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Introductory Remarks

Donna Solen

concern is that although the International Trade Administration (ITA) of the U.S. Department of Commerce had found no dumping of Mexican tomatoes in 1980, in 1996, it reached an opposite conclusion. AGMEX will further consider the following:

1. Commence a petition before NAFTA to challenge any violation of U.S. obligations under NAFTA.
2. Commence a petition before the World Trade Organization (WTO) to challenge any violation of U.S. obligations under the WTO.
3. Challenge any adverse decision from a countervailing duty or dumping action in the United States under Chapter Nineteen of NAFTA or under the dispute procedures of the WTO.
4. Challenge any other adverse decision such as a Section 201 or 301 or 337 decision under Chapter Twenty of NAFTA or the dispute procedures of the WTO.
5. Respond to any unilateral changes in the U.S. laws as permitted under the rules of NAFTA or the WTO.
6. Adopt similar measures regarding labeling, packaging, sanitary and phytosanitary, and other rules to govern U.S. exporters of food products to Mexico, such as apples and other fruits, and especially with regard to the import of California tomatoes and tomato products, which have substantially increased under NAFTA.
7. Initiate a "Buy Mexican" campaign in the agricultural industry directed to Mexican restaurants, institutions, and consumers, all subsidized with federal funding.
8. Require all foreign fast food companies to buy Mexican food products.
9. Take any other action deemed appropriate.

Our function will be to work through the above conflict, addressing each possible action by the Florida growers, by the U.S. government, and by any state governments. We will consider the lawfulness of each proposal. We also will consider the role NAFTA and the WTO might play as a result of Mexico's threat to take the conflict to those organizations, plus the likelihood of success if Mexico challenges any ITA or International Trade Commission (ITC) determinations in a NAFTA or WTO dispute panel.

II. INTRODUCTORY REMARKS

WELCOME BY DONNA SOLEN, EDITOR-IN-CHIEF, *FLORIDA JOURNAL OF INTERNATIONAL LAW*, AND DEAN RICHARD MATASAR

This year's symposium is on a very timely issue, involving huge agricultural interest. Today, we have a distinguished panel of experts on international commercial law and international trade. I would like to thank the many people who made this symposium possible, including Dean Richard

Matasar, the Law College Council, and the Board of College Councils. I also would like to thank Laura Beebe and the other *Journal* members who have done a great job organizing this event. Our special thanks goes to Professor Michael Gordon who conceived the idea of the Annual International Business Symposium. His invaluable guidance has enabled the *Journal* to hold this symposium and to grow and become a successful contributor to the field of international law. At this time, I would like to introduce Dean Matasar.

DEAN RICHARD A. MATASAR:

Thank you. I want to add my welcome to this International Business Symposium. It is appropriate for us to welcome this panel to the University of Florida College of Law. Appropriate for at least two or three reasons. First, Florida is one of the fastest growing states in this country, in terms of population and its economy. It also is one of the least developed trading portions of the country, but given its prominent role in the economy of the United States, and projecting forward, it is one of the most likely to become an expanding trade partner throughout the world. So, we at the law school of this great state are in the position of trying to develop for ourselves an understanding of what the future will bring. How will our country and our state participate in the world economy? And how can we, as members of the legal community within the state, help create a better regulatory climate, one that promotes the growth not only of our state and country, but the world as well? It is appropriate that this law school should host this type of symposium. Not just because we have an international faculty, not just because our students have been dedicated to this field for a long time, but additionally because as an institution we are dedicated to the proposition that international comparative law forms a critical portion of a student's legal education.

I want to share with you the latest edition of the *Florida Lawyer*. What is important to me is not that it is called "The Evolving Globalization of the Law School," something that was anticipated twenty-five years ago by this law school, but rather the sense of commitment that the faculty have brought to this mission. The first article in this issue of *Florida Lawyer* is a message of from Professor Roy Hunt. One of the things that is contained in the message is a brief statement of what our policy is toward global studies. I want to share that with all of you because I think it is an important statement by the College of Law.

> The College of Law recognizes that globalization has direct relevance to our students' professional training and understanding of the underpinnings of developing law. Global legal studies reinforce the fundamental subjects of the College's curriculum: almost all

> areas of law now have transnational aspects. A systematic and conscious global law program in the College of Law will expand the boundaries of students' knowledge, and help them reach full participation in the legal community of the next century.

I want to pause there because this is exactly what we are talking about. We are not talking about the last legal century; we are talking about the next one. Our students, all of you, our faculty, are poised for the next forty- to fifty-year period to make professional contributions. It does not do us any good to think about the battlestar of the future if we are operating on the battleship of the past.

> Through a global approach to legal education, the College of Law will also help Florida meet the first goal of its State Comprehensive Plan:
>
> The creation of an educational environment which is intended to provide adequate skills and knowledge for students to develop their full potential, embrace the highest ideas and accomplishments, make a positive contribution to society, and promote the advancement of knowledge and human dignity. The global approach coincides with Florida's growing importance in the international arena and with the College of Law's obligation to train leaders to meet this challenge . . . .

Not followers but leaders. And we are seriously committed at this law school to imagining that the leaders of tomorrow will come from this faculty and this group of students; that the leaders in international trade and international development will come from this student body. It underscores the efforts of the University of Florida to develop its international programs. And this is the guts, the sort of payoff:

> Therefore, the faculty of the College of Law commits to develop a comprehensive program of studies in international and comparative law to give our students the tools to become effective professionals for the next century.

I share with my colleagues an excitement about that mission. The sense that we, at this law school, have the ability to bring ourselves forward into the future. As part of that, we hope to continue bringing scholars, practitioners, government officials, and academics together to discuss critical developments in the law of international business and international business trade.

So, on behalf of my colleagues, our students, and the members of the public who are here today, I want to welcome all of you. I know there will

be incredible ideas spinning forth for the rest of this morning and on through the rest of the day.

PROFESSOR GORDON:

First it was the killer bees. Now it is the killer tomatoes. You may not know this but the tomato was called the "love apple" in France because it was thought to be an aphrodisiac. But of course, in France almost everything is thought to be an aphrodisiac. The tomato is believed to have originated in the highlands of South America. The name is closely linked to an Aztec word. Mexico knew the tomato before the United States, thus raising issues of prior use. It is relatively disease-prone, subject to flea beetles, aphids, white flies, cutworms, and hornworms; but these problems have been addressed by malathion and other pesticides. However, the greatest danger to the Florida tomato comes from another disease called competition, which is unaffected by malathion and other pesticides. It is best addressed by a variety of trade barriers and trade actions, which we will explore today.

Nearly two hundred years ago, David Ricardo, an Englishman, set out his famous theory of comparative advantage. He suggested that nations ought to produce those products where they have a comparative advantage. If England can produce cloth using less labor than Portugal and Portugal can produce wine using less labor than England, then England ought to produce cloth and Portugal wine. Today, the world is far more complex than when David Ricardo left it, nonetheless the theory of comparative advantage is the foundation for what ought to occur when nations remove trade barriers. What David Ricardo did not explain was how a nation is to comfort its losers. While England's cloth and Portugal's wine producers are the winners from comparative advantage, England's wine and Portugal's cloth producers are the losers. Using Ricardo's principles and addressing production, not with England and Portugal but with the United States and Mexico, we might say that the United States has a comparative advantage in producing apples and grain while Mexico has a comparative advantage in producing tomatoes and winter vegetables. If that is the case, under free trade, we ought to be addressing the tomato and vegetable industries in Florida as terminal patients rather than recipients of life-renewing transplants. There is indeed relatively little support for the Florida tomato industry in many parts of the United States, certainly not in those states where agricultural producers are the net gainers from NAFTA, such as grain-producing Kansas and apple-producing Washington.

The discussion you are to hear today is more a state versus nation than a nation versus nation dispute. It is often referred to as "the Florida-Mexico Tomato War" not the "United States Tomato War." Indeed, Bob Crawford, the Florida Commissioner of Agriculture, formally declared war against Mexico at a rally about a year ago, which raises some very interesting public

international law questions about the ability of a state to declare war on a foreign nation.

The fact that it is a state issue with a foreign country raises the question of the legitimacy of state actions that have been taken in Tallahassee rather than in Washington. To be sure, Washington has responded. Four members of this panel have come from Washington. The Washington response has been inextricably linked with politics and electoral votes. Is it merely a coincidence that the agreement reached last September between Mexico and the United States, which one of our panel members, Stephen Powell, worked on, occurred on the eve of counting electoral votes for the President? We will use a hypothetical from the actual conflict over the past few years. The hypothetical allows us to stray from the confines of the actual case into the realm of "what if," which may someday become "what is."

Our panelists all have extensive experience with the issues we are to discuss from a number of different perspectives. Let me briefly introduce them. Patrick Macrory represented the Mexican winter vegetable industry in the 1979-80 dumping investigation. He is currently with Akin, Gump, Strauss, Hauer & Feld in Washington, D.C. and practices in the area of international trade law.

Stephen Powell is a graduate of the University of Florida College of Law from a long time ago. He is the Chief Counsel for Import Administration/ International Trade Administration (ITA) of the U.S. Department of Commerce. He has been involved in many cases in which the Department of Commerce has played an integral role, particularly where the ITA role came into play.

Eric Salonen is attorney-advisor for the U.S. International Trade Commission (ITC). He served as attorney-advisor to Commissioner Janet Nuzum and is now taking over as attorney-advisor to another commissioner, Chairman Miller. So, he brings a rich experience of knowing exactly what is going on in the ITC.

John "Andy" Spanogle, an old friend of mine, is the William Wallace Kirkpatrick Professor of Law at George Washington University. We have co-authored half a dozen or more books on the subject of international business transactions and international trade. Professor Spanogle has been a consultant for the U.S. Department of State since 1982, and a lot of his interest is international commercial law and work with UNCITRAL.

John VanSickle is another faculty member from this university, whose work on this particular issue I have admired over the years. Professor VanSickle is an agricultural economist with the Institute of Food and Agricultural Sciences at the University of Florida. Much of his work deals with extension educational programs, but he has authored many materials that deal with agricultural issues and has been very much involved in working on this particular issue as a consultant and an expert witness.

I am Michael Gordon, and I have been on this faculty for longer than I care to remember. I have been here longer, perhaps, than some of my colleagues care to remember. Over the years, I have had a very close affection and affiliation with Mexico, where I did part of my graduate law work. I remain the only gringo who did their graduate work in Mexico rather than in the United States. Professor Spanogle and I are currently working on a book on NAFTA dispute resolution; we have both been appointed by the U.S. Trade Representative to the roster for Chapter Nineteen NAFTA dispute panels.

Now we will turn to the hypothetical. We are dealing with a food product company called CONVEG. It is a large U.S. food products company, which has now acquired much of the tomato industry in Florida and is very concerned with the increasing competition from Mexican tomatoes. We would like to give different views on some possible actions. I think that in many instances, although the tomato industry is obviously more sophisticated, clients come into a lawyer's office and say, "Our industry is hurting; let's bring everything we can" rather than saying, "Let's bring a 337 or 301 or a 201 or a dumping action." We are going to review the "everything we can" scenarios. It might be appropriate at this time to see if there are other introductory comments that members of the panel would like to make. Then we will turn to the possibility of a Section 201 action.

Would anyone like to make any initial comments?

PROFESSOR VANSICKLE:

I would like to make a couple of comments on some of your opening remarks. Perhaps Mr. Powell could more appropriately respond to the signing of the suspension agreement just prior to the elections, since Commerce was involved in negotiating the suspension agreement that was developed. The development of a suspension agreement is not uncommon following a preliminary determination on a dumping investigation. And the timing on that was due more to the results of the dumping investigation than to the election itself. So, why it may have been coincidental in some ways, I think, or at least I believe, that Commerce might take some exception. Looking at the suspension agreement, it is a good agreement for all parties, including Mexican and U.S. producers. Either of these parties would have been better off if they had been able to change some of the provisions. From that point of view, to be fair, I think it was more of a timing issue from the investigation than from the election standpoint.

Secondly, when you brought up the point of view of comparative advantage, you mentioned that Mexico may have an advantage in growing tomatoes, where actually prior to the peso devaluations that occurred in late 1994 and going into 1995, our studies had shown that Florida and Mexico were very competitive in the market. There was no clear advantage, and in

fact, the latest numbers that were published showed that Florida really had an advantage in the U.S. market for fresh tomatoes. When you look at comparative advantage and try to define who ought to be supplying a market, you need to look at the resources that the participants control. There are many reasons, because of the resources that are used to produce an item, that dictate who has the advantage. But we must recognize that governments create resources. It is when those created resources lead to an unfair advantage that you have trade remedy laws to address the situation. I believe that the Section 201 case that was brought forth was done just for that reason because it allowed U.S. producers to seek relief because of what had happened due to the peso devaluation not any unfair trade practice.

From there I will allow somebody to pick it up.

PROFESSOR GORDON:

Stephen, would you like to comment on the agreement?

MR. POWELL:

I think that the point that Professor VanSickle made is well-taken. But I also think it is impossible for us to pretend that we can separate politics from trade. Let's face it: the matters that are involved with trade are the lifeblood of our country. And politics is going to be hovering around no matter what kind of law you are dealing with. But I think, as you will see from our discussion this morning, Congress has attempted to make the antidumping and the countervailing duty laws as immune from those kinds of considerations as human beings can do when writing laws, by specifying the discretionary limits to which the Department of Commerce and the ITC are subject. Nonetheless, even there Congress has given some areas a wider reach of discretion than others. Entering into a suspension agreement is one of those areas where the Department of Commerce is provided with a bit more discretion than in calculating, for example, the dumping margins or with regards to the ITC's calculating whether a domestic industry is injured by the imports.

Although there are very careful procedural requirements and very specific points that have to be met, there is more discretion with respect to whether to enter into a suspension agreement. Now, obviously as a member of the Administration, I am going to tell you that politics is not what drove that agreement. I think Professor VanSickle is exactly right; the timing of the agreement was based on the timing of the investigation.

MR. MACRORY:

May I add a couple of points? One is that there is a historical irony about the Florida-Mexico tomato war, and perhaps this illustrates the point that this is really the State of Florida against the rest of the United States.

Early in the 1960s, the United States encouraged Mexico to start growing winter vegetables. Cuba had been a major source of winter vegetables until the Cuban embargo. At that point, the United States needed another source since Florida could not supply the entire market.

The second point is that the 1980 antidumping case was very political, to the extent that at one point President Lopez-Portillo said to President Carter, "If you want to continue buying Mexican oil and gas, you better go on taking our tomatoes." There was great interest in settling that case. An interagency task force was set up, and after the Mexicans won the case at the Commerce Department, the domestic Florida tomato industry challenged the decision in the U.S. Court of International Trade. One of the grounds was that there had, in fact, been political interference with the case, which clearly would have been illegal. The Florida industry took discovery and got a lot of documents from many different government agencies, which certainly indicated a very strong interest on the part of many agencies for a variety of reasons. There was no "smoking gun" there, and the allegation of political interference was rejected. But it was a very serious allegation, and there clearly was a great deal of political interest in the case.

MR. SALONEN:

Before I say anything else, I want to make a disclaimer. Since not even the Chairman of the ITC can speak on behalf of the other commissioners, certainly an Attorney-Advisor cannot either. So, my comments here are solely my views. The second point I would make is that perhaps it is appropriate that I am sitting in the middle since the ITC is often caught in the middle of these cases.

One point I wanted to pick up on, which Steve mentioned, is the issue of discretion. It is important to understand that the industries that come before the Commerce Department and the ITC seeking relief from import competition, whether fair or unfair, and the markets that those industries operate in, vary tremendously. There is simply no way that Congress can possibly anticipate every single situation, every single instance, and every single fact and tailor a law that is going to adequately address all of those various possibilities. So, it must provide some measure of discretion to the decisionmakers, to the agencies, and trust their judgment and that they are going to make those judgments in good faith.

The other point I would like to make as a preliminary point is that particularly in the dumping and countervailing duty cases, which are perhaps the most high profile since they are the ones that occur the most often, there is arguably a lot less opportunity for political interference than in other cases where purely political motivations enter into the decisionmaking process. Once the Commerce Department and the ITC make their decisions, they are final. There is no opportunity for other federal agencies to intervene, which

is untrue of other trade remedy statutes. The only opportunity is for the parties to either appeal to the U.S. Court of International Trade, or in the case of a NAFTA decision, to go to a NAFTA panel, or in the case of other foreign governments, to try to take the case to the World Trade Organization (WTO). So, I think that the dumping and countervailing duty laws, as Steve has said, are probably as insulated from political influence as is humanly possible.

PROFESSOR SPANOGLE:

To follow up on that, I would like to point out that there is a great division between countervailing duties and antidumping duties on the one hand, for which there is a genuine attempt to provide a buffer between the agencies and political processes, and Section 201 actions on the other, which are clearly going to be political decisions at the end of the day, even though the ITC does its usual unbiased fact-finding. The decision to take any action on the basis of Section 201 is going to be done by people who are basically politicians and is made in a totally different milieu than countervailing duties and antidumping duty decisions.

PROFESSOR GORDON:

Are you saying that people are going to take action after the ITC has rendered its decision?

PROFESSOR SPANOGLE:

The ITC renders an advisory decision.

PROFESSOR GORDON:

And then the President has the authority to use it or reject it and use it in many different ways.

PROFESSOR SPANOGLE:

This is a caricature of a Section 201 action. There are five main points that you should know about a Section 201 action.

First, there is no allegation of an unfair trade practice. The ITA, the Department of Commerce, does not get into this one at all. This is very simply someone saying, "I want to complain, even though the other guys are playing straight and fair." In fact, they might not be playing straight and fair, but that would be irrelevant to a Section 201 action.

Well, if they are playing straight and fair, what are you complaining about? You are complaining, "I am getting hurt. I am really getting hurt; I am not just bleeding from a small cut on the side of my face. I am bleeding from my eyeballs, and I need governmental help." But, the second point is to note that the connotation from that statement is "I cannot compete

right now in a fair fight in a free market. I need help from the government."

Well, there is a further implication from that which is the third point. You are saying, "Please hurt somebody else who is offshore, who is exporting to the United States. Please keep them from sending goods into the United States, at least for a time."

The fourth point is that under the basic rules of international trade law, if you say, "Please hurt somebody offshore," you are going to have to give with one hand what you take away with the other. So the United States has to offer them compensation. Thus, when the U.S. government says, "We are going to help the petitioner under a Section 201 action," it must also, at the same time, say, "We are going to hurt some other American, who is competing and winning. We are going to take money out of their pocket to help the petitioner." That is always going to be a political decision. That is not a decision for the ITC. The President makes that kind of a decision, to take money out of one person's hands and give it to another person among U.S. citizens.

And there is one last, fifth point; and it is a crucial one. If the President is going to transfer harm, the whole basis of Section 201 is supposed to be "I have a plan that I can put into effect in the next *X* number of years that will revive my industry so that it will be able to compete without this help from the government in a very quick order." And if you do not have the plan, the likelihood that you can get respect from the political types, regardless of findings by the ITC or others, is very small.

So, a Section 201 action is a statement by the petitioner: "Help, I cannot compete. I need help; I need it so badly that you have hurt other Americans. In addition, I can get my act together in a short time, like three years or so."

MR. MACRORY:

If I could just add a couple of background points that might be helpful. First, Section 201 is based on Article XIX of GATT. As you probably know, the original 1947 GATT was essentially a tariff-cutting exercise, and the various articles, such as Article VI on anti-dumping, were designed to prevent countries from undercutting the effect of the tariff cuts. The notion was that countries might be reluctant to cut tariffs if they could not quite predict the impact those tariff cuts would have on their industries. So Article XIX, known as the "Escape Clause," was put in, which provides that if tariff cuts resulting from an international tariff-cutting round result in increased imports that have a serious effect or cause serious injury to a domestic industry, then the country can put its tariffs back to the original level for a temporary period. It is five years with the possibility of three additional years. The basis of the law is to provide temporary relief where the tariff cuts have had an unexpectedly large impact on the domestic industry.

To add to the point about the politics involved, if you look at the

statistics, Section 201 relief is pretty hard to obtain. About fifty percent of the cases that go to the ITC result in an affirmative finding. But of those cases only about half actually result in import relief. The other cases get thrown out at the presidential level. So, the chances of winning a Section 201 case are roughly one in four, which are not very good odds. In fact, there have been very, very few cases filed in the last five or ten years; tomatoes, of course, being an exception.

MR. SALONEN:

Another example is *Broom-Corn Broom*,[1] which was filed before the Commission at about the same time as the tomatoes case. And that resulted in an affirmative determination by a majority of the Commission and in relief by the Clinton Administration for about three years. So it does happen. Not often, but it does happen.

It should not be hard to understand why that is the case; because as Professor Spanogle mentioned, the claim for protection is being brought against imports that are not doing anything wrong, or at least there is no allegation of any unfairness. If you are going to impose quotas or tariffs or some other sort of temporary barrier to imports that would otherwise be entering the country under normal circumstances, then as a policy matter there ought to be a fairly high threshold of injury and of causation in order to provide that relief.

PROFESSOR GORDON:

Eric, in a 201 action, the products have to be like or directly competitive. In the *Broom-Corn Broom* action, the result was that broom-corn brooms are not like or directly competitive with plastic brooms, even though we have both used them to sweep. How consistent is that with the decisions of the ITC that seem to suggest that mature, green tomatoes are like or directly competitive with vine-ripe tomatoes.

MR. SALONEN:

Well, let's take the *Broom-Corn Brooms* decision first. What the Commission looked at is this: plastic brooms and broom-corn brooms both are used to sweep up the dust in your living room. The market shares held in the United States by each of these products have been relatively stable over a number of years: 40% by broom-corn brooms; 60% by plastic brooms. You also had very different manufacturing processes and evidence that purchasers were perceiving these as being different products.

With mature green tomatoes and vine-ripe tomatoes, one of the points

1. USITC Pub. 2984, Invs. Nos. TA-201-66 and NAFTA 302-1 (Aug. 1996).

that the Commission found is that by the time the tomatoes get to the market, the differences in appearance are virtually eliminated. They are both red, and they are both waiting to be purchased. Mature green and vine-ripe tomatoes are frequently grown on the same plants. And the production process is very similar, so that, although there was evidence and testimony that there were differences in taste and customer preferences, when the Commission weighed these different factors, they found that those differences were outweighed by the similarities.

MR. MACRORY:

Eric, did the Commission do a taste-test?

MR. SALONEN:

I do not know.

MR. MACRORY:

In a case involving Swiss cheese, we did actually proffer up a Swiss cheese for the Commission to taste, and it resulted in an exemption for cheese above US$.47 on the ground that it was quite different from the other imported cheeses.

MR. SALONEN:

Yes, but even a taste test would not have been a dispositive factor.

PROFESSOR GORDON:

Professor VanSickle, why don't we just include all tomatoes, tomatoes that are made for processors, grown for processing; tomatoes that are grown for the fresh market, greenhouse grown tomatoes, and outdoor field-grown tomatoes. What is your view from being an agricultural economist?

PROFESSOR VANSICKLE:

Processed tomatoes are grown through a different production technology. The characteristics of those tomatoes are different and their enduse is very different. You cannot take a processing tomato and put it into the fresh market and expect it to compete because its quality is very different. A tomato must have a different solids content to put it into a processing stream than is required to put it on the fresh market. They are very different tomatoes although they may look similar coming directly out of the field.

PROFESSOR GORDON:

What about the industry? One of the other requirements in a 201 action is that the domestic industry suffers a serious injury? What is the industry? Are we the industry? What about the past decisions of the ITC? Did they

struggle with defining "industry"?

MR. SALONEN:

There have been a number of issues on "the industry" in the tomatoes cases. One issue was processing versus fresh. The Commission found it to be a fairly simple issue. In fact, the parties in the case also agreed that the processing industry and the growers of the fresh product were different industries.

A second issue was that there are not only those who grow the tomatoes, but also those who pack them. What do you do with them? There have been cases, for example, *Kiwifruit from New Zealand*,[2] where the Commission found that the people who pack the kiwifruit were not part of the same industry as the growers because there was not a great degree of vertical integration and the economic interests of the growers and the packers were not similarly situated.

That was not the case for tomatoes. The Commission found that there was a fairly high degree of vertical integration between growers and packers of tomatoes. It also found that the economic interests of the packers were very directly affected if the growers decided to leave their tomatoes in the field because they could not get a sufficiently high price. One thing that the Commission looks at, particularly when it comes to agricultural products, is whether there is a single continuous line of production from the field to market. And that condition also was met.

PROFESSOR GORDON:

What about the industry? Tomatoes, according to the Encyclopedia Britannica, are grown in every state in the United States. And yet, we seem to have only Florida wanting to bring the action. And not only Florida, but, in particular, South Florida; and not only South Florida, but a South Florida industry that seems to be restricted to a January, February, March and April season.

MR. SALONEN:

That has been a contentious issue, of course. The Commission rejected the claim in a 1995 provisional 201 action that was brought that the industry and the product could be defined according to seasonality. The ITC said, "We do not have the authority to do that under the statute." It is a difficult issue. It raises the question of industry support for any case. The greater the industry support you have before the Commission, the better your chances are of prevailing on injury and causation. And, of course, industry support

2. USITC Pub. 2510, Inv. No. 731-TA-516 (May 1992) (final).

in the dumping context — I am getting ahead of ourselves here — also has become a legal threshold.

PROFESSOR GORDON:

We will come back to that issue. Stephen Powell is quiet during this time because the ITA is kept out of this. But there is an industry determination of necessity in the actions that go before the ITA, and I think when the dumping case was brought, there were some reports in the paper that this was a strange industry that included the last two months of one growing season and the first two months of the next growing season, which just happened to be the times that seemed to favor the Florida industry. Can you comment on that?

MR. POWELL:

Well, believe it or not, the temporal limitation of a dumping investigation is not unusual with Commerce. We have investigated, for example, fall potatoes from Canada. So, we do not find those issues to be as critical as the ITC does, and Eric is quite correct in noting that any industry that attempts to limit its petitioners, to limit its growers, to those who produce for a certain time of year is likely to have some difficulties on the injury side.

However, our agency has not found that to be a consideration. We are looking at producers who come in the door and tell us how we can distinguish the products. This is an important issue. When we are determining support for a petition, like the ITC, although they obviously are looking at it for a different reason, we look at it for purposes of whether the industry that produces the product is really behind the petition, as opposed to just a small group of people. The ITC, however, looks at it from a very different perspective. The Department of Commerce looks at the same statutory factor, domestic like product, but for a very different reason. The fact of the matter is we are going to see differences in the determination of the two agencies because of the different purposes for which each seeks an answer. The Department of Commerce looks for clear dividing lines as does the ITC, but we look for them for a completely different reason, that is, to see whether the petition is supported.

Interestingly enough, the domestic industry did not attempt in its most recent case to make the temporal claim that they did in the 1980 antidumping investigation. There, the Commission did not have an opportunity to address the issue, so we do not know what it would have done. In fact, it would have been interesting to see. But the Commerce Department did limit the industry to the winter production of tomatoes, actually winter vegetables in the 1980 case.

It will be very interesting, because your hypothetical posits a potential new investigation in 1997 of winter vegetables. That would be a very

important point as to whether the industry would attempt to limit their production to the winter months. If we take the 1996 case and if we take the Section 201 action by the Commission, one would suspect that they would not make such an attempt.

PROFESSOR GORDON:

One of the other attempts they have made, and they have received Senator Graham's backing, was to introduce a bill that would essentially change U.S. trade law and redefine "industry" so as to make it possible for a regional industry, and I think a short-term seasonal industry, to bring a 201 action. I have a little trouble with the unilateral basis of this. Of course, we can unilaterally change our own trade law, but it seems to me that this trade law is based upon the WTO and that we have certain obligations under NAFTA as well.

What would be the consequences of changing this law? It certainly might be favorable to the Florida industry, but what would be the likely reaction of Mexico?

MR. MACRORY:

Does NAFTA require that we at least notify our partners of any changes in our trade law?

PROFESSOR GORDON:

Yes.

MR. POWELL:

Well, certainly for changes to the antidumping and countervailing duty laws, there is a process by which each country must notify and give the other NAFTA parties the opportunity to claim that it is either in violation of NAFTA or in violation of the WTO.

PROFESSOR GORDON :

If I am not incorrect, it allows Mexico to respond as though their law reads the same as any unilateral change that we might make and consequently, this would be upsetting to any U.S. industry, such as the Washington apple industry, where we might see a complete reversal of all of this. Indeed, very important to the whole issue is that within the last two weeks or three weeks, the Mexicans have filed a dumping action against Washington apples. And so tables are turned in this, and it will be interesting to see what results.

One of the other impacts of NAFTA, and it makes one wonder why a 201 action is ever brought, is that in NAFTA, we agreed that tariffs would snap back to essentially the tariffs that were in existence at the time of the

signing of NAFTA. My understanding is that tariffs on tomatoes were very low. So there could be the expectation of our CONVEG company receiving a favorable ruling on 201, because it does not seem that the sanctions are going to be very helpful?

MR. SALONEN:

As part of our global safeguard statute and the NAFTA Implementation Act of 1994,[3] we have an additional test for imports from Canada or Mexico that are involved in a 201 action. Let me preface this with a brief description of global and bilateral safeguards. Global safeguards involve imports from all over the world, while bilateral safeguards concern imports either from Canada or Mexico.

In a global safeguard action, once you have demonstrated that imports are increasing, that a domestic industry is seriously injured, and that imports are a substantial cause of that serious injury, if there are imports from Mexico or Canada involved, you must additionally show that these imports are a substantial source of the total imports. That is defined to mean normally among the top five suppliers of imports, and that the imports from Mexico or Canada are contributing importantly to the serious injury. Again, if you have already made the case for a substantial connection between imports and the serious injury to the industry, it should not be hard to make the case that imports from Mexico, which are the lion's share of total imports, also are contributing importantly to the injury. If that is the case, then the snap-back is not the limitation, and you can have additional relief. Again, going back to *Broom-Corn Brooms*, that is exactly what happened. The Commission made all those findings, and the Administration as a result issued relief in the form of raising tariffs back to the most favored nation level, plus an additional percentage.

It is snap-back that occurs in bilateral safeguard investigations, which has the same injury standards as Section 201. The key difference is that you are looking only at the imports from Canada or Mexico, standing alone, and that the increase in the imports has to be due to a reduction or elimination of a tariff under NAFTA. In that case, the limit on relief would be a snap-back to the most favored nation levels.

PROFESSOR GORDON:

In the *Broom-Corn Brooms* case the Commissioners split on what the relief would be. Is there a good deal of latitude in the ITC in terms of formulating this additional relief?

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3. 19 U.S.C. §§ 3352-3354 (1994).

MR. SALONEN:

The statute spells out the types of relief that can be provided in terms of raising tariffs, imposing quotas or a tariff-rate quota, or recommending adjustment assistance in addition to a couple of other measures.

The other advice or the other direction that the statute gives the Commission is that the relief recommendations to the President must both be effective in remedying the serious injury and not have other adverse effects. Going back to a case a few years ago, *Extruded Rubber Thread*[4] from Malaysia, the Commissioners, who voted in the affirmative, specifically noted in their remedy recommendation to the President, which ultimately was not adopted, that their recommendation was to simply limit imports to the levels that already existed because the domestic industry could not fully supply the product needed to the United States. They were concerned that if you kept too much of the imports out, downstream you would have consumers of that product moving offshore in order to get their supplies. And this would hurt the domestic industry that is trying to supply the customers as well.

PROFESSOR SPANOGLE:

In *Broom-Corn Brooms*, the safeguard was limited to three years because under the WTO agreement, if you only have a three-year safeguard, you do not have to offer compensation. But I do not remember anything in NAFTA that says that a country does not have to offer compensation for a safeguard action that is only three years long.

MR. MACRORY:

No, in Article 802.6, it provides that the party taking an action under Article 802 must provide trade liberalizing compensation.

MR. SALONEN:

In fact, I think that the Mexicans are seeking compensation on the import of Jack Daniels and other U.S. bourbons, among other products.

MR. MACRORY:

So, you are simply shifting the cost from the broom-corn broom industry to Jack Daniels.

PROFESSOR GORDON:

To Lynchburg, Tennessee.

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4. Report to the President on Investigation No. TA-201-63, USITC Pub. 2563 (Dec. 1992).

MR. SALONEN:

To possibly an industry that can perhaps carry the burden a little better while the broom-corn broom industry adjusts its resources, either to compete more effectively or to move to some other industry in some other pursuit.

MR. MACRORY:

Do you think that is the view of Jack Daniels?

MR. SALONEN:

They are still in business.

PROFESSOR GORDON:

It certainly seems to me that we have got some problems in bringing a 201 action, but is it not worthwhile for the industry to bring as many actions as possible, including a 201, and to bring them as often as they can? Does it just shift a good deal of the burden and the cost to the foreign parties, while the U.S. government picks up the tab for the local industry?

MR. SALONEN:

I would say no because if nothing else these are extraordinarily expensive proceedings to bring. I think, Patrick can certainly speak to this much better, that even for domestic industries, the amount of information that has to be compiled, that the Commerce Department would require in an antidumping case, for example, to initiate an investigation, is extraordinary. If you have an industry that says it already is suffering injury, is unprofitable, and so forth, but brings one case after another after another, that begins to strain their creditability.

The other point is that there also are limitations put forth in the statutes as to how soon you can bring a new case if you have already brought one.

MR. POWELL:

I think there is an additional, very important factor that we should not forget. And that is that the Department of Justice watches carefully when competitors get together to restrain trade. There are a couple of laws to deal with that. One exception is if you are petitioning your government for proper relief under statutes. But if those petitions are a sham, if they are done solely to cause burdens, financial or otherwise, or to kill trade, and you do not really have a case, you can get into very serious anti-trust law problems. In fact, if you watch the investigations that are opened by the anti-trust division, almost every time an industry loses at Commerce or the ITC, a case is almost automatically opened by the anti-trust division to see if the petition was legitimate. This is something that our industries are very careful about in addition to the fact that it costs a lot of money to bring a

trade case.

MR. SALONEN:

The historical record also would show that industries that lose do not come right back and file another petition. These cases involve a record of time that goes back either three years, in the case of a dumping investigation, or five years, in the case of a safeguard investigation. If you were not able to make your case, bringing a new case in six months will not make a difference, since presumably the market, the import levels, and the industry's performance will not have changed so dramatically that a different outcome would be likely.

MR. MACRORY:

On the other hand, you may have a change of Commissioners that could affect the outcome.

PROFESSOR GORDON:

But we did have a 201 action brought by Mexico again fairly soon after the preliminary relief request was denied, and that was not a very long period.

MR. SALONEN:

But it was a different case. They brought it on tomatoes and fresh peppers, and they also did not try to limit it to the winter growing season.

PROFESSOR SPANOGLE:

There is one other downside risk — a psychological one. If you seek Section 201 relief, you are saying basically, and your whole argument must be pitched toward, "Help me. I cannot compete even though the others guys are competing fairly." If you then want to seek antidumping relief, you have just spent a great deal of time trying to persuade somebody that they are competing fairly, and now you have to turn around and try to persuade people that they are not competing fairly.

That generates a problem in perception. When you get to the political end, especially in a Section 201 action, you can get yourself into trouble if you make inconsistent statements. Now, I know all lawyers like to argue all the alternatives, stating alternatives in a complaint is one of things that civil procedure teachers make a living out of teaching — how to do it. But if you do that in this area, just remember that there are folks out there who remember what you said last time, and it can hurt you.

When I first started teaching trade regulation, most complaints were shotgun: antidumping and countervailing duties, escape clauses, and anything else an attorney could think of. Now, complaints are far more

targeted and much more likely to seek only antidumping relief and nothing else. That has become the weapon of choice. It works better than the others for reasons that we will get into later.

MR. MACRORY:

If I might just make a comment before we move off the Section 201 case. While preparing for this symposium, for the first time, I read the decisions in both 201 cases. When the second 201 decision, the nonseasonal decision, came out, it was quite severely criticized by both the Secretary of Commerce and the Acting U.S. Trade Representative. A lot of people were rather surprised. It was the first time of which I am aware that members of the cabinet criticized the decision of an independent agency. But reading the decision, I was rather struck by something. Here are the net income figures of the domestic industry: in 1993, they made a profit of US$36 million; in 1994, they made a loss of US$7 million; and in 1995, they made a loss of US$22 million. The Commission also looked at interim 1996 figures to see what the trends were. From July 1994 to February 1995, the industry made a profit of US$2 million; in the corresponding period a year later they lost US$41 million. Now, that is pretty striking, and that is the net, that is, bottom line, income. Here is what the Commission said: "Financial data for domestic growers are on the whole inconclusive." Quite a striking statement in light of those results.

PROFESSOR VANSICKLE:

Well, you know, it is interesting. If you go back to the dissenting opinion of Commissioner Bragg, she said: "[I] would like to comment on my view of the statutory standards that the Commission must consider in investigations under Section 201 of the Trade Act. In my view, by making a negative determination in these investigations, the Commission majority has set a standard for obtaining relief under 201 that is virtually impossible to satisfy. The statutory language and legislative history clearly provide that the standard for an affirmative finding in a Section 201 case, which involves allegations of injury from fairly traded imports, is higher than that for relief in other types of investigations.

Nonetheless, I do not believe that Congress intended for this standard to impose a bar to relief in cases such as these where imports are increasing dramatically and domestic producers are suffering badly as a result. Indeed, it is precisely this type of situation that the standard was intended to remedy."

PROFESSOR GORDON:

As we have defined a Section 201 action, we might also ask Professor Spanogle to comment quickly on and caricature the dumping action, and how

it perhaps contrasts.

PROFESSOR SPANOGLE:

A dumping complaint is basically one that says, "The other guys are not playing fair." They are not playing fair by selling at a reduced price in the United States. It is a reduced price compared to the price that they sell the same product for either in their own home market, or if they do not sell it in their own home market, to the price they sell to other third countries. The perceived danger is predatory pricing, that it will drive out the domestic industry. Then the foreign producer will have a monopoly of which it can take advantage.

You also must draw a distinction between the ordinary loss leader in your local supermarket, something with which we are all familiar, and the kind of pricing campaign that is intended to drive a domestic producer out of business. Therefore, you have to make two different decisions. One is that they are in fact selling at less than "normal value," less than what they are selling for in their home market, because that is the presumed fair value. The other is that you are causing material injury to a domestic industry or that you are threatening to cause material injury to a domestic industry.

PROFESSOR GORDON:

You said "material," where you said "serious" under Section 201. Is there a distinction?

PROFESSOR SPANOGLE:

Those are two different standards. I will let our representative from the ITC explain the difference between those two standards. Section 201 actions (escape clauses) require a substantial cause of serious injury. All that the antidumping provisions require is that the dumping cause material injury to the industry. So, you have two different agencies making two different decisions. Steve Powell's agency, the ITA, part of the Department of Commerce, will make a decision about the pricing. Is this being sold at less than fair value? The ITC will make a decision about what kind of injury, if any, is being caused to the domestic industry. It bounces back and forth between these two: first, for preliminary determinations and second, for final determinations.

The major thing to remember procedurally, although you may want to go into more detail on procedure, is that after both agencies have made preliminary determinations, the importer has to post a bond to cover any potential antidumping duty. Consequently, at that point negotiations usually start to be very serious. Until then, no one has to put any money on the table, except the lawyers' fees, which may be getting to be more now than the antidumping fees.

The gist of the complaint in an antidumping action is that foreign producers are attempting to run the local producers out of the business through their pricing decisions and that this can be predatory pricing. In some cases, there also is a suggestion that the underlying problem arises from a market distortion, in that goods from the United States cannot get into the foreign producer's market to create the normal competitive conditions in that foreign market.

PROFESSOR GORDON:

The Europeans did not include dumping in their European Union (EU) regulations, so Spain cannot bring a dumping action against England or France against Germany, and yet we seem to have it. Why is that? Economists certainly have very different views on the advisably, or the viability really, of dumping and whether there is a history of people trying and succeeding in becoming monopolists. Don't we also have something in NAFTA that requires us to take a second look at dumping in the long run?

PROFESSOR SPANOGLE:

Well, let me try and remember all of those questions.

There is a difference between an economic union, such as the EU, and a free-trade agreement. An economic union has a common, external tariff barrier, and once goods cross that common, external tariff barrier, they supposedly circulate freely across borders without difficulty. However, a free-trade agreement, which is what we have with NAFTA, is not a customs union. In a free-trade agreement each individual country maintains its own external tariff system. While goods made in Mexico can circulate freely to the United States, goods that came from Japan into Mexico cannot circulate freely into the United States. That is what rules of origin are all about, and rules of origin were the hardest fought part of the entire NAFTA negotiations.

There is a different organizational structure between the EU and NAFTA. Thus, you would expect that where goods in the EU circulate freely through a common, external barrier, the EU itself would take jurisdiction to exercise all antidumping functions. And it has done so. And it is doing so more and more each year. One of the things, of course, that we have to watch out for is that if they keep on increasing their use of antidumping concepts, they may have more dumping cases than we do before very long. It also has become their weapon of choice.

MR. MACRORY:

Interestingly, this question of unitary markets did come up in the first Mexican dumping case, because the basis for the Commerce Department's ruling that there was no dumping was the finding that Canada, the third-

country market they were using for comparison with the United States, was in fact a unitary market with the United States. The evidence was that the tomatoes came from Mexico mostly through Arizona and then were sold to both Canada and the United States by the same distributors, really quite indiscriminately. And there were no tariff barriers in Canada. The basic finding — and it was a very unusual finding — was not based on the traditional, very detailed price comparison, but on a regression analysis. The finding was that there was a unitary market, and therefore, there could be no price discrimination. Also, in a more recent case involving minivans from Japan, one of the producers, Mazda, had very, very few sales in their home market and argued that Canada should be used as the third country market. The petitioners said, "No, you cannot do that because Canada and the United States are a unitary market for automobiles." I do not think Commerce addressed that specifically, but they did use the Japanese home-market sales and not Canada's.

MR. POWELL:

Well, Professor Gordon raises a question that is controversial, to put it mildly, and I think it is time that I follow Eric's lead and point out that I am not speaking for the ITA. Canada will not let us forget that it is their belief that the unfair trade laws have no place in a free-trade area. But the foundation for that claim is that goods can move freely among the three NAFTA parties, and although there are some thirty chapters in NAFTA, and it is by far the broadest free-trade agreement that has been negotiated, it would be foolish for us to claim that there are no remaining trade barriers among these countries. And as long as there are trade barriers that make the transfer of material within the free-trade area difficult, there is the possibility of hiding behind these barriers in order to serve as a platform for dumping.

What the United States has said is, and this is starting to come true, "If dumping is not being practiced because of arbitrage, because your competitors in the other country can ship that product right back to you and undercut your prices in the home country, then nobody is going to bring dumping cases because there is no dumping." And the proof, therefore, will be in the pudding. You do not need to eliminate the dumping laws; the dumping laws will wither on the vine if there is no dumping. Given the importance of these laws to domestic industries in all three countries, I might add, we have cautioned against simply repealing the laws on the assumption that the theory might work and letting the practical consequences be the way in which this is dealt.

MR. SALONEN:

The other thing I would like to point out is from the perspective of the relief that the dumping laws are designed provide industries. Our Office of

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Investigations compiles an internal report every year to show what percentage of U.S. imports are actually affected by either dumping investigations or dumping orders. The percentage is very, very small. You would have to go to years where there have been investigations of softwood lumber, which are countervailing duty investigations involving a substantial volume of trade for the total value of U.S. imports that are affected, that even come within the confines of an antidumping or countervailing duty investigation, to exceed more than one percent. It is a very, very small fraction.

Now, taking that on one side, keep in mind that dumping and countervailing duty laws unlike Section 201 are country-specific. They provide a mechanism for an industry that says it is being hurt by unfair imports to seek relief and to obtain what I would argue is a fairly focused remedy, and it is a safety valve. Getting back to the question of politics, the question is what sort of reaction will you get to increasing free trade as tariff barriers and nontariff barriers are brought down. If you do not have a mechanism of relief for the industry that is getting hurt, whether by a predatory intent or simply by some sort of currency devaluation, there is going to be greater resistance overall to freer and freer trade.

And this may be a minor point, but from a trade negotiator's standpoint, our market is ten times larger than Mexico's. So for every dollar we exempt from the unfair trade laws for us, we are exempting ten dollars from Mexico. And that makes the negotiating equation a little bit different.

PROFESSOR SPANOGLE:

Both the free trade agreement that has been negotiated between Mexico and Chile and the agreement between Canada and Chile have no antidumping provision. As we delay bringing Chile into NAFTA (although it would obviously have to be renamed), our partners are getting a lot of experience in operating in an environment that does not permit dumping actions. And they may want to challenge the last assertion that you made that agreements need antidumping provisions. This is something we have got to keep on having.

But, I keep wondering about the assertion that only one percent of imports are affected by antidumping orders. When an antidumping order is issued, imports often decrease, rather remarkably. Does your assertion count for the imports that do not make it in that otherwise might have made it in if there had not been dumping orders? In other words, perhaps there are a lot of potential imports that would be coming in that are affected by antidumping orders.

MR. SALONEN:

First, how do you measure imports that have not entered in the first place? But, responding to your question, the measure is based on the value

of imports in the preceding year. That is the denominator. The numerator is the value of imports in the preceding year that came within the scope of some investigation.

MR. MACRORY:

It might be useful to step back for a minute and examine the economic premise behind the dumping law. The traditional test of dumping in the original law that was passed by the United States in 1921 was price discrimination. In 1974, the law was changed to essentially require that the exporter meet a second hurdle, which is that its sales be above cost. It is a little more complicated than that, but that is a shorthand way of stating it. Now the exporter must meet two tests. Its sales cannot be below its home market price, *and* they must be at or above cost.

The cost of production amendment, which has certainly been the most significant change in the antidumping law since it was first passed — an enormous number of cases now involve the cost test — came about in a rather curious way. The United States sulphur industry, which was based in Texas and Louisiana, filed a dumping case against Canadian sulphur, which was produced as a by-product of natural gas. They admitted that there was no dumping in the traditional sense, in that Canadian and U.S. prices were the same, but they argued that the sales were made below cost and that the legislative history of the 1921 Act made clear that this was dumping. The Treasury Department, which at that time administered the dumping law, rejected that argument. The U.S. industry, rather than give up went to their favorite senator, Senator Long, who was Chairman of the Senate Finance Committee. One of his staff called the then-Assistant Secretary of Treasury who was in charge of the law, and said, "Fix this." There was a bill that subsequently became the Trade Act of 1974, which at that time was before the House Ways and Means Committee. The Assistant Secretary drafted some language as an amendment to the bill and sent it down with a covering memorandum to the Committee. He was asked to come and explain it a couple of days later, and as he went through it, he noticed rather blank looks on the faces of the members. It is a rather complicated amendment on top of a very technical law. And he discovered that the staff had failed to circulate his memorandum. He said it was quite clear that not one person on the Ways and Means Committee had any idea what the implications of this particular amendment were. That is how it came into law.

The amendment imposes much tougher economic restraints on exporters to the U.S. market than those faced by U.S. producers because the definition of cost is "fully allocated cost," which means all costs, including interest costs, cost of capital, and so forth. Most economists will tell you that in a cyclical industry, when prices are down, it still makes sense to sell as long as you are covering your variable costs and part of your fixed costs. But

under the dumping law, as it is now written and construed, an exporter cannot do that. The exporter is automatically dumping, even if he is selling above the variable cost. Under the antitrust laws, the definition of predatory pricing is selling below variable costs.

Requiring growers of perishable products like tomatoes to sell above cost at all time also is very restrictive and does not reflect market conditions. This kind of market is really a true market. There are hundreds of growers and thousands of buyers, and no one individual seller can possibly affect prices. Each seller has to sell his product regardless of what the market price is, otherwise he does not sell at all. That presents a problem for the seller of this type of product, unlike a manufacturer of televisions who can control prices to some extent. Also, in this business costs vary enormously from year to year. They depend very largely on yield, which is affected by weather and by disease. The dumping law requires Mexican growers of tomatoes to sell above their cost of production, even though they do not know what that cost is at the time they make the sale. It will not be determined until a year or two later. During the 1980 proceedings, we testified before Congress to try to get the law changed. We made some progress, but then Sam Gibbons of Florida, who was a senior member of the Ways and Means Committee, stepped in, and we did not get anywhere.

MR. POWELL:

I agree that the manner in which the cost test made it into U.S. law was somewhat bizarre. But, I think that the value of that alternate basis for measuring an unfair trade practice has been fully established by the fact that it has been brought aboard the WTO. It is explicit in the WTO agreement and accepted, of course, by all the WTO members that selling below fully allocated costs is an unfair practice. And it is important to recall that this is not an antitrust law, there may well be different standards for selling within one's own country, and this may be discriminating against imports. But this is an exception to the national treatment requirements of Article 6 of GATT, which is an exception to virtually everything else in GATT. Let's face it, antidumping orders do create trade barriers, and that is exactly the opposite of what you are supposedly creating in furthering international trade. But what the drafters have decided is that it is unfair and therefore should not be permitted. In fact, GATT states that it should be condemned if it causes injury.

So, I do not disagree with your point that the standard is a high one. But the Department of Commerce and certainly the Congress, beginning in 1980 with the first winter vegetables case from Mexico, began to try to adapt this cost test to perishable, agricultural products. It is not easy, and Patrick is absolutely correct that substantial below-cost sales are the norm and not the exception. Nonetheless, if it is unfair to not recover your costs, then

effectively what you are doing is exporting unemployment to your neighbors across the border, rather than taking that unemployment in your country. At some point, whether or not you have any control, you should not be in business if you cannot recover your costs, at least over some reasonable period of time.

Now, what the Commerce has done beginning in 1980, and this is now codified in the 1994 amendments, is to say that the time period is an entire growing season. You do not look at what a particular sale is priced at, you do not look at even a month's worth of sales; you look at whether the grower is recovering his costs over the entire growing season. And even there, you apply some very, what I would call, loose rules compared with those applied to televisions, where you could expect that that producer would be able to recover its cost much more quickly. You look at a very different kind of test, and without getting into technical details, I think the practice has evolved into one that, although I cannot claim that every grower every year is going to be able to qualify, attempts to respond to the very different situation that exists for perishable products.

I might add, there really are three tests for whether these below-cost sales will be discarded and not used for the comparisons that Professor Spanogle has told us about.

First is whether the products are being sold below their fully allocated costs, and second, are they sold in substantial quantities within an extended period of time? This means not just one or two instances, or a fire sale, or an end of inventory sale, but rather that you really are seriously selling below cost. Third, and this comes in with great force for perishable products, are you going to be able, in a reasonable period of time, to recover your costs? Even though you are clearly selling below cost, you are doing it in substantial quantities and over an extended period of time, can you eventually make it back during those peaks of production where your supply is at one level and demand is a lot higher. Are you going to be able to make it back? These rules, although I would not by any means call them generous, do take account of perishable products.

MR. MACRORY:

There is no question that the Department of Commerce has applied much more flexible rules to perishable products. I think, though, that growers of perishable produce do not necessarily expect to make a profit every season. What tends to happen is that growers make a small profit in some seasons, perhaps a big loss in another season, and then, with luck, your competition gets frozen out, and you make a big bonanza in another season.

PROFESSOR VANSICKLE:

Sure. It is considered to be a very high-risk industry. There is no doubt

about that. But I think that a couple of points should be considered: When you assume that you do not know your costs, that is a bit naive. By the time that you bring that product to market, you have a very good understanding in terms of what your yields are and also a very good understanding of what your costs are.

Secondly, what comes to bear on this is where you sell your product and the price that is received for it. If you look at the suspension agreement, the suspension agreement itself did not specify a price that recovers all cost. It still is less than full cost, in terms of producing and marketing the product in the United States, but it comes closer it. But if you look back at the margins that were measured by Commerce, they were far below that suspension agreement reference price, and certainly, there is no question from the measures that were brought forth by Commerce that those sales were far below fair value.

PROFESSOR GORDON:

Let's consider next sanctions under the antidumping law. It would be nice to ask Stephen Powell what the ITA was going to rule when they entered into this agreement. Not only is that an unfair question to ask him, but he probably does not know the answer.

Unlike in the 201 actions, where the President has a broad array of potential sanctions or where there is provided for by law an even broader range of sanctions, there is a very limited sanction allowed in this in the form of antidumping duties. We do not know what the antidumping duty margin might have been in this case, but assuming it was higher than the *de minimus* level, would it have made much difference? What kind of a dumping margin would it have taken, and John probably knows this, for the action to be meaningful to U.S. growers? Something unrealistically high or would a five percent or an eight percent have helped the Florida growers?

PROFESSOR VANSICKLE:

If you look at the dumping margins calculated by the Department of Commerce, the average was 17 ½% through their investigation. Certainly, the industry would liked to have seen something that was more than that, but it really comes down to forcing a change in how the product is marketed. One of the problems for the tomato industry is in how that product is sold into the U.S. market, that is, it is never priced until it crosses the border and is in a handling facility on this side. So, nobody ever knows what kind of price they are going to receive, and that is one of the marvelous things that the suspension agreement does address. It forces marketing into the equation at the production point rather than waiting until the product sits on U.S. soil.

PROFESSOR GORDON:

Is this really a voluntary restraint agreement, which I guess we are not supposed to be doing any longer? It has always seemed to me that we bring these various actions not so much in order to have a conclusion with sanctions, as to get people talking to work out some kind of an arrangement. We did this in the form of what are called voluntary restraint agreements (VRA) in many of the most important cases but many people have objected to that because it is something that is outside the framework of the law. The WTO process seems to put a crimp in the use of VRA's. Can we label this agreement, really, a form of VRA's, Stephen?

MR. POWELL:

I do not think properly so. I defer to John on the figures but our data show this has not substantially reduced the shipment of tomatoes from Mexico. It has stabilized the prices. And that is what the statute anticipates.

PROFESSOR GORDON:

Were we not in many ways helped more this year by the weather than by the agreement? I understand there were poor crops in both Mexico and the United States, which allowed almost everyone to get rid of their tomatoes.

PROFESSOR VANSICKLE:

I will address that. If you go back early in the season, and in fact having been to Mexico in February prior to the bad weather in Florida, while the market was testing the reference price, it was at least rarely violated. There were some questions on some occasional cases, but when you look at the numbers in terms of the volume of product that was going into the market, the reference price provided a floor, and everybody was better off.

In fact, it is the antitrust provisions, preventing growers from getting together across borders and discussing marketing agreements that may be a bit unfair in terms of how to address problems that come forth in cases like this. The growers could have addressed this issue directly if they had come together, and in fact, they have come forward asking for that opportunity, yet they cannot do that.

MR. MACRORY:

They would have gone to jail. This raises an interesting issue, the relationship between the antidumping laws and the antitrust laws. Their objects are absolutely antithetical. It is quite clear that the suspension agreement is terrific from the Florida point of view because it sets a minimum price. I assume that the Mexicans also would be quite happy with a minimum price. But the person who gets hurt is the consumer who will

end up paying more for tomatoes.

PROFESSOR VANSICKLE:

No. I would take exception to that. If you look at the market for fresh produce and the demand elasticity of the market that exists, and if you look at the margins that exist between freight on board and retail, the price to the consumer has not changed critically because of the price at the shipping point.

MR. MACRORY:

To the squeezing of the middlemen.

PROFESSOR VANSICKLE:

Right.

MR. MACRORY:

I know in the *Flowers* case, in which there is a dumping order on flowers from Colombia, there is something like a 2,000% mark-up between the grower's price and the retail price.

PROFESSOR VANSICKLE:

In fact, I would go so far as to say that the consumer is better off simply because one thing that the suspension agreement does is to provide a little more comfort in the industry on both sides of the border. And because there is that level of comfort for the industry, from the point of view of U.S. growers as well as Mexican growers, it does assure that there will be producers on both sides of the border. Because of that situation, there is more opportunity to have choice in product, as well as a consistent supply that will be there regardless of what may happen in either production area. So consumers are really better off by having this kind of an agreement.

PROFESSOR SPANOGLE:

To go back to Professor Gordon's hypothetical, I take it you are saying that with the suspension agreement, even if the Mexican growers' market share continued to increase, that the Florida growers would be satisfied with the suspension agreement, and we would not have to consider taking all of these actions that he is going to force us to walk through one at a time. So that would not bother them, that the suspension agreement is curing the problem.

PROFESSOR VANSICKLE:

Again, I think that the suspension agreement, if allowed to work, will

take care of many of the problems that exist within this industry, yes. It is in an infant stage right now, and Mr. Powell, I am sure, has worked extensively in trying to get this to work within the letter of the agreement. There have been a lot of problems that have had to be addressed, but once we work through those problems, both parties are going to be better off, and there will be less of a likelihood that there will be a need for other actions to be taken.

MR. MACRORY:

How about an exception to the antitrust laws for agricultural products? Rather than going through this elaborate process of filing a dumping case, why not just have an exception for agricultural products, so that the Mexican growers and the Florida growers could get together and agree on pricing?

PROFESSOR VANSICKLE:

If that were allowed, it would happen. They have met, but they have been restricted in terms of what they can do. I have had growers from both sides of the border come to me, asking that they be allowed to get together and talk. But again, there is the fear of the antitrust regulations.

PROFESSOR SPANOGLE:

What you are basically saying is "Let the . . .

PROFESSOR GORDON:

two oligopolists get together?"

MR. MACRORY:

Another form of relief that we should discuss is going to Congress to obtain an exception from the antitrust laws.

PROFESSOR SPANOGLE:

I understand your not wanting to get people riled up, but what does this do to the long-term price?

MR. MACRORY:

That is the question I raised with John, but he said it is the wholesalers we should be crying for and not the consumers. Apparently, the middlemen take the hit.

PROFESSOR VANSICKLE:

When you look at the broader industry, there has been a significant change in terms of those who are handlers within the industry. Consider particularly the retail trade. There has been a squeeze of margins within

certain departments within that sector. The perishable products within those stores have had growing margins to offset some of the losses from those non-perishable items that are handled. So, what has happened is, in terms of the market power that exists, the market power has shifted toward the retail end of the spectrum. All you are asking for when you allow growers to meet is to use their own tools to help balance that market power, so that you do not have those larger margins and any inefficiencies that might come into the marketing system because of it.

MR. MACRORY:

In essence, you already have an exception to the antitrust laws for agricultural products in the form of agricultural marketing orders, which allow the Florida tomato growers to get together to propose restrictions on sales, as I understand it. These have to be approved by the U.S. Department of Agriculture, but I think it normally does so. So, there already is a recognition that agricultural producers are subject to rather different economic constraints than manufacturers.

PROFESSOR VANSICKLE:

They are allowed to set certain regulations on the market by way of that. They still cannot talk about pricing.

MR. MACRORY:

No, not exactly. But they can affect prices by agreeing to hold production off the market.

PROFESSOR VANSICKLE:

Now, agricultural cooperatives do that. They can speak to the pricing issue, but again they cannot go across borders.

MR. MACRORY:

Maybe that would make sense. Particularly in the context of a free-trade agreement, where we are eliminating barriers to trade.

PROFESSOR SPANOGLE:

It depends on your picture of the industry. If you picture a whole bunch of family farmers, then there can be a public policy to help them get a balance of power. If, on the other hand, you have four growers who dominate the industry, or as the hypothetical suggests one grower who has half of the industry, we are not talking about the ordinary family farmer anymore. And squeezing the middleman sounds really nice, because nobody likes middlemen. But it is early days yet, and middlemen have a way of getting back into the action. The person who is least organized in all of this

is the consumer. And so the consumer's pocketbook is the place where the hit is likely to be absorbed over a period of time. The United States has built a system based on antitrust laws. If you picture just the good old family farmer, you might decide to tinker with those laws. But I am not sure that you should tinker with the system in these days of agribusiness. We have come a long way since the pioneer days.

PROFESSOR GORDON:

I was asked by someone in Senator Graham's office when he introduced this bill to look at it in terms of the consequences within NAFTA of the unilateral change in the United States. I did so, and I asked him why he was pushing this so much. One of the responses was that these were families farms in Florida that they were trying to save, and there were a lot of votes. And when he became a little more lukewarm on this bill, a little later than that, I asked why did that happen. And he said that he recounted the farms and found there were not quite so many of them.

This afternoon we are going to get away from the 201 and the dumping actions and look at some other issues, on both the state and federal level. Why can't we approach this problem from the way the avocado farmers have in the California and say that the products that are coming in from Mexico are grown with pesticides, are unsanitary, and are unsafe for human consumption. Why can't all tomatoes come in the type of box as Florida tomatoes rather than the egg-type crate in which Mexican vine-ripe tomatoes are shipped? And why can't we impose labeling laws? Can we harass the people in Publix and make sure they are labeling things properly? What other sanctions and actions may be taken outside of the framework of some of these federal laws? We will look at all of those.

PROFESSOR GORDON:

This morning we looked at two actions that have actually been brought. One is a 201 action, and the other is a dumping action. There are some other possibilities to be considered. There is a countervailing duty action, which would charge Mexico with subsidizing the production of tomatoes, or the possibility of Section 301 or Section 337 actions. After we are through these actions, we will take a look at some other issues, such as pesticides and box type. What about any of these actions? Subsidy, 301, or 337?

MR. POWELL:

Well, let me start with the countervailing duty law, which deals with government subsidies and attempts to eliminate the effect of the subsidy on the merchandise, putting the producers in both countries in the position of competing in a marketplace without government intervention. That is easier said than done. Governments intervene in many different ways.

The new Uruguay Round Subsidy Agreement is a very tough one. It attempts to deal with subsidies in a variety of ways. But even though the United States was very successful in addressing agricultural subsidies, agricultural subsidies around the world simply must be thought of as a different kind of beast. Because they are basic to the social structures of many different countries, particularly developing countries, agricultural subsidies are always dealt with a little differently. So, with the Uruguay Round Agreement, we have an agreement on subsidies that rather explicitly exempts agricultural subsidies, which are dealt with in the Agreement on Agriculture. And although the Agricultural Agreement is very successful in beginning to get a handle on disciplines for subsidies by governments to their agricultural producers, it is still a lot more generous than the rules that deal with manufactured goods.

This fact would have a major effect on whether I would bring a subsidies case involving winter vegetables. For a start, the Agreement on Agriculture has something called "green box" subsidies. The nations decided that even though these subsidies meet the definition of a subsidy in the Subsidies Agreement, they still are not trade-distorting. It would be very hard to prove that some of these programs are not trade-distorting, but that is what the governments have agreed upon.

In this instance, if you start looking at the kinds of activities that could be covered by the "green box," it is fairly extensive. For example, research services, even if they are specific to a particular product, and marketing and promotion services, which obviously help you sell your product, are going to be exempt as "green box" subsidies. Certain money programs, such as paying a producer to irrigate his fields, also can be exempt. And these are the sorts of things that if you add them up, equal a large number of benefits that governments can provide.

Even though it is going to take governments a while to structure their programs to make sure they are included in these "green boxes," their existence could be one reason why a subsidy case might not be the best kind to bring in terms of your trade remedies. This may be indicated by the fact that since 1986, there has been only one subsidy case brought against Mexico. And in that case, Mexico was included with fifteen other countries that produce steel from around the world, and our domestic industry rather periodically files a case against everybody in the world that produces steel, just to keep them on their toes.

I am not convinced that a countervailing duty case, and I am obviously not speaking for Commerce and what it might find, would be the one at the top of my list.

MR. SALONEN:

Well, from the Commission's perspective, it makes relatively little

difference whether you are talking about a subsidy case or a dumping case. The Commission's concern is whether the imports that are being subsidized or dumped are causing injury to the industry. A point I should have made this morning, when we were discussing different standards, is that the injury test in dumping and subsidy cases is considerably easier to meet than it is in safeguard cases. Material injury in a dumping case is defined as "injury that is not unimportant, inconsequential, or immaterial." So that is a relatively low threshold. The other point to keep in mind is that in a dumping or subsidy case, the Commission can take other factors into account that may be causing injury, but it cannot assign weight to them and weigh them against imports. It cannot say, "Well, imports are causing some injury but not as much as something else." But that of course is exactly what they must do in a safeguard case. I just wanted to get that on the record as far as comparing those two laws.

Where the fact that there is a subsidy involved does make a difference is in the Commission's threat analysis. There are several statutory factors the Commission has to take into account in determining, if there isn't currently injury from imports, whether imports pose a threat of injury. The first factor at the top of the list is to take into account the nature of the subsidy; for example, whether it is an export subsidy or a subsidy that is designed to boost production. That would presumably mean that there are going to be additional shipments coming from that foreign country to the United States. That would factor into the Commission's analysis. From the Commission's perspective, it probably makes little difference whether it is a subsidy case or a dumping case. It really matters more to the folks over in Steve's shop.

Next on the list is a Section 337. This is one I would not put at the top of the list. Section 337 also is an unfair trade law, and it is designed to capture imports that are unfair for reasons other than dumping or subsidies. Primarily, it is used to bring complaints against imports that are infringing a U.S. patent or some other intellectual property. Unless we are talking about genetically-engineered or genetically-designed tomatoes that have some sort of U.S. patent on them and unless the Mexicans are infringing upon that patent by having cloned one of those tomatoes and then exporting it from Mexico to the United States, you would not have a lot of luck with that. However, if this were a different industry, if we change the hypothetical around, I will say that the relief that you get in Section 337 is perhaps the most sweeping of any of the trade laws. And that is an exclusion order. You get to keep the products that are infringing your patent out of the U.S. market for the life of the patent. That is a very sweeping kind of a remedy.

PROFESSOR GORDON:

What is the involvement of the ITC and the ITA in Section 337?

MR. SALONEN:

At the ITC, initially what happens is that somebody will file a complaint. If the complaint passes muster, the Commission will start an investigation and then kick it down to an administrative law judge. And you will have a mini-trial before the judge. You will have discovery and depositions in a fairly compressed time frame. Then the judge will make a decision, and the Commission can take it up for review.

PROFESSOR GORDON:

Section 337 also has the sort of albatross of a GATT decision hanging over it. And, although the law was changed, it seems that it certainly has a poor opinion abroad as a tool that one might use. Near the end of GATT, we were actually beginning to use it broadly beyond the intellectual property area, which also was a concern of some other countries.

PROFESSOR SALONEN:

Do you have an example in mind?

PROFESSOR GORDON:

Well, was there a Korean insurance industry challenge on Section 337, as well as some other reasons?

MR. SALONEN:

I am not familiar with that.

PROFESSOR GORDON:

Well, one of the concerns was that we had taken what really was a challenge for intellectual property and were beginning to expand it. And then when GATT ruled against us, and essentially ruled that 337 put foreigners in a disadvantageous position because foreigners would have to face a domestic action or the alternative of a 337 action, whereas domestic competitors would not.

MR. SALONEN:

And as a result of the Uruguay Round Agreement, the law was changed. A very common practice prior to the Uruguay Round and still a common practice, is for a U.S. company to file a patent lawsuit in district court and on the same day file a complaint at the Commission. You put foreigners at a disadvantage because they will have to address both of these actions in two different forums.

Prior to the Uruguay Round, the big advantage of Section 337 was that there were statutory deadlines in place. The case had to be completed within one year and in extraordinary circumstances within eighteen months. A

patent action in district court could drag on for a long time. Therefore, foreign companies frequently felt compelled to arrive at a settlement, and the domestic company would get a license agreement, royalties, and so forth, which is not a bad result if they are, in fact, infringing a U.S. patent, because the patent is designed to provide a monopoly for a fixed amount of time.

Now, what happens is if you file a case in district court and at the Commission at the same time, the district court action will be stayed until the Commission action is completed. Then the record is transferred to the district court.

PROFESSOR GORDON:

Are there any 337 actions pending?

MR. SALONEN:

There are tons pending. The other change to the statute was the elimination of the statutory deadlines, although Congress said, "We still expect you, the ITC, to handle these in an expeditious fashion." There had been some speculation as to what sort of an effect this change would have on the attractiveness of 337 to U.S. companies. So far, they have been following pretty much the same time periods as previous cases. So, it does not seem to have dissuaded them at all. The docket is busier than it has been in a long time.

PROFESSOR SPANOGLE:

Under Section 337, can the respondent seek to have the patent declared invalid?

MR. SALONEN:

Yes.

PROFESSOR SPANOGLE:

And that then will be ruled on by the ITC?

MR. SALONEN:

For purposes of whether there is a violation of the statute, that is correct. It would probably not have great effect in district court; although the district court might give it some weight. But that seems unlikely because district courts say, "Well, that is a different proceeding, and there are different things going on there. The parties might not have the same opportunity for discovery that they would in a district court proceeding." In a 337 patent case, you have to prove you have a valid patent, and that it is being infringed.

PROFESSOR SPANOGLE:

And how often has the ITC ruled that a patent is invalid?

MR. SALONEN:

It happens. I do not have the numbers, but it does happen.

PROFESSOR GORDON:

It has no effect on the revocation of the patent from your registration process, I assume?

MR. SALONEN:

No, because the sole question is: Is there a violation of the statute? If there is no valid intellectual property right, then there cannot be a violation of the statute.

PROFESSOR GORDON:

Section 301 is a pretty broad statute. What about a Section 301 action?

PROFESSOR SPANOGLE:

How would you want to use it? I looked at your suggestions of Section 301 or Section 337 actions and said, "I am not quite sure what you have in mind."

PROFESSOR GORDON:

Well, I was going to add Section 406 as well, but I left that out.

PROFESSOR SPANOGLE:

Well, the Mexican government might find that a little insulting. The Section 406 action being one for command economies.

PROFESSOR GORDON:

That is where the definitional provisions reached the height of confusion. The 406 provision essentially says you can go after a Communist nation. Your level of entry goes back to "material." You do not have prove they have done anything wrong other than being Communist, and when you read the definitional provision of Section 406, it says that a Communist nation is "any nation ruled under the theory of Communism," which makes it a little difficult to determine. But there has been, perhaps, only one of those actions that have ever reached a conclusion.

MR. SALONEN:

I think the last one was *Honey from China*,[5] several years ago. Although actually, I think it is a market disruption test.

PROFESSOR GORDON:

Yes. Basically Section 301 charges lack of compliance with trade agreements. Is that useful as an action or just useful to open negotiations and discussions?

PROFESSOR SPANOGLE:

Well, Section 301 is usually used as a method of assisting our exports, to induce foreign countries to accept our goods. It is usually used offensively. Here, the tomato growers would want to use it defensively, but it was not designed to be a shield. The 337 action would be fine if you were to present facts about a genetically patentable tomato. A square one that packs easily or something like that. Then it would be useful.

The countervailing duty action would be useful if you gave information on a subsidy, but most of the subsidies for enhancing local agriculture would have difficulty meeting a *de minimus* rule. So, unless you find some new Mexican program that I do not know of, it is quite unlikely that you are going to find anything that makes a significant enough impact to either create injury or to meet the requirements of the ITA.

Section 301 is used by the U.S. Trade Representative (U.S.T.R.) and would require some additional facts to allow it to be used in this case. Are we looking at other aspects of Mexican law that impede our exports of nontomato products? The Mexicans have not barred U.S. apples — yet.

PROFESSOR GORDON:

It would have to be used simply to get negotiations going; used against other agricultural products to which they have not opened their markets, and then try to sit and deal with several products all at once.

MR. POWELL:

Well, on the other hand, look at lumber from Canada in 1986; that was used very effectively by the domestic industry in the United States to impose a barrier on the shipment of lumber from Canada. That case started as a countervailing duty case, but it veered off, and Section 301 became the remedy of choice by the U.S. government, furthering U.S. interests, including those of the domestic lumber producers. I think it is fair to say, it is easily the most powerful trade statute in the world. The European Union now has

5. USITC Pub. 2715, Inv. No. TA-406-13 (Jan. 1994).

passed something called the "Trade Barriers Regulation."

PROFESSOR SPANOGLE:

Every other country in the world will soon have something just like Section 301.

MR. POWELL:

Since the Uruguay Round, there is a big difference in the way these cases are processed. Many new rules apply, and Section 301 really is a precursor to filing a WTO challenge. The point you made is an important one. What trade agreement is being violated by Mexico that would serve as a premise to pursue Section 301 remedies? You can come up with a number of remedies to apply to imports. Section 301 would permit you to do it. The question is: What is going to be the premise? Interestingly enough, subsidies can be one premise, if there is a violation of the Subsidies Agreement. One would think that one would normally pursue a countervailing duty action because it is less discretionary at the end of the day. However, you could premise it on a violation of a subsidies agreement.

PROFESSOR SPANOGLE:

Two comments. One is the most likely use of Section 301 in this area, as far as I can tell from the facts that you are giving us, is when Mexico reacts to everything that the tomato growers want to do in the United States and does exactly the same thing to the Washington state apple crop. When Mexico excludes apple imports from the United States, the U.S.T.R. would want to use Section 301. It would then have to figure out how to walk the wonderfully fine line between saying, "Everything that Mexico has done violates all the trade agreements; but nothing that we have done, which looks exactly the same to the untrained eye, violates any trade agreement."

PROFESSOR GORDON:

I have been saying that for years!

PROFESSOR SPANOGLE:

Yes, it is an art form.

The other comment I want to make is about the countervailing duties. If you find a subsidy, there are two different types of actions. One is for the United States to go directly to the WTO and to bring an action and seek a WTO panel. The other is to pursue our normative countervailing duty process and to go before the ITA and the ITC for determinations of subsidy and material injury to an industry, respectively. Thus, there are two different ways to play this. Even if we go through our domestic process, if the Mexicans are unhappy with the final result, they can bring our result to the

WTO.

PROFESSOR GORDON:

I raised the 337 action after having read in the literature, that a U.S. company had been filing patents on certain new kinds of tomatoes. It certainly seems that agricultural products are the ones that are genetically manipulated to come out with new products that achieve the McDonald's great height of desire — tasteless, colorless, and so forth. Could tomatoes end up being patented, if they are not now, and could this be used as a 337 basis? What is the state of the art?

PROFESSOR VANSICKLE:

Right now, in terms of new varieties that are in place and being used by the companies that are involved in industry, they are certainly on the side of Mexico. But in the future those tomatoes are going to be developed in the United States, and there is that concern. It is not that difficult once you develop a variety to copy that variety for use in other climates. It provides an opportunity that today does not exist.

PROFESSOR GORDON:

Another alternative involves the question of pesticide use. Is there a way of using the same methods that the avocado industry in California used to keep Mexican avocados out? Why not attempt to keep Mexican tomatoes out on the basis of pesticides? Why not make claims that, like Mexican strawberries, they cause hepatitis in school children? Is that a possible approach?

PROFESSOR VANSICKLE:

Is this a palatable approach? It is something that has been discussed for a long time. As it stands right now, there is a great deal of controversy in terms of what is actually done in Mexico. In Mexico, they have to follow the same kinds of regulations that we have for pesticide use, however, they do not have the infrastructure in place to monitor use as closely as it is monitored in the United States. That is a major difference. Growers in Mexico recognize that this is a problem. They are trying to bring their production process as close to ours as is possible and to get away from their present means of pesticide use. However, the question remains: is it possible? It may be possible, whether it is palatable, I do not know.

PROFESSOR GORDON:

There are other approaches one could take. One is under the sanitary-phytosanitary provisions of NAFTA and the other is under the environmental standards of NAFTA. The environmental approach probably would be more

difficult. But it seems that we have increased the role that disruption of trade plays even when there is a sanitary-phytosanitary issue present. In other words, if one looks at a sanitary-phytosanitary claim, one also has to look on balance at whether or not it seriously disrupts trade. I am not sure there have been any cases brought yet on this, although there is certainly the dolphin-tuna situation.

PROFESSOR SPANOGLE:

There are many illustrations of using standards in various ways as a disguised trade barrier, ranging from the Thais who do not get cancer from Thai cigarettes but do get it from U.S. cigarettes, to the Japanese who apparently have very different innards than we do and cannot digest food produced in the United States but can digest food produced in Japan. Note that the trade barrier that masquerades as a standard of some kind is something our exports need protection from.

Standards come in two basic flavors. One is sanitary and phytosanitary standards. This is the kind of standard that tries to prevent the spread of disease or the spread of pests. The other flavor is the standard that relates to how goods are packaged or anything that does not relate to pests and the spread of disease. These two standards get two different kinds of rules, which is interesting. NAFTA is relatively clear on sanitary and phytosanitary standards. If a country puts in restrictions, the determination of whether they are disguised trade barriers depends upon whether they are based on scientific principles. However, a country can set whatever risk assessment standard it wants. It can set up a very high risk assessment standard, but then it has to treat all goods the same. The high standard cannot be used to justify treatment of foreign goods different from what a country gives its own goods, unless justified by scientific evidence. You also have to be very careful on the procedures. When dealing with these sorts of subjects, remember that Micky Canter, is a litigator. One of the things that both NAFTA and the WTO are absolutely full of is rules of procedure, which you must go through one step at a time. And if a country does not go through all the correct steps, then it probably just busted the code or agreement that regulates how standards can be used in those kinds of restrictions. If the United States puts in a test that says, "Mexican tomatoes cannot be imported into the United States," we would need to develop some scientific evidence, and we would need to have a process that was both very open and in which the Mexicans could participate.

PROFESSOR GORDON:

Whose scientific evidence? Ours? The problem is whether we are obligated to accept the scientific evidence of world organizations as opposed to that of our own scientific community.

Any other comments on this?

MR. SALONEN:

Not so much on phytosanitary specifically, but on something that Professor Spanogle said that just triggered in my mind what the appellate body said in *Reformulated Gasoline*,[6] when looking at Article 20. That case involved U.S. regulations that required imported gasoline to meet certain statutory baselines, but permitted domestic producers to use their own baselines, based on their own historical data. Both the dispute panel and the appellate body held that this action was not justified under Article 20 of GATT. Article 20 says that you can, for purposes of protecting public health and safety and other good public policy things, take measures that are discriminatory against imports but we are going to look very closely at it.

One important point that came out of the appellate body decision in that case is that you do not necessarily have to treat imports and domestic products exactly alike in all regulatory schemes. Rather you just have to make sure that there is even handedness in the regulations that you apply. For example, in *Reformulated Gasoline*, the foreign producers and importers must have the same opportunity to create their historical information to use their own individual baselines. But if they cannot, then you can have a statutory baseline as a backstop that you would use instead.

And so when we are talking about how we treat imports versus how we treat domestic products, I think that is an important point to keep in mind.

PROFESSOR SPANOGLE:

A standard that would apply specifically to tomatoes, relates to chilling. My understanding is that most tomatoes get chilled during storage or transportation. If you have that, and a pest dies off during the cold, your regulations cannot be any more stringent than is necessary for the risk assessment that has been set up. No? Okay.

PROFESSOR GORDON:

Subsidiary principles. One of the other questions that I asked concerned looking at some legislative changes to adopt a stance parallel to the 1957 Poultry Inspection Act. The Arkansas chicken industry was unsatisfied that chickens were coming in from Canada, and they were able to get through the inspection because the inspection in Canada was similar, essentially equivalent to, the inspection in the United States. So, the Arkansas industry had the language in the statute changed to "the same as." This meant

6. United States — Standards for Reformulated and Conventional Gasoline, WT/DS2/R (29 Jan. 1996), WT/Ds2/AB (29 Apr. 1996) (both adopted 20 May 1996).

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essentially that the Canadians had to make substantial changes to their inspection process, and this certainly kept a lot of chickens out of the United States. During the NAFTA negotiations, they made us alter that kind of device back to nothing more than to mandate a "similar" kind of inspection.

PROFESSOR SPANOGLE:

Where the statutory language had been "equivalent to," the senator from Arkansas introduced an amendment to the Agriculture Bill that said "same as." The Department of Agriculture was on record as saying Canadian inspection was just as good as ours. At that point, it was clear that there was some improper motivation. The change was not based on scientific principles of any kind. There were no hearings on the matter. So, my reaction is that if a senator from Florida introduced a bill to say, "same as," you probably would have problems under NAFTA and WTO.

PROFESSOR GORDON:

One way of perhaps slowing tomato imports into Florida would be if the federal government were to increase legislation on labeling, packing, and other kinds of rules, including a mandatory inspection fee. Florida did this as a state, so we could get Mexican imports twice, we imposed a flat US$75.00 per shipment inspection fee. I am not sure whether it was per shipment or according to the size of the shipment. The interesting problem now arises of a state enacting rules that may be in conflict with federal goals in opening trade. How do we deal with that? What are the limits that are imposed upon a state in setting up its own standards?

PROFESSOR SPANOGLE:

Well, NAFTA Article 105 states, "The parties," (that includes the U.S. federal government), "shall ensure that all necessary measures are taken in order to give effect to the provisions of this agreement, including their observance by state and provincial governments." So, the United States is supposed to do something; it does not say what.

PROFESSOR GORDON:

We were not involved, as the State of Florida, in the negotiations of NAFTA. How can we have this imposed upon us?

PROFESSOR SPANOGLE:

Well, there is the usual doctrine of preemption by federal law of state law. It would probably be more understandable had NAFTA gone through as a treaty, but since the Senate in its august wisdom, decided not to pursue that route, it is still federal law. Before you can go much further in your analysis, you must specify what provision in NAFTA is being violated, or

what provision in WTO is being violated, by any of these long lists of labeling, packaging, sanitary and phytosanitary, and other rules. So, you need to focus on perhaps one rule at a time.

PROFESSOR GORDON:

Let me give one: the box. Tomatoes that are brought in from Mexico are vine-ripened, and John can certainly correct me on this, and are not put into cold storage as are immature green tomatoes. They are delicate. And so, they are packed in something that looks like an egg carton. In the United States, contrastingly, the mature green tomato is picked at a time when it is relatively hard, it can be packed more like oranges are packed, and it is put into boxes. I know there was a proposal, in fact, to mandate that all tomatoes be shipped in U.S. style boxes. That seemed to me to be rather blatantly protectionist of the industry. And I was just curious as to your comments on that. Are you familiar with that?

PROFESSOR VANSICKLE:

First of all, the vine-ripe tomatoes from Mexico are not packed in an egg-crate type of carton. It does follow their standard. What we are trying to get at, within the container regulations, is not to make them pack their tomatoes in the same type of box, but rather to add information to the container that they use. In other words, the container that is packed and shipped across the border from Mexico is labeled by the packing within the box. It is a four-by-five tomato, which means there are four across and five wide, and then you can go up to two or three layers. Also, there is only an approximation of the weight of the box. You never know what you get out of their pack other than that there is a certain count. It creates inefficiency in the system when you deal with a product that does not have a good description.

In Florida, they define a twenty- or thirty-pound carton. If you ship in a thirty-pound carton, that product must meet a minimum range that is very narrow in terms of the weight. And when we deal with the suspension agreement on tomatoes, that has been an issue that the Department of Commerce has had to address. One way of getting the reference price, was to increase the weight that was in that box, so that you were able to bring down the price that you received, instead of placing the same weight in a box. So, the regulation that was written for the box is one of trying to add a uniform standard to the box. It is not forcing their tomato cartons to be the same as U.S. tomato cartons.

PROFESSOR GORDON:

It seems that the Mexican growers' view was that the Florida type box would cause damage to Mexican tomatoes. Is that incorrect?

PROFESSOR VANSICKLE:

That is incorrect. Their carton is not that much different; it is a matter of whether they would fit twenty pounds of tomatoes in their carton. It comes back to Section 18a(d) of the agricultural marketing act, which deals with imports meeting the same standards that any products packed within a marketing order must meet. And the USDA has interpreted that regulation to mean minimum standard. And so anything that is the minimum standard is on the cartons. Really, all that Florida growers are asking is a literal interpretation of the current law, and then again, they are attempting to add information to the box. So, when you take the uncertainty out of the packaging, you take inefficiency out of the system.

PROFESSOR SPANOGLE:

Well, in weighing each box, you may be adding the inefficiency back in. Let me start with NAFTA. We have shifted ground now, from the sanitary and phytosanitary measures, to technical barriers to trade. We are no longer talking about spreading pests. We are now talking about other kinds of measures that have to do with weights and other things, such as packaging. The basic rule that is set out in NAFTA is that a party can set any standard that it wants. We retain the right to make sure that automobiles emit a lot less pollutants than automobiles in Mexico. We have retained the right to set our standards at any risk assessment level that we wish. But what we gave up was the ability to create an unnecessary obstacle to trade. Therefore, if the United States wants to put efficiency into this, and says, "Okay, count is not important, but weight is," there are two initial hurdles. First, we would have to state why weight is important and count is not. Second, we would have to use an open process to decide whether it is really necessary to weigh each individual box or whether, for example, weighing a carload of boxes would be a better method. If weighing a carload of boxes promotes equivalent efficiency because that is the way tomatoes are sold, then requiring each box to be weighed would be courting a violation of NAFTA by setting up a standard that is not necessary in order to achieve risk assessment of the particular goal that you have in mind.

The idea is that you should avoid arbitrary and unjustifiable distinctions. So, before adopting a rule, governments need to consider what the effect of a particular approach to setting a standard will be. Is there a better way to do it? Our batting average in international panels on "Is there a better way to do it?" has been very poor. There is a wonderful habit in the United States that whatever is worth doing, is worth overdoing. When we regulate, we really regulate. Sometimes, in the judgment of people who are asked to judge this issue in international panels, we over-regulate.

We also should mention Section 902 of NAFTA. The regulation of standards comes out of Section 904, but Section 902 says that "each party

shall seek to ensure observance of the technical barriers to trade or standards-related measures." That means the federal government should seek to ensure observance of those methods by state or provincial governments and by nongovernmental bodies. Section 102 of the NAFTA Implementation Agreement says that actions can be brought to enforce both Section 105 and this one by the federal government alone. And the wonderful thing is that it does not say who in the federal government has the power to bring any of these actions. So, this may be one of those nice rights that is sitting out there in the air, waiting for somebody to claim it — if somebody in the federal government wants to make themselves truly unpopular.

On the other hand, a NAFTA panel or a WTO panel would not be bound by Section 102. The U.S. government could be found in violation of either agreement if the package measure was found to be over-regulatory and if it were found that the United States had not taken any action under Sections 902 or 105.

PROFESSOR GORDON:

I gather that there has been no action taken by the United States under that. I suppose the closest thing to challenging standards would probably arise if the labeling issue between Mexico and the United States is not worked out, and there is a continuing conflict in the labeling area. That would seem the most likely thing that would end up probably in a Chapter 20 bill.

PROFESSOR SPANOGLE:

Well, one of the things you need to remember is that labeling is not considered a standards-related measure. That is covered separately under NAFTA Section 311 in Annex 311.

PROFESSOR GORDON:

We will now move on and look at some of the possible actions that Mexico may take if they object to any of the actions we have proposed. What are the routes with which we have to be concerned if we are going to bring an action and win it before the ITA or ITC on any of the actions we have suggested? Is that it? If we win?

MR. POWELL:

Well, obviously that is not it. There are rights to bring challenges to most of these actions. Certainly the unfair trade laws are subject to judicial type review. In fact, Mexico would have three forums in which to challenge any action taken by Commerce or the ITC under the antidumping or countervailing duty laws. The most unusual is the NAFTA Chapter 19 binational panel dispute process, which even eight years later is a

controversial cession of judicial sovereignty to a private group of experts who are chosen *ad hoc* to resolve a particular dispute between the two countries. These cases are supposed to be different from challenges in the courts only on procedural grounds. The panels are supposed to apply the law of the importing country in exactly the same way that a court would apply that law. And they are supposed to apply the general principles and the precedent that applies in these countries as if they were judges sitting on a panel.

But one has to ask why would Canada or Mexico would want a system like this if the panels were going to operate in exactly the same manner as a national court system. I need to be very careful what I say about the process. I am definitely a proponent of it, but the fact of the matter is that you have two members chosen by one government, two members chosen by another government, and essentially a third member chosen by lot. I will not go into the specifics of how that happens, but effectively, each panel ends up with three nationals from one country and two nationals from another country. The drafters of NAFTA have written this procedure to attempt to prevent voting by flag, because obviously if its members simply vote according to their national interests, it could bring down the process. That is not, obviously, what judges are supposed to do.

If you look at some of the data, you will see that most decisions are unanimous. Very, very few have any dissent, and those that do are the most controversial decisions, like the lumber case from Canada. But, if you look at who was the principal winner in the unanimous cases, you will find that at least in the first few years, more often than not, the winner was from the country with the majority of the panelists. Now, I do not try to draw any conclusions from that, but it is very interesting and is something not reported on; many who have studied this system have drawn the same conclusions. Mexico's principal factors, looking at the panel process, would be procedural. Is there something that they can get out of a binational panel that they cannot expect to get out of the federal courts? And that I think is very difficult to articulate. You could find something where panels have more power than courts. In fact, in some ways they may have less power because panels do not have equitable powers like the courts do; but this is one of the big question marks.

As to the WTO, Mexico could bring a challenge, both before the U.S. courts or a binational panel system, and in addition, could bring a case under GATT. And I might point out something that I do not think is very widely reported — there is no statute of limitations for GATT challenges. You do not have to bring a challenge within thirty days of the conclusion of the action, as you do in the U.S. national system and the binational panels. So, conceivably Mexico could wait until the NAFTA process is wound down, and if they did not succeed there, they could decide to bring it at the next level.

Of course, currently the most significant thing about WTO dispute settlement is that it is effectively binding. I say effectively because we have not given up our national sovereignty; we have not said, "Yes, I will do anything that the Geneva group tells me." But if we do not implement a panel decision, there is a price to pay. The other country has an absolute right to retaliate and to take measures that will even the field of battle.

PROFESSOR GORDON:

The Extraordinary Challenge Committee is the area where the desire to have judges really came through into the NAFTA Implementation Act.

MR. POWELL:

Yes. When NAFTA was being created, when the U.S.-Canada Trade Agreement model was being extended to Mexico, the drafters had an opportunity to look at some of the aspects that needed improvement. One problem was that if you appoint private trade-law experts to act as judges, you cannot really expect these people not to have a life. They have other cases, unless they are in the enviable position of Professor Gordon and our other friends. We do not have the option always of having private trade law experts who do not have other clients. So, the problem is conflict of interest. If you were representing a company in an issue, and that same issue came up before the Commerce Department or the ITC, could you really be a neutral panelist in a case in which you were supposed to be acting completely as a judge? Consequently, the drafters of NAFTA tried to create a preference for judges. And this is supposed to come into play at the basic panel level. Now, the appeal process is to an Extraordinary Challenge Committee, which is composed of judges, either sitting or retired judges.

But the Extraordinary Challenge Committee is not exactly the same as an appeal. It is, as the name implies, very unusual, and many of the trade-law experts with whom I have spoken seem to think that effectively, the only time an Extraordinary Challenge Committee is going to actually reverse a panel is if the panel says, "Well, I know what the standard of review is, but I am not going to apply it." And that is not likely to happen. Rather, the panels try to apply the law, maybe they do it a little inexpertly because they are not always judges. They are not as careful as they might be. However, that sort of error is not going to result in reversal. So that is a major difference between our national courts and the binational panel system.

I might add that this is very different from the WTO system. In the WTO system, there is a right of appeal to an expert sitting body that presumably is going to know a lot about the WTO agreements after they decide a number of cases.

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PROFESSOR GORDON:

I am a little troubled with the criticism about the judges, not from the perspective that U.S. judges might not be more appropriate to sit, but rather with having that as a norm throughout the North American Common Market countries. I think of this concern in working with the World Bank on the Mexican judicial reform project. The people who were gathered from around Mexico were asked what they thought had to be done with Mexico, and the conclusion was essentially to completely re-do the court system because of corruption in the courts. I have worked in Mexico for a very long period of time, and I know no judges in Mexico other than some of the senior Supreme Court judges over the years. It is not a position of prestige, it is not a position of very great skill, and indeed when you ask Mexicans what is the most important reason for arbitration, it is not speed or cost, but to keep things out of the Mexican judicial system.

So, if we were to follow the view of having more judges, we would certainly have some skewed panels on this because the Mexicans do not want to have judges on them. And I gather, the Canadians had economists and a variety of people on the panel.

MR. POWELL:

There has been some difficulty in getting Mexico and Canada to sign on to the principal goal of trying to get judges. This is principally because they do not have that many expert judges who know anything about trade law. And this is not necessarily something that their judges have been doing for a long time.

But the idea is to get someone who can apply a standard of review. There is always the potential for corruption, although I do not want to subscribe to the view that any of our NAFTA partners is more likely to have that situation than any other. The point is not to find people who are experts in the particular laws, but rather to find people who are experts in applying judicial standards. The idea is not to have a political process here. The idea is to have a judicial process.

MR. SALONEN:

Just a very quick point. In fact, this is a real issue, particularly in the Chapter 19 area, with respect to whether or not the Chapter 19 process of NAFTA ought to be extended to Chile. There are some questions about how well it has operated altogether and its constitutionality. There also is a question of whether there is enough expertise and familiarity with the operation of the trade laws for a sufficient pool of people to sit on the panels.

PROFESSOR SPANOGLE:

It is a wonderfully American concept that if a process may not work

right, have judges run it, and it will work right. And, judges will understand what we mean by "standard of review."

Well, "standard of review" in Mexico is totally different than it is in the United States. "Standard of review" in Canada also is totally different than it is in the United States. And if you get Canadian judges, much less Mexican judges, and tell them, "Here is a standard of review," and you state a standard of review that from the perspective of their legal system does not make a whole lot of sense, you are not likely to get the results you would have expected from U.S. judges.

To believe that you will get both judicial temperament and expertise in trade law in an ad hoc panel of semi-volunteers, you have to believe in the tooth fairy. That is an unlikely combination. If you could get one of these in one person and the other in another person, you would be lucky. So, this concentration on judges is nice, but there is no guarantee that it serves well the purposes that it was intended to serve.

We have a similar problem in the WTO review of our decisions, especially in the antidumping area, where we have set up a standard of review that says, "By the way, just review the *process* for fact gathering." Then, as far as legal interpretation is concerned, we ask the appellate body or the panel if there are several different, reasonable interpretations. And if the domestic court has adopted one of those interpretations, we ask the WTO review to approve that domestic court decision, even though the reviewing panel might prefer a different interpretation.

Now, to common law ears, that rings perfectly true. To a civil law ear, that makes no sense whatsoever, and probably never will. To civil law scholars, who are brought up on the idea that law is a science, there can be only one fundamentally correct way not only of writing a statute, but also of interpreting it after it has been written. Their law school education assumes this, they are then apprenticed to a lawyer who believes this. When they become either judges or practitioners, the idea that there are several different legitimate interpretations, literally does not make any sense to them.

So, this wonderful standard of review that is included is going to disarm those who come from a common law background and participate in WTO review. But it will not change the minds of those who come from a civil law background. I predict that this will lead to some very interesting contradictions and debates because this is a truly U.S. idea that the rest of the world does not quite get yet.

However, there is a different problem with the suggestions concerning what the Mexican growers might do. The problem is that all of these suggestions are defensive actions. If the Mexican government is willing to spend its money on these kinds of actions, that is fine. They are diplomats or civil servants, and let them do their thing. But, if I were a Mexican grower, I would want to take positive action to fix this. I probably would

not look at the law at all. Although this is not my forte, I would probably look at whether I could get listed on the Chicago board for commodities futures. If so, that would iron out price fluctuations, and it also would mean that there were people who are buying and selling contracts. Those people would automatically become salesmen for my goods, and I would really like to get some Americans pushing the sales of my goods. How can anybody possibly react badly to prices that are set on the Chicago futures market?

Mexican growers would prefer that kind of a solution. I do not know whether that is realistic. But it is the type of solution I would look for, rather than a process of playing games forever with lawyers, which might someday lead to an order from NAFTA panel or the WTO.

Concerning WTO enforcement, there is a current debate as to whether this more resembles the "sheriff with a writ of attachment" enforcement, or just is a more complicated, sophisticated form of diplomacy — a better way of getting the attention of the other country to sit down and say, "Let's talk and do a deal." The suspension agreement, for example, may indicate that "Let's do a deal" is the way that trade disputes are still resolved even by U.S. law under NAFTA and WTO. If you look, for example, at *Reformulated Gasoline*, the Venezuelans got a WTO order, but they never sought compensation.

MR. SALONEN:

Because we said we would comply with it.

PROFESSOR SPANOGLE:

Well, the way you are complying with it is to allow a regulation to lapse, as it was already scheduled to lapse. Right?

MR. SALONEN:

Well, we still have to comply for conventional gasoline. That regulation will not lapse.

PROFESSOR SPANOGLE:

Have you complied?

MR. SALONEN:

It is U.S.T.R. and E.P.A. that are involved in that, not the ITC.

PROFESSOR SPANOGLE:

I understand. Is there current compliance?

MR. SALONEN:

They are going through a rulemaking.

PROFESSOR SPANOGLE:

Okay. And how long does the rulemaking take?

MR. SALONEN:

I do not know. It could take thirty to sixty days. The WTO also allows a reasonable amount of time for the country to come into compliance. And that is a matter of negotiation.

PROFESSOR GORDON:

John, you were shaking your head when Professor Spanogle was making the commodities on the Chicago exchange suggestion.

PROFESSOR VANSICKLE:

Right. You know you have taken the argument from one extreme to the opposite. To argue for the use of a futures market assumes a very high standard for the product. You have to deal with the uniform standard because when you deal with that product on the market, it has to be the same product regardless of where it is and what it is, which can be delivered to anywhere with nobody knowing or caring where it came from.

That is not the standard in the tomato industry. We have tried that on potatoes, which is a more generic product, and it has not been very successful. I will buy your argument from the point of view that what you are doing is creating a focus for the marketing, and you are adding information to the system in an attempt to take out the inefficiencies. So, part of your argument I will accept. If that is a premise that you believe could work and contribute to a resolution, you go back to the idea of why not have standards of description so that people understand, and the you can help introduce some efficiencies into the system.

PROFESSOR SPANOGLE:

I am simply saying I would not spend my money on lawyers; I would find some way to use market mechanisms if I were the Mexican growers.

MR. MACRORY:

It will not happen.

PROFESSOR GORDON:

Let me answer this with a question about the future. Where are we going from here? What would you do if you were the growers in Florida? What would you do if you were the growers in Mexico? Would you attempt to use the trade laws or would you back off and attempt to increase your efficiencies? Do they need the time in Florida that can be gained by using the trade laws? Is the agreement that we have entered into going to work?

What is the picture going to look like five or ten years from now? Will we have two healthy competitive tomato industries, one in each of the countries? Or will there only be one? And where will that be?

PROFESSOR VANSICKLE:

I would like to think that the suspension agreement can work and work well. It does need to have some fine-tuning done to remove some of the uncertainties still within it. But, if allowed to work, it could be to the benefit of all parties, that is, growers in the United States, growers in Mexico, and consumers. They will all benefit from this kind of a suspension agreement.

The question of where we go from here comes back to our earlier discussion of justice and antitrust provisions, and allowing the growers to converse and talk about how to move beyond dispute and work together. Once they can get to that point, then they can concentrate on the marketing of the product and try to expand the demand for the product itself. One of the problems is that we went through a golden era in the produce industry, where we had demand growing at tremendous rates over the decade of the 1980s. However, when we got into the 1990s, the demand turned flat. If you can get the U.S. and Mexican growers together to discuss the issues, they would be able to create a new growth in demand and produce the kinds of products that you and I would like to have on our tables.

PROFESSOR GORDON:

You mean start the rumor again that it is an aphrodisiac?

PROFESSOR SPANOGLE:

I do not know whether the suspension agreement will work or not. I will leave that up to John. The extent to which it works, and whether there are two industries ten years from now or not, probably depends more on what the peso is worth than it does on anything that any of us talks about today. If the peso is still in the dumps, without dumping and without subsidies, it is far more likely that you will see a single industry. So, that puts the U.S. public in an interesting dilemma. Buy Mexican goods, help the Mexican economy, and get the peso up, or buy U.S. goods and try to keep inefficient local producers surviving only on the basis of a "buy local" campaign.

PROFESSOR GORDON:

In talking about the peso, it means not so much in keeping the peso up but in keeping the peso realistic, and preventing the kind of over-inflation of the peso that occurred in December of 1994. It is those terrible dislocations that seem to hurt the industry very badly. And even if the peso is dropping, if it is dropping realistically, it is far easier to adjust markets.

MR. SALONEN:

Well, I do not know what is going to happen five or ten years from now, but I wonder whether one answer might be for the Florida growers to take a page from some of the California producers and invest in Mexico. Through the investments, they would be able legally to achieve some of the crossborder stabilization that John has been talking about.

MR. POWELL:

Let me say in closing that I do not share quite the pessimism that Andy does about the standards of review in the international fora. Although certainly civil law and common law judges would approach these issues differently, no matter what legal system you were trained in, you can understand about deference to authorities that have expertise. And that is really all the standard of review and the WTO is trying to say: you should not do this all over again. Do not start from scratch and decide what you would think is best. Start from the point where the agencies have used their expertise in attempting to come up with the right answer.

I understand the point about whether there is one answer or two answers, and that has plagued me in attempting to defend two reasonable interpretations before the court at the same time. It is not a concept that some of our judges take very well. But the judges can understand when the standard tells you, "This is not *de novo* review." This is a review based on the record that is put before that agency, and that agency is applying its expertise.

Just to mention one point of order: in NAFTA, we are talking about a very different job. The NAFTA panelists are not trying to create a single body of law. They are not attempting to interpret a single body of law. So, the NAFTA judge, the NAFTA trade expert, is applying its own standard of review, not the U.S. standard of review, not the Canadian standard of review. Each of them is significantly different, and we are not asking them to do that. They can create as many different bodies of law as their own courts would permit them to create.

MR. MACRORY:

Steve makes the point that agreements like the suspension agreement often do not last for very long, because conditions change. The softwood lumber case was another sort of a patch-up job in 1986. After a preliminary finding of subsidization, the Canadian government agreed to impose export taxes to offset the subsidies. This lasted for about five years, at which point the Canadians got fed up and just dropped the export tax. The United States came back with a new countervailing duty case. There was, again, some sort of a settlement. But I think the lawyers all feel that *Lumber 4* will be around before too long.

The suspension agreement on tomatoes may not last long, but a lot depends on the price level at which it has been set. If this level keeps a lot of Mexican produce off the market, then the Mexicans are not going to be happy with it. And they are going to try to work out a different approach. If it is high enough that it encourages more production in Florida, which it may, then presumably that in turn is going to have an effect on prices down the road, pushing prices down, which will make it difficult for the Mexican growers to come in.

My view is that this sort of approach is usually temporary. It is a way to remove the problem from the immediate agenda; push it down the road, so that maybe somebody else will have to deal with it in four years' time. But I also agree with Eric. I think that if I were a Mexican grower, I would be looking for some sort of financial alliance with Florida. I think some exist already. One technique for avoiding dumping duties, and it has been done in the past, is for the foreign exporter to buy the domestic industry, if it is a small industry, and then the case goes away. Now, I do not know if that is possible in this case, but I would certainly think that there is likely to be more financial linkages with these two industries working closely together.

MR. SALONEN:

I think that that is just a natural development of increasing economic integration regionally. In *Minivans*,[7] the domestic industry argued, "The United States and Canada really are a regional industry in a regional market." Legally, that argument did not fly under the way the dumping laws are written, and so the Commission really could not give that argument a lot of credence.

But as a question of market reality, the industry had a good point to make. They just were not going to win it as a legal matter. As we see greater integration going on here, perhaps the natural inclination will be for the Florida and Mexican industries to see where they have common interests and use investment to further those interests.

PROFESSOR SPANOGLE:

There is one way in which this whole story could have a very unhappy ending. And that is if the United States or Florida take extra-legal actions to try to save an industry that does not adjust so that it can compete on its own. For example, if you set up standards with scientific principles, or you set up other kinds of barriers to trade, the Mexicans have a right to set up the same kinds of barriers to U.S. grain and apples. That is the beginning of a potential trade war, which then needs an enormous amount of effort to undo

7. Minivans from Japan, USITC Pub. 2529, Inv. No. 731-TA-522 (final) (July 1992).

and to bring back to some kind normalcy. That is one way that we could have a very unhappy ending, and I think we need to talk about this.

PROFESSOR GORDON:

Essentially what you are saying is that if we truly have some losers, and we do not acknowledge them as being losers, whether they are losers because they cannot create the efficiencies to compete at the market, or because they simply are unwilling to do so, we ought to acknowledge that there are losers and not allow them to spoil the game.

PROFESSOR SPANOGLE:

This is what Section 201 was supposed to do in part. It was to produce adjustment assistance. But remember, it is adjustment assistance, and it can either be adjustment within the industry or adjustment to find some way to do something else with those resources.

The problem is that Washington has run out of money for adjustment assistance. Adjustment assistance is nice in theory, but it has no substance of its own at this point. Perhaps, that is a place to look for some corrections.

PROFESSOR GORDON:

Look at the motorcycle case, *Harley-Davidson*, how they received adjustment assistance under 201 action, saved themselves, and essentially now have become a cult symbol in Japan. So perhaps the answer is to have a little bit of time, and it will be up to you, John, to create a tomato, an American tomato, that is a cult symbol.

PROFESSOR VANSICKLE:

Let's back this up just a bit. When you talk about the demise, you have got to remember that this industry was competitive and has been judged to have been competitive, in terms of how well it did in commanding market shares in the United States. And the real collapse of the market took place with the devaluation of the peso. So, the adjustment may well come with, or in coincidence with, the recovery of the peso. And that leads to how it fits in with the 201 action. The escape clause may well be that you are looking at an adjustment program that allows them to make the necessary investments to survive while the peso is put back on firm footing.

PROFESSOR SPANOGLE:

Well, that may be beyond the life of my grandchild, recently born. So your duration of needed assistance has a small problem. When the tomato growers went to Washington saying, "Section 201 relief," was there an adjustment plan that was part of the program?

PROFESSOR VANSICKLE:

The adjustment is contained in the petition. And, they did address the adjustment program.

MR. MACRORY:

What sort of things do they suggest? It is one thing with motorcycles and manufacturing, but what sort of adjustment were they suggesting? What can you do to adjust to equal competition? Is there a lot of room for improved efficiency? I guess that is the major area, to try to cut costs.

PROFESSOR VANSICKLE:

Well, a lot of it comes from just looking at the kinds of things that are going on at this institution, at those people who are involved in the technologies, involved in growing, and involved in programs that are in place to create those technologies. There are some things happening. In fact, the industry itself went through an evaluation of their own programs: what could they do in terms of marketing their product to once again make the demand for their product increase. The production systems that are in place are under continuous review. The programs are there. However, federal assistance is declining and pulling away from the development of technologies at the universities, with government expecting the industries to pick that cost up on their own and pay for the development of those technologies. This has injured the industry, and they really cannot make those necessary investments in technology developments. This is an example of the type of adjustment that has to be made.

PROFESSOR SPANOGLE:

I have a question on that because investments assume long-term survival. I keep reading about chemicals that are currently in use that you will have to stop using by 2001. And, there are press releases that say, "If we have to stop using this, the industry is not viable anymore." Well, if it is not going to be viable in 2001, the idea that people are going to invest a whole lot of money for a three-year cycle, seems to me to need some explanation.

PROFESSOR VANSICKLE:

One example is methyl-bromide, a chemical that will be phased out by the U.S. Clean Air Act by the year 2001. By the Montreal Protocol, which is an international agreement, it is being phased out worldwide by the year 2010. Again, fitting in with part of the adjustment program, is the development of alternatives that may work as well. When that scheduled phase-out was put into place, there were no identifiable alternatives to methyl-bromide. Consequently, the federal government has begun to fund directed research, for example, methyl-bromide alternatives has been an area

where they have focused more and more dollars. And they are making inroads. And the impact of that ban is not as great today as it was even only two years ago. And certainly, I know that with the kinds of programs that are in place, the hope is that there will be an effective substitute by the year 2001 and the tomato industry will still be able to compete.

MR. SALONEN:

This exchange reminds me of the comment of the Commissioner of the Patent Office, who at the end of the last century, said, "There is nothing left to be invented." I think that economic need drives innovation.

PROFESSOR GORDON:

I would to ask if there are questions.

QUESTION:

My name is Joachim Corvales, and I have been here at University of Florida. My question is a policy question. How do you think these types of conflicts, as they become more public, are going to affect Chile's incorporation into NAFTA and the development of a hemispheric trade agreement? How do you think the test of public confidence will affect that process?

MR. POWELL:

Well, I think they would help us focus our attention on some of the problems that exist. There are an extraordinary number of problem-solving methods that are in NAFTA. We have talked about a dozen of them today. There are at least a dozen others. Agricultural problems are among the most difficult to deal with, but I do not get any impression that potential trading partners are put off by the existence of trade conflict. In fact, that is a reason for going forward and not for backing off.

MR. MACRORY:

One of the ironies is that very often trade agreements give rise to more trade conflicts because you get more trade. The first trade agreement was the United States-Israel Free-Trade Agreement, in which the Israelis were very keen to get an exemption from the antidumping and countervailing duty law, which they did not get. After the agreement went into effect, Israel was hit by more cases than before the agreement, and some people were saying, "Why did we enter this free-trade agreement?" As you lower tariffs, you lower barriers to trade. Industries start to suffer, and one of the easiest ways for them to get relief is through the antidumping law. I have not done the numbers, but I strongly suspect that the number of dumping and countervailing cases against Canada did not go down after the United States-Canada

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Free Trade Agreement and may indeed have gone up.

MR. POWELL:

Interestingly enough, the fact is that they are trending substantially down. I do not know if that is coincidence. I would like to think it is because NAFTA has made things a little smoother. They have not increased because frankly, trade always has been very high in Canada. We have always had a very healthy number of dumping cases between the two of us.

MR. MACRORY:

A healthy number being a high number?

MR. POWELL:

Yes.

MR. SALONEN:

I also think that — not to sound too much like a Pollyanna — as the benefits of free trade are recognized, taking into account the fact that trade disputes are going to get attention because that is where the frictions are, nobody is going to report that a Canadian company bought U.S. products, the delivery went through, and everybody was happy — that is not news.

But the important point is that as trade increases and as we enter into these agreements, we agree to rules in order to govern these disputes so that we do have a rules-based system. You do not have a system whereby you resort to political force or unilateral measures to address those problems.

QUESTION:

Do you think that the U.S. public is aware of these benefits that you have been discussing and therefore, will be ready to accept Chile or to accept a hemispheric trade agreement in light of some of these conflicts? Do you think there will be a problem in the future?

MR. SALONEN:

It would depend greatly on what region of the country the consumer is located and what is the particular industry that is under discussion. I think that the salmon growers and the companies that own salmon farms up in New England would be a lot less amenable to a free-trade agreement with Chile than connoisseurs of good, cheap wine. So that really depends.

PROFESSOR GORDON:

It may be that with the relatively brief experience of NAFTA, we now know a little more, so industries can determine whether they are going to be on the winning or losing side. Certainly, there was a great deal of discussion

prior to NAFTA where the Florida agricultural industries were arguing their concerns, but they did not have a lot of proof that the agreement would be damaging to them. They now have that proof. And I think other industries can be a little more accurate in predicting this.

Another difficulty is that much of the debate going on about including Chile does not concern whether Chile ought to come in, but rather the debate is taking place because we have to extend the fast track authority to realistically bring any other country into NAFTA. We hid some of the realities behind the politics involved in whether or not fast track authority will be extended, because of the great conflict between the executive authority and the legislative authority.

PROFESSOR SPANOGLE:

It seems to me that a healthy caution may be engendered. The payoff is that you get some realism. A free-trade agreement is like a marriage. If you think you will live happily ever after and never have any conflicts with your spouse, you probably should not get married. If, on the other hand, you understand that you are going to have conflicts and will have to figure out ways of working them out, then you are probably in the right frame of mind.

There are several ways of solving these problems that you did not have before. The problems that we have been discussing today have nothing to do with the free-trade aspect of NAFTA. The elimination of a US1.4¢ a pound tariff is minuscule when compared to all the other problems the that "the swamp reveals when it is drained." Thus, the great advantage of the free-trade agreement is that it gets all of these other rules into some kind of order that you can talk about in a rational way.

QUESTION:

My name is Ron Parks, and I am a *Journal* member. My question is addressed to Professor VanSickle. I am trying to picture packing green tomatoes, and I know that I could dump a bag of green tomatoes into a twenty or thirty-pound crate and that would be fine for shipping them. But if I were to take ripe tomatoes, I just cannot see that having twenty or thirty pounds of tomatoes on top of the tomatoes on the bottom is going to be very good for them. And this just reminds me of a lot of the cases that come out, where you have a result, you want to keep something out, and the Japanese are famous for this with, "We want to keep out French skis, we will just say our snow is a little different," and the result is achieved. I just see this in very much the same way. We want to keep out these tomatoes. It seems to have a dual purpose, in my mind, and one of them is legitimate, the efficiency argument, but the other one has a side effect that seems somewhat subservient.

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PROFESSOR VANSICKLE:

You have a naive interpretation of what a vine-ripe tomato is. The difference between a mature green and a vine-ripe tomato could very well be only a matter of one extra day on the plant. A vine-ripe tomato is anything that shows any break in the color at all. They are both mature from an internal characteristics point of view, but if it has got a tinge of red on the fruit itself, it is considered to be a vine-ripe tomato. And the way that we pack the vine-ripe tomatoes today, in Florida and other places in the United States, as well as those coming from Mexico, is that they are bulk-packed. Even though they may be place-packed, they are still stacked on top. The ones that you deal with from the carton that are truly red-ripe tomatoes, those that are red on the plant before they are picked, are the ones that you see in the egg-carton type trays. And those you would never stack. Regardless of where they are grown throughout the world, those types of tomatoes are shipped in those place-packed containers with the eggshell crate.

But red-ripe tomatoes is not the industry with which we are dealing and to which we are trying bring those standards. They bulk-pack the vine-ripes out of Mexico just the same way they are bulk-packed in Florida. So, it is a question of whether you have a standard container so that you can say one container of tomatoes is like another container of tomatoes, and there is no uncertainty about what is inside.

MR. MACRORY:

Can I just add a personal anecdote on this? Back in about 1980, there was an attempt to get Congress to change the law to prevent Mexican produce from being place-packed. The argument then was that because you are mixing sizes in place-packs the consumers do not know what they are getting. I happened to be at the produce market in Washington early one morning, and I saw some Florida tomatoes that had been place-packed. I expressed some surprise, and said to the seller that I thought these came in large cartons. He replied that they do but we place-pack them because our customers want them that way, because that way they can tell what they are getting. They can inspect them more easily.

So, I got a letter from him that went into the Congressional Record to support our case. In this case at least, customers preferred the place-packing; they could see what they were getting. But that may be an unusual case.

PROFESSOR VANSICKLE:

It is. It is a rarity.

PROFESSOR GORDON:

Very unusual.

PROFESSOR VANSICKLE:

How many boxes of tomatoes have you seen in a grocery store? Those tomatoes are taken out of the containers for display purposes. It is a matter of how they are shipped. Most mature green tomatoes are repacked at some point; eighty percent of the tomatoes that are grown in Florida are shipped to a market, and where there is a repacker who, after the tomatoes have reached that full-red color, goes sorts them according to their size and color for consistency. Because if there is one thing that will bother a retailer, it is to have different colors of tomatoes on display.

MR. MACRORY:

Let me address one other brief point on this question of motive, which is a very important one. The first attempt that I am aware of by the Florida industry to keep out Mexican tomatoes was in the early 1970s. As you probably know, there is a marketing order that allows the Florida industry to get together if there is too much supply on the market and agree to hold back certain sizes or grades. This is then approved by the Department of Agriculture.

In the early 1970s, the Florida industry came up with a proposed rule, which the U.S.D.A. signed off on, that imposed greater restrictions on vine-ripes than on mature greens. On its face, it looks fine until you realize that ninety percent of the Mexican tomatoes coming in are vine-ripe, and therefore, the rule had a much greater effect on Mexican growers. My law firm sued the U.S.D.A., and in the course of this suit, the Florida Tomato Committee produced some tapes of their committee meetings. There were literally statements like, "Don't forget what we are trying to here, boys, we're trying to screw the Mexicans." And we won the case.

As another footnote to history, we offered to play these tapes to a district court judge in Washington, and he said, "You know, in fourteen years as a district court judge, nobody has offered to play a tape to me before, and I'm not sure whether this is appropriate." This was Judge Sirica, one year before Watergate.

PROFESSOR GORDON:

I think that it an appropriate comment on which to end. I appreciate all of you for coming and staying so long on a Friday afternoon. I appreciate your coming down from Washington and from close by. Thank you all very much.