 See Article 6 of the Understanding.

271 See Article 8 (4) of the Understanding.

272 Article 12 (8) and (9) of the Understanding.

273 See Article 16 of the Understanding.

274 Cf. Robert Howse, op. cit. supra 93, at 27.
completed within 60 days from the date a party formally notifies its decision to appeal. The resulting report must be adopted by the DSB and accepted by the parties within 30 days following its issuance to Members, unless the DSB decides by consensus against its adoption.\textsuperscript{275}

Once the panel report or the Appellate Body report is adopted, the party adversely affected by the decision must advise the DSB how it intends to implement or adopt the recommendations. If it is impossible to comply immediately, the party concerned shall be given \textit{a reasonable period of time}, to be decided either by agreement of the parties and approval by the DSB within 45 days of adoption of the report or through arbitration within 90 days of adoption. In any event, the DSB will keep the implementation under regular surveillance until the issue is resolved.\textsuperscript{276}

Article 22 of the Understanding sets out rules for compensation or the suspension of concessions in the event of non-implementation. Within a specified time-frame, parties can enter into negotiations to agree on mutually acceptable compensation. Where this has not been agreed, a party to the dispute may request the DSB's authorization to suspend concessions or other obligations to the other party concerned. The DSB must grant such authorization within 30 days of the expiry of the agreed time-frame for implementation. Disagreements over the proposed level of suspension may be referred to arbitration.\textsuperscript{277} In principle, concessions should be suspended in the same sector as that at issue in the panel

\textsuperscript{275} \textit{Cf.} Article 17 of the Understanding.

\textsuperscript{276} \textit{Cf.} Article 21 of the Understanding.

\textsuperscript{277} Article 22 (6) of the Understanding.
case. However, if this is not practicable or effective, the suspension can be made in a
different sector of the same agreement. If this is not effective or practicable and if the
circumstances are serious enough, the suspension of concessions may be made under
another agreement.278

There is some overlap between the GATT/WTO system and the NAFTA
mechanisms for dispute resolution. As a principle, article 2005 of the NAFTA establishes
that any matter arising under both the NAFTA and the GATT may be settled in either
forum at the discretion of the complaining Party.279 When a third Party intervenes in the
proceedings and there is not agreement between the Parties with respect to the forum, the
dispute normally shall be settled under the NAFTA.280 As for Chapter 19, a complaining
party can challenge an agency decision before a domestic court, before a NAFTA
Binational Panel or before the GATT/WTO mechanism. In contrast with Chapter 20 of
the NAFTA, there is no regulation in the agreement concerning the overlaps of Chapter
19 and the GATT.281 In theory, there is no restriction on challenging the same case in
both fora: the GATT/WTO and the NAFTA. The lack of coordination between the two
mechanisms gives rise to the likelihood that they will generate two different
jusrisprudences, which is a central element to consider in this thesis and that will be
addressed later in this chapter.

278 Article 22 (3) of the Understanding.
279 Article 2005 (1) of the NAFTA.
280 Article 2005 (2) of the NAFTA.
281 Cf. Victor Carlos García Moreno, El Capítulo 19 del Tratado de Libre Comercio de América del Norte,
ALEGATOS Núm. 32, Mexico City (January-april 1996) at 39
The substantial difference between the NAFTA and the GATT/WTO mechanisms is with respect to the decisional law. As has been said, in the NAFTA the standard of review is that of the importing Party while in the GATT/WTO it is a set of international rules. As to the procedure, the NAFTA is an *ad hoc* mechanism specifically designed for antidumping and countervailing duties, while the GATT/WTO is a mechanism for trade disputes in general.

Another substantial difference between the two mechanisms is with respect to the institutional framework. In the NAFTA the institutional framework is weaker than that of the GATT/WTO. As has been stated, Mexico proposed stronger institutions for the NAFTA but, during the negotiations of the agreement, these recommendations were rejected by the American negotiators. The GATT/WTO has a Dispute Settlement Body composed of the full organization membership that supervises the implementation of Panels and Appelate Body recommendations. The system is an authentic third-party adjudication process. It would be most enriching if some of the improvements in the GATT/WTO dispute settlement mechanism, such as a strong institutional framework, are introduced in the Chapter 19 mechanism. This was one of the original Mexican recommendations and I will deal with it in Section F of this Chapter.

Despite the improvements in the WTO mechanism "[t]he full compliance with the rules (...) is not completely assured, and one can therefore share the view that the WTO is


283 Ibid.
and will remain, for the foreseeable future, a hybrid creature, both diplomatic and legal, and that the creation of a supranational organization, which may be able to impose its decisions on the Member States, is still a long way to come.\textsuperscript{284} The Chapter 19 mechanism was born before the improved GATT/WTO system. In any event, the question arises: Is the WTO a better forum for the NAFTA members in which to resolve antidumping and countervailing duty disputes? If we have the GATT/WTO mechanism, why do we need the NAFTA's Chapter 19 system?

\section*{E. The Main Shortcomings of the NAFTA Mechanism: Which is the Better Forum?}

A general observation about the NAFTA's Chapter 19 is that it is a very specialized mechanism.\textsuperscript{285} The NAFTA is a treaty with a strong commitment to dispute resolution. However, as has been seen, while sharing the same goals, the GATT/WTO mechanism also provides instructive alternatives.

Some authors have listed four major advantages of the NAFTA mechanism to resolve antidumping and countervailing duty disputes:\textsuperscript{286}

1) The NAFTA provides an expeditious review. As stated, the mechanism establishes specific time limits to which all parties and panel members are required to adhere. The deadlines require the issuance of final decisions within 315 days from the

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\begin{itemize}
\item \textsuperscript{284} Claudio Cocuzza \& Andrea Forabosco, \textit{op. cit. supra} 269, at 188.
\item \textsuperscript{285} Victor Carlos García Moreno, \textit{op. cit. supra} 196, at 48.
\item \textsuperscript{286} See Robert E. Burke \& Brian F. Walsh: \textit{NAFTA Binational Panel Review: Should It Be Continued, Eliminated or Substantially Changed?} 20 \textit{Brook. J. Int'l L.} 529 (1995) at 530-535.
\end{itemize}
filing of a request for panel review.\textsuperscript{287} Also, as the mechanism does not involve a formal appeal, the time spent pursuing a final decision is significantly decreased, with the exception of those few issues which may be the subject of review by an extraordinary challenge.\textsuperscript{288}

2) Issues are reviewed by a panel rather than by a single individual. This fact, and the panelists’ expertise in areas of international trade, is responsible for the quality of the panel decisions.\textsuperscript{289} The Panels reviewing Mexican agency determinations.\textsuperscript{290} are noted for the in-depth analysis of the issues surrounding the dispute. It seems to me that this in-depth analysis cannot be expected from the resolutions of the Federal Fiscal Tribunal which reviews the SECOFI determinations. This tribunal is not specialized in international trade but in general tax matters. In this respect, some commentators consider that Mexico is in a serious disadvantage as compared with Canada and the United States.\textsuperscript{291} It is an advantage for foreign exporters to have a regional mechanism such as the Binational Panels at their disposal, because it enables them to avoid the risk of facing an uncertain and unknown level of domestic justice. In sum, the specialization of the Binational Panels is an advantage of the NAFTA’s Chapter 19 system.

\textsuperscript{287} Article 1904 (14) of the NAFTA.

\textsuperscript{288} Cf. Burke & Walsh, \textit{op. cit. supra} \textsuperscript{286}, at 532.

\textsuperscript{289} \textit{Ibid.} at 533.

\textsuperscript{290} MEX-94-1904-01 \textit{Flat Coated Steel Products from the USA}; MEX-94-1904-02 \textit{Cut to Length Plate products from USA}; MEX-94-1904-03 \textit{Crystal and Solid Polystyrene from the USA}.

\textsuperscript{291} Interview with Victor Carlos Garcia Moreno, \textit{supra} 200.
3) Simplification of Procedures. Many innovative procedural simplifications are part of the NAFTA. For example, antidumping and countervailing determinations involving several issues may result in only one proceeding before the panel.\textsuperscript{292} For instance, in a case where a Canadian exporter wishes to challenge a determination issued by the American Department of Commerce and a domestic party wishes to challenge certain aspects of the determination, but also support the aspects of the determination challenged by the foreign exporter, all issues can be dealt in one Panel proceeding. It is not necessary to bring separate Panel actions.\textsuperscript{293}

4) Probably the most compelling point in favour of the continued existence of the Binational Panels is that "...Canada and Mexico would not have become parties to these trade agreements [FTA and NAFTA] without the inclusion of these dispute settlement procedures..."\textsuperscript{294}

An evident advantage of the NAFTA's Chapter 19 mechanism is that it is part of the whole dispute settlement system of NAFTA. In this context, another perceived advantage should be addressed within the debate between \textit{multilateralism} versus \textit{regionalism}. In the view of some commentators a regional trade agreement without a proper dispute settlement mechanism is to some extent "incomplete".\textsuperscript{295} In contrast to this argument, I have already mentioned the overlaps between the different dispute resolution

\textsuperscript{292} Cf. Burke & Walsh, \textit{op cit. supra} 286, at 533-534.

\textsuperscript{293} Ibid.

\textsuperscript{294} Ibid. at 534.

\textsuperscript{295} Interview with Victor Carlos Garcia Moreno, \textit{supra} 200
mechanisms. A proliferation of regional dispute settlement processes "...poses a threat to clarity and certainty in trade rules. Overlap between GATT and regional obligations, the latter often stated in similar but not identical terms to those in the GATT, can create confusion with respect to the appropriate interpretation of both sets of rules."\(^{296}\) Nevertheless, it seems to me that the general perception in Mexico is that regional arrangements require regional mechanisms.\(^{297}\) The NAFTA is a regional free trade agreement, an exception to the Most Favoured Nation principle of the GATT. It has been argued that through a regional agreement it is easier to implement "real" economic integration and that the progress made in regional arrangements also advances progress at the multilateral level.\(^{298}\) Perhaps this argument is stronger from a political view than from an economic perspective.

Despite these perceived advantages, the Binational Panels mechanism also has serious shortcomings. These shortcomings are both administrative and substantive, because after all, "[q]uestions that a binational panel faces are mixtures not only of law and fact, but also of economics..."\(^{299}\) I will refer to the most relevant issues in the following pages.

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\(^{296}\) Trebilcock and Howse, op. cit. supra 2, at 429.

\(^{297}\) Interview conducted by author with Mexican Panelist Héctor Cuadra y Moreno, National Autonomous University of Mexico, Centre for International Studies, Mexico City, May 26th, 1997. (hereinafter: Interview with Héctor Cuadra y Moreno)


\(^{299}\) Andreas F. Lowenfeld in Forum...op cit. supra 105, at 351.
a) The problem of the standard of review.

As has been stated, according to the text of the NAFTA, Binational Panels, in reviewing a competent investigative authority determination, are requested to apply the standard of review for the importing Party established in Annex 1911\textsuperscript{300} and the legal principles that a court of the importing country would apply to such a review.\textsuperscript{301} In general, a Binational Panel should apply the antidumping and countervailing duty legislation of the importing Party.\textsuperscript{302} In the previous chapter, I have indicated that the articulation and application of the standard of review has been one of the most important flaws in the Binational Panels' work. Moreover, by comparing the application of the Mexican standard in three different cases reviewing a Mexican final agency determination, I have found that the articulation was very different.

The Panel decisions analyzed in the previous chapter showed that they were not applying the same criteria as a domestic court would. In the Mexican experience, only the Panel in Cut to Length Plate Products from the USA\textsuperscript{303} recognized that it was obliged

\textsuperscript{300} Annex 1911 of the NAFTA establishes: "standard of review means the following standards, as may be amended from time to time by the relevant Party: (a) in the case of Canada, the grounds set out in subsection 18.1 (4) of the Federal Court Act, as amended, with respect to all final determinations; (b) in the case of the United States, (i) the standard set out in section 516A (b)(1)(B) of the Tariff Act of 1930, as amended, with the exception of a determination referred to in (ii), and (ii) the standard set out in section 516A (b)(1)(A) of the Tariff Act of 1930, as amended, with respect to a determination by the U.S. International Trade Commission no to initiate a review pursuant to section 751(b) of the Tariff Act of 1930, as amended; and (c) in the case of Mexico, the standard set out in Article 238 of the Federal Fiscal Code ("Código Fiscal de la Federación"), or any successor statutes, based solely on the administrative record.

\textsuperscript{301} See Article 1904 (3) of the NAFTA.

\textsuperscript{302} See Article 1904 (2) of the NAFTA.

\textsuperscript{303} MEX-94-1904-02
to apply the same standard as a domestic court. By doing so, the Panel extended its jurisdiction beyond the limits established by the NAFTA.\textsuperscript{304}

The problem of the standard of review seems to be aggravated by the fact that the NAFTA enshrines two different legal traditions: common law and civil law. Therefore, this makes it very difficult for an international adjudicatory body to apply domestic law exactly as a domestic court does. If Panels apply the law as a domestic court, what is the reason for its existence? Apparently, the governments of the three NAFTA Parties felt that the Panel system was more satisfactory than the domestic review.\textsuperscript{305} Of course it is known that the original idea of applying domestic law to resolve disputes under NAFTA’s Chapter 19 had to do with the perceived bias on the part of U.S. decision makers when they applied their own laws.\textsuperscript{306}

On the other hand, the existence of different interpretations of the standards of review has led to different levels of deference to the competent investigative authority and has created inconsistency in the decisions of the panels. In Chapter II I indicated the differences between the American and Canadian standards of review. Canadian law requires significantly greater deference to agency decisionmaking than the U.S. standard.\textsuperscript{307} In Mexico there is not a deferential principle as there is in the U.S. or

\textsuperscript{304} See Section D in Chapter II of this thesis.


\textsuperscript{307} Cf. Robert Howse, \textit{op. cit. supra} 93, at 12.
The Mexican standard set out in Annex 1911 of the NAFTA is Article 238 of the Federal Fiscal Code which was originally created as a standard for all administrative determinations in tax matters. There is not a specific standard to be applied for antidumping and countervailing duties.

Despite these difficulties, the standard of review is not a problem for Mexican panelist Héctor Cuadra y Moreno. In his view, the Panels should have a broad jurisdiction to interpret the NAFTA and a wide discretion when applying the standard of review. In his opinion, the real problem is the bad "juridical technique" (técnicas jurídicas) applied by the NAFTA drafters that gives rise to wrong interpretations.

The Panels' inconsistency in the levels of deference to the administrative agency led me to conclude in the previous chapter that a harmonized standard of review for the three Parties of the NAFTA is necessary. According to the arguments exposed in chapter II, the Panels reviewing a Mexican agency determination should apply the GATT/WTO standard of review set out in the Uruguay Round Agreements, i.e., an international rather than a domestic standard.

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308 In Chapter IV I will deal with the juridical nature of the NAFTA's Chapter 19 mechanism in light of the Mexican law. The standard of review has been a constitutional concern in Mexico.


310 Interview with Héctor Cuadra y Moreno, supra 297.

311 See Section E in Chapter II of this thesis.
b) No appeal.

Although finality and speed are advantages of the NAFTA mechanism, a significant flaw is the fact that there is no right of appeal, either domestically nor internationally. The only alternative for a party dissatisfied with a Panel resolution is the ECC which "...should be perceived as a safety valve in those extraordinary circumstances where a challenge is warranted to maintain the integrity of the binational panel process."312 In contrast with the U.S.-Canada FTA, the NAFTA extends the grounds for Extraordinary Challenge review to include failure "to apply the appropriate standard of review."313 This may be considered as an explicit invitation to the ECC "...to re-open the whole case through examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision."314 Now that the GATT/WTO mechanism has its own appellate body, this extraordinary challenge mechanism seems too limited. In any event, the main concern about the lack of an appellate process in Chapter 19 comes from the fact that no domestic appeal is permitted.315

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312 In re Live Swine from Canada, No. EEC-93-1904-01 USA. As quoted by Burke & Walsh, op. cit. supra 286. at 540.

313 Annex 1904.13 of the NAFTA.

314 Cf. Robert Howse, op. cit. supra 93. at 14. (the emphasis indicates the quote from Annex 1904.13 (3) of the NAFTA)

315 The constitutional issues from the Mexican perspectives are analyzed in Chapter IV.
c) Panelists.

Another issue in the NAFTA mechanism has been the role of the Panelists. Should the panelists be trade experts or just lawyers? As stated earlier in this chapter, the NAFTA requires the presence of judges or former judges as panelists and that tends to judicialize the review mechanism. Usually, the kind of errors in agency determinations identified by Binational Panels, "...involve the examination of complex methodologies, empirical economic studies, including econometric modeling, and sometimes, dozens of specific calculations." In the view of Mexican panelist Víctor Carlos García Moreno the ideal is to combine in a Panel the experience of international trade lawyers with the expertise of economists. In contrast, Héctor Cuadra y Moreno believes that a lawyer competent in the analysis and theory of Economic Law is enough. In his view, it is very difficult for economists to understand the juridical issues involved in the Panels work. Another difficulty affecting the panelists' work is that in controversial cases there is sometimes a division along national lines: this fact often seeks to make a decision turn on seem based on which country has three as opposed to two panelists. However this

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316 Robert Howse, op. cit. supra 93, at 15.
317 Interview with Víctor Carlos García Moreno. supra 200.
318 In Mexico known as "Derecho Económico".
319 Interview with Héctor Cuadra y Moreno. supra 297.
describes an exceptional situation and in disputes involving Mexico there have not been any panel division along national.\textsuperscript{321}

Perhaps the most important problem has been the competence of the foreign panelists to interpret a domestic law. It seems to me that it is often very difficult for foreign panelists to articulate and apply a standard of review with which they may not be familiar. This has been an issue since the FTA days when it was assumed that Canadian and American laws were similar. This assumption was shared by the American Congress, but one commentator argued in 1991: "Congress thinks that they know Canadian law because they do not really realize that there are two different sets of Canadian law - civil and common - but they do not have a clue about Mexican law..."\textsuperscript{322} The experience between Canada and the United States seems to be unsatisfactory for an American perspective. At least this is the opinion of Judge Wilkey, who argued in an undertone of "legal racism": "The Canadians ought to be the most apt at bridging the gap between the two judicial systems. but I submit that they failed in \textit{Softwood Lumber}. perhaps also in the preceding \textit{Live Swine} case. How will the Mexicans or the Chileans cope with this system?"\textsuperscript{323} In my view, the Mexican lawyers' performance up to now done in the Binational Panels interpreting foreign law has been quite satisfactory. This is because Mexican lawyers are much more familiar with the U.S. and Canadian systems than is true in reverse. At least before the NAFTA came into force. American lawyers showed an

\textsuperscript{321} Interview with Víctor García Moreno. \textit{supra} 200.

\textsuperscript{322} Colleen S. Morton in \textit{Forum...op. cit. supra} 105. at 431.

\textsuperscript{323} Malcolm Wilkey, \textit{op. cit. supra} 210. at 8.
appalling lack of knowledge of Mexican law. However, the position has improved significantly since the NAFTA came into force. In sum, it seems to me that the real problem for the Mexican lawyers has been the proper articulation and application of the Mexican standard of review.

Another criticism made about the Panelists is that they are "too expert" and tend to redo the work of the experts in the administrative agency. In contrast, it has been said that the members of the Extraordinary Challenge Committees are "too generalist". At least from an American perspective, some ECC members lack knowledge or experience in judicial review of administrative agency action. These considerations raise the following question: Why should the Panels be Binational rather than Trinational?

d) Panels are creators of a different body of law.

Because most Panels make reference to other Panels' opinions although they are not obliged to do so. Chapter 19's mechanism has the potential to create a body of jurisprudence which diverges from the precedents created by domestic courts with respect to non-NAFTA exporters. Likewise, its decisions may differ significantly from the GATT/WTO Panels decisions. In Fresh, Chilled and Frozen Pork from Canada, a GATT Panel determined that, on the issue of specificity, United States law was not

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324 This is the view of Colleen S. Morton in Forum, op. cit. supra 105, at 431.


326 Ibid at 7.

327 Cf. John M. Mercury, op. cit. supra 152, at 603.

328 USA-89-1904-06 (hereinafter Pork)

consistent with the GATT. In contrast, the FTA Panel determined that the Department of Commerce’s specificity determination was in accordance with U.S. law.\(^{330}\) It seems to me that the creation of separate bodies of law is problematic for governments as well as exporters and importers. In my view, this danger is all the more pressing because it was not the intention of the Chapter 19 dispute settlement mechanism drafters to create a confronting jurisprudence.

In the Mexican experience with the Binational Panels’ system, this issue has been interesting. First, in the Mexican civil law tradition, the concept of jurisprudence as an obligatory source of law does not exist as it does in Canada or the United States. Judges are obliged to follow precedents in the sense of stare decisis only when the Supreme Court or the Federal Circuit Tribunals have established “obligatory jurisprudence”.\(^{331}\) Second, there are no relevant precedents involving antidumping and countervailing duty cases in the Mexican courts. The NAFTA jurisprudence is actually the first one for Mexican cases. At the same time it must be recognized that there is no consistency in the Panels decisions reviewing a Mexican agency determination. Because Panels by their very nature are *ad hoc*, the articulation and application of the standard of review differs from one case to another. The Panels are authorized to cite other Panel decisions, but they are not entitled to treat them as binding. In the view of Mexican panelist Héctor Cuadra y Moreno, it is necessary to create a “specialized jurisprudence”

\(^{330}\) Cf. Ms. Koteen’s comment in *Forum... op. cit supra* 105, at 384-385.

\(^{331}\) See Mexico’s *Ley de Amparo, Reglamentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, Diario Oficial de la Federación, (January 10, 1936) Article 192, 2nd. paragraph, and Article 193 2nd. paragraph.
of NAFTA: a jurisprudence that reflects the peculiarities of the regional agreement but not in conflict with the GATT/WTO fundamental principles.332 This raises the following question: Why should the Panels be *ad hoc* and not a permanent adjudicatory body?

e) Constitutional problems.

To examine in detail the serious constitutional issues raised by the NAFTA’s Chapter 19 would be beyond the scope of this chapter. In Chapter IV I will deal with the perceived unconstitutionality of the Chapter 19 mechanism in Mexico. For the purposes of this Chapter it is important to mention that the constitutionality of this dispute mechanism has been challenged in the United States on the grounds that it violates Article III section 1 of the American Constitution.333 In Mexico, some legal scholars have suggested, based on a literal and strict parsing of Articles 14 and 16 of the Mexican Constitution that the NAFTA mechanism may be unconstitutional.334 As stated earlier, the absence of an appeal procedure also raises several constitutional issues.

In summary, the NAFTA Chapter 19 is a limited system that only provides a means of reducing or eliminating duties resulting from *improperly* applied trade remedy laws.335 There are also other flaws in the NAFTA mechanism such as costs.336 Because of

332 Interview with Héctor Cuadra y Moreno, *supra* 297.

333 See generally, Burke & Walsh, *op. cit.* supra 260, at 546-553.


335 John M. Mercury, *op. cit.* supra 152, at 604.

these shortcomings. One author has argued that the WTO multilateral dispute settlement mechanism, as strengthened in the Uruguay Round, offers numerous advantages over the Binational Panel process.\textsuperscript{337} Other authors have argued that "serious consideration should be given to eliminating the panels" or if the system is to continue, improvements should be made.\textsuperscript{338} Wilkey J. has said: "The advantages of Chapter 19 to any country except Canada have yet to be proved. As long as Chapter 19 is included in NAFTA, it will be an insurmountable barrier to the extension of NAFTA to Chile or any other country. I respectfully submit that Chapter 19 inevitably will be eliminated, sooner or later, and that all friends of NAFTA should join in removing the uncertainty by making the date sooner and in agreeing upon a dispute settlement mechanism to replace Chapter 19."\textsuperscript{339} He adds that the dispute settlement body to which the complaining parties under the NAFTA ought to resort should be multinational in composition and empowered to interpret NAFTA or GATT/WTO obligations, but never a domestic law.\textsuperscript{340} He concludes that the GATT/WTO Dispute Settlement Understanding (DSU) already covers the subject matter of antidumping and countervailing duties among the United States, Canada and Mexico. Moreover, he says that Chapter 19 process has been made redundant and it is not necessary to continue asking foreign judges to interpret domestic law.\textsuperscript{341}

\textsuperscript{337} See Robert Howse, \textit{op. cit. supra} 93, at 28.

\textsuperscript{338} Burke & Walsh, \textit{op. cit. supra} 286, at 559-561.

\textsuperscript{339} Malcolm Wilkey, \textit{op. cit. supra} 210, at 1.

\textsuperscript{340} Ibid. at 10

\textsuperscript{341} Ibid. at 13.
I will not argue that Chapter 19 is a better dispute settlement forum than the GATT/WTO DSU. It is my argument that the NAFTA mechanism, if improved, should remain as a regional dispute settlement system because it has the following advantages as compared to GATT/WTO mechanism:

• The Panels’ resolutions create an international obligation automatically implemented under national law:

• it gives private parties direct access to the dispute settlement mechanism.

The first point has triggered serious constitutional issues in the United States and in Mexico. These issues are analyzed in Chapter IV of this thesis. The second point, however, deserves a brief analysis here. The availability of a dispute settlement mechanism to private parties relieves the national governments of the burden of raising a minor dispute to the level of a state-to-state dispute.342 In antidumping and countervailing duty disputes, private parties play a significant role: In the Mexican experience, some enterprises have been affected by protectionist policies of the American Department of Commerce.343 and they have had to litigate the cases, mostly at their own expense. Indeed, the participation of private parties in the Panels’ process has been relevant since the FTA days. As one commentator explains: "...I do not think that the ability of the governments to participate in the panels has had any influence on the panels.

342 Cf. Nina Norregaard, National Competition Policies and Trade Liberalisation under NAFTA. Thesis submitted in conformity with the requirements for the Master of Laws (LL.M.) degree, Faculty of Law, University of Toronto (1995) Citing: Kristin L. Oelstrom, A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA, 25 (No. 2) LAW AND POLICY IN INTERNATIONAL BUSINESS 783, at 802. (Commentary about the availability to private parties of dispute resolution mechanisms in competition law disputes)

343 See supra 45
Canada and the United States have not participated as capital ‘P’ parties to the agreement in the panel proceedings. They participated to the extent that they have only insofar as they would participate before the relevant courts under domestic law.\(^{344}\) In the Extraordinary Challenge Committees, however, the situation is different; here government participation is unavoidable because the alleged errors, if proven, threaten the integrity of the Chapter 19 mechanism.\(^{345}\) The participation of the administrative agency in the proceedings has given rise to issues such as whether this participation is as a party or as an intervenor. This issue has been particularly relevant in light of Canadian administrative law.\(^{346}\)

The participation of private parties in the Chapter 19’s binational review can give rise to some unusual situations. It could happen that two countries are on the same side of the dispute. For example, if an American manufacturer brings a dumping case against Canada and it is determined that there is no injury, the manufacturer may appeal; the Canadian parties will defend the decision and the American governmental parties will also defend the decision and yet there will be binational review.\(^{347}\)

In sum, the participation of non-government parties in NAFTA gives a considerable advantage to exporters seeking fair access to foreign markets. This fact has

\(^{344}\) James A. Toupin in *Forum...op. cit. supra 105*, at 372.

\(^{345}\) *Ibid.*


\(^{347}\) Cf. Andreas F. Lowenfeld in *Forum...op. cit. supra 105*, at 344.
been particularly important for Mexican exporters seeking access to the American market. These considerations persuade me that this accessibility of the Chapter 19 mechanism to private parties is an advantage that the GATT/WTO system does not have.

A more compelling argument to retain an improved Chapter 19 mechanism is that it relieves the pressure on the multilateral dispute settlement system. In the view of Mexican panelist Héctor Cuadra y Moreno, if all the antidumping and countervailing duties disputes were concentrated in the GATT/WTO, this multilateral mechanism would become slower, more problematic and more politicized.\textsuperscript{348}

In the light of the recent Mexican experience with the Binational Panels of NAFTA, in the next section and as a conclusion to this chapter, I proceed to make some suggestions for the improvement of the Chapter 19 mechanism.

\textbf{F. CAN CHAPTER 19 BE IMPROVED?}

As has been seen, experience shows that the Binational Panels suffer from several shortcomings. The most significant problem is the application of domestic law to resolve an international controversy. This factor has been especially problematic when a different legal tradition, such as the Mexican, is confronted. It has been a very difficult task for the Panels to apply Mexican domestic law as a domestic tribunal, especially when articulating and applying the proper standard of review. Moreover, it seems to me that to settle an international dispute by acting \textit{exactly} as a domestic court is contrary to the very

\textsuperscript{348} Interview with Héctor Cuadra y Moreno. \textit{supra} 297
nature of an international adjudicatory body. How can international standards be incorporated in an international adjudicatory body of domestic law? I have concluded in Chapter II that a feasible way to achieve more consistency in the resolutions of the panels is to incorporate the GATT/WTO standards in the articulation and application of the standard of review in the NAFTA cases: i.e., to superimpose international law in the body of domestic law.

I believe that some of the original suggestions made by the Mexican negotiators with respect to the structure of the Chapter 19 mechanism are still appropriate. In addition to the proposed substantive reform, some other changes should be implemented in the Panels themselves:

1) Panels as standing adjudicatory bodies.

Rather than creating ad hoc Panels for each case, a better alternative would be "...to establish a core of full time panel members consisting of persons who are capable of carrying on adjudicative activities but who are prohibited from appearing before any United States or foreign government agency that deals with trade in order to guarantee impartiality." This recommendation would also guarantee greater consistency in the

349 I do not mean to say that every international conflict should be a political rather than a legal conflict; however, by their very nature, international conflicts involve state interests and for this reason they should be dealt in a different way.

350 I consider these suggestions as an important part of this thesis from the perspective of the Mexican experience. They reflect a more appropriate way to face unfair trade disputes at the NAFTA level, both for Mexican exporters seeking fair access as well as for litigants. Nevertheless, I assume that probably the American Congress would never accept these changes in the NAFTA mechanism. Also, I consider the likelihood of these changes in a context where no harmonization is achieved with respect to unfair trade law between the Parties of the NAFTA. Of course, the "ideal" alternative would be the total elimination of antidumping and countervailing duties. See Trebilcock and Howse, op. cit. supra 2, at 121.

351 Burke & Walsh, op. cit. supra 286, at 562.
outcomes of the different cases. A permanent body knows that its action should be consistent because it faces different cases involving similar issues. Also, a permanent body would eliminate the problem of lack of accountability of the panel members and would avoid the danger of conflict of interest among its members.

The cost factor would be an important obstacle for the implementation of a permanent body. Nevertheless, the current NAFTA institutions such as the Secretariat, could evolve into this permanent body through a reform in the text of the Agreement. In sum, the institutional framework of the NAFTA would be stronger.

2) Trinational Panels.

By eliminating the ad hoc character of the Panels, the period of time taken to select the panelists for each case would be also dramatically reduced. It also seems to me that the composition of the Panels should be Trinational rather than Binational. For instance, in a case involving the review of the Mexican agency determination related to an American product, two members of the Panel would be Mexican, two from the United States, and both countries would choose a fifth Canadian panelist. The selection of panelists from the Permanent body for the specific case would be a responsibility of the Secretariat by means of a “reverse nomination process” i.e., the Mexican section of the Secretariat would choose the American panelists and vice versa. Given this reform of the NAFTA mechanism, division along national lines - as happened in the Softwood Lumber

352 This method, as has been explained, was accepted for disputes under Chapter 20 of the NAFTA.
case would be avoided. It would also confer on the mechanism the status of a more formal third party adjudication.

3) A permanent Appellate Body.

Without precedential effect or meaningful appellate-style review, there is no safeguard in Chapter 19 against the element of arbitrariness that can occur in Panel decisions. As a result, conflicting decisions involving the same order cannot be properly resolved. The Extraordinary Challenge Committees (ECC’s) provided by the current Chapter 19 system, are more in the nature of “safety valves” than real appeal opportunities. The initial tension with regard to the ECC’s has been between a “... U.S desire for broader appellate recourse in cases it believes were wrongly decided by a panel and a Canadian desire to restrict extraordinary challenges to rare instances of systematic abuse, such as gross misconduct and ultra vires action.”

With the creation of a standing dispute settlement body for the Chapter 19 system, disputes would be more speedily resolved, because the initiating process to establish the panel would be considerably faster. The possibility of an appeal procedure would not increase the delays and it would give the Parties a greater confidence in the procedure. It would also eliminate the “temptation” of challenging the Panel decisions in a domestic

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354 James R. Cannon, Jr., op. cit. supra 240, at 225.

355 Homer E. Moyer, Jr. Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, 27 THE INTERNATIONAL LAWYER 3 (1993) at 724. (See also footnote 89: The addition of the phrase “failing to apply the proper standard of review” in the text of NAFTA’s Article 1904(13) indicates broader grounds for an extraordinary challenge)
court and on constitutional grounds.\textsuperscript{356} Despite these arguments, I believe that an appellate mechanism could harm the two fundamental characteristics of an arbitration process: speed and finality. In any event, the implementation of a formal appeal of the Panels' resolutions should be made only if the Extraordinary Challenge mechanism proves to fail consistently. Mexico has not yet had any experience with the Extraordinary Challenge mechanism.

I do not agree with those who suggest the elimination of the NAFTA's Panel mechanism for antidumping and countervailing duties disputes. Rather, I argue that this mechanism should be strengthened and improved so it can operates efficiently as a very innovative alternative to the multilateral mechanism.

Despite the difficulty that involves the application of different standards of review and different levels of deference, the experience in the cases involving Mexican products has not been "catastrophic". In April 1997, the Mexican Section of the NAFTA Secretariat informed about the three Panels reviewing Mexican agency determinations.\textsuperscript{357} In \textit{Cut-to-Length Plate Products from the USA} the majority of the Panel remanded the determination. In \textit{Flat Coated Steel Products from the USA}, the Panel unanimously upheld in part and remanded in part the agency determination. This decision was

\textsuperscript{356} Constitutional issues are analyzed in Chapter IV of this thesis.

\textsuperscript{357} See Sección Mexicana del Secretariado de los Tratados de Libre Comercio, \textit{Informe sobre los Casos de Solución de Contestroversias del Capítulo XIV y XIX del Tratado de Libre Comercio de América del Norte} (April 16th, 1997) at 1-2
challenged on constitutional grounds in Mexico. Finally, in *Crystal and Solid Polystyrene from the USA*, the majority of the Panel upheld the agency determination. On the other hand, out of four cases involving Mexican products on which the United States Department of Commerce imposed antidumping duties, in only one of them did a Binational Panel uphold as a whole the American agency determination.

Antidumping and countervailing duties are significant obstacles for free trade and an adequate dispute resolution mechanism is essential, especially in a regional environment such as NAFTA. The rules of international trade have yet to reach the degree of maturity and unqualified acceptance of the principles applicable, for example, to human rights. The commitment to resolve international antidumping and countervailing duty disputes according to a rule of law should be of grater willingness to improve this complex, specialized area of the law.

In the next Chapter I will deal with the juridical nature of the Chapter 19 Binational Panels according to the Mexican law, the constitutional concerns that have

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358 See Chapter IV, Section C of this thesis. (An analysis of the *Amparo* lawsuit challenging the constitutionality of a Binational Panel resolution)

359 In two other cases: MEX-95-1904-01 and MEX-96-1904-01, the parties negotiated a settlement. In two other cases involving products from Canada (MEX-96-1904-02 and MEX-96-1904-03) the resolution is pending. See Sección Mexicana del Secretariado de los Tratados de Libre Comercio, *Informe sobre los Casos de Solución de Controversias del Capítulo XIX y XX del Tratado de Libre Comercio de América del Norte* (April 16th, 1997) at 2-3.

360 Ibid. at 4-7. See also Section D in the Conclusion to this thesis.


emerged since this mechanism was implemented, and how the Panels so far established to review a Mexican agency determination have addressed these legal issues.
In the previous chapter, it was stated that the constitutional concern has been a significant shortcoming of the NAFTA's Chapter 19 dispute settlement mechanism. This has been especially relevant in the United States and Mexico. In this context, in addition to the substantive weaknesses analyzed in chapter III of this thesis, it is necessary to analyze the constitutional problem. This chapter focuses in a very summary fashion on the most important problems posed by the NAFTA's Chapter 19 under the Mexican Constitution. Because American commentators were the first ones to place Chapter 19 under serious constitutional scrutiny, section A of this chapter will be a brief overview of the constitutional concerns in the United States. In order to determine the similitude and differences with the American arguments, section B. describes the most relevant constitutional problems in Mexico. I describe also, how the Binational Panels applying Mexican domestic law have dealt with these constitutional issues. Section C. analyzes the most important constitutional concern for Mexico: the *Juicio de Amparo* problem. Finally, section D. provides some conclusions and recommendations to address the constitutional concerns of the NAFTA's Chapter 19 in Mexico.
A. OVERVIEW OF THE CONSTITUTIONAL CONCERNS IN THE UNITED STATES.\textsuperscript{363}

Why has Chapter 19 been criticized as unconstitutional in the United States? It is essential to recall that in the United States "[n]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."\textsuperscript{364} Therefore, the constitutional scrutiny has been an issue since the FTA negotiations. Actually, the U.S. Department of Justice testified to Congress that the system violated the Appointments Clause\textsuperscript{365} set out in Article II of the American Constitution. Buckley v. Valeo\textsuperscript{366} held that individuals "exercising significant authority pursuant to the laws of the United States" must be officers of this country properly appointed under the process described in Article II.\textsuperscript{367} In this context, binational panelists are not appointed in conformity with the Appointments Clause. Critics of Chapter 19 deem the binational panelists "officers" of the United States pursuant to the definition held in Buckley v. Valeo, because the NAFTA directs Binational Panels to

\textsuperscript{363} This section focuses only on Chapter 19 issues. The discussion about the constitutionality of the NAFTA as an Agreement is beyond the scope of this section. See e.g. Bruce Ackerman and David Golove, \textit{Is NAFTA Constitutional?} (Cambridge: Harvard University Press, 1995) at 1: "Artic le 2, section 2 of the Constitution requires treaties to be approved by two thirds of the Senate. But many international accords, including the North American Free Trade Agreement (NAFTA) and the World Trade Organization, are approved as congressional-executive agreements by simple majorities of both Houses. "This is a modern development, departing radically from the constitutional practice of the first 150 years of the Republic."\


\textsuperscript{365} Hearing before the Committee on the Judiciary. United States Senate: The Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases, 100th Cong., 2nd sess. 79 (1988) as cited by John A. Ragosta et al., \textit{op. cit.} at 3.\

\textsuperscript{366} 424 US 1 (1976).\

\textsuperscript{367} C\textit{f.} James R. Cannon, Jr., \textit{op. cit. supra} 240, at 245.
decide appeals of U.S. antidumping and countervailing duty determinations by applying U.S. law.\textsuperscript{368} Therefore, Panels are not subject to the control or direction of any other authority.\textsuperscript{369} However, as half of the panelists are appointed by Canadian or Mexican officials, they would fail to meet the Article II requirement.\textsuperscript{370}

A stronger argument is the fact that Panels exercise significant authority pursuant to the law of the United States: according to this argument, Chapter 19 restricts Binational Panels to employing U.S. (or Canadian or Mexican) law, including the standard of review. "...Chapter 19 panels would be irrelevant if not operating pursuant to U.S. laws."\textsuperscript{371} In response, Chapter 19 supporters argue that the NAFTA "internationalizes" relevant U.S. law.\textsuperscript{372} The critics' argument is that "[i]f U.S. law becomes international law by upstream incorporation, then international law enforced in the United States just as easily becomes part of U.S. law by application."\textsuperscript{373}

Another perceived constitutional discrepancy is related to Article III of the American Constitution. According to this provision, the U.S. judicial power shall be vested in one Supreme Court and in such inferior Courts established by the Congress.\textsuperscript{374} In addition, this Article provides that the Supreme Court shall have

\textsuperscript{368} Cf. John A. Ragosta et al., \textit{op. cit. supra} 364, at 6.
\textsuperscript{369} \textit{Ibid.}
\textsuperscript{370} \textit{Ibid.} at 2.
\textsuperscript{371} \textit{Ibid.} at 9.
\textsuperscript{373} John A. Ragosta et al., \textit{op. cit. supra} 364, at 9.
\textsuperscript{374} Cf. U.S. Constitution, Art. III, s. 1.
jurisdiction to decide "all Cases. in Law and Equity. arising under this Constitution, the laws of the United States...the controversies in which the United States shall be a Party...and between a State, or the Citizens thereof, and foreign States. Citizens and Subjects." Antidumping and countervailing duty cases are disputes involving U.S. citizens and foreign citizens and states: also, the United States is a party in these controversies. In this case, Article III vests appellate jurisdiction in the Supreme Court except as provided by Congress. It is clear that Congress has broad power to determine the jurisdictional reach of the federal judiciary, but this power is certainly not unlimited. It is also clear that there is a statutory right of importers to obtain judicial review by an Article III court. Also, there is a statutory right of the domestic producers to obtain relief from dumped and subsidized merchandise and to obtain judicial review of antidumping and countervailing duty decisions. Does the protection of these statutory rights require access to an Article III court? To answer this question critics and defenders of Chapter 19 focus on the nature of the rights created. If the rights are public, the Congress has discretion to determine the forum: if they are private, then they are entitled to protection by Article III courts. Authors have analyzed case law in order to resolve the issue of whether Chapter 19 escapes an Article III challenge either because it

375 Ibid., s. 2, cl. 1.

376 Ibid., s. 2, cl. 2. Cf. James R. Cannon, Jr., op. cit supra 240, at 237-238.

377 Cf. Barbara Bucholtz, op. cit supra 34, at 205.

378 Cf. James R. Cannon, op. cit supra 240, at 239. (See footnote 21 and accompanying text at the same page)

concerns only public rights or because it concerns international law.\textsuperscript{380} It seems that the mechanism is still vulnerable to an Article III challenge \textquotedblleft...but the outcome is shrouded in the ambivalence of doctrine.\textquotedblright\textsuperscript{381} Another significant constitutional concern of the Chapter 19 mechanism has been the respect of the fair decision-making fundamental guarantees. Due Process protections of Chapter 19 include the panelists' duty to apply domestic law; the panelists' subjection to a strict code of ethics; the review mechanism for aberrant panel decisions through the extraordinary challenge committees; and the use of the basic rules of appellate procedure as they exist in each of the NAFTA Parties.\textsuperscript{382} With respect to the duty to apply domestic law, critics in the United States have argued that \textquotedblleft...panels have demonstrated a propensity to stray from accepted substantive law in some cases, particularly large countervailing duty appeals.\textquotedblright\textsuperscript{383} Concerning the panelists selection and the Code of Conduct,\textsuperscript{384} the process has raised serious concerns about conflict of interests, mainly because many panelists are private trade attorneys. These lawyers can decide some issues \textquotedblleft...in which their clients have a substantive, albeit indirect, interest.\textquotedblright\textsuperscript{385} Another due

\textsuperscript{380} Cf. Barbara Bucholtz, \textit{op. cit. supra} 54, at 208.

\textsuperscript{381} Ibid.

\textsuperscript{382} Cf. John A. Ragosta \textit{et al.}, \textit{op. cit. supra} 364, at 12, citing H.R. Rep. No. 816, Part 4, 100th Cong., 2nd Sess. 5 (1988) \textquotedblleft Dissenting ECC member Malcolm Wilkey, former chief judge of the U.S. Circuit Court for the District of Columbia Circuit, implied that each of these factors was absent in the Softwood Lumber panel review.\textquotedblright\textsuperscript{ Certain Softwood Lumber Products from Canada, ECC-94-1904-01USA.\textsuperscript{383} John A. Ragosta \textit{et al.}, \textit{op. cit. supra} 364, at 14. \textquotedblleft Perhaps the foremost example is the Softwood Lumber case in which an all-Canadian majority reversed the Department of Commerce over the dissent of two eminent U.S. panelists.\textquotedblright\textsuperscript{384} I have dealt with this issue in chapter III of this thesis.

\textsuperscript{385} John A. Ragosta \textit{et al. supra} 364, \textit{op. cit.} at 15.
process concern has been the lack of adequate policing of the Panels’ decisions by the
Extraordinary Challenge Committees (ECC). In the Chapter 19 critics’ view, the ECC
mechanism has done nothing to prevent panel legal weaknesses from becoming binding
decisions.\textsuperscript{386} Finally, the appellate procedural rules operated by the panels have
sometimes been inconsistent with U.S. appellate practice. According to the NAFTA’s
Chapter 19 critics in the United States, all these four constitutional due process
protections have failed at least in some applications.\textsuperscript{387}

Closely related to the Article III constitutional concern is the separation of powers
problem. Authors have said in the United States that the NAFTA’s Chapter 19
mechanism violates the Doctrine of Separation of Powers. "...a fundamental tenet of
American constitutional government."\textsuperscript{388} Opposite arguments characterize the panel
system as international and, therefore, within the jurisdictional reach of the executive and
legislative branches.\textsuperscript{389} As has been stated, authors argue that the system is not really
international mainly because domestic law is applied by the panels to resolve the unfair
trade disputes. In this context, the mechanism which supplants judicial review with panel
review seems to diminish the power of the judiciary.\textsuperscript{390}

\textsuperscript{386} \textit{Ibid.} at 18.
\textsuperscript{387} \textit{Ibid.} at 19.
\textsuperscript{388} Barbara Bucholtz, \textit{op. cit. supra} 54, at 211.
\textsuperscript{389} \textit{Ibid.} at 210.
\textsuperscript{390} John A. Ragosta, \textit{et al.}, \textit{op. cit. supra} 364, at 20.
A more extreme constitutional issue is the complete preclusion of judicial review of Binational Panels' decisions. Even when faced with a statute that appears expressly to preclude judicial review, the U.S. Supreme Court has construed the "no-review clause" to permit judicial review of constitutional issues raised pursuant to it.\(^391\) In fact, the FTA drafters included a provision for judicial review of constitutional issues raised by the agreement in the Implementation Act of 1988.\(^392\) A case pursuant to this provision emerged from the Softwood Lumber controversy. In *Coalition for Fair Lumber Imports v. United States* \(^393\) (Coalition case), a declaratory and injunctive relief was requested on the grounds of alleged unconstitutionality.\(^394\) The petition was filed in September 14, 1994 and on December 15, the Coalition requested dismissal of its lawsuit. On the same day the U.S. Trade Representative announced an agreement with Canada to establish a bilateral consultative body to resolve the Softwood Lumber dispute. In its lawsuit, the Coalition alleged violation of due process in the panel proceedings and challenged the "fallback mechanism".\(^395\) The American Congress, anticipating the possible weakness of Chapter 19, adopted this procedural mechanism (fallback) to protect the process should Chapter 19 fail a constitutional challenge, especially on the grounds of violation to the

\(^{391}\) Barbara Bucholtz, *op. cit. supra 54.* at 209.


\(^{393}\) No 94-1627 (DC Cir docketed Oct 4, 1994)

\(^{394}\) Two years before, in the case *National Council for Industrial Defense, Inc. v. United States* No 92-1898 (DDC filed Aug 19, 1992), the plaintiffs sought a declaratory judgment finding Binational Panels to be devoid of authority to "review, reverse and modify" determinations in antidumping and countervailing duty investigations. They alleged violations on the grounds described in this section. *Cf.* James R. Cannon, *op. cit. supra 240.* at 256-257.

\(^{395}\) *Cf.* Barbara Bucholtz, *op. cit. supra 54.* at 222.
Appointments Clause: "In the event that the provisions of subparagraph (A) are held unconstitutional (...), the President is authorized on behalf of the United States to accept, as a whole, the [binational panel and ECC] decision[s]."\(^{396}\) remanding the American agency determinations. Moreover, by Executive Order No. 12889 (Dec. 27, 1993), the President announces in advance that he accepts, as a whole, all decisions of Binational Panels and ECC’s.\(^{397}\) It is important to recall that, pursuant to Article 1905 (8) (b) of the NAFTA, the President is under an international obligation to implement Panel decisions.

In this constitutional debate in the United States, there is a presumption of the Chapter 19’s constitutionality, grounded in the President’s treaty-making power and Congressional power to regulate commerce. Actually, the American Congress pronounced the mechanism to be constitutional. The House Judiciary Committee concluded that "...the use of international tribunals to resolve these disputes [antidumping and countervailing duty] falls within the power of the Congress and the President to regulate foreign commerce and foreign affairs, and is consistent with historical precedent and our legal tradition."\(^{398}\)


\(^{397}\) Cf. John A. Ragosta et al., op. cit. supra 364. at 10.

\(^{398}\) HR Rep No 816, 100th Cong. 2d Sess 2 (1988) as cited by James R. Cannon, Jr. op. cit. at 256. "The Judiciary Committee concluded that issues involved in antidumping duty and countervailing duty actions are 'public rights;' therefore, it could divest the jurisdiction of Article III courts in these matters. With respect to Article II, the Judiciary Committee reasoned that because binational panels issue decisions pursuant to both United States and international law, panelists need not be officers of the United States, and Congress need only grant authority to the relevant agencies for implementing the panel process. The fact that panels include members who are not United States citizens would not adversely affect this authority as panel decisions are issued pursuant to the CFTA [United States - Canada Free Trade Agreement], not United States domestic law.
Some of the arguments addressed in the NAFTA Chapter 19's constitutional debate in the United States are similar to those used in the Mexican constitutional debate that is described in the next section.

**B. The Binational Panels’ Constitutionality in Mexico.**

We can find several analogies between the constitutional concerns in the United States and in Mexico. Nevertheless, some of these concerns appear to be more troublesome in Mexico especially because this country has a different legal system as compared to the Canadian and the American systems. For some Mexican authors, the Mexican experience in the Binational Panels’ mechanism has been a “conflict of idiosyncrasies”399 between the three Parties of the NAFTA. As in the United States, the constitutional debate in Mexico addresses the question about whether the Binational Panels are really international, even when they apply domestic law and their decisions are implemented according to domestic law.

The examination of the constitutional soundness of the NAFTA’s Chapter 19 in Mexico begins with Article 104 of the Mexican Constitution. This problem is similar to that of Articles II and III of the American Constitution. According to the Mexican constitutional provision the Mexican federal courts have exclusive jurisdiction with

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regard to Mexico’s international treaties. Accordingly, the issue is whether Chapter 19’s Panels are unconstitutional because they abrogate the exclusive jurisdiction of the federal courts. The question is: Is there an exclusive jurisdiction of the Mexican courts for antidumping and countervailing duty cases? If the jurisdiction of the Panels is derived from the constitutional power to interpret internal compliance with and application of an international treaty, such an exercise of jurisdiction would be unconstitutional. However, the jurisdiction granted to federal courts by the Mexican Constitution assumes that its exercise will only be with respect to internal disputes. On the other hand, it seems clear that Article 104 refers to civil or criminal matters but not to commercial matters. This issue would escape a constitutional challenge if it is determined that it concerns international law even when domestic law is applied. In summary, the problem is similar to that of Article III of the American Constitution.

Due process concerns exist in the Mexican constitutional debate about the NAFTA’s Chapter 19. In this respect, the due process protections included in Chapter 19 that have been more relevant in the Mexican experience are the panelists’ duty to apply domestic law and the panelists’ subjection to a code of conduct as well as the rules of

400 See Article 104 (I-A) Constitución Política de los Estados Unidos Mexicanos: “Federal courts shall assert jurisdiction over: I.- A.- All civil or criminal disputes derived from the enforcement and application of federal statutes or the international treaties concluded by the Mexican State.” (Translation from Spanish by author)

401 Cf. Víctor Carlos García Moreno, op. cit. supra 194, at 61.


403 Ibid. at 685.
procedure. As seen at the previous section, American authors argue that several Binational Panels have failed in applying American law properly, i.e., as an American domestic court. This problem has been more evident in respect to the proper application of the standard of review as set out in Annex 1911 of the NAFTA and it has been an issue for the Binational Panels applying Mexican law. In Chapter II of this thesis, we have seen the two different perspectives of the Panels reviewing a Mexican agency determination with respect to their own jurisdiction and the proper application and articulation of the standard of review. The Cut to Length Plate Products from the USA\textsuperscript{404} Panel concluded that according to the NAFTA, the standard of review to be applied was exactly the same as if it was applied by the Mexican Federal Fiscal Tribunal.\textsuperscript{405} Therefore, the Panel had the jurisdiction to declare a challenged resolution to be a nullity.\textsuperscript{406} This jurisdiction to declare a nullity does not exist under NAFTA Article 1904 (8), therefore, the Panel in Flat Coated Steel Products from the USA\textsuperscript{407} in contrast with the Cut to Length Plate Panel, concluded that its task was different from the task of the Mexican Federal Fiscal Tribunal.\textsuperscript{408}

The considerations of the Cut to Length Plate Panel were similar to those expressed by the American Chapter 19 critics: If the domestic law is not applied exactly

\textsuperscript{404} MEX-94-1904-02.

\textsuperscript{405} See Section D in Chapter II of this thesis.

\textsuperscript{406} According to Article 239/II of the Mexican Federal Fiscal Code, the Federal Fiscal Tribunal can declare a resolution to be a nullity: "La sentencia definitiva podrá...II. Declarar la nulidad de la resolución impugnada." See: Código Fiscal de la Federación (January 1st. 1983).

\textsuperscript{407} MEX-94-1904-01.

\textsuperscript{408} See Section D in Chapter II of this thesis.
as a domestic court would apply it. there is a violation of due process and this is of course a constitutional concern. In fact, the Cut to Length Plate Panel took into account considerations of due process as contained in two fundamental articles of the Mexican Constitution, Articles 14 and 16. In the decision the Panel wrote:

[...] [T]he Panel notes that the Fiscal Tribunal has the authority under Articles 238(1) and 239 to declare an agency determination to be a "nullity" in situations where fundamental principles are at stake, particularly when basic constitutional provisions, incorporated through Article 238, are deemed to have been violated. In these situations, binational panels need to have a similarly effective remedy for such violations. If Article 1904(8) were read to limit the ability of the binational panel in this regard, a panel might find itself in the unacceptable position, once having determined that fundamental constitutional provisions had been violated by the Investigating Authority, that it had no effective remedy for such violation.409

In fact, Article 238 of the Federal Fiscal Code410, which is the Mexican standard of review according to the NAFTA's Annex 1911, incorporates elements of due process contained in Articles 14 and 16 of the Mexican Constitution.411 It is a shortcoming of the NAFTA drafting, that Article 1904(2) does not explicitly include the Constitution as relevant domestic law of the importing Party. In any event, if a Panel wants to apply the domestic law (especially the standard of review) exactly as a domestic court would apply

409 Resolution of the Panel in Imports of Cut to Length Plate Products from the USA, MEX-94-1904-02, Official English translation from the LEXIS-NEXIS Version at 39.

410 See Section D in Chapter II of this thesis.

411 See Constitución Política de los Estados Unidos Mexicanos. Article 14 (second paragraph) establishes a fundamental Mexican right, the "guarantee of legal security": "No person shall be deprived of life, liberty, property, possessions or rights, without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect at the time of the act." Article 16 (first paragraph) provides: "No person shall be disturbed in his/her person, family, domicile, documents or possessions, except by virtue of a written order issued by a competent authority staging the legal grounds and justification of the procedure" (Translation from Spanish by the Cut to Length Plate Panel, LEXIS-NEXIS Version at 45)
it, it would have to go beyond the NAFTA text, at least in the cases reviewing a Mexican agency determination.

With respect to the selection of panelists, the process has raised some constitutional concerns in Mexico. According to Annex 1901.2 of the NAFTA, the panelists’ roster "...shall include judges or former judges to the fullest extent practicable." This provision conflicts with the Mexican Constitution which in Article 101 provides that federal judges and magistrates cannot accept any other employment, public or private, except pro-bono positions in scientific, teaching, literary or other non-profit organizations.

Another due process concern is the code of conduct. Article 1909 of the NAFTA provides that "[t]he Parties shall, by the date of entry into force of this Agreement, exchange letters establishing a code of conduct for panelists and members of committees established pursuant to Articles 1903, 1904 and 1905." The exchange of letters as a means of implementing "inter-institutional agreements" is recognized by the Mexican Act on Concluding Treaties but some authors consider that this act violates Article 133 of the Mexican Constitution, which requires all international agreements negotiated by the Executive to be approved by the Mexican Senate. The same problem occurs with the

412 See Annex 1901.2 (1) of the NAFTA.

413 Cf. Luis Manuel Pérez de Acha, op.cit supra 399, at 22.

414 Article 1909 of the NAFTA.

415 Ley sobre la Celebración de Tratados. Diario Oficial de la Federación (January 2, 1992).

416 This is the opinion of Luis Malpica de Lamadrid. El Sistema Mexicano Contra Prácticas Desleales de Comercio Internacional y el Tratado de Libre Comercio de América del Norte, (Mexico City: UNAM, Instituto de Investigaciones Jurídicas, 1996) at 290-291.
Rules of Procedure. Article 1904 of the NAFTA provides that “[t]o implement the provisions of this Article, the Parties shall adopt rules of procedure...” The convened rules were neither negotiated by the Executive nor approved by the Mexican Senate. An important concern related to the rules of procedure is their perceived inconsistency with Mexican legal practice, at least in some cases. For example, with respect to service of documents and communications, Rule 24 provides that a document can be served “...by expedited delivery courier or expedited mail service...” This provision is inconsistent with the more formalist practice of Mexican courts in which services must be made personally or by publication. Another issue is the disclosure of proprietary or privileged information. Rule 46 provides that “[a] counsel of record, or a professional retained by, or under the control or direction of, a counsel of record, who wishes disclosure of proprietary information in a panel review shall file a Proprietary Information Access Application with respect to the proprietary information...” In contrast, the Mexican Foreign Trade statute grants access to this type of information only

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417 Article 1904 (14) of the NAFTA.

418 Cf. Luis Manuel Pérez de Acha, op. cit. supra 399, at 21. This author adds that another shortcoming of the rules of procedure is the fact that they were originally negotiated in English and the Spanish translation is very defective; to the extent that the Mexican Federal Register (Diario Oficial de la Federación) had to publish errata on March 20, 1996.


420 Cf. Luis Manuel Pérez de Acha, op. cit. supra 399, at 24. In the Mexican legal practice, there is a court’s clerk (Actuario) who is responsible for service and communications. See e.g. Article 27, Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos. (Mexican Juicio de Amparo Act) supra 331. Nevertheless, the Mexican Federal Fiscal Code accepts service and communications by facsimile with specific requirements. See: Código Fiscal de la Federación, Article 253 (last paragraph).

421 Rule 46 (1) of the Rules of Procedure.
to an authorized legal representative of the parties involved in an agency investigation.\textsuperscript{422}

The Chapter 19 rules of procedure provide that "[a] counsel who signs a document filed pursuant to these rules on behalf of a participant shall be the counsel of record for the participant from the date of filing until a change is effected..."\textsuperscript{423} The problem with this provision is that a "counsel of record" is not the equivalent to the "authorized legal representative" (in Spanish: "representante legal acreditado") as provided in the relevant Mexican statutes. Nevertheless, the Spanish version of the rules of procedure translates "counsel of record" as a representante legal who, according to the Mexican legal tradition (and the relevant statutes), should have his/her legal status accredited by a formal document and not by the simple act of signing a document as provided by the rules of procedure.\textsuperscript{424} In summary, these substantive inconsistencies with the Mexican

\textsuperscript{422} See Ley de Comercio Exterior, Diario Oficial de la Federación, (July 27, 1993) Article 80. In the Panel Flat Coated Steel Products from the USA, the Mexican agency (SECOFI) denied access to the American counsel of records on the grounds of lack of standing according to the Mexican statute, nonetheless, the Panel resolved: "In response to a motion by Bethlehem, and later to a motion by USX, LTV and Inland, the Panel unanimously ordered that SECOFI issue an authorization granting access to information contained in the ConfidentialRecord to the counsel of record of Bethlehem, USX, LTV, Inland, New Process and IMSA without any requirement for the posting of a bond or financial guarantee." See Revisión de la Resolución Definitiva de la Investigación Antidumping sobre las Importaciones de Aceros Planos Recubiertos Originarios y Procedentes de los Estados Unidos de América, Secretariado del TLCAN, at 9. (English official translation in Flat Coated Steel Products from the USA. LEXIS-NEXIS Version at 6)

\textsuperscript{423} Rule 21 (1) of the Rules of Procedure.

\textsuperscript{424} Cf. Luis Manuel Pérez de Acha, op. cit. supra 399, at 23. In Mexico, a counsel of record must be an Attorney at Law as required by Article 200, paragraph 4th, of the Mexican Federal Fiscal Code (Código Fiscal de la Federación). This issue was dealt by the Panel MEX-94-1904-01 as follows: "In response to a motion by SECOFI of lack of standing of Licenciado Luis Manuel Perez de Acha, Licenciado Luis Rubio Barnetche and Claire E. Reade, the Panel ordered the recognition of Luis Manuel Perez de Acha as counsel of record of Bethlehem, USX, LTV and Inland and Luis Rubio Barnetche as counsel of record of New Process to the extent that both counsel could demonstrate that they were attorneys at law with authorization to practice Law in Mexico. As to Claire E. Reade, the Panel ordered that she be recognized as providing legal advice but not as counsel of record for New Process." See Revisión de la Resolución Definitiva de la Investigación Antidumping sobre las Importaciones de Aceros Planos Recubiertos Originarios.
legislation and legal practice may violate the relevant due process provisions in Articles 14 and 16 of the Mexican Constitution.

As is the case with the United States, the most complex constitutional issue for Mexico with respect to the Binational Panels' system is the complete preclusion of judicial review of the Panels' decisions. A question arises: Does the Mexican Constitution forbid private parties from waiving judicial review? The problem may be illustrated by the following hypothesis: In concluding an antidumping investigation, the SECOFI establishes antidumping duties on widgets imported from the United States. The relevant Mexican industry is dissatisfied with the SECOFI resolution because it believes the antidumping duties imposed on the American widgets should be higher. As a result, the domestic industry, in accordance with Article 1904 (15) (c) (ii) of the NAFTA and within a period of twenty days following the publication of the SECOFI determination, announces its intention to initiate a domestic judicial review. Meanwhile.

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Procedentes de los Estados Unidos de América. Secretariado del TLCAN, at 9. (English official transaltion in Flat Coated Steel Products from the U.S.A. LEXIS-NEXIS Version at 5)


427 Article 1904 (15) of the NAFTA provides that in order to achieve the objectives of the mechanism, the Parties shall amend their antidumping and countervailing duty statutes to ensure that, inter alia, "(i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired..." Paragraph 4 provides: "A request for a panel shall be made in writing to the other involving Party within 30 days following the date of publication of the final determination in question in the official journal of the importing Party." Finally, Article 1904 (11) provides: "A final determination shall not be reviewed under any judicial review procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article. No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."
in the following ten days, an American exporter affected by the SECOFI determination requests, through the American government, the establishment of a Binational Panel to challenge the same determination the Mexican industry is seeking to challenge. As a result, the Binational Panel will be established even if the Mexican producer preferred the domestic judicial review. The Mexican industry will lose automatically, against its will, its constitutional right to challenge the SECOFI determination through domestic judicial review.\textsuperscript{428} This issue is closely related to the \textit{Juicio de Amparo} problem which is analyzed in the next section of this chapter.

\textbf{C. THE \textit{JUICIO DE AMPARO} PROBLEM}

In Mexico, a final antidumping and countervailing duty determination of SECOFI can be appealed by means of an administrative proceeding before the agency making the determination. The decision arising from this proceeding may be appealed to the Upper Division of the Federal Fiscal Tribunal pursuant to a judicial proceeding of nullification. A private party may challenge the Fiscal Tribunal decision\textsuperscript{429} by means of the \textit{Juicio de Amparo}, Mexico's direct constitutional challenge apparatus.\textsuperscript{430}

\textsuperscript{428} Craig R. Giesze, \textit{Los Desafíos Jurídicos... op. cit. supra} 426, at 265.

\textsuperscript{429} The challenge must be made to a Collegiate Circuit Tribunal; see Luis Malpica de Lamadrid, \textit{op. cit. supra} 416, at 138.

\textsuperscript{430} See Chapter II, Section D (3) of this thesis.
The *Juicio de Amparo*\(^{431}\) is a constitutional remedy peculiar to Mexico,\(^{432}\) resembling in many respects an ordinary appeal and in other respects the extraordinary writs of prohibition, certiorari, injunction, and habeas corpus.\(^{433}\) In antidumping and countervailing duty cases, the *Juicio de Amparo* is the last resort of a private party, after the judicial review by the Federal Fiscal Tribunal in case of alleged violations of due process in accordance with Articles 14 and 16 of the Mexican Constitution. Article 1 of the Mexican *Amparo* Act (*Ley de Amparo*), provides that the purpose of this process is to resolve any controversy arising because of a) statutes or authority actions that violate the constitutional rights of individuals; b) statutes or federal authority actions that violate the sovereignty of the member States of the Federal Union; and c) States' statutes or authorities' actions that interfere with the federal authorities' scope.\(^{434}\) An *Amparo* lawsuit should be brought by the affected party against the responsible authority or authorities.\(^{435}\) The judgment does not have *erga omnes* effects but is only binding *inter partes*, i.e. in providing a relief to the affected party.\(^{436}\)

\(^{431}\) *Amparo* means shelter or protection.

\(^{432}\) The *Juicio de Amparo* is an original Mexican juridical institution designed to protect the individuals from the abuses of the authority. By means of this institution, the Mexican Federal Judiciary protects the individual rights guaranteed in the Constitution. *See* Ignacio Burgoa, *El Juicio de Amparo*, (Mexico City: Porrúa, 1985) at 8.

\(^{433}\) *See* Leonel Pérez Nieto, *op. cit.* supra 402, at 685.

\(^{434}\) *Ley de Amparo Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos*, *supra* 331, Article 1 (I), (II) and (III). (Translation from Spanish by author).

\(^{435}\) *Ibid*. Articles 4 and 11.

\(^{436}\) *See* Ignacio Burgoa, *op. cit.* supra 432, at 275-280. (Explaining the “Principio de Relatividad de las Sentencias de Amparo”) Only under certain circumstances, the Mexican Supreme Court is empowered to declare a statute in whole or in part unconstitutional across the board for all adversely affected parties and to set aside the deviant law or statutory provision. *See* Article 105 (II) of the Mexican Constitution.
In accordance with the NAFTA's Chapter 19, the Mexican Foreign Trade statute explicitly precludes both an administrative appeal for reversal and revocation and a judicial proceeding of nullification in the event of a Binational Panel review. Nevertheless, no Mexican constitutional provision or statute deprives private parties of their constitutional right to protect their individual guarantees pursuant to a *Juicio de Amparo* in the event of a Chapter 19 proceeding. Authors consider that there is no legal basis for a *Juicio de Amparo* challenging a Binational Panel resolution, but that there is a legal basis for challenging the SECOFI final determination made as a result of a Panel decision. The reason is that it is very difficult to establish constitutionally that the Binational Panels are authorities as provided by the Mexican Law. “The Mexican constitutional problem essentially boils down to the legal reality that, as legal creatures, the Chapter 19 binational panels, comprising Mexican national and foreign panelists, are not ‘Mexican courts,’ ‘competent Mexican authorities,’ or ‘Mexican arbitration tribunals’ within the strict meaning of the Mexican constitutional scheme but rather, constitute some kind of different legal animal alien to the Mexican Magna Carta.”

Nevertheless, in a recent *Juicio de Amparo* case, a Mexican District Judge

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440 *See* Ley de Amparo, *supra* 331, Article 11.

determined that the Binational Panels were "tribunals" internalized in the Mexican legal system because the NAFTA, by virtue of Article 133 of the Mexican Constitution,\textsuperscript{443} is part of the Mexican domestic law.\textsuperscript{444}

This Juicio de Amparo lawsuit challenged the resolution of the Flat Coated Steel Products from the USA Binational Panel. In this resolution, the Panel upheld part of the SECOFI determination and remanded it with respect to certain parts of the resolution concerning issues about dumping and injury. It may be recalled that in Chapter II of this thesis, I analyzed how the Flat Coated Steel Panel applied and articulated a narrow standard of review as opposed to the one applied by the Cut to Length Plate Panel.\textsuperscript{445} The Cut to Length Plate Panel concluded that it should apply the Mexican domestic law exactly as a Mexican domestic court would; in contrast, the Flat Coated Steel Panel concluded that the Panel jurisdiction was limited by the NAFTA provisions. It is therefore interesting to highlight that in the Juicio de Amparo lawsuit (hereinafter: the

\textsuperscript{442} Casos más Relevantes, Seminario internacional sobre Prácticas Desleales de Comercio, Mexico City, UNAM. Instituto de Investigaciones Jurídicas, at 32-33.

\textsuperscript{443} Article 133. "This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union." (Artículo 133 de la Constitución Política de los Estados Unidos Mexicanos) Translation from Spanish made by the Cut to Length Plate Binational Panel MEX-94-1904-02

\textsuperscript{444} Flat Coated Steel Amparo Resolution at 40-41.

\textsuperscript{445} See supra page 121 of this Chapter.
Flat Coated Steel Amparo), the aggrieved party challenged the resolution of a Panel that did not apply the standard of review exactly as a Mexican domestic court would.

In the Flat Coated Steel Amparo, the complainants (USX Corporation & Inland Steel Company) alleged that their constitutional due process guarantees, established in Articles 14 and 16 of the Mexican Constitution, were violated by the Panel. Judge Jorge Antonio Cruz Ramos, 7th District Judge for Administrative Matters in Mexico City, determined that the Binational Panel was an authority under Mexican law and therefore, it was subject to responsibility on the grounds of the Amparo statute. Nevertheless, Judge Cruz Ramos concluded that the Panel resolution was not final. One of the most important principles of the Juicio de Amparo is the one referring to finality. The Amparo should be the last resort and also only final and definitive resolutions can be challenged by means of this process. Thus, Judge Cruz Ramos stated that the Binational Panel resolution was not final and definitive as required by Article 114 (II) of the Amparo statute, because it should be implemented by the Mexican relevant administrative agency, i.e., SECOFI. As a result, in any event, the Judge determined that an Amparo lawsuit could be eventually commenced but to challenge not the Panel

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446 See Flat Coated Steel Amparo Resolution at 2.

447 Ibid. at 41: "...se establece la procedencia general del amparo contra un laudo de Panel Binacional..."

448 Cf. Ignacio Burgoa, op. cit. supra 432. at 280-282. (Dealing with "principio de definitividad" in Amparo)

449 Flat Coated Steel Amparo Resolution at 48-49
decision but the SECOFI implementation.\footnote{Ibid. at 49.} On these grounds, the Judge stayed the lawsuit.\footnote{Ibid. at 50: "Se SOBRESEE en el presente juicio de garantías" (March 31, 1997).}

Judge Cruz Ramos judgment is not binding on other Mexican courts, but it may well establish a "precedent" and attract more Amparo lawsuits against the Mexican administrative agency's implementation of Binational Panels' resolutions. Some authors have argued that in a hypothetical situation, SECOFI would have to obey the Mexican court judgment and not the Binational Panel resolution.\footnote{Cf. Luis Manuel Pérez de Acha, op. cit. supra 399, at 20-21.} Of course, in such a situation, the NAFTA's Chapter 19 safeguard mechanism would be triggered, establishing consultations, or the establishment of a special committee or, if the Parties are unable to reach a mutually satisfactory solution, the complaining Party may suspend either the operation of Article 1904 with respect to the Party complained against or the application to the Party complained against of such benefits under the NAFTA as may be appropriate under the circumstances.\footnote{Article 1905 (1), (2), (3) and (8) (a) and (b) of the NAFTA.} Such a result would jeopardize the interests of the NAFTA.

The Juicio de Amparo problem is certainly a difficult one. It seems to me, nonetheless, that Judge Cruz Ramos' judgment did not address the whole range of issues and only tried to find a suitable escape device. In my view, the resolution although legally correct, has at least one serious shortcoming: the judgment mentions\footnote{Flat Coated Steel Amparo Resolution at 6.} the fact that the
plaintiffs USX Corporation and Inland Steel Company requested the establishment of a Binational Panel, but it fails to mention that this fact can be a relevant ground for dismissal of the *Amparo* lawsuit. Article 73 (XI) of the Mexican *Amparo* statute establishes as a ground for dismissal of an *Amparo* lawsuit when the complainant challenges an authority action that he/she previously consented to expressly or tacitly. In the *Flat Coated Steel* case, the complainants requested the establishment of the Panel and therefore accepted the legal conditions provided in Article 1904 (9) of the NAFTA: “The decision of the panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.” The complainants also accepted the provision of Article 1904 (11) of the NAFTA that precludes any further judicial review of the final determination of the Panel. Moreover, they opted for the Binational Panel review even when they had the opportunity to challenge the administrative agency determination at the domestic level. It seems to me that this ground for dismissal could be adopted by a Mexican Federal Judge, or even by the Mexican Supreme Court in future cases challenging the implementation of a Panel decision. It should be noted that this statutory provision also gives grounds for dismissal

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455 See Resolution of the Panel in *Flat Coated Steel Products from the USA*. LEXIS-NEXIS Version at 5: “8. On September 1, 1994, two of the U.S. exporters, USX and Inland, filed with the Mexican Section of the NAFTA Secretariat a Request for Panel Review of the Final Determination. During October 1994 and pursuant to Rule 39 of the Rules of Procedure for Article 1904 Binational Panel Review, New Process, Bethlehem, USX, Inland. [*5] LTV, and IMSA all filed with the Mexican Section of the NAFTA Secretariat complaints presenting issues for panel review. This Binational Panel (the “Panel”) was subsequently constituted under Article 1904 of NAFTA.”

456 Ley de Amparo, supra 331. Article 73: “El juicio de amparo es improcedente...XI: Contra actos consentidos expresamente o por manifestaciones de voluntad que entrañen ese consentimiento.” See generally Ignacio Burgos, *op. cit.* supra 432, at 475-476 (“La improcedencia del juicio de amparo por consentimiento tácito o expreso del acto reclamado”)
of those *Amparo* lawsuits challenging a SECOFI action consistent with a Binational Panel decision remanding a final agency determination.

In contrast, it seems to me that there is no constitutional, statutory or jurisprudencial ground for dismissing an *Amparo* lawsuit challenging a SECOFI action in compliance with a Binational Panel remand in the hypothetical case described in section B of this chapter; i.e. when a domestic producer is forced to resort to a Binational Panel proceeding. As is the case in the United States, this situation represents the most important constitutional weakness of the NAFTA’s Chapter 19 mechanism in Mexico.

**D. CONCLUSIONS**

The purpose of this chapter has been to determine the most important inconsistencies of the NAFTA’s Chapter 19 and the Mexican Constitution. A relevant tool in the analysis is the American experience dealing with constitutional issues related to this international dispute settlement mechanism. The result of this analysis has led me to determine that the *Juicio de Amparo* is the most relevant constitutional issue when confronting the Mexican legal system with Chapter 19. Moreover, in contrast with the United States, in Mexico there is no “fallback” or any other legal mechanism to address this constitutional issue at its source.

Despite the inconsistencies, I believe that the Mexican courts would be highly unlikely to find a constitutional conflict. Either they can keep on finding escape devices, or construe a creative legal opinion reconciling the apparent constitutional inconsistency
with Mexico's NAFTA obligations. This latter approach would be especially expected from the Mexican Supreme Court. Nevertheless, in different jurisprudencial theses, the Mexican Supreme Court has established that it is possible to challenge the domestic implementation of an international treaty by means of a Juicio de Amparo. when the implementation violates the fundamental individual due process guarantees. On the other hand, the Supreme Court has established that, pursuant to Article 133 of the Mexican Constitution, the international treaties are not superior to the domestic federal statutes. They have the status of a federal statute, but that does not imply that they should be applied "preferably" over a domestic law. The Supreme Court has recognized the obligatory force of international treaties, but not the supremacy of international law over domestic law. Moreover, international law is, by means of the treaties, domestic law in Mexico. By way of contrast, the International Court of Justice has established that "it is a generally accepted principle of international law that in the relations between Powers

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458 See Mexican Supreme Court's Jurisprudencial Thesis: "TRATADOS INTERNACIONALES Y LEYES DEL CONGRESO DE LA UNION EMANADOS DE LA CONSTITUCION FEDERAL. SU RANGO CONSTITUCIONAL ES DE IGUAL JERARQUÍA. "El artículo 133 constitucional no establece preferencia alguna entre las leyes del Congreso de la Unión que emanen de ella y los tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, puesto que el apuntado dispositivo legal no propugna la tesis de la supremacía del derecho internacional sobre el derecho interno, sino que adopta la regla de que el derecho internacional es parte del nacional, ya que si bien reconoce la fuerza obligatoria de los tratados, no da a estos un rango superior a las leyes del Congreso de la Unión emanadas de esa Constitución, sino que el rango que las confiere a unos y otras es el mismo." Vols. 151-156, sexta parte, p. 196, primer circuito, tercero administrativo, Amparo en revisión 256/81, C. H. Bohering Sohn, 9 de julio de 1981, unanimidad de votos.
who are contracting Parties to a treaty. the provisions of municipal law cannot prevail over those of a treaty (P.C.I.J., Series B. No. 17. p. 32).\footnote{Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, \textit{World Court Digest, Vol. 1, 1986-1990}, (Berlin: Springer-Verlag, 1993) at 27.}

It seems to me that the Mexican Supreme Court should construe a constitutional legal opinion that reflects Mexico’s new reality in the international scope. Perhaps the best answer to solve the Chapter 19 constitutional problem in Mexico is by giving to the Binational Panels the international status that they deserve. As has been seen. American authors argue that the Binational Panels are not really international because they apply domestic law and their resolutions are implemented in the corpus of municipal law. In contrast, Mexican authors have characterized the Binational Panels as supranational.\footnote{See e.g. Luis Malpica de Lamadrid, \textit{op. cit. supra} 416. at 155-158 and Leonel Péreznieto, \textit{op. cit.} at 683-684.} This characterization is due to the fact that the NAFTA precludes domestic judicial review of a Binational Panel resolution.\footnote{\textit{Cf.} Luis Malpica de Lamadrid, \textit{op. cit. supra} 416. at 289.} Moreover. Article 1902 of the NAFTA establishes that each Party reserves the right to change or modify its antidumping and countervailing duty law provides that “the amending Party notifies in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the day of enactment of such statute.”\footnote{Article 1902 (2) (b) of the NAFTA.} In addition. the amendments should not be inconsistent with the GATT and its relevant codes.\footnote{Article 1902 (2) (d) (i) of the NAFTA.}
difficult to determine the degree of supranationality in the Chapter 19 mechanism, but suffice it to say that the recognition of the international character of the Binational Panels would avoid internal constitutional inconsistencies. As far as I am concerned, nobody has challenged a decision of an international adjudicatory body by means of the *Juicio de Amparo* in Mexico, until the *sui generis* Binational Panels came to life. On the other hand, the fact that the Panels apply domestic law to resolve an international dispute does not deprive them of their international character. Reference to municipal law is particularly common in international arbitration.

In summary, if the NAFTA's Chapter 19 Binational Panel mechanism is characterized as truly international, then it is within the jurisdictional reach of the Mexican executive and legislative branches. Pursuant to Article 89 (X) of the Mexican Constitution, the executive is empowered to conclude international treaties which should be approved by the Senate. A presumption of Chapter 19's constitutionality is grounded in this provision. It would eventually be the task of the Mexican Supreme Court to resolve the *Juicio de Amparo* problem. In any event, it seems to me that if the Chapter 19 mechanism is improved and its substantive shortcomings are amended, the constitutional debate, at least in Mexico, will come to an end.

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464 See Forest L. Grieves, *Supranationalism and International Adjudication*, (Urbana: University of Illinois Press, 1969) at 16-17 (Enlisting different elements which give an International Court a supranational character).

V. CONCLUSION

The purpose of this thesis has been to analyze the issues that have arisen in the application of Mexican law to resolve antidumping and countervailing duty disputes under the NAFTA’s Chapter 19 Binational Panels’ mechanism. I have divided the issues into three main topics: a) the domestic elements of unfair trade law in Mexico and the standard of review; b) the mechanics of the Chapter 19 Binational Panels system, their weaknesses and possible improvement from the perspective of the Mexican experience; and c) the constitutional problem of the system in Mexico. In this final chapter, I provide a summary of the most relevant conclusions on each topic. Finally, I briefly reflect on the possible future of the Binational Panels system.

A. THE STANDARD OF REVIEW PROBLEM.

The proper articulation and application of the standard of review has been a problem for the Binational Panels reviewing a Mexican agency determination. It was also a problem for the panels during the US - Canada FTA years. In the disputes involving Mexico and the United States the Binational Panels have adopted two different approaches: a) the approach of the Panel in Cut to Length Plate Products from the USA, and b) the approach of the Panels in Flat Coated Steel Products from the USA and
Imports of Crystal and Solid Polystyrene from the USA. The first established that the standard of review should be exactly the same as under domestic Mexican law. Thus, the Cut to Length Plate Panel concluded that, like the Mexican Federal Fiscal Tribunal, the Binational Panel had the jurisdiction to declare the agency determination as a nullity as provided by the Mexican Federal Fiscal Code. This meant that the Panel, in applying the standard as a domestic court, went beyond the jurisdiction established in the NAFTA which does not allow a Panel to declare a determination a nullity but only to uphold it or to remand it. The result of this Panel was not at all deferential to the decision by SECOFI, the Mexican administrative agency.

On the other hand, the Panels in Flat Coated Steel and in Polystyrene concluded that the task of a Binational Panel reviewing a SECOFI determination was different from the task of the Mexican Federal Fiscal Tribunal. The Panel held that when applying the standard of review, a Panel cannot go beyond the jurisdiction conferred on it under the NAFTA. The outcome in these Panels was more deferential.

In comparing the standards of review of Canada and the United States with the Mexican standard, the Mexican standard seems, at first glance, to be exacting, rigorous and strict. There is not a deferential principle in Mexican administrative law as there is in the other two Parties of the NAFTA. If the Binational Panels apply the domestic standard exactly as a domestic court would, the outcome will usually be disadvantageous for the agency whose decision is being reviewed. On the other hand, Mexico does not have the experience which Canada and the US have had with domestic judicial review of antidumping and countervailing duty decisions by administrative and quasi-judicial
agencies. Therefore, the Mexican jurisprudence for these sort of cases is evolving out of the NAFTA experience.

A solution to the apparent problems in the application of the standard of review in cases reviewing a Mexican agency determination would be the application of the GATT/WTO standard of review. The standard for Mexico set out in Annex 1911 of the NAFTA is the one that is applied for domestic tax disputes. The NAFTA provides that the Panels, when applying domestic law, are to take into account relevant statutes, legislative history, regulations, administrative practice and judicial precedents. As established by Article 133 of the Mexican Constitution, both the GATT/WTO and the NAFTA are part of the domestic law: therefore there would not be any legal inconsistency if the GATT/WTO standard of review and the relevant antidumping and subsidy codes are applied when reviewing a Mexican agency determination. It seems to me that the application of the GATT/WTO standard of review, instead of the Federal Fiscal Code standard, would be a better alternative for Mexico. The application of the Mexican domestic standard of review implies a less deferential approach that may be disadvantageous for the Mexican administrative agency and, in some cases, for the domestic industry. The provisions of the GATT/WTO relevant codes can also be applied by the Panels reviewing a Mexican determination, where there are special difficulties or apparent discrepancies between the multilateral codes and the domestic law. This approach can be taken by the Panels without any modifications to the NAFTA text.

In my view, the application of domestic law exactly as a domestic court would to resolve an international dispute is impractical for Mexico. Applying an international
standard of review by one of the NAFTA Parties would perhaps avoid the overlap or conflict between GATT/WTO and regional obligations. On the other hand, a jurisprudence particular to the NAFTA would evolve over time. Such jurisprudence would not totally diverge from the multilateral agreement. In sum, there would exist more consistency among the Panel decisions.

B. AN IMPROVED CHAPTER 19 MECHANISM.

Some authors have argued that the GATT/WTO Uruguay Round dispute settlement mechanism is a better alternative to the NAFTA Chapter 19 system. American commentators have suggested that the Binational Panels mechanism is unacceptably weak and that it should be eliminated. They emphasize the problems concerning the proper application of domestic law as well as some other substantive perceived weaknesses such as the constitutional discrepancies between the NAFTA provisions and the domestic law. As an alternative, they suggest the adoption of the GATT/WTO mechanism. American critics argue that the Chapter 19 system was approved with three underlying assumptions: a) the scheme was to be temporary and the Parties would negotiate substantive agreements on antidumping and countervailing duty rules, b) it would only apply between Canada and the United States, and c) that in 1987 and 1993 there was no readily available alternative. These critics argue that all these justifications have disappeared: Negotiations have failed on a substantive agreement on unfair trade
laws: the system was extended to Mexico, a civil law country; and there is now an improved alternate dispute settlement mechanism in the GATT/WTO.

In fact, the Uruguay Round Understanding provides an innovative dispute settlement mechanism. Nevertheless, the NAFTA’s Chapter 19 system has several advantages such as the direct access of private parties. In addition, a regional system relieves the pressure on the multilateral dispute settlement system. If all antidumping and countervailing duty disputes were concentrated in the GATT/WTO this multilateral mechanism would become perceptibly overloaded, slower and perhaps more politicized.

It seems to me that some of the original recommendations made by the Mexican negotiators in 1993 with respect to the structure of the Chapter 19 mechanism are still worth considering in order to improve the system, especially if the NAFTA is extended to Chile. The first recommendation is that the ad hoc Binational Panels’ system should evolve into a standing adjudicatory body of full time panelists who are prohibited from appearing before any government agency in order to guarantee their impartiality. Also, the composition of the Panels should be trinational rather than binational. and the selection of panelists from the proposed permanent body should be by means of a “reverse nomination process”. This would avoid division along national lines and give the system the status of a more formal third party adjudicative mechanism. Finally, another recommendation is the establishment of an appellate body, following the example of the GATT/WTO mechanism. Nevertheless, I believe that an appellate mechanism could harm the two fundamental characteristics of an arbitral process: speed and finality. In any event, the implementation of a formal mechanism for appeal from the Panels’ resolutions
should be only if the Extraordinary Challenge mechanism proves to be a complete failure. Mexico has not yet had any experience with the Extraordinary Challenge mechanism.

C. THE CONSTITUTIONAL PROBLEM

An improved Chapter 19 mechanism with the possibility of applying an international standard of review at least in those cases reviewing a Mexican agency determination would still have to face the constitutional problems presented under Mexico and the United States law. In Mexico there is a presumption of Chapter 19 constitutionality grounded in the executive’s treaty-making power. The President is empowered by the Constitution to conclude international treaties which must be approved by the Senate. Nevertheless, a constitutional concern is that a Panel decision is automatically enforceable under national law and is not appealable to a domestic court.

Particularly relevant for the constitutional analysis of Chapter 19 in Mexico is the Jucio de Amparo, a constitutional remedy peculiar to Mexico. In antidumping and countervailing duty cases, the Jucio de Amparo is the last resort of a private party, after the Federal Fiscal Tribunal’s judicial review in case of alleged violations to due process in accordance with the Mexican Constitution. Some American commentators have argued that the Chapter 19 system is not really international because of the fact that domestic law is applied and because the Panel decisions must be implemented under domestic law. In the Mexican case, it seems to me that if the Binational Panels’ mechanism is characterized as truly international, then it is within the jurisdictional reach of the
Mexican executive and legislative branches. Therefore, there is no place for a *Juicio de Amparo* challenge. However, it seems to me that there is no constitutional, statutory or jurisprudencial ground for dismissing an *Amparo* lawsuit challenging a Mexican agency action in compliance with a Binational Panel remand when a domestic producer is forced to use the Chapter 19 route even when he/she would rather choose a domestic judicial review. This hypothetical situation would arise in the case where both the domestic and the foreign industry are dissatisfied with the agency determination, but the Mexican producer prefers to challenge it at the domestic level while the foreign industry prefers the Binational Panel proceeding. According to the NAFTA, the Panel proceeding would prevail. This NAFTA provision is clearly contrary to the Mexican Constitution.

A Mexican Federal Judge has determined in a recent *Amparo* case that the Binational Panels are authorities under Mexican law and therefore are subject to an *Amparo* lawsuit. Nevertheless, the same Judge found an escape device to dismiss a challenge against a Binational Panel resolution. It seems to me that Mexican courts would be highly unlikely to find a constitutional conflict. I would expect a creative legal opinion construed by the Mexican Supreme Court, reconciling the apparent constitutional inconsistencies with Mexico’s NAFTA obligations.

**D. The Future of the NAFTA’s Chapter 19 Mechanism.**

Apart from the Constitutional concerns and weaknesses discussed above, how effective has the NAFTA’s Chapter 19 dispute settlement mechanism been to Mexico? It
is still early to determine the effectiveness of the system. Suffice it to say that the mere institution of the Binational Panels has been a totally new experience for Mexican business people, lawyers and policy makers. The system has been effective in the sense that it has provided legal security for Mexican exporters affected by antidumping and countervailing duty determinations in the United States. Out of four cases involving Mexican products on which the United States Department of Commerce imposed antidumping duties, in only one did a Binational Panel uphold as a whole the American agency determination.\(^{466}\) In the cases reviewing a Mexican agency determination, the subject matter of this thesis, the experience has also been positive. Due to the lack of domestic experience with antidumping and countervailing duty cases in Mexico, the gap is being filled by the Binational Panels' resolutions. This means that the Mexican agency determinations are less arbitrary than they were before the NAFTA came into force. In sum, the Binational Panels have been not only impartial adjudicators, they have also brought new ideas and new challenges for the study of unfair trade law in Mexico.

It seems to me that a key point in the Chapter 19 analysis is the fact that NAFTA in general, and the dispute settlement mechanism in particular, are internationalist in

\(^{466}\) See Sección Mexicana del Secretariado de los Tratados de Libre Comercio, Informe sobre los Casos de Solución de Controversias del Capítulo XVI y XV del Tratado de Libre Comercio de América del Norte (April 16th, 1997) The case where the Binational Panel upheld the agency determination was Gray Portland and Clinker Cement from Mexico, USA-95-1904-02, October 16th, 1996. Cement has always been an area of tension between Mexico and the United States. The Mexican enterprises believe that the Department of Commerce has issued unfair determinations with protectionist purposes. On April 10th, 1997, the US Department of Commerce recognized that there were "administrative errors" in the determination of the fifth review of the antidumping duty imposed on Mexican cement, therefore it reduced the antidumping duty from 103.83% to 74.42%. See Victor Alemán y Yadira Mena, Reduce El Arancel a Cemex, EL NORTE (Monterrey, N.L., Mexico, April 11th, 1997) at 1A. The other antidumping cases involving Mexican products imported in the U.S., were resolved by the Binational Panels as follows: One (USA-94-1904-02) was remanded, and the other two (USA-95-1904-01 and USA-95-1904-04) were upheld in part and remanded in part.
philosophy and consistent with the GATT obligations.\textsuperscript{467} The GATT, despite its weaknesses, has evidenced an impressive overall legal effectiveness; for example, many GATT obligations have been enacted into domestic law.\textsuperscript{468} Therefore, the success of the NAFTA's Chapter 19 dispute resolution mechanism should rest on its compliance with the GATT/WTO standards. If the Panels applying Mexican law adopt the multilateral standard of review which is domestic law in Mexico, that would be a significant step to a greater level of harmonization in international trade disputes. NAFTA is already developing its own particular jurisprudence for antidumping and countervailing duty cases. It is obvious that the Binational Panels can create new legal solutions when domestic laws do not provide clear guidance about a particular issue, but this jurisprudence should not depart radically from the GATT/WTO. NAFTA is a regional block that "...might improve the conduct and management of multilateral negotiations, while at the same time providing a mechanism that could effectively address uniquely regional problems."\textsuperscript{469}

In my view, the NAFTA dispute settlement mechanism does not further the process of economic integration.\textsuperscript{470} It is clear that the three Parties of the NAFTA are only interested in creating a free trade agreement: they do not seek the harmonization of

\textsuperscript{467} Cf. Gilbert R. Winham, \textit{The Evolution of International Trade Agreements}, (Toronto: University of Toronto Press, 1992) at 121.


\textsuperscript{469} Gilbert R. Winham, \textit{op. cit. supra} \textsuperscript{46} at 121.

\textsuperscript{470} Cf. Cherie O'Neal Taylor, \textit{Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR}, \textit{17 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS} 850 (1996-97) at 897.
social, political or legal regimes. The NAFTA dispute settlement mechanisms reflect this limited objective and for this reason they remain decentralized. Chapter 19 has certainly provided control over abusive or arbitrary application of domestic trade remedy laws, but the system would work even better if it was developed as a catalyst for economic integration. The Binational Panels mechanism should be the spawning ground of new ideas to encourage the NAFTA countries to negotiate harmonized legislation to deal with dumping and subsidies. I believe that the recent experience in the NAFTA’s Chapter 19 mechanism shows that Mexico is prepared to negotiate a further step beyond the current system: the possibility of harmonization.
