TRADE REMEDY ACTIONS IN NAFTA AGRICULTURE AND AGRI-FOOD INDUSTRIES

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INTRODUCTION

One of the most obvious and important trends of the past decade has been the increasing importance of regional economic integration, achieved primarily through the formation of free trade areas. While the debate over the welfare effects of regional integration agreements (RIAs) and their dynamic effects on the world trading system remain unresolved, empirical analyses of NAFTA suggest they have been welfare increasing (Burfisher and Jones, eds. 1998; Krueger 1999; Panagariya 2000). However increased trade, especially in import sensitive raw agricultural products, often results in protectionist pressure that politicians have trouble resisting, free trade area or not. Largely for this reason most RIAs, including the Canada/United States Free Trade Agreement (CUSTA) and the North American Free Trade Agreement (NAFTA) include agriculture specific safeguard provisions that allow members to legally restrict import surges under specified conditions.[1] These agriculture specific safeguards do not require evidence of injury in the importing country, even though the more

[1] The agricultural safeguard (emergency) provisions in CUSTA applied only to fruits and vegetables. In NAFTA, the agricultural emergency provisions apply to a short list of commodities specified in NAFTA's Annex 703.3.

general safeguard provisions of the CUSTA and NAFTA do require an injury determination. However, the safeguard (emergency) provisions of the CUSTA and NAFTA apply only during the implementation periods of the agreements.

At the multilateral level, the World Trade Organization (WTO) also allows members to legally curtail imports. WTO members have a number of legal ways to respond to unwanted imports:

- renegotiate bound tariffs;
- raise tariffs from applied to bound rates;
- use restrictive import measures for balance of payments reasons;
- apply the WTO safeguard mechanism under the Special Safeguards provision of the Agreement on Agriculture;
- apply the WTO safeguard mechanism under the Agreement on Safeguards;
- apply countervailing duties; and
- apply anti-dumping duties.

The first three ways are rarely used. In the fourth, the special agricultural safeguard applies only to those commodities "tariffied" during the Uruguay Round of trade negotiations. In the fifth, the WTO safeguard mechanism requires proof that the imports are causing or are threatening to cause serious injury to the domestic industry. None of the first five approaches to curtail imports suggests that the imports are "unfair." The last two remedies, which are often called administered protection, allow countries to respond to "unfair" imports.

In this paper we focus on administered protection since it is widely believed to be the instrument of choice for protectionist domestic industries, when tariffs are lowered or eliminated. The use of administered protection was for a long time the exclusive purview of the developed world, but this is no longer the case. Lindsey and Ikenson (2001) report that in 1995, among the top ten countries using anti-dumping (AD) measures, 72 percent of the 874 AD measures in place were in the United States (35 percent), the European Union (16 percent), Canada (11 percent) and Australia (10 percent). By 2000, these four countries accounted for only 55

percent of antidumping measures. India accounted for less than 2 percent of the AD measures in 1995, however in 2000 it accounted for 9 percent, more than either Australia or Canada. Clearly, developing countries have learned from the developed world how to use administered protection to inhibit imports.[2]

The objective of this paper is to examine four questions regarding administered protection, especially as it applies to members of NAFTA:

1. What is the economic rationale for administered protection and does it continue to hold true in the context of the NAFTA?
2. What is the evidence on the use of administered protection
   - by the NAFTA countries against each other,
   - by NAFTA countries against third countries, and
   - by third countries against NAFTA members?
3. How can administered protection laws be changed to improve the ability of NAFTA members to actually resolve disputes?
4. Are there reasonable alternatives to administered protection within NAFTA?

Before proceeding it is important to understand two key dimensions of administered protection law. The WTO rules governing administered protection are not self-executing. The procedures must be incorporated into domestic legislation and applied by national administered protection agencies. Hence, while the rules governing administered protection in different countries are similar, they are not necessarily identical (Leycegui, Robson and Stein 1995). Second, administered protection rules cover all products. The rules must be sufficiently robust to cover cases involving commodities as distinct in their production practices and marketing arrangements as steel, cut flowers, collated roofing nails and hogs. The chances of developing administered protection rules specific to agriculture seem so remote as not to deserve attention. Both of these facts put constraints on the type of reforms agriculturalists can hope for.

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[2] Interestingly, Mexico had ten percent of AD measures in 1995 but only seven percent in 2000.

ECONOMIC RATIONALE FOR ADMINISTERED PROTECTION

Administered protection is a generic term that covers antidumping duties, countervailing duties and a variety of trade actions that can be brought under domestic laws for import relief (Congressional Budget Office, 2001; U.S. International Trade Commission, 1998). Our concern is solely with AD and countervailing duty (CV) actions.

AD actions are brought against firms in foreign countries that are selling in the domestic market at prices below those charged in the home country, or more often, below their full cost of production including a margin for profit. The stated goal of AD law is to combat predatory pricing, but complainants have to prove only that the firm is dumping, and not that it is engaged in predatory pricing. Predatory pricing involves a firm selling below its cost of production to drive out rival firms, thereby creating a monopoly position. The firm's monopoly position then allows it to subsequently raise prices above those that prevailed during the "predatory" period and above competitive levels. This type of firm behavior stifles competition and is welfare decreasing. However, it is widely believed that successful predatory pricing is extremely rare. Shin (1994), in her study of 282 antidumping cases, could find only 10 percent that were consistent with predatory pricing. Successful predatory pricing of agricultural products, especially raw agricultural products seems even more remote because there are few commodity specific resources involved in the production of most agricultural commodities, and entry is easy and relatively inexpensive. While predatory pricing might be easier for firms that process agricultural products, it is hard to believe it is common given the ability of consumers to substitute products in consumption and given the number of alternative foreign suppliers.

The economic essence of predatory pricing is the ability to price discriminate among markets. For a firm to successfully price discriminate among domestic and foreign markets, it needs to be able to protect the "high" price in the domestic market either through tariff or non-tariff barriers. NAFTA eliminated nearly all tariffs following the implementation period and most non-tariff barriers have also been removed. As a conse-

quence, most of the protection of the domestic market that a firm needs to engage successfully in predatory pricing has been eliminated. As a consequence, a NAFTA member imposing an AD duty is simply depriving its consumers of a product available to other members of NAFTA at a lower price. This welfare decreasing action discourages, rather than encourages, competition.

As shown later in the paper, an industry bringing a complaint in a NAFTA country has more than a 50 percent chance of obtaining formal import relief. In addition, AD duties tend to be large once put into place.[3] This situation is especially true for cyclical agricultural products where selling below the full cost of production is not an uneconomic or unusual activity. As Lindsey (1999, p. 19) argues, "Yet in actual practice, the methods of determining dumping under the law fail, repeatedly and at multiple levels, to distinguish between normal commercial pricing practices and those that reflect government-caused market distortions." It is difficult to make the general case for antidumping measures and perhaps impossible to make the case within a free trade area. In essence, firms are punished for taking actions in foreign markets that are considered normal practice in the domestic market.

The economic basis for a CV action is different than for an AD action. An AD case is brought by domestic producers against foreign firms who are alleged to be engaging in unfair pricing practices. A CV action is brought by domestic producers against foreign producers who are alleged to benefit from unfairly provided government subsidies. Horlick (1991, p.137) notes that there is "a grain of truth, which is the distortion caused by subsidies lying behind the rationale for a CV, while AD actions are 90 percent pure protectionist."

In a free trade area where the member governments have differing domestic policies, countervailing duties are weapons that can be used to offset the trade-distorting effects of one member's policies on other mem-

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[3] Even in situations where the complainant losses the case, the uncertainty resulting from the investigation and temporary import duties can severely restrict trade.

bers. However, CD actions, or their threat, are often used to harass foreign producers when there is little evidence of injury. Meilke and Sarker (1997) argue that national administered protection agencies need to be reformed to act more as "transparency agents" and "investigatory agents" acting in the public good, and less as "advocacy" agents for domestic protectionist interests.

A countervailing duty is a tariff. The welfare effects of a tariff and hence a CV are well known to economists. However, van Duren (1991) and Moschini and Meilke (1992) raise a number of important issues in the context of administered protection. Is the objective of the CV to restore trade flows and prices of the subsidized product to free trade levels? Is it to restore welfare to the free trade level in the importing country? Or is it to convince the offending country to remove its offending policies? A trade lawyer will argue that eliminating the offending policies is the goal of administered protection. This goal is accomplished by punishing foreign producers, and at the same time domestic consumers. If the objective is only to remove the injury caused by the unfair imports, then the CV should almost always be less than the measured subsidy (van Duren 1991; Meilke and Sarker 1997), and it may need to be applied to both raw and processed products (Moschini and Meilke 1992).[4]

The economic cost of administered protection to both the importing and exporting countries can be substantial, despite the small number of products affected at any one time. The producers in exporting nations face the out-of-pocket cost of defending themselves in the trade action. Lawyers and economic consultants are not cheap, and trade actions tend not to go away.[5] Producers in the importing country face the same litigation costs but if the rent seeking results in a CV they are usually hand-

[4] If the goal is to restore the price and trade flows of the subsidized product to free trade levels, then a CV on that product is sufficient. However, if the subsidized product is a significant input (swine and pork) into the production of another product, duties are required on both the raw and the processed product to restore welfare in the importing country.

[5] Canadian hog producers spent 15 years defending themselves in the U.S. CV action against Canadian swine.

somely repaid. On top of these costs are the economic efficiency losses associated with the AD and countervailing duties. The ITC (USITC, 1995), in a comprehensive analysis of the economic effects of AD and CV actions in the United States, calculated a net welfare loss of $1.59 billion and job losses of 4,075 in the affected sectors. These numbers amount to about $39,000/worker transferred from employment in the affected sector to alternative employment elsewhere in the economy.[6]

In the next section we turn to the question of just how important are administered protection actions in NAFTA countries, with an emphasis on agricultural products. Following that section, we turn to the question of how to modify current administered protection rules and institutions.

PREVALENCE OF TRADE REMEDY INVESTIGATIONS BY NAFTA COUNTRIES

The use of AD duties and CVs to prevent or to remedy unfair trade practices was an important issue during both the CUSTA and NAFTA negotiations. During the CUSTA talks, the United States was urged to consider alternatives to its national trade remedy laws. In particular, Canada sought agreement that each country would exempt the other from existing national AD and CV laws and replace them with a new set of disciplines modeled on competition law principles with a binational tribunal to enforce them. For a number of reasons, CUSTA produced no substantive changes in the trade remedy laws of either country. During the NAFTA negotiations, Mexico pursued having the United States suspend or make changes to its trade remedy laws and practices, again with no success.

The concern shared by Canada and Mexico countries was that as traditional trade barriers such as tariffs and quotas were eliminated, producers in the United States would turn their attention toward trade remedy actions as a way to relieve pressure from import competition. This concern was not unwarranted, since at the time that these agreements were being negotiated, the United States was the heaviest user of trade remedy actions

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[6] The general equilibrium model used by the ITC assumed full employment.

by virtually every indicator. It ranked first in the average number of cases initiated per year, average number of measures imposed per year, and number of active measures in place. In this section we quantify and analyze the pre- and post-agreements incidence of AD and CV actions by NAFTA countries, focusing on actions taken against products in the food and agricultural sector.

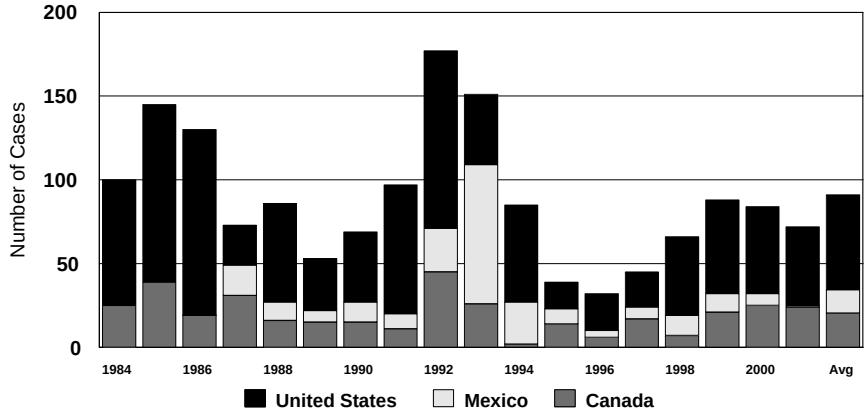
GLOBAL USE OF TRADE REMEDY LAWS BY NAFTA COUNTRIES

Between 1984, five years before the beginning of CUSTA, and mid-2001, the United States, Canada, and Mexico initiated a total of 1,592 unfair trade practice investigations (Figure 1). About 83 percent (1,314) involved alleged dumping while 18 percent (278) involved subsidies. In global terms, NAFTA partners accounted for 35 percent of all AD investigations and 66 percent of all CV investigations notified to the WTO.[7] The United States alone accounted for 20 percent (749) of all AD investigations and 55 percent (243) of all CV investigations during this period, making it the heaviest user of trade remedy laws in the world. Canada and Mexico, however, are also frequent users. Canada was the fourth most active initiator with a total of 358 AD and CV cases opened, accounting for about 8 percent of the global total. Mexico quickly joined the ranks of main users and was fifth with 242 cases initiated, 6 percent of the global total during this period, even though it did not initiate its first trade remedy action until 1987.

For the United States and Canada, 1992 was the year of greatest activity for initiations. The number of cases opened in each country was over twice the yearly average for the period. It was also a year of heavy protectionist tendencies in a number of other countries due to a cyclical downturn in commodity markets. The following year, 1993 was the most active for initiations of investigations by Mexico—82 cases, or 35 percent of Mexico's total. This spike in activity was largely attributed to a combi-

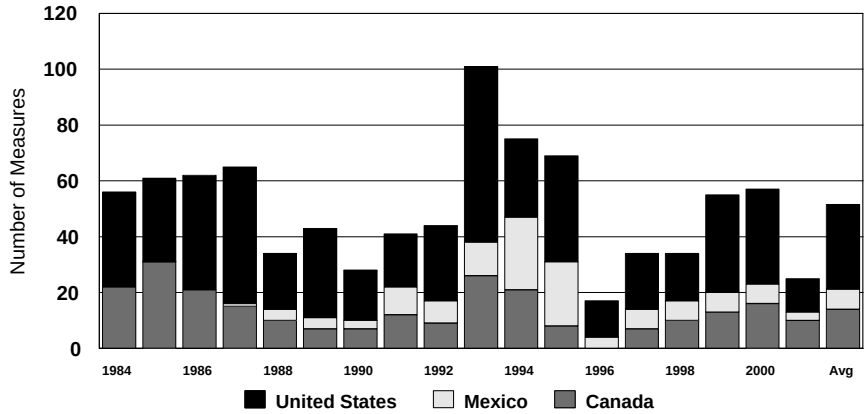
[7] Because of numerous errors, omissions, and inconsistencies in the way countries notify their trade remedy actions to the GATT/WTO, these numbers and proportions are not exact. They are, however, broadly illustrative of the level of administered protection found in each country.

Figure 1: AD and CVD cases initiated by NAFTA countries, January 1984 to June 2001.



Source: Canada Customs and Revenue Agency (2002); Congressional Budget Office (2001); Miranda, Torres and Ruiz (1998); Miranda (1995); U.S. International Trade Commission (1983–1989); U.S. International Trade Administration (1984–2001); World Trade Organization (2002).

Figure 2: AD and CVD measures imposed by NAFTA Countries, January 1, 1984 to June 30, 2001.



Source: Canada Customs and Revenue Agency (2002); Congressional Budget Office (2001); Miranda, Torres and Ruiz (1998); Miranda (1995); U.S. International Trade Commission (1983–1989); U.S. International Trade Administration (1984–2001); World Trade Organization (2002).

nation of an overvalued exchange rate and continued low commodity prices (Miranda 1995). The popularity of AD and CV actions in all three countries waned in the mid-1990s. In 1996, when commodity prices were high,

the number of cases opened was less than a fifth the number in 1992. Since then the level of activity has begun to pick up.

The proportion of the global total attributed to NAFTA countries increases slightly when administered protection activity is quantified on the basis of final measures imposed (Figure 2).[8] On a global basis, final measures, in the form of either duties or price undertakings, were imposed in 2,155 of the 4,170 cases opened between 1984 and 2001, 52 percent of the time.[9] The United States imposed more new measures than any other country, an average of almost 31 per year, representing a quarter of the reported total world average. Canada accounted for 11 percent and Mexico 6 percent. In all three countries, the chances that an investigation resulted in the imposition of a duty or price undertaking exceeded the world average. In Mexico final measures were imposed in 52 percent of cases, in the United States 54 percent, and in Canada 68 percent. These data mean that every time the investigating authorities in Canada pursued a case against alleged dumping or subsidization, the accused party had only a 32 percent chance of obtaining a favorable ruling. It bears pointing out that even when a case results in a final determination of no dumping or subsidization or a finding of no injury, the investigating country may have imposed a preliminary duty. These preliminary duties and, in some cases, the initiation of an investigation, can have a chilling effect on trade, causing imports to drop. In addition, firms or countries subject to AD or CV investigations incur considerable expense in defending themselves.

On June 30, 2001, there were 1,126 AD and 87 CV orders in place around the world (Table 1). These orders are only a fraction of the over 2,000 cases that resulted in the imposition of a duty or price undertaking

[8] The calculations presented here compare measures initiated with measures imposed during the period, regardless of the date of initiation of the cases from which the measures derive. Some measures in the early years stem from cases initiated before 1984, while some cases initiated late in the period had not yet been completed, so no measure is reported.

[9] Price undertakings are provided for under the GATT/WTO rules. Put simply, they refer to the situation where an individual exporter reaches an agreement with the investigating authorities of the importing country to raise their export price to a level sufficiently high to eliminate injury.

Table 1: Active Anti-dumping and Countervailing Duty Measures in the World as of June 30, 2001.

Reporting Party	*Antidumping*	*Countervailing*	*Total*	*Percent of Total*
Argentina	46	3	49	4
Australia	56	6	62	5
Brazil	52		52	4
Canada	89	9	98	8
Czech Republic	1		1	0
Egypt	10		10	1
European Communities	219	19	238	20
India	121		121	10
Israel	4		4	0
Jamaica	1		1	0
Korea	29		29	2
Malaysia	8		8	1
Mexico	66	1	67	6
New Zealand	11	2	13	1
Peru	15		15	1
Singapore	2		2	0
South Africa	110	1	111	9
Thailand	6		6	0
Trinidad and Tobago	5		5	0
Turkey	15		15	1
United States	241	43	284	23
Venezuela	19	3	22	2
Total	1126	87	1213	100

Source: WTO (2002).

since 1984. Many of these orders have since been revoked or suspended. Canada ranked fifth in the world in active measures, accounting for 8 percent of the reported world total. This percent share is well below the 11 percent share of all measures imposed by Canada, indicating a greater propensity to revoke measures over time. Mexico, which accounted for 6 percent of all measures imposed during the period also accounted for 6 percent of active measures at the end of the period.

The United States, which is the most frequent user of trade remedy laws by the active measure indicator, has seen its share of the total stock drop from 33 percent (390 measures in place) in 1999 to 23 percent (284

TTable 2: The Number and Duration of Active Measures by NAFTA Countries, June 30, 2001.

	Active Measures	***Duration in Years***		
		Mean	***Median***	***Maximum***
Antidumping Measures				
United States	241	8.3	7.8	27.5
Canada	89	5.1	3.7	19.2
Mexico	66	2.8	2.6	5.9
Countervailing Duty Measures				
United States	43	7.0	7.8	22.9
Canada	9	5.6	1.0	16.8
Mexico	1	2.0	2.0	2.0

Source: WTO (2002).

measures) as of June 30, 2001. Before the Uruguay Round, a large proportion of U.S. AD orders were considered by exporters to be effectively permanent. According to a U.S. government study, exporters found it almost impossible to get an order removed once applied, and the United States had no provision for regular "sunset" reviews and terminations of AD and CV measures (Congressional Budget Office, 2001). The Uruguay Round required the United States to complete sunset reviews of active measures and terminate those measures no longer applicable by January 1, 2000.[10] As a result, on January 1, 2000, the U.S. stock of active measures dropped over one quarter, from 390 to 285.

The Uruguay Round sunset provisions also resulted in a large drop in the average duration of U.S. orders. Nevertheless, this average is still quite high as U.S. orders tend to remain in place much longer than those imposed by other countries. The average duration of the 241 active U.S. AD orders in place on June 30, 2001 was 8.3 years, with nine orders having been in effect for over 20 years (Table 2). The average duration for the

[10] The Uruguay Round established rules for the duration of AD and CV measures and requirements for periodic review of the continuing need, if any, for the imposition of duties or price undertakings. The "sunset" requirement established that duties shall normally terminate no later than five years after first being applied, unless a review investigation prior to that date establishes that expiry of the duty would be likely to lead to continuation or recurrence of dumping or subsidization and injury. This five-year "sunset" provision also applies to price undertakings.

43 active U.S. CV orders was a bit lower at seven years, with one order having been in place over 20 years. In the case of both AD and CV orders, the median duration was 7.8 years.

Canada also has some long-lived orders, with an average duration of 5.1 years for the 89 AD orders in place, including one in effect over 19 years. Canada had two CV orders that have survived almost 17 years.[11] The average duration for Canada's nine active CVD orders was 5.6 years. Of the three NAFTA partners, Mexico's active orders have the shortest duration, not surprising since Mexico did not conduct its first AD investigation until 1987 or its first CVD investigation until 1990. Mexico's 66 active AD measures had an average duration of only 2.8 years, with only 12 having been in place five years or more. In the case of the United States, 18 percent of its active measures on June 30, 2001 had been put into effect during the last two years, versus 38 percent for Canada and 43 percent for Mexico.[12]

Impact of CUSTA and NAFTA

Before CUSTA and NAFTA were implemented, some believed that pressure to adjust to increased competition brought on by free trade would result in producers, particularly U.S. producers, pressuring their governments to regulate this trade. The argument was that if no efforts were made to address the problems that originally compelled governments to impose trade barriers, removal of these barriers would result in increased efforts to seek relief available under trade remedy laws. Comparing the number of cases initiated before and after each agreement should provide some indication of whether the lowering of trade barriers had an effect on how aggressively each country investigated alleged unfair trading practices.

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[11] The United States and Canada are the only countries in the world having active measures that have been in place over 15 years.

[12] One would expect that a country that has enacted most of its measures only recently would have a shorter mean and median duration even though its recent measures could end up lasting a long time. A better measure of the expected duration of a measure would be to calculate the mean duration of measures that have been terminated.

The United States and Canada were both more frequent users of trade remedy law against each other during the five years prior to the formation of CUSTA (1989–1993), than during the first five years of the agreement. Between 1984 and 1988, the United States opened 24 investigations of Canadian imports while Canada opened 29 investigations of imports from the United States (Table 3). These numbers declined to 18 and 25 during the 1989 to 1993 period. Canada showed a slightly greater propensity to investigate the United States than the reverse before the agreement. This difference widened slightly after the agreement.

How do these numbers compare with investigations against non-CUSTA countries on a trade basis? In the five years prior to CUSTA, investigations of Canadian imports by the United States accounted for 6.4 percent of the U.S. total. In comparison, Canada accounted for 18.9 percent of U.S. merchandise imports during this period. In the five years after, Canada accounted for a slightly smaller proportion (6.0 percent) of all U.S. cases, while its share of the U.S. import market dropped slightly to 18.7 percent. Contrary to Canada's concerns, the number of investigations decreased both in absolute and percentage terms. During the same time, the proportion of all Canadian AD and CD investigations that were directed at U.S. imports remained steady at 22.3 percent, while the share of Canadian merchandise imports held by the United States increased from a five-year average of 68.6 percent before the agreement to 71.7 percent after the agreement.

The picture is similar when bilateral investigations between the United States and Mexico are considered before and after NAFTA (Table 4). During the five years before NAFTA (1989–1993), the United States initiated 13 AD and CV cases against Mexican imports while Mexico initiated twice that number against U.S. imports. During the first five years of the Agreement, the number of cases each country launched against the other declined 50 percent. This decline was taking place even though the value of bilateral trade was growing rapidly. Between the two periods, the average share of Mexican imports in the U.S. market increased from 6.4 percent to 9.2 percent, while the share of U.S. imports in the Mexican market increased from 71.1 percent to 73.8 percent.

Table 3: Bilateral AD and CVD Initiations Before and After CUSFTA.

	Cases Filed By U.S. Against Canada			*Cases Filed by Canada Against U.S.*		
	Total No. of Cases	*Percent of All Cases*	*Percent of U.S. Imports from Canada*	*Total No. of Cases*	*Percent of All Cases*	*Percent of Canadian Imports from the U.S.*
Pre-CUSFTA						
1984	4	5.3	20.1	6	24.0	71.5
1985	7	6.6	20.5	7	17.9	69.0
1986	5	4.5	18.6	7	36.8	68.0
1987	2	8.3	17.4	3	9.7	68.9
1988	6	10.2	18.3	6	37.5	68.4
Total	24	6.4	18.9	29	22.3	68.6
Post-CUSFTA						
1989	4	12.9	18.6	3	20.0	68.9
1990	0	0.0	18.4	3	20.0	71.4
1991	6	7.8	18.6	4	36.4	69.1
1992	7	6.6	18.5	10	22.2	70.9
1993	1	2.4	19.2	5	19.2	73.2
Total	18	6.0	18.7	25	22.3	71.1

Source: Cases - U.S.: International Trade Administration (1984–2001); Canada: Canada Customs and Revenue Agency (2002); Also World Trade Organization (2002). Trade: U.S. Census Bureau (2002); Statistics Canada (various years); United Nations (1984–2001).

Table 4: Bilateral AD and CVD Initiations before and after NAFTA*

	Cases Filed By U.S. Against Mexico			*Cases Filed by Mexico Against U.S.*		
	Total No. of Cases	*Percent of All Cases*	*Percent of U.S. Imports from Mexico*	*Total No. of Cases*	*Percent of All Cases*	*Percent of Mexican Imports from the U.S.*
Pre-NAFTA						
1989	1	3.2	5.7	2	17.2	65.0
1990	1	2.4	6.1	8	18.9	67.1
1991	2	2.6	6.4	6	25.0	68.6
1992	7	6.6	6.6	6	9.4	73.8
1993	2	4.8	6.9	4	37.5	74.0
Total	13	4.4	6.4	26	19.7	71.1
Post-NAFTA						
1994	2	3.4	7.5	3	20.0	69.1
1995	1	6.3	8.4	2	20.0	74.5
1996	1	4.5	9.3	2	45.5	75.7
1997	0	0.0	9.9	2	21.7	74.3
1998	3	6.4	10.4	4	18.5	74.5
Total	7	4.3	9.2	13	22.8	73.8

*In the five years prior to NAFTA, Mexico initiated 4 cases against Canada, while Canada initiated one against Mexico.
In the five years after NAFTA, Mexico initiated 0 cases against Canada, Canada Iinitiated one against Mexico.
Source: Cases - U.S.: U.S. International Trade Administration (1984–2001). Mexico: U.S. International Trade Administration (1984–2001); Also World Trade Organization (2002). Trade: U.S. Census Bureau (2002); United Nations (1984–2001).

Table 5: Bilateral AD and CVD Investigations within NAFTA, January 1, 1984 to June 30, 2001.

	Initiating Country			*NAFTA*
	United States	***Canada***	***Mexico***	***Total***
Affected Country				
United States	0	65	57	122
Canada	36	0	4	40
Mexico	24	4	0	28
NAFTA Totals	60	69	61	190
Global Totals	761	334	219	1314
NAFTA/Global	8%	21%	28%	14%
Percent of NAFTA Total				
United States	0	34	30	64
Canada	19	0	2	21
Mexico	13	2	0	15
NAFTA Totals	32	36	32	1

Source: Cases - U.S.: U.S. International Trade Administration (1984–2001); Canada: Canada Customs and Revenue Agency (2002); Mexico: U.S. International Trade Administration (1990–1996); Also World Trade Organization (2002).

During most of the 1984 to 2001 period, NAFTA countries were the subject of far fewer investigations by their bloc partners than their import shares might predict. Table 5 shows the number of bilateral cases initiated and defended by each country during this period. Only 14 percent of the total investigations initiated by NAFTA countries were directed at a bloc partner. Eight percent of total U.S. investigations were directed against NAFTA partners, compared with 21 percent by Canada and 28 percent by Mexico. Of the 190 trade remedy cases initiated by one NAFTA country against another during the period under review, the United States opened the least amount—60 or 32 percent of the total—but was the largest defender. The United States was the target of 122 investigations by its NAFTA partners during the period, or 64 percent of the total.

Clearly, neither agreement has resulted in an explosion of AD and CV cases by the United States against its bloc partners, nor by them against the United States. Rather, the agreements seem to have moderated the number of trade remedy actions between the countries. Nevertheless, in some sectors, including agriculture, trade disputes between these countries appear to have grown in frequency and intensity since the two agreements

Table 6: Bilateral AD and CVD Investigations on Agricultural Imports within NAFTA, January 1, 1984 and June 30, 2001.

	Initiating Country			*NAFTA*
Affected Country	*United States*	*Canada*	*Mexico*	*Total*
United States	0	18	10	28
Canada	9	0	0	9
Mexico	4	0	0	4
NAFTA Totals	13	18	10	41
Global Totals	71	32	16	119
NAFTA/Global	18%	56%	63%	34%
Percent of NAFTA Total				
United States	0	44	24	68
Canada	22	0	0	22
Mexico	10	0	0	10
NAFTA Totals	32	44	24	1

Source: Cases - U.S.: U.S. International Trade Administration (1984–2001). Canada: Canada Customs and Revenue Agency (2002). Mexico: U.S. International Trade Administration (1984–2001); Also World Trade Organization (2002).

were implemented. We focus next on AD and CV actions within the agricultural sector, to determine if they provide any indication of how the level of trade tension has changed during this time.

TRADE REMEDY ACTIONS IN THE AGRICULTURAL SECTOR

While most agricultural trade within NAFTA flows smoothly and is taken for granted, a small portion continues to generate disputes, many of which have involved allegations of dumping or subsidization. In fact, the agricultural sectors in NAFTA countries have been much more frequent users of AD and CV laws to contest imports from bloc partners than from non-bloc partners. A comparison of Tables 5 and 6 reveals that of the 190 trade remedy cases initiated by one NAFTA country against another during the period under review, 41 (22 percent) were directed at agricultural imports (Table 6). By comparison, of the 1,402 cases initiated by the three against non-NAFTA countries, only 78, or about 5.6 percent, were agricultural.

All of the agricultural actions have involved the United States as either the investigator or the target of the action. The United States has been the target in 68 percent of the cases and the initiator in 32 percent. Canada has been the heaviest user of trade remedy actions against its NAFTA partners in the agricultural sector, accounting for 44 percent of all cases investigated. Canada was the only country that opened more agricultural cases against NAFTA partners (all against the United States) than against non-NAFTA partners. Of the 71 agricultural cases investigated by the United States, only 13 involved NAFTA partners. Ten of Mexico's 23 agricultural cases were directed at U.S. imports.

Appendix Table 1 provides an inventory of every agricultural case initiated by one NAFTA partner against another between 1984 and 2001, as well as a few cases that were initiated before 1984 but active during this time period. Of the 32 bilateral cases between the United States and Canada, 15 were initiated before CUSTA was in place, seven by the United States and eight by Canada. Definitive duties or undertakings were imposed in all but two of these cases. Since CUSTA began, Canada has initiated 13 AD and CV cases against U.S. agricultural imports while the United States has initiated four cases against Canada.[13] Of the 14 cases completed, only six resulted in duties.

For bilateral cases between the United States and Mexico, only three of the 15 were opened before NAFTA, two by the United States and one by Mexico. Only one of these resulted in a duty. Since NAFTA, the United States has investigated Mexican agricultural imports three times while Mexico has initiated nine investigations against the United States. Of the ten cases that have been completed, six have resulted in duties or undertakings.

In general, it appears that the United States has decreased the frequency with which it has used its trade remedy laws in the agricultural

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[13] On October 23, 2000, the U.S. Trade Representative initiated a Section 301 investigation of Canadian wheat marketing practices; on October 15, 2002 he announced that he would be examining the possibilities of filing AD and CV petitions with the U.S. DOC.

sector since CUSTA and NAFTA have been in place. CUSTA does not seem to have had any perceptible impact on the frequency of Canadian initiations, although the chances of an investigation resulting in a duty or undertaking have decreased. Mexico, on the other hand, has seen a large increase in cases within the agricultural sector. Prior to NAFTA, only one of Mexico's 26 cases opened against the United States was against agricultural imports. Since NAFTA, seven of the 13 cases by Mexico against the United States have been against agricultural imports.

As of June 30, 2001, the three countries had a total of 39 active measures against agricultural imports (out of a total 449 active measures). As shown in Table 7, the United States had 20 active measures against agricultural imports (15 AD and 5 CV measures), followed by Canada with 14 (11 AD, 3 CV), and Mexico with 5 (4 AD, 1 CV). Five of Canada's measures and 4 of Mexico's were against U.S. imports, while the United States had only one active measure against its NAFTA partners agricultural imports, a price undertaking against Mexican tomatoes.

Comparing active measures on agricultural imports with those on non-agricultural imports, the sole U.S. measure against Mexican tomatoes was one of nine total active measures against Mexican imports (Table 8). Of the eight measures against Canada, none were on agricultural imports. An investigation against greenhouse tomatoes from Canada was recently concluded with a finding of no injury. Canada had (as of June 30, 2001) 15 orders in place against the United States, five of which were on agricultural products. In addition, an ongoing Canadian investigation against field tomato imports from the United States has resulted in a preliminary finding of dumping. Mexico had (again, as of June 30, 2001) 11 active orders against the United States, four targeting agricultural exports. Mexico also has two active investigations against U.S. agricultural imports, one on rice and a circumvention investigation on beef.

As already mentioned, U.S. orders tend to be longer-lived than those of Canada and Mexico and this is also the case when considering all active orders against NAFTA partners. When only agricultural cases are considered, however, Canada's measures tend to have the longest dura-

Table 7: Agricultural Products with AD or CVD Orders in Place in NAFTA Countries, as of June 30, 2001.

Type of Order	*Commodity*	*Order Date*	*Exporter*
Canada			
AD Duty	Garlic (Jul-Dec)	1997	China
AD Duty	Garlic (Jan-Jun)	2001	China
AD Duty	Refined sugar	1995	Denmark
CVD Duty	Canned ham	1984	Denmark
CVD Duty	Refined sugar	1995	EU
AD Duty	Refined sugar	1995	Netherlands
CVD Duty	Canned ham	1984	Netherlands
AD Duty	Refined sugar	1995	United Kingdom
AD Duty	Refined sugar	1995	US
AD Duty	Whole potatoes (non-size A russets)	1984	US
AD Duty	Whole potatoes (excl. non-size A russets)	1986	US
AD Duty	Iceberg lettuce	1992	US
AD Duty	Prepared baby foods	1998	US
AD Duty	Garlic	2001	Vietnam
Mexico			
CVD Duty	Beef	1994	EU
AD Duty	High fructose corn syrup	1998	US
AD Duty	Swine for slaughter	1999	US
AD Duty	Live bovine animals, beef and edible offals	2000	US
AD Price Undertaking	Apples	1998	US
United States			
AD Duty	Sugar	1979	Belgium
AD Duty	Frozen concentrated orange juice	1987	Brazil
AD Duty	Preserved mushrooms	1998	Chile
AD Duty	Preserved mushrooms	1999	China
AD Duty	Apple juice	2000	China
AD Duty	Garlic	1994	China
CVD Duty	Sugar	1978	EU
AD Duty	Sugar	1979	France
AD Duty	Sugar	1979	Germany
AD Duty	Preserved mushrooms	1999	India
AD Duty	Preserved mushrooms	1999	Indonesia
AD/CVD Duty	Raw pistachios, in shell	1986	Iran
CVD Duty	Roasted pistachios, in shell	1986	Iran
AD/CVD Duty	Certain pasta	1996	Italy
AD Price Undertaking	Tomatoes	1996	Mexico
AD Duty	Canned pineapple	1995	Thailand
AD/CVD Duty	Certain pasta	1996	Turkey

Source: World Trade Organization (2000).

tion, with an average of almost 10 years, including an active order on potatoes from the United States that has been in place for 17 years.

Even though the proportion of imports within the NAFTA region that are subject to AD/CV investigations and definitive duties or undertakings is small, this does not mean that these actions have not imposed significant costs on the industries targeted. Table 9 contains trade value data for most of the agricultural cases investigated within the NAFTA region over the last 25 years.[14] In general, the value of imports increased in the 12-month period immediately preceding the start of an investigation. For all three NAFTA countries, imports under investigation by another NAFTA partner totaled about $5.0 billion during the 12 months prior to the initiation of a case. In comparison, imports two years prior to initiation totaled about $4.6 billion, or about 9 percent less. The largest jump was in two-way trade between the United States and Mexico. Mexican agricultural imports subject to investigation by the United States increased by an average of 19 percent during the 12-month period preceding the investigation. U.S. exports to Mexico increased by an average of 15 percent prior to investigation. As expected, in the case of both countries, imports during the 12 months after the initiation of an investigation declined.

Both AD and CV investigations and ensuing measures tend to be disproportionately concentrated in a few industries, with agricultural imports on the receiving end in a large number of cases. CUSTA contained a mechanism for reviewing AD/CV verdicts and, if necessary, remanding them to the investigating authority if they were found not to have been in accordance with the imposing country's laws.[15] This mechanism was incorporated into NAFTA as well. Prior to the implementation of CUSTA and NAFTA, final AD, CV and injury determinations could be appealed, in the United States to the Court of International Trade, in Mexico to the Tribunal Fiscal de la Federación or, in Canada for certain final determina-

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[14] Trade data were not available for Canadian imports of U.S. dry dog food, Christmas trees, or frozen pot pies and dinners. The trade data in Table 9 is at the HS6 digit level, which does not always comply exactly with the HS trade lines subject to investigation.

[15] In a remand, the panel sends a determination back to the investigating authority asking it to explain decisions, provide more information or make corrections.

Table 8: Number and Duration of Active Measures within NAFTA, June 30, 2001.

	Active Measures		***Average Duration***		***Maximum***	
	Total	***Agricultural***	***Total***	***Agricultural***	***Total***	***Agricultural***
United States						
AD Measures						
Canada	6	0	10.0	—	15.3	—
Mexico	8	1	6.9	4.8	14.5	4.8
CVD Measures						
Canada	2	0	10.3	—	11.8	—
Mexico	1	0	7.8	—	7.8	—
Canada						
AD Measures						
US	15	5	7.1	9.9	17.0	17.0
Mexico	1	0	3.7	—	3.7	—
Mexico						
AD Measures						
US	11	4	3.5	2.3	5.9	3.4
Canada	0	0	—	—	—	—

Source: Cases - U.S.: U.S. International Trade Administration (1984–2001).
Canada: Canada Customs and Revenue Agency (2002).
Mexico: U.S. International Trade Administration (1984–2001);
Also World Trade Organization (2002).

tions to the Federal Court of Appeal or for some Revenue Canada decisions, to the Canadian International Trade Tribunal (CITT). Chapter 19 of CUSTA /NAFTA provides for the binational panel review of AD, CV and injury final determinations as an alternative to judicial review or appeal to these bodies. Chapter 19 also provides for an "extraordinary challenge procedure" for appealing panel decisions under certain defined circumstances.

Since the creation of these dispute resolution mechanisms, there have been a total of 25 Chapter 19 cases reviewing final AD/CV determinations on agricultural imports, including two extraordinary challenges. The United States has been on the defensive side of 15 of these cases, 11 within CUSTA (including the two extraordinary challenges) and four within NAFTA. Canada has been on the receiving end eight times, four each with CUSTA and NAFTA, and Mexico twice. There have been cases where a

decision to remand the case to the investigating authorities has resulted in duties being rescinded. Assuming that the duties would have persisted without the panel's decision, this has resulted in an increase in bilateral trade.

In summary, the evidence suggests that imposing more restrictive rules on trade remedy actions within NAFTA would have varied effects on all three countries, since each is both an extensive initiator and defendant in these actions. While protection for import-competing industries would be less available, consumers in the importing country would benefit from access to relatively cheaper imports as would producers in the exporting country. The economies, as a whole, of each country would benefit.

In the agricultural sector, the pressure to adjust to increased competition has in some cases resulted in efforts by industry to pursue protection under trade remedy laws. But, this was the case before the agreements were in place and there is little evidence to suggest that these actions have significantly increased in recent years. Nevertheless, even though most of the trade disputes represent minor irritants that have been addressed through consultations and negotiations, some have proven to be intractable, occupying a significant portion of the political and bureaucratic agenda in each country. Some have even persisted in spite of panel decisions rendered under the dispute resolution mechanisms provided for CUSTA and NAFTA. It is important to realize, however, that these trade disputes have not necessarily been the result of CUSTA or NAFTA and they may have been worse without the agreements. The next section explores a number of promising approaches that could be taken to limit the adverse effects of AD and CV laws on trade within the NAFTA region.

ALTERNATIVES TO ADMINISTERED PROTECTION

There are a number of alternatives to administered protection in NAFTA, although any change will face political resistance. The first set of alternatives involves "tweaking" the current system of administered protection. The second set involves major changes to the system. Consideration of these potential changes may be enhanced by first defining criteria

Table 9: Bilateral AD and CVD Actions within NAFTA against Food and Agricultural Exports, 1984-2001.

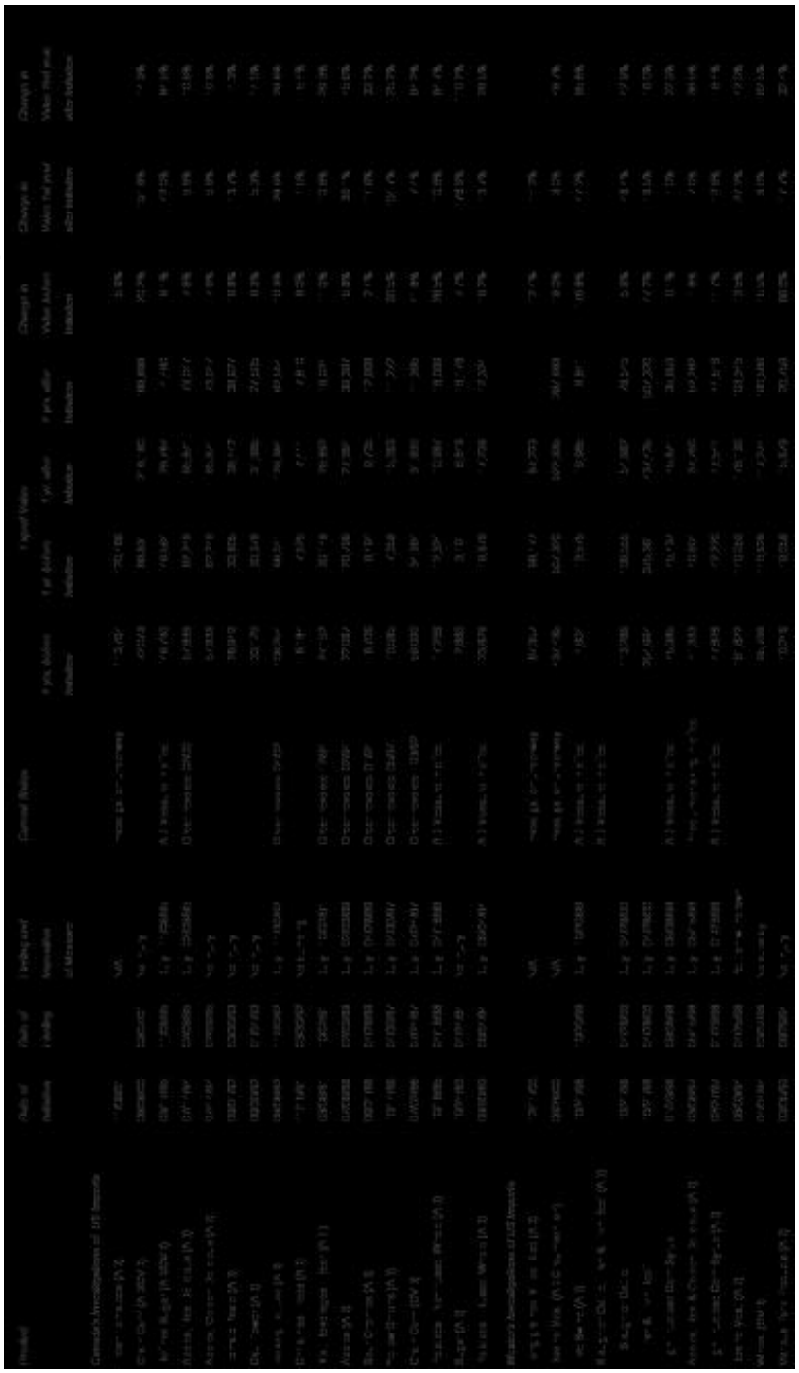
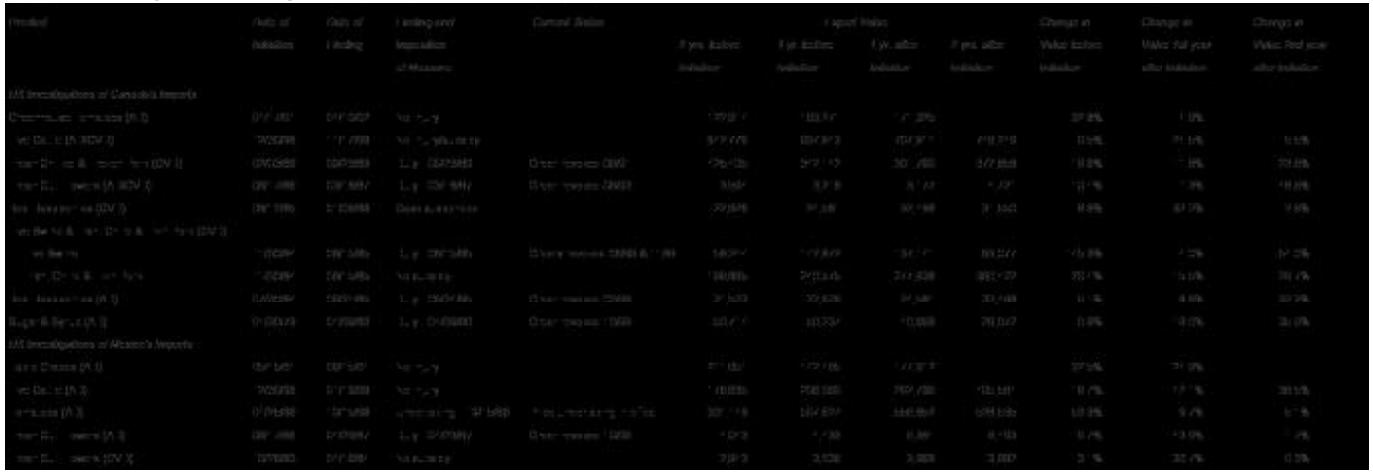


Table 9: Bilateral AD and CVD Actions within NAFTA against Food and Agricultural Exports, 1984-2001 (Continued).



Source: Foreign Agricultural Trade of the U.S. (FATUS) (1984–2001).

to evaluate the modifications—or answering the question of what we want to achieve with the changes. We propose seven possible criteria:

- reducing the incidence of trade actions;
- reducing the number of retaliatory actions, those initiated by countries in response to another countries' specific investigations;
- reducing the costs of each trade action, including the cost of conducting the suit and the economic inefficiency due to the resulting imposition of duties;
- maintaining or increasing the transparency of trade remedies;
- maintaining the ability to protect producers from unfair trade practices of other countries;
- noting the extent to which trade remedy laws are congruent with the overarching goals of the free trade area; and
- noting the extent to which modifications to trade remedy laws assist producers in considering their "domestic" market to be tri-national rather than national.

The last criterion in particular requires some explanation. Tariffs and other quantitative barriers to trade in agricultural products were phased out between 1989 and 1998 for most trade between the United States and Canada.[16] As a consequence, Canada and the United States have a bi-national market for most agricultural goods. The transition period for removal of trade barriers between the United States and Mexico will end on January 1, 2008. Following the transition period the NAFTA members will share a tri-national market.

The agreement on the creation of a free trade area and the removal of barriers to trade has occurred more quickly than the development of supporting paradigms and institutions. This may be partially due to the rapidity of change in trade rules and institutions for agriculture both within North America and within the GATT/WTO. For forty years agriculture was a special case inside the GATT, and relatively few GATT rules structured trade or disciplined domestic policies. While the importance of agricul-

[16] Exceptions include Canadian dairy, poultry and eggs, and the United States maintains tariffs on Canadian dairy, peanuts and peanut butter, cotton, sugar and sugar-containing products.

tural trade was increasing during this time, this trend did not fundamentally challenge the roles of the national government or national agricultural producer groups.

Since the completion of the Uruguay Round of multilateral trade negotiations a new set of rules apply to agriculture. National governments can still subsidize farm income and regulate food safety among other traditional functions, but rules govern how this can be done if members are to meet their WTO commitments. These rapid transitions have resulted in conflicting ideas over the role of the federal government in the market, with a tension between historic obligations to producers and the obligations imposed by trade agreements. In addition, efforts to create a binational market with a harmonious set of rules governing transactions creates tension between national desires for sovereignty and the control producers want to exert over the policies and regulations affecting foreign governments and their farmers.

Producer groups in the NAFTA market have been slow to create new institutions, namely bi- or tri-national commodity groups, to accompany the change in their marketplace (Young, 2000). The development of such institutions may increase the gains to producers from trade liberalization within NAFTA, with the gains resulting from co-operation in market development, research and development, lowering transactions costs of crossing the border and working jointly on sanitary and phytosanitary issues. The U.S. National Cattlemen's and Beef Association, the Canadian Cattlemen's Association and the Mexican Confederacion Nacional Ganadera are examples of an industry that has begun to actively pursue co-operative goals on many fronts. The continued use of administered protection inhibits this type of co-operation by emphasizing the importance of the national market and by stressing relationships between national commodity groups.

As noted in the introduction, economists have long criticized the use of trade remedies (Loyns, Young and Carter, 2000; Kerr, 2001; Barichello, 2002), however, politicians and industry groups have insisted on keeping them to manage the tension created by economic integration. Tension results when producers perceive that they are competing with dif-

ferent types and levels of government support or different marketing institutions. Tensions over differing policies run particularly high when there are pronounced changes in market share. In the next section we discuss relatively minor changes that could be made to administered protection laws to make them less protectionist. We present these options because it may be politically necessary to keep administered protection as an "escape valve" for managing tension and anti-trade sentiment during the process of economic integration. However, we believe that administered protection may not be the best way to achieve that goal.

Tweaking The Current System

The Trade Remedies Working Group (TRWG) was established by the NAFTA partners in 1993 to address issues arising from the operation of trade remedy law. The TRWG notes that the Uruguay Round Agreement (URA) resulted in significant improvements in disciplines on subsidies and also in increasing the uniformity of AD processes. The TRWG made a number of recommendations that member governments agreed to with the goal of reducing trade irritants between countries including four measures:

- to increase the transparency of proceedings and accessibility of public records;
- to increase other country's comments on standing and other factual matters;
- to simplify dumping calculations; and
- to address a variety of other technical matters relating to administered protection.

Unfortunately, the TRWG states that they have completed their assignment and are no longer meeting. However, we argue further changes should be made.

One option for consideration is to increase the difficulty of meeting the requirements for the imposition of AD and CVs and/or to change the criteria for the level of the duty. This option could be accomplished by changing some of the economic definitions used in AD and CV suits. While members of the WTO are constrained to meet the minimum level of these definitions, nothing prevents the NAFTA partners from specifying a higher

standard for the imposition of duties. A gradual increase in the criteria for the imposition of AD and CV duties could be used as a transition to eliminating their use within the NAFTA. We suggest five possible adjustments to the definitions:[17]

Increasing the de minimis level—for AD duties a margin of dumping of less than two percent of the export price is considered *de minimis.* For CVs, a subsidy level of less than one percent ad valorem is considered *de minimis* and in that case no duties are imposed. These *de minimis* levels could be increased.

Increasing the level of negligible imports— currently, the imposition of a duty requires that the imported good must be three percent of the volume of all such merchandise imported into the United States (or seven percent if a number of suits are initiated on the same day against a number of countries). This level could be increased on imports from NAFTA partners.

Restricting the duty to the level sufficient to address injury instead of the amount required to negate the dumping or subsidy margin—if the duty required to offset the injury to the domestic industry is less than the dumping or subsidy margin, (as discussed earlier in the paper) then the lesser duty could be imposed. This practice has precedence. The Canada/Costa Rica Free Trade Agreement has a provision (Chapter VII Article 2.a) that provides "for the possibility of imposing AD duties that are less than the full margin of dumping in appropriate circumstances." Mexico also has a lesser duty rule (Leycegui, Robson and Stein 1995).

Changing the calculation of duties to account for practices in the domestic industry. This modification would be to impose duties on the difference in practices between the domestic and foreign industry. For example, if Canadian producers were found to have a subsidy that is ten percent of the cost of production and U.S. producers are subsidized

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[17] In making these proposals we have generally considered United States rules as representative of what is done in all three member countries.

eight percent, then duties would be limited to the difference of two percent.

Including a provision requiring evaluation of the impact of duties on the general interest of the free trade area. This provision would be similar to the public interest provision that exists in Canada and the European Union. It would require that the broader goals prescribed by the NAFTA be considered before a determination to impose duties is made. There is also precedence for this proposal. In Canada, CITT may consider the potential impact of duties on the public interest as the "concentration of producer interests is too narrow a focus and consumer interests must be considered" (Trebilock and Howse 1995, p. 111). However, this provision is rarely used. The Canada/Costa Rica Free Trade Area does not eliminate AD cases. It does however, state that "the Parties recognize the desirability of establishing a domestic process whereby the investigating authorities can consider, in appropriate circumstances, broader issues of public interest, including the impact of AD duties on other sectors or the domestic economy and on competition . . ." (Department of Foreign Affairs and International Trade, 2003) In the European Union, once it has been shown that there is dumping or subsidization by a third country into the European Union, and that injury has been caused, before the imposition of duties the broader interests of the European Union must be evaluated. In the past, consideration has been given to the maintenance of competition, concern over the impact of duties on trade relations with other countries, and finally the impact of duties on related industries.[18]

Consultations Between Countries. Currently, NAFTA countries are not required to engage in consultations before the initiation of legal action. NAFTA allows each member to continue their use of domestic administered protection processes and, at least for the United States, administered protection processes do not require consultations. In contrast, dispute resolution systems within the WTO and NAFTA stress the role of consultations between governments before initiating formal inves-

[18] However, Trebilcock and Howse (1995) state that the European Union uses the public interest provision only to protect producers from paying more for inputs.

tigations. For example, within the WTO members must first make a request for consultations, and if the consultations are not successful, the complainant can request establishment of a panel. Consultations are confidential and without prejudice to the rights of the member in any further proceedings. Consultations are likely to involve the following steps:

- clarification of the legal basis for the dispute on the part of the complainant;
- discussion of why the defending party has maintained the policy or taken the action in question; and
- exploration and investigation of the options to resolve the conflict.

How successful are WTO consultations in resolving disputes? In July 2001, the WTO considered 51 cases with completed panel reports, indicating that initial consultations did not resolve the dispute. Thirty-seven cases were resolved in consultations without proceeding to the request for establishment of a panel, and another seven cases were resolved during the panel process before a formal report was adopted. Hence, nearly one-half of the complaints were resolved through consultations. Three examples of cases settled without a panel report include:

- the U.S. complaint against Denmark on measures affecting the enforcement of intellectual property rights;
- the Thai complaint against Colombia on the safeguard measures on imports of plain polyester filaments from Thailand; and
- the U.S. complaint against Greece on the enforcement of intellectual property rights for motion pictures and of the WTO's dispute resolution system on that matter.

Already, consultations are occasionally used between NAFTA parties during AD and CV investigations. The governments of the United States and Canada have consulted at different times during the long-standing softwood lumber dispute (Department of Foreign Affairs and International Trade, 2002). This proposal would make consultations a mandatory part of the process for resolving AD and CV suits.

If consultations were adopted as a preliminary step in resolving administered protection complaints, a process for consultations would need to be developed. One important question affecting the success of consultations is the scope of the parties included in the process. Would only the complainants be allowed to make presentations, or would the process allow for the inclusion of parties representing the broader public interest? Principles for consultations could be established to ensure that managed trade is not the outcome.

The changes in administered protection processes suggested in this section do not require major changes to the current practice, although making consultations a mandatory part of the procedure would involve legislative change. In the next section we consider a range of radical changes. The options range from the complete elimination of administered protection within NAFTA to the alternatives of "good offices" and mandatory facilitated dialogue.

Radical Changes To The Administered Protection System

One radical option for change is to eliminate AD suits within NAFTA entirely, as Canada attempted to do when negotiating a free trade area (FTA) with the United States (Kerr 2000). Other FTAs have eliminated the option to press dumping suits, notably Australia and New Zealand within the trans-Tasman market:

> *In an open trans-Tasman market, the different thresholds for anti-dumping and competition laws would have led to the protection of relatively inefficient industries in the trans-Tasman context and hence would have hampered the efficient allocation of resources between the two countries. Moreover, it was felt that the removal of trade barriers would make dumping increasingly redundant as the scope for price discrimination between the domestic and export markets was reduced, and the risk of retaliation by competitors increased. Continuation of the anti-dumping remedy would also have enhanced the possibilities for prolonged dispu-*

tation at an official level to the detriment of a beneficial commercial relationship."[19]

Other FTAs such as the Canada/Chile FTA have eliminated the use of AD measures within their FTA. Furthermore, the Canada/Chile FTA established a committee with the view to eliminating the need for CVs as well. Another goal of this committee is to work with other like-minded countries to remove the application of AD measures in FTAs (Article M-05 of the Canada/Chile Agreement). The political difficulty of eliminating administered protection processes within the European Union may have been lessened by the existence of their Common Agricultural Policy and the fact that the European Union is a customs union.[20] In contrast, fierce political opposition has been expressed to the elimination of administered protection processes by U.S. legislators (Kerr 2001).

Alternative Dispute Resolution Processes. Among other radical changes to administered protection processes is the introduction of alternative dispute resolution (ADR). The U.S. government and the Canadian federal and provincial governments have adopted ADR for use in a variety of contexts. Within NAFTA, ADR is recognized as a valuable tool for the resolution of private commercial disputes (Department of Foreign Affairs and International Trade, 2001).

ADR processes usually involve a third neutral party which has no stake in the outcome. The goal of ADR is to encourage communication, and to leave litigation as a last resort. The literature in dispute resolution suggests the following criteria when considering the introduction of ADR:

- does the current system produce acceptable and durable outcomes?
- what are the costs of the current system and are they acceptable?

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[19] (Leycegui, Robson and Stein 1995, p. 210).

[20] The European Union has also eliminated AD suits between member states. As the European Union is a customs union with a Common Agricultural Policy, this case has different characteristics than NAFTA.

- what is the impact of the current systems on the relationships between the parties and to what extent are the relationships valued?
- are the disputants involved in the generation of the solutions to the dispute or is that function given to a separate authority?

These questions may be useful to policymakers concerned with whether or not to modify existing AD and CV processes.

While ADR includes a wide variety of options, two processes are suggested for incorporation into a dispute resolution system for administered protection cases: "good offices," and mediation between the industry pressing the suit and the industry under investigation. Before these two processes are considered in detail, a hypothesis on the causes of administered protection suits and the characteristics of dispute resolution systems are considered.

Hypotheses On The Motivations For Initiating A Suit

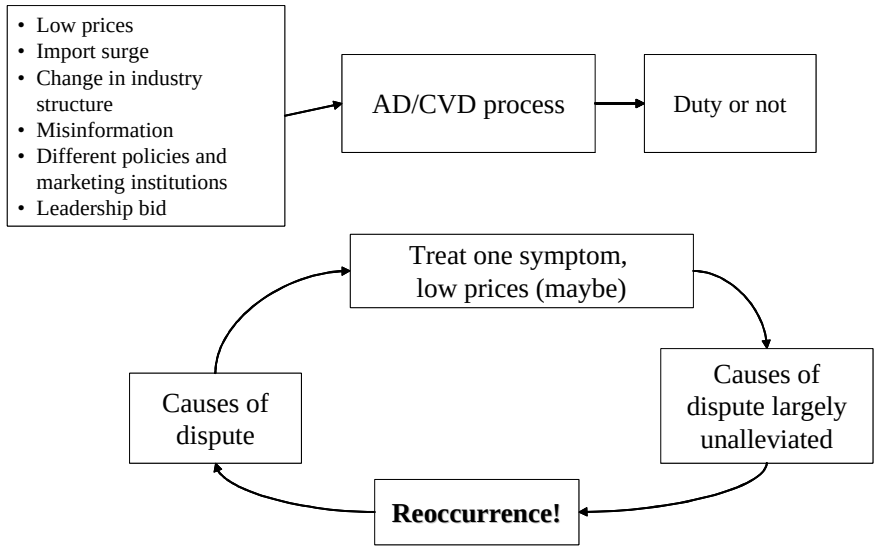
Six possible motivations exist for pressing an AD or CV suit:

- the actual evidence of dumping or subsidies;
- low prices and import surges;
- changes in industry structure;
- misinformation;
- differing policies, regulations and marketing structures; and
- leadership bids within commodity organizations.[21]

Of these six, the perceptions held by producers about the advantages given to their competitors due to differing government subsidies and policies may be most critical. As indicated in Figure 3, some of these factors may feed into the tension that motivates the suit; however, AD and CV processes are limited to the determinations of dumping and/or injury. Outcomes are limited to the imposition of a duty or not, and many of the other

[21] This hypothesis has been discussed with Chuck Lambert of the U.S. National Cattlemen's Beef Association and he was supportive of this view. Other industry groups are being approached to validate or to correct this proposition. Rice (2000) offers further support in his assessment.

Figure 3: Factors Leading to an AD and CVD Dispute.



causal factors remain unaffected by the outcome. Because many of the tensions underlying the dispute are not alleviated, the suit may occur again. This hypothesis is supported by the number of repetitive suits and investigations that exist in some industries, for example, cattle and grains (Young, 2000) and hogs (Meilke and van Duren, 1990). In the recent tomato dispute (Barichello in this publication), a suit filed by the U.S. tomato industry against Canadian greenhouse tomatoes promptly motivated a Canadian suit against the U.S. fresh tomato industry. Another example is the Mexican action against U.S. beef exports filed during consideration of a U.S. AD suit against the Mexican beef industry.

Characteristics Of Alternative Dispute Resolution Systems

If an ADR system is being considered to replace administered protection, it is useful to consider the five common elements of such a system:

Assessment of the resolution options. The complainants assess the conflict and identify the stakeholders, as well as the economic, political and legal issues. The processes available for the resolution of the dispute may be evaluated, and the cost and the timeliness of different op-

tions may constrain choices. Currently, administered protection does not offer a choice of dispute resolution processes to disputants.

Identification of the interests and the development of the agenda of issues. Identifying the interests (needs) Disreali once said, "I serve your interests and not your desires" underlying a group's positions is critical to a successful resolution of the conflict. The industry may have one set of interests around the dispute and another broader set of general interests. The general interests of the group pressing the suit may include access to other NAFTA markets, avoidance of a countersuit, a general de-escalation of the use of trade remedies, regulatory and policy harmonization within NAFTA, increased demand for their product, trade liberalization generally, and a unified domestic industry. Administered protection processes are centered on the criteria for imposing duties and do not identify or evaluate a broader set of interests.

Fact finding—may include an analysis of the data needs of the stakeholders for successful resolution of the conflict. Joint fact finding stresses the importance of all parties being involved in defining questions requiring additional data, and how data will be collected and interpreted (Adler et al., 2001; Environmental Protection Agency, 1999). The goal of joint fact finding is to avoid the use of "duelling experts" hired by one side and distrusted by the other, and instead to use methods and experts that all parties agree upon. In administered protection processes, fact finding occurs through a rigidly structured process. Public input is accepted, but stakeholders have no ability to influence the course of the prescribed investigation. Frustration has been frequently expressed over the criteria for a positive assessment of dumping, indicating a lack of respect for the process on the part of both participants and analysts.

Collaborative problem solving—along with fact finding may occur in iterations as the investigation leads to the generation of new options. Stakeholder groups may work collaboratively in generating options that will best meet the interests of all participants. This may also involve stakeholders consulting with their constituent groups over the desirability

of various outcomes. In administered protection processes, the possible outcomes are predetermined, with a duty being imposed or not.

Settlement. It involves negotiation and agreement by parties over the options for resolution of the dispute. In administered protection processes, even if a duty is imposed, trade tension almost certainly continues to exist and may well increase.

One point of the description above is to illuminate that administered protection does not have the characteristics of an ADR, but may more aptly be considered an administrative review. The process of adjudication does not assist groups in identifying their interests, nor does it involve them in generating options to advance those interests. The proposals made here to include good offices and mediation are meant to supplement the current process of administrative review.

Good Offices

"Good offices" are used when a third party works to correct misunderstandings, to reduce fear and mistrust and to increase communication. Good offices stop short of mediation as they do not involve formal negotiation. The use of good offices takes a variety of forms. Within the WTO, the Director-General may offer his good offices with a view to assisting members to settle a dispute. A similar role is frequently taken by the UN Secretary General who uses his good offices (generally meaning the weight and prestige of the world community he represents) to undertake efforts publicly or privately to prevent international disputes from developing, escalating or spreading. In some cases, a good offices commission has been established and any of the members can be called on to offer their services to resolve disputes.

The success of a good offices commission within NAFTA would depend critically on the use of commissioners who were effective in their role, who could act effectively as neutral parties, while working with industries to foster the communication required for collaborative problem solving. It is envisioned that industry could request the services of a good

offices commissioner to seek an early resolution of its dispute. This process is proposed to be voluntary, less formal and less structured than the proposal for facilitated dialog discussed below.

Mandatory Facilitated Dialogue

The proposal of mandatory facilitated dialogue is to have the complainants engage in a dialogue with all stakeholders, facilitated by a neutral party, before the national administered protection agencies for all NAFTA partners can investigate a suit. Facilitated dialogue is a type of mediation the purpose of which is to explore issues, interests and options. It is however, less geared toward negotiation and settlement than mediation. The purpose of the facilitated dialogue is to engage the complainant in a wide-ranging discussion on the consequences, costs and benefits, widely defined, of pursuing the suit. The underlying premise is that the complaining industry may have higher opportunity costs than the substantial amount of money and effort required to launch a suit. These opportunity costs are detailed below. Participants would include the industry under investigation and other stakeholders in the domestic industry. If the domestic industry is divided about whether or not to initiate the suit, all relevant divisions in the domestic industry would need to be included.

A discussion of the costs and benefits of the suit might include three topics:

- whether or not the defending industry is likely to retaliate by initiating a suit through its own domestic AD and CV process. Such retaliatory suits occur with enough frequency to be a consideration;
- if the domestic industry is divided on the question of the suit, particularly the leadership of commodity organizations, discussion is needed about the cost to the domestic industry of proceeding with a divisive action;
- discussion is needed about how the industries might gain from co-operation on issues of joint concern and the possible impact of the suit on progress toward cooperative goals and the relationships involved. It has been observed that progress on these issues may be halted during the course of the AD and CV actions.

Another important element of the facilitated dialogue would be to correct misinformation that might exist, particularly on the costs of production in both (or all three) countries, and differences in policies and marketing systems that affect returns to producers. This question might need to be addressed through a joint fact finding effort, in which all participants define the question, what data are needed, and how to interpret the data. An investigation that is jointly devised and that has the respect of all parties may be instrumental in addressing the problem of misinformation that is widely recognized to form an important part of trade tension.

In-depth, face-to-face discussions may yield other benefits. For example, the ironic fact that if the defending industry is selling at less than the cost of production (as input and output prices across the border are highly correlated), it is likely that the complaining industry may also be engaging in the same practice to some degree. The ability of commodity groups to reach this level of honesty and to have it affect their negotiations will depend critically on the skill of the facilitator and the vision of the industry held by its representatives.

Some disputes have three characteristics that favor the use of mediation:

- the outcome of litigation is unknown which would appear to be the case as for administered protection cases. The statistics for U.S. AD and CV cases between 1980 and 1998[22] are:
  - Title VII cases—positive 35%, negative 39%, terminated 25%
  - AD cases—positive 42%, negative 36.5%, terminated 22%
  - CV cases—positive 23%, negative 45%, and terminated 32%.

These percentages are based on the number of cases, not the value of imports.

- the parties are interdependent. The degree of interdependence between parties will vary by industry. Some industries may place a high value on the maintenance of relationships across the border within the industry and the up- or down-stream segments of the industry, and between commodity groups and governments;

[22] U.S. International Trade Commission 1999.

- issues are clearly identifiable and there are multiple issues, allowing give and takeand trade-offs between parties.

Five factors impede the success of mediation as a tool for resolving disputes:

- parties do not have on-going relationships;
- one party has an easier way to meet its needs;
- parties are under outside pressure to fight;
- too much or not enough urgency; and
- mandated participation in mediation.

The purpose of facilitated dialogue is to assist the complainant in making a comprehensive evaluation of the consequences of pressing an AD or CV suit. If the complainants proceed to press the suit, the outcome may still include education for all parties on the other's interests, increased knowledge of the potential for collaboration, familiarity with other country's industry leaders, and a clearer picture of the likely consequences of pressing the suit. If the complainants decide after the facilitated dialogue not to press the suit, then all of the proceeding advantages apply, as well as a reduction in the incidence and costs of the trade remedies.

An important question is whether the facilitated dialogues should be mandatory or voluntary. Mediation is argued to have the highest chance of success when all parties enter the process voluntarily. However, there is ample precedence for mediation that is mandatory. In many situations when mediation is mandated and no agreement is reached, the case will proceed to litigation, or in this case, to administrative review. Given the history of AD and CV in the United States and the proclivity of parties to use it -- it is likely that the domestic industry may be reluctant to engage in this process on a voluntary basis.

CONCLUSIONS

Domestic industries have the opportunity to pursue administered protection within NAFTA, even though the reduction or the elimination of tariffs has largely eliminated the ability of firms to price discriminate be-

tween national markets. This means that the rational for dumping, widely considered theoretically weak to begin with, has become even weaker with the implementation of NAFTA.

An examination of the data on AD and CVD suits between NAFTA parties indicates lower tariffs have not resulted in an explosion of administered protection. In fact, during most of the 1984 to 2001 period, NAFTA members were subject to fewer investigations by their NAFTA partners than their import shares might suggest. Since the agreement, Mexico has increased the frequency of its suits, but the United States and Canada have not. The agreement appears to have moderated, overall, the incidence of trade remedy actions between countries. However, with 22 percent of cases initiated, agriculture is responsible for a substantially higher percentage of cases than its import share.

While it is true that the number of suits has not increased dramatically with the elimination of most tariffs, this conference and previous ones have discussed in detail the cost of AD and CV suits. Authors have been critical of the motivations prompting the suits, the criteria used to determine the outcomes, the trade-dampening effects of a suit in progress, and the economic inefficiency caused by the imposition of duties. In Canada duties are imposed in 70 percent of the investigations, and in over 50 percent of the cases in the United States and Mexico, These odds make it extremely difficult to find a constituency with the political will to change the system, despite the economic costs and the impact these suits have on the commercial and governmental relationships that are critical to achieving the goals of the FTA.

If a constituency exits that believes that the current system does not produce acceptable outcomes, then the next question is what goals should be pursued in the adoption of a new process for resolving AD and CV complaints? How important are possible goals of cost and incident reduction, transparency of resolution processes, and the promotion of commercial ties between NAFTA partners?

The options for the modification of administered protection processes are evaluated according to the criteria presented earlier (Table 10). Options 1–3 would reduce either the size of the duty or the likelihood of its imposition. Option 4, requiring consideration of the interests of the FTA, is difficult to evaluate because it is poorly defined in an operational sense, and the literature indicates that this clause has been ineffective in other venues. The removal of AD and CV suits meets all criteria with the possible exception of maintaining the ability to protect producers. The caveat is that safeguard provisions do offer some automatic protection to producers from import surges, but not specifically from dumping.

Requiring consultations, the use of good offices, and facilitated dialogue all may reduce the incidence of suits (and thus their overall cost) by terminating the suit before it progresses to administrative review. These options score poorly on transparency, as these processes are unlikely to be open to the public and by their nature are poorly suited to rigid guidelines. However, best practices and guidelines could be developed. These three processes are appropriate if an implicit goal is to strengthen relationships between industries. By doing so they assist in a paradigm shift to a trinational market, which in itself should reduce the incidence of AD and CV suits between NAFTA partners.

However, to the extent that AD and CV processes are used as an escape valve for the tensions inherent in economic integration, it is more appropriate to try to reduce the likelihood of conflict at an earlier stage. The NAFTA agreement did set up a number of working groups to address issues of economic integration, but much remains to be done. It would be useful to offer an array of ADR processes for industries to manage tensions and to work through issues that are unconnected to AD/CD processes. This array could include good offices, facilitated dialogue and mediation offered to industries through the NAFTA secretariat.

Political opposition has thwarted past attempts to eliminate AD and CV suits within the context of NAFTA. This paper has explored the frequency of suits within the agricultural sector and has offered some ideas

about how to reduce the cost of the current system by supplementing it with other options for resolving these disputes.

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APPENDIX

Table A1: Bilateral AD/CVD Actions Within NAFTA Against Food and Agricultural Exports, 1984-2001, follows on the next page.

Table A1: Bilateral AD/CVD Actions Within NAFTA Against Food and Agricultural Exports, 1984-2001.

Product	*Initiation*	*Final Determination*	*Final Duty*	*Dispute Resolution 1/*	*Current Status*
Canada's Investigations of U.S. Imports					
Fresh Tomatoes (AD)	11/9/2001				Investigation underway
Grain Corn (AD)	8/9/2000	3/7/2001			Finding of no injury
Grain Corn (CVD)	8/9/2000	3/7/2001			Finding of no injury
Baby Food Products (AD)	10/3/1997	4/29/1998	59.76%	NAFTA panel (1)	AD Measure in effect
Refined Sugar (AD)	3/17/1995	11/6/1995	43.86%	NAFTA panel (1)	AD Measure in effect
Refined Sugar (CVD)	3/17/1995	7/7/1995			Finding of no subsidy
Apples, Red Delicious (AD)	7/14/1994	2/9/1995	28.00%	NAFTA panel (1)*	Order revoked 02/08/00
Golden Delicious (AD)					Finding of no injury
Tomato Paste (AD)	9/1/1992	3/30/1993		CUSFTA panel (1)*	Finding of no injury
Cauliflower (AD)	6/30/1992	1/4/1993			Finding of no injury
Iceberg Lettuce (AD)	6/8/1992	11/30/1992	31.00%		Order revoked 04/22/02
Christmas Trees (AD)	11/15/1991	3/30/1992			Finding of no dumping
Malt Beverages - Beer (AD)	3/6/1991	10/2/1991	29.80%	CUSFTA & NAFTA panels (4)	Order revoked 12/2/94
Dry Dog Food (AD)	3/28/1990				Terminated 6/25/90
Apples (AD)	7/8/1988	2/3/1989	27.45%		Order revoked 02/07/94
Sour Cherries (AD)	6/21/1988	N/A	35.36%		Order revoked 01/29/94
Yellow Onions (AD)	10/14/1986	4/30/1987	42.58%		Order revoked 05/21/97
Grain Corn (CVD)	7/2/1986	3/6/1987	54.00%		Order revoked - 03/05/92
Potatoes - Non-russet Whole (AD)	10/18/1985	4/18/1986	32.40%		AD Measure in effect
Frozen Pot Pies & Dinners (AD)	4/24/1985	7/4/1988			Price undertaking; now expired
Sugar (AD)	10/24/1983	4/24/1984			Finding of no injury
Potatoes - Russet Whole (AD)	9/30/1983	6/4/1984	N/A		AD Measure in effect
Mexico's Investigations of U.S. Imports					
Long-grained Milled Rice (AD)	12/11/2000				Investigation underway
Bovine Meat (AD Circumvention)	9/29/2000				Investigation underway
Live Swine (AD)	10/21/1998	10/20/1999	$.351/kg (48.13%)		AD Measure in effect
Slaughter Cattle, Frsh & Frzn Beef (AD)	10/21/1998	4/8/2000	12-76%-214.52%	NAFTA panel (active)	AD Measure in effect
High Fructose Corn Syrup	1/23/1998	9/8/1998			
Grade 90 (AD Circumvention)			$55.37-$90.36/mt		AD Measure in effect
Apples, Red & Golden Delicious (AD)	3/6/1997	5/15/1998	$.72/kg		Price undertaking in effect
High Fructose Corn Syrup (AD)	2/27/1997	12/26/1997		NAFTA panel (active)	
Grade 42			$63.75-$100.60/mt		AD Measure in effect
Grade 55			$55.37-$175.50/mt		AD Measure in effect
Bovine Meat (AD)	6/3/1994				Petition withdrawn 04/25/96
Wheat (CVD)	4/4/1994	3/7/1996			Finding of no subsidy
Various Pork Products (AD)	1/25/1993	8/26/1994			Finding of no injury
U.S. Investigations of Canada's Imports					
Greenhouse Tomatoes (AD)	4/17/2001	4/10/2002			Finding of no injury
Live Cattle (AD)	12/30/1998	11/17/1999			Finding of no injury
Live Cattle (CVD)	12/30/1998	10/21/1999		NAFTA panel (2)*	Finding of no subsidy
Fresh Chilled & Frozen Pork (CVD)	2/3/1989	7/24/1989	N/A	CUSFTA panel (5)	Order revoked 06/27/91
Fresh Cut Flowers (AD)	6/17/1986	1/20/1987	N/A		Order revoked 06/18/93
Fresh Cut Flowers (CVD)	6/17/1986	1/20/1987	N/A		Order revoked 01/01/93
Red Raspberries (CVD)	8/12/1985	1/9/1986	N/A		Investigation suspended 01/09/86; Terminated 10/09/91
Live Swine & Frsh, Chll'd & Frzn Pork (CVD)	11/30/1984	6/17/1985		CUSFTA & NAFTA panels (6)	
Live Swine (other than slaughter animals)			$.02602/lb		Order revoked 11/04/99
Slaughter Sows & Boars			$.02602/lb		Order revoked 08/29/96
Dressed Wt. Swine			$.03272/lb		Order revoked 11/04/99
Frsh, Chll'd & Frzn Pork					Finding of no subsidy
Red Raspberries (AD)	7/30/1984	5/10/1985	0%-22.76%	CUSFTA panel (1)	Order revoked 02/26/99
Sugar & Syrup (AD)	4/30/1979	11/8/1979	$.010105-$.0237/lb		Order revoked 10/28/99
Instant Potato Granules (AD)	9/28/1971	6/7/1972	N/A		Order revoked 07/31/87
U.S. Investigations of Mexico's Imports					
Table Grapes (AD)	5/15/2001	6/15/2001			Finding of no injury
Live Cattle (AD)	12/30/1998	1/19/1999			Finding of no injury
Tomatoes (AD)	4/25/1996	11/1/1996			Price undertaking in effect
From 10/23 to 06/30			$.2108/lb		
From 07/01 to 10/22			$.172/lb		
Fresh Cut Flowers (AD)	6/17/1986	3/3/1987	0%-29.4%	NAFTA panel (1)	Order revoked 10/15/96
Fresh Cut Flowers (CVD)	10/26/1983	4/16/1984			Finding of no subsidy

1/ Number of panel cases in parentheses.

* Terminated, no decision issued

Source: Cases - U.S.: International Trade Administration Database (http://ia.ita.doc.gov/); Canada: Special Import Measures Act Database (http://www.ccra-adrc.gc.ca/customs/business/sima/historic-e.html); Mexico: *The Year in Trade* (ITC publication), various years; Also, WTO - Members' semi-annual reports to the Committees on Antidumping Practices and Subsidies and Countervailing Measures (http://www.wto.org/english/tratop_e/tratop_e.htm)