TRADING REMEDIES TO REMEDY TRADE: THE NAFTA EXPERIENCE

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INTRODUCTION

After World War II, many countries shared the perception that as part of the effort of attaining a more politically stable and economically integrated international environment; accomplishing trade discipline and liberalization was fundamental. Thus, a new set of multilateral institutions and rules were adopted with the purpose of reducing and eventually eliminating all tariff and non-tariff trade barriers. In addition, this new legal framework also provided for trade remedy measures so that the governments could remedy the situation of their domestic industry, when materially or seriously injured as a consequence of unfair trade practices antidumping (AD) or countervailing duty (CV) measures, or simply by the trade liberalization itself (safeguard measures).

This paper focuses on the use of unfair trade laws in North America. Therefore it looks at how much have NAFTA parties (Canada, Mexico and the United States) have resorted to or traded AD and CV remedies to influence their trade with other countries, and particularly between themselves, prior to and after the entry into force of the North American Free Trade Agreement (NAFTA). Three methods are used to determine which of these three countries has more intensively applied unfair trade

practices measures affecting intra-NAFTA trade. Particularly interesting is the analysis of whether the initiations by each NAFTA party, affecting intra-NAFTA imports, diminished with the implementation of the AD and CV commitments contemplated under Chapter 19 of the NAFTA.

In addition, complementing Chapter 19 objectives, an assessment is offered relative to the functioning of Chapter 19's binational review panel system, based on the experience of 75 cases filed during the first eight years of NAFTA's implementation (January 1994 - January 2002). Specific suggestions are included pertaining to the possibility of observing a reduction or elimination of the application of AD and CV laws, or to the negotiation of less trade-restrictive AD and CV rules to be applied between the NAFTA partners. As an introduction to these issues, general reference is first made to the nature, objective, evolution and international legal framework of AD and CV measures.

OVERVIEW OF AD AND CD MEASURES

Antidumping And Countervailing Measures

The practice of exporting dumped or subsidized goods[1] has been considered unfair at a national and a multilateral level, since these products compete with identical or similar goods in the export market, placing domestic producers in a situation of disadvantage. Consequently, through the application of AD or CV duties, governments intend to level the playing field so that all producers are able to compete in equal terms.

Canada was the first country to pass an antidumping law in 1904, as a consequence of the pressure exerted by Canadian steelmakers who demanded higher tariffs on U.S. steel rails. They alleged that as railroad

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[1] A "dumped good" is a good exported at a price lower than the price it is sold in its country of origin, or if the home market price cannot be determined, when the export price is lower than the price of the same or a comparable product in a third market, or alternatively, lower than the exporter's cost of production. A "subsidized good" is a good in which its producer has received a financial contribution by its government or any public body or a private body acting on its behalf, that confers a benefit to the recipient.

building began to surge once Canada's transcontinental railroad was completed in 1885, the U.S. Steel Corporation was unfairly aggressive and was dumping rails into the Canadian market. Since Canada could not limit the tariff increase to steel rails, its government was aware that once it revised the tariff for such good, other producers to which it owed political debt would also demand tariff increases on imported competing products.[2] By 1921, the United States, France, Great Britain and most of the British Commonwealth countries had adopted antidumping laws. Although dumping was not a new issue,[3] the passage of such AD laws at that time responded to particular circumstances which happened to concur:

- the perception that as World War I neared its end "the German government was accumulating vast stocks of goods in order to dump them on the markets of the world and regain in the field of economic warfare what she was losing on the military battlefield."[4]
- the concern at the end of the 19th century and the beginning of the 20th, of the need to regulate the evils of predatory trusts, especially when practiced by foreigners.
- the need to lower high tariffs which "provided national firms the opportunity to price monopolistically at home and at the same time protected them from re-import of goods they sold competitively in world markets."[5]

Despite the adoption of AD legislation, countries for many more decades continued to protect their industries, basically through tariffs and quotas. With the progressive elimination of the latter, as well as other non-tariff barriers, since the 1970's countries began to rely more frequently on

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[2] Michael Finger, "The Origins and Evolution of Antidumping Regulation," *Antidumping- How it Works and Who Gets Hurt*, J. Michael Finger (ed.), Ann Arbor, The University of Michigan Press, 1993, pp. 13-14.

[3] "Jacob Viner (1923), the first scholar to pull together previous writing on the subject, notes a sixteenth century English writer who charged foreigners with selling paper at a loss to smother the infant paper industry in England. Viner also notes an instance in the seventeenth century in which the Dutch were accused of selling in the Baltic regions at ruinously low prices to drive out French merchants." *Ibid.*, p. 13 -14.

[4] *Ibid,* Jacob Viner, cited in p. 16.

[5] *Ibid.*, p. 17.

their unfair trade practice laws, especially to those which regulate the AD procedure.[6] Since 1948, multilaterally through the General Agreement of Tariffs and Trade (GATT), contracting parties have recognized and regulated the right of parties to impose AD and CV duties if domestic production has been injured or is threaten to be injured.[7] Ad duties are imposed despite concern that the abuse in the application of AD laws might hamper the trade liberalization commitments of the Agreement.

In 1955, new principles and disciplines were agreed with respect to subsidies under the GATT, yet important aspects remained undefined. Antidumping did not become a significant GATT issue until the Kennedy Round (1964-1967) of multilateral trade negotiations (MTN) where an Antidumping Code was drafted. However, since the U.S. Congress did not approve it, the Code never came into effect. In the years that followed the use of AD laws expanded, where the dominant question became "How can antidumping be applied to this problem?" instead of asking "Was the problem caused by dumping?"

Specific agreements on dumping and subsidies were achieved in 1979, with the conclusion of the MTN of the Tokyo Round (1973-1979). The Antidumping Code and the Subsidies and Countervailing Duties Codes contributed to strengthening the protection regime against unfair trade practices. In the view of Michael Finger the "agreement helped transform antidumping from a minor instrument for restricting imports to a major

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[6] The outnumbering of AD investigations compared to CV investigations basically responds to:

i) The difference in nature of dumped and subsidized goods: while the former are linked to enterprises behavior, the latter to government actions. Consequently, the determination of CV measures has a greater impact in diplomatic relations, since the government of the importing country determines whether the government policy or policies of another sovereign state are legitimate or not and shall therefore be actionable or not.

ii) The fact that governments tend to subsidize in a lesser degree than private industries to price discriminate.

iii) The preparation, gathering of proofs, and procedures of antidumping cases are less complicated than subsidies investigations.

[7] GATT, Articles VI and XVI.

one." He adds that "as antidumping became more and more detailed, its motive became more and more to find a way to fit antidumping to each immediate problem. (If your favorite tool is a hammer, your problems will all look like nails)."[8] In this respect Lowenfeld notes that the substance of trade disputes is the effect on the importer, not the behavior of the exporter and therefore the Tokyo Round's mistake consisted in focusing on the differences between fair and unfair trade, when the real focus is on acceptable vs. unacceptable level of trade or market share or import penetration.[9]

Some years later, as a consequence of the MTN of the Uruguay Round (1986-1994), where a new GATT was negotiated (GATT 1994) and the World Trade Organization (WTO) established, also new agreements on antidumping and subsidies were adopted by all Members of the newly founded WTO. The new Agreement on the Implementation of Article VI of GATT 1994 (the Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement) were built on the 1979 Antidumping Code and Subsidies and Countervailing Duties Code negotiated under the Tokyo Round. Departing from the former, these two new Agreements apply to all WTO Members.

The Antidumping Agreement requires greater transparency and establishes new methodological rules regarding the determination of dumping (e.g. as to the calculation of cost of production to include reasonable administrative and selling costs, and profit; the margin of dumping shall normally be calculated either from a comparison of the weighted average normal value in the home market with the weighted average of prices of all comparable exports, or on a transaction-to-transaction basis; and sales below cost). It further disciplines the application of AD measures by establishing new rules related to injury determinations, procedures to conduct investigations, imposing duties, reviewing determinations and terminating antidumping duties. Furthermore, the Antidumping Agreement introduces a special standard of review rule: *If the WTO Member's*

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[8] Michael Finger, op. cit., pp. 59, 63 and 65.
[9] *Ibid.*, pp. 59 and 63.

authority's have established the facts of a case properly, and made and unbiased and objective evaluation of these facts, the evaluation shall not be overturned, even though the panel might have reached a different conclusion. In addition, as to panel's interpretation rules, the Agreement establishes that if a panel finds that one of its provisions admits of more than one permissible interpretation, it shall find the authorities measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations of the Agreement.

It is also worth highlighting the main accomplishments of the Uruguay Round SCM Agreement:

- it identifies the three necessary elements for a subsidy to exist
  i) financial contribution,
  ii) made by a government or public body within a territory of a WTO member, and
  iii) the contribution confers a benefit;
- aside from disciplining the use of export subsidies, it also does so for production subsidies;
- it adopts a "traffic light approach" for identifying three different type of subsidies, in which each category is subject to different consequences due to their diverse nature:
  - *"Green subsidies" or non actionable subsidies,* considered to unlikely cause harm to trade (non-specific subsidies, or those which provide assistance: for basic research, to disadvantaged regions; to adapt existing facilities to new environmental standards.
  - *"Red subsidies" or "prohibited subsidies"*, considered clearly harmful to trade (those contingent to export performance or to the use of domestic inputs).
  - *"Amber subsidies"or actionable subsidies*, only challengeable if they cause adverse effects (serious prejudice, injury, or nullification and impairment of benefits). The Agreement establishes rebuttal presumptions of when subsidies give rise to adverse effects.
- it provides for a more expeditious dispute settlement procedure for actionable subsidies.

- it introduced special provisions in favor of developing countries, perhaps of greater impact than all those introduced in other Agreements of the WTO.

However, despite the progress made multilaterally in the field of trade remedies, achieving full transparency and discipline in the application of AD and CV measures remains to be among the most important challenges facing the international community. The former since countries continue to abuse in the application of such laws, mainly the AD ones, constituting today one of the most important barriers to legitimate international competition.

TRADE REMEDY LAWS IN NORTH AMERICA

Mexico[10]

From 1987 to 1999,[11] Mexico initiated a total of 228 AD/CV investigations.[12] Most of these investigations have been AD cases with a share of 92 percent (210 proceedings), leaving CV cases with the remaining 8 percent (18 proceedings). This number of AD cases places the Mexican system as one of the most active worldwide. From 1987 to 1997, Mexico ranked fourth in initiations of AD cases, along with Canada.[13] Table 1

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[10] The statistical information included in this section was prepared by the authors from the following sources: the 2000 Annual Report of the UPCI, the UPCI's database. In some instances it was necessary to consult the final determinations published in the Federal Official Bulletin (*Diario Oficial de la Federación).*

[11] The data used do not go beyond 1999, even though at the time this paper was written there was information on initiations available until 2001. The reason being that through the exclusion of the unconcluded cases initiated in 2000 and 2001, it was possible to determine the rate of cases in which final measures were imposed to the total number of cases. It is also important to note that the final measures reported in this document reflect those imposed and not the measures currently in effect.

[12] The cases are measured by product, country and type of procedure (AD or CV). For example, the Mexican AD and CV investigations regarding cold-rolled sheet and hot-rolled sheet from Venezuela and Brazil are considered as eight different proceedings, since an AD and CV investigation for each product was initiated against each country.

[13] See Jorge Miranda, Raúl Torres, and Mario Ruiz, "The International Use of Antidumping: 1987-1997", *Journal of World Trade*, Vol. 32, No. 5, October , 1998, pp. 6 – 7.

Table 1: Mexican AD/CVD Cases and Measures by Type of Procedure, 1987-1999.

Type of Investigation	*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success Ratio*
Antidumping	210	92	111	93	0.53
Countervailing	18	8	8	7	0.44
Total	228	100	119	100	0.52

Source: Made by the authors with information from UPCI's *Annual Report 2000* and case database, and complemented with research by the authors.

shows the number of cases and measures[14] by type of procedure. The last column, "success ratio," is the result of dividing the number of final AD and CV measures imposed by the number of initiations; and thus represents the probability that an initiation concludes with a final measure. The data below indicate that AD measures were imposed in 53 percent of the initiated cases; whereas CV measures were imposed in 44 percent of them. Consequently, a petitioner has roughly 50 percent of probability of obtaining a favorable outcome.

During the period of study, Mexico initiated cases against 43 countries. The three most affected were the United States followed by China and Brazil. These countries account for 56 percent of the total number of cases. Table 2 shows the 11 countries most affected by initiations, the final measures imposed and the success ratio. Whether each subject country is over/under-represented in the total number of investigations or measures goes beyond the scope of this paper.[15] In any event, it is interesting to see countries like China, Brazil or Venezuela in the first places of countries under investigation by Mexico, when they are far from representing such an important role in terms of the total value of Mexico's imports.[16]

[14] Final measures include duties as well as price undertakings.

[15] Miranda makes a deeper analysis of this matter in "An Economic Analysis of Mexico's Use of Trade Remedy Laws from 1987 to 1995" in Beatriz Leycegui et al, *Trading Punches: Trade Remedy Law and Disputes Under NAFTA*. North American Committee, pp. 137-160.

[16] One possible and partial answer to this is that, as we will point out later, the base metal sector is the most active in AD/CV initiations, and countries like Brazil and Venezuela are important exporters of products of such sector.

Table 2: Mexican AD/CVD cases and measures by subject country.

Rank	*Subject country*	*Number of Initiations*	*Share in the total of initiations (%)*	*Final Measures*	*Share in the total of measures (%)*	*Success Ratio*
1	United States	65	28.51	28	23.53	0.43
2	China	39	17.11	34	28.57	0.87
3	Brazil	23	10.09	16	13.45	0.70
4	Venezuela	10	4.39	7	5.88	0.70
5	Korea	8	3.51	2	1.68	0.25
6	Germany	7	3.07	4	3.36	0.57
7	Russia	6	2.63	3	2.52	0.50
8	Spain	5	2.19	4	3.36	0.80
8	Chinese Taipei	5	2.19	4	3.36	0.80
8	Ukraine	5	2.19	3	2.52	0.60
8	Canada	5	2.19	2	1.68	0.40
	Others	50	21.93	12	10.08	0.24
	Total	228	100	119	100	0.52

Source: Made by the authors with information from UPCI's Annual Report 2000 and case database, and complemented with research by the authors.

Differences between the success ratio of certain countries is significant. The probability of "succeeding in" a case involving a Chinese product is the double than a case against a U.S. product. The low success ratio involving investigations against "other countries," is explained by the fact that nearly 40 percent of these proceedings involve ex-Soviet Union states (19 cases), where only one measure was adopted (0.05 success ratio).[17] Remarkably, the United States and Canada, as well as Korea's success ratios are below the average ratio.

Table 3 shows the AD/CV initiations and measures by HS Section.[18] Three HS Sections account for over 66 percent of the initiations: base metals (36 percent), chemicals (20 percent), and textiles (10 percent). Other important players are plastics (7 percent) and electrical equipment (6 percent). Except for chemicals, the other four Sections mentioned have success ratios over the average, with ratios from 54 percent in the case of base metals and electrical equipment to 65 percent in the case of plastics.

United States

From 1987 to 1997 the United States was the country with most AD cases initiated and measures[19] imposed worldwide.[20] During this period the United States initiated 598 AD/CV investigations. Eighty-one percent of the initiations involved dumping allegations (484 cases) and 19 percent subsidies (114 cases).

Table 4 shows the initiations, measures and success ratio by type of procedure. The overall success ratio of the U.S. investigations is 0.47, which means that the probability for a petitioner to win a case is almost 50 percent.

Table 5 shows the top 12 subject countries of U.S. investigations. Japan appears in the first place with 60 initiations or 10 percent, followed

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[17] It seems that there have been problems identifying the origin of the dumped products when they are imported from the ex-Soviet Union states.

[18] Sectors are defined in accordance with the Harmonized System Sections (HS Section).

[19] Measures include only duty orders.

[20] See Miranda, Torres and Ruiz, op. cit., pp. 6-7.

Table 3: Mexican AD/CVD cases and measures by HS Section.

HS Section		*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success ratio*
XV	Base metals	81	35.53	44	36.97	0.54
VI	Chemicals	46	20.18	23	19.33	0.50
XI	Textiles	23	10.09	13	10.92	0.57
VII	Plastics	17	7.46	11	9.24	0.65
XVI	Electrical equipment	13	5.70	7	5.88	0.54
XX	Other manufactures	9	3.95	6	5.04	0.67
I	Animal products	7	3.07	3	2.52	0.43
X	Pulp and paper	6	2.63	1	0.84	0.17
XII	Footwear	5	2.19	5	4.20	1.00
V	Minerals	5	2.19	2	1.68	0.40
IV	Prepared foodstuffs	4	1.75	0	0.00	0.00
XVIII	Instruments	3	1.32	1	0.84	0.33
II	Vegetables	3	1.32	0	0.00	0.00
XIII	Glass and ceramics	2	0.88	2	1.68	1.00
XVII	Vehicles	2	0.88	1	0.84	0.50
VIII	Leather	1	0.44	0	0.00	0.00
IX	Wood	1	0.44	0	0.00	0.00
Total	228	100.00	119	100.00	0.52	

Source: Made by the authors with information from UPCI's Annual Report 2000 and case database, and complemented with research by the authors.

Table 4: US AD/CVD cases and measures by type of procedure.

Type of Investigation	*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success Ratio*
Antidumping	484	81	227	80	0.47
Countervailing	114	19	56	20	0.49
Total	598	100	283	100	0.47

Source: Made by the authors with information from the AD and CVD Case History Tables 1980-1999, ITA, and the Semi Annual reports under Article 16.4 of the United States to the WTO.

closely by China with 55 initiations or 9 percent. As to their participation in the total number of adopted measures, Japan's and China's share grow to 14 and 11 percent respectively. Other countries with shares over 5 percent of initiations are Korea (7 percent), Taiwan and Canada (6 percent each), and Brazil and Italy (5 percent each). Mexico ranks eighth with 20 procedures and a share of 3 percent. Under the period of review, the US initiated cases involving a total of 63 countries.

Something interesting from Table 5 is that the two lowest success ratios correspond to the United States' NAFTA partners: Canada (0.27) and Mexico (0.40). Brazil's measure equals that of Mexico. The countries with the highest ratios are Italy, Japan, China, Korea and Germany, with ratios of 0.66, 0.65, 0.58, 0.55 and 0.54, respectively. Also worth of noticing is the fact that three of these countries are also the top three in number of initiations and measures.

As regard to U.S. investigations with respect to the HS Section[21] (Table 6), one is by far the most active: 52 percent of the initiations are against base metals. This figure grows to 58 percent, when considering final measures. The three next HS Sections in initiations are electrical equipment (11 percent), chemicals (10 percent) and plastics (8 percent), leaving the rest with shares under 5 percent. Excluding the leathers HS Section with only one initiation and measure, the highest success ratios are

[21] Since the United States sources do not include the tariff position of the products under investigation, the authors classified the cases within the HS sections in accordance to the nature of the products.

Table 5: US AD/CVD cases and measures by subject country.

Rank	*Subject country*	*Number of Initiations*	*Share in the total of initiations (%)*	*Final Measures*	*Share in the total of measures (%)*	*Success Ratio*
1	Japan	60	10.03	39	13.78	0.65
2	China	55	9.20	32	11.31	0.58
3	Korea	40	6.69	22	7.77	0.55
4	Taiwan	35	5.85	17	6.01	0.49
5	Canada	33	5.52	9	3.18	0.27
6	Brazil	30	5.02	12	4.24	0.40
7	Italy	29	4.85	19	6.71	0.66
8	Mexico	20	3.34	8	2.83	0.40
9	Germany	26	4.35	14	4.95	0.54
10	India	18	3.01	8	2.83	0.44
10	United Kingdom	18	3.01	8	2.83	0.44
10	Venezuela	18	3.01	8	2.83	0.44
	Others	216	36.12	87	30.74	0.40
	Total	598	100.00	283	100.00	0.47

Source: Made by the authors with information from the AD and CVD Case History Tables 1980-1999, ITA, and the Semi Annual reports under Article 16.4 of the United States to the WTO.

Table 6: US AD/CVD cases and measures by HS Section.

HS Section		*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success ratio*
XV	Base metals	308	51.51	165	58.30	0.54
XVI	Electrical equipment	66	11.04	30	10.60	0.45
VI	Chemicals	59	9.87	21	7.42	0.36
VII	Plastics	48	8.03	25	8.83	0.52
V	Minerals	26	4.35	10	3.53	0.38
IV	Prepared foodstuffs	16	2.68	10	3.53	0.63
XVIII	Instruments	14	2.34	3	1.06	0.21
XI	Textiles	13	2.17	8	2.83	0.62
I	Animal products	10	1.67	5	1.77	0.50
X	Pulp and paper	9	1.51	0	0.00	0.00
XVII	Vehicles	9	1.51	1	0.35	0.11
XX	Other manufactures	7	1.17	1	0.35	0.14
II	Vegetables	5	0.84	2	0.71	0.40
XIII	Glass and ceramics	4	0.67	0	0.00	0.00
IX	Wood	2	0.33	1	0.35	0.50
XII	Footwear	1	0.17	0	0.00	0.00
VIII	Leather	1	0.17	1	0.35	1.00
Total	598	100.00	283	100.00	0.47	

Source: Made by the authors with information from the AD and CVD Case History Tables 1980-1999, ITA, and the Semi Annual reports under Article 16.4 of the United States to the WTO.

Table 7: Canadian AD/CVD cases and measures by type of procedure.

Type of Investigation	*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success Ratio*
Antidumping	213	95	150	95	0.70
Countervailing	12	5	8	5	0.67
Total	225	100	158	100	0.70

Source: Made by the authors with information from the historical listing of SIMA cases, Canada Customs and Revenue Agency.

for prepared foodstuffs, textiles, base metals and plastics, with 0.63, 0.62, 0.54 and 0.52 respectively.

Canada[22]

As mentioned, from 1987 to 1997 Canada along with Mexico occupied the fourth place worldwide in the use of antidumping procedures.[23] From 1997 to 1999 Canada initiated a total of 225 AD/CV investigations: 213 AD cases (95 percent) and 12 CV cases (5 percent). The success ratio of AD/CV cases was 70 percent, which means that a petitioner filing a case had 70 percent of probability of obtaining a favorable result if the authority decided to initiate its case. Table 7 shows initiations, measures and success ratios by type of procedure.

In terms of subject countries, the United Sates is by far the first target in the Canadian AD/CV system, accounting for 46 initiations and 29 final measures, with shares of 20 and 18 percent respectively.[24] The rest of

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[22] The statistical information included in this section was prepared by the authors with information from the historical listing of the Special Import Measures Act (SIMA) cases of the Canada Customs and Revenue Agency.

[23] See Miranda, Torres and Ruiz, *op. cit*., pp. 6-7

[24] Daniel Schwanen makes a value-oriented analysis for cases from 1989 to 1995 and finds that the share of the investigations involving US exports is much higher in terms of import values than in terms of absolute numbers: 61.5 percent vs. 19.5, according to his data. Daniel Schwanen, "When Push Comes to Shove: Quantifying the Continuing Use of Trade "Remedy" Laws Between Canada and the United States" in Beatriz Leycegui, William Robson, S. Dahlia Stein (eds.), *Trading Punches: Trade Remedy Law and Disputes under NAFTA,* Washington D.C.: National Planning Association, 1995, pp. 161-181.

the subject countries have shares under 6 percent, being Germany (13 cases), Brazil (12 cases) and the United Kingdom (11 cases) at the top. Mexico appears in place 21 with only three cases and one established measure. Forty-five countries have been involved in AD/CV proceedings in Canada.

In Table 8, the highest success ratio is for India (0.86), followed by the so-called "Others" category (0.80) and Brazil in third place. The United States and Mexico have success ratios below the average. Finally, Table 9 shows the Canadian AD/CV cases and measures broken down by the HS Section. Once again base metals is in first place in initiations and measures accounting for 50 percent of the initiations (113 cases) and 62 percent of the measures (98 cases). Other important HS Sections in terms of initiations are electrical equipment (23 cases), pulp and paper (22 cases), prepared foodstuff (14 cases) and footwear (12 cases). In terms of measures, the distribution differs since electrical equipment goes from the second place in number of initiations to the seventh place in measures. This difference is clear if we see the success ratios. The lowest ratio, excluding minerals and plastics that have only one initiation with no measure, is for electrical equipment: 0.17; this is only 4 measures for 23 initiations. The highest ratios excluding "other manufactures" that have only 2 initiations, are glass and ceramics (1.00) and base metals (0.87). Other HS Sections with ratios over the average are pulp and paper (0.82) and vegetables (0.71).

Intra-NAFTA Use of Antidumping and Countervailing Measures

Determination of most intensive user. Table 10 shows investigations initiated by NAFTA partners against exports originating within the region. The information contained in the columns corresponds to subject countries and the information contained in the rows, to the investigating country. From 1987 to 1999, 172 initiations occurred between NAFTA partners. Mexico stands in first place in terms of initiations with 70 (41 percent), the United States appears in second with 53 (31 percent), and finally Canada with 49 (28 percent) ranks third and last. On the other hand, the United States was the most affected country with 111 initiations (65 percent) against its products, followed by Canada with 38 (22 percent) and

Table 8: Canadian AD/CVD cases and measures by subject country.

Rank	*Subject country*	*Number of Initiations*	*Share in the total of initiations (%)*	*Final Measures*	*Share in the total of measures (%)*	*Success Ratio*
1	United States	46	20.44	29	18.35	0.63
2	Germany	13	5.78	8	5.06	0.62
3	Brazil	12	5.33	9	5.70	0.75
4	United Kingdom	11	4.89	7	4.43	0.64
5	France	10	4.44	7	4.43	0.70
5	Taiwan	10	4.44	7	4.43	0.70
7	Korea	9	4.00	5	3.16	0.56
8	Japan	8	3.56	5	3.16	0.63
9	India	7	3.11	6	3.80	0.86
9	China	7	3.11	5	3.16	0.71
9	Spain	7	3.11	5	3.16	0.71
9	Italy	7	3.11	4	2.53	0.57
21	Mexico	3	1.33	1	0.63	0.33
	Others	75	33.33	60	37.97	0.80
	Total	225	100.00	158	100.00	0.70

Source: Made by the authors with information from the historical listing of SIMA cases, Canada Customs and Revenue Agency.

Table 9: Canadian AD/CVD cases and measures by HS Section.

HS Section		*Number of Initiations*	*Share in the total of initiations (%)*	*Number of final measures*	*Share in the total of measures (%)*	*Success ratio*
XV	Base metals	113	50.22	98	62.03	0.87
XVI	Electrical equipment	23	10.22	4	2.53	0.17
X	Pulp and paper	22	9.78	18	11.39	0.82
IV	Prepared foodstuffs	14	6.22	8	5.06	0.57
XII	Footwear	12	5.33	7	4.43	0.58
II	Vegetables	7	3.11	5	3.16	0.71
VI	Chemicals	7	3.11	3	1.90	0.43
XIII	Glass and ceramics	6	2.67	6	3.80	1.00
XVII	Vehicles	6	2.67	3	1.90	0.50
XI	Textiles	5	2.22	2	1.27	0.40
IX	Wood	3	1.33	1	0.63	0.33
XIX	Arms	3	1.33	1	0.63	0.33
XX	Other manufactures	2	0.89	2	1.27	1.00
V	Minerals	1	0.44	0	0.00	0.00
VII	Plastics	1	0.44	0	0.00	0.00
Total	225	100.00	158	100.00	0.70	

Source: Made by the authors with information from the historical listing of SIMA cases, Canada Customs and Revenue Agency.

Mexico with 23 (13 percent). Almost all the initiations (95 percent) involved the United States as a party, either as an investigating or subject country; which implies that between Mexico and Canada there were very few initiations, only 8. The absolute number of initiations within each investigating country is more or less the reflect of the volume of imports from each subject country. Nevertheless, the former methodology, *per se* does not provide a valid indicator of the country which uses AD/CV procedures more intensively.

Another method to measure the intensity with which each country uses its AD/CV tools is simply by dividing the number of cases by the total intra-NAFTA import value. The result would be the number of cases for each, for example, billion dollars.[25] This alternative is shown in Table 10 in the seventh column. Roughly, we would say that Canada is almost twice as much an intensive user, as compared to the US; while Mexico's intensity is more than two times that of Canada. The problem of this method is that it does not consider the size of the economy at stake: Mexico is the country with less imports, which makes it the "most intensive user;" but it is also the country with the smallest economy, so we can expect that the imports are relatively high for the size of the market.

Finally, a proposed alternative, is that which measures intensity in terms of the "penetration grade" that the imports have in the investigating market. In other words, the amount of competition that those imports generate in the exporting market, or how much they affect producers of this latter market. Under this methodology, the "penetration grade" is calculated by at first obtaining the imports/GDP ratio. Then dividing the number of initiations by the imports/GDP ratio, to obtain a ratio of intensity in the use of AD/CV procedures. The ratio of intensity which results provides

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[25] This method is equivalent to comparing the share of initiations of each country in the Intra-NAFTA total to their share in the imports value also in the intra-NAFTA total. See Miranda, Torres and Ruiz; and Thomas Prusa "An Overview of the Impact of U.S. Unfair Trade Laws" in Beatriz Leycegui, William B.P. Robson, S. Dahlia Stein (eds.), *Trading Punches: Trade Remedy Law and Disputes under NAFTA*, Washington D.C., National Planning Association, 1995, pp.183-204. The result of each method would be the same measuring which country is more intensive in the use of AD/CV procedures since the ratio between countries of each method is identical.

Table 10: Intra-NAFTA AD/CVD cases matrix by investigating and subject country.

Investigating Country	*Subject country*				*Share in Total*	*Cases/ Imports value ratio*	*Imports/ GDP ratio*	*Intensive Ratio NAFTA*	*Intensive Ratio Other countries*
	Canada	*Mexico*	*United States*	*Total*					
Canada	NA	3	46	49	28	0.32	23.05	2.13	17.80
Mexico	5	NA	65	70	41	0.63	23.17	3.02	22.09
United States	33	20	NA	53	31	0.17	3.37	15.72	67.65
Total	38	23	111	172	100	0.30			
Share in total	22%	13%	65%	100%					

Source: Made by the authors with information from: cases see tables above, imports from the WTO's International Trade Statistics 2000, and GDP from the FMI's International Financial Statistics.

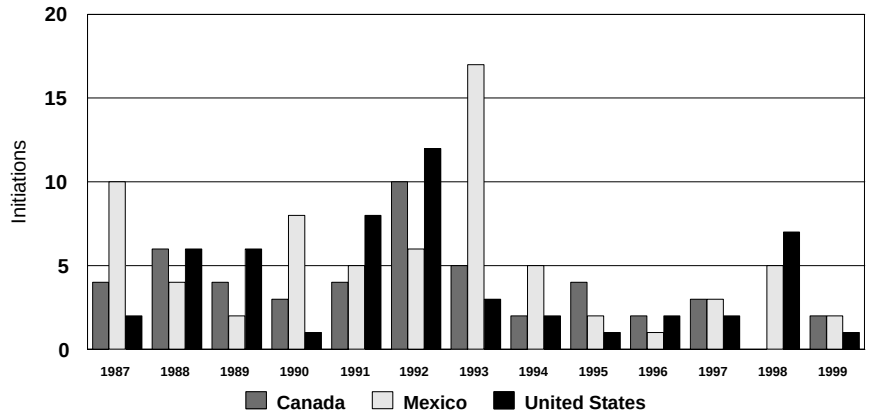
the number of initiations for each percentage point of the "imports penetration."

Column nine of Table 10 includes the calculation of the ratio of intensity for NAFTA's imports: the number of cases initiated between NAFTA partners divided by the imports/GDP ratio, calculated only with imports from NAFTA's partners. The last column includes the intensive ratio calculated with the same methodology for imports from other non-NAFTA countries (total number of cases initiated against other countries, by the imports/GDP ratio calculated with imports from all other countries). A first conclusion is that the three countries use less intensively AD/CV cases against NAFTA's partners than against the rest of the world. Particularly, Canada uses AD/CV procedures seven times more intensively against third countries than its NAFTA partners; Mexico six times; and the United States three times. A possible explanation to this phenomena could be the existence of NAFTA's Chapter XIX review system. Under this methodology, the United States happens to be the most heavily intensive user of AD/CV procedures, either against NAFTA's partners (exceeding Canada by six times and Mexico four times) or third countries (exceeding Canada by three times and Mexico by two times).

Impact of NAFTA on the number of initiations. Figure 1 shows initiations affecting intra-NAFTA trade by partner by year. This figure reveals that since 1994 the initiations in the three countries fell. In fact, the average of intra-NAFTA initiations for the period 1994 to 1999 dropped almost 60 percent (from 18 cases to 8 by year), when compared to those investigations initiated between 1987 to 1993. This occurred despite the fact that intra-NAFTA trade grew 142 percent from 1990 to 1999.

The relevant question at this point is what explains the decrease in the number of cases? To try to answer this question it is relevant to also look at what occurred with the initiations against the rest of the countries, to observe if this phenomenon is limited to intra-NAFTA trade. From the period 1987 to 1993 to the period 1994 to 1999, the average of initiations against non-NAFTA partners fell from 82 to 51 per year, a reduction of 39 percent. Therefore, the decrease in AD/CV activity took place in intra-

Figure 1: AD/CVD initiations affecting intra-NAFTA trade by partner.



Source: Made by the authors with the information from cases of each country. See text.

NAFTA trade, as well in trade with other countries, but the reduction in the former exceeded the latter.

The reasons for the reduction in the number of initiations are not clear. Some hypothesis which explain such decrease are: the presence of low prices of certain cyclical commodities in 1992 and 1993 "pushed" to the initiation of more cases; trend which was overturned as prices recovered in subsequent years,[26] and the Mexican crisis after 1994 which gave producers certain exchange rate protection against imports. Two additional reasons which might explain the decrease in intra-NAFTA cases are: as mentioned, the implementation of the Chapter XIX review system (see section below); and the fact that before NAFTA was implemented, AD and CV measures had been adopted in most of the traditionally affected sectors, and therefore continued to be in effect for several years after NAFTA's entry into force.

Intra-NAFTA Initiations by HS Section. Figure 2 shows the distribution of the intra-NAFTA initiations by HS Section. Five sections cover the 70 percent of the cases (base metals, chemicals, electrical

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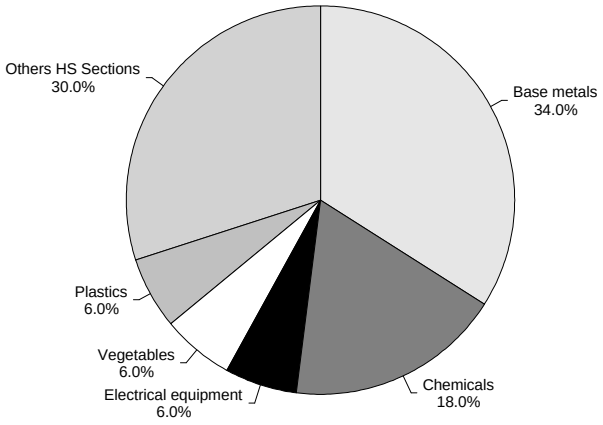
[26] See Miranda Torres and Ruiz , op. cit, pp. 99. 16.

Figure 2: Share of the AD/CVD initiations affecting intra-NAFTA trade by HS Section.



Source: Made by the authors with the information from cases of each country. See text.

equipment, vegetables and plastics), leaving the other 30 percent spread across 10 HS Sections. The two Sections with more cases are base metals and chemicals, in conjunction accounting for more than 50 percent of the cases. These markets are highly cyclical, which supports the idea that: first, part of the general decrease of cases can be explained by the increase in prices of certain commodities, like steel and fertilizers; and second, that such markets are not easily subject again to initiations to the extent that there are still measures in force imposed when the prices where low.

TRADE REMEDIES UNDER NAFTA

Antidumping and Countervailing Duty Measures

AD and CV measures under NAFTA are addressed through a look at the negotiation history, the description and objectives of the most relevant commitments, as well as the cases filed up to January 2002. An assessment of the functioning of the AD and CV binational panel review procedures during NAFTA's first 8 years of implementation is also offered.

Negotiation. The unfair trade practices discussions, covering antidumping and countervailing duty matters were among the most difficult

and intense during the NAFTA negotiations. What was at stake was basically Mexico's and Canada's interest of not only increasing their access to their most important market, the United States, but of securing such access that had been seriously hampered in the past by the application of such remedies as described in the former section. To this end, the following proposals were forwarded by Mexico to the United States, with Canada's acquiescence with respect to the first two, at that time. One was replacement of antidumping laws by antitrust laws ("high ground proposal"). Once trade between NAFTA Parties became fully liberalized, they would not be able to initiate antidumping cases against each other.[27] Departing from what Canada had proposed under The Canada-U.S. Free Trade Agreement (Canada-US FTA) negotiations, Mexico designed a transitory mechanism in which the implementation would occur piecemeal. Antidumping investigations would cease to be initiated against those products included in a list of "fully liberalized goods."[28] Once the North American market became totally integrated, antidumping laws would be replaced by antitrust laws.

For political and economic reasons this proposal was shortly eliminated from the table of negotiations. However, the Parties did agree under NAFTA to establish a Working Group on Trade and Competition[29] "to report, and to make recommendations within five years of the date of entry into force of this Agreement (January 1, 1994) on relevant issues concerning the relationship between competition laws and policies and

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[27] In 1988, New Zealand and Australia agreed to eliminate the application of antidumping measures against each other under the Protocol to the Australia-New Zealand Closer Economic Relations Trade Agreement and amended their competition laws so they could apply to anti-competitive practices affecting Australia-New Zealand trade. The Treaty of Rome of 1957 provided from the outset for the abolition of antidumping laws among member countries. However, it established a transitional period which ended in 1969, in recognition that tariff and non-tariff barriers were still in existence. In addition, Canada and Chile in their free trade agreement have negotiated the dumping of antidumping laws without establishing a substitute system.

[28] To be considered a "fully liberalized" product, two conditions would have to be fulfilled: the elimination of all applicable tariff and non-tariff barriers to trade within the free trade area, and the non-existence of anti-competitive practices (predatory pricing).

[29] Article 1504 of NAFTA.

trade in the free trade area." In addition, on December 3, 1993, the three NAFTA parties issued a joint statement agreeing to "seek solutions that reduce the possibility of disputes concerning the issues of subsidies, dumping and the operation of the trade remedy laws regarding such practices" and to set up a working group on trade law to complete this work by December 31, 1995. The deadlines of both groups have been met, and the work is far from being completed. However the Parties have extended the groups work beyond the established time frames.

The U.S. position in this respect was also inflexible. They made it clear that they would await until the conclusion of the Uruguay Round to amend their legal framework in correspondence to the agreements reached under the WTO. Consequently, each Party reserved the right to apply its AD and CV law. Nevertheless, the Parties did agree that amendments to such laws are subject to certain rules under NAFTA: the amending statute must specify that it applies to goods from the other Parties to the Agreement; written notification to the other Parties of the amendments to be adopted must be made in advance to their enactment; and such amendments must be consistent with the GATT, the Agreement on Antidumping, the Agreement on SCM, and the object and purpose of NAFTA and Chapter 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters).[30]

A panel procedure to review statutory amendments was introduced in Chapter 19, to be used when a Party considers that an amendment of another Party does not comply with the aforementioned rules or have the function and effect of overturning a decision of a binational panel of review of final AD/CV determinations. In case the panel confirms the above, and the Parties do not reach agreement on a mutually satisfactory solution, the affected Party may take comparable legislative or equivalent executive action, or terminate the Agreement with regard to the amending Party.[31] As of January 2002, no case had been filed under this mechanism.

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[30] NAFTA, Article 1902.
[31] NAFTA, Article 1903.

Establishment of binational panel review procedures such as those contemplated under Chapter 19 of the Canada-US FTA,[32] under which international trade experts replace domestic administrative and judicial review of AD and CV determinations issued by the national agencies of NAFTA Parties, regarding goods of North American origin. This proposal was incorporated to NAFTA also under Chapter 19.[33] However, Mexico faced opposition from its trading partners due to their perception that jurists from Canada or the United States able to apply Mexico's civil law correctly, nor would Mexican jurists be able to adapt to Canadian or American common law practices.

Mexico was obliged to accept certain commitments in order to be granted access to binational review panels. First, to appease U.S. concerns that constitutional constraints in Mexico might interfere with the panel process, a new mechanism was incorporated under Chapter 19 of NAFTA to "safeguard the panel review system."[34] Specifically, the U.S. wanted to avoid that by means of the *juicio de amparo (habeas corpus)*,[35] that binational panel resolutions would be revoked, and therefore not enforced.

Under such mechanism, if a Party alleges interference in the panel process, and a special committee established to analyze this specific issue makes a finding that such is the case, the complaining Party can suspend the operation of the AD/CV panel system with respect to the non compliant Party or suspend to the latter any other benefit under NAFTA. Until January of 2002, this review system has not been invoked. The *amparo* proceeding certainly constitutes a permanent threat to the panel system. If a panel decision is revoked affecting the United States or Canada interests by means of an

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[32] Under this Agreement, panels were meant to be a temporary mechanism (to be in place for a maximum time limit of seven years). This mechanism was to disappear once the Parties agreed on an alternate system.

[33] Binational panels are also ruled according to the Rules of Procedure of Article 1904 of the NAFTA, and the Code of Conduct for Dispute Settlement Procedures of Chapters XIX and XX of the NAFTA.

[34] Article 1905 of NAFTA.

[35] Among the most important functions of the *amparo* proceedings are to protect individual guarantees, to test allegedly unconstitutional laws, to contest judicial decisions, and to review official administrative acts and resolutions.

amparo, Mexico could loose one of the most important benefits negotiated under NAFTA.[36] However, it could not commit itself under NAFTA to deny to its nationals this ultimate, extraordinary constitutional review procedure, centerpiece of Mexicans bill of rights, since all international agreements must be consistent with Mexico's Constitution.[37] Second, Mexico had to implement several procedural changes in its trade law, to increase the level of transparency of antidumping and countervailing proceedings.[38]

Description and Objectives of Binational Review Panel Procedures. Under NAFTA (Article 1904.1), a Party on its own initiative or if requested by an interested person[39] "may request that a

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[36] NAFTA negotiators recognize that "Chapter 19 was the key compromise between the United States and Canada- and then between the United States and Mexico- that enabled the parties to conclude a free trade agreement", Guillermo Aguilar Alvarez, Jonathan T. Fried, Charles E. Roh, Jr, Christianne M. Laizner, and David W. Oliver, "Nafta Chapter 19: Binational Panel Review of Antidumping and Countervailing Duty Determinations", in Beatriz Leycegui, William B.P. Robson, and S. Dahlia Stein (eds.). *Trading Punches: Trade Remedy Law and Disputes under NAFTA*, Washington D.C.: National Planning Association, 1995, pp. 24-42.

[37] Up to January 2002, only one panel decision had been challenged through the *juicio de amparo* (three *amparo* procedures were filed). In fact, the decision rendered in the first case, reviewed a final determination of Mexico's competent authorities (flat coated steel from the United States, MEX-94-1904-01). One of the *amparos* was finally attracted by Mexico's Supreme Court which did not issue a decision on the merits but dismissed it alleging that the amparo would only proceed against the measure adopted by the investigating authority implementing the panel's decision. The other two amparos filed at an early stage against the panel's decision were finished under the same grounds. The subsequent act which implemented the panel's decision was never challenged.

[38] Mexico's specific commitments of amendment were incorporated in NAFTA, Annex 1905.15, Schedule of Mexico. A listing of the specific provisions that were amended or introduced in Mexican law in order to conform to the aforementioned Schedule is provided in: Beatriz Leycegui, "A Legal Analysis of Mexico's Antidumping and Countervailing Regulatory Framework" in Beatriz Leycegui, William B.P. Robson, and S. Dahlia Stein (eds.). *Trading Punches: Trade Remedy Law and Disputes under NAFTA*, Washington D.C.: National Planning Association, 1995, pp. 64-66.

[39] Interested person is that who is entitled under the law of the importing Party to commence domestic procedures for judicial review of final determinations. This is usually an: importer, exporter, or domestic producer.

panel review... a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party,[40] to determine whether such determination was in accordance with the antidumping and countervailing duty law[41] of the importing Party." The panel shall apply the standard of review[42] and the general legal principles that a court of the importing Party would apply to review final determinations.[43] This makes them unique, since although the panels are international, the law and the standard of review that they apply are national.

The panel's decision "may uphold a final determination, or remand it for action no inconsistent with the panel's decision... if review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it."[44]

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[40] Annex 1911 defines such authorities from Canada, Mexico and the United States.

[41] According to Article 1904.2 of NAFTA: "...the AD/CV law consists of 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 investigating authority".

[42] Defined in Annex 1911.

[43] NAFTA, article 1904.3. In the first three decisions adopted by panels reviewing Mexican agency determinations, controversy surged among the panelists to this cases regarding the powers of the panels and the standard of review to observe. Under these cases panelists found difficulty in reaching consensus. In addition, the three cases are interesting to look at since they all raised very complex questions of constitutional law: they all involved antidumping investigations conducted under an old antidumping law which was no longer in effect when the panels reviewed the determinations; it was alleged that the Mexican investigating authority was incompetent since the applicable laws and regulation did not contemplate it's existence; and there was no guidance in Mexican jurisprudence. For further detail on this subject see Beatriz Leycegui and Gustavo Vega-Cánovas, "Eliminating 'Unfairness' within the North American Region: A Look at Antidumping", in Michael Hart (ed.), *Finding Middle Ground-Reforming the Antidumping Laws in North America*, pp. 261-268. Ottawa, Carleton University-Centre for Trade Policy and Law, 1997, pp. 251-322.

[44] Article 1904.8 of NAFTA.

Panel decisions "shall be binding"[45] ... and no Party may provide in its legislation for an appeal from a panel decision to its domestic courts."[46] Panels shall issue their final decision within 315 days of the date on which a request for a panel is made.[47] Panels are integrated by five members. Each Party involved names two panelists and the fifth one is named by the Parties in dispute by mutual agreement. If agreement is not reached, they shall decide by lot which of them shall select the fifth panelist.[48] The Parties normally shall appoint panelists from a roster. The roster shall include at least 75 candidates (each Party shall select at least 25 candidates).[49]

Only under exceptional circumstances, may their decisions be reviewed under an extraordinary challenge procedure, by an extraordinary challenge committee (comprising three members): when panelists have violated the Code of Conduct (e.g. existence of a conflict of interest); have departed from a fundamental rule of procedure (e.g. the involved Parties are denied from participating in the public hearing; or have exceeded their power, authority or jurisdiction (has failed to apply the proper standard of review).[50] However, it must be additionally proven that either of the former actions affected the panel's decision and threatens the integrity of the binational review process. The committee may vacate the original panel decision or remand it to the original panel for action not inconsistent with its decision; as well as deny the challenge if the grounds are not established.[51] It must be noted that this procedure before the committee does not constitute and additional review procedure. This is confirmed by the fact that under

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[45] Article 1904.9 of NAFTA.

[46] NAFTA, Article 1904.11. Some legal experts have argued that this provision infringes Mexico's Constitution by inhibiting the *juicio de amparo* from operating. Others diverge from the former opinion since in their view, the *amparo* is not an appeal procedure but an extraordinary constitutional review procedure. By the same token, neither the United States nor Canada is in a position to limit its judicial courts' authority over constitutional challenges to NAFTA.

[47] NAFTA, Article 1904.14

[48] NAFTA, Annex 1901.2, paragraphs 2 and 3.

[49] NAFTA, Annex 1901.2, paragraph 1 sets out the rules for the establishment of the roster.

[50] NAFTA, Article 1904.13.

[51] NAFTA, Annex 1904.13, paragraph 3.

the Canada-U.S FTA, of the 49 cases submitted to binational panel review, only three were subject to an extraordinary challenge, and neither one of them did the challenge succeed.[52] Under NAFTA, of the 75 cases filed in the 8 years of application of the Agreement, in only one has an extraordinary challenge committee been requested.[53]

Finally through the binational review panel procedure Mexico and Canada seek to accomplish the following objectives:

- reduction in the amount of time involved in pursuing domestic judicial review of AD/CV final determinations through the various appelate levels in the United States.
- as a consequence of the above, savings in money to the parties involved (fewer fees paid to attorneys). This also due to the fact that decisions would be made within a fixed period of time, and that they could not be appealed.
- extra savings would be achieved by private individuals through the transfer of costs from them to the governments, since it is the latter that carries out the process and assumes the bulk of the costs of the procedure.
- as a consequence of the above, access to judicial review by small and medium-sized companies would be enhanced.
- as the numbers of reviews increase, decisions of the administrative authority are under international scrutiny, this would discourage unfair claims and unjustified and frivolous administrative petitions in trade remedy cases; as well as the lax and flexible application of the trade remedy laws by administrative authorities, whose decisions were not oftenly appealed, and when appealed, usually confirmed by the judicial review authorities.
- if panel decisions proved to be fair and objective, the discouragement of frivolous claims and lax resolutions influenced

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[52] The case of fresh swine, chilled and frozen, from Canada (ECC-91-1904-01 USA); the case of alive swine from Canada (ECC-93-1904-01); and the case of certain softwood lumber products from Canada (ECC-94-1904-01).

[53] The case of cement gray portland and clinker from Mexico (ECC-2000-1904-01 USA). Although filed since March 23, 2000, the parties have not agreed on the integration of the committee, and therefore a decision on the matter is still pending.

by political considerations, would also come from the realization by private individuals and administrative authorities that their claims and resolutions, respectively, would be either rejected or remanded or amended if they were not in accordance with the law.

CASES

In this section, statistical information, covering January 1994 to January 2002, is provided regarding the activity of binational review panels. From such data, some conclusions can be drawn on the accomplishment of the objectives outlined earlier.

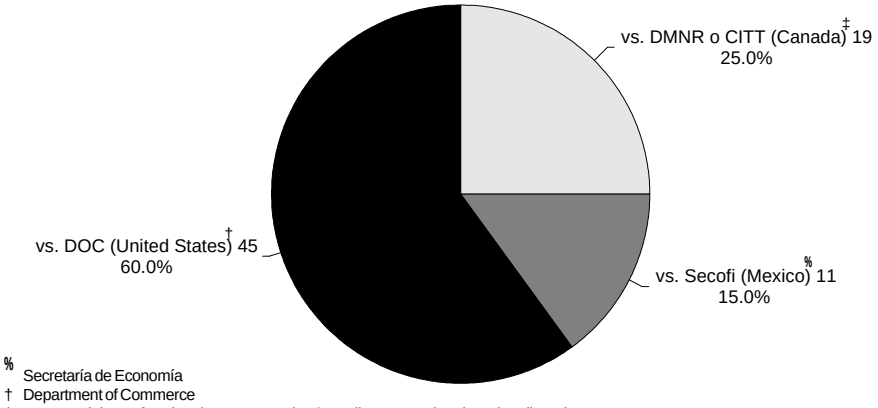
Investigated Authority. During the period of study, 75 cases had been filed under the binational panels of review: 45 (60 percent) involving final determinations of the U.S. investigating authority, 19 (25 percent) of Canada's, and 11 (15 percent) of Mexico's (see figure 3).

Type of investigation. As of January 2002, of the 75 cases filed under Chapter XIX of NAFTA, 72 had to do with dumping practices and only three with subsidies. All the subsidies cases involve revision of decisions of the United States administrative authority.

Affected sectors. Consistent to what occurs at the national level, a reduced number of sectors have been subject to review under binational panels: the metallurgic sector leads the list with 42 cases; followed by animal products (HS Section I), vegetables (HS Section II) and prepared foodstuffs (HS Section IV) with 11 cases; mineral products, 9; chemicals, 6; and other goods, 7 (electrical equipment, ceramic and textiles) (see figure 4).

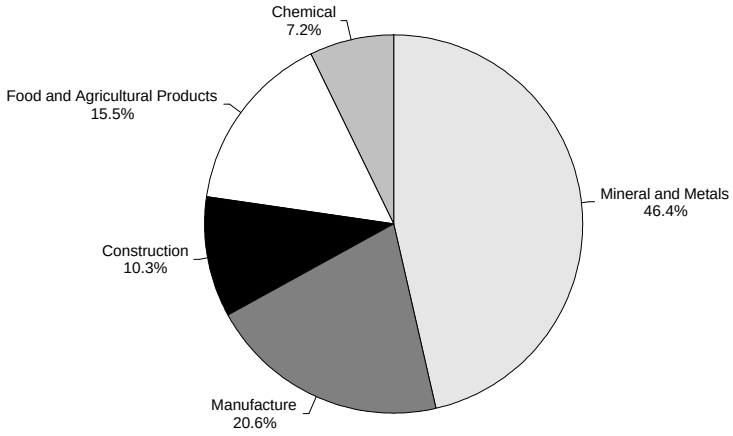
Status. Of the 75 cases filed: 26 were concluded; in 24 the panels' decision has not (see table 11). been issued; in 3 the panels' decision is pending of implementation; and 22 were withdrawn. (see table 11).

Figure 3: Chapter 19 -- Binational Panels Investigated Authority (January 1994-2002).



% Secretaría de Economía
† Department of Commerce
‡ Deputy Minister of National Revenue or the Canadian International Trade Tribunal.
Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

Figure 4: Chapter 19 -- Binational Panels Affected Sectors (January 1994-2002).



Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

Table 11: Status of Chapter 19 cases (January 2002).

Cases	*Mexico*	*U.S.*	*Canada*	*Total*
Concluded	5	11	10	26
Withdrawn	3	14	5	22
Pending Implementation of Panel Decision	2	18	4	24
Total	11	45	19	75

Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

Panels' decisions. Regarding the 29 cases in which the panels issued a decision (table 12),[54] in 14 (48 percent) they confirmed the determinations of the investigating authority, and in 15 they remanded the cases for new determinations (52 percent).[55] Note that panels reviewing U.S. and Canada investigating authorities have in 38 and 80 percent respectively of the cases deferred to their decision. This has not occurred when reviewing decisions from Mexican authorities, were 83 percent of their determinations have been overturned.

Panels' vote. Of the 29 decisions rendered by binational panels, 25 of them were adopted unanimously (86 percent); and 4 with a majority vote. In these latter cases, in neither of them did the vote split according to nationality (table 13) It is interesting to note that in all cases reviewing Canadian investigating authorities, the panels decisions were all unanimous.

Time. In only six of the 29 cases with a decision, the binational panel issued its final decision within the 315 days deadline provided for in the Agreement (starting from the date of request for a panel). An important

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[54] Note that 29 cases are reported, when it has been indicated that only 26 have concluded. This is explained by the fact that an extraordinary challenge review has been requested in one case, which is still pending of resolution. Two others were remanded to the administrative authority and are pending of implementation.

[55] Although in the majority of the cases, the panels decisions are reported as partially confirming or partially remanding the final determinations rendered by the Parties investigating authorities; when reviewing the panels decisions, depending on the nature of the remand (the specific instructions submitted to the investigating authority) these have been classified in the Appendix under only two categories, as either confirming or remanding the decision under review.

Table 12: Panel's Decisions (January 2002).

Cases	*Mexico*	*U.S.*	*Canada*	*Total*
Concluded	1	5	8	14
Remanded	5	8	2	15
Total	6	13	10	29

Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

Table 13: Panel's Vote (January 2002).

Cases	*Mexico*	*U.S.*	*Canada*	*Total*
Unanimous	4	11	10	25
Majority Vote	2	2	0	4
Total	6	13	10	29

Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

Table 14: Average Total Time of Chapter 19 Cases (January 2002).

Cases	*Panel decisions (29 cases)*	*Panel integration (42 cases)*	*Implementation of the (26 cases)*	*Total Panel procedure (26 cases)*
Canada (days)	446	169	80	526
U.S. (days)	523	315	138	566
Mexico (days)	703	224	258	849
Average total time (days)	533	256	139	605

Source: Elaborated with data from the Ministry of the Economy and the Mexican Section of the Secretariat of Free Trade Agreements.

number of cases have significantly surpassed those 315 days (by an average of 276 days). The average time of the binational panel procedures has been of 533 days (See table 14). Once the pending cases are resolved, this average will substantially be increased, since three were initiated in 1998, two in 1999 and fourteen in the year 2000.

The delay is closely linked to the time it has taken to integrate the panels: average time, 256 days, exceeding by 196 the maximum 60 days time limit from the date of request of a panel.[56] There are eight cases in which panels are pending of integration since 2000 and five since 2001.

[56] NAFTA, Annex 1901.2, paragraphs 2 and 3.

Of the 18 pending cases reviewing U.S. authorities decisions, 13 have not been integrated. Of those four pending cases reviewing Canadian decisions, in two of them from the mid 2000, the panel has not been integrated yet. In all of Mexico's three pending cases, a panel has already been appointed.

Although the implementation of the decisions account for an important number of days of the total days of the panel procedure (Canada 15% of the total days, U.S. 24%, and Mexico 30%), they have occurred in the case of the U.S. and Canada within a considerable shorter amount of time than that provided for under NAFTA.[57]

Assessment

Based on Chapter 19 objectives, among the criteria to assess whether Chapter 19 binational review panels are functioning appropriately are those relative to: the time length of the proceedings; their cost; and the expertise, fairness and objectivity of panelists. Closely linked to the last criteria is the manner in which panels voted, panels degree of deference to the investigating authorities decisions; and the governments acceptance and compliance of the panels decisions.

Time. From the data on the time so far taken to resolve the proceedings (average time, 533 days), it is not at all clear that Chapter 19 binational panels are serving their purpose of providing decisions which, in comparative terms, are more expeditious than national judicial reviews.[58] Considering the time within the proceedings linked to the panels' integration process, the delays in great part are associated to serious problems facing

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[57] NAFTA, Article. 1904.8: ... "In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation..." This is 240 days in the case of Canada, 260 days in the case of Mexico and 287 days in the case of the United States.

[58] It is estimated that in Mexico the administrative and judicial review procedures take approximately 540 days to be resolved (18 months). In the other hand, the U.S. Court of International Trade may take between 540 and 900 days (from 18 to 30 months). If the matter is taken to the U.S. Court of Appeals for the Federal Circuit, the review before the two mentioned stages may take from two to five years.

the appointment of panelists (average time, 256 days). There is a growing difficulty in finding qualified, available, and non-conflicted panelists.

Due to the expertise and other qualifications required under NAFTA, it is not difficult for panelists to encounter conflicts of interest. In fact, it is common that individuals that act as panelists in binational reviews are simultaneously acting as attorneys in investigations before investigating authorities whose actions they themselves are reviewing as panelists.

Panelists fees are another disincentive to the participation of a panelist in several binational reviews.[59] The contemplated fees under NAFTA are equivalent to $400.00 Canadian dollars, for an 8 hour day of work. An attorney hourly fee, with the credentials similar to those who sit in panels, is nearly equivalent to that amount, and in U.S. dollars. Taking one case has been sufficient to many panelists with regard to fulfilling their interest in terms of curriculum and experience.

Finally, associated with the delay of the proceedings, might be the defendant party's unwillingness to cooperate in the appointment of panelists, in occasions in retaliation to the application of a trade remedy measure in another case or to what occurred in other areas of the trade relationship; or because the case involves a politically sensitive product. The delay and in a growing number of occasions, stalemate in the appointment of panels, specially observed since 1999; if not addressed, may not only threaten Chapter 19 dispute settlement procedures, but the NAFTA itself.

Cost. Even under the scenario were panel proceedings are more expeditious than U.S. and Canada's national review procedures, the costs of the first tend to be equivalent or higher than the latter. With respect to Mexico, filing a case before its review authorities can be almost six times less expensive than recurring to binational panels. This is explained by the fact that binational panels follow rules and procedures applicable in common law legal systems. The oral nature of the procedure and the diverse

[59] The Parties are currently exploring the possibility of increasing the originally negotiated fees.

hearings and documents to be presented contribute to increase the costs *vis a vis* those incurred in Mexico's written based appeal system.

Expertise, fairness and objectivity of panelists. The panel system comprising five experts in international trade law, in general constitute a more specialized body than those in charge of reviewing AD/CVD determinations in the judicial review proceedings in Canada, Mexico and the United States. The fact that in 86 percent of the cases the panel's vote was unanimous, is a proof of the panels fairness and objectivity. This is additionally confirmed by the governments acceptance of their rulings, since in only one of the 29 decisions rendered, did they requested an extraordinary challenge investigation. Moreover, the investigating authority has also complied in all cases with their decisions within in general a reasonable period of time.

Finally, perhaps Chapter 19's most important contribution has to do with the disciplining of the use of AD/CV measures within the North American region, specially under a scenario where the Parties have not agreed on different alternatives for the handling of unfair trade practices. The decrease in recent years, of initiation of cases between NAFTA Parties (as mentioned in the previous section) in part may respond to the fact that the administrative authorities may be more careful when initiating and imposing duties against their trading partners.

SUMMARY AND PERSPECTIVE THOUGHTS

From 1987 to 1999, the United States was the most important user worldwide of AD and CV remedies. (Figure 5.) Mexico and Canada ranked fourth. The probability for a petitioner or domestic producer to succeed in an AD or CV investigation, "success ratio" (number of AD and CV cases initiated divided by the number of final measures imposed, see table 15) is more likely in Canada than in the United States and Mexico (70 percent vs. 47 and 52 percent, respectively). Cases involving NAFTA partners had lower success ratios than against other third countries.

Figure 5: AD/CV Cases (1987-1999): Total Number of Initiations.

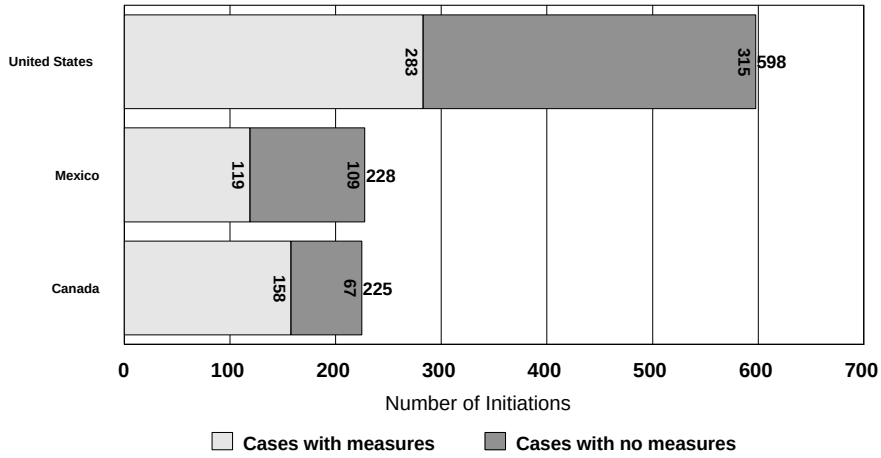

Table 15: AD/CV Cases (1987-1999) -- "Success Ratio."

Country	*NAFTA partners*	*Other Countries*
Canada	0.61	0.73
Mexico	0.43	0.56
United States*	0.32	0.49

* This ratio does not consider the cases concluded because of price undertakings.

Table 16: AD/CV Cases (1987-1999) -- Initiations by Type of Investigation.

Country	*Antidumping*	*Subsidies*
Canada	95%	5%
Mexico	92%	8%
United States	81%	19%

In the three North American countries, AD cases superseded the subsidies cases (table 16). The United States is the country most affected by Mexico and Canada AD and CV procedures. Canada is the fifth country most affected by the United States procedures, and Mexico ranks eighth. Same place, this last, that Canada has regarding Mexico's investigations. Mexico appears in place 21 of Canada's investigations. The far most affected

section of the HS Code by AD and CV investigations is the base metal section.

AD and CV initiations affecting intra-NAFTA trade dropped in average 60 percent from 1994 to1999, when compared with investigations initiated between 1987 to 1993. This took place under a scenario where intra-NAFTA trade increased 142 percent from 1990 to 1999. From 1987 to 1999, 172 initiations took place between NAFTA partners. Mexico stands first in terms of investigations: 70, compared to 53 of the United States and 49 of Canada. However, these numbers do not serve to indicate which country uses the AD and CV system more intensively.

An alternative methodology that has been used in the past to measure intensity is that of dividing the number of cases by the total intra-NAFTA import value, to determine the number of cases for each billion dollars of trade. Mexico happens to be twice as intensive user when compared with Canada, and the latter twice as intensive user when compared with the United States.

However, the problem with the former methodology is that the country with less imports and with the smallest economy will necessarily turn out to be the most intensive user. Consequently, the proposed methodology to measure intensity is that which has to do with determining the degree of penetration, the amount of competition that imports generate in the export market. Calculation is made of the number of cases for each percentage point in the imports/GDP ratio. In contrast with the results of the former two methodologies, United States is the most intensive user against NAFTA partners, followed by Mexico and finally Canada. It is interesting to note that for the three NAFTA Parties, the intensity ratio with respect to third countries is higher, suggesting they use of AD/CV measures less against themselves.

As of January 2002, of the 75 cases filed under Chapter XIX of NAFTA, 72 had to do with dumping practices and only 3 with subsidies. Consistent to what has occurred at the domestic level, a reduced number

of the HS sections have been subject to review, being the base metal section the most represented.

Regarding the 29 cases of the 75, in which the panels have issued a decision, in 14 (48 percent) they confirmed the determinations. Canadian administrative decisions have been the most confirmed when subject to review by NAFTA's binational panels, 80 percent of those subject to revision, followed by the U.S. with 38 percent and Mexico with only 17 percent.

Of the 29 decisions rendered by binational panels, 25 of them were adopted unanimously (86 percent), and 4 with a majority vote. In these latter cases, in neither of them was the vote split according to nationality. During the first eight years of NAFTA enforcement, the average total time taken by panels to issue their decisions was of 533, when the Agreement provides for 315 days, following the request for the establishment of a panel. The delays in the panel procedures are closely linked to delay in integrating the panels: 256 days average time when the Agreement establishes a 60 day time limit for this to occur.

In terms of time and cost, it is not clear that NAFTA's binational panel procedures have proven to be better than domestic review procedures. However, binational panels performance has been positive regarding their degree of expertise, fairness and objectiveness.

NAFTA's Chapter 19 panels have contributed to discipline the use of AD/CV measures within the North American region, being to an important extent responsible for the decrease in initiation of cases between NAFTA Parties (despite significant increases in trade flows). Administrative investigating authorities of the three countries have been more careful when initiating and imposing duties against their trading partners. Under a scenario in which NAFTA partners will continue to use "trade remedies to remedy their trade" because of market imperfections, they shall observe the principles and obligations of the WTO Agreements and NAFTA.

NAFTA Parties shall continue negotiating multilaterally on pending issues in order to further discipline the application of trade remedies, reducing the discretion that is still present in trade remedy investigations.

Considering the serious problems associated with the integration of NAFTA´s Chapter 19 binational panels, it is urgent that parties agree: on a roster of panelists; on improving the benefits and payments offered to them; in strengthening the role of the Secretariat (exerting functions similar to those of the WTO Secretariat) and if necessary on substituting the present *ad hoc* panels by a permanent tribunal. Since the elimination of AD laws within NAFTA seems unfeasible in the short and middle term, Parties should work towards negotiating less trade-restrictive AD rules to be applied between them, and in applying safeguards with greater frequency when required.

Finally, diminishing trading of remedies to remedy trade among NAFTA partners will occur when:

- a higher degree of specialization in the production processes is reached within the North American region; thus reaching a higher degree of integration.
- consumers and domestic producers (users of intermediate goods usually investigated), become better organized to counter the political pressure exerted by very specific domestic industries.
- the domestic industry of Canada, Mexico and the U.S. have better adapted to competition and thus the reallocation of the production factors has taken place to improve the regions´ competitiveness.
- in sum, once the losers of the liberalization are substantially reduced or have disappeared.

Perhaps, only when the former conditions have occurred, shall we observe willingness from NAFTA's trading partners to eliminate between them the application of AD laws and procedures that have proven to be in part science, in part art and even in part religion.

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