

6.2 Insistence on the criterion of injury, a permanent tribunal and its features: the middle term

A number of people think that the North American negotiations on subsidies should address first and foremost the issue of the injury suffered by companies. The most promising strategy in this regard would be to start with what has been achieved in NAFTA, in particular the binational panels, and attempt to improve them. Most importantly, the ad hoc panels should be replaced by a permanent tribunal, in order to put an end to the harassment of Canadian exports to the United States.

This permanent tribunal could be responsible primarily for making final determinations of whether there has been material injury or a threat of material injury to a domestic industry. As we have seen, the injury question is especially difficult because factors other than subsidies may be mainly responsible for the problems that companies experience. Here we see, once again, the importance of a permanent tribunal to ensure a certain consistency in enforcing trade conditions, and therefore a stable environment for investment. The decisions of a permanent North American tribunal should be binding, without appeal, and, most importantly and in a departure from international rules, able to create law.

Since NAFTA benefits most from a pragmatic approach and a minimum of institutional arrangements, injury investigations would always fall to national bodies, as is the case according to the current provisions, with the permanent tribunal providing only an appeal mechanism if a national government decides that it wants to appeal the results of an investigation. The tribunal could uphold or quash, in all or in part, decisions made by national investigating bodies. The point here is to ensure that the burden of proof rests exclusively with the national investigating bodies (in this case the U.S. International Trade Commission), and that, in the absence of sufficient proof in the view of the North American tribunal, the request for countervailing duties would fail. In the softwood lumber case, Canada decided in July 1992 to appeal the Commission's decision of the previous June 25 that imports of Canadian softwood lumber were injuring the American industry. However, the matter still had not been settled in June 1994, two years later, after being remanded for a third time to the U.S. Commission for lack of convincing evidence. Originally, as we remember, the panel mechanism established in the FTA was supposed to ensure prompt dispute settlement within one year.

In regard to American practices, Canada needs to ensure furthermore that a similar investigation cannot be launched shortly afterwards in response to another request for an investigation by the same complainants or interests (one of the most important ways in which our exports are harassed), unless these complainants or