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I. INTRODUCTION

By negotiating the Free Trade Agreement (FTA) with the United States, the Canadian government sought to ensure its exporters more secure and predictable access to the huge United States market, where a majority of Canadian foreign trade is conducted.[1] Canadian exporters were especially concerned with the increased imposition of antidumping (AD) and countervailing duties (CVD) by the United States.[2]

Trade laws in the United States are effected through the International Trade Commission (ITC) and the International Trade Administration of the Department of Commerce (ITA). These bodies are central to the bifurcated, quasi-judicial administrative system used in the United States to resolve antidumping and countervailing duty complaints. The ITC determines whether the imported product has materially injured a domestic producer, and the ITA determines the amount of subsidy or dumping margin which exists.[3]

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1 For a complete guide to the Canadian objectives in the FTA negotiations, see CANADA, DEPARTMENT OF EXTERNAL AFFAIRS, CANADA TRADE NEGOTIATIONS (1986).

2 These concerns were outlined, *id.*, at 65-69, by James F. Kelleher, then Minister for International Trade. Kelleher discussed the manner in which access was being frustrated by the use of trade remedy laws, the threat posed by potential unilateral trade law changes, the inadequacy of the current dispute settlement mechanisms, and other trade law problems requiring resolution. *See also* Rugman, *Canada's Agenda For Bilateral Trade Negotiations*, 51 BUS. Q. 37 (Spring 1986).

3 For a detailed analysis of the system through which trade laws are administered in the U.S.,

The potential for abuse in the administration of United States trade laws has been well documented[4], although the impact of any such abuse has been a subject of controversy[5]. Commentators generally agree, however, that United States firms and industries make strategic use of such 'administered protection', at the expense of American consumers and Canadian exporters.[6]

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see Rugman and Porteous, *Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures*, 15 N.C. J. INT'L L. & COM. REG. 67 (1990). For a study focusing on the administration of Canadian trade laws, see Porteous and Rugman, *Canadian Unfair Trade Laws and Corporate Strategy*, 3 REV. INT'L BUS. L. 237 (1989).

[4] For an insightful analysis of the decision-making process at the ITC, see R. Cass, Economics in the Administration of U.S. International Trade Law (1989)(Working Paper #16, Ontario Centre For International Business Research Programme, Faculty of Management, University of Toronto). For a discussion and critique of the procedures used at the ITA, see Palmeter, *The Capture of the Antidumping Law*, 14 YALE. J. INT'L L. 182 (1989), which builds upon the thesis presented in J. BHAGWATI, PROTECTIONISM (1988).

[5] The best description of this abuse can be found in 1 CANADA, REPORT OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA 302-303 (1985), which states:

> U.S. trade policy is created and applied through political and legal processes which decentralize decision-making power and enhance the political influence of relatively small and narrowly based interest groups. . . . The most notable examples . . . are the legal mechanisms that afford producers contingent protection from import competition. These mechanisms usually involve countervailing duties, antidumping duties, and emergency protection for U.S. producers. . . . U.S. legislation gives domestic producers the right to launch costly lawsuits against foreign rivals, with little risk of loss if the claims of unfair and injurious competition are proved groundless.

See also Cass & Schwartz, *Causality, Coherence, and Transparency in the Implementation of the International Trade Laws* in FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 24 (M. Trebilock & R. York ed. 1990), who present the argument that the existence of this problem is not surprising given that ITC Commissioners have a tendency to base their decisions on political rather than legal considerations. It has been argued by Whalley, *Now That the Deal is Over: Canadian Trade Policy Options in the 1990's*, 16 CANADIAN PUB. POL'Y - ANALYSE DE POLITIQUE [CAN. PUB. POL.] 121 (1990), that the effects of such abuse are minimal in terms of the percentage of Canadian exports affected, and that the importance of seeking solutions to such abuse is therefore an overrated concern. However, this argument is not tenable. It relies on CVD data from Nam, *Export Promoting Subsidies, Countervailing Threats, and the General Agreement on Tariffs and Trade*, 1 THE WORLD BANK ECON. REV. 727 (Sept. 1987), which only covers the period from 1980-1985. Using more updated data, and including cases such as the softwood lumber dispute in which the Canadian government imposed an export tax to avoid the imposition of CVD's, it has been shown that Canadian industry has suffered serious detriment as a result of United States trade actions, *see* A. Anderson and Rugman, A Note on Nam's Data on the Impact of Countervailing Duty Actions; A Canadian Perspective (1989) (unpublished). For further insight on the adverse effects on Canadian exporters stemming from the abuse of trade laws by U.S. industry, see Rugman & Porteous, *The Softwood Lumber Decision of 1986: Broadening the Nature of U.S. Administered Protection*, 2 REV. INT'L BUS. L. 35 (1988); Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 ME. L. REV. 305 (1988); A. RUGMAN & A. ANDERSON, ADMINISTERED PROTECTION IN AMERICA (1987).

[6] For a comprehensive discussion of this issue, see A. RUGMAN & A. VERBEKE, GLOBAL CORPORATE STRATEGY AND TRADE POLICY (1990). This book discusses the manner in which United States business planners act in their own rational self interest by putting pressure on the agencies charged with the administration of trade law to erect barriers against import competition. When the

Canadian concerns with the effects of United States administered protection on Canadian exporters led to the inclusion of Chapter Nineteen in the FTA, which establishes binational panel dispute settlement for AD and CVD cases.[7] This article examines the potential effectiveness of such panels in curbing the abuses of United States trade law and presents evidence showing that while the regime established by Chapter Nineteen of the FTA is not the ideal, it represents a significant improvement over past dispute settlement procedures. In other words, the binational panels can be a useful tool in securing increased access to U.S. markets. As a result of Chapter Nineteen, United States administrators charged with determining dumping/subsidy levels and finding material injury may face new restrictions on their discretionary powers; their decisions must be based on sound reasoning, be in accordance with law, and be backed by what the panelists consider to be substantial evidence.

As an example we will examine the first case to come before the panel, *In the Matter of Red Raspberries From Canada*,[8] which provides support for the conclusions above, and sets the stage for future panel decisions.[9] This article will then briefly touch on the implications of such changes for Canadian exporters seeking increased access to U.S markets. In order to establish the parameters for this discussion, this article will first briefly examine and interpret relevant legislation.

II. Dispute Settlement: Mechanics and Theories

A. Applicable Legislation

Chapter Nineteen of the FTA represents the logical starting point for a review of the legislation applicable to the operation of the binational

agency succumbs to this pressure, it disregards the welfare of consumers in order to provide shelter to the domestic industry. As a result, the firm becomes reliant on governmental protection for its very survival. In the long run, such reliance results in the inability of the firm to compete on the basis of cost or product differentiation.

[7] This paper focuses exclusively on the dispute settlement mechanism established in Chapter Nineteen of the FTA to deal with AD and CVD cases. For a discussion on the effectiveness to date of Chapter Eighteen as a means of resolving disputes stemming from the implementation and operation of the FTA, see Anderson & Rugman, *The Dispute Settlement Mechanisms' Cases in the Canada-United States Free Trade Agreement: An Economic Evaluation* 24 Geo. Wash. J. L. & Econ. 1 (Fall, 1990).

[8] In the Matter of Red Raspberries From Canada; Binational Panel Decision, USA-89-1904-01.

[9] At the time of writing, only two other decisions had been made by the panel. In Replacement Parts for Self-Propelled Bituminous Paving Equipment, USA-89-1904-02, USA-89-1904-03, and USA-89-1904-05, the panel rejected a challenge to the ITA's use of the "best information available" in an administrative review of a dumping order. In Fresh, Chilled, or Frozen Pork From Canada, USA-89-1904-11, released on August 24, 1990, the panel remanded the case back to the ITC, refusing to uphold the ITC determination of material injury to United States pork processors.

panels. Most of the provisions are straightforward, and will not be discussed. Instead, this article will focus primarily on those Articles in Chapter Nineteen which describe the role and function of the panels, and establish the standard of review by which panels are bound. These Articles provide the legal and institutional setting within which the discussions of potential panel effectiveness and the resolution of the red raspberries case have taken place.

The first key provision states that "each Party reserves the right to apply its antidumping and countervailing duty law to goods imported from the territory of the other Party."[10] This falls short of what Canadian negotiators were seeking; namely, a new regime of rules to deal with unfair pricing and government subsidization.[11] However, Canadian and United States negotiators agreed to work towards such a regime through the Working Group established by the parties to develop and implement such a system[12] within five to seven years. Ideally, in a true free trade area, there should be agreement on what constitutes a countervailable subsidy and no need for antidumping law.[13] However, the non-inclusion of such an agreement in the FTA does not mean that the interim solution embodied in Chapter Nineteen is a failure. As we will show, Chapter Nineteen represents a significant improvement over the previous system.

The function of the binational panel is to "review, based upon the administrative record, a final antidumping or countervailing duty determination . . . to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing

10 Canada, Department of External Affairs, The Canada-U.S. Free Trade Agreement at 271, Art. 1902(1)(1988)[hereinafter FTA].

11 That Canada sought such a regime is clear, see *supra* note 1, at 3, where it is stated that "Canada will seek to secure our market access through. . .NEW RULES AND PROCEDURES limiting the protectionist effect of trade remedy laws. . .and clearer definition of countervailable financial assistance programs" (emphasis added).

12 FTA, at 279, Art. 1907.

13 For a comprehensive discussion of the issues such a new regime must address, and some of the components it would necessarily entail, see M. Hart, The Future on the Table: The Continuing Negotiating Agenda Under the Canada-United States Free Trade Agreement (May 1989) (paper presented at a conference entitled Living With Free Trade, University of Ottawa); Horlick and Steger, *Subsidies and Countervailing Duties*, in MAKING FREE TRADE WORK: THE CANADA-U.S. AGREEMENT 84 (P. Morici ed. 1990); M. Hart, *Trade Remedy Law and the Canada-United States Trade Negotiations*, in UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS (1988). For an interesting discussion suggesting the complete abolition of AD and CVD laws, and the retention of a well conceived safeguards regime, see Trebilcock, *Throwing Deep: Trade Remedy Laws in a First-Best World*, in FAIR EXCHANGE: REFORMING TRADE REMEDY LAWS 235 (M. Trebilock & R. York ed. 1990). For an argument that subsidy and dumping determinations should use a "net" approach, taking account of "off setting" practices in the home country, see Anderson & Rugman, *Subsidies in the U.S. Steel Industry: A New Conceptual Framework and Literature Review*, 26 J. WORLD TRADE 59 (Dec. 1989).

Party."[14] This means that the binational panel displaces the United States Court of International Trade (CIT) and the Federal Court of Canada (FCC) as the body to which appeals from administrative determinations are made.

In undertaking such a review, the panel must apply the standards of review used by the importing country.[15] This means that when reviewing an American final determination, "the [Panel] shall hold unlawful any determination . . . found . . . to be unsupported by *substantial evidence* on the record, or otherwise not in accordance with law."[16]

The FTA defines the applicable law as the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents of the country where the determination was made.[17] This leads to two situations which could result in the panel remanding the case back to the competent investigating authority for action not inconsistent with the panel decision.[18] First, remand may be appropriate when the panel finds a misapplication of the law, as defined by the applicable sources. Second, and perhaps of more significance, a remand may take place when the record lacks substantial evidence supporting the final determination.

B. Deference and the Role of the Panels

Some commentators have argued that Chapter Nineteen offers Canadian exporters little, if any, relief from the current system of United States trade law administration.[19] They posit that Canadian negotiators failed to make any improvement in the current trade laws or their administration by the ITC and ITA. The critics' basic premise is that without

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14 FTA, at 273, Art. 1904(2). Note that the administrative record includes "all documentary or other information presented to or obtained by the competent investigating authority" prior to reaching the final determination. FTA at 281, Art. 1911.

15 FTA at 273, Arts. 1904(3).

16 Tariff Act of 1930, U.S.C. § 516a(b)(1)(B)(1980 & Supp. 1990) [emphasis added, and the word "Panel" has been substituted for the word "Court"]. Note that a different standard, as enunciated in U.S.C. § 516a(b)(1)(A), applies with respect to a determination by the International Trade Commission not to initiate a review. Only U.S.C. § 516a(b)(1)(B) is applicable to the discussion at hand.

17 FTA at 273, Art.1904(3).

18 The FTA provides that remand is the appropriate action to be taken by the panel *Id.* at 274, Art. 1904(8). While the panels are not in a position to overturn a decision made by the administrative agency, this provision does force the agency to act in conformity with the wishes of the panel.

19 This view, or derivatives of it, has been expressed by several commentators, including Quinn, *A Critical Perspective on Dispute Settlement* in TRADE-OFFS ON FREE TRADE, 188 (M. Gold & D. Leyton-Brown ed. 1988); Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335, 346 (1988); Herman, *Dispute Resolution; Chapter 18 and How it Will/Should/ Might Work*, in THE FREE TRADE AGREEMENT: WHAT THOSE INTERESTED IN BUSINESS LAW NEED TO KNOW E1-1 at E1-8 (J. Spence ed. 1989); Slayton, *Dispute Resolution Mechanisms* in COMMENTARY ON THE CANADA-U.S. FREE TRADE AGREEMENT 18, 20 (1988).

any change in the trade laws, or the system by which they are administered, no change will result in the effects they have upon exporters.

Critics of the FTA believe that the binational panel is an ineffective substitute for the CIT and the FCC. Critics presume that the panels will follow the practice of the CIT, which traditionally accorded a high degree of deference to the ITC and ITA. This can be seen in the following assertion made by one United States scholar:

> It is to be anticipated that a panel composed of at least a majority of lawyers will accord substantial deference to the findings of the administrative agency. There is simply no reason to anticipate that a binational panel will be any less deferential than a court would be under the same standard of review. In these circumstances, it is difficult to conclude that a binational panel will reach a different result from that which the [CIT] would reach in reviewing a determination of the [ITC or ITA] under United States trade laws.[20]

If one accepts this approach, the logical conclusion is that Chapter Nineteen represents an ineffective compromise which lacks the ability to save Canadian exporters from any perceived or actual protectionist effects of United States trade law or its administration.

C. A Positive View of the Panels

The position adopted by the critics of Chapter Nineteen has three weaknesses. First, when evaluating potential panel effectiveness it is inappropriate to focus on the trade laws themselves. The fact that no change has been made to the applicable trade laws does not ensure the inadequacy of the binational panels as a means of dispute resolution. The trade laws themselves are not the cause for serious concern. The real problem lies in the application of the trade laws.[21] The correct question is whether the binational panels will result in less abusive application of the trade laws for protectionist purposes, thereby resulting in increased Canadian access to the United States market.[22]

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20 Cluchey, *supra* note 19, at 347. This statement typifies the negative view of the panels held by theorists such as those listed in the preceding footnote.

21 This view was previously forwarded by Rugman & Anderson, *How to Make the Free Trade Agreement Work: Implementing the Dispute Settlement Measures and the Subsidies Code*, 11 TRADE MONITOR 1, 7 (1989), where they stated that "there is nothing wrong with how U.S. trade remedy law has been legislated, only with its administration within the agencies." This criticism is also made by McDorman, *The Dispute Settlement Regime of the Free Trade Agreement*, 2 REV. INT'L BUS. L. 303, 325-26 (1988). For further discussion on the abusive application of United States trade laws, see Rugman & Anderson, *A Fishy Business: The Abuse of American Trade Law in the Atlantic Groundfish Case of 1985-86*, 13 CANADIAN PUB. POL'Y 152 (June 1987); RUGMAN & ANDERSON, ADMINISTERED PROTECTION IN AMERICA, *supra* note 5, at 79 and 85; RUGMAN & VERBEKE, *supra* note 6.

22 R. LIPSEY & R. YORK, EVALUATING THE FREE TRADE DEAL: A GUIDED TOUR THROUGH

The second error of the critics lies in the assumption that deferential panels will necessarily reach the same decision as would the CIT. This conclusion does not necessarily follow from the fact that the panel is bound by the same standard of review as the CIT. The standard of review which binds the CIT does not lead to a uniform interpretation of the law; on the contrary, varying interpretations by different CIT judges are not uncommon.[23] This variation stems from the fact that the trade laws are so vague that their content only emerges through interpretation. The panels will not eliminate this room for varying interpretations.

Third, what constitutes substantial evidence to support an administrative determination is at least partially a matter for expert opinion, open to various interpretations by the five panelists. The United States Court of Appeals for the Federal Circuit[24] has defined the term 'substantial evidence' as follows:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.[25]

This authoritative definition of what constitutes substantial evidence under United States law lacks precision, and leaves a great deal of room for varying interpretations. As a standard of review, it leaves a great deal of discretion to the reviewer.[26] A panel may consider what the CIT

THE CANADA-U.S. AGREEMENT 100 (1988), argues that the Agreement "did achieve the realistic goal of increasing security of access incrementally". This argument relies on the belief that a binational panel is a clear improvement over the status quo (i.e. the CIT), and confidence in the ability of the two countries to successfully continue negotiating toward a comprehensive agreement on what constitutes fair trade.

23 That the judges at the CIT did not always interpret the trade laws in a homogeneous fashion is discussed by Horlick, Oliver, & Steger, *Dispute Resolution Mechanisms*, in THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE GLOBAL IMPACT 70 (J. Schott & M. Smith ed. 1988). A clear example of this can be seen by contrasting Carlisle Tire & Rubber Company v. United States, 564 F. Supp. 1237 (Ct. Int'l Trade, 1983) with Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int'l Trade, 1984). In the former case, the court held that generally available subsidies are not countervailable, while in the latter, the court held that they are countervailable (except for tax deductions).

24 Prior to the implementation of the FTA, decisions made by the CIT could be appealed to the United States Court of Appeals for the Federal Circuit. No appeal to this or any other judicial body from the binational panels established under Chapter Nineteen is provided for by the FTA.

25 Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984), *quoting* Consolidated Edison Co. v. NLRB, 3050 U.S. 197, 229 (1938), Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619 (1966).

26 This has been recognized by ITC commissioner Cass, *supra* note 4, at 31, where he states:

> It is fatuous to suggest that the decision makers (panelists) are mere ciphers. Surely, no matter what the review standard, the reviewer makes some difference .. . . American standards for

thought sufficient to support the determination of the administrative agency to be wholly inadequate.

This becomes clear upon the consideration of a panel's composition. A panel is made up of trade lawyers and other experts in the field of trade law.[27] It is only natural that panel members may draw upon their collective experience in a way which the judiciary at the CIT could not due to inadequate resources and expertise. After all, it should be remembered that the replacement of a court with an administrative tribunal is at least partially justified by a desire to bring specialized expertise to an area of the law which is or has become too technical for a court to effectively address.

Based on these observations, we reject the opinion that the presence of the same standard of review limits the panels to interpreting the law in the same manner as the CIT judiciary. In addition, it seems clear that the reasoning used by the ITA and ITC in making their determinations will not be given the unchallenged approval it received in the past. In order to test the validity of these hypotheses, we will now study the red raspberry case, the first Chapter Nineteen dispute to go to a binational panel.

III. Red Raspberries From Canada

A. Introduction

The case of red raspberries was the first dispute to go before a binational panel established under Chapter Nineteen of the FTA. It involved an action brought by Canadian raspberry producers disputing the determination made by the ITA in an administrative review of the dumping margins imposed against these producers. The complainants successfully obtained a removal of the previously imposed duties. Section III provides a detailed analysis of the raspberry case as it progressed through the ITC and ITA. Section IV examines the resolution of the dispute before the binational panel.

judicial review of administrative decisions are by no means so clear, continuing, or deferential as the argument for ineffectuality supposes.

27 FTA, 285-286, annex 1901.2 establishes the composition of the binational panels. Panel members are to be chosen from a roster of fifty candidates, twenty five selected by each country. Candidates should be of good character, high standing and repute, and shall be chosen based on objectivity, reliability, sound judgment, and familiarity with international trade law. Each Party shall appoint two candidates to the panel, with a fifth panelist chosen through consultation. One of the five shall be chosen by the panelists themselves to act as Chairperson. The Chairperson must be a lawyer, as must a majority of the panel members.

B. The Origination of the Dispute

In July of 1984, growers and packers of red raspberries in the American Northwest filed a petition with the ITC and the ITA alleging material injury resulting from the dumping of red raspberries by the Canadian red raspberry industry.[28] After experiencing growth in production and shipments in 1981 and 1982, the petitioners experienced decline in 1983, with a corresponding detrimental effect on employment, wages, and profitability.[29] Meanwhile, Canadian capacity had been steadily increasing, and imports from Canada were making major inroads into the United States market.[30] Given the economic unfeasibility of storing raspberries for an extended period, the American producers took action to guard against eroding market share. Faced with these competitive pressures, United States producers turned to United States trade remedy law for protection.

C. The Product and Industry

Of the three raspberry varieties, red, black, and purple, the red raspberry represents the dominant commercial purpose raspberry. It is sold to retailers for resale on the fresh market, or is packed, usually in a frozen state, for less immediate uses. The latter are either bulk packed (in 28 or 400 pound barrels), or retail packed for retail sale as frozen raspberries. The preserve, dairy, bakery, confectionery, and juice/wine industries purchase the majority of bulk packed raspberries.[31]

The product being imported from Canada consisted almost exclusively of bulk packed red raspberries.[32] These bulk packed berries were the sole focus of the intestigation.

The United States raspberry industry is situated primarily in the states of Oregon and Washington while the Canadian industry is located in British Columbia. The industry consists of two segments: growers

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28 The actual petitioners were the Washington Red Raspberry Commission, the Red Raspberry Committee of the Oregon Cranberry Commission, the Red Raspberry Committee of the Northwest Food Processor's Association, the Red Raspberry Member Group of the American Frozen Food Institute, Rader Farms, Ron Roberts, and Shuksan Frozen Foods, Inc., as reported in 49 Fed. Reg. 30,342 (1984).

29 Certain Red Raspberries from Canada, USITC Investigation No. 731-TA-196 at 8,9 (Final Report 1984), Exact figures on production, shipments, employment, wages, profitability and other relevant data can be found in the Appendix to this USITC report. *Id.* at A-20, A-38.

30 *Id.* at A-20, A-38. For example, a 47 percent increase in imports from Canada was registered from 1981 to 1982 (from 7.5 to 11 million pounds), and harvested acreage increased by 38 percent between 1981 and 1983 (from 37,000 to 51,000 acres, with further increases expected).

31 For an extended discussion of the product, *see id.* at A4-A8.

32 *Id.* at A7; it was estimated that 95 percent of the imported raspberries were chilled or frozen bulk packed.

and packers. There has been a trend towards vertical integration, with many growers establishing their own packing facilities. Both growers and packers of the bulk packed raspberries were involved in forwarding the complaint.

D. The ITC Preliminary Determination

At the preliminary stage, the ITC concluded that "there is a reasonable indication that less than fair value (LTFV) imports of manufacturing grade red raspberries packed in bulk from Canada threaten to cause material injury to a domestic industry."[33] The ITC based its opinion solely upon the evidence of declining United States productive capacity and increasing Canadian imports. The ITC also gave weight to the statements of certain United States growers/packers who alleged lost sales due to low priced Canadian imports.

Given the reliance on such criteria without regard to the exact nature of the link between the imports and the injury, it is hardly surprising that the majority of ITC preliminary determinations favor the United States producer.[34] In fact, it is difficult to see how any preliminary determinations result in negative rulings; any competitive factor causing poorer performance seems to justify use of this protectionist regime by the United States producer.

E. The ITA Ruling on LTFV

The ITA determines whether Canadian imports are being sold at LTFV prices. If so, the goods are "dumped" goods, against which duties will be imposed (provided a positive final determination of material injury is made at the ITC). The methodology used by the ITA is prima facie quite straightforward, but several problems with it directly resulted in the dispute which eventually reached the binational panel.

1. ITA Methodology

In its investigations, the ITA looks for evidence of international price discrimination. International price discrimination takes place when merchandise is sold in the United States for less than its "fair" value.[35]

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33 *Id.* at 9.

34 According to Anderson and Rugman, *The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms*, 13 J. WORLD COMP. 43, 47 (1989), "Currently more than 70% of all preliminary United States AD and CVD cases go against the Canadian exporters."

35 For an excellent overview of ITA methodology and the misuse of this agent by the forces of protectionism, *see* Palmeter, *supra* note 4.

In order to determine whether price discrimination exists, the ITA compares the foreign market value ("FMV") to the U.S. sale price. The U.S. price is simply the sale price to U.S. purchasers, as determined in accordance with § 772 of the U.S. Tariff Act.[36] Calculation of FMV must conform with § 773 of the Tariff Act.[37]

The Act provides for three alternative methods of calculating FMV. The predominant method uses the price at which similar merchandise is sold in the country of export.[38] However, this may not always be possible. On occasion, the quantity sold in the home market (HM) may be small. Thus, the Tariff Act also provides for determination of FMV through use of the export price to countries other than the United States, or alternatively, by use of a constructed value.[39]

Given that the broad language of the Tariff Act is open to various interpretations, the ITA has published the criteria upon which it bases its determinations.[40] In accordance with the Tariff Act, use of HM sales is the primary method of determining FMV. However, the ITA will substitute some other measure of FMV in four situations. Two of these situations, inapplicable in the raspberry context, occur when the exporting country has a state-controlled economy, and when HM sales are pretended or fictitious.[41]

The remaining two situations did play a role in the raspberries case. First, the ITA may not use HM sales where the quantity sold in the HM is less than 5% of third country sales. In such a case FMV will be determined by reference either to the sale price in the third country market or by reference to the constructed value.[42] Second, constructed value will be used where HM sale prices fall below the cost of production, and there are an inadequate number of sales made above the cost of production in either the third country or HM for the purposes of comparison.[43]

When constructed value is to be used, the ITA estimates and takes the sum of the costs of material, labor, overhead, general, selling, and administrative (GS&A) expenses, and profit.[44] Where actual GS&A expenses are less than 10 percent of total costs, the statutory minimum of

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36 Tariff Act, 19 U.S.C. § 1677a (1990).

37 *Id.* § 1677b.

38 *Id.* § 1677b(a)(1)(A).

39 *Id.* § 1677b(a).

40 Antidumping Duty Regulations, 19 C.F.R. § 353 (1988).

41 *Id.* § 353.8(a), § 353.18.

42 *Id.* § 353.4(a) (1988).

43 *Id.* § 353.7.

44 19 U.S.C. § 773(e)(1)(B); 19 C.F.R. § 353.6 (1988).

10 percent is used.[45] Similarly, where actual profit is less than 8 percent of the total cost of manufacture, the ITA applies the statutory minimum of 8 percent.[46] It is not difficult to see that this can lead to an inflated FMV for Canadian exporters who do not spend 10 percent on GS&A, or who are not earning 8 percent profit.

2. The ITA Raspberry Ruling

On May 10th, 1985, the ITA published its final determination, finding that Canadian exporters were selling red raspberries at LTFV.[47] The ITA found that two of the processors, Jesse Processing Ltd. and East Chilliwack Fruit Grower's Cooperative, made all HM sales below the cost of production.[48] Not surprisingly, these two processors had the highest dumping margins at 22.76 percent and 3.39 percent, respectively. As for the other two processors involved, Abbotsford Growers Cooperative Association, and Mukhtiar & Sons Packers Ltd. (M&S), the ITA found that they made sufficient HM sales above the cost of production to use HM sales in calculating FMV.[49] The ITA calculated that these two had margins of 0.19 percent (de minimis, so the processor avoided the imposition of duties) and 1.21 percent, respectively.

Of the processors involved in this early determination, M&S is of particular interest because it was one of three processors to be involved in the binational panel dispute four years later. At this stage, M&S was not particularly distressed about the 1.21 percent margin it faced. Customs officers received the antidumping duty order on red raspberries pending the final ITC determination that the United States industry was suffering material injury as a result of these imports.

3. The ITC Final Determination

By a unanimous vote of five to zero, the ITC commissioners found material injury to the U.S. industry resulting from the sale of Canadian red raspberry imports at LTFV.[50] The ITC based its material injury determination on declining domestic production, increasing inventories, and a worsening profit-and-loss situation. The rapid increase in imports from Canada, United States market price depression, and specific instances of lost sales led the ITC to believe that the Canadian imports

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45 *Id.*
46 *Id.*
47 50 Fed Reg. 19,768 (1985).
48 *Id.* at 19,769.
49 *Id.*
50 USITC Pub. 1707, Inv. No. 731-TA-196 at 1 (Final Report, 1985).

caused the material injury.[51]

F. The ITA's First Administrative Review

The Tariff Act provides for an administrative review of an existing antidumping order in each period subsequent to the order to determine whether the goods in question are still being sold at LTFV and to make any necessary adjustments to the prevailing dumping margins.[52] The ITA released final results of the first administrative review of red raspberries, covering the period from December 1984 through May 1986, on June 2, 1988.[53] M&S was again involved, as was a new exporter to the U.S. and eventual complainant before the panel, Clearbrook Packers, Inc. (Clearbrook).

Duties remained in place for several of the Canadian firms. However, in the case of M&S and Clearbrook, the ITA determined that the dumping margins were only .28 percent and .009 percent, respectively.[54] Given that these margins fell below the de minimis level of .5 percent, neither faced antidumping duties. Of key importance is the fact that the ITA used HM sales, rather than constructed value in calculating FMV.

G. The ITA's Second Administrative Review

Final results of the second review of red raspberries, covering the period of June 1986 through May 1987, were released on February 13, 1989.[55] Marco Estates Ltd./Landgrow (Marco), the third of the three complainants to eventually bring the case before the binational panel, had begun exporting to the U.S. and was thus included in the review along with M&S, Clearbrook and others. The ITA departed from the use of HM sales, choosing to use constructed value to determine the FMV for the three firms. Each of these firms had HM sales, but the ITA stated that these sales were not "of sufficient magnitude to provide a meaningful basis for price-to-price comparisons".[56]

This decision to use constructed value is interesting, given that the Tariff Act calls for the use of HM sales where possible, and exceptions to the use of HM sales, identified in the Antidumping Duty Regulations, do

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51 *Id.* at 3.

52 An administrative review can be requested by firms with antidumping duties imposed against them through the Antidumping Duty Regulations, 19 C.F.R. § 353.53a(a). The ITA will then carry out the review in accordance with § 751 of the Tariff Act.

53 53 Fed. Reg. 20,150 (1988).

54 *Id.* at 20,152.

55 54 Fed. Reg. 6559 (1989).

56 *Id.* at 6560. The actual number and volume of sales reported by the three complainants is as follows:

not cover the case at hand.[57] The regulations do not provide for the use of constructed value where HM sales constitute some minimal percentage of United States sales. Yet, the ITA, without any supporting reasons, stated in their review that "where home market sales are negligible compared to both the volume and number of sales to the United States, constructed value should be used to determine FMV".[58]

As a result of this change in ITA methodology, dumping margins of 2.59 percent, 3.67 percent and 9.15 percent were found against Clearbrook, M&S, and Marco, respectively.[59] Not surprisingly, this unexplained change which led to protectionist barriers against the processors where none previously existed, spurred these processors to take action.

IV. The Binational Panel Review Process

As a result of dissatisfaction with the ITA decision in the second administrative review, M&S, Clearbrook, and Marco initiated an action on March 15, 1989 to contest the results before a binational panel under Chapter Nineteen of the FTA. The fact that these producers could take any action at all underscores a key advantage of the FTA. Under the old system, review by the CIT took from two to four years, and was extremely expensive.[60] In contrast the FTA provides for dispute resolution in 315 days.[61] This results in more timely decisions as well as a reduction in the expense to complainants. Given the relatively small size of the raspberry industry, the cost to these three complainants of instituting an action through the CIT under the prior system would have been prohibitive.

On July 10, 1989, the three complainants, M&S, Clearbrook, and

	SALES		
	U.S.	3rd Country	Home Market
Marco			
# of sales	19	0	1*
Total lbs(000)	[]	0	[]
Clearbrook			
# of sales	16	0	2
Total lbs(000)	1800	0	55
Mukhtiar			
# of sales	13	1	1
Total lbs(000)	1800	35	10

*Fresh raspberries

Source: Panel Decision, *supra* note 8, at 7.

57 *See supra* notes 41-43 and accompanying text.

58 54 Fed. Reg. 6560.

59 *Id.* at 6561.

60 For discussion of these factors, see Steger, A Concise Guide to the Canada-United States Free Trade Agreement 74 (1988); Quinn, *supra* note 19, at 194; Lipsey & York, *supra* note 22, at 100.

61 FTA, Art. 1904(14).

Marco filed their brief with the United States-Canada FTA Binational Secretariat (U.S. section).[62] On September 8, 1989, the ITA filed its own brief.[63] The complainants then filed a reply brief on September 25, 1989.[64] After each party presented its case to the binational panel a decision was rendered on December 15, 1989.[65]

Two primary arguments were used in an attempt to alter the decision of the ITA in the second administrative review.[66] First, the complainants submitted that the ITA did not have the authority at law to ignore HM sales under the circumstances. Second, the complainants claimed that the ITA determination that the volume and number of HM sales were too small was not supported by substantial evidence.[67]

A. Is the ITA Determination in Accordance With Law?

1. The Complainants' View

The majority of the complainants' brief attempted to show that the ITA lacked statutory or legal authority to ignore HM sales in this case. The complainants claimed that the use of constructed value creates artificial dumping margins,[68] and that had HM sales been used to calculate FMV, the result would have been de minimis dumping margins, as in the first administrative review.

The complainants pointed out that § 773 of the Tariff Act does not provide for ignoring HM sales which are minimal compared to United States sales. Thus, Congress did not mandate such action. In fact, Congress failed to act on an attempt by the ITA to have § 773 (a)(1)(B)

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62 Brief on Behalf of the Complainants, In the Matter of Red Raspberries from Canada; USA-89-1904-01.

63 Reply Brief of the Investigating Authority, In the Matter of Red Raspberries From Canada; USA-89-1904-01.

64 Reply Brief on Behalf of the Complainants, In the Matter of Red Raspberries From Canada; USA-89-1904-01.

65 *Supra* note 8.

66 There were actually three issues raised, but the third was of little significance to this study. Basically, it consisted of an assertion by Marco that its HM sales, consisting of a single sale of fresh raspberries, should be compared to its sales of frozen bulk-packed raspberries in the United States in order to determine FMV. This argument could only succeed if the fresh raspberries were considered to be "similar merchandise" within the meaning of § 771(16) of the Tariff Act. This approach eventually failed, as the binational panel agreed with and put weight on an earlier statement of Marco itself, which said that "the products were in no way comparable" (quote taken from Marco's ITA questionnaire response of November 16, 1987).

67 *Supra* note 62, at 12.

68 For an explanation of why this is so, see *Id.* at 17, on constructed value. The complainants contend that "the 8 percent statutory minimum for profit is wholly unrealistic in the context of the red raspberry industry . . . like many agricultural commodities, the actual profit margin . . . is substantially lower." *Id.* at 18.

changed to allow the use of constructed value in such circumstances.[69] This constituted strong evidence that the ITA took an action which it believed to be beyond the authority provided by Congress. Thus, the complainants submitted that "the ITA cannot be permitted to do by administrative fiat what the Congress refused to do by legislative amendment."[70]

The complainants also argued that the ITA's own Antidumping Duty Regulations did not provide that bona fide HM sales could be ignored in favor of constructed value. That is, the ITA did not find that the Canadian economy was state-controlled, or that HM sales were fictitious or below the cost of production. All HM sales were also considered viable when compared to third country sales. Therefore, complainants claimed that "in this case . . . the ITA attempts to ignore HM sales based on a consideration not authorized by the regulations."[71]

Finally, the complainants pointed out that an agency seeking to implement a certain policy must do so in accordance with the Administrative Procedure Act (APA), which calls for notice of the proposed rule in the Federal Register as well as an opportunity for public comment.[72] According to the complainants, the ITA attempted to enforce a rule regarding minimal HM sales in comparison to United States sales without adhering to the APA notice and comment provisions. As a result, the ITA becomes a less transparent, less predictable agency, creating uncertainty as to what constitutes appropriate behavior and what will be punished as unacceptable dumping.

2. The View of the ITA

The ITA placed much weight on the fact that this was an unusual case given the small number of HM sales and lack of an adequate third country benchmark with which to compare them. The ITA argued that a strict interpretation of the Tariff Act and the Antidumping Duty Regulations, as advocated by the complainants, would create absurd results in that the ITA could be required to compare a single HM sale to a million

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69 This attempt took place through a letter to Representative Dan Rostenkowski, Chairman of the House Ways and Means Committee, from the late Malcom Baldridge, Secretary of Commerce, and William E. Brock, United States Trade Representative. The letter outlined the ITA position on the proposed Trade Remedies Reform Act of 1984.

70 *Supra* note 62, at 31.

71 *Id.* at 39.

72 APA, 5 U.S.C. § 553 (b) & (c) (1990). There is strong precedent for this in Carlisle & Rubber Company v. U.S., 634 F. Supp. 419, 423 (Ct. Int'l Trade 1986), where the Court held that the policy of ignoring dumping margins below 0.5 percent was subject to the notice and comment procedure of the APA.

United States sales. The ITA does not explain why the relatively minuscule HM sales are necessarily unrepresentative of FMV even when they are bona fide and above the cost of production, as admitted by the ITA.

The ITA submitted that the legislature gave it the duty of making reasonable price comparisons, and that to make the comparison complainants sought would be a contravention of ITA's duty. Thus, the ITA felt obligated to interpret the Tariff Act and the Antidumping Duty Regulations in a purposive instead of a literal manner.[73] As interpreters of the laws and regulations, the ITA chose to exercise its discretion by ignoring the exact wording of the statute in the name of protecting what they perceived to be the statute's purpose.

The ITA also contested complainants' submission that the ITA had violated the APA. The ITA submitted that the case did not involve the making of a rule, but rather involved an adjudicatory process. The ITA claimed that "an antidumping investigation is precisely the type of proceeding which may require the development of flexible standards on a case by case basis,"[74] and "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"[75]. Thus, while the ITA will publish regulations which govern how they will act, they will not give up the flexibility which allows them to develop standards as new situations arise.

3. *The Panel Decision*

On the first issue of whether the ITA decision was in accordance with law, the panel thought it necessary to first ask whether Congress had spoken to the issue. Had Congress done so, then the panel was willing to follow the words of Congress, be they for or against the ITA. In answering this question, the panel stated that "neither side has brought any evidence that Congress ever considered the precise factual situation presented in this review."[76] Thus, the panel chose to take the position

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[73] In support of this, the brief of the Investigating Authority, *supra* note 63, at 22, states that "it is an often quoted principle of statutory construction that the literal words of the statute are to be read in the light of the purpose of the statute taken as a whole, and will not be followed when to do so would lead to an absurd result." *See* U.S. v. Katz, 271 U.S. 354, 357 (1926); Hawaii v. Mankichi, 190 U.S. 197, 212-3 (1903). The ITA also cites the CIT case of Ceramic Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), which states that the Tariff Act and Antidumping Duty Regulations must be applied in a manner that will not "contravene or ignore the intent of the legislature or the guiding purpose of the statute."

[74] *Supra* note 63, at 39.

[75] *Id.*, *quoting* NLRB v. Bell Aerospace Company, 416 U.S. 267, 293 (1974), which in turn quoted SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[76] *Supra* note 8, at 20.

that absent legislation dealing specifically with the situation of HM sales being compared to United States sales, the will of Congress cannot be known and enforced. In addition, it rejected the assertion of the complainants that the notice and comment provisions of the APA had been violated, accepting the ITA position that adjudication and not rule making was involved.

Having decided that Congress had not spoken to the issue at hand, the panel followed the United States precedent of giving great deference to the administrative interpretation of the statute.[77]

Unquestionably, such deference is called for where the statute is unclear or open to various interpretations. However, that did not appear to be the case in this situation. The statute in question, § 773 of the Tariff Act, clearly establishes HM sales as the preferred yardstick against which to compare United States sales.[78] Exceptions to the use of HM sales are clearly enunciated.[79] None of the exceptions include the situation in the case at hand. When asked by the ITA to include this type of situation as an exception to the use of HM sales, Congress declined.[80] Therefore, it appears that Congress clearly intended HM value to be used in such a situation.

On this issue of whether the ITA determination was in accordance with law, it would appear that the panel gave too much power to the administrative agency. The panel allowed the ITA to interpret the relevant legislation in a manner not in accordance with the common sense reading. This may result in future uncertainty, as it will be difficult to determine how the ITA will exercise such discretion in the future.

B. Is the ITA Determination Supported By Substantial Evidence?

1. The Complainants' View

According to the complainants, the ITA stated its position that the quantity of HM sales were insufficient to provide a meaningful basis for

77 *FTA*, Art. 1904(2) requires deference to United States judicial precedent, and the doctrine of deferring to administrative agencies in the matter of interpreting the statutes they are charged with enforcing was clearly outlined in Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837 , 842-4 (1984).

78 That "home market sales are clearly the preferred basis" was recognized in the case of Smith Corona Group v. United States, 713 F.2d 1568, 1569 (1983), and is codified in the Antidumping Duty Regulations, 19 C.F.R. § 353.3(a)(1) (1987).

79 As discussed earlier, *supra* notes 41-43 and accompanying text, these exceptions can be found in the Tariff Act, 19 U.S.C. §§ 773(a)(1)(B), 773(a)(2); Antidumping Duty Regulations, 19 C.F.R. § 353 (1988).

80 *See supra* note 69 and accompanying text.

price comparisons in "conclusory fashion".[81] Their brief points out that the ITA failed to support its conclusion regarding the sufficiency of HM sales through either statistical, economic, or any other type of reasoning, and also failed to offer an explanation for its action when one was requested.[82] Contrary to the ITA's conclusion, the complainants asserted that HM sales, having been made in bona fide transactions at arms length at prevailing market prices, represented an extremely reliable measure of FMV.[83]

2. The View of the ITA

The ITA did not include in its brief any justification as to why the HM sales of the complainants were an unreliable measure of FMV. The ITA appeared to be satisfied with the explanation that the number and quantity of sales were just too small. In fact, when pressed on this before the binational panel, counsel for the ITA simply replied that the "ITA know(s) inadequacy when we see it."[84]

The ITA appeared to assume that sales of some minimal amount cannot possibly provide a fair indication of FMV. Why this must be so is not readily apparent. Where the sales are bona fide, as here, and not simply an attempt to create a low standard against which U.S. sales will be compared, it is incorrect to assume they are an unreliable indication of FMV. Furthermore, the ITA approach leaves questions unanswered, such as what percentage of sales are too few and whether the number or the quantity of sales should be used as the basis for comparison.

3. The Panel Decision

The reasoning of the panel on this issue illustrates that while deference will be given to the administrative agency with respect to statutory interpretation, agency discretion is not completely unfettered. Where the statute is not clear and its interpretation is left to the ITA, the option chosen must be supported by clearly articulated reasons.[85] Like the complainants, the panel did not accept that the ITA's conclusions regarding an insufficient number and volume of sales were self-evident. In particular, the panel could not blindly accept the de minimis classification of the M&S HM sales, which were 7.8 percent of its United States sales by

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[81] *Supra* note 62, at 55.

[82] *Id.* at 56.

[83] *Id.* at 57.

[84] United States-Canada Free Trade Agreement Binational Secretariat Transcript: In the Matter of Red Raspberries From Canada, at 93 (October 20, 1989).

[85] *Supra* note 8, at 20.

number, and the Clearbrook HM sales, which were 12.5 percent of its United States sales by number.[86] As a result, the panel remanded the decision to the ITA, with a request for reasons supporting the ITA's decision to ignore these HM sales.

C. Final Resolution of the Raspberry Dispute

In light of the panel decision, the ITA attempted to provide support for its decision sufficient to constitute substantial evidence. The ITA explained that the five percent standard of market viability used to compare HM to third country sales was also used here. That is, the HM sales of M&S and Clearbrook by *volume* were less than five percent of United States sales.

The panel found this explanation completely unacceptable. First, the panel objected to the ITA suddenly dropping the *number* of sales from the analysis, and second, the panel stated that the ITA's choice of the five percent standard when that choice is not mandated by statute requires supporting reasoning before the substantial evidence test is met.[87] As a result, on April 2, 1990 the panel ordered the ITA to amend its final determination.[88]

In accordance with the Panel Decision, the ITA altered its subsidy calculation, using HM sales in determining the FMV of raspberries sold by M&S and Clearbrook. This methodology led to dumping margins of 0.00 percent and 0. 11 percent for M&S and Clearbrook, respectively. These de minimis levels allowed the two complainants to completely avoid the imposition of antidumping duties.[89]

V. Analysis of the Panel Decision

As stated earlier, the binational panels as currently constituted do not act as a panacea to the problems of trade law. But it is not an ideal world in which we live. In order for the panels to be useful, they merely must improve upon the system of dispute settlement which they replace. The red raspberry case shows that the panels are quite likely to result in significant improvements.

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86 *Id.* at 21.

87 For an extended discussion, see In The Matter of Red Raspberries From Canada; Opinion of the Panel Upon Remand, USA-89-1904-01.

88 In other words, an order was made under FTA, Art. 1904(8) to take action not inconsistent with the Panel's decision.

89 The third complainant, Marco, was not so successful. Given that they had no HM or third country sales of similar merchandise (they only had one HM sale, involving fresh, and not bulk packed raspberries), the constructed value method used by the ITA was upheld as valid, and the dumping margin of 9.15 percent calculated prior to the panel review stood.

Some advantages of the panels cannot be disputed. For example, major benefits include the reduction of the time and expense involved in bringing an action, and the perception of the parties that the system results in a more fair and impartial hearing.[90] The critics of Chapter Nineteen of the FTA correctly note that the panels are bound by the laws and precedents of the country in which the administrative determination was made. This became evident in red raspberries, where the panel felt compelled by precedent to show deference to the ITA's interpretation of the Tariff Act, in spite of the fact that the ITA interpretation seemed to be clearly in opposition to Congressional intent. However, in spite of the correctness of this point, it should be noted that the critics were wrong in extrapolating that panel decisions would be of no more benefit to Canadian exporters than those by the CIT.

The reason for optimism is the panel requirement that substantial evidence support the ITA determination. The result was that the exporters involved (excluding Marco) won the case resoundingly, having all duties against them removed. Unlike the situation in the past, flexibility was only granted to the ITA on a conditional basis, with the condition being that their chosen methodology and resulting determination be based on sound reasoning. In this case, the ITA failed to provide such reasoning, and thus failed the 'substantial evidence' test. As a result, the panel decision curtailed the ITA's flexibility and discretion.[91]

F. CONCLUSION

The results in this case can only be seen as a positive step forward for Canadian exporters who were previously at the mercy of ITA and

[90] In an interview conducted on July 31, 1990 with Ivan Feltham, Chairman of the panel in the Red Raspberries case, it was confirmed that the general perceptions with respect to the effectiveness and fairness of the panels were very positive. The importance of a favorable perception of panel effectiveness should not be underestimated. As pointed out by Horlick, Oliver and Steger, *supra* note 23, at 71, "the panels. . .will also increase the perception of fairness and impartiality among business people in the application of (trade) laws. An improved business climate and confidence in the fair application of each country's trade laws should result in more willingness to export to the other country and a corresponding removal of investment distortions between the two countries."

[91] The importance of sound reasoning and the presence of substantial evidence was recently underlined in the case of Fresh, Chilled, or Frozen Pork From Canada, *supra* note 9. In a report on the case by Bertin, *Panel Overturns U.S. Duty on Pork*, Globe and Mail, August 25, 1990, at B1, it is stated that "The Binational Panel Review admonished the members of the U.S. International Trade Commission. . .and told them, in effect, to try their math again." He also quotes from the decision itself, which states "The panel remands the ITC's final determination. . .because it relied heavily on statistics which appear at best questionable." This builds on the case of red raspberries, by refusing to accept a determination where the evidence is inadequate to support the conclusion forwarded, thus failing the substantial evidence test. Thus, the panels are showing a willingness to question the economic data which the agency has relied upon in making their determination.

ITC administrators. Three positive effects should flow from the red raspberry decision. First, future panels will be able to learn from this case, and apply the same high standard of substantial evidence. Second, the ITA and ITC will think twice before making a determination unsupported by strong supporting reasoning. Third, and perhaps most importantly, the FTA will deter United States producers from using the trade laws as a strategic weapon, and will result in a decline in the number of frivolous claims in search of protection from legitimate competitive pressures. While the raspberries case is only the first to come before the panel, its message is clear: proponents of protectionism beware.