Trade Remedy Laws and Agriculture

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Paper presented at the Free Trade Area of the Americas, The WTO, and New Farm Legislation: Responding to Opportunities and Challenges, San Antonio, May 22-24, 2002.

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Introduction

In the course of the last century industrialized-country governments devised three basic defenses against "excessive" imports—Antidumping, Countervailing Duties, and Safeguards. The Uruguay Round of the WTO attempted to discipline inappropriate use of these defense mechanisms by establishing criteria for their use. Whether these provisions have disciplined inappropriate use is open to debate. The Uruguay Round standards largely legitimized mechanisms already in place in industrialized countries, and appears to have promoted the adoption of these devices by other WTO members. The proliferation has increased the use of trade remedies by developing countries. Trade remedy laws are a major source of trade disputes within the WTO and, for agricultural products in particular, a threat to trade and a thorny topic for the next round of trade negotiations.

This paper starts with some background on the emergence of trade remedy legislation in Canada and the United States and its recent adoption by developing countries. It then surveys the four types of trade remedies recognized by the WTO: antidumping, countervailing duties, general safeguards, and special safeguards for agricultural products. In each case we present evidence that the use of the remedy is increasing. Trade remedies are being increasingly employed by developing countries. They are also increasingly employed against agricultural products and, in particular, against value-added agricultural products. As the United States is a major exporter of high-value agricultural products, U.S. agriculture faces a mounting risk of future trade remedy actions. Indeed, U.S. agriculture has, on balance, much to gain from tighter WTO disciplines on the use of trade remedies. The concluding section of the paper discusses some possible directions for trade remedy reform.

The emergence of trade remedies

The causes of "excessive imports" that stimulate trade remedies—subsidies and dumping—are ancient, but formal remedies are relatively new. Countervailing duties and antidumping remedies

originated in 1880-1916, about the same time as antitrust laws and for the same reasons. High tariffs supported domestic cartels and led to aggressive export policies. Several European governments, for example, supported their sugar beet producers and refiners through subsidies—bounties—on refined sugar exports. To combat this practice, the United States, in the McKinley Tariff of 1890, created the first formal countervailing duty (CVD) mechanism (Viner, 1923 and1934). A countervailing duty is "a duty on bounties, not on sugar." They are meant to neutralize the subsidies of foreign governments, not as a means of protection.

While countervailing duties are supposed to offset the actions of foreign governments, the antidumping (AD) mechanism was developed to offset the "unfair" actions of foreign (private) firms. High tariffs facilitated the development of cartels or "trusts," as they were then called. They could charge a high price in the captive domestic market and export at lower prices in foreign markets. If the export price covered marginal costs, it is simply price discrimination, a common and legal business practice. If the export price is less than marginal cost, then the firm is said to engage in predatory pricing. Predatory pricing is illegal in many countries, although it is rarely observed in practice. Dumping, however, is not limited to predatory pricing: it does not require proof of sales below cost, merely sales below "fair value," which is defined as the comparable price of the product in domestic market.

Antidumping laws discipline price discrimination by foreign firms, even though domestic firms, engaging in identical conduct could not be similarly prosecuted. Canada, in 1904, created the first formal antidumping mechanism. The Canadian case was stimulated by steel exports from the United States. Canada claimed that the U.S. steel exports to Canada were priced below the U.S. price for the identical product. Canada imposed a duty to offset the difference between the U.S. export price and "fair value." The United States adopted an antidumping law in 1916. By the 1920s most English-speaking countries had enacted antidumping laws; the depression of the 1930 induced other industrialized countries to adopt them as well.

International discipline of trade remedies

The General Agreement on Tariffs and Trade (GATT) of 1947 attempted to reverse the economic nationalism and protectionism of the inter-war years. Article VI of the GATT addressed antidumping and countervailing duties, but the text was so general that it provided no effective discipline. The Tokyo Round produced the 1979 Code on Antidumping. It was more specific than earlier agreements but it left considerable discretion to the few GATT members that agreed to abide by it. The Uruguay Round Agreement of 1994 marks a major change. It resolved many of the ambiguities in earlier agreements: it includes an Agreement on Subsidies and Countervailing Measures, an Agreement on Safeguards, and an Agreement on Implementation of Article VI (antidumping). The antidumping agreement, for example, sets out specific definitions of "dumping," "injury," and "domestic industry"; it establishes standards of evidence and of public notification and disclosure; and it imposes a 5-year sunset review provision on all antidumping duties. The terms of these three agreements are binding on all WTO members; not just those that choose to abide by them. Importantly, the Uruguay Round improved on the existing dispute resolution process. Previously, under the GATT, disputes could continue indefinitely: there is now a binding timeline and several antidumping complaints have been initiated and resolved. For example table 1 lists disputes over the use of trade remedies involving the United States in the WTO.

WTO membership obliges member countries to play by WTO rules. Member governments voluntarily surrender some discretion over actions that can adversely affect other members; in return they gain the benefit that other members must also refrain from such actions. The United States is the world's leading importer, so it is no surprise that its trade remedies are often challenged. But the United States is also the world's leading exporter and it stands to benefit if its trading partners abide by trade remedy disciplines. Indeed as more countries adopt trade remedy laws, particularly developing countries, the benefits to the United States of stronger trade-remedy disciplines will likely outweigh the costs.

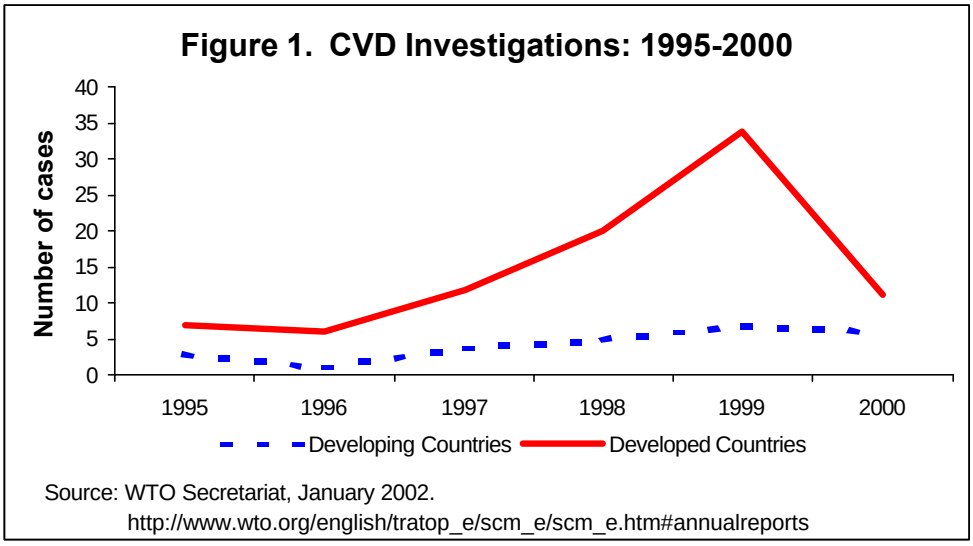
Table 1. Disputes involving the United States in the WTO

Defendant	Complainant(s)	Issue
Mexico	United States	Anti-Dumping Investigation of High Fructose Corn Syrup
United States	European Union	Anti-Dumping Act of 1916
United States	Japan	Anti-Dumping Act of 1916
United States	European Union	Safeguard measures on imports of wheat gluten
United States	Australia, New Zealand	Safeguard measures on imports of fresh, chilled or frozen lamb meat
United States	Pakistan	Transitional safeguard measure on combed cotton yarn

Countervailing Duties

GATT Article VI (1994) allows the use of countervailing duties (CVDs) to offset public subsidies for the manufacture, production or export of any merchandise. A CVD requires evidence proving the existence of a subsidy and that the subsidized imports cause or threaten to cause material injury to domestic industry. The UR Agreement establishes disciplines for calculating subsidies, and requires that CVDs terminate after five years—the sunset provision. Article VI allows the duty to be extended beyond the five-year sunset if a public review determines that the foreign subsidy still exists and that domestic injury is still likely.

Although previously used mainly by developed countries, CVD use by developing countries is rising, accounting for over one-third of all investigations initiated in 2000 (figure 1). As the effects of a trade remedy measure are generally experienced with the initiation of an investigation, this study uses the number of investigations rather than the number of implementations in the analysis. While CVDs were generally used in non-agricultural sectors by the United States and the European Community, CVD use by developing countries is primarily on agricultural products (table 2). High value and processed food products appear to be the most vulnerable. For example, all of the 34 CVD investigations carried out by WTO members on agricultural products during 1995-2000 were on high value products such as meat and other animal products, vegetables, fats and oils and processed food products (table 3).



Antidumping

Article VI, GATT 1994 (WTO 1996), defines ***dumping*** as the introduction of a product of one country into the commerce of another country at less than its fair or ***normal value***. The Uruguay Round Agreement clarified how members may determine normal value. Normal value is the comparable price for the product, in the ordinary course of trade, when destined for domestic consumption in the exporting country. If such a price is not available, normal value may be computed using a comparable price for the product exported to a third country. If this information

is not available, one may calculate the normal value for the product taking into account costs of production, plus additional selling expenses and profits—the "constructed value" method.

Table 2. Developing Country Countervailing Duty Actions More on Agriculture

	1 Jan-30 Jun 99				1 Jul-31 Dec 98			
	CVDs Initiated		Duties in Force		CVDs Initiated		Duties in Force	
	Food & Ag	Non-ag	Food & Ag	Non-ag	Food & Ag	Non-ag	Food & Ag	Non-ag
EEC		21		7		8		3
United States	2	36	9	51	5	26	11	48
Mexico			1	7	1		1	7
Argentina			3		2		3	
Australia			5				5	1
Brazil			6				6	
Canada			4	1			4	1
Egypt	4				4			
New Zealand			2				2	
South Africa				2				1
Venezuela	1		3				3	

Source: WTO Semi Annual Reports by Members.

Table 3. High Value Products Dominate CVD Actions on Agriculture

Category	1995	1996	1997	1998	1999	2000	Total 1995-2000
Agriculture Total	9	6	4	6	6	3	34
Animal and Products	1	1	1	1	4	1	9
Vegetables	0	1	0	0	0	2	3
Fats and Oils	0	0	1	0	0	0	1
Prepared Food	8	4	2	5	2	0	21
Wood and Products	0	1	0	0	0	0	1
Textiles	0	0	0	2	5	1	8
Other Sectors	1	0	12	17	30	13	73
Total	10	7	16	25	41	17	116

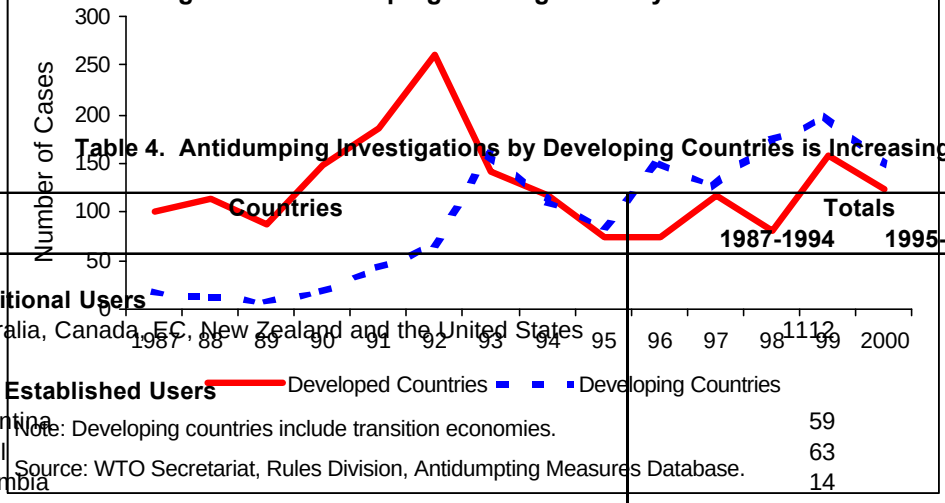
Source: WTO Secretariat, Geneva, January 2002.
http://www.wto.org/english/tratop_e/scm_e/scm_e.htm#annualreports

An antidumping investigation involves a two-part test. A member must first demonstrate that dumping exists. Second, a member must show that dumping causes or threatens to cause material injury to an established industry in the country or retards the establishment of a domestic industry. If both requirements are satisfied an AD duty can be imposed; the duty cannot exceed the ***margin***

of dumping–the difference between the export price and normal value.

The Antidumping Agreement established a *de minimis* threshold. AD duties can only be imposed if the dumping margin exceeds 2 percent of the export price or if the import market share from the dumping supplier exceeds 3 percent (by volume). When several countries are simultaneously subject to an AD investigation their imports can be aggregated or "cumulated." The cumulated *de minimis* volume share is 7 percent. Finally, AD actions are subject to a five-year sunset provision similar to the Countervailing Duty sunset provision.

Figure 2. Antidumping Investigations by Countries



Note: Developing countries include transition economies.

Source: WTO Secretariat, Rules Division, Antidumpting Measures Database.

Table 4. Antidumping Investigations by Developing Countries is Increasing.

Countries	Totals 1987-1994	Totals 1995-Jun 30,2001
Traditional Users		
Australia, Canada, EC, New Zealand and the United States	1112	711
New Established Users		
Argentina	59	151
Brazil	63	82
Colombia	14	17
India	15	189
Korea	21	46
Mexico	174	45
Poland	24	8
South Africa	16	155
Turkey	28	16
Total	414	709
Infrequent Developed Country Users		
Austria, Finland, Japan, Singapore and Sweden	39	2
Emerging Developing Country Users		
Indonesia	0	38
Venezuela	3	30
Egypt	1	25
Israel	2	24
Peru	3	23
Malaysia	0	16
Philippines	8	15
Chile	2	14
Others[1]	3	33
Total	21	218
Total	1586	1640

Note: [1]Includes Trinidad & Tobago, Costa Rica, Thailand, Czech Republic, Uruguay, Nicaragua, Panama, Ecuador, Guatemala and Slovenia.

Antidumping measures, once imposed only by a few industrialized countries, have been increasingly adopted by developing countries. The number of countries using AD increased over five-fold between 1987 and 2000 from 7 to 37, with AD use by non-traditional users, such as Argentina, India, and South Africa increasing significantly (table 4). Antidumping use by traditional users, on the other hand, slowed down in recent years compared with the early 1990s. The decline in AD use by industrialized countries has been attributed to general economic prosperity and a growing realization that AD use had not served their national interests (Finger 1998). Moreover, the United States and the European Union have faced increased complaints from the domestic importing industries that must pay the AD duties. The use by developing countries, on the other hand, is on the rise and account for over half of all AD investigations during 1995-

2000 (figure 2).

AD investigations for agricultural products have a high probability of finding dumping and injury due to frequent price variations, especially among perishable products (Regmi, 2002). Agriculture also remains very vulnerable to AD investigations given the current rule by which the normal value of a product is calculated based on estimates of total production costs (rather than variable cost) adjusted for marketing, handling and an imputed profit rate. Given the length of time required for agricultural production, agricultural supply cannot be adjusted to price variations in the short run, and selling below the largely sunk cost of production, especially for perishable products, is the rational loss-minimizing option for producers.

Table 5. High Value Products Dominate AD Actions on Agriculture

Category	*1995*	*1996*	*1997*	*1998*	*1999*	*2000*	Total 1995-2000
Agriculture Total	14	15	8	18	11	13	79
Animal & Products	1	2	2	6	8	3	**22**
Vegetables	0	5	2	4	1	7	**19**
Fats, Oils & Products	0	0	0	0	0	0	**0**
Prepared Food	13	5	4	8	2	3	**35**
Hides, Skins & Products	0	3	0	0	0	0	**3**
Wood & Products	1	4	10	3	1	5	**24**
Textiles	1	23	8	28	34	12	**106**
Other Sectors	141	182	217	205	310	242	1297
Total	157	224	243	254	356	272	1506

Source: WTO Secretariat, Geneva, January 2002.
http://www.wto.org/english/tratop_e/adp_e/adp_e.htm#annualreports

With increased use of AD by developing countries, agricultural exports are increasingly vulnerable to AD actions. Many developing countries restricted food and agricultural imports through high tariffs, licensing requirements and parastatal import controls. As these countries implement their WTO obligations and liberalize agricultural trade, AD actions become an increasingly attractive substitute for traditional means of protection. The trend is already evident: while agriculture accounted for about 6 percent of the total number of AD cases launched between

1987-1997, it accounted for 10 percent of the total cases among the newly established developing country users, and 96 percent of all cases for Poland (Regmi, 2002). Similar to the use of CVDs, the use of AD in agriculture is primarily limited to high value products such as fresh produce, meat and processed food products (table 5).

Safeguards under WTO

Article XIX of GATT (1994) allows members to impose temporary border control measures, such as increased tariffs or quantitative restrictions, if a surge of imports causes or threatens to cause serious injury to the domestic industry. WTO Agreement on Safeguards establishes several rules. First, the necessary condition is a finding of "serious injury" (or threat thereof) which, while vague, is a higher standard than the "material injury" standard used for antidumping and countervailing actions.

The Agreement on Safeguards grants Members imposing a safeguard a three-year retaliation-free period. After three years adversely affected trading partners can retaliate. Whether the safeguard was correctly imposed can be challenged through the WTO's dispute settlement process. A sunset provision requires safeguards to lapse after four years; if the sunset review reveals serious injury the safeguard can be re-imposed an additional four years. While CVD and AD actions apply only to particular exporters, safeguards must apply to all suppliers. The safeguard *de minimis* exempts actions against developing countries with market shares of less than 3 percent and cumulative shares of less than 9 percent.

Between 1995 and October 2001, only 46 WTO members had notified the WTO of their domestic legislation relating to safeguards. Given the lack of domestic legislation, safeguard actions have been limited to 17 countries (WTO 2000, and 2001), but as legislation develops, it is likely that the number of countries invoking safeguards will increase. This is evident by the fact that while just over 50 investigations were notified to the WTO between 1 January 1995 and 9 November 2000, 30 investigation notifications were received by the WTO during the 11-month period

between 10 November 2000 and 29 October 2001. About half of all safeguard investigations notified to the WTO (since 1995) have covered agricultural products, primarily high-value

Table 6. Summary of Safeguard Investigations: 10 November 2000-29 October 2001

Country	Investigations Initiated	Preliminary Measures Imposed	Definitive Measures Imposed	Investigations terminated
Argentina	Peaches	Peaches	Peaches, Motocyles	
Brazil	Coconuts			
Bulgaria	ammonium nitrate	ammonium nitrate		
Chile	Lighters, mixed oils	mixed oils	liquid and powdered milk	mixed oils
Czech Republic	Isoglucose, footwear	Isoglucose	Isoglucose	Footwear
Ecuador		Matches		
Egypt			Powdered milk	
El Salvador	Fertilizers			Rice, Pigmeat
Japan	Tatami-Omote, Welsh onions, Shiitake mushrooms	Tatami-Omote, Welsh onions, Shiitake mushrooms		
Jordan	Biscuits, chocolates		Biscuits	Chocolates
Morocco	Rubber plates & sheets		Bananas	
Philippines	Ceramic Tiles, Cement			
Poland	Potassium nitrate			
Slovakia	Sugar		Sugar	
United States	Steel			

Source: WTO report G/L/494, 31 October 2001

products such as meat, milk powder, edible oils, peaches and tomatoes (WTO 2000 and 2001). As illustrated in table 6, the United States, Japan, and many Latin American countries, including Argentina, Brazil, Chile and Colombia have used the safeguard measures to date.

In addition to the general safeguard provision, a Special Safeguard (SSG) provision for selected

agricultural products is available under the WTO. This is described in the following section.

Special Safeguard Provision under the Agreement on Agriculture

The Agreement on Agriculture (AoA) allowed members to create Special Safeguards (SSG) for agricultural commodities subject to tariffication—those products subject to quotas and bans prior to the Uruguay Round. Under this provision WTO members are allowed recourse to SSG, for those products identified by the members in their country schedules, when volume and value

Table 7. Special Agricultural Safeguard By WTO Members

Member	No. of tariff items	No. of product groups (HS 4-digit headings)	Notified Use in				
			1995	1996	1997	1998	1999
Switzerland-Liechtenstein	961	134					X
Norway	581	141					
European Communities	539	72	X	X			
Iceland	462	121					
Morocco	374	46					
Mexico	293	83					
Czech Republic	236	29					
United States	189	26	X			X	
Romania	175	14					
Namibia	166	75					
South Africa	166	75					
Swaziland	166	75					
Botswana	161	71					
Canada	150	37					
Poland	144	133		X	X	X	X
Japan	121	27	X	X	X	X	X
Philippines	118	36					
Hungary	117	117					X
Slovak Republic	114	28			X		
Korea	111	34	X	X			
Guatemala	107	35					
Costa Rica	87	24					
El Salvador	84	23					
Venezuela	76	63					
Malaysia	72	12					
Colombia	56	55					
Thailand	52	23					
Israel	41	14					
Barbados	37	24					
Tunisia	32	13					
Nicaragua	21	14					
Bulgaria	21	9					
Indonesia	13	4					
Australia	10	2					
Ecuador	7	1					
Panama	6	2					
New Zealand	4	2					
Uruguay	2	1					
Total	6072	1695					

Source: AIE/S12, WTO Geneva 9 October 1998
G/AG/NG/S/9, WTO, Geneva, May 2000.

trigger levels for action are satisfied. For example, additional SSG duties can be levied on an imported product if the import volume exceeds a pre-set (according to WTO guidelines) volume trigger, or the price of the imported product is below the set trigger level. The AoA provides general guidelines for setting trigger levels and for calculating additional duty when an SSG action is to be taken.

As of 1999, 38 members had designated SSG in their country schedules, and 8 had actually employed them (table 7). The United States, Japan, and the European Community (EC) have accounted for most of the SSG cases—mostly for sugar, dairy, animal and horticultural products (table 8). But there is growing use by other countries; of this group Poland is the biggest user of SSG. Developing countries have complained about the SSG provision. Many developing countries (allegedly due to lack of knowledge) failed to identify commodities as eligible for SSGs at the conclusion of the Uruguay Round and were thus unable to use the provision.

Table 8. Special Agricultural Safeguard by Country and Product (1995-99)

Agricultural Product	EC	Japan	Korea	Poland	US	Slovakia	Hungary	Switzerland	Total
Cereals		10	4	9	1				24
Oilseeds, fats, oils & products			4		1				5
Sugar & Confectionary	20			3	2				25
Dairy Products		25			13		7		45
Animals & products	5	41		96	6			7	155
Eggs	1								1
Beverage & Spirits					1				1
Fruit & vegetables	47	3		1					51
Tobacco									0
Agricultural fibers		5							5
Coffee, tea, mate, cocoa, spices & preparations		1			6	1			8
Other agricultural products				13					13
Total	73	85	8	122	30	1	7	7	333

Source: AIE/S12, WTO Geneva 9 October 1998
G/AG/NG/S/9, WTO, Geneva, May 2000.

SSGs are automatic; unlike general safeguards, ADs, and CVDs, they do not require a quasi-judicial process to determine whether action is merited. If the import volume or value limits, set by the importing country, are breached, SSGs are automatically imposed; no injury determination is required. SSGs remain in effect for a year after implementation, but may be re-imposed if conditions continue to exceed trigger levels. Furthermore, SSGs are exempt from trade remedy actions by adversely affected exporters.

Similar to the use of other trade remedy measures on agriculture, AD and CVD, SSGs are primarily used on high-value agricultural products. Over half of all SSGs used between 1995 and 1999 were on meat products, 15 percent were on fresh produce, and 14 percent on dairy products

(table 8).

What's ahead ?

As more countries join the WTO and engage in regional trade agreements that facilitate freer trade, the risk increases that countries will resort to trade remedy measures to restrict agricultural imports. Trade remedy laws provide safety valves that enable governments to implement trade liberalization by reducing domestic political opposition. However, the current provisions appear too generous, allowing trade restrictions to be implemented very easily. For example, the freer flow of trade among NAFTA signatories has resulted in increased use of trade remedy measures. Through the end of 1998, Canada initiated 25 AD and 2 CVD cases, and Mexico initiated 35 AD and 4 CVD cases against the United States (USDOC, 2001). Twenty one percent of all AD and CVD cases for Mexico were for agricultural products, while 32 percent of all AD and CVD cases for Canada were on agricultural products. This is a disproportionately high rate: agricultural products account for less than 8 percent of US export value to Mexico and 5 percent to Canada (ITC, 2001).

As mentioned in the earlier sections, increased use by developing countries has led to increased application of trade remedy measures on agriculture. Given the important role of agriculture in developing countries, and the greater probability of injury finding on AD investigations on agriculture, agricultural products are particularly vulnerable to increased implementation of these measures by WTO members. Among agricultural products, high value fresh produce, meat and processed food products appear to be the most affected by these measures. Although trade remedy provisions provide an impetus to reach an agreement in trade negotiations, many Member countries and individuals have argued that the existing provisions allow importing governments too much discretion to impose protection, and favor developed countries with the administrative capacity to exercise the discretion allowed.

In light of these concerns the Doha Ministerial declaration (WTO, November 2001) states that the

new Round of WTO negotiations will aim at clarifying and improving disciplines under the Agreements on the Implementations of Article VI of GATT 1994 (AD) and on Subsidies and Countervailing Measures (CVD). In the initial phase of the negotiations, participants are to indicate the provisions for which they seek clarification and improvement. The determination of 'fair value' in AD investigations is the most common target of criticism; the methods currently permitted for calculating 'fair value' allow so much latitude that a dumping determination can be obtained for almost any good. Construction of fair value for imports from non-market economies or from economies with 'special market situations' present challenges and the existing rules do not offer satisfactory guidelines. Second, the system of administration in some countries is susceptible to capture by import-competing industries. For example, the United States allows no consumer representation or consideration of consumer welfare in its AD investigations; Canada, in contrast, considers the potential negative impact on consumer households in its investigations.

The official U.S. negotiation position (USTR, 2000) is to "eliminate the transitional special agricultural safeguard as defined in Article 5 of the Agreement on Agriculture." The three other forms of trade remedy require a quasi-judicial investigation. One potential avenue of reform is to devise different standards of evidence and proof for different classes of traded goods. Among commodities, perishable agricultural commodities have an intrinsically higher risk of a false guilty finding than other traded goods. Thus stronger tests or higher standards are appropriate for equal treatment across traded goods. Several "parameters" of the investigation could be increased for agricultural and perishable goods. These include higher de minimus levels, and higher tolerances for cumulating imports, and stricter definitions of the domestic industry.

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