3-1-1998

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Apples to Mexico

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AGRICULTURAL DISPUTES: MEXICAN TOMATOES TO FLORIDA AND WASHINGTON APPLES TO MEXICO

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I. INTRODUCTION

GORDON: Our problem is based on actual agricultural disputes, but is framed around hypothetical companies in parallel factual situations. On the Mexican side, growers located principally in Chihuahua are concerned with the introduction of U.S. apples, mostly from the State of Washington. The reciprocal is the Florida grower who is very concerned about the importation into the United States of Mexican tomatoes and winter vegetables. The tomato was known in Mexico for a very long period of time, certainly much before the use in the United States. It is a relatively disease-prone item, subject to flea beetles, aphids, white flies, cutworms and hornworms, but these problems have been addressed by malathion and other pesticides. The greatest danger to the Florida tomato industry comes instead from competition. Others would say that the same disease, competition, is affecting the Chihuahua apple growers. Such competition is best addressed by a variety of trade barriers and trade actions, which we are going to explore.

These issues are very important, especially for the people who do not do the final arguing before relevant trade commissions. Many people believe that trade law is something that will never involve them, because they do not practice in Washington, D.C. or in Mexico City. But a Florida or northern Mexico grower who believes that imports are harming his business is just as likely to seek help from a local attorney. The client wants the harm to stop. His attorney should be at least acquainted with the possible alternatives for addressing import-based injuries. Many factors could be involved in the import-related difficulties faced by growers in a given industry. It may be that the other country's government has been subsidizing production. The foreign producers may be dumping, that is, selling their goods at an unfairly low price. The other country may be in violation of a trade agreement. Even without such a violation, import surges may be causing sufficient harm to justify the use of safeguards or an escape clause. Whatever the situation, practitioners ought to have sufficient knowledge at least to use this kind of language.

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******* The views expressed here are the panelists' own, and should not be taken to represent those of their employers or other organizations with whom they may be affiliated. In particular, Mr. Salonen and Mr. Powell speak only for themselves, not the U.S. government or any of its agencies.
The concerns underlying trade policy stretch well beyond our countries’ capitals. In fact, the present disputes over tomatoes can be characterized partly as a state versus nation, rather than nation versus nation, dispute. It is often referred to as the “Florida-Mexico Tomato War.” Similarly, the apple case becomes perhaps even a state versus state issue: it primarily concerns the State of Chihuahua and the State of Washington.

Some 200 years ago, English theorist David Ricardo suggested that nations ought to produce the goods which they have a comparative advantage in producing. If England could produce cloth using less labor than Portugal, and Portugal could produce wine using less labor than England, then England ought to produce cloth and Portugal produce the wine. The world is much more complex than when David Ricardo left it, but the theory of comparative advantage is still the foundation for what ought to occur when nations remove trade barriers. What David Ricardo failed to explain was how a nation is to comfort its losers. While England’s cloth and Portugal’s wine producers are the winners in the comparative advantage war, their counterparts — England’s wine and Portugal’s cloth producers — become the losers. Applying Ricardo’s principles to our present discussion, we might say that the United States has a comparative advantage in producing apples, while Mexico has a comparative advantage in producing tomatoes and winter vegetables. If that is the case, under the theory of free trade, we ought to be addressing the tomato and vegetable industries in Florida and the apple industry in Mexico as terminal patients, rather than as the prospective recipients of life-renewing transplants.

There is, in fact, little support for the Florida industry in many parts of the United States, and certainly not in those states where agricultural producers are net gainers from the North American Free Trade Agreement (NAFTA). These states include grain-producing Kansas and apple-producing Washington. Indeed, they have received little support from the American Farm Bureau, which is an especially important group at present because of the fast-track authority negotiations and the role which agricultural interests will have in the fast track. Many agricultural interests want to see fast track restored because they export items such as apples and grain. In contrast, the Florida delegation is very concerned about the extension of free trade to other areas. Such an extension would simply exacerbate the injury being caused to the Florida industries.

MACRORY: I agree that this is largely a state versus state problem. In the first antidumping case against Mexican winter vegetables in 1980, the Florida congressional delegation naturally placed a great deal of pressure on the Commerce Department to rule in favor of its growers. In contrast, senators from states as varied as Maine, Massachusetts, Texas and New Mexico opposed any added restrictions on Mexican imports. They saw this as a matter of consumer interest: if Mexican imports were blocked, then vegetable prices would rise and variety would be diminished. Different U.S. states and regions had very different concerns about the outcome of the case.

GORDON: Is the apple dispute an issue throughout Mexico, or is it specific to Chihuahua? In other words, is it predominantly a state issue?

HURTADO: It is certainly a regional issue. The State of Chihuahua is one of the largest in Mexico, and the production of apples is very highly concentrated in that area. In addition, the Minister of Commerce, Herminio Blanco, is from Chihuahua. So political factors may come into play here as everywhere.

GORDON: I assume that Chihuahua apple producers and Sinaloa tomato producers hold very different views as to whether or not Mexico should get tough on the apple issue. A tough stance on apples in Mexico could exacerbate the tomato issue in the United States.

HURTADO: Absolutely. The same principle applies in all trade disputes. Whenever an industry prevails in a particular case, there is a fear that retaliation will affect that country's other products. The current controversy over high fructose corn syrup has been of great concern to Mexican tomato producers, for instance, because of the possibility of U.S. retaliation. A commercial war injures everybody. No one wishes to provoke one, or to be blamed for one.

VANSICKLE: I would like to make a couple of comments. The first is related to the theory of comparative advantage, which is obviously very important in terms of defining who is going to control markets. However, I am not sure that either country has an outright comparative advantage in tomato production. What each area does have is unique resources under its control. Mexico has a very labor-intensive production practice; Florida's is less so. The idea is to use the available resources as effectively as possible in order to produce efficiently. A relatively recent industry study showed that Florida could in fact compete with Mexico in the winter produce market. This provoked some controversy. Florida producers did not want that said up front, prior to the passage of NAFTA. However, the study eventually became useful to them in the safeguard cases: to obtain relief, the growers had to show that they could compete in the long run if permitted to go through a protected adjustment phase.

My second comment relates to the state versus nation issue. In the new era of business, the agricultural industry is no longer comprised of individual producers in a single location. Production is integrated across state and national boundaries. Growers in Florida are also growing all the way up the east coast; some are even in California. It is possible to say that a lot of the injury to the tomato industry was concentrated in Florida, but it was in fact felt by producers in other states. The trade controversy cannot be wholly reduced to state versus nation terms.

MACRORY: Would you agree that the Florida industry has (in some sense) a comparative advantage on the east coast of the United States, and Mexico on the west coast, because of transportation costs? At one point in the 1980 case we proposed facetiously to divide up the country at the Mississippi, and declare that tomatoes could not be shipped across the river. That would have taken care of everybody. To some extent that is a factor, is it not?

VANSICKLE: Sure, that is a factor. There is a line of demarcation which determines a comparative advantage based just on location. That line will shift as

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producers become more efficient in utilizing certain resources. Market share depends upon the efficient use of all available resources; transportation is just one issue.

POWELL: I would like to comment on the political dimension to these questions. Clearly, political interests will be involved in all of the most important issues that our country deals with, and many of those issues concern trade. Political pressures have undoubtedly come to bear on both the apple and the tomato controversies. This should not come as a surprise. However, it is important to point out that Congress has attempted to immunize the dumping and subsidy laws as much as possible from those political pressures. This is not an insurmountable goal, and I believe it can be done well.

SALONEN: Let me take a minute to describe the International Trade Commission (ITC), because it touches upon many of the issues that have been raised so far by this panel. The ITC is an independent agency. There are a maximum of six commissioners who are appointed by the president and confirmed by the Senate for a fixed term of years. A political balance is written into its organic statute: no more than 3 commissioners may be of the same political party. A layer of independence for analysis and decision is assured by the fact that the agency is not really answerable either to the Executive Branch or to Congress, once the commissioners are appointed. The factual and legal findings of the ITC genuinely reflect the views and different perspectives of these six individuals.

The commissioners are fairly well buffered from the political influences promoting one outcome or another. For example, once the Commerce Department determines that a particular group of imports is being dumped or subsidized, and once the ITC determines that an industry has been materially injured by those imports, no one else can intervene. The imposition of the appropriate duty is automatic. The only recourse is appeal to the courts or to a NAFTA Chapter 19 panel, if there is a NAFTA country involved, or to a World Trade Organization (WTO) panel, through a government challenge.

The proceedings at the ITC and at the Commerce Department are highly transparent. Parties assisted by counsel have access to the entire record, including the confidential questionnaires that are submitted by other parties. Counsel can see the financial information, the production information, and the pricing information. In formulating arguments and presenting evidence before the ITC, they have essentially the same facts available to them as the commissioners have. This gives the parties whose business is likely to be affected by these investigations a very good opportunity to participate and to be heard. In a dumping or subsidy case, they also have the opportunity to appeal afterwards.

MACRORY: I would like to mention two curiosities about the ITC. The first relates to the even number of commissioners. Split decisions can be frequent, and these go in favor of the domestic industry. Counsel representing a petitioner, then, do not have to convince a majority of the commissioners. They need to convince only half of them. The other curiosity is that the ITC is the only governmental agency I am aware of that requires the lawyers to swear to tell the truth, as well as the witnesses.

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SALONEN: It is true that split decisions are possible. In dumping cases, Congress has decided that when three commissioners vote in the affirmative, the decision goes in favor of the domestic industry. When a split decision happens in a Section 201 safeguard action, however, the President has the final say one way or the other. Out of sixty-six safeguard cases, I believe that there have been only three where the ITC split evenly and could not make a specific recommendation. Split decisions have not been entirely common in the dumping area, either, based on my own review of the ITC Annual Reports of the last several years. From 1989 through 1995 the ITC issued 220 final antidumping injury determinations. Only eleven percent of those were tie votes. Forty-five percent were unanimous decisions, and another forty had a majority with at least two more votes than the dissent. This suggests that what really drives these cases is the information in the record. These decision-makers have different interpretations of the law, and give different weight to the various pieces of evidence, but nevertheless arrive very often at the same outcome. They may differ in how they get there, but ultimately the result is the same.

GORDON: How does the International Trade Administration (ITA) of the Commerce Department differ from the ITC? Why do we have the two? In Mexico, these matters are handled in a single institute.

POWELL: The independence of the two agencies owes more to an accident of history than to any particular plan on the part of Congress. The Tariff Commission originally addressed matters that had to do with the effect of imports on American industry. It was quite logical, when the injury test came into being under the dumping and countervailing duty laws, that it would be assigned to the people who were already expert in that subject.

Some countries have a more unitary approach to defining the industry and making the injury determination than we do. Here, the ITC is responsible for determining whether dumping and subsidies are causing injury to the domestic industry. It is the ITA, however, which determines in the first instance whether there is any dumping and whether there is any subsidization. Once dumping or subsidies are found, the case moves to the ITC so that it may evaluate the possibly injurious effect of that unfair trade action. Unless the two combine, there can be no relief. Dumping is not condemned unless it also causes injury to domestic production.

GORDON: In Mexico, the Secretaría de Comercio and Fomento Industrial (SECOFI) handles both. Is that correct?

HURTADO: Yes. After ten years of practice, I am not sure which system is more effective or appropriate. Few cases have been tried in Mexico so far, because we are relative newcomers in this area. In 1987, when we joined the General Agreement on Tariffs and Trade (GATT), we also adopted the antidumping code, but the law was not finalized until 1993. Only since then has our law been truly comparable to that of the United States. From that date on there have been only about 200 cases. Approximately eighty of them have been resolved by imposing antidumping or countervailing duties.

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7. LEY DE COMERCIO EXTERIOR [FOREIGN COMMERCE LAW] [hereinafter L.C.EXT.], Diario Oficial de la Federación [D.O.], 27 de julio de 1993.
The Mexican system is indeed more unitary than that of the United States: the cases are handled entirely within SECOFI, particularly the Unidad de Prácticas Comerciales Internacionales [International Commercial Practices Unit]. This unit, in turn, has two subsidiary departments. One deals with dumping, and the other with injury. The analysis of dumping and injury occurs simultaneously, however. The conclusion reached by each department is subsequently analyzed by the head of the unit. If dumping margins have been found, and if that dumping has been found to be the principal or sole cause of the injury, then a resolution is issued linking the two activities, and dumping duties are imposed. This would seem to be a less democratic system, but I am personally unfamiliar with the political nuances of the process. Certainly there have been many cases where the head of the unit favors, or allegedly favors, one sector of the industry. Because there is only one final decision maker, our system is potentially more expeditious. That decision maker is more exposed to political influence or to directives from his superiors within SECOFI, however.

II. INDIVIDUAL ACTIONS

A. Safeguard Actions

GORDON: Let us turn to some of the import relief actions that might be brought in the United States and in Mexico. We will see that the actions available in both the United States and Mexico fall under the umbrella of the WTO’s rules, which set a basic standard for all participating countries. When we talk about the various norms against dumping, for example, we should find that the proof requirements are much the same in Mexico as they are in the United States. The same would be true of any WTO country. One of the first of the actions that might be initiated, which has already been raised in this case, is what we call a Section 201 action.8

SALONEN: Section 201 used to be known as the escape clause, and is now referred to as safeguard. It is intended to assist a domestic industry that is being seriously injured by an increase in imports, where the increase in imports is a substantial cause of that injury. These are statutory terms that have a very specific meaning.

Once the statutory tests are met, the law is designed to provide the industry with an opportunity to make a positive adjustment to import competition. This relates to our earlier discussion about the “losers” in international trade. Section 201 is designed to provide the “loser” with some breathing space either to become more competitive through investment, streamlining or consolidation, or to make an orderly transition of resources to some other pursuit — in other words, leave the industry. Since 1988, Congress has emphasized the importance of an industry really being committed to an adjustment plan. The statute indicates that if relief is provided for a given period, it can be modified or eliminated if it turns out that the industry is not taking sufficient steps to make that adjustment to competition.9

To gauge “serious injury,” the ITC has to look at whether there is a significant idling of production facilities, whether there is a significant increase in unemploy-

ment or significant unemployment in the industry, and whether there is a significant number of producers who are unable to operate at a reasonable level of profit. Each of those prongs has to be met before it can be said that an industry has been seriously injured.

Assuming that imports are increasing, the question becomes whether or not those imports are a substantial cause of the serious injury. In other words, are they an important cause, and at least as important as any other cause? The ITC has to weigh imports versus other possible causes of injury such as adverse weather conditions, an economic recession, or a labor strike. They engage in highly fact-sensitive, case by case analysis.

GORDON: In a Section 201 action, then, the focus is really on the injury to the industry in the United States. There is no allegation of wrongdoing on the part of the other country.

SALONEN: Correct. That is exactly why the standard is so high. The injury standard is lower in dumping cases, where the imports are considered unfair per se by virtue of the fact that they are being dumped.

MACRORY: An important point about safeguard cases is that the ITC, if it makes an affirmative determination that relief is warranted, then makes a recommendation to the President as to what kind of import relief should be imposed. The President is entirely free to reject that advice, however. Furthermore, the President's and the ITC's decisions in the matter cannot be appealed to the courts on substantive grounds. The President is required by statute to consider a wide range of factors, including consumer interests and foreign policy interests. Unlike dumping cases, these do become extraordinarily political.

GORDON: An ordinary safeguard action is taken against all competing imports, wherever they come from. But there is an alternative possibility, under NAFTA, of bringing a safeguard action against Mexico alone. Would this make much difference?

SALONEN: Yes it does. The relief that such a bilateral safeguard action provides is very limited. It is essentially limited to a snap-back of the tariff to some statutorily predetermined level, whether it is the tariffs that were in effect before NAFTA or some other measure. I believe that over the next three to five years, the law will also have a phase-out. This will mean in practical terms that if someone wishes to bring a Section 302, bilateral safeguard action against Mexico or Canada, they will have to obtain the consent of the Mexican or Canadian government before any relief can be authorized.

In contrast, a general safeguard action can result in various types of relief, such as adjustment assistance or the imposition of tariffs and/or quotas. Such measures can have a real impact on prices and the volume of supply in the market.

GORDON: John, is that snap-back a help to the industry in Florida?

VANSICKLE: No. Because produce industry tariffs have been quite low for several years, a snap-back does not provide domestic growers with sufficient protection to meet their needs in this kind of situation.

GORDON: What about the possible use of safeguards in this case? Should the tomato industry bring a safeguard action, or does past experience suggest that this would be unwise?

SALONEN: The industry would be hard pressed right now to consider a safeguard action. It has attempted two of them in the past, and both were denied. In addition, returns to the industry were improved this year. Part of that is due to a weather event in Florida, but it is also related to the suspension agreement which is now in place. After the agreement was signed, U.S. producers formed exchanges from Florida to California and up the east coast. These exchanges imposed a minimum price on their own product, parallel to that imposed on imports from Mexico by the agreement.

As long as prices remain high, both U.S. and Mexican producers should remain fairly happy. This could easily change in upcoming growing seasons, however. In that case, Section 201 may very well be revisited, in regard to tomatoes or other winter vegetables.

GORDON: U.S. tomato producers have brought two dumping actions against the Mexican industry. One was unsuccessful, and the other one is suspended because of the suspension agreement. Although the suspension agreement relates to the dumping statute, it is relevant here to understanding whether the tomato growers can or should initiate a safeguard action as well. Because of this, we have asked Steve Powell to explain the agreement.

POWELL: The suspension agreement is under an unusual provision in the dumping statute. I say "unusual" because it is very difficult to meet the statutory requirements for this kind of agreement. The statute in essence requires that the agreement eliminate the injurious effects of the imports. Normally such injury is best addressed by imposing an antidumping order and collecting duties in the amount of the dumping margin. The dumping margin is the difference between the pricing in the home market and the pricing in the export market or, basically, the difference between the cost and the price.

What this agreement tries to do is match the effects of a dumping order without having quite the effect that a dumping order has on markets, which is usually fairly extreme in the sense of blocking imports. Suspension agreements, like other settlements, are not intended to please everyone. Instead, they are intended to give the domestic industry a measure of relief once preliminary findings of both dumping and injury have been made. In general terms, what this agreement does is set a floor price on the sale of tomatoes in the United States, i.e., a certain price per 25-pound box. The goal is to prevent the undercutting or suppression of domestic prices.

HURTADO: Michael, you have hinted that a safeguard measure might be initiated. How might the risk of retaliation influence such a decision? What impact might it have on the outcome?

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15. Certain Fresh Winter Vegetables from Mexico, supra note 2.
MACRORY: This is a very important point which we did not raise before. Section 201 is the domestic embodiment of Article XIX of the GATT. Under its provisions, if we take import relief action in the form of quotas or tariffs, the United States is required to compensate the affected countries by lowering tariffs on some other items that are equivalent in trade. If it failed to do so, Mexico (in this case) would be entitled to raise its tariffs on apples, perhaps. That would be legal. This is one of the reasons why Section 201 cases rarely result in relief. The ITC makes a negative decision in maybe half of its cases, referring the other half to the President. The President, in turn, grants relief in about half the cases forwarded to him by the ITC. The final success rate is thus around 25%. These are not very good odds for producers seeking relief.

GORDON: The two cases that were brought by the tomato industry under Section 201 both failed. Why did the first one fail? Why was the second one brought so soon thereafter, and why did it fail?

SALONEN: In brief, the first one failed because it was brought on fresh winter tomatoes and because there was a request for provisional relief.

The provisional relief phase of the safeguard law for agricultural products adheres to a very compressed schedule, because these products are perishable. The ITC has twenty-one days from the filing of the petition to complete its investigation and make its recommendation to the President. The President then has seven days to decide whether to provide some sort of temporary relief, which will remain pending for the duration of the case.

The growers filed their case in the middle of their growing season, I believe towards the end of March 1995. I think they were trying to carve out an industry in terms of a growing season, January through April. Thus they were trying to get relief directed at imports of tomatoes, primarily from Mexico, during this same season. They ran into several hurdles. The first of these was trying to define an industry in this sort of temporal fashion. The ITC has done that once before, in a dumping case many years ago involving fall harvested round white potatoes that are grown in Maine. In that case, however, there were factors of qualities intrinsic to the product, intrinsic to the potatoes, that distinguished them from other potatoes such as russets and red rounds and so forth. There was consequently little difficulty in finding that these potatoes, harvested in the fall, truly constituted a separate product and a separate industry.

In the fresh winter tomatoes case, three commissioners chose in essence to follow a product line of analysis. These commissioners define the industry by looking at factors intrinsic to its product: its physical characteristics, the employees who make it, the channels of distribution, and so on. They saw no inherent difference between a tomato grown in April and a tomato grown in May, apart from the fact that they are harvested at different times. Two other commissioners found nothing in the statute to prevent an industry from being defined by its growing season, but had other reservations that I will explain in a moment.

The second major hurdle for the growers was their request for provisional relief, because the commissioners unanimously decided that any relief granted would expire

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at the end of April. The decision was made in the middle of April, so at most, only a week of relief could have been granted. The commissioners did not see how this would achieve the purpose set forth in the statute's requirements for provisional relief.

That gets back to my point about the other two commissioners. They had no objection to defining the production of "fresh winter tomatoes" as a separate industry, as requested by the petitioners. I think that they were in effect giving the petitioners the benefit of the doubt throughout the entire process, in regard to defining the product and on questions of serious injury and substantial cause. This is because even if all of those elements were decided in the petitioners' favor, the outcome would have been the same. The time frame was simply too short to justify a grant of provisional relief.

The second safeguard case was filed about a year later. This time, the petitioners expanded the product definition to include not only fresh tomatoes, but also bell peppers. They did not seek to limit the industry to a particular season. Because of this, the petition included growers in California, New Jersey, Pennsylvania and so on, not just Florida. The hurdle encountered by the petitioners in this case was the requirement of serious injury.

As mentioned earlier, the ITC has to take very specific factors into account. These include significant idling of production facilities, significant levels of unemployment or underemployment, and a significant number of producers who are unable to operate at a reasonable level of profit.\(^\text{20}\) In a 4-1 decision, the majority of commissioners found little evidence of a significant idling of production facilities. Data gathered over a five-year period, regarding questions of acreage, harvest and yield, failed to show that there was a genuinely significant and sharp downturn. The commissioners also failed to locate evidence of significant underemployment in the industry. In fact, they found that employment had actually increased slightly. Finally, although the financial data did show substantial losses industry-wide, this fact did not correlate with the actual number of producers who reported that they were operating at a loss. The year that the industry had its highest sales, during the period under examination, was also the year that the highest number of producers (in percentage terms) operated at a loss. At the end of the period, in contrast, this percentage was far lower.

The aggregate loss figures were certainly high. If the question had been, "Is the industry losing a lot of money?" I believe that the commissioners would have said "yes" and found serious injury. However, this is not what the statute was asking them to do. A few large producers (accounting for a high percentage of the industry's production) were operating at a loss, but a greater number of smaller producers were not. Because of this, the commissioners apparently did not believe that the statutory requirements had been met.

The reasons for the negative decision in the tomato case are more clear when compared to a safeguard action which was successful, such as the one filed by the broom-corn broom industry.\(^\text{21}\) In that case the ITC did find serious injury, based on several factors. Specifically, the ITC found that in the last two years of the period

\(^{20}\) See supra note 10.

under investigation, a number of producers closed their operations; there was a significant decline in employment; and there was a significant decline of ten percent or more in production and shipments. Not only was the industry reporting operating losses as a whole, but a majority of producers reported individual operating losses as well. This was not true in the tomato case.

GORDON: What about the requirement that a safeguard action be sustained only if brought against “like or directly competitive” products? Could the ITC have disposed of the case more easily simply by determining that the U.S. and Mexican tomatoes were not comparable products? There seem to be substantial differences between them.

A large percentage of the Mexican imports are vine-ripe tomatoes. They are red, soft, and somewhat fragile. In contrast, American, Florida tomatoes are largely mature green tomatoes. These are grown essentially by clearing land, spraying it with methyl bromide, covering it with plastic to make sure none of the chemicals can escape, letting the plants grow until the tomatoes reach a very hard, green condition, then picking and cold-storing them. When the tomato is needed for the market, it is gassed. It then turns red and is sold.

I think that we are dealing in fact with two products. And yet in the broom-corn broom case, the ITC determined that broom-corcons are a different industry from plastic brooms. They both sweep. What prevents them from being “like or directly competitive”?

SALONEN: I will address broom-corcons first. Both types of broom do sweep, just as you could say that both a mini-van and a pickup truck, using an internal combustion engine, will take you from Point A to Point B. However, we might not necessarily say that those are like or directly competitive products, or like or similar products. The pickup truck and the mini-van are both used to take people or cargo from place to place, but the end use of the product is only one factor. You also have to take a look at how the products are made, and what are their physical characteristics. The production of plastic brooms is much more highly automated, and obviously uses plastic, while there is a much greater degree of labor intensiveness in the production of broomcorn brooms. I believe that this was the basis of the ITC’s finding.

As far as the tomatoes go, although it is true that there are vine-ripened and mature green tomatoes, the Florida industry also produces vine-ripe tomatoes. The way “vine-ripe” is defined, if the tomatoes show even a blush of red when picked, they are called vine ripe. More importantly, they are grown on the same plants. I do not think there are different strains, different species, or whatever else agricultural economists use to identify these products. By the time the tomatoes get to the supermarket, they appear virtually identical. A consumer would be hard pressed to distinguish visually between a vine-ripe and a mature green.

MACRORY: As Eric says, the vine-ripe tomato is one which has just begun to turn pink. If picked at that stage, it will continue to ripen naturally. In contrast, the mature green must be subjected to ethylene gas. However, this is what the tomato itself would produce naturally. The ripening process of a vine-ripe and a mature green is not substantially different.

VANSICKLE: Those who distinguish vine-ripe and mature green tomatoes are taking a myopic view. Qualitatively, the tomatoes are only slightly different. The real issue is the production process. Mexican growers have an advantage in regard
to certain resources, and U.S. growers have an advantage in others. Growers in each country fine-tune their production process to fit those resources. In the mature green tomato case, what the grower seeks to do is minimize the labor component of the production process.

The "mature green" tomato will eventually ripen without ethylene gas. The purpose of gassing is to bring the tomatoes up to the same color together. Otherwise there is a "checkerboard effect" in the box after it is shipped. Ethylene gas brings the color out more quickly, and does so uniformly. The end-use product is the same: a tomato ready for sale to consumers. The key is advantageous use of the resources that the producer controls: that is the difference between mature green and vine ripe. In the United States, we minimize the labor component. Mexico, because there labor is an advantage, uses more of it.

GORDON: Does Mexico have a parallel safeguard provision in its foreign trade law? Is it being used? What has been Mexico's experience?

HURTADO: Such a provision certainly does exist in the foreign trade law, as in the GATT. Mexico opted into the safeguard provisions upon becoming a member of the GATT. The subject has been very clearly regulated since the implementation of the current foreign trade law in 1993; the legislation has been supplemented by administrative regulations. Nonetheless, the use of this method has been very limited. It is just a footnote to the antidumping cases. Mexican producers have attempted to obtain a safeguard in only three cases. One involved the shoe industry, which had been damaged by imports from many countries; one involved pork meat from the United States, and failed at the first stage; one that was more or less successful involved dried fish blend from Chile. In the latter instance, however, market conditions changed after the case was initiated and opened. SECOFI consequently ruled that there was no injury, and terminated the case.

There are a number of reasons why the law's safeguard provisions have been so seldom used. One is the difficulty of moving the government in this direction. Another is fear of retaliation. Finally, the implementation of safeguards, because it is intended to promote adjustment to competition, triggers a need to initiate investment projects in the safeguarded industry. This is always a major task in an underdeveloped or developing country. For these and similar reasons, the safeguard remains a very rare, exceptional type of action.

SALONEN: A moment ago we discussed the difficulty of defining an industry in seasonal terms. In contrast, there is a provision for defining regional industries, both in the dumping law and in the safeguard law. It really is tied to geography and not to growing seasons, however. A variety of tests have to be met before a regional industry will be found. Although an industry may be operating in just one part of the United States, import relief will nonetheless be directed at imports generally. In the cement case, for example, the industry is operating only in southern California, but antidumping duties will be imposed on cement no matter where it comes from. Because of this, there are higher thresholds and more stringent tests.

23. 19 U.S.C. § 1677(4)(C); see also 19 U.S.C. § 1671e(c) (countervailing duties); 1673e(d) (antidumping duties).
POWELL: That brings us to one of the more interesting parts of Professor Gordon's hypothetical. What about industry support if you are talking about winter vegetables, generally? What the hypothetical suggests is that not just tomato imports, but all winter vegetable imports, are harming the Florida growers. Would they be interested in a case dealing with this broader question?

I think this is where the question of industry support is going to get very dicey. If the industry is broadly defined, the tomato growers may find that they lack sufficient support from bell pepper producers and cucumber producers and squash producers and other kinds of winter vegetable producers. In other words, they may be unable to get more than half of the industry on their side as required when filing an antidumping petition.24 At a minimum, it is going to be a much closer issue.

The definition of "domestic like product" is obviously critical. Commerce does not have the time that the ITC has to examine all the various characteristics that a like product, as Eric has described, can have. Nonetheless, the ITA will look at physical characteristics, will look at uses and will look for clear dividing lines. Is there a clear dividing line between a winter-produced tomato and a summer-produced tomato? That is a very interesting question.

MACRORY: Steve, what happened in the second dumping case, on this question of industry support?

POWELL: They did not limit it to winter production.

MACRORY: So they had support from other people as well.

POWELL: Exactly.

HURTADO: I have a brief comment as to the Mexican law. Mexican foreign trade law requires the participation of 25% of the domestic industry in order to have standing for a case.25 There is also a provision which mostly coincides with the GATT, that takes regional injury into account. This can also supply standing, if it is proven that the region effectively produces a substantial part of the market in a certain product.

B. Antidumping Duties

GORDON: Let us move on to the dumping area, which we've already talked about a good deal. We can probably conclude that there are some very shaky grounds for bringing a Section 201 action, given its high injury standard. Section 201 requires that the petitioners demonstrate "serious injury." In contrast, petitions for antidumping or countervailing duties only require a showing of "material injury." How much lower is the material injury standard than the serious injury standard, and how is it measured?

SALONEN: The statutory definition of material injury is harm that is not unimportant, inconsequential or immaterial.26 This represents a relatively low threshold. Nevertheless, it is interesting to point out that since the 1979 Trade Agreements Act, which incorporated the Tokyo Round agreement provisions into the U.S. dumping and subsidy laws, only little more than a third of the total number of

25. L.C.EXT. art. 40.
cases filed at the ITC have resulted in affirmative determinations. Although the threshold is low, this is no guarantee of an affirmative determination from the ITC.

GORDON: Is the causal link lower as well?

SALONEN: The causal link is much lower. The industry has to be materially injured "by reason of" the dumped imports, and Congress has never told anybody what it meant by "by reason of." What it has done is specify the factors to take into consideration. First is the volume of imports: are they significant, or are increases in those volumes significant? Next are the price effects of the underselling of the imports, as compared to the domestic product. Finally, there is the impact that the imports are having on the domestic industry, taking into account production capacity utilization, shipments, inventories, net sales, operating costs, profits and losses, cash flows, and capital expenditures. We collect information on a whole host of factors. After winnowing through them, you ultimately just have to make a decision.

Unlike the safeguard law where the ITC has to find that the imports are at least as important a cause of the injury as any other, the legislative history of the dumping law makes it very clear that the ITC may not weigh causes. It can and does weigh the evidence. However, if imports are a cause of harm, the ITC may not make a finding that this is outweighed by some other cause, be it bad weather, a labor strike, the industry's own inefficient operations, or bad management decisions. This does amount to a much lower threshold for industry relief than in the case of a safeguard action.

MACRORY: Has the ITC defined material injury as any injury more than de minimis?

SALONEN: No it has not, although some individual commissioners have. There are very different approaches to injury and causation analysis in the dumping law. As recently as 1991, a majority of the ITC employed a so-called bifurcated analysis. This approach determines first of all whether or not the industry was materially injured, then asks whether or not imports caused that injury. Under this analysis, imports need only be a cause of the material injury suffered by the industry.

Today only one commissioner expressly continues to employ that method of analysis. The alternative to the bifurcated analysis is the so-called unitary analysis, which does not make a separate finding on injury. There are different kinds of unitary analysis. One of the popular kinds, known as the "but-for" analysis, asks whether the industry would be materially better off if imports were fairly traded. The but-for analysis attempts to isolate the effects that the dumped imports are having on the domestic industry, and then make a determination as to whether that effect or that impact is material. There are ways to measure the revenue and the price and the product shipment effects. Suppose that the dumping margin is at twenty percent. Economic modeling can be used to answer questions such as: "Had the imports come in at prices twenty percent higher, what would that have meant for the industry? Would the industry's revenues have been five percent or ten percent or any other amount higher?"

Other commissioners who use a unitary analysis, I think, focus on trends in imports, and in production, shipments, consumption, and prices. The requisite causal
nexus between dumping and injury may be inferred from evidence concerning the
degree and extent to which the import and the domestic product compete with each
other in the market on the basis of price or, alternatively, the extent to which they are
serving different market segments or can be differentiated from one another.

GORDON: This illustrates another element of the bifurcation process. In the ITC
we begin to talk about particular commissioners, their views and how much time they
have left. We certainly do not see that in the ITA, and I assume that we do not see
that in SECOFI. David, what is the struggle going on to define injury in dumping
cases in Mexico? How is this problem approached?

HURTADO: For the petitioner to prevail in a dumping case, according to the law,
the dumped products have to be the direct cause of the injury. Every case involves
an analysis of the particular domestic industry. Very thorough analyses and
verifications are conducted, and evidence is very important to determine whether
dumping or some other factor such as natural competition or advantage is the direct
cause of the displacement of a product’s sales. It is a very thoughtful analysis along
the lines of the GATT. I think the SECOFI has done a good job in every resolution
of isolating the injury aspect, analyzing other possible causes of the injury in
accordance with the guidelines specified by law.

GORDON: Do the regulations to the Foreign Trade Law go into injury in some
depth?

HURTADO: Absolutely. The regulations expand the general provisions of the
law and give more detailed guidelines on how to analyze dumping and injury.

POWELL: You mentioned that SECOFI has to find that the dumped imports are
the direct cause of the harm. Does that mean that SECOFI will look at other causes
and determine whether or not they are more important than dumping? In other
words, will it engage in a weighing of different causes? The importers in the apple
situation, for instance, were arguing that the apple growers in Chihuahua were having
difficulties for a whole variety of other reasons, rather than dumped imports. The
Secretary has rejected those arguments, at least at the preliminary stages. But have
there been cases where SECOFI has said that other causes were more important than
the dumped imports?

HURTADO: Absolutely, there have been many of them. I would think that in
about thirty percent if not more of the cases that have been dismissed, the reason has
been that there was no connection between the dumping margin and the injury, even
when SECOFI recognized that the import prices constituted dumping. The burden
is on the parties to offer economic analysis and a worldwide view of a specific
product’s market, in order to prove that non-dumping elements may need to be
considered.

The high-fructose corn syrup case is, in many respects, illustrative of SECOFI’s
approach. It is believed by some that the sugar industry has been injured by a variety
of factors other than fructose. I have teams researching that. The sugar industry was
at first state-owned; then it was privatized; then came the devaluation. Many factors
caused it to become a deeply indebted industry. Fructose did not really enter the
market until the sugar industry was already deeply in trouble. We are trying to prove
that the injury was produced by many elements other than fructose.

SALONEN: That is interesting. The Court of International Trade (CIT) has said
in one case that petitioners repeat frequently that under the U.S. dumping law,
imports take the industry as they find it. If an industry has been losing money, due
to bad management or any other reason, the ITC might very well decide that the industry's problems had merely made it more vulnerable and thus unable to absorb the adverse effects of dumped imports. Such imports would simply have aggravated the industry's condition.

GORDON: The tomato industry tried a dumping action once before, some years ago. It did not work. Why? And why did it come back again if it did not work before?

POWELL: Since 1980 there have been substantial changes in the law and, I think, substantial changes in the facts. It has been over sixteen years and it is very hard to compare cases across such a span of time.

One of the more important things that the industry in your hypothetical would have to think about is the timing of any new petition, if the suspension agreement comes to an end. I think we have been assuming that if the agreement goes away, we will just resume our investigation. But that is not the hypothetical that you have posited. You have suggested that there are other winter vegetables that the industry is concerned about and, obviously, they aren't included in this investigation. As a result, if the Commerce Department terminates the suspension agreement, a new petition will have to be brought.

I would be very interested in everyone's opinions about what effect the suspension agreement has had on injury analysis. I do not mean injury in fact, but what the ITC would look at. Under the current law, if we resume our investigation, the ITC is required to ignore the effects of the suspension agreement. This makes perfect sense because it is a continuation of the original investigation. When the reasons for suspending that investigation no longer apply, we essentially have to go back to the status quo ante.

But what about an agreement, according to your hypothetical, with which the Mexican producers have complied throughout the 1996-97 seasons? That agreement required that the producers eliminate most of their dumping, and it required a benchmark price that prevented the suppression or undercutting of domestic prices. This is not to say that the ITA is a perfect judge of what that number would be, but it would seem to have some effect on the timing of a future case.

MACRORY: The ITC can base an affirmative decision merely on a showing of threat of injury. If there is likely to be injury in the future, present injury need not be proven. This certainly offers one possible approach for reviewing the data collected just prior to the suspension agreement. Do those data suggest that future injury would have been likely in the absence of an agreement?

Another possibility, perhaps, is that the ITC could decide to go further back and look at the earlier period. Has it done that ever? Has it gone back and disregarded a couple of years?

SALONEN: I am not really sure. It certainly has not done so anytime after 1991.

MACRORY: The statute talks about present or threatened injury, not past injury. It seems to me that legally, they could only look at the past experience as a way of predicting the future.

SALONEN: One point that I think should be made is that the fact that a suspension agreement was in place, and that the imports were coming in at the agreed-upon prices, does not necessarily mean that the ITC would find that there were no adverse price effects. This would depend on the domestic industry's prices and the domestic industry's costs. Ideally the suspension agreement will ensure that
there is no undercutting or suppression of domestic prices. Although I am not intimately familiar with all the details, I assume that the ITA is not looking at the domestic industry’s cost of production or other factors when it evaluates the suspension agreement. The focus of the evaluation will be on the Mexico side. In contrast, the ITC’s practical analysis obviously compares the import price to the domestic price. If the domestic industry’s costs have been going up, has it also been able to raise prices sufficiently? It may turn out that the industry has not been able to do so, despite the fact that Mexican tomato imports are priced in accordance with the suspension agreement. The ITA and the ITC are dealing ultimately with two very different considerations.

VANSICKLE: There has to be an administrative review annually, following the imposition of antidumping duties.\(^{28}\) What period of time will be taken into consideration for purposes of this review, after the termination of a two-year suspension agreement? Does the review process disregard those two years? Is it always two years behind? Or is the annual review based on the last calendar year? Certainly, if two years of a suspension agreement have succeeded in really helping the industry, this will have a spill-over effect into that first year of administrative review.

MACRORY: The administrative review does not look at the injury question; it only looks at the duties. The ITC does not get involved in administrative reviews. The sole purpose of a review is to determine what actual duties are owed on the imports over the last year, and to set a cash deposit rate for the future year.

HURTADO: What is the mechanism for the termination of a suspension agreement? Is that a unilateral measure by ITA or does there have to be a request from one party or another?

POWELL: The Department of Commerce may determine that an agreement is no longer in the public interest, or that it has been violated. If either of these findings is made, then we will end the agreement and resume the investigation at that point.\(^{29}\) In practice, respondents certainly have the opportunity to bring the agreement to an end simply by deciding not to comply with it any longer. They can make their noncompliance quite public if they choose; it has certainly been done before. Even though it is the ITA that technically pulls the plug on the agreement, it is clear in those situations that the exporter is simply tired of being subject to the agreement’s restrictions.

GORDON: What if the opposite happens? What if you decide that it is no longer in the public interest, but the prices continue on because the parties have apparently decided that it is a pretty good deal?

POWELL: That is a problem for the anti-trust division.

MACRORY: Suppose the Mexicans say that they want to terminate the agreement, and the ITA renews its investigation. What prices would you look at? Would you look at prices from the original investigation that may now be two or three years old? Would you look at current prices, which are obviously affected by the suspension agreement?

\(^{28}\) 19 U.S.C. § 1675(1).

\(^{29}\) See 19 U.S.C. § 1673c(i)(1).
POWELL: The presumption is that we will look at the prices obtained during the investigation. By the time of the preliminary determination, we will already have gathered all the data we are likely to get from the exporters, except incidental information obtained during the on-site verification. Unless a very substantial period of time has passed, we will not hesitate to use the data collected during the original investigation.

SALONEN: The period of time analyzed by the Commerce Department in a dumping case is very different than that looked at by the ITC. The ITA looks at a one-year period. In contrast, the ITC looks back to three years prior to the filing of the petition. The interim period—the one most likely in this case to coincide with the suspension agreement—is likely to be disregarded. Our period of investigation does not usually catch up to any point in time that significantly overlaps with the filing of the initial petition.

MACRORY: So even if the suspension agreement lasted for five years, you would go back and look at data that is five to eight years old, to determine if the industry is currently being injured or threatened with injury?

SALONEN: Since that is what the law provides, the ITC may not feel that it has a lot of leeway.

POWELL: The ITC does not have a lot of leeway, in my opinion. The statute instructs the ITC to ignore everything that has happened since the suspension agreement. Some agreements have lasted literally ten years. The only remaining issue is whether so much time has passed that it makes no sense to engage in comparisons, because the industry is in effect completely different.

C. Countervailing Duties

GORDON: Another alternative would be to seek a countervailing duty. This would go to the ITC for a material injury determination, just as with dumping. It would also go to the ITA for a determination as to the existence of countervailable subsidies. This action has not been used in the area of tomatoes, however, and Mexico has not used it in the apple case. Why not? Is this just not a viable action for our industries?

MACRORY: My impression is that the Mexican winter vegetable industry, at least a few years ago, was not receiving any significant countervailable subsidies. It does receive fairly cheap water, but that is available to all agricultural industry. Under the Commerce Department rules that would not be countervailable. A domestic subsidy is only countervailable if it is limited to certain industries or certain groups of industries. If it is generally available to agriculture (in this case) it will not be countervailable. My guess is that the Mexican tomato industry just is not receiving the types of subsidies that would give rise to a significant countervailing duty.

POWELL: Patrick is right. One of the definite reasons why countervailing duties have not been the weapon of choice recently is that subsidies themselves are in disfavor. This is largely attributable to the GATT. The Uruguay Round Subsidy Agreement added substantial disciplines to subsidies that governments give to their companies. It went far beyond the export subsidies addressed in the Tokyo Round.

In turn, and just as important, the agreement adds very explicit rules to countervailing duty actions. Certain subsidies are now prohibited absolutely. An action can be filed against them within the GATT itself. Other subsidies belong in what we call the "yellow category." They are not absolutely prohibited, but they are unlawful if they cause serious prejudice.

As an alternative to proceeding directly under the GATT, of course, an action may be brought under one's own national subsidy laws. These are the countervailing duty laws in the United States. Countervailing duty actions seek to quantify the subsidy being provided by the other government. As in antidumping actions, a duty is then imposed at the border to offset the unfair advantage given to the producers in that country.

There are important limitations that might reduce the viability of a countervailing duty action in this particular instance. First are the so-called "green light" and "green box" subsidies. The GATT now says for the first time that while certain subsidies are prohibited, others are acceptable. Neither a national action nor a GATT action may be brought against a permitted subsidy. These subsidies are very controversial. They were only agreed to at the last minute, and there are some very powerful restrictions on what fits into the "green light" categories. A government would virtually have to redesign any subsidy program that it has in place, in order to meet the conditions established by the GATT. But a program that does fit into these categories, which involve environmental subsidies, research subsidies, and certain regional subsidies, is exempt from countervailing duties.

The "green box" cases are those in the agricultural area. Agriculture has always been subject to special considerations. Because of its importance to every country's economy, it has traditionally been the last area to be subjected to the disciplines of international rules. Permissible government support of the agricultural industry might include the provision of crop insurance and disaster assistance; research, marketing and promotion services; and certain forms of infrastructure development such as the construction of dams, roads, and ports. Even direct payments to farmers are exempt in some circumstances.

Another important factor, as Patrick mentioned, is that in order for a subsidy to be countervailable, it must be specific to an industry. The longstanding Department of Commerce rule on this is that if the benefit is provided to all agricultural producers, it is not "specific" enough to be actionable. Furthermore, governments now are much less likely than in the past to spend their limited resources on subsidy programs. In the early 1980s, fifteen or twenty countervailing duty cases were brought against Mexico. There are now fewer subsidies. About ten years ago, Mexico also became entitled to an injury test under the countervailing duty law. Since then, only one countervailing duty case has been brought against Mexico.

GORDON: Do similar considerations apply to the apple industry in Mexico, David?

HURTADO: Yes, certainly. Only ten countervailing duty cases have been brought in Mexico, many of them involving steel products from Venezuela. In about five cases the target was Siderúrgica del Orinoco.

the formerly state-owned Venezuelan steel company, and it was proven that the government had subsidized the industry by providing it with very soft loans after the company’s privatization.

The remaining countervailing duty cases have been initiated against pork meat from Europe. About five or six of them have succeeded. Altogether, however, fewer and fewer issues are arising in regard to subsidies of agricultural products.

MITCHELL: I have a question regarding agricultural cases and other cases involving multiple respondents. There are many potential respondents in an antidumping action. The ITA does not have the manpower to deal with every submission of information from every respondent, and often resorts to sampling. I believe this occurred in the tomato case. What happens, then, if a client who is not dumping wants to submit information to that effect, but does not happen to be one of the big companies? Can such a client bring himself into the case? Or does he have to wait for the review process?

POWELL: This is a genuine problem. The ITA is required to assign individual dumping margins to every exporter, but in the case of agricultural products, there can sometimes be hundreds or even thousands of such exporters. At the same time, the WTO Agreements impose deadlines for the completion of our investigation. The calculation of individual margins becomes truly impossible under these circumstances, so we have resorted to sampling. This is permitted by the Agreements in limited circumstances. However, our goal is to include as many exporters as possible in that sample.

We recognize the tension between the dual requirements of promptness and inclusiveness, and are trying to deal with it the best way we can. An alternative process, developed in our regulations this past spring, is one that resembles a lottery. Not everybody is interested in having an individual margin. Some producers, for example, are convinced that they are dumping well above the industry average and are unlikely to want their individual data examined. They would prefer the “all others” rate, which is the weighted average of their colleagues’ margins. Those who do wish to have their data reviewed, however, can tell us and have their names placed on a list. If we have any drop-outs from our sample, as we sometimes do, then we take names from the list in the order received. This gives producers a general idea of the likelihood of their data being reviewed. Number 539 probably need not do anything further, but number one may want to start preparing a questionnaire response. A second alternative is the so-called “new shippers” review. As soon as the investigation is completed, producers who did not receive an individual rate can return and request that a particular rate be assigned to them. We have to do that in effectively half the time than what we take for normal reviews.

MACRORY: As you mention, Stephen, companies that are not investigated will be required to put up cash deposits based on the average from the companies that are investigated, where dumping is found in an industry. Ordinarily, the former have always had the chance to have their rate changed upon review. Until very recently, the ITA has given every company a review upon request. As a result, the duties actually collected from any given company have been based on that company’s own experience.

In a case involving a large number of producers, issuing individual margins is a huge and lengthy task. The Colombian Flowers case, for example, included more...
than 300 companies. With the imposition of deadlines, the ITA can no longer calculate individual margins. Instead, it is now calculating margins based on the twelve largest companies, and the average will apply to everyone else. This means that other companies will pay dumping rates based on someone else's experience. The ITA may not have any choice in the matter, but it raises certain interesting questions. As Steve says, many producers may prefer not having to undergo investigation, but this will not always be true of everyone. It is as if someone were told by the Internal Revenue Service, "We're going to pick ten people in your county and figure out the average income tax rate for them, then collect the same rate for everyone else."

POWELL: That is not an altogether bad analogy, but it does not take into account the fact that our statistical sampling, by definition, has to be statistically valid.

MACRORY: Under the law, it can either be statistical sampling, or sampling of the largest producers. As I understand the Colombian Flowers case, a decision was made against statistical sampling because of the difficulty of doing a good job. Up until now, the ITA has simply taken data from the twelve largest companies, and the law clearly permits that.

GORDON: Although time pressure is certainly an important factor, recent cases suggest that resorting to "best information available" does not necessarily yield satisfactory determinations. In the United States, for example, a great deal of criticism has been levied at Mexico's preliminary determination in the apple case, which was based partly on "best information available." Is there a likelihood that we might reevaluate the time frames for ITA and SECOFI investigations, so that they need not resort to such limited sampling?

HURTADO: I do not think so. An important feature of Mexican antidumping law is that the final resolution in a dumping case imposes separate duties for the companies that appeared in the case versus the ones that did not. The duties imposed on those who appeared in the case are based on the actual dumping margin found. Industry members who do not offer a defense in the case become subject to a residual or "pseudo-dumping" duty, which is essentially the highest dumping margin found.

This is what happened in the apple cases. Approximately ten exporters were named in the initial investigation, but only two of them made an appearance during the resolution phase. This surprised us, given the importance of the apple industry to the state of Washington. There are many other pitfalls in this case, but it is a simple fact that information from two companies is not statistically representative of an entire industry. Furthermore, the importers presented invoices inconsistent with those submitted by the two exporters. SECOFI was forced to resort to the "best information available" at the preliminary stage.

POWELL: Accuracy and expediency have always been at war in trade cases. I seriously doubt that respondents would wish these cases to last more than a year. Our investigations take place during a time of trouble in the market. Importers do not know from whom to buy; exporters do not know who their buyers are going to be. Although such investigations are part of doing business in the international sector,

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it is probable that most countries are pushing for shorter investigations. It is important to keep in mind that deadlines were added to the GATT for the first time in the Uruguay Round. Some countries were taking a great deal longer than a year or so to complete their investigations. I do not believe that the desire for accuracy will lead to the restoration of longer investigation periods. Instead, I think that it will encourage countries to invest more resources in each investigation.

David mentioned the youth of SECOFI’s unfair practices law. It is still relatively new. Nonetheless, the Mexicans have become the second most active users of dumping laws in the entire world, following only the United States. In just a few years, they have surpassed the Europeans, the Canadians, and the Australians. This has been done with the addition of a substantial number of staff. We used to go to Geneva and people would laugh at us when we told them that the ITA and the ITC each had about two hundred people conducting investigations. They would say, “My God, why do you need that many people?” We need them because we have about five hundred active investigations pending at any given moment, either in the initial or the review stage. Lawsuits number about the same. I think other countries are beginning to realize that if they want to administer an antidumping law successfully, they have to commit adequate resources. In a sense, the themes of the WTO Anti-Dumping Agreement are accuracy and transparency. These very important goals, in which we think the United States is already a leader, require creativity and investigative resources.

Turning to the specific question of apples, I would like to make some observations. As I understand the facts, the two U.S. companies that chose to respond submitted their questionnaire responses on time and in proper form. Both of those facts were confirmed by SECOFI in its preliminary determination. SECOFI also asked importers for their information about pricing of apples; at the same time, they obtained invoices from those importers to double-check the responses that they were getting. It is somewhat unusual to go into records at this stage. Usually this is not done until the on-site verification phase, after the preliminary determination, although the investigating body is entitled to review a company’s records when it sees fit. In this case, SECOFI found discrepancies between the pricing reported by importers and the pricing reported by exporters in regard to the same transactions. It consequently asked the two U.S. producers to supply invoices as well. Needless to say, those invoices matched the numbers given by the producers in their questionnaire response. Some discrepancies nonetheless remained. It is unclear how many of these there were. Either three out of 120 invoices did not match, or the three that SECOFI was able to trace did not match. In any event, SECOFI decided at that point that the information from both the exporters and the importers was unreliable as a basis to calculate margins. As a result, it discarded all of that information and used the numbers the petitioner had supplied. Such figures are, to put it mildly, sometimes generous to the petitioner. In this case, the petitioner had alleged a dumping margin of 101%. This margin became the “best information” or “facts available” margin, and SECOFI assigned it to the apple exporters in its preliminary determination.

What I find most interesting is the question of why SECOFI would assume that the U.S. exporter was lying. In my opinion, that would be the only basis for disregarding all the information that had been supplied, rather than just the three invoices in which there was an observed discrepancy. Why were all 120 invoices
discarded from the analysis? There are many possible explanations for the invoice discrepancies. Clearly, one of them could be dumping engaged in by the U.S. trading company serving as an intermediary between the exporter and the importer. Another possibility is that the importer was trying to avoid paying regular tariffs on apples. There is still a tariff on apples going into Mexico, although it is trending down with the NAFTA.

These are not accusations. My point is simply that there are a number of possible explanations for the discrepancies that SECOFI found, not necessarily attributable to the exporters. The troubling fact here is not that SECOFI resorted to the “best information available.” When other data are unusable, this is the only alternative. What disturbs me is that the data supplied by the exporters could only be considered unusable if SECOFI found that they did not cooperate to the best of their ability. In other words, SECOFI’s investigators assumed that the exporters were lying to them.

HURTADO: That is not my understanding of the case. To the best of my knowledge, what SECOFI said was that the two exporters were not representative of the aggregate exports from the country. This is why they disregarded the information.

POWELL: That is not what SECOFI said in its preliminary findings. It said that the invoices did not match, that the figures on both sides were thus unreliable, and that it would not use any of those numbers. This is especially troubling because of another fact: at the “disclosure conference” held by SECOFI, the investigators refused to share the disputed invoices with the U.S. producers. Perhaps this was based on confidentiality reasons.

HURTADO: Mexican law has strict rules regarding access to confidential information in a dumping procedure. This does not mean that access is impossible to obtain, however. The party seeking the information must provide a valid reason for doing so, and must post a bond. I have personally requested information regarding the sugar industry on behalf of importers of high fructose corn syrup. This was more or less easily managed, as long as those conditions were met.

III. ALTERNATE TRADE BARRIERS

A. Sanitary Restrictions

GORDON: We are talking about agricultural products that are grown with various pesticides. Is there any possibility for either the United States or Mexico to argue that these products are simply unsanitary? One way to raise this would be through mandatory inspection rules. For example, I imagine that the United States could not only inspect Mexican goods as they enter this country, but mandate that Mexico subject them to a pre-export inspection as well. Another approach to sanitary issues would be through labeling requirements. The label would certify that the product had passed some kind of sanitary test.

MACRORY: As a matter of fact, that may well happen. President Clinton announced yesterday\(^34\) that the administration is seeking new powers which would allow federal inspectors to block imports of fresh fruits and vegetables that do not

\(^34\) Sept. 26, 1997.
meet U.S. food safety standards. They intend to propose legislation that would give the Food and Drug Administration (FDA) authority to block substandard imports at the border, through on-site inspections or some other mechanism. The United States Department of Agriculture (USDA) apparently has this authority over meat and poultry imports already.

GORDON: How does this mesh with our international obligations under NAFTA and WTO rules?

MACRORY: Under NAFTA, we are entitled to impose sanitary restrictions on imports so long as two conditions are met. First, the standards applied cannot be more strict than those we impose on our own produce. Second, these standards must be scientifically supported. The WTO requirements are essentially the same. The test would be whether or not there is adequate scientific support for this type of restriction.

GORDON: Would "scientific support" for restrictions we impose be measured by our own scientific standards?

MACRORY: I believe so, at least initially. If Mexico were to challenge the restriction, however, the panel would be left to decide whether the scientific data were adequate or not. The U.S. case would be strengthened by a showing that the standard imposed on Mexican and domestic producers is the same.

GORDON: The NAFTA parties agreed to move to an international standard. I understand this to mean that if we want to adopt a standard stricter than the international norm, we cannot use that as a justification for imposing equally high standards on foreign producers. This is one of the compromises made in order to further the trading relationship.

John, is there any basis for the tomato industry to raise the sanitary argument? Do you know whether, according to the industry, tomatoes coming from Mexico are unsafe?

VANSICKLE: Obviously the issue has been raised. Whether or not it is justified is a more complicated question. The President has asked for studies, in order to set correct sanitary/phytosanitary standards. Mechanisms also need to be devised which enable our inspectors to examine produce inside Mexico without imposing the cost on their government. Harmonized standards mean little unless there is an adequate regulatory force for monitoring compliance on both sides. It has long been proposed that Mexican producers operate under standards similar to those of the United States; however, Mexico does not have similar enforcement infrastructure.

GORDON: David, is there any discussion in Mexico along these lines? Has anyone proposed using sanitary/phytosanitary measures as a roadblock to apple imports?

HURTADO: No, I do not think so. NAFTA has had a big impact in this regard. At one time, the importation of avocados and many other products was restricted or banned. This was considered a barrier to commerce, sometimes justifiable and sometimes not. NAFTA has established a clearer set of rules regarding the imposition of sanitary and phytosanitary measures. Accordingly, Mexico and the

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36. Id. at arts. 751-766, 32 I.L.M. at 377-83.
United States have signed a protocol limiting the scope of permissible phytosanitary measures. Such measures, as Patrick mentioned, require scientific support.

Mexico also has emergency rules or standards that may be enforced when there is a threat of disease, as happened for example with the Mediterranean fruit fly. I believe that any non-emergency measure taken outside of the NAFTA protocol guidelines would be considered a violation of both NAFTA and WTO provisions.

B. Packaging

GORDON: Another possible device for keeping products out of a country is the regulation of packaging. The “vine ripe” tomatoes grown in the United States are, in essence, packed by dumping them into large containers. Mexican vine ripe tomatoes are packed in a much different way because they are subject to being bruised. The packaging resembles that for eggs. The U.S. tomato industry would like to see international standardization in packing, in line with American packing norms.

MACRORY: The “place packing” commonly used by Mexican growers seeks to minimize bruising by packing the tomatoes closely together, so that there is no movement. This method was also used for many years by growers in California and other parts of the United States. Successful place packing requires the commingling of tomatoes of slightly different sizes. The problem now is that USDA has published uniform size standards for tomatoes. Should place packing be prohibited, in order to encourage similar uniformity in foreign-grown tomato imports?

VANSICKLE: The underlying issue is information in the marketplace. A lack of information implies a corresponding risk. In turn, added risk increases costs. The reason for product grades and standards, including those related to size, is to eliminate uncertainty. This eliminates a risk variable and thus improves returns to the growers. Similarly, it provides more certainty to those who are buying the product.

The place packing of Mexican-produced tomatoes back in 1980 may well have been a legitimate practice. Mexican vine ripe tomatoes were truly vine ripened, and thus soft when harvested and shipped. Unlike a mature green, the vine ripe needed a great deal of help to survive as it moved through the marketing system. Today’s vine ripe tomato is much different than it was then, however. Mexico is already bulk packing some of its tomatoes, even the vine ripes. There are new varieties which retain a great deal of firmness when ripe. They are much less likely to break down into a mush when shipped.

Given that modern tomatoes will withstand bulk packing, resorting to a place pack adds risk to the buyer because of the lack of uniformity in size. Tomatoes labeled by size will be inspected by the USDA to ensure that they meet minimum size standards as indicated on the box. Inspection guarantees that a tomato labeled “extra large” actually meets the corresponding U.S. size requirements. Place packed tomatoes, however, are labeled by quantity rather than size. For example, a box might be labeled as “four by four” or “five by six” according to the number of tomatoes in each row by width and length. Tomatoes packed this way do not have to meet any of the sizing standards.

By promoting uniform size standards, all that U.S. growers are really asking for is the elimination of risk in the marketplace. This does not merely provide increased
returns to the growers. It also enhances consumer welfare by lowering the cost of the product.

MACRORY: If it is true that place packing is no longer necessary to preserve the product, why do Mexican tomato growers still do it at all? It is a great deal more expensive than bulk packing. What would be the incentive for continuing to place pack?

VANSICKLE: I think that is exactly why Mexican growers are bulk packing their tomatoes much more frequently than before.

MACRORY: In that case, why do you want to ban place packing where it is necessary? As an economic matter, it seems fairly clear that growers would only incur the extra cost of place packing if good judgment indicated that it was necessary. Am I correct in understanding that California growers also continue to place pack? Do you attack them for doing so?

VANSICKLE: I do not believe that as many place packed tomatoes are coming out of California as in the past. In turn, Florida vine ripes are not place packed at all.

C. Labeling

GORDON: What we are really talking about, it seems, is the validity of different kinds of produce standards. Do the standards adopted meet legitimate goals? Or are they used simply as devices to keep products out of the country? The packing problem does not appear to be an issue with apples, because they are regularly shipped when firm. They are not subject to the same kinds of consistency variations as tomatoes. As an alternative, could import concerns be addressed through labeling laws? Could we mandate labeling by place of origin, for example?

MACRORY: The answer is yes. Under NAFTA, the parties are permitted to require goods imported from another NAFTA country to bear a country of origin marking. Exceptions are offered for import articles incapable of being marked, for those which cannot be marked except at a cost which would discourage importation, and for those which cannot be marked without material impairment of its function or substantial detraction from its appearance. Every time I buy a tomato in the local supermarket, it comes with a little sticker on it. The sticker does not say where the tomato was grown. Instead it bears some kind of a code, which means something to the supermarket owners. However, it seems to me that it would be perfectly acceptable to place a “Mexico” sticker on tomatoes and other imported vegetables. Rather than hurting Mexican producers, this may actually prove to be a marketing advantage, given the perception that Mexican vine ripes are better tasting than domestic tomatoes.

GORDON: Does NAFTA treat state and federal labeling controls differently? Are states subject to the same rules, or are they permitted to impose independent labeling requirements?

MACRORY: If a given labeling provision is permitted under NAFTA, I do not see why a state government would not have just as much right to impose it as the federal government. If a state tried to impose a labeling requirement incompatible with NAFTA, Mexico could ask the United States to bring an action against the individual state. This is authorized by the NAFTA Implementation Act.

GORDON: The Florida state government already has a labeling requirement. Does it apply to all vegetables?
VANSICKLE: All foreign produce has to be labeled as foreign produce, by country of origin.

MACRORY: Many years ago, Hawaii passed a similar law, requiring that foreign eggs be labeled “foreign eggs.” Somebody challenged that successfully under the GATT. It was one of the first cases holding that the GATT was incorporated in U.S. law; as federal law it preempted state and territorial law. Consequently, the court ruled that the Hawaii statute was void.37

Under NAFTA, in contrast, private parties cannot bring their own actions to challenge statutes alleged to be inconsistent with the treaty. A Mexican producer harmed by Florida’s labeling requirements would have to ask the Mexican government to raise the issue with the United States. In turn, only the U.S. federal government is entitled to challenge the compatibility of the state action with the NAFTA. In other words, Mexico would have to go to the United States and say, “We believe that this particular action by Florida is illegal. Please bring an action.” A U.S. refusal to initiate such an action, I suspect, could be challenged using NAFTA’s dispute resolution mechanisms.38 Nonetheless, this scenario clearly presents political difficulties.

GORDON: What is Florida’s motivation for requiring specific country of origin labeling rather than a generic “foreign product” designation? Is it simply to allow consumers to choose?

VANSICKLE: The idea is to build on patriotism in consumers.

GORDON: Could we adopt a “Buy America” program in this? Such a measure is clearly unlawful in the European Community system; “Buy Irish” and similar programs have failed there in a number of cases. Is there anything to prevent a NAFTA party, however, from adopting a “Buy America” policy and dedicating federal resources to it? I can imagine at least two possible scenarios. The first would involve a preference in government-funded purchases; the other would pertain to a government-supported, government-subsidized “Buy America” advertising program.

MACRORY: Government purchases are a special issue, with unique problems. Certain agencies are subject to specific government procurement rules. Under these rules, I think that (for example) a U.S. Army policy to buy only domestic tomatoes would fail.

VANSICKLE: In contrast, a general “Buy America” campaign should be permissible, if there is no specificity in terms of product.

POWELL: General agricultural marketing and product promotion by a national government are normally not considered to qualify as countervailable subsidies. Concerns do arise, however, if such promotion becomes limited to a specific industry.

IV. REVIEW OF ADJUDICATED TRADE ACTIONS

GORDON: For the remainder of the discussion, let us assume that a given trade action has been adjudicated, and that the decision was unfavorable to our industry. What alternatives remain to the losing industries or producers?

POWELL: There is actually an extraordinarily broad range of recourse available to a country and its producers, if they are dissatisfied with an unfair trade proceeding which has taken place in another country. This is especially true in the NAFTA region.

As an example, let us assume that Mexico wishes to challenge an action taken by the ITA or the ITC. Review is available from the federal courts at two levels, trial and appellate. They will examine the disputed decision to see if it is unsupported by substantial evidence or is otherwise inconsistent with the law. Cases are actually remanded to the ITA or the ITC about forty percent of the time. The agencies may be instructed to redo the case, to reevaluate it, or to better articulate their reasoning. Judicial review, then, is an effective remedy.

Mexico could also bring a challenge under Chapter 19 of the NAFTA, although this dispute settlement mechanism is still controversial. The resolution panel is a private group of ad hoc trade experts chosen only for that case, who in essence substitute for the national court system. This is very unusual. To my knowledge, we have never before ceded our judicial sovereignty to an international body to review our own law, as opposed to deciding whether or not an action is consistent with an international standard.

Concern about this exists for several reasons. One of them is the perception that the NAFTA panels favor respondents slightly more than national courts do. Another concern is that the Mexican courts are beginning to dismantle some of the basic assumptions that were made in designing this dispute resolution system for the NAFTA. A fundamental point in the NAFTA is that a panel decision is final. It simply may not be reviewed. If amparo means what some of Mexico’s courts have said it means, however, then courts will begin reviewing panel decisions in amparo proceedings.39

This is not necessarily the end of the world, of course. In fact, the issue was anticipated during the NAFTA negotiations. When the United States and Canada talked to Mexico about extending the Chapter 19 system to a civil law country, all three parties were concerned about whether or not it would fit. Because of this, a new article was added to the agreement. Officially it is called Safeguarding the Panel Review System,40 but it is known unofficially as the self-destruct button. The article provides (in essence) that if panel decisions cannot be implemented in a NAFTA country, then the other parties will be free to cease applying Chapter 19 as well. The effect is to “turn off” Chapter 19 without suspending the NAFTA itself. The purpose of this mechanism is to preserve NAFTA even if Chapter 19 ceases to function. Under the U.S.-Canada Free Trade Agreement, the only way to disable Chapter 19 was to abrogate the entire Agreement.

A third recourse for losing parties in a trade action is review by the World Trade Organization, which now has a sheriff and a jail. WTO decisions are effectively binding. However, it is important to recognize that the United States has not ceded judicial sovereignty to the GATT. Like every other country, we have reserved the right not to implement a WTO decision that goes against us. At the same time, of

course, there is a price to pay if we choose not to implement such a decision. That price is the other party’s absolute right to retaliate against us in the amount of the damage that the disputed U.S. trade action has caused to its industry.

V. CONCLUDING REMARKS

GORDON: John, is the suspension agreement working? Do you think it will last? If not, what would cause it to come apart?

VANSICKLE: The suspension agreement worked marvelously last year simply because there was a weather event and prices were high. There is no such weather event this year, and we may see the suspension agreement and its enforcement put to the test. We do not yet know how growers on each side will react.

MACRORY: One thing that is clear from this discussion and also from the Florida tomato growers’ experience is that the dumping law is currently the most effective way of obtaining import relief. There are presently around three hundred dumping orders in place.

In the tomato case, there is not much evidence of deliberate price discrimination used to penetrate the U.S. market unfairly. The problem is one of volume, entirely. As John mentioned, volume was low last year for various reasons. But if both Mexico and Florida get good crops, the increased volume is likely to drive market prices down. This will place huge pressure on the Mexicans, because the suspension agreement obligates them to meet a minimum price. The agreement may not survive. At the same time, I am unsure what alternatives would remain to the Mexican producers.

POWELL: As we have seen in a number of other very important trade disputes (such as lumber from Canada, semi-conductors from Japan, and cement from Mexico), the first compromises reached by the parties do not often remain intact as permanent solutions. Sometimes one country has an advantage at a particular moment, and is able to extract concessions that cannot be sustained over a long term. Trade disputes have a way of resurfacing repeatedly until a genuine solution can be found. The “tomato wars” have gone on for at least a decade and a half. And they will continue until we as trade officials find a creative way to meet the needs of both sides.

SALONEN: Unless and until current laws are changed, which I do not expect to happen any time soon, import relief will remain subject to some very real constraints. It will continue to be difficult for tomato growers to obtain relief, especially since this is an industry so dependent on the dynamics of the growing season. This reality is unlikely to change. On the other hand, one thing that will continue to change is the composition of the ITC. The appointment of new commissioners over time may have a real effect on outcomes. The industries should keep this in mind.

Another observation that I would like to make is that the various import remedies have corresponding trade-offs. In many cases, Section 201 remedies will probably be most effective simply because they can have a substantial effect on the price and/or volume of imports in the market. Then again, because Section 201 relief is based on a weighing of competing interests at the highest levels of government, policymakers may deny relief even to industries that have amply demonstrated import-based injury. The advantage of antidumping remedies is that the eligibility
thresholds are far lower, and the imposition of a remedy is automatic when those thresholds are met. However, the effectiveness of the remedy is open to question and depends on the size of the margin. The margin may not be enough to make a big difference in market prices.

It is interesting to note that despite the disappointments faced by the tomato growers in their Section 201 actions, the antidumping suspension agreement ultimately provided them with a remedy comparable to what they might have obtained in a safeguard proceeding. In this respect, they achieved their objective.

GORDON: Perhaps it is unfair to ask what might happen in the next year. As Steve indicates, these are long-term issues that can go on for decades. Time will continue to test the effectiveness of our dispute resolution mechanisms and corresponding forms of import relief.