

**A presentation to the Australia-US Free
Trade Agreement Conference**

**"The Impact of an Australia-US Free Trade
Agreement: Foreign Policy Challenges and
Economic Opportunities"**

Containing contingent protection

**29-30 August 2002
National Press Club
Canberra**

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Containing Contingent Protection

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1 Three words, much meaning

The title for the presentation assigned to me resonates with intrigue. Like a leading question in cross examination, the words suggest there is something blurred or indistinct in the background which needs to be exposed. “Containing” - a need to suppress something. “Protection” could hardly be a more emotive concept at a conference involving international trade. Putting the word “contingent” in front of it introduces the concept of conditionality, and subjectivity.

I intend to deal with this mysterious and consequently exciting topic in three parts.

- First I will define what is meant by “contingent protection”.
- Secondly, I will look at some models for containment, particularly focussing on existing Australian and US experience.
- Thirdly, I will relate containment methodologies to Australia-US trade and law and raise some critical issues for consideration in that context.

2 Defining contingent protection

Contingent protection could refer to almost any political or legal trade barrier where it is necessary for an evidentiary and argumentative burden of some sort to be discharged by a domestic industry to justify protection from imports. Such protection could take any number of different forms. However, as a term of art for trade lawyers, contingent protection is more specifically taken to mean safeguard measures, or what is known as emergency action in GATT-speak, and the remedies of anti-dumping and countervailing duties. Quarantine fits the wider description of contingent protection, but because of its scientific basis is not thought of as being based on attitudes towards “unfair” trade.¹

¹ Sanitary and phytosanitary rules and their application are not considered in this paper.

2.1 Safeguard measures

The ability to take emergency action against import surges is enshrined under Article XIX of the GATT 1994, and has been in the GATT since 1947. The meaning of Article XIX, and the procedures to be followed by members to investigate import surges and their effects, and to regulate the type of emergency action that can be taken, were fleshed out in the Agreement on Safeguards introduced at the end of the Uruguay Round.

Justification to apply a safeguard measure against imported products by the government of the importing WTO member exists where a number of contingencies are met. The product concerned must be shown to have been imported into the territory of the member:

- in such increased quantities, absolute or relative to domestic production (such increase being due to unforeseen developments);² and
- under such conditions as to cause or threaten to cause serious injury to the domestic industry (being the domestic industry that produces like or directly competitive products).

The Agreement defines the concepts used by offering more concepts. For example, “serious injury” is said to mean a significant overall impairment in the position of a domestic industry. A causal link must exist between the increased imports and the injury. If factors other than increased imports are causing injury, that injury must not be attributed to the increased imports. Threat must be shown to be clearly imminent, and based on facts and not merely allegation, conjecture or remote possibility.

The procedures set out under the Agreement on Safeguards must be followed in determining whether or not the contingencies exist. These include:

- public notification of the procedures to be followed by the competent authority, in a general sense, and in each investigation;
- public hearings, or other appropriate means for presenting evidence and hearing views and opposing views; and
- publication of a report by the competent authority setting out findings and conclusions on facts and law.

Optimistically, the Agreement states that safeguard measures must only be applied to prevent or remedy the injury and to facilitate adjustment of the domestic industry. The type of measures that can be imposed against the imported products include quotas, tariff quotas and tariffs. Time limitations are imposed on the duration of safeguard measures. Members affected by safeguard measures are entitled to trade compensation for the adverse effects of the safeguard measure, except that if no agreement is reached on compensation, the affected member must not exercise any retaliatory measure, by way of suspension of substantially equivalent concessions under GATT, for the first three years of the measure concerned.

² The question of whether “unforeseen developments” is a necessary condition to justify the imposition of a safeguard measure has been confirmed by the WTO’s Appellate Body. The words appear in Article XIX, but not in the text of the Agreement on Safeguards itself. See the Appellate Body report in *Argentina – Safeguard measures on imports of footwear* (WT/DS121/AB/R) at para 88.

Examples may help colour in this “black and white” legal explanation.

2.2 Australian safeguard measures example - pork

Australia’s only post Uruguay Round safeguard investigation took place in 1998.³ At that time, the Coalition government of the Liberal and National Parties was facing a Federal election. The protectionist policies of the One Nation Party was having a significant impact on the polling of the National Party. To bolster support in country areas, the government decided to respond to pressure from pig farmers complaining about imported frozen pork. On 25 June 1998, it established General Procedures for Safeguard Inquiries,⁴ there being no such procedures in place prior to that time. On the next day the Treasurer referred to the Productivity Commission the question of whether safeguard action was warranted against imports of frozen pork.

In its inquiry the Commission found:

- that the like or directly competitive products to the imported frozen pork cuts included live pigs;
- that, following from this finding, the Australian domestic industry comprised pig farmers as well as abattoirs and boning room operators;
- that there had been increased imports;
- that the industry was suffering serious injury; and
- that this injury had been caused primarily by increased imports.

The source of imports was Canada. The safeguard measure suggested by the Commission as being an appropriate remedy to the injury was a 10% tariff, phasing to 5% after one year and zero after two years. No quota limits were proposed.

Having won the election just prior to the publication of the Commission’s report, the Australian government decided against the imposition of a safeguard measure. It accepted the Commission’s view that a safeguard measure would not of itself promote adjustment, nor encourage exports. Other types of direct assistance were provided, targeted at encouraging export activities and industry rationalisation.⁵

2.3 US safeguard measures example - lamb

Two recent and highly topical examples of safeguard measures imposed by the US are those against lamb (principally affecting Australia and New Zealand), and against steel (affecting many countries).

³ The Australian Treasurer is responsible for referring inquiries into safeguard action to the Productivity Commission. In that context, the only other recent safeguard issue considered at the official level was somewhat unusual. In September 2001, the Treasurer referred to the Commission the question of whether the Commission was of the view that the Treasurer should refer a safeguard action inquiry to the Commission in relation to citrus. The Commission decided that he shouldn’t (Productivity Commission, *Citrus Growing and Processing*, Inquiry Report No. 20, 30 April 2002).

⁴ Special Gazette No. S 297, Thursday, 25 June 1998.

⁵ One might say that a GATT-legal remedy (if one accepts that the Commission was correct in its findings) was replaced by GATT-suspect subsidies. The Australian pork industry has enjoyed growing export success since then.

The action against lamb was a sharp thorn in the side of Australia-US trade relations.⁶ The US International Trade Commission (“ITC”) determined that there had been a surge in imports of 47% over four years, over which time imports increased their US market share from 13% to 24%. The ITC also found an imminent threat of serious injury to the domestic industry (not present serious injury), and that imports were an important cause, and a cause no less important than any other, of that threat. US President Clinton imposed a 9% tariff on imports up to the pre-existing (1998) quantities, and a 40% tariff on out of quota imports.

Australia took its complaint against the safeguard measure to the WTO. The Appellate Body found that the US safeguard measures were improperly applied because of errors in the procedures and the decision making processes used. The Appellate Body decided that the US:

- had not demonstrated that the injury arose by way of unforeseen developments;
- had considered the effect of the imports on the wrong industry, because growers and feeders of live lamb should not have been included in it;
- had not adequately explained the finding that there was a threat of serious injury to the domestic industry; and
- had not ensured that injury caused by other factors was not attributed to Australian imports.⁷

2.4 Anti-dumping and countervailing duties

The other form of contingent protection is the application of anti-dumping and countervailing duties. Again, there are requirements spelt out in the relevant WTO Agreements. The criteria will be well known to many of you. If:

- a product is imported into the territory of a member at a price which is lower than the price in its home market; and
- that practice causes or threatens material injury to the domestic industry of the importing member,

then the importing member can apply a duty to the imports. The duty can be up to the level of the price difference, or less if the domestic industry can operate profitably against lower priced import competition.

Countervailing involves similar concepts, but with a focus on offsetting the amount of any prohibited or actionable subsidy which has conferred a benefit on the production of the imported goods.

⁶ It was also an excuse for some excruciating puns in newspaper headlines, eg “*Aussie lambs to the slaughter*”; “*US buys trouble with lamb chop*”; and “*Clinton to get a lamb roast*”.

⁷ The outcome might not have surprised everyone in the US. In an article in the Australian Financial Review in July 1999, it was reported that the US Deputy Secretary of Agriculture, Richard Rominger, told Australian Deputy Prime Minister, Tim Fischer, following a lengthy presentation by Fischer against the application of safeguard measures, that “*you, your Embassy and your sheep farmers have won the economic and intellectual argument on this one all over town. But this is a problem that requires a political solution.*”

2.5 Australia and the US – dumping comparisons

Australia and the US have traditionally been the biggest users of anti-dumping action as a trade remedy instrument (based on initiations of investigations by product and source). As between the US and Australia, it is Australia which has more aggressively applied anti-dumping measures against the other. The US currently maintains only one active anti-dumping measure against Australia. Five years ago there were only two.

For its part, Australia currently maintains five such measures against the United States, and maintained six at a point in time five years ago. The measures currently in place here in Australia affect PVC resin, flexible slabstock polyols, carpet gripper, woven polypropylene carpet backing and wound skin closure strips.

A summary of Australian investigations involving US exporters makes interesting reading. The focus has been overwhelmingly chemical industry based (intermediate and plastics), with medical products a distant second.⁸ An analysis of products and findings in all Australian investigations involving US exports since 1990 follows:

Australian anti-dumping and countervailing investigations involving US exports 1990 to present

Date ⁹	Product	Dumping margins?	Material injury?	Causal link?	Comment
May 1990	Certain transparent film wound dressings (USA)	67-80 %	No		No dumping measures
Aug 1990	Vibrating wire piezometers/pressure transducers/sensors (USA)	None			No dumping measures
Nov 1990	Diagnostic reagent strips for the measurement of blood glucose in whole blood (UK and USA)	43-56%	Yes	No	No dumping measures
Jun 1991	Low density polyethylene (Argentina, Brazil, Canada, Finland, France, Israel, Japan, Qatar, Singapore, USA)	5-13%	Yes	No	No dumping measures
Jun 1991	Sodium cyanide (Germany, Italy, Japan, Korea, UK, USA)	2%			No dumping measures
Dec 1991	PVC resin (Argentina, Brazil, Israel, Mexico, Taiwan, USA)	0-20%	Yes	Yes	Dumping measures imposed
Jan 1992	Triethanolamine (Brazil, USA)	3-45%	Yes	Yes	Dumping measures imposed
May 1992	Sodium silicate (Malaysia, USA) - review of Customs' negative preliminary finding				Authority confirmed Customs' negative preliminary finding

⁸ Claims of dumping in this area are no doubt assisted by high US insurance costs and litigation risk factors, which have a strong upward domestic price effect.

⁹ This is the date of initiation of the investigation into the product.

Date ⁹	Product	Dumping margins?	Material injury?	Causal link?	Comment
Aug 1992	High density polyethylene (Italy, Japan, Korea, Saudi Arabia, Singapore, Sweden, Thailand, USA)	0-22%	Yes	Yes	No dumping measures - negligible volumes of dumped exports from USA
Dec 1992	Trifluralin technical (USA)	49-56%	Yes	Yes	Dumping measures imposed
Dec 1992	Chlorinated paraffin (Taiwan, USA)	No			No dumping measures
Apr 1993	Sodium cyanide (India, USA)	0-6%	Yes	Yes	Dumping measures imposed
Jul 1993	Propylene oxide based polyether polyols (Belgium, Netherlands, USA)	No			No dumping measures
Jan 1994	A4 Copy Paper (Brazil, Finland, Germany, Indonesia, South Africa, USA)	0-26%	Yes	Yes	Dumping measures imposed
Mar 1994	Sodium cyanide (USA, India) - revocation inquiry				Authority revoked dumping measures that were then in place - no longer a threat of material injury
Jul 1994	Blood collection packs (USA)	51-116%	Yes	Yes	Dumping measures imposed
Jan 1995	Sodium cyanide (USA) – review of Customs' negative preliminary finding (that interim dumping duties not be refunded)				Authority reversed finding - interim duties refunded to exporter
Apr 1996	Reinforced wound closure strips (USA)	100-327%	Yes	No	No dumping measures
Nov 1996	PVC resin (Brazil, Mexico, USA) - continuation inquiry				Dumping measures continued
Dec 1996	Triethanolamine (Brazil, USA) - continuation inquiry				Dumping measures not continued
Apr 1997	First aid strips (USA) – review of Customs' negative preliminary finding	19-210%	Yes	No	Preliminary finding of future threat of material injury - decision to investigate fully
Aug 1997	First aid strips (USA)	61-227%	Yes	No	No dumping measures
Nov 1998	Certain wound/skin closure strips (France, Germany, USA)	91-419%	Yes	Yes	Dumping measures imposed
Dec 1998	Woven polypropylene primary carpet backing fabric (Belgium, Colombia, Saudi Arabia, UK, USA)	0-9%	Yes	Yes	Dumping measures imposed
April 2001	Flexible slabstock polyols (Japan, Korea, Singapore, USA)	55%	Yes	Yes	Dumping measures imposed
June 2001	PVC resin (USA)				Dumping measures continued
July 2001	Carpet gripper (China, USA)	37%	Yes	Yes	Dumping measures imposed

In contrast, US scrutiny of Australian imports over the same period has been minimal:

**US anti-dumping and countervailing investigations involving Australian exports
1990 to present**

Date¹⁰	Product	Finding	Comment
Sept 1968	Canned bartlett pears	Dumping, injury and causal link	Not revoked until 1 January 2000
July 1992	Corrosion resistant carbon steel flat products	Dumping, injury and causal link	Dumping measures continue
Oct 2001	Certain cold-rolled carbon steel flat products	No injury	No dumping measures

3 Models for containment

The first question which must be asked is: why is there a need for containment? The answer to this lies in the friction and frustration which necessarily arises when protective measures are imposed on products traded between partners, especially where the partners consider themselves to be commercially compatible. Whether or not the measures are justified, the commercial implications are no different. Whether or not the measures are justified, the exporting member will think they are not. Frequently, as Australia's initiation of an inquiry into frozen pork, and as Richard Rominger's comments to Tim Fischer bear out,¹¹ there are political motivations which add to the frenzy of protest.

Looking at the measures of contingent protection in place at present, it could be argued that the impact on our trading relations is not great. However, this would be short-sighted. A free trade agreement, or freer trade agreement, will have liberalising aspects which will bring about the type of competitive pressures which contingent measures are designed to attack. New subsidy disciplines will change the competitive balance between products of the two countries. Ironically, industries which previously relied on practices outside the international rules, or at least outside their spirit, will have to work inside the rules for protection. Investigating authorities and decision makers will come under greater pressure to use these rules. Potentially, contingent measures might sharply increase under a freer trade agreement.

Trading partners, it is thought, should behave at least legally, and at most compassionately, in their trade dealings. Australia's Closer Economic Relations Agreement with New Zealand ("CER"), and the US's North American Free Trade Area Agreement with its North American neighbours of Canada and Mexico ("NAFTA"), are models to which we can have reference.

¹⁰ Date of initiation

¹¹ See footnote 7.

3.1 Safeguard measures under CER

Under CER, the containment of safeguard measures as a form of contingent protection is complete. No tariffs and quantitative import restrictions on goods originating in the free trade area are permitted.¹² Accordingly, safeguard measures (which would otherwise lead to the imposition of tariffs or import restrictions) are not permitted. This applies on a bilateral and multilateral basis: in other words, imports originating in the free trade area cannot be “caught up” in safeguard action taken against a wider group of countries.¹³ The question of dispute resolution does not arise in this area as between Australia and New Zealand.

3.2 Safeguard measures under NAFTA

NAFTA permits bilateral safeguard measures to continue to be applied to bilateral trade during a 10 year transition period which ends on 31 December 2003. The requirements for taking such action are similar to the Agreement on Safeguards, although slightly tighter in some conceptual aspects and certainly tighter in relation to the measures which can be imposed and their duration. For example, the measures can only involve tariff changes (not quotas) and any increased duty must not exceed the most favoured nation rate in force at the time, or at the time NAFTA came into force, whichever is the lesser. After the transition period, safeguard measures may only be applied with the consent of the exporting member country.¹⁴ Unlike the Agreement on Safeguards, there is an automatic and immediate requirement for trade liberalising compensation to be mutually agreed, failing which the exporting member may take retaliatory tariff action against the other.

Multilateral safeguards (or “global actions”), where a NAFTA members exports are “caught up” in safeguard measure proposals by another NAFTA member, are also differentially regulated. Accordingly:

- NAFTA member exports must be excluded unless they account for a “substantial share” of total imports; and
- action can only be taken against them if the exports, when considered individually or together with those of the other NAFTA member, contribute “importantly” to the serious injury.

Substantiality is defined in terms of whether the NAFTA member was one of the top five suppliers to the market over the previous three years. An important contribution is deemed not to have arisen where the growth rate of imports from the NAFTA member concerned is “appreciably lower” than that of the other import sources. Preferential treatment to NAFTA exporters is also provided in restricting the importing NAFTA member from reducing imports below the trend of imports, and also requiring allowance for reasonable growth.¹⁵ Arbitral dispute resolution mechanisms are not available for *proposed* emergency action,¹⁶ but is

¹² This came about as of 1 July 1990, as a result of the entry into force of the Protocol on Acceleration of Free Trade in Goods.

¹³ The same situation has applied under MERCOSUR since 1 January 1995.

¹⁴ NAFTA, Article 801.

¹⁵ NAFTA, Article 802.

¹⁶ NAFTA, Article 804.

available post imposition. Consultation is required, in both bilateral and global cases.

NAFTA's comprehensive arbitral system for the avoidance or settlement of disputes applies to the interpretation or application of these safeguard rules.¹⁷ NAFTA countries may pursue either arbitral settlement or WTO dispute settlement, but not both.¹⁸ Consultations,¹⁹ and the good offices of the Free Trade Commission,²⁰ must intervene in an effort to settle the dispute prior to the establishment of an arbitral panel.²¹ Hearings, in private, are required to be held by the panel.²² If an arbitral panel's determination is not implemented, the complaining NAFTA country may suspend benefits to a degree commensurate with the nullification or impairment of its NAFTA rights.²³

3.3 Anti-dumping and countervailing duties under CER

Under CER, anti-dumping duties are prohibited on goods originating in the free trade area.²⁴ However, countervailing duties may still be applied on goods originating in one territory and imported into the other. Other than the precondition of consultation, no regard must necessarily be taken of the other country's interests. The procedures and tests used in deciding whether to impose countervailing measures must be WTO consistent.²⁵ There is no binding dispute resolution under CER.

3.4 Anti-dumping and countervailing duties under NAFTA

The position under NAFTA is quite different. An innovative binational panel system arose as the centrepiece of "containment" in an environment of legal and political controversy between the US and Canada. It has since proven to be an effective way to reduce trade tensions. NAFTA provides that each country retains its own anti-dumping or countervailing duty laws. However, when NAFTA came into force, each country agreed to a schedule of amendments to their legislation to appease the others as to the compliance or reasonableness of the laws with international norms and NAFTA policies (including, importantly, the "standard of review").

Originally, the NAFTA containment methodologies were perceived to have ceded sovereignty, but whilst they have come under strong attack on those grounds they remain in place today. Statutory amendments to any of the countries' anti-dumping or countervailing duty laws can be referred, at the request of one of the other countries, to a binational panel for a declaratory opinion. The opinion will

¹⁷ NAFTA, Chapter 20.

¹⁸ NAFTA, Article 2005.6.

¹⁹ NAFTA, Article 2006.

²⁰ NAFTA, Article 2007.

²¹ NAFTA, Article 2008.

²² NAFTA, Article 2012.

²³ NAFTA, Article 2019.

²⁴ This also came about at the time of the Protocol on Acceleration of Free Trade in Goods on 1 July 1990, and has been implemented under Australian legislation in *Customs Act 1901*, Section 269TAAA.

²⁵ CER, Article 16.

relate to compliance with the relevant WTO agreements, and the object and purpose of NAFTA.²⁶ If a panel declares non-compliance, and after consultation no mutually satisfactory solution is achieved between the parties, the complaining party can take “copy cat” action or terminate NAFTA. This clearly would be a very serious outcome, and underlines the resolve of the countries to “contain” improper practices.

The members of NAFTA have handed over the judicial review of anti-dumping and countervailing decisions to binational panels,²⁷ yet another very serious attempt to confine and regulate the intrusion of domestic policies into legal decision making.²⁸ The rights of review are for the direct benefit of private parties to proceedings, and the agencies involved in making decisions and opposing parties have rights to appear and defend their interests. No appeals lie to domestic courts from binational panel decisions. Standards of review are stipulated for the review of each country’s decisions. The only right of appeal is pursuant to an extraordinary challenge procedure, the circumstances for which require:

- misbehaviour or lack of capacity of panellists, a serious departure from procedure or a failure by the panel to act within its powers; coupled with
- a material affect, because of that circumstance, upon the panel’s decision which threatens the integrity of the panel process.²⁹

Extraordinary challenge committees can vacate the original panel decision, remit it to the panel for action consistent with the committee’s direction, or deny the challenge. There are mechanisms in place to shield the functioning of the panel review system from interference, through a “special committee” system.³⁰

Under NAFTA we find a critical concern for due process as between the countries themselves. One of the great ironies of all of this is that, on one view, all that binational panels do is to make sure that an anti-dumping or countervailing decision is made in accordance with the laws of the very jurisdiction from which the decision emanated. One could be forgiven for thinking that this should always be the case, because that is what law is supposed to ensure. Charitably, this may be seen as a humble admission that things can go wrong, even if it might hide behind an accusation that it is the other countries that need to be kept in check.

Article 19 was born when US and Canadian negotiators reached an impasse³¹ over anti-dumping and countervailing issues towards the end of the original Canada-

²⁶ The object and purpose is “to establish fair and predictable conditions for the progressive liberalisation of trade between the Parties to [NAFTA] while maintaining effective and fair disciplines on unfair trade practices”: NAFTA, Article 1902.2(d)(ii).

²⁷ Five panellists sit on a panel. Two are selected by each country, and each country has four peremptory challenges. The fifth is agreed between them. Failing agreement, one of the countries (decided by lot) selects the fifth from a roster of available panellists. A panel must be chaired by a lawyer, and consist of a majority of lawyers: NAFTA, Annex 1901.2.

²⁸ However, this does not apply where there is no recourse to a binational panel procedure within 30 days after the final determination (ie resort may be had to judicial review in such circumstances).

²⁹ Article 1904.13

³⁰ Article 1905

³¹ Gary Horlick, writing in the Journal of World Trade in 1992, colourfully explained it thus:

“...Chapter 19 panels... were a complete innovation. They are an agreement by the United States and Canada to have binding binational panel review administrative decisions in the two countries. This is a very

US free trade negotiations which preceded the later enlargement to Mexico under NAFTA.³² The binational panel compromise was ground-breaking at the time. Constitutionality, sovereignty and judicial power concerns have largely been overcome (or overlooked). Government commentators claim that decisions have been reasonable, rigorous and timely.

A critical feature of binational panel decisions is the “standard of review”, each of which (for the separate countries) is defined differently, in terms of their domestic judicial systems.

- For Canada, the standard is administrative law standards with which common law practitioners can be relatively comfortable. “Natural justice” and “error of law” are prominent features of the standard.³³
- For the US, the standard mandates that a determination which is unsupported by substantial evidence, or is not in accordance with law, is to be held unlawful.³⁴
- For Mexico, the standards require a determination to be declared “illegal” if the determination is affected by some official incompetence, omission of formal legal requirements (including the absence of findings of fact or legal conclusions), absence of facts (or wrong appraisal of them) and improper exercise of power.³⁵

3.5 WTO “containment”

It would be a misnomer to speak of the norm (ie the relevant WTO Agreements) as a containment model. It is mentioned simply to observe themes which might assist in consideration of any such models under a regional trade agreement. Amongst the important trends at the WTO level, these are notable:

- legalisation of process and argumentation;
- acceptance of independent supra national review;
- emphasis on due process and intellectual rigour; and
- drawing the line between legal review and merits review.³⁶

unusual thing for the US government to agree to. It can only be explained by the fact that it was done very quickly. The background was this: Canada wanted some changes on US anti-dumping and countervailing procedures. The United States, for political reasons, refused even to discuss the topic. Canada walked out of the negotiations as a result, and with two weeks to go before a statutory legislative deadline in the United States, new negotiators were brought in. The USTR was displaced by Treasury and a political deal had to be made.”

³² Leaving anti-dumping until last was also a potential deal breaker at the end of the Uruguay Round, indicating that of all trade remedy laws, it is the one seen as the most difficult to negotiate (but also as the most useful counterweight to free trade, only to be placed on the scales when the political burden of opening up markets has become clear).

³³ Federal Court Act, subsection 18.1(4).

³⁴ Tariff Act of 1930, section 516A(b)(1)(B).

³⁵ Código Fiscal de la Federación (Federal Fiscal Code), Article 238.

³⁶ A tension exemplified in this statement by the Appellate Body in *United States – Safeguard measures on imports of fresh, chilled or frozen lamb meat from New Zealand and Australia* (WT/DS177/AB/R and WT/DS178/AB/R):

4 Australia-US trade remedy containment – prospects and issues

4.1 Contrasts between CER and NAFTA

CER is more truly a free trade agreement than NAFTA. Safeguard measures, abolished between Australia and New Zealand, are reduced in their impact under NAFTA, by numerical ceilings (volume of imports) and floors (tariff snap-back to the lesser of pre NAFTA or MFN). Anti-dumping duties, abolished between Australia and New Zealand, continue to be permitted under NAFTA but binational panels police decision makers as if they, the panels, were themselves domestic courts. Countervailing remains at large as between Australia and New Zealand, but also falls into the binational panel system under NAFTA.

4.2 What will the US and Australia want to achieve?

Designing a system of containment must be fashioned by, and respond to, the interests of the parties concerned. Australia's trade experiences can be broadly related to a contingent protection interest *vis-a-vis* the US as follows:

Possible Australian "containment" negotiating interests

Experience	Interest
Ineffective judicial review of safeguard measures ³⁷	Independent review.
Political motivation for safeguard measures ³⁸	No safeguards, or limited recourse to safeguards, and independent review with bilateral retaliation rights
Timeliness of safeguard measure review, in context of three year non-suspension period under Agreement on Safeguards	No safeguards, or limited recourse to safeguards, and access to independent review with strict timelines
Value of food/processed food exports to US	Defining upstream subsidy "pass-through"; using "nullification or impairment" to overcome subsidy exclusion from domestic "national treatment" obligation
Reliance on multilateral rules based mechanisms ³⁹	Possible schizophrenic approach towards modification of norms and new formal containment methodologies under a bilateral deal

"We wish to emphasise that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities". (emphasis in original)

³⁷ For example, Australian Meat and Livestock Corporation's unsuccessful proceedings in Canada concerning Canadian beef safeguards (1994).

³⁸ For example, allegations as to the political expedience of lamb safeguards.

³⁹ The Australian Government emphasises the benefits of a rules-based system for small trading nations, but is not averse to regional trade agreements ("RTAs"). "Containment" methodologies may, however, be perceived as raising more complications than simple differential tariff treatment. See also concerns about RTAs voiced by the Productivity Commission:

"While it might look superficially appealing for 'new age trade agreements' to concentrate on new age issues, leaving the remaining areas of high trade protection to be negotiated down in a multilateral trade round, this creates the problem of 'cherry-picking'." (Productivity Commission, Submission to DFAT on Australia's Approach to Forthcoming Trade Negotiations, July 2001).

A brief negotiating template of the US might include the following.⁴⁰

Possible US “containment” negotiating interests

Experience	Interest
Attacks against US agricultural subsidies, and prospect that they will be brought within the FTA's purview	Reduce exposure to improper countervailing findings by Australia
Export grants, “structural” adjustment, and commodity boards maintained in Australia	Protect legitimacy of US countervailing findings
Value of chemical exports to Australia	Reduce exposure to improper dumping findings by Australia
Reasonableness of threat analysis in dumping continuation findings. ⁴¹	Reduce exposure to improper dumping findings by Australia
Growing “popularity” of the US as a target for anti-dumping actions amongst new anti-dumping users	Limiting initiations of new cases
NAFTA example of managing trade issues through special purpose bodies ⁴²	Duplication of bodies for purposes with which the US is familiar

What these experiences and interests tell us is that Australia may be interested in a safeguard review system, and also in a “level playing field” in the US on agricultural subsidies. The former would need to be approached with an inventive spirit. The latter would be difficult to achieve in a bilateral context. The US will be concerned about the application of Australian anti-dumping and countervailing procedures and rules, especially given Australia’s strong push to bring agriculture under an FTA umbrella (and the US willingness to do so in the Doha Round as well). The US may even seek stronger initiation disciplines, however this would be better approached in a multilateral context.

4.3 Preferential treatment in a multilateral setting – a conundrum

In the US International Trade Commission determination in the lamb meat safeguard investigation,⁴³ successfully impugned by Australia and New Zealand in the WTO Dispute Settlement Body, NAFTA country imports of lamb meat were each less than 1% of import trade. The increased tariff and tariff quota applied to imports from Australia and New Zealand were not applied to Canada or Mexico. They could not be so applied under NAFTA: however Article 2.2 of the Agreement on Safeguards provides that “[s]afeguard measures shall be applied to a product being imported irrespective of its source.”

⁴⁰ Noting, for the record, that Australia’s sanitary and phytosanitary barriers are the subject of strong US objections, but that such barriers and the rules concerning them are not considered to be within the ambit of the term “contingent protection”.

⁴¹ For example the dumping measures in place against PVC from the USA have now been in place for 11 years, and are next scheduled for a continuation review in 2006.

⁴² The minimum number of councils, secretariats, commissions, committees, subcommittees, working groups, administrative offices and working groups stipulated under NAFTA for operational purposes at its inception was 32.

⁴³ Investigation No. TA-201-68, USITC Publication No. 3176, April 1999.

It is here that a contest arises between the policies of multilateralism and regional trade agreements. A policy issue arises as to the compatibility of the Agreement on Safeguards with Article XXIV of GATT 1994, the latter being tolerant of regional trading arrangements to an undefined extent. For example, how can a safeguard measure prevent or remedy serious injury, or facilitate adjustment of an industry, if certain export sources are excluded? How is a contest between Article 5.1 of the Agreement on Safeguards (requiring measures to facilitate industry adjustment) and a differential (lower) tariff for imports within the free trade area to be addressed? The issue would be exacerbated by a safeguard measure taking the form of quotas, where (as under NAFTA) no quotas can be applied within the free trade area.⁴⁴

These are not new issues. Australia has partly had to grapple with similar issues in an anti-dumping context, where there is potential for “rogue” dumped New Zealand exports to make it difficult for effective relief to be provided to the Australian industry against dumped imports from other countries (because the New Zealand imports must be left out of the dumping duty catch-net under CER).

4.4 Constitutionality of abdicating legal power

The Australian Constitution vests “the judicial power of the Commonwealth” in specified federal courts.⁴⁵ Thus it would be important to consider, in any proposal to abdicate the power to adjudicate anti-dumping or countervailing disputes to some other body (say a panel of some sort), whether “judicial power” was intended to be exercised or would necessarily be exercised by that body. The definition of what constitutes “judicial power” is a wiggly one. Whilst there are said to be three elements which attract an exercise of “judicial power”, namely:

- a controversy;
- an impact on right, liberty or property;
- and conclusiveness of the decision,

it is abundantly clear that Australian tribunals, commissions and decision makers which (or who) are not federal courts routinely resolve controversies about rights and do so as conclusively as their empowering legislation dares to permit.

This would introduce an element of uncertainty as to the validity of a proposal to cede power to a supra national panel in contingent protection cases. Whilst a similar problem (of validity) was voiced in the US and Canada when the binational panel proposals were first mooted, the constitutional questions under US law seem to be quite different to those which would arise in Australia, and have not been provided by litigants.⁴⁶

⁴⁴ The issue has been raised in the WTO Dispute Settlement Body. The Appellate Body struck down safeguard measures applied by Argentina where MERCOSUR imports were excluded, deciding that where an investigation evaluated whether serious injury was caused by imports from all sources, safeguard measures later imposed could not exclude any of those sources: *Argentina – Safeguard measures on imports of footwear* (WT/DS121/AB/R).

⁴⁵ Australian Constitution, Section 71.

⁴⁶ The US Congress, in its NAFTA implementing legislation, gave express opportunity for interested parties to challenge binational panel proceedings along constitutional grounds, and defined the jurisdiction within which that could occur. Two such challenges were commenced, but in each case they fell short of a substantive hearing on the matters raised.

4.5 Strength and breadth of the “standard of review”

NAFTA negotiators have instructed binational panels to conduct themselves as if they were a court in the country which made the relevant decision, and to apply a standard of review which is to be found in that country’s law and jurisprudence. They also required each others’ anti-dumping and countervailing laws to be moulded into an acceptable shape, by including schedules of modifications to be made to the laws as an express requirement of entry into NAFTA. A similar process is taking place between Australia and New Zealand under CER, as the two countries attempt to harmonise their business laws and create a seamless trans-Tasman market place (with anti-trust laws being a particular focus).

The laws and legal standards of Australia and the US will need to be assessed by each country if a containment methodology along the same lines as the NAFTA binational panel example is contemplated. Which brings us to the question of administrative law standards of review as they apply to anti-dumping and countervailing decisions here in Australia. Appeals against decisions of an administrative character are both permitted and confined under Australian law.⁴⁷ In the context of anti-dumping and countervailing decisions, there are some notable features, which might trouble an aggrieved party.

First, courts here have shown a marked reluctance to intervene in trade disputes.⁴⁸ Anti-dumping and countervailing cases involve technical and complex calculation issues (dumping margins) on the one hand, and subjective factual questions (the degree of injury necessary to establish materiality, and the causal link between any dumping and the injury) on the other hand. The courts have not shown themselves to be particularly keen to exercise a strong legal oversight of the resolution of such issues. This is evidenced in a number of ways, such as an unwillingness to intervene at any time prior to a final decision by the relevant Minister, and a fairly conservative approach towards “unreasonableness” as a ground for judicial review. Litigation in anti-dumping matters is not frequently pursued by aggrieved parties, perhaps in recognition of perceived judicial attitudes towards this area of law.⁴⁹

⁴⁷ The principal entitlement arises under the *Administrative Decisions (Judicial Review) Act 1977*, a codification and extension of traditional rights to challenge executive decisions. Prerogative writs are also available under the *Judiciary Act 1903*.

⁴⁸ This is to be contrasted with the situation in the US, where the specialised Court of International Trade is frequently called upon to adjudicate trade matters.

⁴⁹ Two examples come to mind. In one case where technical errors in calculations of normal values were alleged, and proven, the court suggested that the impugned decision would have to be “*devoid of plausible justification*” for it to be set aside. The court endorsed other authority, to this effect:

“Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced.” (Moore J in *Metal Manufacturers Limited & Ors v Comptroller General of Customs & Ors*, quoting from *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 36).

In a case where an aggrieved party argued that the decision maker had taken into account irrelevant considerations concerning causation of material injury, the Federal Court said:

“Judicial review of administrative decisions ‘is not concerned with technical niceties, looseness of language, or infelicities of expression, but with whether a decision is infected in substance by some error of law’” (Full Federal Court in *Mullins Wheels v Minister for Customs and Consumer Affairs* [2000] FCA 357.)

Secondly, an unusual and much criticised mechanism for merits review in Australia is available to aggrieved parties, after the Minister has made his or her “final” decision. This involves a review of the Minister’s decision by an administrative officer within the Minister’s department, the “Trade Measures Review Officer” (“TMRO”), possibly leading to reconsideration by both Customs and the Minister (without either of them being under any compulsion to undertake such a reconsideration according to the directions of the TMRO, nor to come to any alternative conclusions).⁵⁰ The question of whether a court would require a party to exhaust its remedies pursuant to this mechanism has not yet been the subject of adjudication. However, on analysis of that mechanism and its workings in the past, an Australian trading partner would probably come to the view that a more certain and timely appeal process would be preferable for its exporters.

4.6 Rules of origin

Where preferential trading arrangements are entered into on a bilateral basis, the origin of goods entitled to the benefits of the preferences comes into sharp focus. Liberal origin rules might lead to greater contingent protection, and in turn to calls for greater containment. Australian industry might be concerned about the prospect of increased competition from lower cost Mexican producers, as part of a North American production chain. Clearly this will be an important agenda item for discussion across all areas of a proposed free trade agreement.

“Local content” requirements for establishing Australian industry (petitioner) status in anti-dumping and countervailing cases were removed from Australian legislation in 1998. Prior to that time a 25% local content standing requirement existed. The WTO Agreement on Implementation of Article VI of GATT 1994 (referred to more commonly as the “Agreement on Anti-Dumping”) does not mandate a particular domestic industry definition, and now under Australian law it is sufficient if at least one substantial process in the manufacture of the relevant goods has taken place in Australia.⁵¹ Presumably Australia will not accept this test for any origin purposes, and in particular not for any preferential anti-dumping rules or containment methodologies.

4.7 Benefits of a separate system of contingent protection review

Amongst the perceived benefits for Canada of the binational panel system, it cited practicality; timeliness; consistency (a panel is less single minded than a single judge); balance of opinions; improved affordability; and perceptions of fairness. A prediction made by Canadian representatives at the time was that binational panels would provide an impetus for future convergence and eventual commonality of trade remedy law between the countries, although commentators cannot agree as to whether this convergence has been significant. The decisions of panels have come to be well regarded, and the fear that panellists might split along “home country” lines has proved to be unfounded.⁵²

⁵⁰ *Customs Act 1901*, Part XVB, Divisions 8 and 9.

⁵¹ *Customs Act 1901*, Section 269T(3).

⁵² In fact the opposite may be true, with one commentator critical of attacks on the independence of panellists:

“Furthermore, in Mexico there is a controversy among the panellists on political issues. Some lawyers who have sat on panels that have made tough rulings have been given a difficult time politically: this has to

Over 150 cases have been before binational panels, both under the Canada-US FTA, and its successor NAFTA. The number of investigations that have taken place over the last ten years involving Australian and US trade are but a small fraction of that number. That is not to say that a binational panel system would not have some utility: however, it is true to say that anti-dumping and countervailing between Australia and the US does not present as great a contingent protection problem as was the case for Canada and the US over the past decade.

5 Closing comments

The US was Australia's second largest trading partner in 2001, representing 14% of Australia's total two way trade. Australia's trade deficit with the United States is its highest, by a long way, followed by the deficits with Germany and China. It need not be a goal of trade policy to have equal terms of trade with each individual trade partner, but it certainly makes commercial sense to remove impediments where the prospect for improvement, and the pace at which that could occur, is greatest. Australia's sense of concern about US trade measures is fuelled by the amount of the deficit and by the close relationship of the two countries in historical, cultural and political terms. Notwithstanding that, we retain strong separate identities.

Both NAFTA and CER, as blueprints or prototypes familiar to both parties, incorporate mechanisms for containing contingent protection. It is inevitable that those mechanisms will be a subject for discussion at the negotiating table. The final result will require delicate management. "Containment" will no doubt call on lawyers and legal process to inject independence, rigour and transparency to the chosen mechanisms.

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stop.": Robert E Lutz, *Resolving Trade Disputes* (www.northamericaninstitute.org/proceedings/Fed96/fedlut.htm).