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 remains unresolved, empirical analyses of NAFTA suggests it has 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 and the North American Free Trade Agreement 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 general safeguard provisions of the CUSTA and NAFTA do require an injury determination. However, the safeguard (emergency) provisions of the CUSTA and NAFTA only apply 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;

[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 Annex 703.3.

- Apply the WTO safeguard mechanism under the Agreement on Safeguards;
- Apply countervailing duties; and
- Apply anti-dumping duties.

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

The focus of this paper is on administered protection since it is widely believed to be the instrument of choice for protectionist domestic industries. The use of administered protection was long the exclusive preview 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 antidumping measures 72 percent of the 874 antidumping 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 only accounted for 55 percent of antidumping measures, and India that had less than two percent of the antidumping measures in 1995 had nine percent in 2000, 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 the NAFTA. First, what is the economic rationale for administered protection and does it continue to hold in the context of the NAFTA? Second, what is the evidence on the use of

[2] Interestingly Mexico had ten percent of antidumping measures in 1995 and this fell to seven percent in 2000.

administered protection i) by the NAFTA countries against each other; ii) by NAFTA countries against third countries; and iii) by third countries against NAFTA members? Third, how can administered protection laws be changed to improve their ability to actually resolve disputes? Fourth, are there reasonable alternatives to administered protection within the 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 seems so remote as to not deserve attention. Both of these facts put constraints on the type of reforms agriculturalists can hope for.

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 (CBO 2001; USITC 1998). Our concern is solely with antidumping and countervailing duty actions.

Antidumping 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 antidumping law is to combat 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 ten percent that were consistent with dumping behavior. Successful predatory pricing of agricultural products, especially raw agricultural products seems even more remote. 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 the number of alternative foreign suppliers.

The economic essence of predatory pricing is the ability to price discriminate among markets. In order for a firm to successfully price discriminate between 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. The NAFTA eliminates nearly all tariffs following the implementation period and most non-tariff barriers have also been removed. This eliminates the protection of the domestic market a firm needs to successfully engage in predatory pricing. As a consequence, a NAFTA member imposing a antidumping duty is simply depriving its consumers of a product available to other members of the NAFTA at a lower price. This is a welfare decreasing action that discourages rather than encourages competition.

Unfortunately, antidumping duties are relatively easy to obtain and tend to be large once put into place. This is especially true for cyclical agricultural products where selling below the full cost of production is not an uneconomic or unusual activity. As Lindsey (1996, p. 19) has argued, "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 with in 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 countervailing duty action is different than for an antidumping action. An antidumping case is brought by domestic producers against foreign firms who are alleged to be engaging in unfair pricing practices. A countervailing duty action is brought by domestic producers against foreign producers who are alleged to benefit from unfairly provided government subsidies. 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 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 members. However, countervailing duty actions, or the threat of countervailing duty actions 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. Within NAFTA, a NAFTA Agency to weed out countervailing duty complaints with little or no merit would seem a logical first step.

A countervailing duty has the same economic effects as a tariff. The welfare effects of a tariff and hence a countervailing duty 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 countervailing duty to: i) restore trade flows and prices of the subsidized product to free trade levels; ii) restore welfare to the free trade level in the importing country; or iii) 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 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 countervailing duty should almost always be less that 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).[3]

The economic cost of administered protection both to the importing and exporting countries can be substantial, especially considering 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 the trade actions tend not to go away.[4] Producers in the importing country face the same litigation costs but if the rent seeking results in a countervailing duty they are handsomely repaid. On top of this are the economic efficiency losses associated with the countervailing duties. The USITC in a comprehensive analysis of the economic effects of antidumping and countervailing duty actions in the United States calculated a net welfare loss of $1.59 billion and job losses of 4,075 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.[5]

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

The Prevalence of Trade Remedy Investigations by NAFTA Countries

The use of antidumping duties (AD) and countervailing duties (CVD) to prevent or remedy unfair trade practices was an important issue during both the CUSFTA and NAFTA negotiations. During the CUSFTA 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

[3] If the goal is to restore the price and trade flows of the subsidized product to free trade levels then a countervailing duty 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.
[4] Canadian swine producers spent 15 years defending themselves in the United States countervailing duty action against Canadian swine.

existing national AD/CVD laws and replace them with a new set of disciplines modelled on competition law principles with a binational tribunal to enforce them. For a number of reasons, CUSFTA produced no substantive changes in the trade remedy laws of either country. During the NAFTA talks, Mexico also pursued having the United States either suspend or make changes to its trade remedy law and practice, again with no success.

The concern shared by both 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 exactly unwarranted, since at the time that these agreements were being negotiated the United States was the heaviest user of trade remedy actions 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 antidumping and countervailing duty actions by NAFTA countries, focusing on actions taken against products in the food and agricultural sector.

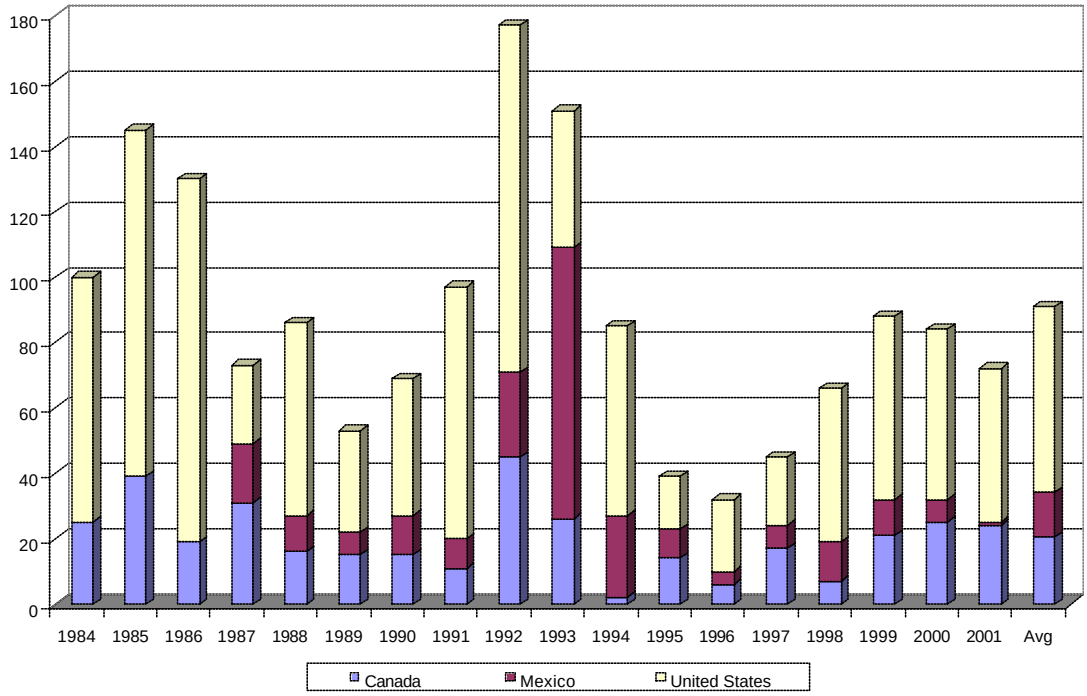
The Global Use of Trade Remedy Laws by NAFTA Countries

Between 1984, five years before the beginning of CUSFTA, and mid year 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 versus only 18 percent (278) involving subsidies. In global terms, this amounted to 35 percent of all antidumping (AD) investigations and 66 percent of all countervailing duty (CVD) investigations notified to the WTO.[6] The United States alone accounted for 20 percent (749) of all AD investigations and 55 percent (243) of all CVD investigations during this period, making it the

[5] The CGE model used by the USITC assumes full employment.

[6] 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.

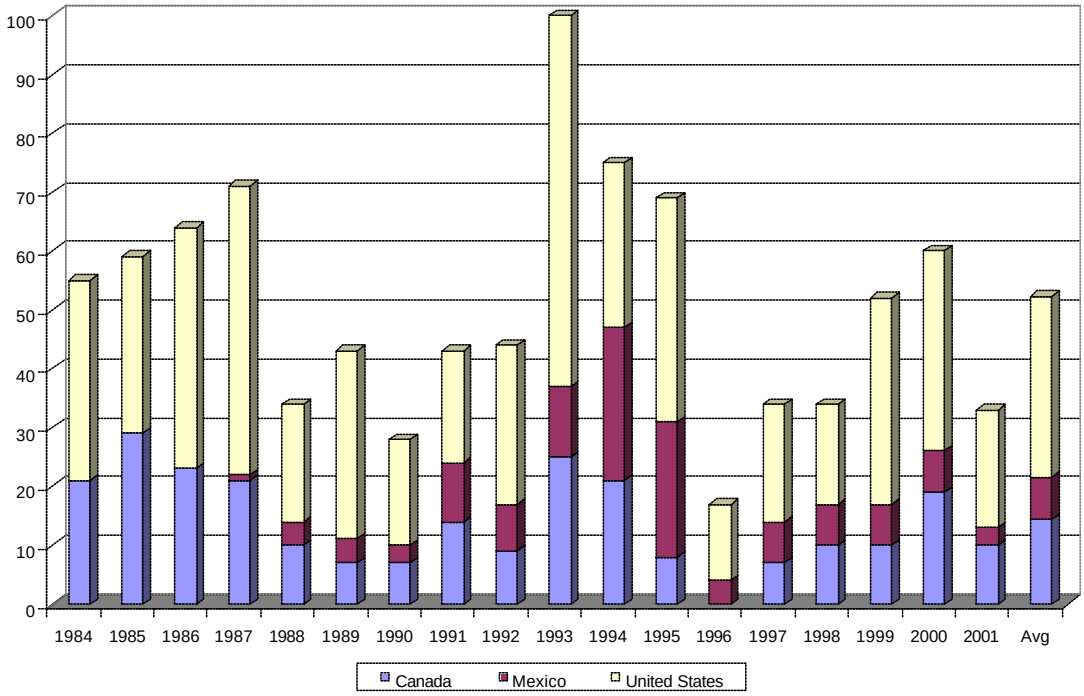
Figure 1: AD/CVD Cases Initiated by NAFTA Countries, 1/1/1984-6/30/2001



heaviest user of its 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/CVD cases opened, accounting for about 8 percent of the global total. Mexico quickly joined the ranks of main users and was fifth overall with 242 cases initiated, 6 percent of the global total during this period, even though it didn't initiate its first trade remedy action until 1987.

For both the United States and Canada, the year of greatest activity in terms of initiations was 1992. In that year, the number of cases opened in each country was over twice the average per year for the period. This 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 was the most active for initiations of investigations by Mexico. Eighty-two cases were opened that year, or 35 percent of Mexico's overall total. This spike in activity has been largely attributed to a combination of an overvalued exchange rate and continued low commodity prices (Miranda 1995). The popularity of AD/CVD actions in all three countries waned in the mid-1990s. In 1996, the number of cases opened was

Figure 2: AD/CVD Measures Imposed by NAFTA Countries, 1/1/1984-6/30/2001



less than a fifth the number opened just four years earlier. Since then, the level of activity has begun to pick up again.

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).[7] 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, or 52 percent of the time.[8] The United States imposed more new measures than any other country, an average of almost 31 per year. This represented a quarter of the reported total world average. Canada accounted for 12 percent and Mexico 6 percent. In all three countries, the chances that an investigation resulted in the imposition of a duty or price

[7] 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.

[8] 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 Antidumping and Countervailing Duty Measures in the World as of June 30, 2001

Reporting Party	Antidumping	Countervailing	Total	Share of Total
Argentina	46	3	49	4%
Australia	56	6	62	5%
Brazil	52		52	4%
Canada	89	9	98	8%
Czech Rep	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 - 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)

undertaking exceeded the world average. In the case of Mexico, final measures were imposed 53 percent of the time, in the United States, 54 percent of the time, and in Canada, 70 percent of the time. This means that every time a case was opened by the investigating authorities in Canada, the accused party had only a 30 percent chance of obtaining a favorable ruling. It bears pointing out, however, that even when a case results in a finding of no dumping or subsidization or no injury, the initiation of a case itself can have a chilling effect on trade, causing imports to drop.

On June 30, 2001, there were 1,126 AD and 87 CVD orders in place around the world (Table 1). This number is only a fraction of the over 2,000 cases that resulted in the imposition of a duty or price undertaking since many orders have been revoked or suspended over time. Canada ranked fifth in the world in active measures, accounting for 8 percent of the reported world total.

This is well below the 12 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.

Even though the United States was the most frequent user of trade remedy laws by the active-measure indicator, the U.S. share of the total stock has actually dropped from 33 percent in 1999 to 23 percent as of June 30, 2001. Before the Uruguay Round, a large proportion of U.S. antidumping 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/CVD measures (CBO 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. As a result, on January 1, 2000, the U.S. stock of active measures dropped by 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 43 active U.S. CVD orders was a bit lower at seven years, with one order having been in place over 20 years. In the case of both ADs and CVDs, the median duration was 7.8 years.

Canada also has some long-lived measures, with an average duration of 5.1 years for the 89 AD orders in place, including one in effect over 19 years. Canada also had two CVD measures that have survived almost 17 years.[9] 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

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

Table 2. The Number and Duration of Active Measures by NAFTA Country, 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 - 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)

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 placed into effect during the last two years, versus 38 percent for Canada and 43 percent for Mexico.[10]

Impact of CUSFTA and NAFTA

Before CUSFTA and NAFTA were implemented, some believed that the 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

[10] 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

Table 3. Bilateral AD/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 Database (http://ia.ita.doc.gov/)
Canada: Special Import Measures Act Database (http://www.ccra-adrc.gc.ca/customs/business/sima/historic-e.htm
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)
Trade: U.S. Census Bureau; Canada Year Book, various years; UN Trade Statistics

trade barriers had an affect on how aggressively each country investigated alleged unfair trading practices.

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 CUSFTA (1989-93), 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 28 investigations of imports from the United States (Table 3). These numbers declined to 18 and 25 during the 1989-1993 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-CUSFTA countries on a trade basis? In the five years prior to CUSFTA, 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

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.

Table 4. Bilateral AD/CVD Initiations Before and After NAFTA 1/

	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%

1/ 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 initiated one against Mexico.

Source: Cases - U.S.: International Trade Administration Database (http://ia.ita.doc.gov/)
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)
Trade: U.S. Census Bureau; UN Trade Statistics

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 went down both in absolute and percentage terms. During the same time, the proportion of all Canadian AD/CVD 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 (1989-93), the United States initiated 13 AD/CVD 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 by 50 percent. This decline was

Table 5. Bilateral AD/CVD Investigations Within NAFTA, 1/1/1984 - 6/30/2001

	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%	100%

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)

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 to 9.2, while the share of U.S. imports in the Mexican market increased from 71.1 to 73.8 percent.

During most of the 1984-2001 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/CVD cases by the United States against its bloc partners, nor by them against the United

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

	Initiating Country			NAFTA
	United States	Canada	Mexico	Total
Affected Country				
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	22	23	116
NAFTA/Global	18%	82%	43%	35%
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%	100%

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)

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 seem to have grown in frequency and intensity since the two agreements were implemented. We next focus on AD/CVD 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 their AD/CVD 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 75, or about five percent, were agricultural.

All of the agricultural actions have involved the United States as either the investigator or 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 A1 provides an inventory of every agricultural case initiated by one NAFTA partner against the other between 1984-2001, 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 CUSFTA 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 CUSFTA began, Canada has initiated 13 AD/CVD cases against U.S. agricultural imports while the U.S. has initiated four cases against Canada.[11] 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 sector since CUSFTA and NAFTA have been in place. CUSFTA does not seem to have had

Table 7. The 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						
United State	15	5	7.1	9.9	17.0	17.0
Mexico	1	0	3.7	--	3.7	--
Mexico						
AD Measures						
United State	11	4	3.5	2.3	5.9	3.4
Canada	0	0	--	--	--	--

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)

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.

In terms of active measures between NAFTA partners, as of June 30, 2001, the United States had eight orders against Canada and nine against Mexico (Table 7). Only one of these was in the agricultural sector, a price undertaking on tomatoes from Mexico. An investigation against greenhouse tomatoes from Canada is still underway. Canada had 15 orders in place against the United States, five of which were on agricultural products. Mexico had 11

[11] On 10/23/00, USTR initiated a Section 301 investigation of Canadian wheat marketing practices; on 02/15/02 it announced that it would be examining the possibilities of filing AD/CVD petitions with the U.S. Department of Commerce.

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 more long-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 duration, 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/CVD investigations and definitive duties or undertakings is small, this does not mean that these actions have not imposed significant costs on the industries targeted. Both AD/CVD 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. What's more, the number of disputes arising from these actions appear to have increased since CUSFTA and NAFTA were formed.

Fortunately, CUSFTA contained a dispute resolution mechanism for reviewing AD/CVD verdicts and, if necessary, remanding them to the investigating authority if they were found to have not been in accordance with the imposing country's laws. This mechanism was incorporated into NAFTA as well. Prior to the implementation of CUSFTA and NAFTA, final AD, CVD and injury determinations could be appealed: in the case of the United States to the Court of International Trade, in the case of Mexico to the Tribunal Fiscal de la Federación, or, in the case of certain Canadian final determinations, to the Federal Court of Appeal or, for some Revenue Canada decisions, to the Canadian International Trade Tribunal (CITT). Chapter 19 of CUSFTA/NAFTA provides for binational panel review of AD, CVD 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/CVD determinations on agricultural imports, including two extraordinary challenges. The U.S. has been on the defensive side of 15 of these cases, 11 within CUSFTA (including the two extraordinary challenges) and four within NAFTA. Canada has been on the receiving end eight times, four each with CUSFTA and NAFTA, and Mexico twice. To what extent have the review mechanisms been able to successfully deal with these disputes? In the agricultural sector, at least, our review of the dispute settlement experience yields mixed results with respect to whether the agreements have offered significant flexibility to governments in resolving disputes. On one hand, 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. On the other hand, the investigating authorities in each country do not have to consider a panel's determination when considering new cases similar to ones previously reviewed by a panel. As a result, a petitioning industry need not consider a panel's verdict as the final answer. It can file repeated cases, even when an action was already found unwarranted by a panel. These repeated actions can have a trade restricting effect, even if duties are not imposed, or imposed and later rescinded. In fact, the threat of continued investigations alone may have a trade-restricting effect.

In summary, evidence suggests that imposing more restrictive rules on trade remedy actions within NAFTA would have mixed effects on all three countries, since each is both an extensive initiator and defendant in these actions. Protection for import-competing industries would be less available. However, exporters in each country facing antidumping actions would benefit, as would producers and consumers in each nation from access to relatively cheaper imports. 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 no evidence to suggest that these actions have 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 each country. Some have even persisted in spite of panel decisions rendered under the dispute resolution mechanisms provided for CUSFTA and NAFTA. It is important to realize, however, that these trade disputes have not necessarily been the result of CUSFTA or NAFTA and they may have been worse without the agreement. Most of the trade remedy actions, both for agricultural and non-agricultural products have involved anti-dumping cases – subsidy cases have been far less frequent. Hence, the data provides some evidence that anti-dumping actions are the instrument of choice for protectionists. Other papers in this workshop will address the economic merits of some of the trade actions.

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 while the second set of alternatives involves major changes to the system. Consideration of these potential changes may be enhanced by first defining criteria to evaluate the modifications – or answering the question of what we want to achieve with the changes.

Possible criteria are:

- Reducing the incidence of trade actions.
- Reducing the number of retaliatory actions – those initiated by countries in response to another countries specific investigation.
- 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.
- The extent to which trade remedy laws are congruent with the overarching goals of the free trade area.
- 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.[12] This means that Canada and the United States have a binational 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 agricultural trade was increasing during this time, this trend did not fundamentally challenge the roles of the national government and of national agricultural producer groups.

Since the completion of the Uruguay Round of multilateral trade negotiations a new set of rules applies 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

[12] 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.

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 cooperation 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 example of an industry that has begun to actively pursue cooperative goals on many fronts. The continued use of administered protection inhibits this type of cooperation by emphasizing the importance of the national market and by stressing relationships between national commodity groups.

Economists have long criticized the use of trade remedies as noted in the introduction (Loyns, Young and Carter 2000; Kerr 2001). However, politicians and industry groups have insisted on the maintenance of trade remedies, as well as safeguard provisions, to manage the tension created by economic integration. Tension results when producers perceive that they are competing with unequal levels of advantage due to differing 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 Group notes that the Uruguay Round Agreement (URA) resulted in significant improvements in disciplines on subsidies and also in increasing the uniformity of antidumping processes. The TRWG made a number of recommendations that member governments agreed to with the goal of reducing trade irritants between countries including 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 antidumping and countervailing duties and/or to change the criteria for the level of the duty. This could be accomplished by changing some of the economic definitions used in AD/CVD suits. While members of the WTO are constrained to meet the *minimum* level of these definitions, nothing prevents NAFTA partners from specifying a higher standard for the imposition of duties. A gradual increase in the criteria for the imposition of AD/CVD duties could be used as a transition to eliminating their use within the NAFTA. Possible adjustments to definitions include:[13]

Increasing the de minimis level. For antidumping duties a margin of dumping of less than two percent of the export price is considered *de minimis*. For countervailing duties a subsidy level of less than one percent *ad valorem* is

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

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.

Restrict 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 antidumping 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, p. 21).

Change the calculation of duties to account for practices in the domestic industry. In some cases, producers on both sides of the border are selling below their cost of production due to cyclical output prices or spikes in input prices. Current practice allows for the possibility of imposing a dumping duty when domestic producers are also selling at less than the cost of production. The proposed modification would be to impose duties on the difference in practices between the domestic and foreign industry. For example, if Canadian producers were found have a dumping margin of ten percent, and U.S. producers were found to have a dumping margin of eight percent, then duties would be limited to the difference of two percent. This modification is equally applicable to subsidies, where only the difference in the subsidy levels between countries would be subject to countervailing duties.

Include 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 precedence for this proposal. In Canada, the Canadian International Trade Tribunal 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."[14] However, this provision is rarely used. The Canada–Costa Rica Free Trade Area does not eliminate antidumping cases. It does however, state that "the Parties recognize the desirability of: (a) establishing a domestic process whereby the investigating authorities can consider, in appropriate circumstances, broader issues of public interest, including the impact of antidumping duties on other sectors or the domestic economy and on competition…" In the European Union, once it has been shown that there is dumping or subsidization by a third country into the EU, and that injury has been caused, before the imposition of duties the broader interests of the Community 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.[15]

Require Consultations Between Countries

Currently, NAFTA countries are not required to engage in consultations before the initiation of legal action. This is because the 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 within NAFTA stress the role of consultations between governments before initiating formal investigations. For example, within the WTO members must first make a request for consultations, and if the consultations are not successful, the complainant

[14] Trebilock and Howse, pg 111.
[15] However, Trebilcock and Howse state that the EU only uses the public interest provision to protect producers from paying more for inputs.

can request a 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, followed by discussion of why the defending party has maintained the policy or taken the action in question. At that point options to resolve the conflict are explored and investigated.

How successful are WTO consultations in resolving disputes? In July 2001, the WTO had 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. Examples of cases settled without a panel report include: the U.S. complaint against Denmark on measures affecting the enforcement of intellectual property rights (DS 83); a complaint by Thailand against Colombia on safeguard measures on imports of plain polyester filaments from Thailand (DS 181); and a complaint by the United States against Greece on the enforcement of intellectual property rights for motion pictures and television programs (DS 125) (WTO 2001).

If consultations are 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 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?

The changes in administered protection processes suggested in this section do not require major changes to current practice. 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 antidumping suits within NAFTA entirely, as Canada attempted to do when negotiating a free trade area with the United States (Kerr 2000). Other free trade areas 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 antidumping 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 antidumping remedy would also have enhanced the possibilities for prolonged disputation at an official level to the detriment of a beneficial commercial relationship."* (Leycegui, Robson and Stein 1995, p. 210)

Other free trade areas such as the Canada–Chile FTA have eliminated the use of antidumping measures within their FTA. Furthermore, the Canada–Chile FTA established a committee with the view to eliminating the need for countervailing duties as well. Another goal of this committee is to work with other like-minded countries to remove the application of anti-dumping measures in FTAs (Article M-05 of the Agreement). The political difficulty of eliminating administered protection processes within the EU may have been lessened by the existence of their Common Agricultural Policy and the fact that the EU is a customs union.[16] In contrast, fierce political opposition has been expressed to the elimination of administered protection processes by U.S. legislators (Kerr 2001).

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

Introduce Alternative Dispute Resolution Processes

Among other radical changes to administered protection processes is the introduction of alternative dispute resolution (ADR). ADR has been widely adopted by the U.S. and Canadian federal and Canadian provincial governments. Within NAFTA, ADR is recognized as a valuable tool for the resolution of private commercial disputes (DFAIT 2001).

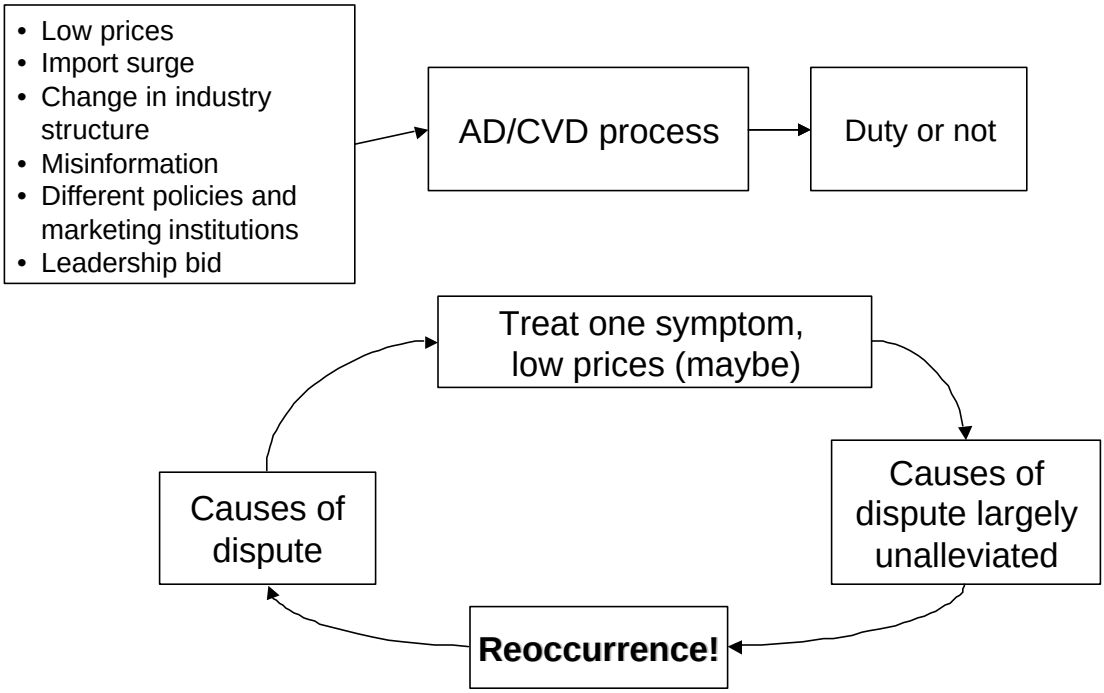
Alternative dispute resolution processes usually involve a third party neutral who has no stake in the outcome. The goal of ADR is to encourage communication, leaving litigation as a last resort. The literature in dispute resolution suggests the following criteria when considering the introduction of an alternative system for dispute resolution:

- Does the current system produce acceptable and durable outcomes?
- What are the costs of the current system and are they acceptable?
- What is the impact of current systems on relationships between parties and to what extent are the relationships valued?
- Are the disputants involved in the generation of 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/CDV processes.

While ADR includes a wide variety of options, two processes are suggested for incorporation into a dispute resolution system for administered protection cases: i) good offices, and ii) 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.

Figure 3. Factors Leading to an AD/CVD Dispute



Hypotheses on the Motivations for Initiating a Suit

Possible motivations for pressing an AD/CVD suit (in addition to actual evidence of dumping or subsidies) include low prices and import surges; changes in industry structure; misinformation; differing policies, regulations and marketing structures; and leadership bids within commodity organizations.[17] Of these, 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/CVD processes are limited to determinations of dumping and/or injury. Outcomes are limited to imposition of a duty or not, and many of the other 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

[17] 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 correct this assumption.

of repetitive suits and investigations that exist in some industries, for example, cattle and grains (Young 2000) and hogs (Meilke and van Duren 1990).

Characteristics of Dispute Resolution Systems

If an alternative dispute resolution system is being considered to replace administered protection it is useful to consider the common elements of such a system.

- *Assessment of resolution options*. In this step the complainants assess the conflict and identify stakeholders, as well as economic, political and legal issues. The processes available for resolution of the dispute may be evaluated, and the cost and timeliness of different options may constrain choices. Currently, administered protection does not offer a choice of dispute resolution processes to disputants.

- *Identification of interests and development of the agenda of issues*. Identifying the interests (the needs) 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*. This stage 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; EPA 1999). The goal of joint fact finding is to avoid the use of "duelling experts" hired by one side and distrusted by the other, by using 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*. Fact-finding and collaborative problem solving may occur in iterations as 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.* This 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.

One point of the analysis above is to illuminate that administered protection does not have the characteristics of a dispute resolution system, 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

The use of good offices is when a third party works to correct misunderstandings, reduce fear and mistrust and increase communication. Good offices stops short of mediation as it does 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 publicly or privately undertake efforts 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 the NAFTA would depend critically on the use of commissioners who were effective in their role, who could act effectively as neutrals, 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 their dispute. This process is proposed to be voluntary, less formal and structured than the proposal for facilitated dialog discussed below.

Mandatory Facilitated Dialogue

This proposal is to have the complainants engage in a dialogue, facilitated by a neutral, with all stakeholders before a suit can be investigated by the national administered protection agencies for all NAFTA partners. Facilitated dialogue is a type of mediation who purpose is to explore issues, interests and options, it is however, less geared towards negotiation and settlement than mediation. The purpose of the facilitated dialogue would be to engage the complainant in a wide-ranging discussion on the consequences, the 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 instigate 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:

- Whether or not the defending industry is likely to retaliate by initiating a suit through its own domestic AD/CVD 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 of the cost to the domestic industry of proceeding with a divisive action;
- A critical part of the facilitated dialogue would be a discussion about the how the industries might gain from cooperation 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/CVD actions.

Another important element of the facilitated dialog 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 is 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 characteristics that favor the use of mediation. These characteristics include:

- *The outcome of litigation is unknown*. This would appear to be the case for administered protection cases. Statistics for U.S. AD/CVD cases between 1980-98 are: for Title VII cases positive 35%, negative 39%, terminated 25%; AD cases positive 42%, negative 36.5%, terminated 22%; CVD cases positive 23%, negative 45%, and terminated 32%. These percentages are based on the number of cases, not the value of imports (USITC 1999).
- *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 up or downstream segments of the industry, and between commodity groups and governments.
- *Issues are clearly identifiable and there are multiple issues, allowing give and take and trade-offs between parties.*

Factors impeding the success of mediation as a tool for resolving disputes are that parties do not have on-going relationships; that one party has an easier way to meet its needs; that parties are under outside pressure to fight; that there is either too much, or not enough urgency, and finally, that participation in mediation is mandated.

The purpose of facilitated dialog is to assist the complainant in making a comprehensive evaluation of the consequences of pressing an AD/CVD 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 dialog not to press the suit, then all of the proceeding advantages apply, as well as a reduction in the incidence and costs of trade remedies.

An important question is whether the facilitated dialogs 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/CVD 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

The options for the modification of administered protection processes are evaluated according to the criteria presented earlier (Table 8). Options 1-3 would either reduce the size of the duty or the likelihood of its imposition. Option four, requiring consideration of the interests of the free trade area, 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. Removal of AD/CVD 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 they progress to the 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. 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/CVD suits between NAFTA partners.

However, one of the underlying hypotheses of this paper is that AD/CVD processes are used in agriculture as an escape valve for the tensions inherent in economic integration. These tensions are funnelled to AD/CVD processes because they are available. The NAFTA agreement did instigate a number of working groups to address issues of economic integration. However, it might be useful to consider offering an array of ADR processes for industries to manage tensions and work through issues that are unconnected to AD/CDV processes. This array could include good offices, facilitated dialog and mediation offered to industries through the NAFTA secretariat.

This paper has argued that modifications to the current AD/CVD processes should begin with an evaluation of the goals of the dispute resolution system. Encouraging the use of ADR in will assist industries by illuminating the total costs and benefits of the suit. In addition, strengthening relationships between the U.S., Canadian and Mexican industries is conducive to achieving the strong commercial ties that are an important goal of the FTA. Finally, there is strong political opposition to removal of the entire AD/CVD process within NAFTA. Leaving them in place as an avenue of last resort may make it possible to put up front more productive options for dispute resolution.

Table 8. Options for Change and Criteria

Criteria / Options	Reduce Incidence	Reduce Cost of a) Suit b) Duty	Reduce Retaliatory suits	Maintain Transparency	Maintain Ability to Protect Producers	Congruent with NAFTA Goals	Create Trinational Market Identity
1. ↑ *de minimus* and negligible imports	Perhaps by ↓ incentives	a) No b) No	Yes	Unaffected	Yes, lower level	Yes	Minimally
2. Restrict duty to injury	Perhaps by ↓ incentives	a) No b) Yes	Yes	Unaffected	Yes, lower level	Yes	Minimally
3. Account for domestic industry practice	Perhaps by ↓ incentives	a) No b) Yes	Yes	Unaffected	Yes, lower level	Yes	Minimally
4. FTA interest	Perhaps by ↓ incentives	a) No b) Possible	Yes	Unaffected	Unclear	Yes	Yes
5. Consultations	Likely	a) If successful	Yes	Not transparent	Maintained	Yes	Yes
6. Remove AD/CVD	Yes	a) Yes b) Yes	Yes	N/A	No	Yes	Yes
7. Good offices	Likely	a) If successful	Yes	Not transparent	maintained	Yes	Yes
8. Mandatory facilitated dialogue	Likely	a) If successful	Yes	Not transparent	Maintained	Yes	Yes

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Box 1. Mediation is Widely Used by the U.S. Federal Government

Mediation is widely used in the U.S. federal government. In 1990 the Administrative Dispute Resolution Act encouraged the use of ADR in all federal disputes. In 1991 the Executive Order on Civil Justice Reforms required all federal government enforcement staff to offer use of ADR as appropriate, prior to initiating any litigation.

The Environmental Protection Agency (EPA) has used ADR since 1987. ADR was used in 50 enforcement-related disputes, with the number of parties ranging from 2 to 1,200. ADR is commonly used for complaints with the Superfund, Resource Conservation Recovery act, Emergency Planning and Community Right to Know Act, The Clean Air and Water Acts, the Fungicide and Rodenticide Acts, and the Toxic Substances Control Act.[1] Examples from the EPA include the GE-Pittsfield case, which involved a highly controversial PCB contaminated site in Western Massachusetts.

In the EPA's experience benefits of ADR include: (1) reducing the transactions costs of the disputes; (2) that mediated negotiations focus more directly on real issues rather than posturing; (3) parties are more likely to identify settlement options that are tailored to their needs; (4) constructive working relationships are developed and on-going relationships preserved.

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

Product	Initiation	Final Determination	Final Duty or Margin	Dispute Resolution 1/	Current Status
U.S. Investigations of Canada's Imports					
Greenhouse Tomatoes (AD)	4/17/2001				Investigation Underway
Live Cattle (AD)	12/30/1998	11/17/1999			Finding of no injury
Live Cattle (CVD)	12/30/1998	10/22/1999		NAFTA panel (2)*	Finding of no subsidy
Fresh Chilled And 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		N/A		Investigation suspended 01/09/86; Terminated 10/09/91
Live Swine & Frsh, Chll'd & Frzn Pork (C	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 and 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 And 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				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
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%	NAFTA panel (1)*	AD Measure in effect
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%		AD Measure in effect
Christmas trees (AD)	11/15/1991	3/30/1992	14.90%		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	27.40%		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%		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
Grade55			$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)	3/5/1993	8/26/1994			Finding of no injury

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