Alternatives to Current Trade Remedy Law within NAFTA

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Introduction

Economists have long criticized the use of trade remedy law, particularly antidumping (AD) and countervailing duties (CVD) (Loyns, Young and Carter 2000; Kerr 2001; Shin 1994; CBO 2001; Lindsey and Ikenson 2001; Lindsey 1996; Meilke and Sarker 1997; USITC 1995). Criticisms of AD and CVD processes include their weak underlying economic rational (particularly for anti-dumping measures), the use of these measures by domestic commodity groups to achieve protection, and the economic inefficiency that results from the imposition of duties. Despite efforts by Canada to eliminate trade remedy law within the Canada-United States Free Trade Agreement and continued efforts to remove trade remedy law when negotiating NAFTA, the United States has insisted on the inclusion of domestic trade remedy law within these free trade areas.

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 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.

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 goals the changes are to achieve.

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.[1] 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.

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.

[1] 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.

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 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.

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, although outstanding issues remain.

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:[2]

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 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

[2] In making these recommendations the rules of the United States are generally considered as representative of what is done in all three member countries.

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."[3] 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

[3] Trebilock and Howse, pg 111.

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.[4]

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 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,

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

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 more radical changes are considered including the complete elimination of administered protection within NAFTA, and use 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.[5] In contrast, fierce political opposition has been expressed to the elimination of administered protection processes by U.S. legislators (Kerr 2001).

Introduce Alternative Dispute Resolution Processes

Among other radical changes to administered protection processes is the introduction of alternative dispute resolution (ADR). ADR is used by the U.S. and Canadian federal and Canadian provincial governments in a variety of venues. 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

[5] 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.

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.

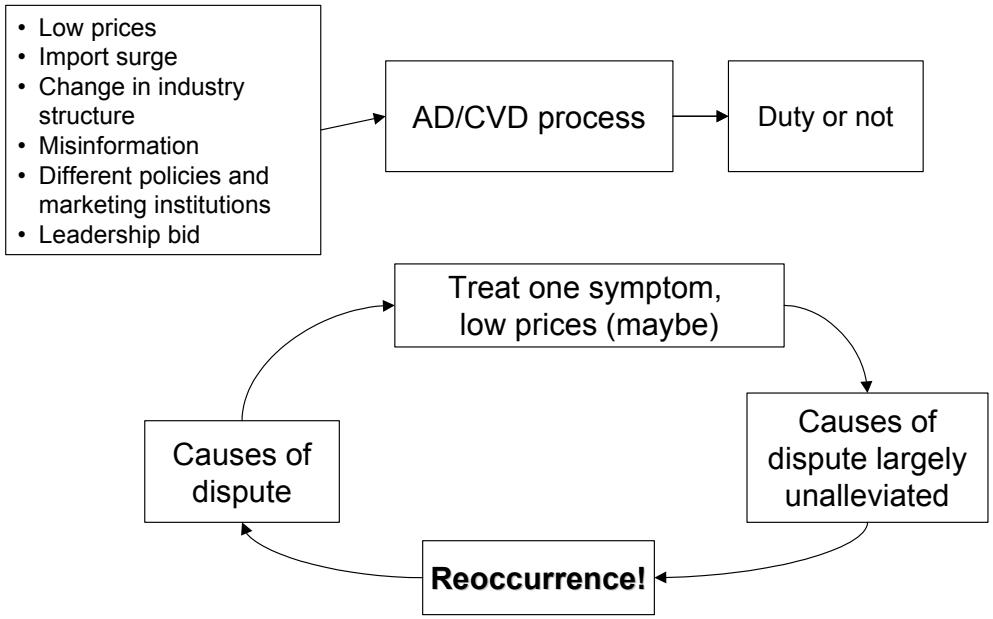

Figure 1. Factors Leading to an AD/CVD Dispute

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.[6] 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 1, 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 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

[6] 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

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,

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validate or correct this assumption.

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

Many economists have documented the cost of AD and CDV suits and have reached the conclusion that the system needs to be changed. If a consensus can be reached that the current system does not produce acceptable outcomes, then the next question is what goals should be pursued in developing a new process for resolving anti-dumping and countervailing duty complaints. How important are possible goals of cost and incident reduction, transparency of the resolution processes, and the promotion of commercial ties between NAFTA partners?

The options for the modification of administered protection processes are evaluated according to the criteria presented earlier (Table1). 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, to the extent that AD/CVD processes are used as an escape valve for the tensions inherent in economic integration, it is more appropriate to try to reduce the likelihood of conflict at an earlier stage. The NAFTA agreement did 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.

There is strong opposition to removal of the entire AD/CVD process within NAFTA. Leaving them in place may make it possible to put up front more productive processes for dispute resolution.

Table 1. Options for Change and Criteria

Options \ Criteria	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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