BOOK REVIEW

GREGORY W. BOWMAN, NICK COVELLI, DAVID A. GANTZ & IHN H. UHM: *TRADE REMEDIES IN NORTH AMERICA*

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INTRODUCTION

When it was concluded in 1992,[1] the North American Free Trade Agreement (NAFTA) was the most comprehensive free trade area agreement ever negotiated, creating the world's largest market for goods and services.[2] Building on the major liberalization efforts initiated by the

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1. North American Free Trade Agreement, U.S.–Can.–Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993). Following passage of the North American Free Trade Agreement Implementation Act of 1993 on November 20, 1993, NAFTA entered into force in the United States on January 1, 1994. Pub. L. No. 103–182, 107 Stat. 2060 (codified at 19 U.S.C. §§ 3301–3473).

2. For an overview of NAFTA's legal obligations, operation, and impact, see generally NORTH AMERICAN FREE TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159 (1st Sess. 1993) [hereinafter STATEMENT OF ADMINISTRATIVE ACTION]; Impact of the North American Free Trade Agreement on the U.S. Economy and Industries: A Three Year Review, Inv. No. 332–381, USITC Pub. 3045 (June 2007) (Final); Potential Impact on the U.S. Economy and Selected Industries of the North American Free Trade Agreement, Inv. No. 332–337, USITC Pub.2596 (Jan. 1993) (Final).

1989 Canada–U.S. Free Trade Agreement (CUSFTA),[3] NAFTA is in essence an expanded version of the CUSFTA that locks into a trilateral treaty the market–oriented reforms unilaterally adopted by Mexico beginning in 1985. Today, NAFTA integrates a region of over 450 million people with a combined gross domestic product of nearly $18 trillion.[4]

One of NAFTA's distinguishing features that sets it apart from all post–NAFTA free trade agreements negotiated by the United States is NAFTA Chapter Nineteen, concerning appeals of antidumping (AD) and countervailing duty (CVD) administrative agency determinations.[5] NAFTA Chapter Nineteen, *Review and Dispute Settlement in Antidumping and Countervailing Duty Matters*, makes no changes to the substance of the three NAFTA Parties' unfair trade remedy laws,[6] nor does it attempt to harmonize those national laws. Instead, NAFTA Chapter Nineteen carries forward the novel dispute settlement mechanism introduced in the CUSFTA[7] by providing an independent, five–member, binational panel

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3. In late 1983, Canada released a comprehensive review of its trade policy during the early 1980s that highlighted the importance of U.S. trade to Canada. The report rejected the idea of a comprehensive, preferential free trade agreement between the United States and Canada. The review instead recommended limited free trade agreements for particular sectors (steel, urban mass transit, petrochemicals, and textiles and clothing), to be modeled after the 1965 U.S–Canada Auto Pact. Several joint working groups were established in 1984 to examine the possibility of negotiating these sectoral agreements. However, these working groups remained dormant during the Canadian election campaign that began in the summer of 1984. Once elected in September 1984, the new government of Canadian Prime Minister Brian Mulroney began a review of ways to promote freer trade with the United States. On September 26, 1985, Mulroney requested that the United States and Canada open negotiations on a free trade agreement. Negotiations began on June 17, 1986. On January 2, 1988, President Ronald Reagan and Prime Minister Mulroney signed the agreement. On July 25, 1988, the President transmitted to Congress implementing legislation which Congress enacted. On September 28, 1988, the President signed the act into law. The U.S–Canada FTA took effect on January 1, 1989. *See* The Impact of Trade Agreements: The Effect of the Tokyo Round, U.S.–Israel FTA, U.S. Canada FTA, NAFTA, and the Uruguay Round on the U.S. Economy 24–25, Inv. No. TA-2111-1, USITC Pub. 3621 (Feb. 25, 2003) (Final).

4. *See* THE ECONOMIST, THE WORLD IN 2010 (SPECIAL ISSUE) 108 (2009).

5. In addition to NAFTA, the United States has in force free trade agreements with Australia, Bahrain, Chile, Israel, Jordan, Morocco, Peru, Oman, Singapore, and collectively under the Dominican Republic-Central American Free Trade Agreement (DR–CAFTA) with the Dominican Republic, Costa Rica, Nicaragua, El Salvador, Honduras, and Guatemala. The United States has completed negotiations on free trade agreements with Colombia, Panama, and South Korea that await congressional approval. None of these post–NAFTA FTAs provide for binational panel review of national investigating authorities' AD and CVD determinations.

6. This Review uses the standard convention of referring to the NAFTA member countries as "Parties" or "Party", i.e., with an initial capital "P".

7. *See* Kevin C. Kennedy, *Binational Dispute Settlement Under the Canada–U.S. Free Trade Agreement*, 13 MD. J. INT'L L. & TRADE 71, 78–83 (1988). Interestingly, the CUSFTA binational panel review process was intended as a stop-gap measure, not a

review of national investigating authorities' determinations in AD and CVD cases as an alternative to judicial review by domestic courts of those determinations.[8] NAFTA Annex 1901.2 addresses the issues of the appointment of individuals to the Chapter Nineteenroster of panelists and their appointment as panelists once a request for panel review has been filed with the NAFTA Secretariat:[9]

> 1. On the date of entry into force of this Agreement, the Parties shall establish and thereafter maintain a roster of individuals to serve as panelists in disputes under this Chapter. . . . Each Party shall select at least 25 candidates, and all candidates shall be citizens of Canada, Mexico or the United States. Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. Candidates shall not be affiliated with a Party, and in no event shall a candidate take instructions from a Party. . . .
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> 2. A majority of the panelists on each panel shall be lawyers in good standing. Within 30 days of a request for a panel, each involved Party shall appoint two panelists, in consultation with the other involved Party. . . .
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> 3. Within 55 days of the request for a panel, the involved Parties shall agree on the selection of a fifth panelist. . . .

Although panel decisions are intended to be final and non–appealable, they are subject to review in very narrowly defined circumstances by a

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permanent institution. *See* Canada–United States Free Trade Agreement art. 1906, U.S.–Can., Oct. 4, 1988, 27 I.L.M. 281 [hereinafter CUSFTA]; Kevin C. Kennedy, *The Canadian and U.S. Responses to Subsidization of International Trade: Toward a Harmonized Countervailing Duty Legal Regime*, 20 LAW & POL'Y INT'L BUS. 683 (1989). Canada and the United States were to negotiate a replacement AD and CVD legal regime that would harmonize the two countries' laws in this regard. At the time of the conclusion of NAFTA, however, Canada and the United States had failed to reach agreement on a substitute legal regime in CUSFTA negotiations. Some of their differences with regard to subsidies were resolved in another forum, the Uruguay Round. The Uruguay Round negotiators agreed to significant changes to the international rules on government subsidies, although its efforts in the antidumping duty area are less impressive. With the exception of the CUSFTA provision on harmonization, which is dropped from NAFTA Chapter Nineteen, Chapter Nineteen is in all material respects identical to CUSFTA Chapter Nineteen.

8. *See* Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, in*THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 291 (Judith H. Bello, Alan F. Holmer & Joseph J. Norton eds. 1994).

9. A panel is established when a Request for Panel Review is filed with the NAFTA Secretariat by an industry asking for a review of an investigating authority's decision involving imports from a NAFTA country.

three–member, ad hoc Extraordinary Challenge Committee (ECC) comprised of former American, Canadian, and Mexican judges. The scope of ECC review is limited to (1) allegations of gross misconduct by a panel, allegations that a panel seriously departed from a fundamental rule of procedure, or allegations that a panel manifestly exceeded its powers, authority, or jurisdiction, and (2) such conduct that materially affected the panel's decision and threatens the integrity of the panel process.[10] In view of the narrowly circumscribed grounds for challenging a panel decision, ECC review falls far short of typical appellate judicial review. It has seen limited use.[11]

In addition to the NAFTA Chapter Nineteen special appeal procedure applicable to the unfair trade remedy laws, the NAFTA Parties established special substantive rules in NAFTA Chapter Eight on safeguards relief to deal with injurious but fairly traded imports. Chapter Eight sets forth "the procedures and remedies available to domestic industries that have sustained, or are threatened by, serious economic injury due to increased imports."[12] The Clinton Administration, which shepherded NAFTA through Congress, predicted that NAFTA would not result in injurious increases in imports from either Mexico or Canada.[13] Nevertheless, safeguards relief was an essential feature of NAFTA that was touted by the Clinton

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10. *See* NAFTA art. 1904.13.

11. Under NAFTA, there have also been three ECC proceedings to date. All three were brought by the United States and in each the extraordinary challenge was unsuccessful. *See* In the Matter of Gray Portland Cement and Clinker from Mexico, Fifth Administrative Review, Secretariat File No. ECC–2000–1904–01USA (Oct. 30, 2003); In the Matter of Pure Magnesium from Canada, Secretariat File No. ECC–2003–1904–01USA; In the Matter of Certain Softwood Lumber Products from Canada, Secretariat File No. ECC–2004–1904–01USA (Aug. 10, 2005). All ECC opinions are available from the NAFTA Secretariat's website at www.nafta-sec-alena.org/en. There were three ECC proceedings under the CUSFTA, all involving the United States as petitioner. The U.S. request for an extraordinary challenge relief was rejected in all three cases. *See* In the Matter of Fresh, Chilled and Frozen Pork from Canada, ECC–91–1904–01USA (June 14, 1991); In the Matter of Live Swine from Canada, Secretariat File No. ECC–93–1904–01USA (Apr. 8, 1993); In the Matter of Certain Softwood Lumber Products from Canada, ECC–94–1904–01 USA (Aug. 3, 1994).

12. STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 2, at 109. The provisions of Chapter Eight are implemented in U.S. law at 19 U.S.C. §§ 3351-3358 (concerning bilateral safeguards), §§ 3371-3372 (concerning global safeguards), and §§ 3381-3382 (concerning general provisions). For a discussion of the additions to U.S. safeguards relief made by the North American Free Trade Agreement Implementation Act, see *Chapter Eight: Emergency Action*, *in* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 2, at 109, 112-19.

13. *See Chapter Eight: Emergency Action*, *supra* note 12, at 109.

Administration in its efforts to win congressional approval of the Agreement.[14]

I. TRADE REMEDIES IN NORTH AMERICA

Trade Remedies in North America is a legal and economic analysis of the trade remedy laws of the three NAFTA Parties. It represents a long overdue and in-depth addition to the legal literature on NAFTA Chapter Nineteen, NAFTA Chapter Eight, and the unfair trade remedy legislation of the three NAFTA countries. Not only does *Trade Remedies in North America* bring together in a single book the law and practice of trade remedies in the three NAFTA countries, but it also provides an insightful analysis of the role played by economics in trade remedy determinations. Written by a foursome of two American law professors (Gregory W. Bowman and David A. Gantz), a Canadian government attorney (Nick Covelli), and an international trade economist (Ihn Ho Uhm), the monograph is divided into fifteen chapters that are organized around four themes: (1) the international trade legal regime governing trade remedy laws; (2) the law and practice of the NAFTA countries in AD, CVD, and safeguards relief cases; (3) an economic and statistical analysis of the trade remedy laws of the three NAFTA countries; and (4) three case studies drawn from each of the three NAFTA countries. A chapter–by–chapter review follows.

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14. *See, e.g.*, EXECUTIVE OFFICE OF THE PRESIDENT, THE NAFTA: EXPANDING U.S. EXPORTS, JOBS AND GROWTH – CLINTON ADMINISTRATION STATEMENT ON THE NORTH AMERICAN FREE TRADE AGREEMENT 6 (Nov. 1993) (discussing the "special rules allowing a temporary reinstatement of U.S. tariffs or other measures to protect U.S. workers and farmers in the case of injury from a sudden surge in imports from Mexico or Canada"). In addition to the dispute settlement mechanism created under NAFTA Chapter Nineteen, NAFTA Chapter 20 contains the government–to–government dispute settlement mechanism. To date, it has seen little use, with only three disputes having been brought before a NAFTA Chapter 20 dispute settlement panel. The United States has been a party to all three cases and has lost in each one. *See* Final Report of the Panel, In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, Secretariat File No. CDA–95–2008–01 (Dec. 2, 1996); Final Report of the Panel, In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico, Secretariat File No. USA–97–2008–01 (Jan. 30, 1998); Final Report of the Panel, In the Matter of Cross-Border Trucking Services, Secretariat File No. USA–MEX–98–2008–01 (Feb. 6, 2001). The NAFTA Secretariat maintains a record of all NAFTA Chapter Twenty panel reports and active panels at www.nafta-sec-alena.org/en. For additional reading on NAFTA Chapter Twenty, see David A. Gantz, *Government–to–Government Dispute Resolution under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481 (2000); Marc Sher, *Chapter 20 Dispute Resolution Under NAFTA: Fact or Fiction?* 35 GEO. WASH. INT'L L. REV. 1001 (2003); Rafael Leal-Arcas, *Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?* 16 MINN. J. INTL. L. 1 (2007).

A. The Antidumping and Countervailing Duty Laws

Trade Remedies in North America (*TRNA*) begins with a brief overview of the international law framework against which all national unfair trade remedy laws (antidumping and countervailing duty) are measured; namely, the WTO Agreement on Antidumping and the WTO Agreement on Subsidies and Countervailing Measures. To be sure, both WTO Agreements leave many gaps to be filled by national AD and CVD law. Nevertheless, these two WTO Agreements serve as a rough template against which the WTO consistency of all national antidumping and countervailing duty laws of WTO members is measured. Although Chapter 1 covers well-trodden ground that will be familiar terrain to international trade law practitioners, it does offer helpful background to the novice who is unfamiliar with the WTO Agreements governing unfair trade remedy law.

Chapter 2 answers the question why NAFTA Chapter Nineteen — and its predecessor, the CUSFTA — creates a special binational dispute settlement panel mechanism for appeals from administrative agency determinations in antidumping and countervailing duty cases. Chapter 2 provides an overview of NAFTA Chapter Nineteen, including a brief but illuminating history of the political machinations that explain the genesis of the binational dispute settlement process. There was a perception in Canada that U.S. courts were too deferential to AD and CVD determinations by the U.S. Commerce Department and to injury determinations by the U.S. International Trade Commission. In lieu of exempting Canada from AD and CVD actions — a proposal that would have been "dead on arrival" if introduced in Congress — the United States and Canada instead compromised by agreeing to the CUSFTA Chapter Nineteen binational dispute settlement process. This process was then carried forward virtually unaltered in NAFTA Chapter Nineteen. As the authors observe, from the U.S. negotiators' perspective, having the panel process in place as an alternative to the Mexican judicial review process was viewed as a potential selling point to U.S. exporters snagged in the Mexican AD and CVD administrative agency net.

The authors underscore that NAFTA Chapter Nineteen (and its predecessor CUSFTA Chapter Nineteen) is merely procedural in scope, i.e., it does not alter the substantive provisions of the AD or CVD laws of Canada, Mexico, or the United States. Consequently, NAFTA Chapter Nineteen panels apply the domestic law of the Party imposing the AD or CVD duty, including that Party's standards of judicial review of administrative agency determinations.[15] Because binational panels in effect

15. NAFTA Article 1904.3 provides: "The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party

replicate the review process that takes place in domestic courts for determining whether the administrative agencies have acted consistently with the terms of the agency's respective domestic AD and CVD laws, could it fairly be said that NAFTA Chapter Nineteen is old wine in a new bottle? While a definitive answer is debatable, it is interesting to note that while an aggrieved interested party has a choice of forum for review of agency action in AD or CVD cases — either the courts or a Chapter Nineteen panel — to the best of my knowledge no litigant has ever opted for the judicial route given the choice of forums.[16] In short, the authors conclude that NAFTA Chapter Nineteen is hardly an insubstantial innovation.

The authors note that Chapter Nineteen consists of not one but three panel review procedures. In addition to the first type discussed above, the second type of panel screens amendments to the Parties' AD and CVD laws that are challenged for inconsistency with NAFTA, the WTO Agreement on Antidumping (AD Agreement), or the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).[17] This provision has never been invoked. The third type of review provides for special committee review in the event that conduct by one of the NAFTA Parties prevents the operation of binational panel review.[18] As Chapter 2 points out, this provision was added as a safeguard against interference by national courts if a successful constitutional challenge is brought against Chapter Nineteen. This provision also has never been invoked.

Chapter 2 concludes with an assessment of Chapter Nineteen's future. The authors note that no post-NAFTA free trade agreement entered into by any of the three NAFTA Parties includes NAFTA Chapter Nineteen-like provisions. They conclude that, despite this apparent ambivalence about the Chapter Nineteen binational panel review process, it is here to stay. Improvements to the process — primarily involving delay in the selection of panelists — could be fixed without amending NAFTA, the authors maintain, if the Parties would simply agree to devote more resources to supporting the process. I agree with this assessment. The U.S. Section of the NAFTA Secretariat is woefully understaffed to handle the proportionally greater number of cases it is called upon to administer. More Chapter Nineteen panels are requested to review U.S. administrative agency

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otherwise would apply to a review of a determination of the competent investigating authority."

16. For the period 1994-2009, there have been more than 130 requests for Chapter Nineteen binational panel review. The NAFTA Secretariat maintains a record of all panel reports and active panel proceedings at www.nafta-sec-alena.org/en.

17. NAFTA, *supra* note 1, art. 1903.

18. *See id.* art. 1905.

determinations than Canadian ones by a ratio of nearly 4:1; the ratio is nearly 5:1 in the case of Mexican determinations.[19]

The next three Chapters of *TRNA* are devoted to a careful analysis of the U.S., Canadian, and Mexican AD and CVD laws and administrative practice, respectively. Each Chapter is exceptionally well written. After tracing the historical development of the AD and CVD unfair trade remedies within each of the three NAFTA Parties — noting that from the start both trade remedies were driven by concerns of producer welfare over consumer welfare — each Chapter introduces the responsible agencies and then walks the reader through an AD and CVD investigation in a step-by-step, methodical fashion. As Chapters 3 and 4 explain, not only is the AD and CVD administrative practice of the United States and Canada strikingly similar, but the administrative process is also bifurcated in both countries. In Canada, the Canada Border Services Agency makes dumping and subsidy determinations, while the Canadian International Trade Tribunal conducts injury inquiries as to whether or not the dumping or subsidy has caused material injury or material retardation of the establishment of a domestic industry, or is threatening to cause such injury to the domestic industry. In the United States, it is the International Trade Administration of the U.S. Department of Commerce (Commerce Department or Commerce) that makes dumping and subsidy determinations, while the U.S. International Trade Commission (ITC or Commission) conducts injury inquiries. In contrast, Mexico follows the general trend of having a single investigating authority, the Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales, make the dumping, subsidy, and injury determinations.[20] The dumping, subsidy, and injury determinations of the investigating authorities may be appealed to the national courts—in Canada to the Federal Court of Canada, in the United States to the Court of International Trade and the Court of Appeals for the Federal Circuit, and in Mexico to the Tribunal Fiscal de la Federación. Unlike the United States and Canada, which were the first countries in the world to enact unfair trade remedy legislation more than 100 years ago, Mexico was a comparative latecomer.

The differences between United States and Canada, on the one hand, and Mexico, on the other, in the field of AD and CVD laws are few but nonetheless significant. In addition to Mexico's unitary administrative process just mentioned, Chapter 5 notes that as a civil law jurisdiction that takes a hybrid "monist" approach to incorporating international treaties directly into domestic law, stare decisis is an alien concept, and Mexico's

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19. *See* GREGORY W. BOWMAN ET AL., TRADE REMEDIES IN NORTH AMERICA § 2.8.1 (2010) [hereinafter TRNA].

20. These agencies are referred to collectively as "investigating authorities."

reviewing court, the Federal Tax Court, as well as the Secretaría de Economía, refer directly to the AD and SCM Agreements in their decisions. Mexican law and practice must be interpreted harmoniously with the WTO Agreements, whereas in the United States and Canada, national law trumps the WTO Agreements in the event of an irreconcilable difference.[21] Mexico is also a much less frequent user of the CVD law compared with Canada and the United States.

It has been said tongue in cheek that the trade remedy laws are the trade lawyer's revenge on the tax lawyers. Both bodies of law are unquestionably complex. Chapters 3–5 do an impressive job of taking the highly sophisticated body of trade remedy law and presenting it in a user-friendly and well-–organized format that includes helpful illustrations of how these byzantine rules apply in practice. Not only do the authors explain the statutory framework, but they also make regular reference to agency rules, agency regulations, agency handbooks, and the trade remedy manuals published by the national investigating authorities. In that connection, Chapters 4 and 5 on Canada's and Mexico's AD and CVD law, respectively, provide the reader with generous citations to agency determinations and federal court decisions.

Each Chapter begins with a brief history of AD and CVD laws in the three NAFTA Parties and concludes with a useful flowchart and timetable for the AD and CVD administrative process. Not surprisingly, today the AD and CVD laws of the three NAFTA Parties do not differ dramatically from each other, owing largely to the fact that the WTO AD and SCM Agreements are supranational law binding on all WTO members that act as a rough template for WTO members' national AD and CVD laws. Nevertheless, the WTO Agreements leave many gaps for national legislatures and national investigating authorities to fill. The agencies charged with administering the AD and CVD statutes are required to undertake a good deal of interstitial lawmaking. Consequently, an understanding of the agencies' rules, regulations, policy manuals, and handbooks is essential to a complete picture of the national trade remedy legal regime. The authors have done an excellent job of weaving the warp of the AD and CVD statutes with the weft of AD and CVD administrative rules, regulations, and practice.

I do have three nits to pick with Chapter 3. The first is with an assertion made that the bifurcated administrative process in the United States — the "politically accountable" Commerce Department, which is responsible for the dumping and subsidization determinations, and the "politically insulated" ITC, which is responsible for the material injury determination — "can be seen as purposeful balancing of the decision–making process

21. *See* TRNA, *supra* note 19, § 5.2.

between political interests and more objective, or at least more insulated, analysis."[22] In my view, the ITC is as much a political animal as the Commerce Department, the former being comprised of presidential appointees with no more than three Democrats and three Republicans being allowed to serve at the same time. More importantly, both agencies' determinations are subject to judicial or binational panel review, thus requiring that the agencies turn square corners in their determinations and not "pull punches" as a political favor. At a trade law conference that I attended several years ago, the then-Assistant Secretary of Commerce, whose responsibilities included signing off on Commerce's AD and CVD determinations, was asked what he thought of judicial review of Commerce's decisions. His somewhat surprising answer was that he liked judicial review very much, and the reason why is that such review was a shield with which he could deflect requests for political favors in the decision-making process. In other words, if the Commerce Department could not provide a rational explanation for why it reached the decision it did, he explained, then a reviewing court would reverse.

Second, when discussing the standard of judicial review and *Chevron* deference to an agency's statutory interpretations, the authors seem a little hasty in dismissing the relevance of *Skidmore* deference.[23] Even when *Chevron* deference is not in play, *Skidmore* deference still may be.[24] Thus, I believe that the authors' report of *Skidmore*'s apparent demise in the wake of *Chevron* is somewhat exaggerated (*pace* Samuel Clemens).[25]

Third and finally, in the discussion of what constitutes a countervailable subsidy, Chapters 3 through 5 do not address the question of "general infrastructure" that is expressly excluded under Article 1.1 of the SCM Agreement and under the NAFTA Parties' CVD laws from the definition of

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22. TRNA, *supra* note 19, § 3.4.2, at 54.

23. *See* TRNA, *supra* note 19, § 3.16.4.1.3, at 174 n.698.

24. According to the Supreme Court in *Skidmore*, "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all other factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). *Skidmore* deference is applicable, for example, in the case of a tariff classification ruling letter issued by U.S. Customs and Border Protection. *See* United States v. Mead Corp., 533 U.S. 218 (2001). The particular relevance of *Skidmore* deference to the AD and CVD administrative setting is that *Skidmore* deference is also applicable to agency statutory interpretations contained in policy statements, agency manuals, and enforcement guidelines. *See id.* at 220.

25. The U.S. Supreme Court reaffirmed the continuing vitality of *Skidmore* deference seven years after its *Chevron* decision. *See* United States v. Mead Corp., 533 U.S. at 234 ("*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form . . . .").

"financial contribution" (in order to be "subsidy," there must be a "financial contribution" that confers a "benefit.") The term "general infrastructure" is not defined in the WTO Agreement. It would have been helpful to know how the three national investigating authorities of the NAFTA Parties deal with this issue.[26]

B. Safeguards Relief

After completing its analysis of the NAFTA Parties' AD and CVD trade remedy law and practice, *TRNA* next moves to a consideration of safeguards relief from fairly traded imports. Chapter 6 provides the international and regional backdrop (the WTO Agreement on Safeguards and NAFTA Chapter Eight), while Chapters 7 through 9 examine the Parties' respective safeguards relief law and practice.

Chapter 6 walks the reader through the WTO Agreement on Safeguards (AoS), including Appellate Body jurisprudence under that Agreement. The authors note the poor fit of the AoS and its GATT predecessor, GATT Article XIX, specifically the latter's requirement that a showing be made that the domestic industry is injured as a result of, *inter alia*, "unforeseen developments," a requirement that is absent from the AoS. Although the Appellate Body has read this GATT Article XIX requirement into the AoS, the authors stress that it is far from clear that this interpretation can be squared with the Uruguay Round negotiators' intent.[27] Safeguards relief is normally global relief, i.e., imports from all sources of the product under investigation must be subject to safeguards relief. The authors discuss the de

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26. The Commerce Department has promulgated a regulation that briefly addresses this question. It provides: "***Exception for general infrastructure.*** A financial contribution does not exist in the case of the government provision of general infrastructure. General infrastructure is defined as infrastructure that is created for the broad societal welfare of a country, region, state or municipality." 19 C.F.R. § 351.511(d) (2010). In a published comment to this regulation, Commerce added the following:

> Any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is potentially countervailable. The provision of industrial parks and ports, special purpose roads, and railroad spur lines, to name some examples (some of which we have encountered in our cases), that do not benefit society as a whole, does not constitute general infrastructure and will be found countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit.

Department of Commerce Comment, 63 Fed. Reg. 65379 (November 25, 1998).

27. *See* TRNA, *supra* note 19, § 6.6.

facto exception that has developed for free trade partners in this regard, including the Appellate Body's apparent acquiescence in the practice. The authors also discuss the special safeguards mechanism applicable to China as part of its WTO protocol of accession that expires in 2013.

Chapter 6 provides an overview of the safeguards provisions contained in NAFTA Chapter Eight, which covers two different types of safeguards relief actions: bilateral and global. By way of backdrop, a bilateral action, covered in Article 801 and Annex 801.1, is an action against increased imports from a NAFTA Party resulting from the phase-out of tariffs under NAFTA, where such imports cause or threaten serious injury. The bilateral safeguards mechanism expired in 2008 upon the full implementation of tariff phase-outs under NAFTA.[28] Article 802 creates an exception for NAFTA Parties in the case of global safeguards actions. Safeguards relief is generally global in scope, that is, imports from all sources are subject to the increased tariffs that are imposed as part of the safeguards relief. However, under NAFTA Article 802, an exemption is carved out for imports from a NAFTA Party in the case of a global safeguards action, unless such imports (1) account for a substantial share of total imports (i.e., are among the top five importers), and (2) contribute importantly to serious injury (i.e., are an important cause, but not necessarily the most important cause). One minor omission in Chapter 6 is some discussion of the special safeguards mechanism that exists under WTO rules for certain trade–sensitive agricultural products.[29] This is one of the many issues being negotiated at the current Doha Round of multilateral trade negotiations that has resulted in an impasse.

As is the case with the AD and SCM Agreements, the WTO Agreement on Safeguards acts as a supranational law template for all WTO members' national safeguards measures, accounting for the similarity among the three Parties' safeguards laws. Chapters 7 through 9 analyze the U.S., Canadian, and Mexican safeguards laws and practice, respectively, and follow the format introduced in Chapter 3 through 5: Each begins by recounting the

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28. One bilateral safeguards relief action taken in 1996 by the United States against Mexico involving broom corn brooms did erupt into heated cross-border issue that culminated in only one of three NAFTA Chapter Twenty dispute settlement proceedings. *See* Final Report of the Panel, In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico, Secretariat File No. USA–97–2008–01 (Jan. 30, 1998); *Mexico Raises Tariffs on U.S. Goods in Response to Corn Broom Safeguard,* 13 Int'l Trade Rep. (BNA) 1962, 1963 (Dec. 18, 1996); *USTR Announces Presidential Decision to Seek Negotiated Solution in Broom Case*, 13 Int'l Trade Rep. (BNA) 1365 (Sept. 4, 1996); Rossella Brevetti, *Increased Imports of Broom Corn Brooms from Mexico are Injuring U.S. Industry*, 13 Int'l Trade Rep. (BNA) 1127 (July 10, 1996).

29. *See* TRNA § 6.1 & n.4 (where the authors mention the WTO Agreement on Agriculture includes its own safeguards provision, but does not expand on it).

history of safeguards relief in the respective NAFTA Party; they each note the infrequency of global safeguards investigations; and they each carefully walk the reader step-by-step through the statutory provisions and the general structure of the national administrative processes. Each of the Chapters on U.S. and Canadian safeguards relief also include a flowchart and timetable. Among the noteworthy differences among the three NAFTA countries in the area of safeguards relief is that in Canada and the United States, the ultimate authority to grant safeguards relief is vested with the Canadian Cabinet and the President, respectively, and not with the investigating authority, i.e., the CITT and the U.S. ITC, respectively. In contrast, in Mexico, the Secretaria de Economia, which is the investigating authority, has the authority to impose safeguards relief. Although the AoS does not require judicial review of national investigating authorities' safeguards determinations — probably because pre-Uruguay Round safeguards provisions in the United States did not expressly authorize such review — judicial review of an agency's substantive determination is available in Canada and in Mexico, but subject to the deferential standards of review applicable in the AD and CVD setting.

Few global safeguards petitions have been filed with the national investigating authorities of the three NAFTA Parties (seventy–two investigations since 1975 in the United States, seven during that same period in Canada, only one in Mexico since 1995). The authors offer two explanations for the paucity of petitions, e.g., domestic producers' preference for the AD remedy in lieu of safeguards relief, and the reluctance of national authorities to grant safeguards relief due in part to the obligation to pay compensation to adversely affected exporting countries. In my view, the sample pool from which to draw any firm conclusions is far too small as to why safeguards relief has seen such little use in Canada and Mexico. In addition, compensation to adversely affected exporting countries is only required when the duration of safeguards relief is more than three years (no post-Uruguay Round safeguards relief in the United States has ever exceeded three years). In short, I do not find the authors' explanations for the paucity of safeguards relief in Canada and Mexico convincing. In the case of the United States, petitioners' low success rate at the ITC (fewer than half of all petitions result in an affirmative injury determination) and then with the President (presidential relief has been granted in fewer than half of the ITC's affirmative injury determinations) may be more revealing as to why safeguards relief is pursued so infrequently in the United States (seventy-three investigations over the course of twenty-five years), i.e., securing relief is a long shot and an expensive one in terms of fees for attorneys, economists, and accountants.

C. Economic and Statistical Analyses

Shifting focus from the law and practice of the AD, CVD, and safeguards trade remedies, Chapters 10 through 12 explore the economic and associated rationales for the unfair trade remedy laws, explain the role of economic analysis in the material injury determination, and provide a statistical analysis of trade remedy cases in the three NAFTA countries, respectively.

Chapter 10 deals with the economics of the AD and CVD laws. The authors succinctly survey the voluminous literature on this subject, which dates back to the 1920's. They marshal the various economic justifications advanced in support of the unfair trade remedy laws and then present the counter-arguments, concluding that the economic justifications for the AD and CVD laws are less than convincing. Because the literature supports the conclusion that the welfare benefits for consumers of lower-priced imported goods normally outweigh the welfare costs for domestic producers, the authors explore the non-economic rationales for the AD and CVD laws by asking the following pivotal question: "Why would politicians favour some domestic producers over millions of voting consumers who stand to benefit from dumping and subsidization [because they lower prices]?"[30] The answer the authors provide is simple but compelling: the gains to consumers are diffuse, the losses to domestic producers and their workers concentrated and potentially enormous. Consequently, consumers lack the incentive or capacity to engage in collective action, whereas domestic producers clearly possess both. Public choice theory is another non-economic explanation for the often economically indefensible trade remedy laws: liberal politicians throw a bone to domestic producers in the form of trade remedy laws so that the politicians can get on with the work of trade liberalization. The authors are unconvinced that public choice theory adequately explains the AD and CVD laws. The authors ask rhetorically: Why wouldn't domestic producers pursue both lobbying and the administrative AD and CVD process?[31] They then examine the domestic politics of the unfair trade remedy laws, particularly the various means at the disposal of a protectionist Congress to affect outcomes at the administrative level in favor of the domestic industry. The authors conclude that the only reasonable prospect for reforming the economically indefensible trade remedy laws is through a multilateral agreement — no country is after all prepared to "unilaterally disarm" — but rate the prospects for such an agreement as dim. Overall, Chapter 10 is an accessible discussion of the economics of trade remedy laws.

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30. TRNA, *supra* note 19, § 10.4.1, at 471.
31. *Id.* § 10.4.2, at 474.

Chapter 11 is somewhat less accessible for the non-economist. It explores two issues in the context of the role of economic analysis in the material injury determination in AD and CVD investigations: (1) the role of economic analysis in assessing the magnitude of injury, and (2) the role of economic analysis in making the link between injury and imports as a cause of that injury. The authors begin with the observation that neither the WTO AD and SCM Agreements nor the national unfair trade remedy laws of the NAFTA Parties quantify how much injury constitutes "material injury." The authors note the analytical weakness in the ITC's material injury determination which arguably confuses causation with coincidence. This dilemma underscores the requirement of non-attribution, i.e., that the investigating authority account for factors other than imports as the cause of the domestic industry's injury. This is no mean feat. What the Chapter does well is to explain the value of the economic model used by the ITC (called the Commercial Policy Analysis System or COMPAS model) when the Commission makes its material injury determination. For an agency under severe statutory time constraints, this model offers the advantage of requiring a relatively small number of input parameters in order to make the injury assessment. The model not only is transparent but can be quickly prepared. The authors point out that the COMPAS model is not without its critics. They concede that the COMPAS model should be refined in particular cases. They also admit that economic modeling is a quantitative exercise that is being applied in a legal setting that calls for both quantitative and qualitative assessments. Nevertheless, the authors argue that such modeling brings a modicum of transparency to bear on the material injury phase of the AD and CVD administrative process, while at the same time providing a helpful tool to guide the ITC commissioners in the delicate task that they are required to perform. What Chapter 11 leaves unstated, but what should be obvious to every practitioner, is how indispensable an experienced economist is to a client's AD or CVD legal team.

Chapter 12 provides a statistical analysis of trade remedy cases in Canada, Mexico, and the United States. Of the three types of trade remedy actions brought in the NAFTA Parties, AD cases comprise the overwhelming majority (seventy percent in the United States, ninety-four percent in Canada, and ninety-seven percent in Mexico). The authors provide a series of interesting graphs that show a strong correlation between AD and CVD initiations and the GDP growth rate, the unemployment rate, and exchange rates. The top ten exporting countries that are the target of AD and CVD investigations are also listed (China topping the U.S. and Mexican AD lists and placing second after the United States on the Canadian AD list), with a disproportionately low number of cases in terms of the volume of trade in the three NAFTA countries involving NAFTA origin goods. This phenomenon, according to the authors, is primarily attributable to the relatively high economic integration of the region, and

secondarily to the propensity of NAFTA Chapter Nineteen panels to find in favor of exporters.[32]

From the perspective of a potential petitioner, outcomes are everything. Chapter 12 describes the trade remedy success rate of petitioners, with fewer than two in five U.S. AD and CVD cases resulting in an affirmative determination,[33] with the percentages being higher in Canada (sixty-six percent) and in Mexico (sixty-nine percent). However, an affirmative AD or CVD determination is not necessarily the same thing as a "successful" outcome from a petitioner's perspective. A petitioner expecting a margin of dumping of fifty percent, but securing an AD order with a final dumping margin of only fifteen percent, while a nominal success, might not be viewed as such by the petitioner. The final part of Chapter 12 — a companion piece to the material in Chapter 11 — identifies a handful of factors (import penetration, magnitude of the dumping margin, and changes in employment and profits) as being the key determinants in an investigating authorities' material injury determination.

I disagree with one assertion made in Chapter 12 that is offered as an explanation for the infrequency of safeguards actions, namely, the high bar set by the Appellate Body for imposing WTO-consistent global safeguards measures.[34] I think a better explanation is to be found in the national capitols of the NAFTA Parties and not in Geneva (at least in the case of the United States), i.e., that petitioners' overall success rate is low at the ITC and with the President, and these two facts in tandem deter safeguards petitions. Moreover, given the time it takes to complete a WTO dispute settlement proceeding — anywhere from two to three years —a WTO member can grant WTO-illegal safeguards relief to a domestic industry and, in effect, do so with impunity, at least for the two to three years that a WTO dispute settlement proceeding challenging such safeguards relief is pending.

D. Case Studies

Chapters 13 through 15 consist of three case studies: (1) the 25-year-long Canada–U.S. dispute involving the imposition of antidumping and countervailing duties on softwood lumber from Canada, including parallel

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32. *Id*. § 12.4.1.

33. ITC statistics support this observation. In its *Antidumping and Countervailing Duty Handbook* the ITC reports that for the 25-year period 1980–2005, it reached affirmative injury determinations in 37.6% of its AD and CVD investigations. *See* U.S. INT'L TRADE COMM'N, PUB. L. NO. 3916, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK at E-9 (2007). The ITC's statistics for the same period show an inverse correlation between the number of petitions filed and the economy, i.e., when the economy is down, the number of filings is up. *See id.* at E-3.

34. *See* TRNA, *supra* note 19, § 12.2.1.

litigation brought by Canada at the WTO, international arbitration brought by private investors against the Governments of Canada and the United States under NAFTA Chapter Eleven, and an unsuccessful NAFTA Chapter Nineteen extraordinary challenge by the United States (Chapter 13); (2) the 20-year-long Mexico-U.S. dispute involving the imposition of antidumping duties on cement from Mexico, including parallel litigation brought by Mexico at GATT (the General Agreement on Tariffs and Trade, the WTO's predecessor that was replaced by the WTO in 1995) and an unsuccessful NAFTA Chapter Nineteen extraordinary challenge by the United States (Chapter 14); and (3) in terms of trade volumes the biggest global safeguards relief action ever brought in Canada seeking relief from steel imports (Chapter 15).

All three case studies are crisply written and offer keen insights into the complexity of the trade remedy process. Each Chapter also highlights how the planar trade remedy process can at times morph into a multi-layered process, with trade remedy dispute settlement involving the same subject matter taking place in several different forums either simultaneously or successively.

CONCLUSION

Trade Remedies in North America is masterful. It is a thorough and accessible analysis of one of the most complex areas of international trade regulation. The authors' crisp and terse writing style makes what could have easily been a dry tome into an extremely useful guide. Its insights into the administrative process will prove equally invaluable to practicing attorneys and teachers of international trade law.