A Primer on Antidumping and Counterveiling Duty Petitions: Review of U.S. Trade Law and Applications to Agriculture

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Executive Summary

Antidumping and Countervailing Duty Petitions: Review of US Trade Law and Applications to Agriculture

Unfair foreign pricing and the use of export and production subsidies distort trade and may adversely impact U.S. businesses and industries. U.S. antidumping and countervailing duty legislation is designed to mitigate the effects of unfair foreign pricing and trade distorting subsidies. There are special provisions related to regions, agriculture, and the semi-finished products analysis which have been applied to recent agricultural cases. There does appear to be, however, a reluctance to use these provisions on a widespread basis. This most likely emanates from legislative guidance passed subsequent to the Tariff Act of 1930. It might prove useful to review these statues in order to consider regulations which would allow more general application. Many, if not all, of these recent laws were enacted during periods of time when international markets were less open to competition and the role of governments was more pervasive.

Trade policy changes, differing rates of economic growth between countries, exchange rate fluctuations, and the emergence of new competition all influence trade to make the international market more risky for U.S. producers. Concurrently, the likelihood of increasing protection by other countries should be considered, especially given the present backdrop of sagging economic growth in Asia, growing unemployment in the European Union, and the prospects for additional currency devaluations in Latin America. With declining government support to U.S. agriculture, however, greater access to international markets will be an important force influencing the future growth and prosperity of agriculture in the United States.

Findings

- Flexibility is important to establish the appropriate domestic like product for analysis, excluding others not directly impacted by the subject imports. Current U.S. law provides flexibility, and therefore supports sound like product determinations by the ITC.

- Less than fair value may be a misleading concept in some agricultural cases due to the nature of agricultural production and the risks associated with the marketing of perishable commodities. Firms may be found to be ‘dumping’ product, when in fact the firm is responding to the appropriate price signal in the market. Without clear evidence of predatory pricing, the dumping rule may be misplaced as an indicator of unwarranted activity.

- The use of a regional industry is used only sparingly in AD/CVD petitions. More use may be appropriate when analyzing agricultural products, especially those which have production concentrated in a limited region of the United States during a specified period of the year, or season.

- The concept of cumulation appears inappropriate when analyzing the impacts of perishable
imports on a domestic market. It may be more appropriately used to determine impacts on storable, nonperishable products.

Current ratios for negligiblity are quite low for agricultural products. It may be unreasonably easy to pursue a case that imports are causing harm to an import market. More reasonable standards for agricultural products would be that one country’s imports account for 15 percent of subject imports and two countries’ imports account for 25 percent of subject imports.

Unresolved Issues

1. Would the international trade interests of the United States be best served, i.e. the facilitation of market opening or increased market access, if the ITC were bound by a legal standard in making material injury findings which is more consistent with the WTO? Currently, the standard requires a finding of ‘no reasonable indication of material injury.’ The WTO requires a positive determination that there is evidence of material injury.

2. Would a more objective process of investigation result if the statutes were changed to require the ranking of causes of material injury according to the relative importance of each identifiable cause? The present statute requires only that imports are a cause of material injury, not that imports the most important, or even an important cause of material injury. Ranking causes of material injury would establish the priority of each cause. If imports were not among the top three causes of material injury, then the petition would be dismissed.

3. At some point in the near future, it may be necessary to establish a methodology to sample and quantify the effects of imports on an industry. If an industry currently consists of 1,000 firms, there is no statutory requirement for sampling to assist in the determination of material injury. Given the atomistic structure of production agriculture, couple with the increased likelihood of more AD/CVD petitions, the need to be able to sample individual sectors of the industry will take on added importance in the future.

4. A consistent methodology to determine the point at which foreign goods become U.S. products needs to be developed. In the live cattle petition against Canada and Mexico, it was unclear when Mexican stocker cattle became U.S. cattle and when Canadian feeder cattle became U.S. fed cattle. It is likely that similar problems will occur in other semi-finished product analyses involving agricultural goods. A standard to determine at which stage of production a foreign raw material or live animal becomes a U.S. product may need to be considered.

5. If foreign imports are excluded from U.S. production and consumption statistics, the resulting data will underestimate the relative importance of imported products relative to the U.S. market. The impacts of imports on U.S. prices, the market, and the relevant industry will, therefore, be underestimated. Standardization of the method used to make these determinations would assist in alleviating confusion and inconsistency in analyses.
# Antidumping and Countervailing Duty Petitions: Review of US Trade Law and Applications to Agriculture

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Background

U.S. agriculture has undergone dramatic change in the 1990s. Rapid growth in U.S. export value in the early 199s was largely offset by a precipitous decline from 1996-99. The 1996 farm bill removed part of the government safety net for some producers, leading to greater dependence on markets and more downside price risk. Agricultural markets experienced a large and rapid transformation from relatively tight supply/demand conditions to weak demand and abundant supplies. U.S. farm prices for grains and livestock tumbled to record lows in 1998 after achieving record highs in 1996. Many U.S. producers also have voiced concern that they are unable to compete with foreign producers as chemicals which control plant diseases and crop pests are eliminated in the United States, while many of the same chemicals continue to be used by developing countries. These events, coupled with more liberal import policies under NAFTA and the Uruguay Round Agreements of GATT (URA-GATT), have resulted in calls for protection by some U.S. producer groups and less support for trade policies to open U.S. markets to freer trade. Other producer groups have voiced concern that U.S. import protection may invite retaliation from trading partners in the form of foreign trade barriers against exports of U.S. agricultural products.

The vagaries of weather, imperfect market structure of input suppliers and purchasers of raw agricultural products, a fixed asset base and specialized plant and equipment, along with high capital intensity, all lead to greater price variability and inherently more risk associated with agricultural production in the United States. U.S. farmers are, for the most part, price takers, delivering their
products to a relatively small number of handlers and processors. These conditions can, and often do, result in less bargaining power for producers and lower prices for their products. U.S. farmers also face a fixed short run supply and market demand which is relatively responsive to price changes. Increases in agricultural production, therefore, more often than not result in sharp price declines and lower returns to producers. Because of greater risk and more uncertain market conditions existing in agriculture, it is believed that the methodology used by the U.S. International Trade Commission and the U.S. Department of Commerce to assess whether U.S. producers are harmed by imports sold at less than fair value, should be examined to determine if “special” provisions should be applied to analyses of agricultural products.

**Administration of U.S. Antidumping and Countervailing Duty Laws**

Unfair foreign pricing and the use of export and production subsidies distort trade and may adversely impact U.S. businesses and industries. Two government agencies have the responsibility to investigate and make determinations on petitions filed in antidumping and countervailing duty cases. The Import Administration (IA) of the International Trade Administration of the U.S. Department of Commerce (DOC) enforces U.S. laws and agreements to protect U.S. businesses from unfair competition within the United States due to unfair pricing by foreign firms and unfair subsidies to foreign firms by their governments.

The U.S. International Trade Commission (ITC), an independent quasi-judicial federal agency, has broad investigative authority. The ITC normally makes determinations whether U.S. industries are materially injured by imports that are priced at less than fair value or from subsidization, directs actions against unfair trade practices, investigates import relief for industries injured by increasing imports, and
monitors import levels and other tariff and trade issues.

In antidumping (AD) and countervailing duty (CVD) investigations involving subsidies or selling foreign goods in the United States at prices of less than fair value (dumping), the ITC works with the IA. The IA determines whether the alleged subsidies or dumping are actually occurring and at what levels. The ITC determines if the U.S. industry is materially injured due to the allegedly dumped or subsidized imports. If both investigations result in affirmative preliminary determinations, the IA issues an administrative protective order (APO) to the U.S. Customs Service to impose import duties on the foreign goods that are being illegally dumped or subsidized in the United States. The investigation then moves into the final phase.

Requirements for Findings of Dumping and Countervailable Subsidies

Legal Standards for Preliminary Determinations

For preliminary determinations in AD and CVD petitions, it is necessary for the ITC to determine, based upon available information, whether there is reasonable indication that a domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded due to allegedly subsidized or less than fair value imports. The ITC determines whether (1) there is clear evidence that there is no material injury or threat of material injury and (2) no likelihood exists that contrary evidence will arise in a final investigation.

Material injury occurs when there is “harm which is not inconsequential, immaterial, or unimportant.” In evaluating harm, the ITC must consider the volume of subject imports, the effect of these imports on the prices of domestic like products, and the impacts on producers of the domestic like product. The volume of imports or their increase must be significant. The ITC must also consider
whether the price of the imported product is significantly lower than the domestic like product and
whether or not these imports significantly depress the price or prevent an increase in the price of the
domestic like product. Relevant economic factors which may be considered when determining material
injury include:

1) “actual or potential declines in output, sales, market share, profits, productivity, return
   on investment, and utilization of capacity;

2) factors affecting domestic prices;

3) actual and potential negative effects on cash flow, inventories, employment, wages,
   growth, ability to raise capital, and investment;

4) actual and potential negative effects on the existing development and production efforts
   of the domestic industry; and

5) in antidumping investigations, the magnitude of the margin of dumping.”

Other factors may also be considered, providing flexibility to the injury determination process.

The U.S. Senate, in the Trade Agreements Act of 1979, provides for specific treatment of
agriculture when assessing material injury:

“Because of the special nature of agriculture, including the cyclical nature of much of agriculture
production, special problems exist in determining whether an agricultural industry is materially injured.
For example, in the livestock sector, certain factors relating to the state of a particular industry within
that sector may appear to indicate a favorable situation for that industry when in fact the opposite is
true. Thus gross sales and employment in the industry producing beef could be increasing at a time
when economic loss is occurring, i.e., cattle herds are being liquidated because prices make the
maintenance of the herds unprofitable.”

The ITC must first define the domestic like product and the industry. The Tariff Act of 1930 defines the relevant industry as the “producers as a whole of a domestic like product, or those producers whose collective output ... constitutes a major proportion of the total domestic production of the product.” To establish the appropriate like product, the ITC has applied the “like” or “most similar in characteristics and uses” on a case-by-case basis. Clear dividing lines among possible like products are examined. While the ITC must accept the determination of IA concerning the scope of the alleged subsidized or less than fair value products, the ITC determines what domestic product is like the imported goods the IA has identified.

**Dumping**

Dumping is the sale or likely sale of goods at less than fair value (LTFV). For dumping to occur, a foreign firm must sell a product in the United States at a price below the sales price in the country of origin (home market) or below the cost of production. The price in the home market is referred to as the product’s “normal value.” In the absence of available home market sales, the price of the product in a third country export market may be used as a proxy. If neither of these prices is available, the product’s cost of production plus profit may be used to establish the product’s normal value. The difference between the price (or cost) in the foreign country and the price in the U.S. market is called the dumping margin. Foreign products which are being sold below U.S. market prices are, therefore, not necessarily being illegally dumped in the United States. The critical test of whether a foreign product is being illegally dumped at LTFV is to establish that the good is being sold in the United States at a price below its normal value or below the cost of production. When it is determined
that dumping has occurred and that a U.S. industry has suffered injury from imports, an anti-dumping duty is imposed.

**Countervailable Subsidy**

A firm or industry is subsidized when a government provides financial assistance to stimulate the production or export of a product. Subsidies may take the form of direct cash payments, payment-in-kind of commodities, tax credits, and loans that do not reflect market interest rates or other market conditions. For a subsidy to be countervailable, it must be “specific,” i.e., the subsidy is 1) contingent upon export performance or 2) a domestic subsidy where the authority limits access to the subsidy to an enterprise or industry. The amount of subsidy received by a foreign producer is the basis for the subsidy rate by which the subsidy is offset, or countervailed, by a duty referred to as a countervailing duty.

**Methodology and Applications to Agriculture**

Methodology used to analyze AD and CVD petitions raises several issues important to agricultural industries. The following discusses appropriate uses of antidumping and countervailing duty principles in agricultural cases.

**Semi-finished Product Analysis**

In many cases involving agricultural goods, the ITC uses the “semi-finished” product analysis rather than the like product analysis. The semi-finished analysis examines:

1) whether the upstream (raw or semi-finished product) article is dedicated to the production of the downstream (finished or processed product) article, or has independent uses;
2) whether there are perceived to be separate markets for the upstream and downstream articles;

3) differences in the physical characteristics and functions of the upstream and downstream articles;

4) differences in the costs or value of the vertically differentiated articles;

5) significance and extent of the processes used to transform the upstream article into the downstream article.

This analysis is especially useful in analyzing if a product at an early stage of production is “like” a finished or further processed product. The semi-finished product analysis was used to analyze petition filed on live cattle from Canada and Mexico (USITC, 3155, February 1999).

**Domestic Like Product**

As discussed in the butter cookies in tins case, the determination of which industry in the United States is allegedly injured or threatened is extremely important (Appendix). The definition of “domestic like product” is broad: a “product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.” As a result, ITC regulations state that this determination is to be made on a case-by-case basis, but this may be a source of inconsistency in some ITC investigations.

In the case of fresh tomatoes from Mexico, for example, the ability to include green tomatoes in the domestic like product category, as opposed to only vine ripened red tomatoes, led to a larger U.S. industry being potentially at risk. Thus, the preliminary ruling in favor of the petitioners meant that if a final ruling also favored the U.S. firms, a larger industry would have been injured, therefore, any remedy
incurred by Mexico would have been larger. A suspension agreement between the parties was reached prior to a final ruling.

In the live cattle case against Mexico and Canada, it was determined that the like product was “live cattle.” It was further established that definitions for live cattle used in other cases, such as Section 201, offered only limited guidance and, therefore, could not be applied. The like product in an AD/CVD investigation must be determined based upon the evidence provided by the petitioner and subject to comment by the respondent in each case. For this particular case, the imported “live cattle” were defined as: “all live cattle except imports of dairy cattle for the production of milk for human consumption and purebred cattle imported for breeding purposes and other cattle imported for breeding purposes” (ITC 3155).

**Finding:** Flexibility is important to establish the appropriate domestic like product for analysis, excluding others not directly impacted by the subject imports. Current U.S. law provides flexibility, and therefore supports sound like product determinations by the ITC.

**Less Than Fair Value**

As discussed earlier, dumping occurs when a foreign exporter sells its product in the U.S. market at a price below the prevailing price in the home market, in other export markets, or at a price lower than the cost of production. This is referred to as selling at less than fair value (LTFV).

Short run market conditions for agricultural products often result in prices that are below the average total cost of production, especially for perishables which have a limited shelf-life. This results in economic losses for firms selling these products. However, short run losses are often preferred when
compared to exiting the market for a period of time and experiencing greater losses. Fixed costs, such as mortgage and equipment payments, must be met regardless of the operating status of the firm. If a firm can sell its product at a price which is at least as high as average variable costs (but less than average total cost), the firm can minimize losses by continuing to operate. By being able to cover all of its variable costs and at least part of its fixed costs, the firm will be better off than not producing at all. Otherwise, the firm would shut down and be required to pay all fixed costs from private finances and equity in the business.

It is important to reiterate that this is a short run phenomenon since firms cannot continue to absorb losses over the long run, but may be willing to do so in the short run. This is especially the case when the product is perishable or must be sold during a certain market window, and when product shrinkage or spoilage occur due to losses in handling and transportation.

In the absence of further evidence such as predatory pricing practices or illegal subsidization, selling below total cost of production or at prices below those in export markets may, in some cases, be inappropriate as an indicator of ‘dumping’ goods at LTFV for many raw agricultural products.

**Finding:** LTFV may be a misleading concept in some agricultural cases due to the nature of agricultural production and the risks associated with the marketing of perishable commodities. Firms may be found to be ‘dumping’ product, when in fact the firm is responding to the appropriate price signal in the market. Without clear evidence of predatory pricing, the dumping rule may be misplaced as an indicator of unwarranted activity.

**Regional Industry**
Regions, or geographic areas, may be considered in AD/CVD petitions. “In appropriate circumstances, the United States, for a particular product, may be divided into two (2) or more markets and the producers within each market may be treated as if they were a separate industry if—

(i) the producers within such a market sell all or almost all of their production of the domestic like product in that market, and

(ii) the demand in that market is not supplied, to any substantial degree, by producers of the product located elsewhere in the United States (Section 771 (4) (C) of the Tariff Act of 1930 (19 U.S.C., 1677 (4) (C). The term ‘regional industry’ means the domestic producers within a region who are treated as a separate industry.

The intended use of regional markets involves remote markets where the product has a low value to weight ratio or has high transportation costs. For many primary agricultural products, markets have developed into a set of local delivery points for producers, such as livestock auction barns and local country elevators for grain and oilseeds. Further, it is often cost prohibitive for producers to transport commodities to more distant regional markets. For many agricultural products, therefore, a strong argument can be made for analyzing regions within the United States as the appropriate market for those products.

An important related question is whether the imports predominately enter the U.S. within the boundaries of the regional industry. While Mexican stocker and feeder cattle were not found to be causing harm or the threat of harm to a U.S. industry in the live cattle AD/CVD petition (1999), the declaration and subsequent analysis of a regional industry including Texas, Colorado, New Mexico, Nebraska, and Oklahoma could have resulted in an affirmative finding against Mexico. It is important
to note that the vast majority of Mexican cattle are imported through Texas and New Mexico. Therefore, even though the Court of International Trade has cautioned against the arbitrary use of regional industry, it may more often than not be appropriate for use in cases involving agricultural products.

**Finding:** The use of a regional industry is used only sparingly in AD/CVD petitions. More use may be appropriate when analyzing agricultural products, especially those which have production concentrated in a limited region of the United States during a specified period of the year, or season.

**Cumulation**

Cumulation occurs when imports from more than one country are combined in an investigation to determine material injury or threat to a domestic like product. Though no statutory requirements exist for deciding whether to cumulate, several factors are typically considered: 1) the degree of substitutability, or fungibility, between the imports and domestic like product; 2) the presence of sales or offers to sell in the same geographic market as the domestic like product; 3) similarity of channels of distribution; and 4) whether the imports are simultaneously present in the market. Since it is not necessary for all of these factors to be present, and only a “reasonable overlap” of competition from the importers is necessary, the determination of whether to cumulate contains a significant degree of flexibility.

Caution should be used when applying the principle of cumulation to investigations involving agricultural products, especially with respect to simultaneous presence in the market. Due to different production seasons in agriculture, an investigation may determine that the domestic like product is
threatened by imports that occur during a time other than when the domestic product is marketed. For instance, if only factors 1, 2 and 3 from above may hold, and if there is not enough import competition present during the domestic like product marketing season, the only way to show injury or threat may be to cumulate imports from several countries from throughout the year. If the exporting countries feel that an unfair application of cumulation is present, they could retaliate by investigating U.S. exports to their countries. Thus, in the absence of simultaneous presence of the imported product, the use of cumulation in the case of agricultural products may be inappropriate when the domestic like product has a short marketing season, such as most perishable fresh fruits and vegetables and market livestock. However, it may be more appropriate for products which can be stored for longer periods of time, such as grains, meats and some fresh produce, such as onions.

**Finding:** The concept of cumulation appears inappropriate when analyzing the impacts of perishable imports on a domestic market. It may be more appropriately used to determine impacts on storable, nonperishable products.

**Negligible Imports**

Imports are negligible if the imports under AD investigations account for less than three percent of all such imports in the applicable 12-month period, or two or more countries cumulatively account for less than seven percent. These percentages rise to four percent and nine percent, respectively, for CVD cases. In cases where the minimum percentages do not exist, the ITC still may not treat the imports as negligible if “there is a potential” that the subject imports “will imminently account for more than” these percentages. However, these percentages may be low when applied to cases involving agricultural products due to the fact that resources limit which countries can produce products similar to
U.S. products, and transportation and perishability factors limit which countries can efficiently export those products to the U.S. market. Thus, it is not unusual for one or a very few countries to account for a significant percentage of the U.S. imports of any particular agricultural product during any selected time period.

For agricultural products, these percentages, or some other small percentages, could be applied not to U.S. imports, but to U.S. consumption or production. Further, a test for negligible imports as a percent of total imports could still be used if those percentages were increased, for example, to 15 percent for one country, 25 percent for two. This way, cases which may seem trivial because a particular country accounts for only four or five percent of total product imports can be avoided. When one country accounts for three or four percent of domestic consumption or 15 percent of imports, though, the investigation would clearly not be over minuscule amounts of imports.

**Finding:** Current ratios for negligibility are quite low for agricultural products. It may be unreasonably easy to pursue a case that imports are causing harm to an import market. More reasonable standards for agricultural products would be that one country’s imports account for 15 percent of subject imports and two countries’ imports account for 25 percent of subject imports.

**Unresolved Issues**

1. Would the international trade interests of the United States be best served, i.e. the facilitation of market opening or increased market access, if the ITC were bound by a legal standard in making material injury findings which is more consistent with the WTO? Currently, the standard requires a finding of ‘no reasonable indication of material injury.’ The WTO requires a positive determination that
there is evidence of material injury.

2. Would a more objective process of investigation result if the statutes were changed to require the ranking of causes of material injury according to the relative importance of each identifiable cause? The present statute requires only that imports are a cause of material injury, not that imports the most important, or even an important cause of material injury. Ranking causes of material injury would establish the priority of each cause. If imports were not among the top three causes of material injury, then the petition would be dismissed.

3. At some point in the near future, it may be necessary to establish a methodology to sample and quantify the effects of imports on an industry. If an industry currently consists of 1,000 firms, there is no statutory requirement for sampling to assist in the determination of material injury. Given the atomistic structure of production agriculture, couple with the increased likelihood of more AD/CVD petitions, the need to be able to sample individual sectors of the industry will take on added importance in the future.

4. A consistent methodology to determine the point at which foreign goods become U.S. products needs to be developed. In the live cattle petition against Canada and Mexico, it was unclear when Mexican stocker cattle became U.S. cattle and when Canadian feeder cattle became U.S. fed cattle. It is likely that similar problems will occur in other semi-finished product analyses involving agricultural goods. A standard to determine at which stage of production a foreign raw material or live animal becomes a U.S. product may need to be considered.

5. If foreign imports are excluded from U.S. production and consumption statistics, the resulting data will underestimate the relative importance of imported products relative to the U.S. market. The impacts of imports on U.S. prices, the market, and the relevant industry will, therefore, be
underestimated. Standardization of the method used to make these determinations would assist in alleviating confusion and inconsistency in analyses.

**U.S. Import Relief Legislation**


Filings of petitions for import protection with the U.S. International Trade Commission and the U.S. Department of Commerce have cycled since 1980, reaching peaks of 178 and 133 petitions in 1982 and 1992, respectively. Petitions declined to a low of 14 in 1996, but filings increased to 29 cases in 1997 and 54 cases in 1998. Of the total in 1998, about 20 percent, or 11 cases, were for agricultural products. The majority of cases filed (79 percent) were antidumping petitions.

From 1980-97, the ITC received 1,167 antidumping and countervailing duty petitions under Title VII of the Tariff Act of 1930. Thirty-five percent of the number of all antidumping cases filed resulted in affirmative determinations by ITC and IA, resulting in the issuance of an antidumping or countervailing duty order. Thirty-nine percent resulted in negative determinations, while 26 percent of the cases were terminated, suspended, or issued a final negative ruling (Carpenter, AD/CVD Handbook). Based on value of imports, however, 45 percent of all filings have resulted in affirmative findings, with 33 percent negative and 22 percent terminations.

Between 1980 and 1985, less than one-third of the antidumping and countervailing duty cases resulted in affirmative findings, compared to almost two-thirds affirmative findings from1986-97. Of the
23 antidumping petitions filed in 1997, 14 resulted in affirmative findings, seven were negative, and two were terminated. This upswing in case filings since 1996 suggests increasing concern that imports are causing harm to domestic industries due to lower prices and declining returns.

Japan, China, Germany, Korea, Taiwan, Brazil, Italy, Canada, France, and the United Kingdom were the major countries against which antidumping cases were filed from 1980-97. These ten countries accounted for 66 percent of all antidumping petitions during this period.

The Uruguay Round Agreements Act 1995

Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) provides provisions for antidumping determinations of member countries. These provisions were implemented into the Uruguay Round Agreements Act 1995 (URAA) and are generally consistent with current U.S. trade law. WTO AD/CVD provisions now apply to all members, not only those who choose to abide by them as was the case under GATT. Consequently, the transparency and due process to ensure that AD/CVD orders do not become nontariff trade barriers are important.

When price comparisons are made between countries under the URAA, allowances are made for conditions and terms of sale, taxation levels, physical product characteristics, levels of trade, and any other differences which affect price comparisons. Differences in import taxes and profits are also considered. Allowances are made for the conversion of prices into a common currency for purposes of comparison.

Import injury determinations shall be made on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the impacts of these imports on domestic
producers. Imports shall be investigated to determine whether there has been a significant increase in imports, either in absolute terms or relative to production or consumption of the product. Authorities shall investigate price undercutting by making a price comparison between the price of the product of the importing member and the price of the dumped imports. Import price effects on the extent to which domestic prices have been depressed or price increases have been prevented shall be investigated. No one or several of these factors can provide decisive guidance.

It must be demonstrated that the dumped imports are causing injury and that there is a causal relationship between the dumped imports and the injury to the domestic industry. Any known factors other than dumped imports which are injuring the industry shall be examined. These factors may include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in patterns of consumption, restrictive trade practices, developments in technology, and productivity and export performance of the domestic industry. Injuries caused by these other factors must not be attributed to the dumped imports. In cases where injury is threatened by dumped imports, the application of antidumping measures shall be considered and decided with special care (Article VI 1994).

**U.S. Phases of Investigation and Petitions**

Under U.S. law, antidumping or countervailing duty petitions may be filed by any domestic interested party, including a producer, manufacturer, or a union within the domestic industry which produces the product that competes with the imported goods to be investigated. The law requires that the petitioners represent at least 25 percent of domestic production. The petition must also contain information about the conditions of the U.S. market and evidence of dumping or unfair subsidization
The investigation process for antidumping and countervailing duty cases is divided into five phases, with each phase resulting in a determination by either the ITC or IA. Petitions may be filed by any domestic interested party with the ITC and IA or an investigation may be initiated by the IA. The petition may allege both sales at LTFV and a subsidy for the same product.

The five phases of investigation for antidumping and countervailing duty cases include: 1) initiation of the investigation by the IA, 2) the preliminary phase of the investigation by the ITC, 3) the preliminary phase of the investigation by the IA, 4) the final phase of the IA investigation, and 5) the final phase of the ITC investigation. With the exception of phase 3, a negative determination by either the IA or the ITC results in the termination of the investigation by both agencies. There is also some overlap in the phases of the investigation.

The statutory time frames related to antidumping and countervailing duty petitions are outlined below:

- Initiation of investigation: 20 days after filing petition;
- Preliminary determination by the ITC: 45 days after filing petition;
- Preliminary determination by the IA: 115 days after ITC preliminary determination in AD cases or 40 days in CVD cases; (extraordinary circumstances or request by petitioner can result in the IA postponing preliminary determinations in AD cases by up to 50 days and by up to 65 days in CVD cases);
- Final determination by IA: 75 days after IA preliminary determination;
- Final determination by the ITC: 120 days after IA preliminary determination or
When an AD investigation runs through the final determination phase, it may last from 280 to 420 days if the case is complicated and additional time is required for its completion. A CVD case may last from 205-300 days if it runs through the final determination phase.

Within 20 days after the filing of a petition with the IA and the ITC, the IA determines whether the petition alleges the necessary components for the imposition of a duty and contains information reasonably available to the petitioner. If the IA determination is affirmative, an investigation is initiated to determine whether dumping or subsidies exist. If the finding is negative, the petition is dismissed and the investigation is terminated.

Within 45 days after the petition is filed, the ITC must make a determination whether there is reasonable indication the a U.S. industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded by imports which are the subject of the investigation. If the determination is affirmative, a notice of the beginning of the final phase of the investigation is published within the Federal Register and a publication containing the determination is disseminated to the public. If the determination is negative or if the ITC finds that imports are negligible, the investigation is terminated.

If the ITC makes an affirmative preliminary determination, then within 160 for AD cases and 85 days for CVD cases, the IA must make a determination whether the imports are being sold or likely to be sold at LTFV, or whether a countervailable subsidy is being used. If the IA preliminary determination is affirmative, a suspension of liquidation of all imports issued. Importers must then post a
cash deposit or bond for each entry of subject goods. If the determination is negative, the IA completes its investigation, but there is no required deposit or bond. The final determination must be made within 235 days after the AD petition is filed or 160 days in CVD cases. The IA ruling states whether imports are being sold or likely to be sold at LTFV or whether a countervailable subsidy exists.

The ITC must make a final determination within 280 days after an AD case is filed or 205 days for CVD cases. The ITC determination is whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by imports.

The ITC holds a public hearing and vote approximately six business days before the statutory deadline to complete the final phase of the investigation. The final determination of the ITC is transmitted to the Secretary of Commerce within 120 days after notification of IA’s preliminary determination or 45 days after notification of its final determination, whichever is later. The determination is published in the Federal Register and a publication is disseminated to the public.

If both the IA and the ITC make affirmative findings of dumping and material injury from imports, the U.S. Department of Commerce instructs the U.S. Customs Service to assess duties on the imported products. These duties are assessed as a percent of the value of the imports and are equal to the dumping and subsidy margins. For example, if a dumping margin of 25 percent if found, the Customs Service will collect a 25 percent duty on the imported product in order to offset the amount by which the product is dumped into the U.S. market.

The U.S. Department of Commerce is required by law to publish in the Federal Register an antidumping or countervailing duty order within seven days after being notified by the ITC of an
affirmative final determination of material injury or threat of material injury. Importers must then post a cash deposit or bond equal to the amount of the estimated antidumping or countervailing duties.

If both the IA and the ITC make affirmative preliminary determinations (within 190 days of initiation in an AD case or 130 days in a CVD case), importers are required to post a bond or cash deposit to cover the estimated amount of any duties which would be collected if an AD or CVD order is issued upon completion of the case. Under normal circumstance, the final phases of investigations are completed within 12 to 18 months of initiation.

**Conclusions**

Greater protectionism in the United States has been manifested by the failure of congress to grant fast track authority to the president on two separate occasions and the filing on numerous anti-dumping, countervailing duty, and import injury petitions. While trade has provided additional market opportunities for some U.S. products, it has also been a major source of market instability and import competition for other producers, resulting in lower prices, declining returns, and growing protectionist sentiment among some U.S. producer interests. Dramatic swings in U.S. exports and farm prices have occurred in less than three years and emphasize the higher degree of risk faced by many U.S. producers. Some of this additional risk emanates from the international market and, therefore, leads to calls for protection from foreign competition and unfair trade practices.

U.S. antidumping and countervailing duty legislation is designed to mitigate the effects of unfair foreign pricing and trade distorting subsidies. There are special provisions related to regions, agriculture, and the semi-finished products analysis which have been applied to recent agricultural cases. There does appear to be, however, a reluctance to use these provisions on a widespread basis.
This most likely emanates from legislative guidance passed subsequent to the Tariff Act of 1930. It might prove useful to review these statues in order to consider regulations which would allow more general application. Many, if not all, of these recent laws were enacted during periods of time when international markets were less open to competition and the role of governments was more pervasive.

Caution should be exercised in the pursuit of legislation to restrict markets, especially for long periods. As has been observed in the last several years, when the United States moves to restrict imports, other countries retaliate with similar actions. Mexico implemented antidumping duties on U.S. high fructose corn syrup in response to U.S. duties on Mexican broomcorn. The petition to investigate Mexican cattle exports to the United States in 1998 resulted in the initiation of Mexican dumping investigations against U.S. beef and hogs. The Canadian government has requested consultations in the WTO claiming that the U.S. AD/CVD process does not comply with international obligations. It is therefore likely that any U.S. legislation which results in more restrictive markets will face at least cursory retaliation, if not challenge in the WTO.

U.S. agriculture stands to gain from expanded trade, but the complexity of trade issues, along with rising protectionism in the United States, has slowed U.S. efforts to pursue new trade arrangements with other countries. Ironically, U.S. reticence is occurring when many trading partners are pursuing bilateral and multilateral agreements, without the participation of the United States. New market opening trade agreements could also stimulate increases in farm incomes.

Trade policy changes, differing rates of economic growth between countries, exchange rate fluctuations, and the emergence of new competition all influence trade to make the international market more risky for U.S. producers. Concurrently, the likelihood of increasing protection by other countries
should be considered, especially given the present backdrop of sagging economic growth in Asia, growing unemployment in the European Union, and the prospects for additional currency devaluations in Latin America. With declining government support to U.S. agriculture, however, greater access to international markets will be an important force influencing the future growth and prosperity of agriculture in the United States.
References


United States Department of Commerce, International Trade Administration, “An Introduction to U.S. Trade Remedies.”


General Agreement on Tariffs and Trade, Article VI, 1994.
Appendix
Live Cattle from Canada and Mexico

On November 12, 1998, the Ranchers-Cattlemen Action Legal Foundation (R-CALF), Columbus, Montana, filed a petition with the ITC and IA alleging that the U.S. cattle industry was materially injured due to subsidized imports of live cattle from Canada and live cattle imports from Canada and Mexico that were alleged to be sold at less than fair value (ITC Investigations Nos. 701-TA-386 and 731-TA812-813). The ITC initiated countervailing and antidumping investigations.

Determinations

The ITC determined under provisions of the Tariff Act of 1930 that there was a reasonable indication that an industry in the United States was materially injured by reason of imports of live cattle that are alleged subsidized by the Government of Canada and by imports of live cattle from Canada that are alleged to be sold in the United States at less than fair value. The ITC also determined that there was no reasonable indication that an industry in the United States was materially injured, threatened with injury, or that the establishment of an industry was materially retarded by reason of live cattle from Mexico that were alleged to be sold at less than fair value in the United States. The ITC voted 4-2 in favor of the petitioner in the case of Canada and 5-1 in favor of the respondent in the Mexican case. The final stage of investigation on Canada has begun.

Live cattle from Canada were found to be materially injuring the U.S. market under the Tariff Act of 1930 which provides that the “Commission (ITC) shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute or relative to production or consumption in the United States, is significant.” The quantity of live cattle imports from Canada increased from 1.454 billion pounds (live weight) to 1.834 billion pounds in 1996 and 1.659 billion
pounds in 1997. This represents an increase of 14.1 percent. By number of head, the increase was from 1.1 million in 1995, 1.476 million in 1996, and 1.352 million in 1997. This was an increase of 22.9 percent from 1995-97. U.S. market share of live cattle held by imports from Canada increased from 3.4 percent in 1995 to 3.8 percent in 1997, but held steady at 4.0 percent for the interim period (Jan.-Oct.), 1997 and 1998. Due to the price-sensitivity of live cattle and the position of the U.S. cattle cycle, it was believed that small import volumes had a significant price depressing effect. It was determined that volumes of imports and market share of the subject imports were significant, despite relatively low levels.

U.S. imports of live cattle from Mexico by weight were 709.3 million pounds in 1995, 196.8 million pounds in 1996, and 297.2 million pounds in 1997. Corresponding market shares declined from 1.7 percent to .7 percent. Because imports were at historically low levels, while imports volumes and market shares were small, it was determined that the insignificant volumes did not adversely affect domestic prices to a significant degree. It was concluded that the domestic industry was not materially injured by reason of imports from Mexico.

It is important to point out, however, that had a ‘regional’ analysis been employed, opposite findings may have resulted in the Mexican case. It is likely that at least a significant number of the 1.65 million head of live cattle imported from Mexico in 1995 were sold at auction markets in of southern Texas and New Mexico and most likely had a price depressing effect in the local areas, but no significant impacts nationally. It has been estimated that about 77,000 head out to the total imports were culled cows and bulls for immediate slaughter.
Tomato Petitions

During 1995 and 1996, three separate petitions were filed with the International Trade Commission (ITC) alleging injury to the domestic tomato industry as a result of imports. These cases will be discussed to highlight the differences in procedures, methodology and outcome between Section 201 investigations and those filed under Title 733 of the Tariff Act of 1930.

The first petition, filed March 29, 1995, on behalf of the Florida Tomato Exchange (ITC Investigation No. TA-201-64), asked the ITC to determine whether imports of fresh winter tomatoes, mostly from Mexico, were causing injury or threat of injury to the domestic industry. The investigation resulted in a negative determination for the petitioners because it was found that there was no winter tomato industry in the U.S. The Florida industry did not meet the three requirements of a geographical industry. Most Florida tomato production does not occur in the winter months, Florida production serves not just Florida but the entire East Coast, and imports during the winter come in to the U.S. predominately through Arizona and California. Further, there was not enough financial data and other evidence available to convince the ITC that serious injury was done; only 36 producer surveys out of 850 distributed responded with usable data. Threat of injury was also not found as there was no evidence that imports of tomatoes from Mexico would increase relative to prior years.

On March 11, 1996, Florida tomato growers and Florida bell pepper growers filed a petition which asked the ITC to determine if those products were being imported in such quantities as to cause serious injury or a threat of serious injury to a domestic like market (ITC Investigation No. TA-201-66). This investigation also yielded a negative finding for the petitioners. While the commission did find that imports of tomatoes had increased after reviewing 1991 to 1995 data, from 795 million pounds to
1.4 billion pounds, they found no serious injury or threat upon reviewing data contained in 163 grower survey responses (666 sent) and 33 packer survey responses (94 sent) and information from other sources such as the Florida Department of Labor. No significant idling of production facilities or decrease in industry employment was found to exist, and financial data were inconclusive. For instance, growers reported losses in both good years and bad years while packers typically operated at a profit, and, as in the previous tomato case, prices fluctuated widely. However, planted and harvested acreage remained steady with production steady or rising and employment actually increased during the period. As a result, “no discernable trend” was shown to conclude that U.S. growers and packers of tomatoes were seriously injured.

Only three weeks after the combined tomato and bell pepper petition, on April 1, 1996, Florida tomato growers, along with growers from California, Georgia, Pennsylvania, South Carolina, Tennessee and Virginia, filed a petition for an investigation to determine whether there was a reasonable indication that fresh tomatoes from Mexico were causing material injury to the U.S. industry as a result of prices which were less than fair value (LTFV) (ITC Investigation No. 731-TA-747). Instead of having to prove increased imports substantially caused serious injury or threat of injury to the U.S. industry as in the two previous Section 201 cases, the evidence is reviewed by the ITC and determines whether “(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood that contrary evidence will arise in a final investigation.” These rules attempt to have the evidence prove a negative and shift the burden of proof to the respondent.

The product classification of the effected domestic industry in this case was all fresh market tomatoes not to be used in further processing. The Mexican respondents disputed this classification
because they felt vine-ripened red tomatoes were different than green tomatoes, which turned red after being treated with ethylene gas, because the former are predominant in grocery stores while the latter dominate the institutional trade. In review of the domestic industry, the ITC considered differences in production times among regions of the U.S. and Mexico, the effect of the growing cycle and weather on tomato supply, the volatility of fresh tomato prices, and inconclusive evidence that consumers prefer vine ripened tomatoes. In addition, it was observed that while apparent U.S. tomato consumption rose by 5.5 percent from 1993 to 1995, the value of this apparent consumption fell be 8.7 percent, planted acreage decreased by 1.8 percent, and harvested acreage decreased by 2.2 percent. (Note: these were considered “steady” in the previous case.) Declining incomes for growers were a note of concern even though income fluctuated for packers. When this information was combined with sharp increases in the quantity of imports from Mexico in 1995, 57.7 percent over 1994, and value of those imports, 32.2 percent over 1994, and a market share of 30 percent by volume in 1995 and 35.6 percent by value, a reasonable indication that the domestic industry was materially injured was determined by reason of allegedly LTFV imports from Mexico. The determination was made even though there was a lack of definitive price trend data. There was adequate evidence that imported Mexican tomatoes had caused a significant reduction or suppression of prices for the domestic like product.
Butter Cookies from Denmark

In the case of butter cookies in tins from Denmark, the ITC investigated whether butter cookie producers in Denmark were subsidized and sold their product packed in tins at LTFV (ITC Investigation Nos. 701-TA-374 and 731-TA-780). The investigation resulted in a negative finding for the petitioner, one of two domestic sellers of butter cookies in tins. Aside from the fact that both domestic producers entered a market long dominated by the Danish only as recently as 1994, the case hinged on the determination of “domestic like product”. Those commissioners which ruled in favor of the Danes said that the “domestic like product” was either “all cookies in tins” or “all cookies”, of which butter cookies in tins were only a small portion. Commissioners which preferred the “all cookies in tins” determination considered that cookies in tins are sold predominately during the winter holiday season, and that tins continue to be used for other purposes after the cookies are consumed. A dissenting opinion by one commissioner stated that the proper domestic like product should have been butter cookies in tins, a more narrow definition. The commissioner did not determine material injury, but a threat of injury since increased imports of butter cookies in tins from Denmark were likely and would inhibit the development of the fledgling U.S. butter cookies in tin industry.
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