RESTORING COMPETITION OR GRANTING PROTECTIONISM?- TRADE REMEDY LAWS IN NORTH AMERICA

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INTRODUCTION

(To be completed)

Purpose and content of the article. Reference to sources of information.

This article includes the following sections:

- Overview of Trade Remedy Measures
- Trade Remedy Laws in North America
- Trade Remedies under NAFTA
- Summary and Prospective Thoughts

OVERVIEW OF TRADE REMEDY MEASURES

(To be completed)

This section refers to three specific types of trade remedy measures that governments may adopt to protect their domestic industry from imported products: antidumping duties, countervailing duties and safeguard or emergency actions. General reference is made to their nature, objective, evolution, legal framework, and use or abuse.

Antidumping and countervailing measures

(To be completed)

Safeguard measures

Safeguard measures respond to fairly traded imports, as oppose to antidumping and countervailing measures which intend to respond to unfair trade practices. As a consequence of their adoption, imports are subject to an increase in tariffs or to a quota. The objective behind such emergency actions, is that as profits increase as a result of the protection, the industry is enabled to invest in new technology and equipment, leading to the competitiveness it needs to eventually coexist with imported products.[1]

[1] Counter to this argument is that which states that governments are not always capable in determining those industries which can become competitive., and in the hypothetical case that they could, direct loans or subsidies, as well as other type of assistance, are usually more effective than protection and do not distort consumer prices. John Jackson, W. J. Davey, and A.O.Sykes Jr. 1995. *Legal Problems of International Economic Relations.* West Publishing Co. St. Paul, Minn., p. 600.

Safeguards were originally "designed to protect against import surges following trade concessions ...grant relief to domestic industries against import surges following trade concessions ... With time, ... safeguards were used by importing nations to protect "seriously injured" industries against increased import competition, ostensibly on a temporary basis, whether or not that competition could be linked to a particular trade concession."[2]

For many years, safeguard measures were only regulated by Article XIX of the General Agreement of Trade and Tariffs (GATT). It was until 1995, when the Uruguay Agreements came into force, that the Agreement on Safeguards additionally rules their use. Through a more thorough regulation of the aforementioned escape clause of GATT and the prohibition of gray area measures consistent in "voluntary" export restraints and orderly market agreements[3], it is expected that countries will recur to safeguards more oftenly to seek relief of their domestic industries.

Among the most important rules contemplated in the Agreement on Safeguards which must be observed in the application of safeguards by all of the World Trade Organization Members are:

A. Increase of imports-Evidence that imports have increased in such volume that they have seriously injured[4] or threaten to seriously injure[5] the domestic industry which produces similar or identical products to those being imported.
B. Causal relation-In the injury and causal relation analysis the following factors are relevant: "the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, sales, production, productivity, capacity, utilization, profits and losses and employment[6]".
C. Global application- Are applied to all imports of a product, independently of the country of origin.
D. Procedural rules- Are imposed as a result of an investigation followed before competent authorities and under a preexistent procedure.
E. Quantitative restrictions- The measure must not reduce the import volumes under the level observed in a recent period[7]

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[2] John Jackson, W. J. Davey, and A.O.Sykes Jr. 1995. *Legal Problems of International Economic Relations,* p. 596, n. .

[3] A quote encloses the word voluntary, since such restraints usually were agreed by exporting countries with importing countries, in order to avoid the risk of the adoption of unilateral trade remedies by the latter, resulting in greater harm to its exports. The former due to the fact that once a trade remedy is imposed they tend to stay in place for an undetermined period of time.

[4] "Serious Injury" shall be understood to mean a significant overall imperment in the position of a domestic industry. (Article 4.1a).

[5] "Threat of serious injury" shall be understood to mean serious injury that is clearly inminent... (Article 4.1b).

[6] Article 4.2a.

[7] The import average of the last three representative years, unless a greater reduction has been justified. If many importers , quotas shall be distributed according the volume or value of their imports during a representative period.

F. Transitory- Only applied during the necessary time to repair the injury, which cannot exceed the time period of four years, with the possibility of extending its life to a maximum time of eight years.
G. Recurrence- New safeguards cannot be imposed on a product,unless an equivalent time correspondent to the period in which the former safeguards were imposed un such product has ellapsed.
H. Compensation- The Member country affected by a safeguard measure may suspend benefits against the trading partner who has imposed it during the first three years after the implementation of the measure.

Reference of use or abuse (to be completed)

TRADE REMEDY LAWS IN NORTH AMERICA

Brief reference is made to the history and legal framework of trade remedy laws in Mexico, United States and Canada. Statistical information is provided on the use of such laws in each country, offering an analysis, on how they have applied these remedies against each other.

Mexico

Antidumping and countervailing measures

A) Legal Framework
(To be completed)

B) Use of antidumping and countervailing measures[8]

From 1987 to 1999,[9] Mexico initiated a total of 228 AD/CVD investigations.[10] Most of these investigations have been AD cases with a share of 92 percent (210 proceedings), leaving CVD cases with the remaining 8 percent (18 proceedings). This number of AD cases places the Mexican system as one of the most active worldwide: particularly, from 1987 to 1997, Mexico

[8] All the statistics included in this section was prepared by the authors with information from the Annual Report 2000 of the UPCI and was complemented as needed from the case database of the UPCI. In some cases was necessary to consult the final determinations published at the Official Journal.

[9] We decided to use information until 1999 even though there is information of initiations available until 2001. This is because we wanted to include information of final measures consistent with the initiations. That means that by the time this article was wrote there were unconcluded cases initiated in the year 2000 and 2001. Since the number of final measures corresponds to the number of initiations, its possible to calculate the rate of cases with final measures in the total cases. It is important to note that the final measures reported in this document reflect those imposed and not the measures currently in effect.

[10] The cases are measured by product, country and type of procedure (AD or CVD). For example, the Mexican AD and CVD investigations regarding cold-rolled sheet and hot-rolled sheet from Venezuela and Brazil were counted as 8 different proceedings, since each country has one AD and one CVD investigation for each product.

was the fourth place in initiations of AD cases, along with Canada.[11] Table 1 shows the number of cases and measures[12] by type of procedure. The last column named "success ratio" is calculated as the division of the number of final measures by the number of initiations, and represents the probability that an initiation finishes with final measures. For instance, 53 percent of the AD cases finished with measures, against 44 percent of the CVD cases. In the total number of AD/CVD investigations, a petitioner has roughly 50 percent of probability to get a positive outcome.

Table 1. Mexican 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	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.

Mexico has initiated cases against 43 countries. The three most affected are 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 with their number of final measures and the success ratio. Whether each subject country is over/under-represented in the total number of investigations or measures is not a matter of this Article., since that goes beyond the scope of the same, [13] 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 Mexican imports.[14]

Differences between the success ratio of certain countries may be so radical that, for example the probability of "winning" a case involving a Chinese product is the double than a case against a US product. The reason why the lower success ratio corresponds to the line of "other countries" is that near the 40 percent of such proceedings against other countries involve ex-Soviet Union states (19 cases) where a rather poor 0.05 success ratio (only 1 measure) was reached.[15] Remarkably, the United States and Canada, as well as Korea, are below the average of success ratio.

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[11] See Miranda, Torres and Ruiz (1998), pp. 6 – 7.

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

[13] Miranda makes a deeper analysis of this matter in "An Economic Analysis of Mexico's Use of Trade Remedy Laws from 1987 to 1995".

[14] 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/CVD initiations, and countries like Brazil and Venezuela are important exporters in this kind of products.

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

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.

Table 3 shows the AD/CVD initiations and measures by HS Section.[16] 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.

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

[16] For the purpose of this article sectors were defined as Harmonized System Sections (HS Section). This is because there is no match between tariff positions and the Sectors and sections of the National Accounts.

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.

Safeguards

Although Mexico's first trade law, issued immediately after Mexico's entrance to the GATT in August 1986, contemplated safeguard measures,[17] it was not until the Ley de Comercio Exterior (Free Trade Law) of 1993, that the a safeguard regime is regulated according to the GATT Article XIX and NAFTA commitments under Chapter Eight. Such law has not been amended to introduce Mexico's Uruguay Round commitments. However, it must be noted that the Foreign Trade Law generally establishes stricter rules than the WTO Agreement on Safeguards and the Safeguards Chapter of NAFTA.[18]

The rules relative to competent investigation authorities, as well as the investigation and review procedures applicable to safeguards are practically the same which apply to antidumping and countervailing duties measures.

[17] Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior (Foreign Trade Act Implementing Article 131 of the Constitution of the United Mexican States), *Diario Oficial de la Federación*, January 13, 1986. Such Act only regulated safeguards through ¿? articles.

[18] To cite some of the differences in which Mexico's domestic legislation is stricter than the WTO and NAFTA:

a) Injury test- Under Mexico's Foreign Trade Law the domestic producers must demonstrate that: . In the other hand under the Agreement on Safeguards and NAFTA the injury test consists of: Therefore Mexico applies a stricter injury test.
b) Adjustment programs- As part of the requisites to file a case, in Mexico domestic producers must submit an adjustment program. The multilateral and regional Agreements to not contemplate the former.
c) Period of revision- While in Mexico's legislation the authorities must examine the industries' indicators during a period of five years, in the aforementioned international agreements three years is sufficient.

However, with regard to the causality test, NAFTA is stricter than the WTO and Mexico's Foreign Trade Law. desarrollar

United States

Antidumping and countervailing measures

A) Legal Framework
(To be completed)

B) Use of antidumping and countervailing measures[19]

From 1987 to 1997 the United States was the country with more AD cases initiated and measures imposed.[20][21] Throughout the period of time where our review is focused, 1987 to 1999, the United States initiated 598 AD/CVD investigations. Eighty-one percent of the initiations involve dumping allegations (484 cases) and the 19 percent subsidies (114 cases). Table 4 shows the initiations, measures and success ratio by type of procedure. The overall success ratio of the US investigations is 0.47, which means that the odds for a petitioner to win a case is almost 50 percent.

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.

Table 5 shows the top 12 subject countries of US investigations. Japan appears in the first place with 60 initiations or 10 percent, followed closely by China with 55 initiations or 9 percent. In terms of measures the shares of Japan and China 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. In 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 US' NAFTA partners: Canada (0.27) and Mexico (0.40), the latter, along with Brazil. Countries with highest ratios are Italy, Japan, China, Korea and Germany, with ratios of 0.66, 0.65, 0.58, 0.55 and 0.54 respectively. Worthy of noticing is the fact that three of these countries are also the top three in number of initiations and measures.

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[19] All the statistics included in this section was prepared by the authors with information from the AD and CVD Case History Tables 1980-1999 from the International Trade Administration (ITA), and was complemented as needed with the Semi Annual reports under Article 16.4 of the United States to the WTO.

[20] Measures include only duty orders.

[21] See Miranda, Torres and Ruiz (1998), pp. 6-7.

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.

As regards US investigations with respect to HS Section[22] (Table 6), one is by far the most active: 52 percent of the initiations are against base metals. This figure grows when, it comes to final measures, to 58 percent. The three next HS Section 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 for prepared foodstuffs, textiles, base metals and plastics, with 0.63, 0.62, 0.54 and 0.52 respectively.

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

[22] Since the sources do not include the tariff position of the products under investigation, the authors classified the cases to the best of their ability.

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.

Safeguards

A) Legal Framework
(To be completed)

B) Use of safeguard measures

Canada

Antidumping and countervailing measures

A) Legal Framework
(To be completed)

B) Use of antidumping and countervailing measures[23]

As we said, from 1987 to 1997 Canada along with Mexico, was the fourth place worldwide in the use of antidumping procedures.[24] From 1997 to 1999 Canada initiated a total of 225 AD/CVD investigations: 213 AD cases (95 percent) and 12 CVD cases (5 percent). The success ratio of AD/CVD cases is 70 percent, this is a petitioner has 70 percent of chance of winning his case. Table 7 shows initiations, measures and success ratios by type of procedure.

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.

[23] All the statistics included in this section was prepared by the authors with information from the historical listing of SIMA cases of the Canada Customs and Revenue Agency.

[24] See Miranda, Torres and Ruiz (1998), pp. 6-7

In terms of subject countries, the United Sates are by far the first target in the Canadian AD/CVD system accounting for 46 initiations and 29 final measures, with shares of 20 and 18 percent respectively.[25] The rest of 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 3 cases and 1 measure. Forty-five countries have been involved in AD/CVD proceedings in Canada.

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.

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/CVD cases and measures broken down by 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 has only 2 initiations are for 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).

[25] 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.

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.

Safeguards

A) Legal Framework
(To be completed)

B) Use of safeguard measures
(To be completed)

Intra-NAFTA use of antidumping and countervailing measures

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 there have been 172 initiations between NAFTA partners. Mexico is first place in 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 is the most affected country with 111 initiations (65 percent) against, followed by Canada with 38 (22 percent) and Mexico with 23 (13 percent). Almost all the initiations (95 percent) involve the United States as a party, this is as investigating or subject country, which implies that between Mexico and Canada there are very few initiations, only 8. Nevertheless, the absolute number of initiations within each investigating country is more or less the reflect of their imports from each subject

country, but *per se* in no way shows us which country uses AD/CVD procedures more intensively.

One way to measure the intensity with which each country uses its AD/CVD tools is simply dividing the number of cases by the total import value. The result would be the number of cases for each, for example, billion dollars.[26] 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. We can also say that countries over the average (0.30 billion dollars per case) use the system intensively, while countries under the average don't use it intensively.

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 problem of this method is that it does not recognize the size of the economy at stake: for instance 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. One could argue that intensity should be measured in terms of the "penetration grade" that the imports have in the investigating market, that is, the number of initiations depends on the amount of competition that those imports generate. Following this idea we calculate the "penetration grade" as the imports over GDP ratio. Then we divide the number of initiations by the imports/GDP ratio to obtain a ratio of intensity in the use of AD/CVD procedures. In simple words this ratio gives us the number of initiations for each percentage point of the "imports penetration".

In columns eighth and ninth of Table 10 above we present the calculation of the ratio of intensity for the NAFTA's imports, this is, the number of cases is divided by the imports/GDP ratio which is calculated only with imports from NAFTA's partners. Also in the last column we include the intensive ratio calculated with the same methodology for imports from other non-NAFTA countries. A first conclusion is that the three countries use less intensively AD/CVD

[26] 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 (1998) and Thomas Prusa (Trading punches). The result of each method would be the same measuring which country is more intensive in the use of AD/CVD procedures since the ratio between countries of each method is identical.

cases against NAFTA's partners than against the rest of the world. Particularly, Canada uses more than 7 times AD/CVD cases against third countries, Mexico 6 times, and the United States 3 times. A reason for this could be existence of Chapter's XIX review system. Under this methodology, either against NAFTA's partners or third countries, from the three countries under review the United States is the most intensive user of AD/CVD cases, Mexico occupies the second place and Canada the last. Also the ratios suggest that the United States is much more intensive in the use of AD/CVD cases since its ratio is 6 times bigger than the Canadian and 4 times than the Mexican.

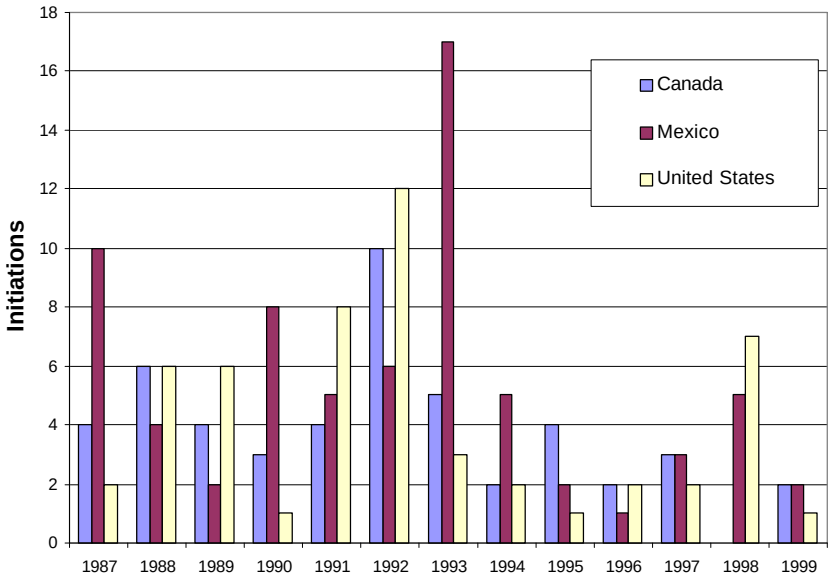
Figure 1 shows initiations affecting intra-NAFTA trade by partner by year. This figure makes it clear that since 1994 the initiations in the three countries fell down. In fact the average of intra-NAFTA initiations for the period 1987 to 1993 fell down almost 60 percent to the period 1994 to 1999, from 18 cases to 8 by year, a good record when the intra-NAFTA trade grew up 142 percent from 1990 to 1999.

The relevant question at this point is why did the cases fall down? To try to answer this question first we have to see what is going on with the initiations against the rest of the countries, to see if this phenomenon happens only at an intra-NAFTA level. 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, this is, they fell down 39 percent. This means that the decrease in the AD/CVD activity was in both sides, intra-NAFTA and other countries, but in the first level (NAFTA) the decrease was superior.

The reasons for the decrease of AD/CVD initiations are not clear. Some reasons that can explain the general decrease in cases are the low price of certain cyclical commodities in 1992 and 1993 that "pushed" to the initiation of more cases,[27] and the Mexican crisis after 1994 that gave producers certain exchange rate protection against imports. Two reasons that might explain the decrease in intra-NAFTA cases are the Chapter XIX review system, and the protection that by 1994 was already "won" through AD/CVD cases in the most controversial sectors, for example base metals, suggesting that in some sectors the AD/CVD could be a step back for the liberalization.

[27] See Miranda Torres and Ruiz (1998), 99. 16.

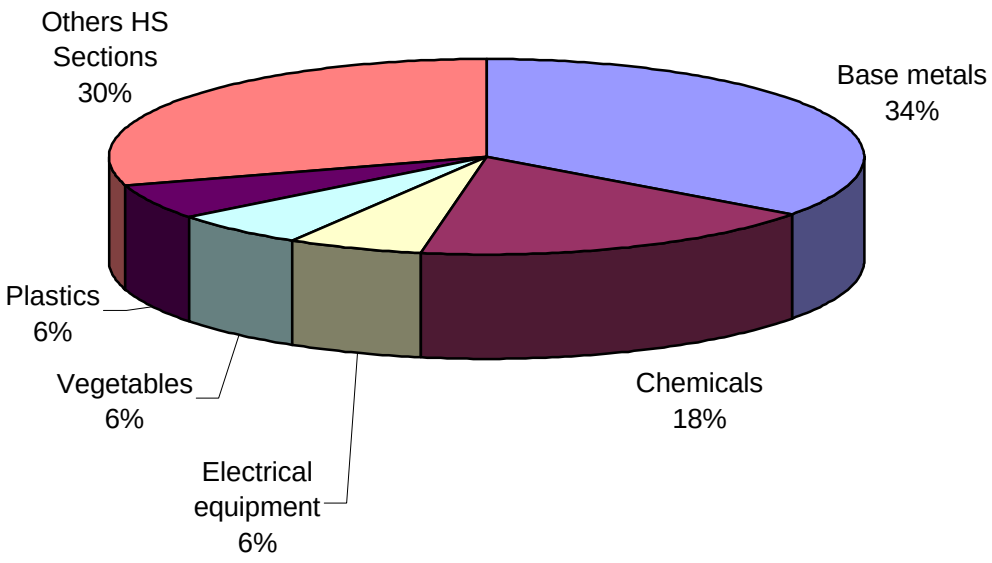
Figure 1. AD/CVD initiations affecting intra-NAFTA trade by partner



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

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 equipment, vegetables and plastics), leaving the last 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 with 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.

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



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

TRADE REMEDIES UNDER NAFTA

Antidumping and Countervailing Duty Measures

Antidumping subsidies and safeguards 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 what has occurred in the first 8 years of NAFTA's 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 North American Free Trade Agreement (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:

a) 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.[28] 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".[29] Once the North American market became totally integrated, antidumping laws would be replaced by antitrust laws.

For obvious political and economic reasons that have previously been discussed, 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[30] "to report, and to make recommendations within five years of the date of entry into force of this Agreement (January 1st. 1994) on relevant issues concerning the relationship between competition laws and policies and 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.[31]

[28] 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. (Include references on this agreement Note 99 finding). The Treaty of Rome of 1958 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. (Include references on this agreement, note 100 finding). In addition, Canada and Chile in their free trade agreement have negotiated the dumping of antidumping laws without establishing a substitute system.

[29] 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 practice (predatory pricing). Thus, under Mexico's proposal, these products could not be subject to an antidumping investigation unless the petitioner proved that barriers to trade were still prevalent, and hence a predatory-pricing practice is taking place.

[30] Article 1504 of NAFTA.

[31] A suggested step-by step approach for replacing antidumping laws with competition policies is presented in: 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*, Ottawa, Carleton University-Centre for Trade Policy and Law, 1997, 251-322.This article recognizes the political and technical problems that such replacement implies. Therefore it suggests necessary reforms and mentions the conditions that have to exist in order to accomplish this goal.

b) Amendment to U.S. antidumping and countervailing duty laws and administrative practices in those areas that enhance protectionism.

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 antidumping law and countervailing duty 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 Subsidies and Countervailing Measures, and the object and purpose of NAFTA and Chapter 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters).[32]

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/CVD 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.[33] As of January 2002, no case had been filed under this mechanism.

c) Establishment of binational panel review procedures such as those contemplated under Chapter 19 of the Canada-US FTA.[34] under which international trade experts replace domestic administrative and judicial review of AD and CVD 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.[35] However, Mexico faced opposition from its trading partners due to their perception that jurists from Canada or the US would not be 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 US 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".[36] Specifically, the U.S. wanted to avoid that by

[32] NAFTA, Article 1902.
[33] NAFTA, Article 1903.
[34] Under this Agreement, panels were meant to be a temporary mechanism (to be in place for only seven years). This mechanism was to disappear once the Parties agreed on an alternate system.
[35] 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.
[36] Article 1905 of NAFTA.

means of the *juicio de amparo (habeas corpus)*,[37] the 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/CVD 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 *amparo,* Mexico could loose one of the most important benefits negotiated under NAFTA.[38] 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 agreeements must be consistent with Mexico's Constitution.[39]

Second, Mexico had to implement several procedural changes in its trade law, to increase the level of transparency of antidumping and countervailing proceedings.[40]

Description and objectives of binational review panel procedures

Under NAFTA (Article 1904.1), a Party on its own initiative or if solicited by an interested person[41] "may request that a panel review... a final antidumping or countervailing duty

[37] 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.

[38] 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.

[39] Up to January 2002, only one panel decision had been challenged through the *juicio de amparo* (three were filed). In fact, the decision rendered in the first case filed, 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 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.

[40] 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.

determination of a competent investigating authority of an importing Party, [42] to determine whether such determination was in accordance with the antidumping and countervailing duty law[43] of the importing Party".

The panel shall apply the standard of review[44] and the general legal principles that a court of the importing Party would apply to review final determinations.[45] 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".[46]

Panel decisions "shall be binding"[47]... and no Party may provide in its legislation for an appeal from a panel decision to its domestic courts"[48]. Panels shall issue their final decision within 315 days of the date on which a request for a panel is made.[49] Panels are integrated by five members. Each Party involved names two panelists and the fifth one is named by the Parties

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[41] 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.

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

[43] According to Article 1904.2 of NAFTA: "...the AD/CVD 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".

[44] Defined in Annex 1911

[45] 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, 251-322.

[46] Article 1904.8 of NAFTA.

[47] Article 1904.9 of NAFTA.

[48] 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 Unted States nor Canada is in a position to limit its judicial courts' authority over constitutional challenges to NAFTA.

[49] NAFTA, Article 1904.14

in dispute by mutual agreement. If agreement is not reached, they shall decide by lot which of them shall select the fifth panelist.[50] The Parties normally shall apoint panelists from a roster. The roster shall include at least 75 candidates (each Party shall select at least 25 candidates).[51]

Only under expectional circumstances, may their decisions be reviewed under an extraordinary challenge procedure, by an extraordinary challenge committe (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).[52] 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.[53] 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 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.[54] 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.[55]

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

a) Reduction in the amount of time involved in pursuing domestic judicial review of AD/CVD final determinations through the various appelate levels in the United States.
b) 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.
c) 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.
d) As a consequence of the above, access to judicial review by small and medium-sized companies would be enhanced.
e) 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

[50] NAFTA, Annex 1901.2, paragraphs 2 and 3.
[51] NAFTA, Annex 1901.2, paragraph 1 sets out the rules for the establishment of the roster.
[52] NAFTA, Article 1904.13.
[53] NAFTA, Annex 1904.13, paragraph 3.
[54] The case of fresh swine, chilled and frozen, from Canada (ECC-91-1904-01 USA); the case of alive swines from Canada (ECC-93-1904-01); and the case of certain softwood lumber products from Canada (ECC-94-1904-01).
[55] 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.

of the trade remedy laws by administrative authorities, whose decisions were not as oftenly appealed, and when appealed, usually confirmed by the judicial review authorities.

f) If panel decisions proved to be fair and objective, the discouragement of frivolous claims and lax resolutions influenced 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.

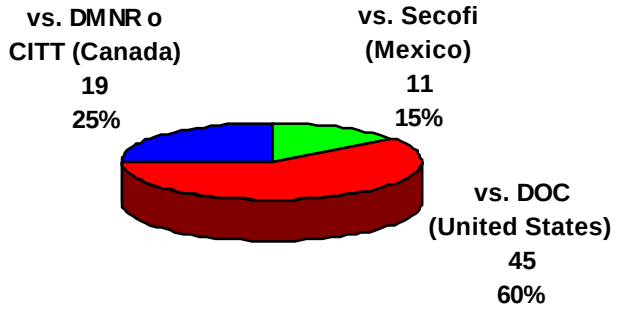
Cases

In this section, statistical information, covering January 1994 to January 2002, is provided regarding the activity of binational review panels. For more detailed information on the cases filed see the Appendix to this article. From such data, some conclusions can be drawn on the accomplishment of the aforementioned objectives.

a) 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).

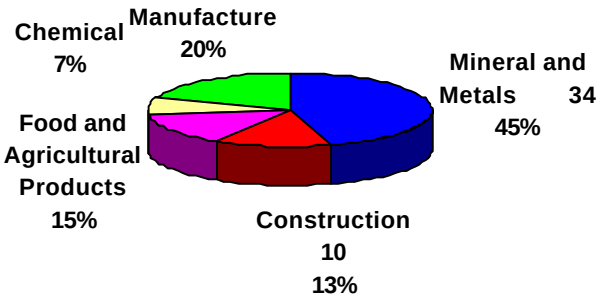
Figure 3. Chapter 19: Binational Panels Investigated Authority (January 1994-2002)



b) 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 34 cases (steel 29, magnesium, 4 and brass 1); followed by agricultural and livestock products with 11 cases; construction products, 10; chemicals, 5; and other manufactured goods 15 (see figure 4).

Figure 3. Chapter 19: Binational Panels Affected Sectors (January 1994-2002)



c) Type of measure reviewed

Also a reflection of what occurs within each country, dumping cases (##) have clearly predominated over those having to do with subsidies (##).

d) Status

Of the 75 cases filed, in 26 the panels issued a decision, 28 are still pending of resolution, and 21 were withdrawn. (see table 11).

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

Cases	Mexico	U.S.	Canada	Total
Concluded	5	11	10	26
Withdrawn	3	14	4	21
Pending	3	20	5	28
Total	11	45	19	75

e) Panels' decisions

Regarding the 26 cases in which the panels issued a decision, in 14 (53.8 percent) they confirmed the determinations of the investigating authority, and in 12 they remanded the cases for new determinations (46.1 percent).[56] See chart . Note that panels reviewing U.S. and Canada investigating authorities have in percent of the cases deferred to their decision. This has not occurred when reviewing decisions from Mexican authorities, were percent of their determinations have been overturned.

[56] 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)

Panel´s decision	Mexico	U.S.	Canada	Total
Confirmed	1	5	8	14
Remanded	4	6	2	12
Total	5	11	10	26

f) Panels'vote

Of the 27 decisions[57] rendered by binational panels, 23 of them were adopted unanimously (85.1 percent); and 4 with a majority vote. In these latter cases, in neither of them did the vote split according to nationality. (See table 13) It is interesting to note that in all cases reviewing Canadian investigating authorities, the panels decisions were all unanimous.

Table 13. Panel's vote (January 2002)

Panel´s votes	Mexico	U.S.	Canada	Total
Unanimous	3	10	10	23
Majority vote	2	2	0	4
Total	5	12	10	27

g) Time

In only of the 26 concluded cases, did the binational panel procedure conclude within the 315 days deadline provided for in the Agreement. An important number of cases have significantly surpassed those 315 days (by an average of days). The average time of the binational panel procedures has been of 603 days. See table 14. Once the 28 pending cases are resolved, this average will substantially be increased, since 1 was initiated in 1997, in 1998, in 1999 and in the year 2000.

Table 14. Average total time of Chapter 19 cases (January 2002)

Cases	Procedure (26 cases)	Panel integration (38 cases)	Implementation of the decision (26 cases)
Canada (days)	684.32	163.90	148.10
U.S. (days)	1138.72	202.73	137.55
Mexico (days)	843.20	184.29	260.40
Average total time (days)	645.28	191.72	165.23

[57] Note that 27 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, and this is still pending of resolution.

The delay is closely linked to the time it has taken to integrate the panels: average time, 191 days, exceeding by 131 the maximum 60 days time limit from the date of request of a panel.[58] There are 5 cases in which panels are pending of integration since 2000 and 5 since 2001. Of the 20 pending cases reviewing U.S authorities decisions, have not been integrated: requested in 1997; in 1988, in 1999; in 2000 and in 2001. Of those five 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.

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.

(lack of use of the ECI and compliance).

A. Time

From the mentioned data on the time so far taken to resolve the proceedings (average time, 603 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.[59] Considering the time within the proceedings linked to the panels' integration process, the delays in great part are associated to serious problems facing the appointment of panelists (average time, 194 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.

The panelists fees are another disincentive to the participation of a panelist in several binational reviews.[60] 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. One case in many times is enough for an individual's interest in terms of curriculum and experience.

[58] NAFTA, Annex 1901.2, paragraphs 2 and 3.
[59] 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.
[60] The Parties are currently exploring the possibility of increasing the originally negotiated fees.

Finally, associated with the delay of the proceedings, might be the investigating authorities unwillingness to cooperate in the appointment of panelists, in occasions in retaliation to the application of a trade remedy measure 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.

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

C. Expertise, fairness and objectivity of panelists

The panel system comprising five experts in international trade law, in general constitute a far 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 85 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 26 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. (mention exceptions which have elevated the average of days in which decisions have been implemented).

Finally, perhaps Chapter 19's most important contribution has to do with the disciplining of the use of AD/CVD 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. (Link this to former conclusions) NAFTA Parties administrative authorities are more careful when initiating and imposing duties against their trading partners.

Safeguard measures

Negotiation

Since the negotiations on safeguards under the Uruguay Round had been completed and there was an agreed draft by the time of the Brussels Ministerial in December 1990, such draft served as an important point of departure during the NAFTA negotiations. This explains why the wording in the WTO Safeguard's Agreement and the one in Chapter VIII of NAFTA are very

similar. However, the NAFTA negotiators departed from the WTO rules with respect to compensation. While under the WTO, the right of trading partners to seek compensation or to retaliate was suspended if the safeguard measures were genuinely temporary (shall not compensate during the first three years of application of the measure),[61] the NAFTA retains such rights of the exporting country in`the case of global and bilateral actions.[62]

The effect of these provision in NAFTA is to limit the use of safeguard measures. Perhaps this was consistent with concerns in Mexico and the US that safeguards could be used as a protectionist measure.

Description of bilateral and global safeguards

In the Canada-U.S. FTA and NAFTA negotiations, the rules for safeguards link emergency actions to the reduction of barriers under the agreement, thus applying the original concept of Article XIX of the GATT.

Under NAFTA Chapter 8 there is on the one hand a special track for bilateral safeguard actions and in the other hand there is another track for global actions. The bilateral track allows a member to suspend further reductions in duties or to increase duties up to a maximum of the current MFN tariff rate for a product or the MFN rate that was in place when NAFTA came into effect, when these increased imports are a substantial cause of serious injury (or threaten serious injury).[63] These bilateral safeguards can be imposed up to three years (except for certain sensitive products where one more year is permitted), can only apply once on a product during the transition period, and cannot remain in place after the end of the transition period without the consent of the exporting country.

Under the global track, each country retains the right to take safeguards under the WTO rules on a global basis, and against imports from a NAFTA party if those imports account for a substantial share of total imports and contribute importantly to serious injury.[64]

Cases

Disputes relative to the safeguards provisions of NAFTA (Chapter 8) are to be settled under the rules of Chapter 20,[65] which contemplates a general dispute settlement mechanism.[66] to

[61] Apparently, the suspension of the right of compensation (which was a deterrent to invoking safeguard measures under Article XIX), was offered as an inducement for countries to use safeguard measures under the rules of the WTO, instead of using extra-GATT measures such as the voluntary export restraints or to use antidumping and countervailing duty measures to restrict legitimate trade.
[62] NAFTA, Article 802.
[63] NAFTA, Article 801.
[64] NAFTA, Article 802.
[65] However, Chapter 20 general dispute settlement mechanism does not apply if the conflict involves a proposed safeguard measure (NAFTA, Article 804).
[66] For further reference on Chapter 20 see: Tesis, which provides a comparison between the Canada-U.S Free Trade Agreement and NAFTA, and the reasons for negotiating different rules; as well as mi artículo Socios Naturales for a description of the three different stages within the procedure, analysis of the cases filed during the first five years of NAFTA, and an assessment with respect to its functioning.

be followed in practically all disputes arising under NAFTA. Two cases involving safeguard measures have been brought under the Agreement. The first one involved a safeguard measure imposed by the United States on Mexican tomatoes and did not go beyond the consultation phase.[67] The second involved a measure again adopted by the United States againts the brooms from Mexico. A panel favored the latter and U.S proceeded to eliminate the application of the measure.

SUMMARY AND PROSPECTIVE THOUGHTS

(To be completed)

[67] The general dispute settlement mechanism has three major stages: consultations, participation of the Free Trade Commision, and intervention of a panel.