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# Four case studies of agri-food CVDs and a proposal for reforming national administered protection agencies

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## Abstract

This paper reviews the role of national administered protection agencies, whose primary responsibility is the enforcement of national trade remedy laws. After reviewing four recent cases of trade disputes between Canada and the United States, it is argued that the role of national administered protection agencies should be changed. The growth of regional trading blocks, the increasing use of anti-dumping and countervailing duty actions against fairly traded imports and the additional responsibilities assumed by the WTO in administering the Agreement on Agriculture strongly suggest that all trade disputes should be taken to the WTO for settlement. The role of national administered protection agencies should be changed to make them agents for trade liberalization. This would involve these agencies taking on three primary functions: (i) as transparency agents; (ii) as investigatory agents; and (iii) as advocacy agents. © 1997 Elsevier Science B.V.

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## 1. Introduction

The rules governing anti-dumping (AD) and countervailing duties (CVD) have been a continuous source of controversy in multilateral trade relations. The United States enacted national trade remedy laws early in the twentieth century, to deal with predatory pricing and subsidized foreign competition. In recent years, laws to govern unfair trading practices have been put into place in other countries as well. Currently, 40 countries have national anti-dumping and countervailing duty legislation (Schott, 1994). However, only a few developed countries (United States, Canada, European Union and Australia) are heavy users of these laws. Developing countries have been slow to implement and enforce contingent protection legislation.

The economic effects of AD and CVD laws are not always transparent. The imports of major agricultural commodities have seldom been affected by these laws, but the imports of many 'minor' agricultural products such as cut flowers, red raspberries, kiwi fruit and asparagus have been. Between 1980 and 1992 more than 1000 AD/CVD cases were filed by the United States and only 34.2% ended with affirmative outcomes and final duties being applied (De Vault, 1993). Except for 1982, the subject imports never accounted for more than 1% of total U.S. imports (United States International Trade Commission, 1995). These figures, however, do not reflect the true costs of contingent protection. While roughly one-third of the U.S. AD/CVD cases received final affirmative duties, less than 25% of the cases were dismissed. The remainder of the cases involved the application of provisional duties or were concluded with price agreements and/or voluntary restraint agreements (De Vault, 1993). All of these less for-

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mal trade actions involve import harassment and import protection.<sup>1</sup> There are indications that AD/CVDs have often been used to impede the exports of developing countries. For example, the U.S. has brought fourteen separate cases against Colombia's cut flower industry (Congressional Budget Office, 1994).

In recent years, the U.S. has consistently taken a position in favour of more stringent AD/CVD laws. As a consequence, there have been more cases filed and a substantial increase in the average duty applied to 'unfair' imports by the United States (De Vault, 1993).

The economic costs of AD/CVD laws on the country imposing these duties can be substantial. Since the country imposing the AD/CVD is an importer, the duty acts like a tariff and it lowers the economic welfare of the country that imposes the duty.<sup>2</sup> Welfare is lowered because expensive home country production or 'fairly' traded imports are substituted, for 'unfairly' traded ones.<sup>3</sup> The USITC in a comprehensive analysis of the economic effects of AD/CVD actions in the United States calculated a net welfare loss of \$1.59 billion and job losses of 4075 in the affected sectors (United States International Trade Commission, 1995). This amounts to about \$39,000/worker transferred from employment in the affected sector to alternative employment elsewhere in the economy.<sup>4</sup>

National administered protection agencies (NAPAs), such as the United States International Trade Commission (USITC) and the Canadian International Trade Tribunal (CITT) are charged with the application of national trade remedy laws. These agencies not only take AD/CVD actions against the

unfair trading practices of foreign exporters, but they also provide input into the proceedings of other forms of contingent protection. For example, the USITC has recently carried out Section 332 investigations of the Canadian beef cattle and durum wheat industries and it provided economic analysis of the US Section 22 investigation of Canadian durum wheat exports.

Significant changes were made in AD/CVD laws as a result of the Uruguay Round of trade negotiations. For CVD investigations the changes include: (1) specific time schedules for decisions, (2) a higher de minimus level, (3) a 5-year sunset provision, (4) the opportunity for consumers of the foreign product to make representations, (5) different rules for developing nations, and (6) an appeal process (Schott, 1994). Most importantly, WTO panel reports cannot be blocked from adoption, except by consensus. The WTO rules governing AD and CVD actions are not self-executing, hence these procedures must be incorporated into domestic legislation and applied by NAPAs.

The objective of this study is to evaluate the role of the NAPAs under the WTO. While the NAPAs perform a variety of functions, the analysis is concentrated on CVD cases. In Section 2, the economic and political issues involved in a typical CVD investigation are reviewed and the changes introduced by the Uruguay Round of GATT negotiations are highlighted. Four case studies involving trade disputes between Canada and the United States are presented in Section 3. Section 4 draws on the lessons to be learned from these case studies and outlines a proposal for changing the role of NAPAs. Section 5 offers some concluding remarks.

## 2. Economic and institutional issues involved in AD and CVD actions

Anti-dumping laws were introduced in the United States to combat predatory pricing. Predatory pricing is the practice of a firm selling products below cost to drive out rival firms, thereby creating a monopoly for itself. Its monopoly position then allows it to subsequently raise prices above those that prevailed before the predatory pricing began. This type of firm behaviour stifles competition and is welfare decreas-

<sup>1</sup> It is generally accepted that bringing a AD/CVD case results in import harassment. The uncertainty surrounding the possibility of a trade action results in caution being exercised by foreign exporters, especially considering the cost of defending themselves, even when successful.

<sup>2</sup> The exception is when the importing country is 'large' and the duty approximates an optimal.

<sup>3</sup> There is considerable evidence of trade diversion from 'unfairly' to 'fairly' traded imports as a result of AD/CVD actions in the United States (United States International Trade Commission, 1995).

<sup>4</sup> The CGE model employed by the USITC assumes full employment (United States International Trade Commission, 1995).

ing. However, it is widely believed that successful predatory pricing is extremely rare. For example, Shin (1994), in her study of 282 anti-dumping cases, could find only 10% that were consistent with dumping behaviour. Successful predatory pricing for agri-food products seems even less likely than for manufactured products given their homogeneous character.

The economic basis for a CVD complaint is different than that for an AD action. An anti-dumping action is brought by domestic producers against foreign firms who are alleged to be engaging in unfair pricing practices. A countervailing duty case, on the other hand, is brought by domestic producers against foreign governments. As Horlick (1991) (p. 137) notes, there is 'a grain of truth, which is the distortion caused by subsidies' lying behind the rationale for a CVD, while AD actions are '90% pure protectionist'. Essentially, domestic firms should not be expected to compete against the treasuries of foreign governments.

Countervailing duty investigations deal with questions which are familiar to economists. What are the effects of subsidies or pricing practices on production, trade flows, prices and industry welfare? The simple analytic of export and production subsidies can be illustrated using graphical analysis.

Panel (a), in Fig. 1, denotes the foreign country, panel (c) the home country and panel (b) the trade sector. The intersection of the excess supply and excess demand curves determines the free trade world market price,  $P_W$ . At this price, the foreign country consumes  $D_f$ , supplies  $S_f$  and the home country supplies  $S_h$  and demands  $D_h$  and the world trade volume is OE. A constant per unit export subsidy in

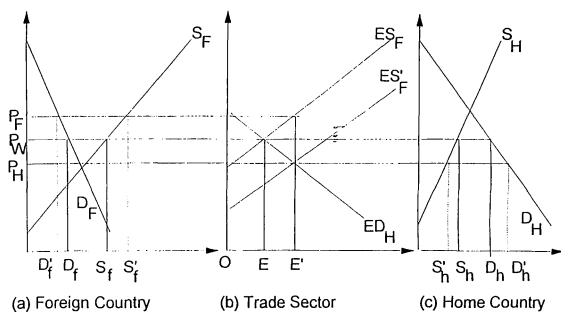


Fig. 1. Effects of an export subsidy.

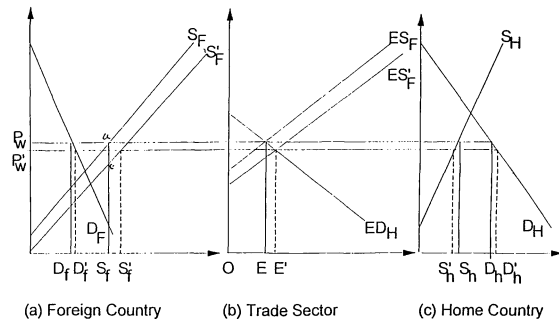


Fig. 2. Effects of domestic subsidy.

the foreign country shifts the excess supply function from  $ES_F$  to  $ES'_F$ . As a result, the world price declines from  $P_W$  to  $P_H$ . However, the price in the foreign country increases from  $P_W$  to  $P_F$  due to the export subsidy. The volume of trade increases from OE to OE'. Foreign country producers and home country consumers gain while foreign consumers and home country producers lose as a result of the export subsidy. If a countervailing duty equal to  $P_F - P_H$  is levied on imports, the excess supply curve shifts back to its original position  $ES_F$  and the free trade equilibrium price and quantities are restored.

Fig. 2 illustrates the case of a domestic subsidy. In panel (a) the competitive supply curve  $S_F$  is shifted to the right, to  $S'_F$ , as a result of either an input subsidy or a fixed per unit output subsidy. This causes the excess supply curve to shift from  $ES_F$  to  $ES'_F$ . World price declines from  $P_W$  to  $P'_W$  in both the importing and exporting regions. As before, the volume of trade increases from OE to OE'. If the home country imposes a countervailing duty equal to the per unit domestic subsidy (a–c), the new excess supply curve will shift to the left of the competitive supply curve ( $ES_F$ ) resulting in higher world market prices and lower world trade volumes than in the free trade situation. The degree of the price and trade distortions of a domestic subsidy depends on the elasticity of the excess supply and excess demand curves. A countervailing duty equal to the per unit domestic subsidy is correct only when the excess demand curve is horizontal.<sup>5</sup> However, in this case the foreign nation (i.e., the exporter) is a 'small

<sup>5</sup> The duty is 'correct' in the sense that it results in the free trade level of imports.

country' and its exports have no effect on price in the home market. Hence, a small country can not cause material injury.

While the analytical framework presented above captures the essence of the issues involved in AD/CVD cases, a practical CVD investigation also requires a set of rules to guide the inquiry. These rules delineate the scope of an investigation and increase the probability of objective and consistent outcomes.

The WTO Agreement on Subsidies and Countervailing Measures provides a three-step process for determining if a country may legally impose a countervailing duty on the exports of another country.

*Standing:* Are the complainants representative of the domestic industry that produces the subject product? In making this determination, the Agreement on Subsidies and Countervailing Measures states that an application can be considered to have been made on behalf of the domestic industry if it is supported by domestic producers whose collective output constitutes more than 50% of the total production of the like-product. No investigation should be undertaken if the petition is supported by less than 25% of total like-product production.

*Subsidy:* Does a domestic or export subsidy exist in a foreign nation which influences domestic imports? The WTO provides an illustrative list of export subsidies, a definition of non-actionable general (non-specific) subsidies and a short list of non-actionable specific subsidies. The WTO also specifies a de minimus level for actionable subsidies of 1% ad valorem in countervailing duty cases. In addition, the Agreement on Agriculture contains a number of exceptions which apply to agriculture.

*Injury / Causality:* Is the complainant's industry materially injured or threatened with material injury as a result of the subsidized imports and, not by other factors which could be harming the industry? On this point, the Agreement is quite specific. It says that "it must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury." In addition, "the demonstration of a causal relationship between the subsidized imports and the injury shall be based on an examination of all relevant evidence before the authorities—other factors (affecting the industry) should not be ascribed to the imports."

The three-step process used in evaluating the domestic effects of subsidized imports are generally consistent with the principles of economic policy evaluation. The rules on standing are designed to reduce frivolous complaints, although they are not sufficiently stringent to keep Canada's single producer of padded and perfumed ladies coat hangers from alleging injury resulting from imports of foreign like-products.

Many of the subsidies provided to agricultural producers are transparent. Nonetheless, the calculation of the level of the subsidy is often problematic due to disagreements about specificity and measurement techniques.<sup>6</sup> However, the determination of injury is generally the most controversial aspect of a CVD investigation. Finally, in discussing remedial measures, the WTO rules emphasize that the duty should only be large enough to remove the injury.

*Remedy:* If an investigation uncovers subsidies above the de minimus level and material injury has occurred, the WTO allows a countervailing duty to be applied to the subsidized imports. The WTO allows the countervailing duty to be 'up to' the level of the measured subsidy. The Agreement on Subsidies Countervailing Measures says that "it is desirable that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove injury to the domestic industry."<sup>7</sup>

In every countervailing duty investigation there are several key decisions that influence the potential for an adverse ruling. These decisions are a part of the standing determination but go well beyond the legal issue of who has the right to bring a case.

Article 11.4 of the Agreement on Subsidies and Countervailing Measures says that domestic producers have the legal right to bring a countervailing duty case if they produce a product 'like' the one subsidized by the foreign government. The term 'like-

<sup>6</sup> The WTO and US CVD laws require that a subsidy be specific to an industry in order for it to be countervailable.

<sup>7</sup> While calculating the proper level for the countervailing duty in the case of a domestic subsidy is more complicated than in the case of an export subsidy, because it relies on economic parameters (supply and demand elasticities), these parameters are often needed to determine injury. Hence, this information could be used in selecting a more appropriate remedy.

product' is not well-defined leaving this decision largely up to the complainant and national authorities' to decide. In general, the complainant will have an incentive to reduce the size of the allegedly injured domestic industry. In this way, the effects of the subsidized imports are more concentrated making it easier to find injury. An example, cited by the Congressional Budget Office, relates to the CVD cases against cut flowers. When the industry was defined as the entire cut flower industry, the USITC usually found no injury, but when the industry was defined for specific flowers, injury was found.

A second key decision relates to the issue of whether the foreign subsidized product is similar to, or identical to the domestic product. Economists tackle this question through the use of elasticities of substitution in final consumption for a consumption good, or production for an input. An infinite elasticity of substitution implies homogeneous goods, while an elasticity of substitution greater than zero but less than infinity signifies differentiated products. An elasticity of substitution equal to zero shows that the goods are used in fixed proportions. In general, the complainant will argue that the imported goods are identical to the domestic good, while the defendant will argue that the imported product is differentiated. If no injury is found using the homogeneous good assumption it seems unlikely that injury could be proven if the goods are considered differentiated products. However, injury might be found for homogeneous goods but not for differentiated products, hence the importance of the decision.

Finally, some agri-food products are traded in more than one form and at multiple levels of the market. The use of an agri-food product as an input raises the issue of 'upstream' subsidies. An upstream subsidy investigation requires two steps. The first step is to document the government programs that provide subsidies and to determine at which market level they most logically apply. The second step is to analyze the potential for the subsidies to injure the domestic industries at both levels.

These possibilities suggest that a proper evaluation of the potential effects of existing subsidies on various market participants is not a trivial task. Indeed, 'real world' CVD cases are often messy. Seldom do the facts fit neatly into a textbook example. We review four such 'messy' CVD cases in

Section 3. Two cases brought by the United States against Canada (softwood lumber and hogs/pork), one Section 22 investigation against Canada (durum wheat) and one CVD action brought by Canada against the United States (corn).

### 3. Four case studies

Over the past 15 years, Canada and United States have been engaged in a number of trade disputes. Four of these disputes have been selected for review because of their complexities, duration, economic importance and political profiles. These cases generated heated political debates both in Canada and in the U.S. The major objective of this section is to illustrate the range of issues involved and the type of economic analysis undertaken in each case.

#### 3.1. *Case 1: the United States CVD case against Canadian softwood lumber*

In 1991, Canada exported about 70% of its softwood lumber production and 77% of its exports were to the United States. Canada is essentially the sole foreign supplier of softwood lumber in the U.S. market. The bilateral softwood lumber trade was worth \$2.82 billion (United States International Trade Commission, 1992) in 1991. However, despite its size, or perhaps because of its size, softwood lumber has been at the centre of a lengthy and heated trade dispute.

The dispute began with an unsuccessful countervailing duty petition from the U.S. Coalition for Fair Canadian Lumber Imports (a group of eight trade associations and 350 lumber producing firms) against softwood lumber imports from Canada in 1982. It appeared to end more than a decade later, when on January 28, 1994, a Binational Panel formed under the Canada–U.S. Free Trade Agreement (FTA) dismissed the CVD case against Canadian softwood lumber. However, trade tensions resurfaced again in the Fall of 1995. In April 1996, Canada signed a voluntary export restraint (VER) agreement with the U.S. agreeing to limit its duty free softwood lumber exports to 14.7 billion board feet. In return, the U.S. agreed not to bring any trade actions against Canadian softwood lumber for 5 years. The VER agreement does nothing to resolve the outstanding economic issues in the softwood lumber case.

The market share of Canadian softwood lumber in the United States rose from 17% in 1975 to 33% in 1985 (Doran and Nostali, 1987). The increasing market share of imported Canadian softwood lumber, during the early 1980s, created concern among U.S. lumber producers. In October 1982, the Coalition filed a formal CVD complaint against softwood lumber imported from Canada alleging that Canadian federal and provincial governments subsidized Canadian forest products through a number of programs and practices. In a preliminary investigation the USITC found that the U.S. lumber industry had been materially injured by allegedly subsidized softwood lumber imported from Canada. Subsequently, the International Trade Administration (ITA) of the Department of Commerce came up with a negative subsidy determination which terminated the case. The ITA argued that provincial stumpage program benefits in Canada were 'generally available' to all forest products and hence, were not countervailable.<sup>8</sup>

In May of 1986, after the market share of imported softwood lumber from Canada had risen to 33%, the Coalition filed a second countervailing duty petition alleging that the provincial governments in Canada sold standing timber at 'below market value' prices which amounted to an 'upstream' subsidy to Canadian softwood lumber producers. This time the ITA came up with a positive determination of subsidy and the margin of subsidy equalled 15% ad valorem. The USITC also ruled that the U.S. softwood lumber industry was materially injured because of subsidized softwood lumber imports from Canada and imposed a 15% preliminary duty on all softwood lumber imported from Canada.

The Trade and Tariff Act of 1984 may have contributed to the reversal of the ITA's decision about softwood lumber imports from Canada. Two provisions of this act are particularly notable. First, the Act provided a reinterpretation of the statute

which allowed the ITA to find a product to be subsidized if the subject product was produced from subsidized inputs (Congressional Budget Office, 1994, p. 28). Second, the Act required all agencies administering U.S. trade laws to give technical assistance to U.S. firms on how to make successful AD/CVD petitions (Congressional Budget Office, 1994, p. 28). The assistance provided by U.S. government agencies may have helped the U.S. lumber coalition to redesign its complaint to be more consistent with a positive subsidy determination.

The final determination of the value of the CVD was to be announced by December 30, 1986. However, the CVD case was terminated when the governments of Canada and the United States negotiated a Memorandum of Understanding (MOU) on softwood lumber. Under the MOU, Canada agreed to impose a 15% export tax on softwood lumber exports bound for the US market. The MOU took effect on January 8, 1987 and influenced Canada–U.S. lumber trade for almost 5 years.

On September 3, 1991, the government of Canada unilaterally announced that provincial stumpage charges had increased to the extent that it was no longer necessary to collect the export tax.<sup>9</sup> Following this action, the U.S. reopened the CVD case against softwood lumber imports from Canada and imposed temporary import duties ranging up to 15% on softwood lumber imported from certain provinces of Canada. In its final determination the ITA calculated a subsidy margin of 6.51%. The USITC ruled once again that subsidized softwood lumber imported from Canada caused material injury to softwood lumber producers in the United States. Consequently, a 6.51% ad valorem duty went into effect on May 28, 1992 (United States International Trade Commission, 1992).

The government of Canada appealed the ITA and ITC decisions to a binational panel under Article 1904 of the Canada–U.S. Free Trade Agreement (FTA). On July 26, 1993, the Binational Panel remanded the ITA and ITC decisions. In particular, the Panel asked the Department of Commerce to recalculate the softwood lumber dumping margin and the

<sup>8</sup> Stumpage programs in Canada are operated by the Ministry of Natural Resources in each province. Under these programs, individuals and companies acquire the right to cut and remove standing timber from Crown lands. The individuals and companies also assume the responsibility to regenerate the forest they harvest up to the stage of 'free to grow'. The royalty/price/rent paid to the provincial government for the standing timber is known as stumpage.

<sup>9</sup> The MOU was terminated on October 4, 1991.

USITC to provide additional statistical evidence to support its determination of material injury. Both the ITA and USITC responded to the request. The ITA revised its softwood lumber subsidy estimate to 11.54%, almost double its earlier estimate. The USITC also reaffirmed its original determination of material injury to the U.S. lumber industry caused by subsidized softwood lumber imports from Canada. After reviewing the responses from the ITA and the ITC, the Binational Panel ruled that the analysis of the determination of the subsidy was flawed and that the ITC's determination of material injury to the U.S. lumber industry was not based on sound statistical evidence. As a result, the Panel dismissed the CVD case against Canadian softwood lumber.

While the case is complex, the softwood lumber dispute deals with the standard economic questions asked in every CVD investigation. Is Canadian lumber production subsidized? Do imports of allegedly subsidized softwood lumber cause material injury to the softwood lumber industry in the U.S.?

In a competitive industry, which seems to characterize the U.S.–Canada softwood lumber market, price is determined by the intersection of supply and demand.<sup>10</sup> The supply of timber depends on a renewable natural resource, primarily second-growth forests. Given the soil and climatic conditions in Canada, a typical planting-harvest cycle takes from 60 to 120 years to complete. Thus, the current stock of timber is largely fixed.

The countervailing duty statute in the U.S. requires the determination by the USITC that the domestic and foreign products are 'like products'. Many people in the softwood lumber industry, both in the U.S. and in Canada, believe that the assumption of like products may not be appropriate for softwood lumber produced in Canada (Spruce-Pine-Fur type) and softwood lumber produced in the U.S. (Southern Yellow Pine). Most of the softwood lum-

ber imported from Canada is considered of better quality because of its straightness, strength and superior nail holding ability (Wallace, 1987, p. 37). In many end uses, particularly in house building, softwood imported from Canada is used for inside framing. The southern yellow pine has the characteristic of absorbing chemicals (United States International Trade Commission, 1992, pp. A-72–A-75). Consequently, Southern yellow pine is used in building patio decks, side walls, etc. At least in this end use, softwood lumber imported from Canada and softwood lumber produced in the U.S. are complements rather than substitutes. If Canadian and U.S. softwood lumber are complements, Canadian shipments cannot cause material injury to the U.S. softwood lumber industry.

The ITA found two countervailable practices in Canada in its final determination: (1) provincial stumpage programs (2.9%), and (2) log export restrictions in the province of British Columbia (3.6%). In calculating the subsidy implicit in the stumpage programs, the ITA compared the price of stumpage for softwood with the stumpage price for pulp logs (for Alberta and Ontario). While the production processes of pulp and softwood lumber both use timber as an input, they result in two different products. The demand and supply conditions for wood pulp and softwood are quite different. Since the stumpage fee is determined as a residual value, the differences in output prices and the differences in operating expenses contribute to the differences in stumpage rates. Hence, it is not clear how the differences in these two stumpage rates could be used to calculate an appropriate subsidy margin.

In calculating the subsidy equivalent of the B.C. log export restriction, the ITA argued that the export ban was an indirect domestic subsidy to the primary lumber producing industry. The log export restrictions in British Columbia, which also prohibits shipments to other provinces, could depress local log prices and give an advantage to local processors/companies in terms of higher rents. However, the log export restrictions have been in place since 1906 and it is unclear why such long standing restrictions have only recently become problematic.

Stumpage fees which are set administratively using a 'residual' approach are calculated as the differ-

<sup>10</sup> According to the United States International Trade Commission (1982), there were 8367 establishments in the United States and Canada involved in producing softwood and hardwood lumber during 1980. The concentration ratio in this industry is also modest. The five largest companies account for 30% of production in the U.S. and only 22% of production in Canada. These figures suggest that a competitive market model applies to the North American softwood lumber industry.

ence between the output price and operating costs per unit. Essentially, the authorities use a cost of production procedure, where working backwards from the lumber price and subtracting transportation, processing and logging costs the 'value' of standing timber is determined. This value is a rent and not profit. Competitive profit is built into the firm's operating costs. Under the formula pricing system, actual stumpage fees may deviate from competitive stumpage charges due to weak competition (constrained entry due to high initial capital investment) or overestimation of sawmills' costs. The question is: what is the supply inducing effect of such underpricing? The answer is either zero or very little. Why? In theory, stumpage is an economic rent, its over or under collection by a resource owner does not alter supply decisions unless it is so high that it causes firms to shut-down. If the alleged underpriced stumpage fees have little influence on timber harvest in Canada, it is unlikely to have any significant price depressing effect in the U.S. market.<sup>11</sup>

### 3.2. Case 2: the US CVD case against Canadian hogs and pork

Although agriculture in Canada is a shared responsibility of federal and provincial governments,

<sup>11</sup> A reviewer questions our conclusion, arguing that underpriced stumpage may create higher demand for permits to cut timber on Crown lands which would increase the intensity of resource exploitation. This is a possibility. However, data on softwood lumber harvests from Crown land do not seem to support this argument. The volume of softwoods harvested, increased from about 111 million cubic metres in 1970 to 143 million cubic metres in 1980 but grew to only 144 million cubic metres in 1990 (Canadian Council of Forest Ministers, 1992). It would be inappropriate to attribute the increased harvest entirely to the alleged stumpage subsidy. The increased supply of timber depends on various biological (growth rates, insect/disease/fire losses), economic (costs of harvesting, transportation and processing, prices of end products) and technological factors (improved fibre recovery, new end products, species used, etc.). The impacts of these factors on timber supply need to be filtered out before determining the effect of the stumpage subsidy on timber supply and subsequently, on softwood lumber exports to the United States. The hypothesis of increased timber supply in Canada resulting from the stumpage subsidy is yet to be verified empirically. It needs to be emphasized that the central issue is whether the alleged stumpage subsidy increased timber supply enough to cause significant price depressing effects in the US market.

the federal government was largely responsible for providing income stabilization programs until the early 1970s (Meilke and Warley, 1990). However, by the mid-1980s the competitive subsidization of red meat producers by provincial governments had become a major problem. An amended National Tripartite Stabilization Plan, which provided floor prices to hog producers and imposed negotiated ceilings on the support provided to the red meat sector appeared to be a solution to differential levels of provincial support (Meilke, 1991).<sup>12</sup> The formation of the NTSP helped to bring diverse provincial hog stabilization programs under one set of rules and some felt it would be considered generally available under U.S. trade law. In retrospect, it may have made hog stabilization payments an easier target for countervailing duty action by the United States.

However, the hog/pork trade dispute preceded the establishment of the National Tripartite Stabilization Plan, and like softwood lumber, the dispute has stretched over more than a decade. The dispute involves domestic production subsidies (not export subsidies) given to hog producers. Like softwood lumber, both hog and pork are priced in competitive North American markets and there is no significant trade barriers inhibiting the movement of hogs and pork between Canada and the United States.<sup>13</sup>

The dispute began in November 1984 when the U.S. National Pork Producers Council along with a number of meat packers in the United States filed a CVD petition against hogs and pork imported from Canada. After the preliminary investigation, the ITA identified 24 federal and provincial programs providing countervailable subsidies to Canadian hog and pork producers. The calculated subsidy was \$0.0439/lb of liveweight. The ITA considered hogs and pork to be members of the same industry. However, in its preliminary investigation of material injury, the USITC disagreed and treated hogs and pork as separate industries. Based on its preliminary investigation, the USITC found that hog producers and not pork producers in the United States were materially injured by subsidized hog imports from Canada.

<sup>12</sup> Tripartite because it is funded jointly by producers and both levels of government.

<sup>13</sup> The exception is Canadian imports of live hogs, which are restricted by the existence of pseudo-rabies in the United States.

The positive injury decision on hogs and the negative injury decision on pork began a long series of appeals and remands. A chronology and discussion of the various judicial decisions is contained in Meilke and van Duren (1990), Meilke and Moschini (1992), Veeman (1994), and Ludwick (1994). Suffice it to say, appeals have been heard by the United States Court of International Trade, at least two binational panels formed under the FTA, two extraordinary challenge committees under the FTA and by the GATT. The result has been the continuous application of countervailing duties on Canada's exports of live hogs to the United States, with no permanent application of duties against imports of Canadian pork. There have been temporary duties applied to pork imports during various stages of the dispute.

There are three key economic questions that need to be answered in this trade dispute. Is hog and pork production subsidized in Canada? If so, do these subsidies materially injure hog and pork producers in the United States? Finally, if hog and pork producers in the US are materially injured because of subsidized hog and pork imports from Canada, what is the appropriate remedy?

On the subsidy question, the issue hinges on the 'specificity' of Canada's domestic production subsidies. The ITA ruled that the production subsidies given to Canadian hog producers through various federal and provincial programs were not generally available to all producers in agriculture and hence, could be considered specific to the hog sector. Canada argued that while the NTSP applied to only a limited number of commodities, nearly all other Canadian agricultural commodities were covered by some form of stabilization plan. However, the type of deficiency payment program used in the hog sector appears to have the potential to increase the output of hogs.

The ITA also ruled that the production subsidies given to Canadian hog producers were equivalent to subsidies being given to pork producers. This cannot be right. Meat packers in both Canada and US buy hogs on the open market and sell pork on the open market. If Canadian hog production subsidies lower the market price for hogs, the meat packers in both countries benefit. Under perfect arbitrage, such subsidies provide no competitive advantage to pork producers located in Canada.

The question of injury has two components. First, have Canadian hog production subsidies increased Canadian hog production and exports? Most of the available econometric estimates suggest that the supply response to Canadian hog production subsidies has been minimal (Martin and Goddard, 1987). Second, has the increase in Canadian hog production and exports caused by the production subsidies, reduced the US hog price to such an extent as to cause material injury to US hog producers? Again, the available economic analysis would suggest the answer is no (Moschini and Meilke, 1992; Meilke and Scally, 1988). In essence, a proper economic analysis must trace the causal effect from the domestic production subsidies through to the increase, if any, in Canadian exports of hogs and pork to the United States, and then to the price impact in the United States market. Injury, if it has occurred, results from the marginal increase in Canadian production and exports resulting from the production subsidies-not from the entire quantity of hogs exported to the United States.

To analyze the effects of Canadian hog and pork exports on the United States market, the USITC estimated injury to U.S. hog producers by: (1) calculating the ratio of Canadian hog marketings to total North American hog marketings; (2) determining the change in this ratio from year to year; and (3) using the change in this ratio to determine the impact of Canadian production subsidies on U.S. hog prices. The USITC seems to suggest that any increase in Canada's North American market share of hog production results from its domestic hog subsidies. Note that the cause and effect relationship was never established by the USITC.

It is difficult to see how Canada's hog production subsidies provided a competitive disadvantage or materially injured pork producers in the United States. However, based on simple correlations and trend analysis, this was precisely the USITC's conclusion. Both a GATT panel and a Binational Panel agreed with the Canadian position that the United States should have conducted an upstream subsidy investigation. Given the vertically integrated nature of hog and pork markets, an upstream subsidy investigation is required to show what proportion of Canada's hog production subsidies were passed-through to pork producers.

Finally, in determining the proper remedy for a domestic production subsidy, the vertically linked nature of this market must be recognized. While Canada's domestic production subsidies provide no competitive advantage to Canadian pork producers, a countervailing duty applied only to hog imports does. A countervailing duty on hogs lowers Canada's hog prices below the free trade price thus providing a price advantage to the Canadian pork industry, at least in the short-run. Using a vertically integrated trade model, Moschini and Meilke (1992) show that the proper remedy (i.e., the level of the CVD and the stage of application) depends on the objective of the complainant country. Irrespective of the objective, however, the level of the CVD should be less than the subsidy margin and the CVD on pork should be less than that on hogs.

### 3.3. Case 3: the United States Section 22 case against durum wheat from Canada

Prior to the signing of the FTA, only a trickle of wheat crossed the border between Canada and the United States. Canada had a restrictive import licensing system for wheat, and the U.S. imposed a tariff of \$0.21/bushel. During the FTA negotiations, both countries agreed on a formula to eliminate these trade barriers. On May 9, 1991 Canada removed its import licensing system. Although the U.S. is the world's dominant wheat exporter, it has recently become an important destination for Canadian durum wheat. Since 1989, Canadian wheat exports to the U.S. have increased steadily, rising to over 2 mmt in 1993–1994. While these imports were only 3% of the total U.S. wheat availability in 1993–1994, wheat imports from Canada became a hot political issue in the U.S. (Loyns et al., 1995).

The wheat dispute began almost immediately after the FTA was ratified when durum wheat producers in North Dakota complained that the freight subsidy given to Canadian durum producers under the Western Grains Transportation Act (WGTA) constituted an export subsidy and hence, violated Article 701.2 of the FTA.<sup>14</sup> The U.S. Trade Representative inves-

tigated this complaint and determined that Canada did not violate the FTA; the wheat shipped to the U.S. did not receive the freight subsidy, and that any subsidy under the WGTA was generally available to all grain shipments from Western Canada to Thunder Bay.<sup>15</sup> After this determination, the U.S. Congress, which was under pressure from the wheat producers lobby, requested the USITC to examine the 'conditions of competition' between the U.S. and Canadian durum industries. In response to this request, the USITC initiated a 332 investigation and submitted its final report in June 1990. The USITC concluded that the durum industries in the U.S. and Canada are competitive and that the drought of 1987–1989 was the main reason for the increased Canadian durum shipments into the United States (United States International Trade Commission, 1990).

The failure of the Congressional attempt intensified lobbying by durum producers which resulted in the U.S. government bringing a trade action against Canadian durum imports under Chapter 18 of the FTA. The U.S. government alleged that the Canadian Wheat Board (CWB) had violated Article 701.3 of the FTA by selling wheat in the U.S. below acquisition cost.<sup>16</sup> In January 1993, the Binational Panel ruled that it found no compelling evidence that the CWB was selling durum wheat in the U.S. at prices lower than its acquisition costs.

A number of weather related and political events have contributed to the most recent round of the wheat trade dispute. Adverse weather conditions in the U.S. during the Summer of 1993–1994 resulted in higher demand for Canadian wheat in the U.S. market. Due to flooding in the Midwest, an increased quantity of Canadian wheat was trucked to elevators in Montana and North Dakota. This made the trade more visible. The timing could not have been better

<sup>14</sup> Article 701.2 of the FTA states that: "Neither party shall introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other party."

<sup>15</sup> Small quantities of wheat destined for the U.S. have been shipped through Thunder Bay in order to be eligible for transportation subsidies to that point. The WGTA transportation subsidy was eliminated on August 1, 1995.

<sup>16</sup> Article 701.3 states that: "Neither party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods."

for U.S. wheat producers, because President Clinton was desperate to gain Congressional approval of the NAFTA. As a consequence, some members of Congress, particularly those from the Northern Plain States, told the President that their support for the NAFTA hinged on his taking action against imports of Canadian wheat.<sup>17</sup> After a successful NAFTA vote, President Clinton directed the USITC to initiate an investigation under Section 22 of the Agricultural Adjustment Act (AAA) of 1933 (amended) to determine whether wheat, wheat flour and semolina imported into the United States from Canada was taking place “under such conditions or in such quantities as to render or tend to render ineffective, or materially interfere with, the price support, payment and production adjustment program conducted by the Department of Agriculture for wheat” (United States International Trade Commission, 1994, p. A-3).<sup>18</sup>

As directed by the President, the USITC started its investigation on January 18, 1994. The final report of this investigation was forwarded, along with a number of recommendations to the President on June 15, 1994. The USITC determined that Canadian wheat, wheat flour, and semolina were not being imported under such conditions and in such quantities as to render, or tend to render, ineffective the USDA wheat program. While the determination was generally negative, the USITC provided the President with recommended levels of import restrictions should the President determine (contrary to its findings) that there was evidence of material interference (United States International Trade Commission, 1994, pp. b:1–18).

On August 1, 1994, the wheat trade dispute came to an end as a result of a negotiated settlement. Canada agreed to limit wheat exports to the United States while the U.S. agreed not to pursue an Article XXVIII action under the GATT to restrict wheat imports. Under this agreement, tariff rate quotas

were used to restrict U.S. imports of wheat from the CWB.<sup>19</sup> The voluntary export restraint agreement was for 1 year and expired in September 1995 (Alston et al., 1994). A binational commission of nongovernmental experts was formed to “assist the two governments in reaching long-term solutions to existing problems in the grain sector”. However, the Commission’s recommendations were not binding on either country (Canada–United States Joint Commission on Grains, 1995). For the time being, the wheat dispute seems to be off the front of the political burner for at least three reasons: (1) the U.S. gave up its Section 22 waiver in the Uruguay Round of trade negotiations; (2) the U.S. has reduced its use of export subsidies; and (3) international wheat prices have increased significantly.

Nonetheless, the economic analysis used by the USITC to investigate the durum wheat dispute is interesting and it illustrates their role in trade disputes not involving ADs or CVDs. In addition, this case is one of the few times the USITC has used an estimated econometric model to examine historical evidence of causal relationships embodied in data. Perhaps, the Commission had little choice. The evidence presented in the USITC hearings was based on a wide variety of formal and informal economic models. On behalf of the CWB, (Sumner et al., 1994) (SAG) presented results from an econometric model which was used to examine the effects of Canadian wheat imports on the U.S. wheat market. SAG’s analysis included an extensive discussion of the assumptions and parameters underlying the model. The Law and Economics Consulting Group made a submission on behalf of U.S. wheat producers arguing that imported Canadian wheat was underpriced in the U.S. market because its quality was understated. The USDA argued, based on expert opinion, that wheat imports from Canada increased wheat supplies in the U.S., and lowered domestic

<sup>17</sup> Destler (1992) describes the horse trading that takes place in developing US trade policy.

<sup>18</sup> A Section 22 investigation differs from a CVD investigation because there is no need for the US to demonstrate that foreign exports are subsidized, or that they are injuring US producers. It is sufficient to show that the imports are interfering with US agricultural support programs.

<sup>19</sup> For durum wheat the tariff rates were as follows: \$3/t for the first 300 kt; \$23/t for the next 150 kt and \$50/t for imports above 450 kt. For ‘other’ wheat from the CWB, the tariff rate was \$3/t for the first 1.05 mmt and a tariff rate of \$50/t for imports above that limit. There were no restrictions on wheat flour, semolina or Canadian soft red winter wheat imported from outside the CWB area.

wheat prices. The lower price then resulted in higher deficiency payments and higher program costs. Hence, it argued, Canadian wheat imports interfered with domestic price and income support programs under Section 22 of the AAA. Abel, Daft and Earley presented economic analysis on behalf of the Millers National Federation, the National Pasta Association and the National Grain Trade Council arguing that imports of Canadian wheat increased because of lower wheat production in the U.S., attributable to weather and USDA farm policies. After reviewing all these arguments, models and results, the USITC staff concluded that the results of any quantitative analysis depend on assumed supply and demand elasticities and that the more elastic the relevant response functions, the lower the impacts on U.S. prices and program costs.

The key legal issue in this dispute is the magnitude of the effect of Canadian wheat exports on U.S. wheat prices and on the cost of U.S. government support programs. The direction of the effect is obvious, only the size of the effect is at issue. The import-induced program costs estimated by the USDA were \$230.4 million (\$0.12/bushel), while SAG estimated the costs to be \$25.9 million (\$0.014/bushel) and the USITC (1994) \$73.2 million (\$0.038/bushel), all for 1993–1994. The USITC investigated this issue using a five-dimensional vector autoregression (VAR) model with domestic supply, domestic demand, exports, ending stocks and average market price of wheat as the variables.<sup>20</sup> Based on their analysis, the USITC concluded that the changes in the supply of durum wheat due to Canadian exports had not influenced the average U.S. wheat price, and had not affected program costs to a ‘statistically significant degree’.

Since the ‘true’ economic model is never known, the discrepancies of a few cents in the estimation of an impact multiplier from different economic models is hardly surprising. Even if we knew the ‘true’ impact multiplier for Canadian wheat imports, the outcome of the trade dispute may not have been different in the absence of an exact definition of ‘material interference’. The determination of mate-

rial interference is made by the President, and is beyond the USITC’s jurisdiction. Consequently, without a precise definition of what constitutes material interference, does a difference of a few cents in economic estimates really matter? If there is a compelling political reason, a price depressing effect of one cent per bushel could be interpreted as causing material interference with the operation of domestic programs.

#### *3.4. Case 4: Canadian CVD case against United States corn*

Canada’s CVD case against U.S. corn is interesting because it is the only example of a successful CVD action against the United States. The case also illustrates the use of a public interest hearing to help in setting the final duty.

Grain corn is grown commercially in only three Canadian provinces: Ontario, Quebec and Manitoba. Ontario accounts for 75–80% of total Canadian corn production which reached 7.0 mmt by the late 1980s. Between the mid-1970s and mid-1980s, Canada moved gradually towards self-sufficiency in corn production. Imports declined from an average of 1.0 mmt (17% of domestic production) during 1978–1980, to 0.48 mmt (7% of domestic production) by 1984–1986. In fact, during the 1980s Canada was an occasional net exporter of corn. The increasing importance of corn in Ontario made producers more sensitive to U.S. corn prices and support programs. Between the 1983–1984 and 1986–1987 crop years the average corn price in the U.S. declined from US\$3.25/bushel to US\$1.57/bushel. However, corn producers in the U.S. were largely protected from income losses by a target price that remained at US\$3.03/bushel. While increased deficiency payments of US\$1.46/bushel in 1986–1987, protected U.S. corn producers, Canadian corn producers (Canadian Import Tribunal, 1987) received support through a stabilization program where support was designed to ratchet downward with market prices (Meilke and Warley, 1990).

Faced with dim prospects for higher market prices, the newly formed Ontario Corn Producer’s Association filed a countervailing duty complaint against the United States in the Fall of 1986. The Association

<sup>20</sup> The USITC VAR-model did not account for the US-EEP program, a seemingly important omission.

alleged that U.S. farm programs for corn had increased production above what would have occurred in an unsubsidized market and that the lower corn prices resulting from these subsidies were causing material injury to Canadian corn producers.<sup>21</sup> After a preliminary investigation, Revenue Canada determined that U.S. corn subsidies led to higher than normal (i.e., market determined) production of corn and depressed corn prices. The countervailable subsidy was calculated to be US\$1.05/bushel. This calculated subsidy margin was lowered, in January 1987 to US\$0.85/bushel (\$1.10/bushel Can.).

On March 6, 1987, the CIT determined that imports of subsidized grain corn in all forms, excluding seed corn, sweet corn and popping corn from the United States had caused, was causing and was likely to cause material injury to Canadian corn producers (Canadian Import Tribunal, 1987). This finding is interesting because injury was found even though imports of corn, both in absolute and relative terms, were declining. The ruling affirmed that domestic policies can 'harm' foreign producers, even when imports are not increasing.

The corn case is also interesting for another reason. It was the first time the CIT conducted 'public interest' hearings where different groups, individuals and businesses presented their views on the likely impact of the countervailing duty on their economic interests.<sup>22</sup> During the course of the public interest investigation, the CIT arranged public hearings and received representations from a number of corn users who claimed that imposition of the CVD would not be in the public interest. After considering the evidence, the CIT advised the Minister of Finance that the imposition of a CVD on corn imports from the

U.S. in excess of \$0.30/bushel Canadian would not be in the public interest. On February 4, 1988, the Minister of Finance reduced the CVD to \$0.46/bushel Canadian (Canadian International Trade Tribunal, 1990). Hence, the final CVD was set at less than one-half of the calculated subsidy. While this determination did not rely on estimated supply and demand curves or formal welfare analysis, the result is consistent with the argument that the proper CVD for domestic subsidies is lower than the subsidy margin. Moreover the public interest hearings allowed the interests of other economic agents to be taken into account.

#### **4. Lessons to be drawn from the case studies and a proposal**

The preceding case studies provide considerable 'food for thought'. First, the legal instruments used by the United States to challenge imports perceived to be unfairly traded, are impressive. Second, the quality of the economic analysis used to address the issue of unfairly traded imports does not always meet professional standards and in a few cases, the economic logic used by the complainants has been seriously flawed. Third, the disputing parties often have serious disagreements about the specificity of the subsidy and the size of the subsidy margin. Fourth, determination of material injury to domestic producers of 'like products' is often contentious. Due to disagreements on these key issues, the role of economic analysis in deciding the outcome of trade disputes is often limited. In the end, the final decisions of the disputes is often left to the political process. Moreover, dispute settlement procedures developed within regional free trade areas and within the WTO have the potential to conflict and overlap with one another. This may create different bodies of trade law and a state of confusion. Even the most efficient political system cannot function properly to settle trade disputes without well defined rules and precedents. There must be a better way. A proposal which draws upon the strengths of the recent trade reforms, while eliminating some of the weaknesses of the current system, is offered for consideration. The goal of this proposal is to move the world

<sup>21</sup> Under Canadian law, Revenue Canada determines if the alleged product is subsidized and the margin of subsidy. The Canadian Import Tribunal then determines whether the subsidy has caused, is causing, or is likely to cause material injury to domestic producers. Therefore, Canada's administrative procedures in a CVD case are very similar to those in the United States (van Duren, 1989).

<sup>22</sup> Since 1984 the CIT has been required to hold public interest hearings in CVD cases. Following these hearings, the CIT advises the Minister of Finance if it is in the public interest to impose a partial countervailing duty. The final decision is made by the Minister of Finance.

economy towards more liberal and predictable international trade in agri-food products. At the same time, it allows domestic industries to have recourse against imports ‘unfairly’ subsidized by foreign governments.

Before proceeding, it is useful to review the current status of agriculture within the WTO. The WTO has taken on the responsibility of monitoring and policing the Agreement on Agriculture. This involves making sure countries live up to their export subsidy reduction commitments, do not exceed their calculated aggregate measure of support and that the minimum access commitments specified in the various country schedules are upheld. In addition, the WTO will be called upon to make rulings with regard to countries using innovative tactics to circumvent the commitments they have made. The WTO also sets the ground rules for national CVD investigations and will get more heavily involved in these disputes as part of its policing role with regard to the Agreement on Agriculture.

Table 1 shows the rules of the WTO, in condensed form, as they apply to CVD investigations of agricultural and manufactured products. For manufactured goods, export subsidies and domestic use regulations are prohibited. For agriculture, only export subsidies on ‘new’ goods not identified in a country’s tariff schedule are prohibited.

For manufactured products, actionable subsidies apply to ad valorem subsidies greater than 5% (under the ‘Serious Prejudice’ provision), government debt forgiveness and subsidies to cover an industry’s operating losses. For agriculture, actionable subsidies include export subsidies and some forms of specific domestic subsidies.

The list of ‘non-actionable’ subsidies for manufactured products is relatively short. It includes generally available subsidies, as well as specific subsidies for research, for regional development and assistance to upgrade existing facilities to satisfy new environmental standards. Even for these subsidies, there are restrictions applied to the allowable expenditures. For agriculture, the list of non-actionable subsidies is much longer. Most notably, it allows subsidies to farmers through direct payments and financial participation in safety net programs, as long as these programs meet certain criteria. A direct implication of these differences is that in many

instances agri-food CVD decisions made by the NAPAs will be appealed to the WTO. While this may create work for lawyers and perhaps even economists, it will not foster freer international trade. To a large extent, this justifies the WTO becoming the sole dispute settlement body for agri-food and manufacturing CVDs.

#### *4.1. A proposal for reform*

If the WTO is going to become the primary judicial body to deal with CVDs—is there still a role for national administered protection agencies? There is, but these agencies will need a different mandate. The new role for the national administered protection agencies would involve them having three primary functions: (1) as a ‘transparency’ agent; (2) as an ‘investigatory’ agent; and (3) as an ‘advocacy’ agent.

A ‘transparency’ agency can operate both at the international and national levels (Leutwiler et al., 1985; Long et al., 1989). The objective of such an agency would be to calculate and publicize the costs and benefits of various domestic and trade policies. The Australian Industry Commission is a starting model for a transparency agency. The argument is that good economic policy can only be made in the full light of day—where the disparate costs of domestic and trade policies are made as apparent as the concentrated benefits of most policy actions (Spriggs, 1991). In the agri-food sector, the calculation and publication of producer subsidy equivalents has been helpful in exposing the horrendous international costs of agricultural support policies, and in illustrating the comparative costs across commodity sectors within national economies.

The role of a national transparency agency would be considerably different than that of the Trade Policy Review Mechanism created within the WTO. The WTOs trade policy reviews are designed to examine the impact of a member’s trade policies on the multilateral trading system. The transparency agencies mandate would be to examine the impact of its own country’s domestic and trade policies on its own consumers, producers and taxpayers. In this way, the national agencies become advocates for trade liberalization. To properly fulfil this role, the national agencies need to be removed, to the extent possible, from the political process. However, in

Table 1  
Summary of WTO rules governing subsidies and countervailing duty measures

Codes	Agriculture	Manufacturing
Prohibited subsidies	Export subsidies on products not identified in the countries tariff schedule	Export subsidies Income or price supports Govt. transfer of funds or provision of services to a specific industry Domestic use regulations
Actionable subsidies	Ad valorem product-specific support exceeding 5% Ad valorem product-specific support 1–5% <sup>a</sup> Ad valorem non-specific support 1–5% <sup>a</sup> Direct payments under production limiting programs Export subsidies on specified products	Ad valorem subsidies exceeding 5% Subsidies to cover operating losses of an industry Forgiveness of government held debt
Non-actionable subsidies	Generally available subsidies Ad valorem subsidy less than 1% General services such as research, training and extension, pest and disease control, inspection, marketing and promotion and infrastructure Public stockholding for food security purposes Domestic food aid Decoupled income support payments to producers Financial participation in income insurance and income safety-net programs <sup>b</sup> Payments under environmental programs Payments under regional assistance programs	Generally available subsidies Specific subsidies satisfying the following conditions: ad valorem subsidy less than 1%; assistance for research activities if the assistance does not cover more than 75% of the costs of industrial research or 50% of the costs of pre-competitive development activity; assistance to disadvantaged regions based on specified development criteria; assistance to upgrade existing facilities to satisfy new environmental standards, provided the assistance does not exceed 20% of the upgrading cost

<sup>a</sup>Between 1% and 5% injury must be proven and ‘due restraint’ shown in bringing a case.

<sup>b</sup>Subject to additional conditions.

order to maintain political support for the agency, it would require other roles.<sup>23</sup>

The second role for redefined national administered protection agencies would be as an investigatory agent. Domestically, this is consistent with the transparency function since doing quality economic analysis requires top flight institutional knowledge. National administered protection agencies might undertake studies of foreign governments and foreign government policies as well as domestic policies. This would serve two purposes. First, like a Section 332 investigation, it would provide a bone to throw to domestic vested interests. It is often helpful when the President or Prime Minister can say, “there is an investigation underway.” In many cases, these investigations may absolve the foreign government of any wrong doing. In other cases, the investigation might uncover unfair trade practices. Models for this type of activity could be the analyses that the Australian Bureau of Agricultural and Resource Economics undertook of the United States and European Community agricultural policies. It might also mirror the economic analysis undertaken by the Canada–US Joint Commission on Grain.

Finally, national administered protection agencies would have a third role as an advocacy agent. This role would mirror the current mandate of national administered protection agencies. Domestic industries that felt they were being harmed by foreign subsidies would approach the agency indicating they wanted to take action against a foreign government subsidy in the WTO. The advocacy agency would undertake economic analysis of the industry’s claim. In so doing, it could filter out false or weak claims and refer enough others to the investigatory agency that only a relatively few cases would be taken to the WTO. At this point, the agency would become the spokesperson for the domestic industry. It would prepare state-of-the-art economic analysis to back up the domestic industry’s claims.

There are several potential shortcomings of this proposal. First, that the WTO could be overwhelmed

by cases. This might be a problem even under the current rules, as more and more disputes are taken to the WTO. However, if the advocacy agency works properly it should filter out a large number of the smaller and less significant cases before they reach the WTO. A second objection is that it might discriminate against poor, less developed countries. This is a non-issue. What could be more difficult, for any country, than attempting to defend itself in a foreign nation under their unique rules and institutions? At the WTO, everyone would be following a common set of procedures and rules. Poorer countries could pool resources to hire lawyers and economists to make their case in Geneva. They would not require different teams of lawyers in the United States, Canada and the European Union. Finally, the proposal would require that the WTO develop legal and economic talent to undertake the enhanced mandate. This is essentially an institutional issue which could be handled with the proper provision of resources, training and manpower.

By far the biggest objection to the proposal is related to its political acceptability or lack thereof by member states. Some national governments, particularly the United States, may never concede so much authority to a foreign body (i.e., the WTO). Various domestic industries currently benefiting from CVD laws are also likely to lobby vigorously to protect their interests. Political sovereignty and protectionist interests are likely to be the major roadblocks to a redefined mandate for national administrative protection agencies and it is difficult to be optimistic on these points. However, there is some hope for progress. First, if the national administrative protection agencies do a good job as ‘transparency’ agents and also as ‘investigatory’ agents, the costs and benefits of various support policies and contingent protection laws will be revealed. Availability of this information may weaken the lobbying position of domestic interest groups. Second, domestic industries will quickly realize that due to a higher de minimus level, they will not receive the same level of protection under CVD laws as they did in the past. The reduced benefits from lobbying may not justify additional lobbying costs. Finally, with the expansion of regional trading agreements and their attendant dispute settlement mechanisms, and the increasing propensity to take disputes to the WTO, it may

<sup>23</sup> We will leave it to those in public administration to decide if the separate roles we envisage can coexist in a single agency. We believe they can and that there are good reasons for doing so; for example, the sharing of common knowledge about economics, industries and institutions.

become obvious that three different levels of dispute settlement are inefficient and counterproductive. With the increasing complexity of dispute settlement mechanisms it is possible progress can be made in this area during the next round of multilateral trade negotiations.

## 5. Conclusion

Anti-dumping and countervailing duty laws have been a continuous source of tension in multilateral trade relations. In recent years, a growing number of countries have enacted national legislation to govern unfair trading practices by foreign exporters. These laws contribute to import harassment and import protection. In most cases, the country imposing an import tariff also bears a substantial economic cost of such contingent protection. National administered protection agencies such as USITC and CITT are given the responsibility to apply national trade remedy laws. The Uruguay Round of trade negotiations brought in significant changes in rules governing AD/CVD actions. These changes include setting a specific time schedule for decisions, a higher de minimus level, a 5-year sunset provision and an appeal process. The WTO panel reports cannot be blocked from adoption, except by consensus. The objective of this paper was to evaluate the role of NAPAs under the WTO. In so doing, four case studies involving trade disputes between Canada and the United States are reviewed and a proposal for changing the role of NAPAs is advanced.

The case studies suggest that national governments have an impressive array of legal instruments at their disposal to challenge imports perceived to be unfairly traded. However, the quality of the economic analysis used to address the issue of unfairly traded imports does not always meet professional standards. By and large, national CVD laws follow the four step process (standing, subsidy, injury determinations and remedy) specified by the WTO. However, national CVD laws, dispute settlement procedures developed within regional FTAs and improved dispute settlement procedures within the WTO have the potential to conflict and overlap with one another. This will create different bodies of trade law and impede more liberal international trade in agri-

food products. Since the WTO sets the ground rules for national CVD investigations and will get more heavily involved in these disputes as a part of its policing role with regard to the Agreement on Agriculture, the WTO should become the sole dispute settlement body for agri-food and manufacturing CVDs.

If the WTO becomes the primary judicial body to deal with CVDs, the NAPAs will require a new mandate. In this mandate, each of the contingent protection agencies will simultaneously play the role of a 'transparency' agent, an 'investigatory' agent and an 'advocacy' agent. The NAPAs can calculate and publicize the costs and benefits of various domestic and trade policies to its own consumers, producers and taxpayers. As investigatory agents, NAPAs can undertake studies of foreign governments and their domestic and trade policies. As the advocacy agents, the NAPAs will undertake economic analysis based on complaints of domestic industries or groups. If the allegation is found to be backed by strong evidence, then the NAPAs would forward the case to the WTO. At this point, the agency would become the spokesperson for the domestic industry.

This proposal will require national governments to concede authority to the WTO dispute settlement body. With the expansion of regional trading blocks and the increasing propensity to take disputes to the WTO, hopefully the member countries will realize that three different levels of dispute settlement are costly, inefficient and counterproductive.

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