Anti-dumping at 100 Years and Counting: A Canadian Perspective

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Introduction

On the 10th of August 1904, the first anti-dumping statutory provisions in any jurisdiction received Royal Assent in Canada, with the provisions coming into force retroactively on the 8th of June 1904. Edward VII, who had recently succeeded Queen Victoria, sat on the throne of the United Kingdom and its overseas Dominions (including Canada), Sir Wilfrid Laurier was the Prime Minister and the Honourable William Patterson was the Minister of Customs whose bill introduced the measures.

The measures implemented in 1904 formed part of the amendments to the Customs Tariff Act of 1897. With the customary granularity of trade measures, much of the Act concerned itself with amendments to the tariff schedules for items ranging from false teeth to machinery and equipment intended for exclusive use in alluvial gold mining.

It was Section 19, which introduced a "special duty on under-valued goods", that had historic significance. At a time when tariffs were not bound, what made the duty special was that it could be levied administratively, rather than being enacted; hence, it was essentially a flexible tariff. Several features of this section are noteworthy in historical perspective:

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- The special duty was to be set at the difference between the selling price in Canada and the "fair market value", where the latter was identified with the value of the goods for purpose of application of the ad valorem tariff. In the Parliamentary discussion of the new measures, the Minister of Customs made clear that the reference price was that at which the goods were sold in the country of production.[1]
- The application of the duty was limited to such goods as were also produced in Canada; provision was made for the exemption of goods from the special duty if domestic supply conditions were found to be inadequate.
- There was no injury test.
- At the same time, the law capped the amount of protection offered by the special duty by setting a maximum equal to 50 percent of the regular duty; goods identified in a specific schedule were subject to different limits.

Apart from a description of consequential amendments to the Act to take account of the introduction of the special duty, there is no record of further parliamentary discussion or debate on the final bill. In the House of Commons, the amended Bill went through first, second and third readings in one day with no comment. In Canada's upper house, the Senate, discussion was limited to measures in the Bill dealing with the risk to importers of false teeth (of which there were apparently large stocks in Canada) of being undercut on price by new shipments if false teeth were moved to the free list; of the "evil" of poor quality horses being imported from the United States (which resulted in horses sold for less than fifty dollars being put on the prohibited list), and concern about very cheap buggies (covered and uncovered) being imported from the United States which resulted in the *ad valorem* tariff being changed to a specific duty. With these amendments, the Bill passed third reading in the Senate and was submitted for Royal Assent.

It was thus with rather sparing comment that the first anti-dumping law in the world came into existence.

[1] Hansard, August 6, 1904, at p. 8717.

Historical Context

Several features of the historical context warrant some comment.

With New Zealand (1905) and Australia (1906) passing similar measures into law hot on Canada's heels, it might seem from an historical perspective that Canada had started a trend amongst the English-speaking countries. However, it would appear that in all three cases, the legislative initiative responded independently to similar specific developments--namely competitive pressure from the United States. It is thus most likely a matter of historical accident that Canada was first. It was the pressure on Canada's steel industry from US Steel that provided the main impetus to the Canadian bill.[2] In Australia's case, the pressure came from the International Harvester trust which was preparing to introduce US and Canadian agricultural machinery into the Australian market; this threatened to wipe out the nascent Australian manufacturing sector, which at the time was centred around agricultural machinery.[3] In New Zealand, it was also pressure from International Harvester on both local and British suppliers that prompted that country's legislation.[4]

The context was that of the "Robber Baron" era of US market capitalism that also prompted the introduction of domestic US anti-trust legislation. In Canada, as well, concern about market dominance strategies had led to an 1889 act outlawing

[2] See J. Michael Finger, "The Origins and Evolution of Anti-dumping Regulation" in J. Michael Finger (ed.), *Anti-dumping* (Ann Arbor: University of Michigan Press, 1993): 14-15.

[3] David H. Plowman, "Protectionism And Labour Regulation"

[4] In New Zealand's case, the anti-dumping provision was targeted very narrowly at International Harvester:

"In 1905 domestic and British manufacturers of agricultural implements complained about the efforts of an American harvester trust to monopolise the New Zealand market by systematic price-cutting to New Zealand purchasers. As a result, the Agricultural Implement Manufacture, Importation and Sale Act was passed, which made provision for a special duty to be applied to the unfairly traded imports. This Act continued in effect until 1915.

The first full anti-dumping legislation appeared as section 11 of the Customs Amendment Act of 1921." See: Ministry of Economic Development, *Anti-dumping Law and Practice in New Zealand.*

"conspiracies and combinations" (which interestingly pre-dated by one year the 1890 Sherman Anti-Trust Act in the US); this was followed up by Canada's 1910 Combines Investigation Act.[5] The 1889 and 1910 Acts concerned themselves with combines activity; price discrimination was not introduced into the Canadian competition legislation until the Great Depression. In this latter regard, Canada trailed the US, which first addressed price discrimination (and other forms of potentially competition-limiting developments such as inter-locking cooperate directorates) in the Clayton Anti-Trust Act of 1914.

The era was a high season of what today we call "globalization", with labor and capital able to move internationally as never before or since, the movement of goods increasingly facilitated by falling transportation costs and improved communications, and with the international gold standard serving to transmit price signals clearly[6]--conditions conducive to economic development as evidenced by the many new entrants into the "convergence club" at that time.[7] But it was also an era marked by an awakening of economic nationalism in newly industrializing countries. Symptomatic of the timein Canada the Laurier government was defeated in 1911 after campaigning on the strength of a proposed reciprocity treaty with the US (which meant free trade in resource products only since Canada would have been allowed to maintain tariff protection for manufactured goods); in Australia, it was the age of the "New Protection" policies.[8]

Economic theory has since developed an explicit linkage between anti-dumping and competition policy (the one being essentially seen as an international trade variant of

[5] Australia also introduced anti-trust legislation in this time period, enacting provisions against predatory pricing in 1906. See Ian Wooton and Maurizio Zanardi, "Trade and Competition Policy: Anti-dumping versus Anti-Trust", footnote 3 at p. 4.

[6] See for example the description in C. Nick Harley, "A Review of "O'Rourke and Williamson's Globalization and History: The Evolution of a Nineteenth Century Atlantic Economy", *Journal of Economic Literature*, Vol. XXXVII (December 2000): 926-935; at p. 926-927.

[7] For some comments on the episodic nature of convergence historically, see Dan Ciuriak and Charles M. Gastle, "The Social Dimensions of Globalization: Some Commentaries on Social Choice and Convergence" in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2003* (Ottawa: Department of Foreign Affairs and International Trade, 2003) http://www.dfait-maeci.gc.ca/eet/research/trade_reseach-en.asp.

[8] See Plowman, op. cit.

the other), which was there only implicitly at the time of the initial formulations of these policies.[9] While some analysts doubt how much validity this theoretical foundation actually has, this linkage has since found public policy expression within the European Union and in the Australia-New Zealand Closer Economic Cooperation (CER) agreement in both of which the application of anti-dumping policies has been explicitly replaced by the application of competition law.[10]

And actual practice has since given ample expression to the protectionist potential implicit in a variable tariff that was developed as a policy tool at a time when a new protectionism was emerging to challenge the trend of globalization.

Today, in another high season of globalization, with new ambivalence about globalization surfacing, it is of no small interest to note the similarities to the historical context in which anti-dumping first took root. It is also of interest to note a major difference: anti-dumping actions did not proliferate then, but they do now.

A Canadian Perspective on Anti-dumping in General

Canada is one of the more active users of anti-dumping (responsible for a modestly disproportionate seven percent of all anti-dumping measures in place worldwide in 2000 according to the WTO) but tends not to be a major target of other countries (measures against Canadian exports account for only one percent of anti-dumping measures in place worldwide in 2000).

[9] The first comprehensive treatment articulating the economic rationale appears to have been by Jacob Viner, *Dumping: A Problem in International Trade* (Chicago: University Press, 1923).

[10] See Jeff Waincymer, "Implications for anti-dumping and countervailing", paper delivered at the Conference, *An Australian-United States Free Trade Agreement -- Opportunities & Challenges*, Canberra, 21 June 2001; at p. 1. The US, in a 1998 communication repudiates any linkage between anti-dumping and competition policy; see WTO, *Communication from the US*, Document WT/WGTCP/W/88. Michael Finger anticipated the official US position: "Its history in Canada provides an explicit lesson on what anti-dumping is: ordinary protection. Its history in the United States an explicit lesson as to what it is not: an extension of anti-trust regulation". J. Michael Finger, *op cit*: 13.

Canadian public policy takes the position that anti-dumping is a legitimate policy tool; Canada thus seeks to maintain the effectiveness of anti-dumping measures to address injurious dumping. At the same time, recognizing the risks to Canadian exporters, Canada seeks through negotiations (including in the WTO, FTAA and bilateral FTA contexts) to promote international convergence in practices and, by clarifying existing provisions, to increase the predictability of market access.

The Special Import Measures Act (SIMA) which embodies Canada's anti-dumping provisions was quite recently the subject of extensive consultations by subcommittees of the House of Commons Standing Committees on Finance and Foreign Affairs and International Trade. The subcommittees heard from a broad range of interested parties, including domestic producers, importers, retailers, academics, trade practitioners and government officials. The subcommittees concluded that Canada's trade remedy system as organized under SIMA in general struck an appropriate balance between the interests of Canadian producers seeking protection under the law and import-dependent producers and consumers.

The resultant changes introduced into the legislation in 1996 were thus in the nature of refinements to the investigation process, dealing with technical matters such as cumulation of injuries found to have been caused by dumping from more than one country, procedural streamlining, confidentiality of information provided, role of expert witnesses, and stakeholder representation.

The Special Place of the US in Canada's Anti-dumping Policy Firmament

When it comes to Canada's major trading partner, the United States, it is no secret that Canada's preferred outcome when it entered free trade talks with the United States was to eliminate the application of trade remedy laws from bilateral trade altogether. This objective, Canada's opening negotiating position in the free trade negotiations leading to the 1989 Canada-US Free Trade Agreement (CUSFTA), has been described as the "Holy Grail" for Canadian trade policy--perhaps an overstatement but certainly indicative of

how large in Canadian eyes looms any threat to Canada's access to the US market, and also perhaps a good point of comparison as regards attainability.

Failing elimination, Canada sought to harmonize the operation of trade remedy laws. While even this negotiating objective was not achieved in the CUSFTA, or in the 1994 North American Free Trade Agreement (NAFTA), these agreements did introduce procedural safeguards against the abuse of trade remedy law for protectionist purposes in the form of an alternate route of appeal, namely a binational panel, for review of administrative agency determinations as regards consistency with domestic law.

The Impact of the CUSFTA/NAFTA

The disciplines on the use of trade remedies introduced with the two free trade agreements involving Canada and the United States have been an important innovation for Canadian firms. Binational panels have been used more frequently and more successfully to appeal affirmative rulings of the US administrative authorities responsible for trade remedies than have been domestic US courts of appeal:

- Canadian firms have appealed over three-quarters of affirmative cases since the introduction of binational panels;[11] binational panels have also been asked to review the majority of affirmative cases filed between 1980 and 1988. By contrast, Canadian cases were appealed to the US Court of International Trade (CIT) only 20 percent of the time.[12]
- Approximately two-thirds of cases appealed to a binational panel were remanded for redetermination.[13] This is a much higher rate of remand than Canada and others have achieved at the CIT; estimates of the fraction of cases remanded by

[11] These percentages include both anti-dumping and countervailing duty appeals.

[12] See Patrick Macrory "NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution", *Commentary 168*, CD Howe Institute, September 2002

[13] Gary C. Hufbauer and Jeffrey J. Schott, NAFTA Dispute Settlement Systems (Washington: Institute for International Economics 2003).

the CIT range from 22% to 40%.[14] In the case of US firms appealing Canadian administrative decisions, nine of the twenty-six cases (or a little over one-third) that have been appealed have resulted in remands.[15]

- The duty rate was, with one exception, lowered for every Canadian industry that was able to obtain a remand decision from the panel.[16] In three cases (including the largest one, softwood lumber III), duties were eliminated for all firms; in three other cases, duties were eliminated for some but not all firms.

In these respects, the institutional changes introduced with the free trade agreements can be said to have reduced the burden of US protectionism for Canadian exporters.

At the same time, it is not possible to firmly conclude on the basis of the available evidence that the new appeal mechanisms served to discipline the use of trade remedies for protectionist purposes in the sense of modifying the behaviour of either US petitioners or the US administrative authorities. This remains an important empirical policy issue to clarify (with implications for public policy); in the meantime, some perspectives can be provided by examining actual trends.

The presence on the scene of CUSFTA/NAFTA Chapter 19, which deals with trade remedies, might have induced the following kinds of behavioral changes in petitioners and/or the administrative authorities.

- A heightened risk of a remand might lead to more conservative determinations by the US Department of Commerce (DOC) to reduce the risk of having to reexamine cases.

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[14] Ryan (1996) finds a 36 percent remand rate; Hansen et al (1995) found 40 percent were reversed; Goldstein (1996) found a 22 percent remand rate for all states, but 33 percent for Canada; Rugman and Anderson (1997) find that 32 percent were remanded. Unah (1997) finds that the Federal Circuit court remands 24 percent of trade remedy cases.

[15] Author's calculation based on completed cases, as available on the NAFTA Secretariat website. Cases that were appealed and remanded more than once before obtaining final decisions are treated as one successful appeal for this count.

[16] The one case that did not result in a lower duty was a review of a case filed prior to 1980 (Paving Equipment); in this case redetermination resulted in a 90 percent *increase* in its duty from 9.47 percent to 17.97 percent (Jones 2000, 149). l Note: not every *remand* resulted in lower duties, but every *case* that obtained a remand did have duties lowered; some products were remanded several times before duties were lowered.

- A heightened risk of failure of a petition might in turn induce somewhat less aggressive petitioning behaviour on the part of US industries, reducing the rate of petitioning.
- Insofar as petitioning is discouraged, the "quality" of petitions would increase as fewer less-meritorious cases are brought forward.

The behavioral considerations point unambiguously to a possible decline (albeit a small one given the low cost of petitioning and the effectiveness of the mere fact of an investigation on curtailing imports) in the frequency of petitions. However, they yield no *a priori* expectation concerning the frequency of affirmative decisions or the rate of success of appeals, since this would depend on the relative strength of the disincentive to file less-meritorious cases versus the discipline exerted on protectionist rulings by US authorities.

Behavioral changes induced by a changed institutional setting would be expected to evolve dynamically as petitioners and the authorities gained experience with the new system. For example, Blonigen (2002) suggests that US authorities and private petitioners may be influenced by the total number of remands and overturned decisions. If expected net benefit calculations are influenced by the cumulation of overturned outcomes, behavioral changes would deepen with the passage of time, insofar as more affirmative decisions get overturned. The minor changes to the CUSFTA regime introduced with the NAFTA would not be expected to have resulted in large behavioral changes.

It has been suggested that the dispute resolution system was weakened considerably by the expansion of the grounds on which a challenge of a panel decision could be brought to the Extraordinary Challenge Committee (ECC), a mechanism provided under the CUSFTA/NAFTA to challenge unfavorable rulings.[17] However, there

[17] See Robert Howse, "Settling Trade Remedy Disputes: When the WTO Forum is better than the NAFTA", Commentary 111, CD Howe Institute, Toronto, June 1998).

has actually been only one instance of recourse to the ECC under NAFTA (compared to three under the CUSFTA regime). [18]

In considering changes to behavior wrought by the CUSFTA/NAFTA, one would also have to take into account possible effects flowing from changes to dispute settlement procedures at the multilateral level. The CUSFTA came into in 1989, the same year in which the *1989 Dispute Settlement Procedures Improvements* ("*Improvements*") gave complainants the right to a GATT panel, removing the ability of defendants to block or significantly delay a panel request; the NAFTA meanwhile came into force the year before the introduction of the further strengthened Dispute Settlement mechanism within the World Trade Organization (WTO). Contrary to at least some expectations, the *Improvements* did not encourage greater recourse to panels;[19] with respect to anti-dumping cases specifically, only six cases were brought forward under the GATT's Tokyo-round vintage Anti-dumping Code, none involving Canada-United States bilateral issues.[20] The rate of panelling of anti-dumping disputes rose significantly under the WTO's Dispute Settlement Understanding; twenty-eight cases were brought forward in the eight-year period 1995-2002.[21] Since only one of these involved a Canada-United States bilateral issue, the 2002 softwood lumber case, it is clear that the NAFTA panel was the preferred route to seek relief from anti-dumping duties. That being said, altogether fifteen of the thirty-four anti-dumping disputes brought to the GATT/WTO system in the years 1989-2002 involved the US as complainant or defendant, including

[18] See "Opinion and Order of the Extraordinary Challenge Committee in the Matter of Gray Portland Cement and Clinker from Mexico" on the NAFTA Secretariat Website. This being said, the one appeal to the ECC, by the US, has resulted in a stalemate in the process with ongoing negotiations aimed at settling the matter. Howse (op cit) also suggested that NAFTA panels are less likely to remand a case because they are staffed increasingly with judges rather than trade/economic experts and so less likely to recognize technical errors by the US administrative authorities. However, as Unah points out: "Expertise of judges is engendered by the special judicial setting. The narrow jurisdiction of specialized courts means that judges can gain expertise rapidly in the policy area they oversee since these judges are repeatedly presented with cases posing similar questions of law and fact" (Unah 1998, p. 93). In any event, there have been too few cases to tell whether there was anything substantive in this change.

[19] See, Marc L. Busch and Eric Reinhardt, "The Evolution of GATT/WTO Dispute Settlement", in John M. Curtis and Dan Ciuriak (eds.) *Trade Policy Research 2003, op cit.* Their data show that rates of paneling before and after the *Improvements* were 43 percent and 45 percent, respectively.

[20] See Table 1 in Chad P. Brown, "Anti-dumping Against the Background of Disputes in the GATT/WTO System", June 2002; at p.38.

thirteen in the latter capacity. As a fraction of all US anti-dumping actions in this period, this is a small number; accordingly, one would not expect a major impact on the behaviour of US authorities or petitioners from this source.

Finally, a new wrinkle was added to the institutional setting with the *Continued Dumping and Subsidy Offset Act 2000* (the so-called "Byrd Amendment"), enacted on 28 October 2000 as part of the *Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2001*. Pursuant to this legislation, the Commissioner of Customs distributes funds (including all interest earned on the funds) generated by anti-dumping and countervailing duties in the preceding fiscal year to each eligible domestic producer. This legislation was almost immediately, and ultimately successfully, challenged at the WTO by eleven co-complainants; failure by the US to comply with the Dispute Settlement Body's recommendation that the US withdraw the legislation has resulted in follow-up action by a number of the co-complainants to retaliate. In the meantime, three disbursements of funds collected pursuant to trade remedy duties have been made. By increasing the potential reward to a successful petition, the Byrd Amendment will have increased incentives to petition.[22]

Any attempt to identify behavioral changes must also sort these out from impacts due to economic conditions—which were quite different than in the pre-free trade era.

First, import penetration into the US rose quite steeply in the 1990s: as shown in Figure 1 below, imports of goods and services rose from an average of about 10 percent of GDP in the 1980s to almost 15 percent in 2000, before falling back during the recessionary conditions in the US in 2001-2002.

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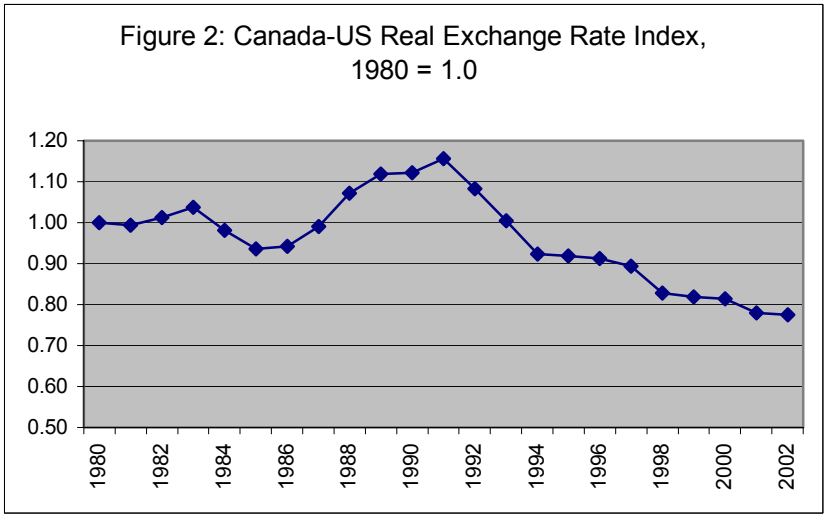
[21] Ibid. In his text at p. 1, Brown puts this figure at twenty-five; his table shows twenty-eight.

[22] A potential further complicating factor in terms of incentive effects would be a scheme involving sharing of the Byrd amendment disbursements as proposed by the US in the Fall of 2003. This issue is discussed in Charles M. Gastle and James Leach "The Need for an Antidumping Market Structure Test in the Context of Free Trade Agreements", Ind. Int'l & Comp. L. Rev. (II:1, 2001)

While Canada only maintained its share of the US import market in this period (which of course brings into question how much of the growth in Canadian exports to the US in the free trade era was due to trade liberalization versus other factors), this nonetheless meant that Canadian goods and services expanded their market share in the US. At the same time, the rise in bilateral investment flows meant that a greater share of trade was accounted for by intra-firm flows.

The free trade era also witnessed a real decline in Canada's exchange rate vis-à-vis the US dollar (see Figure 2).



To be sure, a good part of that depreciation represented a reversal of the earlier steep appreciation of the Canadian dollar during the second half of the 1980s, a period when the US dollar weakened globally following the Plaza Accord.[23] That being said, towards the end of the period, the Canadian dollar became undervalued by standard indicators of exchange rate determination: it fell below its purchasing power parity and Canada's external balance shifted from deficit to surplus. This shift was largely driven by an expansion of Canada's balance on merchandise trade, which in turn was more than fully accounted for an expansion in Canada's bilateral trade balance with the US (Canada's trade balance with the rest of the world weakened over the free trade era).

While these indicators point to progressive intensification of the kinds of conditions that are associated with protectionist pressures, an important counterweight came in the form of the remarkable Clinton-era economic boom in the US. Simply put, the expansion of the US economic pie meant that any increase in the share taken up by imports was more easily accommodated than would otherwise have been the case. In particular, the boom resulted in a steep decline in the US unemployment rate and a surge in US corporate profits (including as a share of US GDP). Both trends should have worked to reduce the likelihood of protectionist actions.[24]

Moreover, the Clinton presidency turned out to be one of the most activist on trade in postwar US history. Within a few years of taking office, the Clinton Administration pressed forward to a conclusion of the Uruguay Round of multilateral negotiations that included the establishment of the World Trade Organization, launched the initiative for free and open trade and investment in the Asia Pacific at the 1993 Seattle

[23] Announcement by the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States (Plaza Accord), September 22, 1985. The key aspect of the agreement was the statement that "some further orderly appreciation of the main non-dollar currencies against the dollar is desirable.". This paved the way for the continued decline of the US dollar from its peak in the first quarter of 1985. The text of the Accord is available online at: https://tspace.library.utoronto.ca/retrieve/640/fm850922.htm

[24] Numerous studies show that macroeconomic conditions influence the extent of trade remedy activity. See for example, Michael M. Knetter and Thomas J. Prusa, "Macroeconomic Factors and Antidumping Filings: Evidence from Four Countries," NBER Working Paper 8010, November 2000,; and Bruce A. Blonigen and Thomas J. Prusa, "Anti-dumping", *NBER Working Paper 8398* (July 2001); and

APEC Summit, concluded the NAFTA, and launched the process to create a Free Trade Area of the Americas at the Miami Summit of the Americas in December 1994.

And perhaps equally important, the Clinton Administration shifted from a dollar policy of "benign neglect" which it had inherited from its predecessor, and instituted a "strong dollar" policy. This was signaled in a speech given by President Clinton immediately before the G7 meeting of 25 April 1995 at which Treasury Secretary Robert Rubin articulated the policy. From the perspective of the trading system, a strong dollar policy is as conducive to trade as US tariff cuts.

Accordingly, while clearly important, contextual factors do not point unambiguously one way or the other as regards the likelihood of more or fewer trade remedy actions by the US against Canadian imports in the free trade era.

In terms of the actual experience, forty-six anti-dumping petitions were filed by US complainants against Canadian exports from 1980 through 2002 (see Annex Table 1). Of these, ten were filed in conjunction with a countervailing duty petition. Seventeen, or 37 percent, of the anti-dumping petitions resulted in the application of duties on some or all of the products named. Thus, on average, this period witnessed two anti-dumping filings per year with duties being applied less than one case per year. Measured by export flows in the year preceding the petition, approximately US$13 billion in annual trade flows were affected; however, about US$9 billion was accounted for by only two cases (the 2001 softwood lumber filing and the 1991 steel ball bearings case). Considered in light of the overall size of the trade flows in this, the single largest bilateral trading relationship in the world, the share of trade affected has been small. Nonetheless, given the severe disruption to trade that accompanies even a filing, the tendency for duties to remain in place for long periods, and negative implications for Canada's investment climate from an implied risk of access to the US market, this rate of trade remedy activity is far from insignificant. Accordingly, any reduction in the rate of petitioning induced by Chapter 19 would have to be considered an important benefit.

As shown in Table 1 below, the frequency of AD petitions fell across the three trade regimes in force during this period, from 2.6 per year in the pre-free trade era to 2.4 per year in the CUSFTA period and only 1.2 in the NAFTA era. The extent of decline in the CUSFTA era is probably understated by this count since the carbon steel products case involved four separate anti-dumping petitions.

Table 1: US AD Petitions against Canadian Imports across Trade Regimes

	1980-1988	CUSFTA (1989-1993)	NAFTA (1994-2002	Full Period (1980-2002)
Number of Petitions	23	12	11	46
Petitions per year	2.6	2.4	1.2	2.0

Source: Author's calculations.

However, the even steeper decline in AD petitions against other industrial countries (see Table 2) cautions against any leap to conclusions about the role in this of Chapter 19.

The same analysis was done pre- and post-NAFTA and the same results obtain – the decline against all industrial countries was larger than it was against Canada.[25]

Table 2: US Petitions/Year against Canada and others, Pre- and Post-CUSFTA

Period	US AD vs. Canada (NBER)	US AD vs. Rest of World	US AD vs. Other Industrial Countries
1980-1988	2.6	45.6	25.3
1989-2002	1.6	40.0	12.9
% change	-38.7%	-12.2%	-49.2%

Source: NBER

It is also important to note the how Mexico fared, pre and post-NAFTA. Mexico experienced an 18 percent fall in petitions, which is larger than for other developing countries, which only experienced a 1 percent reduction in petitions, but there was a 30 percent fall in petitions against all states post-NAFTA.

Overall, it is difficult to make a strong case that free trade significantly reduced the rate of petitions.

[25] Two studies (Jones 2000 and Blonigen 2002) that addressed this issue came to opposite conclusions: Jones concluded that free trade had reduced the petition rate, Blonigen found not.

The percentage of petitions that resulted in the application of duties also fell, although to a lesser extent than the decline in the rate of petitions. The petition success rate in the free trade era was about 30 percent compared to 39 percent previously.

Table 3: Frequency of Successful Petitions against Canadian Imports across Trade Regimes

	1980-1988	CUSFTA (1989-1993)	NAFTA (1994-2002	Full Sample Period (1980-2002)
Number of Petitions	23	12	11	46
Duties applied	9	3	4	16
Annual Success Rate	1	0.6	0.4	0.7
Percentage succeeding	39%	25%	36%	35%

Source: Author's calculations.

Table 4 compares the likelihood of a petition leading to duties against Canada versus other countries. For Canada, the success rate fell by seven percentage points after CUSFTA. By contrast, the success rate against all other countries *rose* by 12 percentage points (including by 14 percent against other industrialized countries).

Table 4: US Petition Success Rate against Canada and others, Pre- and Post-CUSFTA

Period	US AD vs. Canada (NBER)	US AD vs. Rest of World	US AD vs. Other Industrial
1980-1988	39%	37%	33%
1989-2002	32%	49%	47%

While it is tempting to read a free trade effect into this result, the data for Mexico muddy the water considerably. The success rate of petitions against Mexico rose after NAFTA by even more than the rise against all other states and all other developing countries.

A number of studies have examined the determinants of the behaviour of the US trade remedy administrative authorities econometrically, with mixed results.[26] Overall, it is difficult on the basis of the available evidence to firmly conclude that US authorities adopted a more conservative approach to evaluating petitions from Canada because of the presence of the appeal mechanisms made available under the free trade, while presumably maintaining their former standards for petitions from other countries.

[26] Blonigen and Prusa "Anti-dumping", *op. cit*., is a useful overview of this literature.

Some thoughts on use of trade remedies and macroeconomic disequilibria

Originally conceived but little used in the first high season of globalization, anti-dumping has become a prominent feature of international trade in the current, second high season of globalization. Why that is the case deserves some discussion.

Put in its worst light, the explanation is that governments, given the way political systems have evolved, and in light of the successes of past trade liberalization initiatives in creating a generally liberal international trading regime with low tariffs, are more likely to respond positively to the narrow but intense pressure from those seeking protection from energetic import competition, thus foregoing the quantitatively larger but much more diffuse benefits of trade. Put in a better light, even though anti-dumping is not seen as functioning like a competition policy regime for trade, the concept which gives it some theoretical legitimacy, it is acting like a circuit-breaker in the political economy of trade--attenuating some of the sharper domestic adjustment pressures emanating from the trade system. Appropriately viewed (or, more harshly, cleverly spun), this arch tool of protection can be presented as actually paving the way for greater liberalization of trade.[27]

It might be ventured that the controversy over anti-dumping is deeply rooted in the emotive concept of "fair market value", words that were used in the very first anti-dumping statute on record, but that are now seen by many as representing Orwellian doublespeak when used in connection with anti-dumping: "[A]ll but AD's staunchest supporters agree that AD has nothing to do with keeping trade "fair". AD has nothing to

[27] The narrowness of the vote (215-214 in the US House of Representatives) authorizing Trade Promotion Authority (TPA) in December 2001 can be cited in this regard; the votes of steel-producing states were essential to passage of TPA and these votes, it has been argued, were effectively secured for TPA by the launching of the Section 201 investigation (see for example, Gary C. Hufbauer and Ben Goodrich, "Time for a Grand Bargain in Steel?", *Policy Brief* 02-1, Institute for International Economics January 2002; footnotes 20 and 21 draw this link). The duties imposed pursuant to this investigation were since found to be inconsistent with the US' WTO obligations and have been withdrawn, but TPA remains in place.

do with moral right or wrong, it is simply another tool to improve the competitive position of the complainant against other companies."[28]

The concept "fair market value" brings together elements from two areas: law and economics--the concept of "fairness" and of "market value".

In some legal traditions (of which the Anglo-American is one), the concept of "fairness" is closely associated, if not identified, with the notion of equity, and is bound up with notions of "natural justice" and morality itself. In this tradition, fairness has both a procedural aspect (due process, trial by peers) and an element of proportionality ("just rewards/deserts"). In economics, the market price has surprisingly similar features—at least under equilibrium conditions and absent externalities that might lead to "market failures" or barriers to economic efficiency that might constitute public policy failures. The procedural element derives from the way in which a market price is determined: as the price determined by the exchange of goods and services between a willing buyer and a willing seller freely transacting their business.[29] The element of proportionality enters through the equation of the price of a good or services with its marginal product in the case of a factor of production, or the marginal utility of that good or service compared to others in the case of consumption.

In principle, there is then no deep wedge between the notions of "free trade" and "fair trade"; they ought in fact to be consonant. One might even go further to assert that the one ought to lead to the other. If there is a bitter struggle between "free traders" and "fair traders", accordingly, something has gone quite badly wrong in the system.

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[28] Bruce A. Blonigen and Thomas J. Prusa, "Anti-dumping", *NBER Working Paper 8398* (July 2001); at p. 3.

[29] Sylvia Ostry put it as follows:

"[A]s a rule competition policy should be directed to promoting a situation of every man for himself and may the least competent get hammered.

This description, harsh as it may sound, paradoxically reflects what to many is perhaps the most appealing aspect of competition: its conformance with a very basic (if perhaps increasingly unfashionable) notion of fairness. Fairness in this sense describes a situation in which individuals are free to compete and limited only by their desire and ability to do so." See: Dr. Sylvia Ostry, "Competition Policy in Canada", October 30, 1975, at the Empire Club.

Arguably, this conflict could not have escalated because of the emergence of major new externalities or a major increase in barriers to economic efficiency. That puts the spotlight on the equilibrium conditions—or more to the point, the apparent lack thereof--in the international market place.

Historically, the surge in the use of anti-dumping occurred in the past three decades or so, with the resort to this measure increasing from decade to decade. Trade analysts naturally associate this with the lowering of tariffs in the Kennedy, Tokyo and Uruguay Round: this trend is thus seen as protection migrating from general tariffs to non-tariff measures and to trade remedy tools. However, this period is also the post Bretton Woods era in international financial markets. The switch from an international finance system anchored by the convertibility of the US dollar to gold has resulted in wide swings in the dollar against the other key global currencies (deutschemark/euro and yen) and the emergence of external imbalances that have become progressively larger from decade to decade.

Notably, the wide swings in the G3 currencies were not for the most part nominal adjustments to offset differential rates of growth of costs and prices in the domestic economies of the trading partners; they were for the most part real movements with profound implications for international competitiveness of production in the various economies. The emergence of the massive US current account deficits of recent years also coincides with the eruption of financial crises in emerging market that started in East Asia in 1997 and that resulted in large real exchange rate depreciations of most of the major traders amongst the developing countries.

These decades also witnessed a surge in the formation of multinational companies able to diversify production and to source globally; in some theoretical models, this trend was in fact induced by the currency instability as the diversification served to create natural hedges. And of course, the massive expansion of international financial balance

sheets represented in good measure the expansion of financial hedges (it was recently reported, for example, that Porsche is fully hedged until 2007 against euro/dollar movements). Arguably, the better that firms hedge, the wider the swings in exchange rates needed to correct external imbalances. And for the firms that cannot afford or obtain full hedging, the costs become even greater.

And so it is less than surprising that exchange rates have rarely at levels consistent with general notions of equilibrium value (e.g., broadly consistent with purchasing power parity, with external balance and with balanced international growth).[30]

Exchange rate disequilibria are most likely to impact sharply on commodities and commoditized manufactured goods, since these compete most directly on the basis of price, face comparatively high cross-price elasticities of demand, and consequently large

[30] A discussion of alternative ways of defining equilibrium conditions for an exchange rate is provided in John Williamson (ed.) *Estimating Equilibrium Exchange Rates*, (Washington: Institute for International Economics, September 1994). In practical terms, an equilibrium exchange rate is associated with rough external balance coupled with stable prices and growth. The concept of purchasing power parity (PPP) allows the identification of a specific value of the exchange rate at which the purchasing power of the local currency in the domestic market is equivalent to that of the reference international currency, the US dollar.

One set of reasons why the developments in real exchange rates and current account balances has proved to be so puzzling concerns certain features of the US economy that might be termed "US exceptionalism". First, the US provides the global numeraire currency; demand for this currency derives from private sector transactions (international trade and investment activity and financial hedging), and from public sector exchange market intervention and precautionary foreign exchange reserve holdings. Since the US feeds this demand by running current account deficits as opposed to by saving and lending, under steady state growth where there is an expanding liquidity requirement abroad, the US would be in perpetual current account deficit. Understanding the extent of demand for US liquid assets abroad is complicated by the fact that any instability in international exchange markets expands demand for precautionary reserve holdings and/or active intervention. At the same time, the distribution of the outstanding stock of liquidity appears to be far from optimal (e.g., Japan and China which cannot make much use of it hold a good portion of it currently). Second, the US has been the world's leading destination for foreign direct investment (after briefly losing top spot to China in 2002, the US reclaimed that position in 2003 with US$86.6 billion of FDI inflows compared to China's second-ranking US$57 billion), and at times in significant surplus on this account. Given that the US is the most capital-rich corner of the world, and the return to that capital is not self-evidently higher than returns on capital abroad (e.g., the US investment income earnings are about the same on its stock of foreign financial asset holdings of US$6.5 trillion as foreigners earn on their holdings of US$ 9 trillion (both figures for 2002, taken from the IMF International Financial Statistics), it is not entirely clear why that is the case. Nonetheless, insofar as the US is successful in attracting net private sector investment, that too would tend to push it deeper into structural current account deficit. It is difficult to infer from the state of the US external balances what its appropriate exchange rate might be. The deficits however do suggest to some that the US is facing systematic "unfair" competition--even though that competition might in reality be from within the US--that is, the Federal Reserve as the issuer of dollars that are often so much in demand abroad.

market share shifts. These are precisely the kinds of products where trade remedy actions tend to be found. And, with the recent pressure by US manufacturers to mount a WTO challenge to China's exchange rate regime, exchange rate policies have come into the line of fire in trade remedy rhetoric if not action.[31]

When conditions are far from equilibrium, the theory of second best warns that a move to optimality in one particular dimension cannot be necessarily equated with an overall improvement in economic welfare—indeed, it could be counter-productive. This makes it very difficult to make definitive assessments of the growing use/abuse of anti-dumping over the recent past, not least from computable general equilibrium models which by definition assume equilibrium conditions.[32]

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[31] Maintaining a nominal exchange rate peg is not *per se* a violation of the IMF's Articles of Agreement, and indeed this was the standard practice under the Bretton Woods arrangements. Charges against China of maintaining an artificially low exchange rate often focus on its decision to peg its nominal exchange rate against the U.S. dollar at the beginning of 1994. This involved a nominal devaluation of 50 percent to an average of 8.6 in 1994. The RMB then gradually appreciated to 8.28 in 1997, an average it has held with minimal variation since. It is interesting to note that the charge that China has been manipulating its exchange rate, the core argument made by those pressing for a WTO challenge of China's exchange rate regime, was more accurately applied during the period when China maintained a higher exchange rate for imports than for exports. Since it unified its exchange rates, it has stopped manipulation for commercial purposes. Under the "managed float", the value of the RMB varies with changes in supply and demand for the currency, but the People's Bank of China intervenes to constrain the actual fluctuations to a very narrow range. For practical purposes, the exchange rate is presently fixed to the dollar.

From the perspective of the trading system, what really matters is not the nominal exchange rate but the real exchange rate. China's real effective exchange rate (REER) as calculated by the IMF bottomed out in the second quarter of 1993, at an index reading of 79.9. Then it rose steadily (including in 1994, when the final major nominal RMB devaluation was made and the dual exchange rate regime was unified) to reach 125.9 in the first quarter of 2002, which also marked the U.S. dollar peak. The full trough-to-peak appreciation was 57.6 percent. This was sufficient to restore China's real effective exchange rate to its late-1980s level. From 1998 through 2002, China experienced net deflation of 2 percent measured by consumer prices. By this standard, the RMB was more likely somewhat undervalued than overvalued. However, as the RMB has followed the US dollar down over the period since 2002:Q1, it has effectively depreciated. While the nominal depreciation has conferred a temporary competitive benefit to Chinese producers, it has also pushed China back into inflation (3.2 percent year over year in January 2004); as China has not been passing on fully all of its energy cost increases, there is more inflation in the pipeline which will erode in real terms the advantage gained from nominal depreciation. Given that China is also close to balance in its overall current account, there is no case to be made of substantial under valuation of the RMB from a trade perspective. For a full discussion, see Dan Ciuriak. "The Laws of Geoeconomic Gravity Fulfilled? China's Move Towards Center Stage", forthcoming in *Asian Affairs: An American Review*, Spring 2004.

[32] This reservation is not meant to gainsay findings such as those of Gallaway et al. that "U.S. AD/CVD laws are poised to become the costliest, in terms of net economic welfare, of U.S. import restraint programs". Because of the behavioral response of firms targeted by trade remedy duties, the mesaured CGE results probably understate the actual welfare costs. See Michael P. Gallaway, Bruce A. blonigen and Joseph E. Flynn, "Welfare costs of the U.S. antidumping and countervailing duty laws", Journal of International Economics, Vol 4, No. 2, December 1999:211-244. Citation is at p.236.

Concluding thoughts

A century after its first introduction, anti-dumping has become a widely used instrument of trade policy. Its early integration into economic theory as an international counterpart of domestic competition policy has received some official ratification (e.g., in the Australia-New Zealand free trade agreement). At the same time, the most frequent user of anti-dumping, the United States, has repudiated any such link. Economic analysis of the pattern of use reveals it to be an instrument of political economy; its use in this sense has become a major bone of contention. Particular decisions have been picked apart and shown to be egregiously at odds with any reasonable economic theory of price discrimination that give anti-dumping theoretical legitimacy.[33] At the same time, the instability in international financial conditions that feed through into the trading system, with trade adjustment often serving to correct imbalances generated in the global financial system, muddies the water for this analysis considerably.

The future trajectory of its use is uncertain. On the one hand, retaliatory tit-for-tat use of anti-dumping actions may lead, given the repeated game nature of trade relations, to a type of "cold war" equilibrium,[34] in which the standards of use are made more rigorous, perhaps with the help of international negotiations. However, the path to such an equilibrium might be bumpy (one might recall the rather extreme bout of protectionism in the 1930s that apparently was required to forge the pro-trade liberalization consensus that informed the Bretton Woods framework for the post-WWII global economy).

Further, this trajectory might be shaped to an important degree by the behaviour of the developing countries rather than the traditional users. Developing countries are far more intensive users of antidumping than the traditional users, when the volume of

[33] As one study found, "In a depressingly wide variety of circumstances, a foreign producer can charge prices in the United States that are identical or even higher than its home-market prices and still be found guilty of dumping." See Antidumping 101: The Devilish Details of "Unfair Trade" Laws", Brink Lindsey and Dan Ikenson, Cato Institute, Center for Trade Policy Studies, November 21, 2002, At p. 10

[34] Bruce A. Blonigen and Chad P. Brown, "Antidumping and Retaliation Threats", *NBER Working Paper 8576*

imports is taken into consideration, and are rapidly becoming an important factor in global trade. The emergence of China, now a WTO member, as a frequent user of anti-dumping and as a vital new centre of dynamism for the global economy in particular represents something of a wildcard in this regard, with unclear though intuitively important consequences. Given how difficult it has been to resolve "system friction" between Canada and the United States (e.g., the softwood lumber and wheat board trade disputes), the comment on China may be "You ain't seen nothing yet!".

However, the apparent success of CUSFTA/NAFTA panels in providing at least some damage control, if not exerting measurable discipline on the underlying petitioner and administrative agency behavior, is something to build on. The infrequency of recourse to NAFTA ECC panels can be taken as an indication of broadly acceptable outcomes; the fractiousness that emerged in the softwood lumber case[35] appears so far to be an isolated exception that proves this rule.

And the WTO's dispute settlement mechanism looms large as a means of dampening or containing outbreaks of damaging tit-for-tat actions.

In the ultimately anarchic world of international relations, an institution such as the NAFTA and the WTO have precisely that amount of power that member governments are prepared to concede. And, in a realpolitik sense, the amount of power that member governments are prepared to concede is determined by a cost-benefit calculus. To date, the willingness of governments to comply with trade agreement obligations has been largely positive. That demonstrates, in a revealed preference sense, the great economic advantages of the liberal international trading system. It is much to be hoped that this revealed preference is sustained.

[35] The often-noted remarks of panel member Judge Malcolm R. Wilkey on the CUSFTA-era ECC panel called to review a softwood lumber decision. This case is given considerable weight by some analysts. See for example Robert Howse, "Settling Trade Remedy Disputes", *op cit*.

Annex 1

An Act to amend the Customs Tariff, 1897,

19. Whenever it appears to the satisfaction of the Minister of Customs, or of any officer of customs authorized to collect customs duties, that the export price or the actual selling price to the importer in Canada of any imported dutiable article, of a class or kind made or produced in Canada, is less than the fair market value thereof, as determined according to the basis of value for duty provided in *The Customs Act* in respect of imported goods subject to an ad valorem duty, such article shall, in addition to the duty otherwise established, be subject to special duty of customs equal to the difference between such fair market value and such selling price: Provided, however, that the special customs duty on any article shall not exceed one-half of the customs duty otherwise established in respect of the article, except in regard to the articles mentioned in items 224, 226, 228 and 231 in schedule A to *The Customs Tariff, 1987*, the special duty of customs on which shall not exceed fifteen per cent ad valorem, nor more than the difference between the selling price and the fair market value of the article.

2. The expression "export price" or "selling price" in this section shall be held to mean and include the exporter's price for the goods, exclusive of all charges thereon after their shipment from the place whence exported directly to Canada.

3. This section shall apply to imported round rolled wire rods not over three-eighths of an inch in diameter, notwithstanding that such rods are on the customs free list: Provided, however, that the special duty of customs on such wire rods shall not exceed fifteen percent ad valorem.

4. If at any time it appears to the satisfaction of the Governor in Council, on a report from the Minister of Customs, that the payment of the special duty by this section provided for is being evaded by the shipment of goods on consignment without sale prior to the such shipment, the Governor in Council may in any case or class of cases authorize such action as is deemed necessary to collect on such goods or any of them the same special duty as if the goods had been sold to an importer in Canada prior to their shipment to Canada.

5. If the full amount of any special duty of customs is not paid on goods imported, the customs entry thereof shall be amended and the deficiency paid upon the demand of the collector of customs.

6. The Minister of Customs may make such regulations as are deemed necessary for carrying out the provisions of this section and for the enforcement thereof.

7. Such regulations may provided for the temporary exemption from special duty of any article or class of articles, when it is established to the satisfaction of the Minister of Customs that such articles are not made in Canada in substantial quantities and offered for sale to all purchasers on equal terms.

8. This section shall not apply to goods of a class subject to excise duty in Canada.

Annex Table 1: US Anti-Dumping Cases on Canadian Exports, 1980-2002

Year Petition Filed	Industry	Remedy Sought	Cases duties were applied	Level of Duties Imposed	Exports (Year Preceding Petition, US $ Millions)
1980	Asphalt Roofing Shingles	AD			38.92
1981	Lightweight Steel Sheet Piling	AD			0.98
1982	Chlorine	AD			16.03
1982	Frozen French Fries	AD			3.25
1983	Round White Potatoes	AD			30.79
1983	Choline Chloride	AD	All items	9.73%	2.5
1984	Red Raspberries	AD	All items	2.41%	4.10
1984	Codfish	AD	All items	16.30%	26.37
1984	Egg Filler Flats	AD			12.62
1985	Rock Salt	AD			27.51
1985	Carbon Steel Pipes and Tubes	AD			89.46
1985	Iron Construction Castings	AD	All items	10%	9.63
1985	Oil Country Tubular Goods	AD & CVD	All items	19.38% (AD); 0.72% (CVD)	240.31
1986	Brass Sheet and Strip	AD	All items	8.10%	7.40
1986	Fresh Cut Flowers	AD & CVD	All items	6.80%	0.25
1986	Colour Picture Tubes	AD	All items	0.65%	15.53
1987	Potassium Chloride	AD			338.97
1987	Carbon Steel API Line Pipe	AD			2.99
1988	Fabricated Structural Steel	AD			125.83
1988	Complete Probe Thermostats	AD & CVD			23.74
1988	New Steel Rails	AD & CVD	All items	AD (38.79%); 13.56%(CVD)	92.65
1988	Generic Cephalexin Capsules	AD			0.46
1989	Limousines	AD & CVD			195.05
1991	Ball Bearings	AD			3,269.39
1991	Steel Wire Rope	AD			8.26
1991	Nepheline Syenite	AD			12.20
1991	Magnesium	AD & CVD	All items	31.33% (AD); 21.61% CVD)	49.35
1992	Potassium Hydroxide	AD			2.69
1992	Voltage Cable	AD			14.25
1992	Carbon Steel Products	AD	Some items	22.29% (corrosion-resistant); 61.95% (steel plate)	527.90
1993	Steel Wire Rod	AD			181.74
1997	Steel Wire Rod	AD & CVD			256.72
1997	UHT Milk	AD			2.01
1998	Stainless Steel Round Wire Rod	AD			17.38
1998	Stainless Steel Plate	AD	All items	11.10%	18.69
1998	Live Cattle	AD & CVD			922.44
2000	Anhydrous Sodium Sulfate	AD			5.77
2001	Mussels	AD			13.81
2001	Greenhouse Tomatoes	AD			160.94
2001	Softwood Lumber	AD & CVD	All items	9.67%(AD); 19.34%(CVD)	6,128.51
2001	Alloy Steel Wire Rod	AD & CVD	All items	9.91% (AD); 6.61% (CVD)	221.84
2002	Durum and Hard Red Spring Wheat	AD	Some Items	8.87% (Spring Wheat AD); 5.29% (Spring Wheat CVD)	252.46

Annex Table 2: Anti-dumping duty reductions following binational panel remands

Industry	Export Value	Initial Duty Level (DOC Final)	Duty After Panel	% Change in Duty Rate
Red Raspberries	4.1	2.41%	0% for some firms	N/A
Brass Sheet and Strip	7.4	8.1%	0.83%	100%
Pure Magnesium (AD)	42	31.33%	21%	33%
Cut-to-Length Carbon Steel Plate	74	61.95%	0% for some firms	N/A
New Steel Rails	92.66	113.56%	94.57%	17%
Corrosion-Resistant Carbon Steel	141	22.29%	0% for some firms	N/A

Author's Note: possibly incomplete.