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Trade Remedy Laws & Agriculture

During the past century, governments of industrialized nations have devised three basic trade remedies—countervailing duties, antidumping provisions, and safeguards—as defense measures against imports causing injury to domestic industry. The Uruguay Round of international trade negotiations, which established the World Trade Organization (WTO) in 1994, attempted to discipline inappropriate use of these trade remedies by establishing criteria or standards for their application.

Building on existing standards in some developed countries, the Uruguay Round established procedural and evidentiary requirements that all WTO members must meet before invoking trade remedies. While used mainly by developed countries, trade remedy use since the Uruguay Round Agreement (URA) of 1994 has expanded rapidly among developing countries. This may indicate a more transparent system, with WTO members adhering to trade regulations and notifying the WTO of any regulatory changes. On the other hand, it may indicate that some members are resorting to trade remedy measures to block imports in place of other trade barriers removed through trade liberalization.

Trade remedies are being increasingly employed by developing countries against agricultural products, particularly value-added agricultural products. As a major exporter of high-value products, U.S. agriculture faces mounting use of trade remedies by importing countries and has a substantial interest in the outcome of WTO negotiations on these measures.

The Emergence of Trade Remedies

Countervailing duties (CVDs) and antidumping remedies originated in the late 19th and early 20th centuries, about the same time as antitrust laws and for similar reasons. High tariffs on imports supported domestic cartels and aggressive export policies. Several European governments, for example, supported their sugar-beet producers and refiners through subsidies or bounties on refined sugar exports. To combat this practice, the U.S., in the McKinley Tariff of 1890, created the first formal CVD measure as “a duty on bounties, not on sugar.” CVDs are aimed at neutralizing the export subsidies of foreign governments, rather than becoming new trade restrictions.

While CVDs are aimed at offsetting foreign government subsidies on exports, antidumping measures are directed at offsetting “unfair” actions of foreign (private) firms. Dumping refers to all export sales below “normal value,” defined as the comparable domestic price (in the exporting country) of the product. Antidumping laws, therefore, discipline export price discrimination by foreign firms, even though domestic firms engaging in identical conduct in the home market would not be similarly disciplined.

In 1904, Canada created the first formal antidumping measure in response to steel exports from the U.S., which Canada claimed were priced below the domestic U.S. price. Canada imposed a duty to offset the difference between the U.S. export price and normal value. The U.S. adopted an antidumping law in 1916, followed in the 1920s by most English-speaking countries, and in the Depression years of the 1930s by other industrialized countries.

International Discipline Of Trade Remedies

The 1947 General Agreement on Tariffs and Trade (GATT) attempted to reverse the economic nationalism and protectionism of the interwar years. Article VI of the GATT addressed antidumping and CVDs, but the text was so general that it provided no effective discipline. The 1979 Tokyo Round of trade negotiations produced “codes” on antidumping and subsidies. While more specific than earlier agreements, these codes still left considerable discretion to the few GATT members that agreed to abide by them.

The 1994 URA marked a major change, resolving many of the ambiguities in earlier agreements with more specific agreements on subsidies, CVDs, safeguards, and antidumping. The terms of these agreements are binding on all WTO members, not just those that chose to abide by the 1979 codes. The URA also improved on the existing dispute resolution process. A binding timeline prevents disputes from continuing indefinitely, and several antidumping complaints already have been resolved.

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Trade Remedies Available Under the Uruguay Round Agreement

Remedy	Target of remedy	Criteria for remedy implementation	Use by WTO members	Duration
Countervailing duties (CVDs)	Foreign government subsidies for manufacture, production, or export	Evidence of foreign government subsidy on exported products	Initially used mainly by developed countries, but developing country use is growing and accounts for over one-third of all CVD actions.	5 years, extended upon review
		Proof that subsidized exports cause or threaten to cause injury to importing country's domestic industry	Member actions on agriculture account for about a third of CVD actions, all on high-value and processed food products.	
Antidumping duties	Exports below "normal value"	Evidence of imports being sold below "normal value"	Initially used mainly by developed countries, but developing country use is growing and accounts for about half of all antidumping actions.	5 years, extended upon review
		Proof that "dumped" imports cause or threaten to cause injury to importing country's domestic industry	Agriculture accounts for about 5 percent of antidumping actions, all on high-value and processed food products.	
Safeguards	Surge of imports	Proof that surge of imports causes or threatens to cause "serious" injury to domestic industry	Due to lack of domestic legislation, safeguard action has been limited to 17 countries. Agriculture has accounted for about half of total safeguard actions, all on high-value and processed products.	4 years, extended upon review
Special safeguards (SSGs)	Agricultural imports exceeding set volume and value trigger levels	No criteria required beyond breaching set trigger levels	Of 38 countries that reserved the right to use SSGs, to date only 8 have employed this right.	1 year, extended if trigger is exceeded
		Only commodities notified with an SSG in WTO Country Schedules are eligible	Of 333 SSGs used to date, over half are on meat products, 15 percent are on fresh produce, and 14 percent are on dairy products.	

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WTO membership obliges member countries to play by WTO rules. Member governments voluntarily surrender some discretion over actions that can adversely affect other members, and in return gain the benefit that other members must also refrain from such actions. The U.S. is the world's leading importer, and its trade remedies are often challenged. But as the world's leading exporter, the U.S. also stands to benefit if its trading partners abide by trade remedy disciplines.

Countervailing duties (CVDs). Article VI of GATT allows the use of CVDs to offset public subsidies for the manufacture, production, or export of any merchandise. When a WTO member suspects that subsidized imports are causing or threatening to cause material injury to a domestic industry, it initiates an investigation to gather evidence. Although CVDs can be levied only after proving the injury or threat of injury, the trade impacts may be immediate upon initiation of the investigation. The URA establishes disciplines for calculating subsidies, and requires that

CVDs terminate after 5 years—the sunset provision. Article VI allows the duty to be extended beyond the 5-year sunset if a public review determines that the foreign subsidy still exists and that injury to a domestic industry is still likely.

The URA also defines what constitutes a subsidy, whether the subsidy is general or specific to a commodity, and whether it is prohibited, actionable, or non-actionable. A *subsidy* is defined as a financial contribution to a private firm by a government or any public body within the territory of

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the member country. It can involve direct transfer of funds, government revenues forgone or uncollected, goods or services provided other than general infrastructure, payments made to a funding mechanism, or any form of income or price support.

Prohibited subsidies include all export subsidies and other subsidies contingent on the use of domestic products over imported products, with the exception of agricultural commodities as specified by Article 13 of the Uruguay Round Agreement on Agriculture (which is part of the URA). **Actionable subsidies** are those against which trading partners can initiate investigations to implement trade remedy measures, and include any non-prohibited subsidies adversely affecting the interests of other WTO members. **Non-actionable subsidies** are general subsidies allocated for research, assistance to disadvantaged regions, assistance to promote adaptation to new environmental regulations, and other non-specific payments.

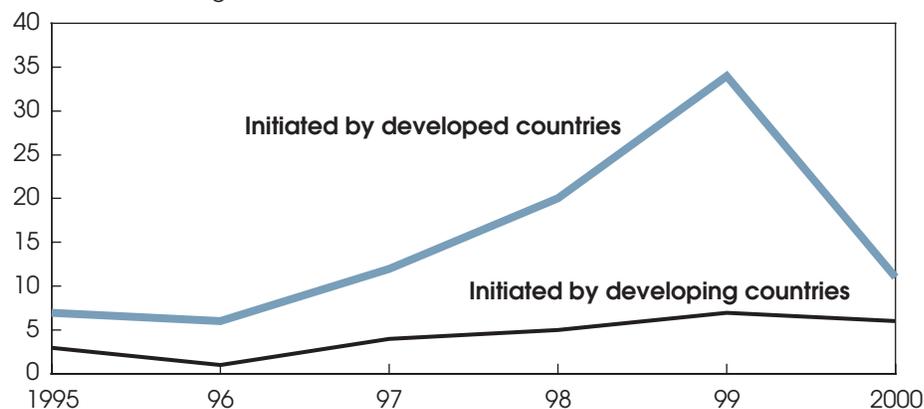
Although previously used mainly by developed countries, CVDs are increasingly used by developing countries, accounting for over one-third of all investigations initiated by WTO members in 2000. While CVDs were mainly used in nonagricultural sectors by the U.S. and the European Union (EU), CVD use by developing countries is primarily for agricultural products. For example, during the first 6 months of 1999, less than 1 percent of CVDs initiated and enforced by the EU and the U.S. were on agricultural products, but all CVDs initiated and about 75 percent of CVDs enforced by developing countries were on agricultural products.

High-value food products appear to be the most vulnerable. All 34 CVD investigations carried out on agricultural products by WTO members between 1995 and 2000 were directed at high-value products such as meat and other animal products, vegetables, fats and oils, and processed food products.

Antidumping provisions. Article VI of GATT defines *dumping* as the introduction of a product from one country into the commerce of another at less than its "normal value." The URA defines normal value as the comparable price for the product, in the ordinary course of trade,

In Recent Years, Developing Countries Have Increasingly Sought to Impose Countervailing Duties. . .

Number of investigations



Developing countries include transition economies, such as countries of the former Soviet Union and Eastern Europe. Countervailing duties offset public subsidies of exports. Investigations determine whether the duties are warranted.

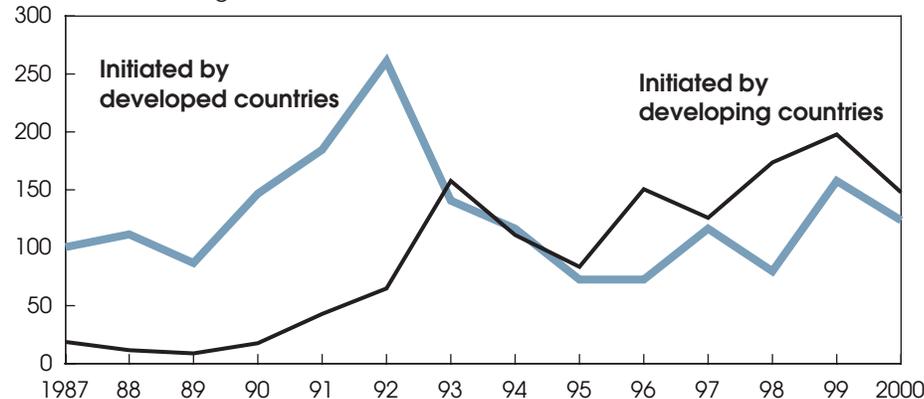
Includes all products, not just agricultural.

Source: World Trade Organization Secretariat, January 2002.

www.wto.org/english/tratop_e/scm_e/scm_e.htm#annualreports

. . . and Have Surpassed Developed Countries in Initiating Antidumping Measures

Number of investigations



Developing countries include transition economies, such as countries of the former Soviet Union and Eastern Europe. The GATT defines dumping as the introduction of a product from one country into the commerce of another country at less than "normal value." Investigations determine whether antidumping duties or other restrictions are warranted.

Includes all products, not just agricultural.

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

www.wto.org/english/tratop_e/adp_e/adp_e.htm#annualreports

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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, the normal value for the product is "constructed" by

taking into account production costs, selling expenses, and profit.

An antidumping investigation also involves a two-part test. A WTO member must first find evidence that dumping exists. Second, a member must find that dumping causes or threatens to cause

material injury to an established domestic industry or retards establishment of a domestic industry. If both requirements are satisfied, the injured country can impose an antidumping duty that cannot exceed the *margin of dumping*—the difference between export price and normal value.

The antidumping agreement established a *de minimis* threshold. Duties can be imposed only 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 subjected to an antidumping investigation, their imports can be aggregated or “cumulated.” The cumulated *de minimis* volume share is 7 percent. Finally, antidumping actions are subject to a 5-year sunset provision similar to that for the CVD which requires that reviews be conducted to ascertain whether dumped imports still cause or threaten to cause injury to domestic industry.

Once imposed only by a few industrialized countries, antidumping measures have been increasingly adopted by developing countries. Between 1995 and 2000, developing countries accounted for over half of all antidumping investigations. The number of countries using antidumping measures increased more than five-fold between 1987 and 2000, from 7 to 37, with nontraditional users such as Argentina, India, and South Africa increasing their use significantly. Antidumping use by traditional (industrialized) users, on the other hand, has slowed in recent years compared with the early 1990s.

Antidumping investigations for agricultural products often find dumping and injury due to frequent price variations, especially among perishable products. Agriculture also remains very vulnerable to antidumping investigations given the current rule that bases the normal value of a product on estimates of total production costs, both fixed and variable, adjusted for marketing, handling, and imputed profit. In contrast, agricultural firms with perishable products make short-term business decisions based on meeting seasonal (variable) expenses. Given the length of time required to produce agricultural products, supply cannot be adjusted to price varia-

GATT & WTO: Distinguishing the Two

At the end of World War II, several international organizations were established to reverse the economic nationalism and protectionism of the interwar years and to enhance global security. The United Nations, the World Bank, and the International Monetary Fund were founded in 1944-45. An International Trade Organization (ITO) was also planned as part of the postwar order, but key countries objected to parts of the ITO charter and the organization was never established. Twenty-three countries, however, did agree to sign the *General Agreement on Tariffs and Trade (GATT)* in 1947.

Technically the GATT is an agreement and not an organization: it has signatories rather than members. The assumption was that someday an ITO would be established as a permanent organization. In the interim, GATT signatories met periodically to negotiate changes in tariffs and trade policies; these meetings were called “rounds” of negotiations. More countries became signatories, and a GATT Secretariat was established to provide administrative support.

In 1994, the Uruguay Round of the GATT (1986-94) established the *World Trade Organization (WTO)*. The GATT Secretariat then became the WTO Secretariat, and GATT signatories became WTO members. The new organization did not supercede the GATT, which still exists.

The GATT is similar to a constitution, where the original text has been and can be amended by its signatories. In contrast, the WTO is like a government that interprets and administers the laws contained in the constitution. Most of the articles of the original 1947 GATT text remain in effect. A few articles have been changed, and some new articles have been added. For example, the Uruguay Round expanded the scope of the GATT to include formal agreements on agricultural and textile trade, and rules governing subsidies and dumping.

In addition to GATT, the WTO also administers other multilateral agreements concluded during or since the Uruguay Round. These include the General Agreement on Trade in Services—covering banking, finance, insurance, telecommunication, tourism, and transportation (see article, this issue); the Agreement on Trade-Related Aspects of Intellectual Property Rights—covering patents and trademarks; and the Dispute Settlement Understanding, which established a WTO judicial body to resolve disputes among members.

tions in the short run. Selling below the already-incurred cost of production, especially for perishable products, is the rational loss-minimizing option for producers.

Agricultural exports are increasingly vulnerable to protective actions, given the increased use of antidumping measures by developing countries. Many developing countries restrict food and agricultural imports through high tariffs, licensing requirements, and parastatal import controls. As these countries implement their WTO obligations and liberalize agricultural trade, antidumping actions become an increasingly attractive substitute for traditional means of protection. While agriculture accounted for about 6 percent of the total number of antidumping inves-

tigations launched between 1987 and 1997, it accounted for over 10 percent of total investigations among newly established developing country users such as Brazil and Colombia, and 96 percent of Poland’s total. Like CVDs, the use of antidumping measures in agriculture is limited primarily to high-value products such as fresh produce, meat, and processed food products.

General safeguards. Article XIX of GATT allows members to impose “safeguards” or temporary import control measures (tariffs and quantity restrictions) if a surge of imports causes or threatens to cause serious injury to a domestic industry. The subsequent Uruguay Round Agreement on Safeguards (URAS) established several rules. A necessary condition

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is a finding of “serious injury” (or threat thereof) which, while vague, is a higher standard than the “material injury” standard in antidumping and CVD actions.

The URAS grants a 3-year retaliation-free period to WTO members who impose a safeguard. After 3 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 4 years, but if the sunset review reveals serious injury to the country imposing the safeguard, it can be reimposed for an additional 4 years. While CVD and antidumping 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, or a group of countries with a cumulative share of less than 9 percent.

Between 1995 and October 2001, only 46 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, but as legislation develops, it is likely that the number of countries invoking safeguards will increase. This is evident by the fact that while only 50 investigations were notified to the WTO between January 1, 1995 and November 9, 2000, the WTO received 30 investigation notifications during the 11-month period between November 10, 2000 and October 29, 2001. About half of all safeguard investigations notified to the WTO since 1995 have covered agricultural products, primarily high-value products such as meat, milk powder, edible oils, peaches, and tomatoes.

Special safeguards. Besides general safeguards, the Uruguay Round Agreement on

Agriculture allows members to create special safeguards (SSGs) in the form of additional duties for agricultural commodities subject to tariffication—those products subject to quotas and bans prior to the Uruguay Round. Although this provision is not labeled as a trade remedy measure, it allows WTO members to implement additional duties for products identified in member-country schedules, when trigger levels for volume and value 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 if the price of the imported product is below a set trigger level. The Agreement on Agriculture provides general guidelines for setting trigger levels and for calculating additional duties when an SSG action is to be taken.

As of 1999, 38 members had designated SSGs in their country schedules, and eight had actually employed them. The U.S. and the EU have accounted for most of the SSG cases—mostly for sugar, dairy, and animal and horticultural products—but there is growing use by other countries, notably Poland. Developing countries, however, have complained about the SSG provision. Many had not identified commodities eligible for SSGs by the conclusion of the Uruguay Round, preventing them from using the provision.

Unlike other remedies, SSGs are immediate; they require no quasi-judicial process to determine whether action is merited. If the import volume or value limit set by the importing country is breached, it may immediately impose an SSG; no injury determination is required. SSGs remain in effect for the remainder of the calendar year after implementation, but may be reimposed if volume or value continue to exceed trigger levels. Furthermore, SSGs

are exempt from trade remedy actions by adversely affected exporters.

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

What’s Ahead for Trade Remedies?

In light of concerns that WTO members may have too much discretion in implementing trade remedy measures, the November 2001 Doha ministerial declaration states that the new round of WTO negotiations will aim at clarifying and improving GATT disciplines on subsidies and countervailing measures. In the initial phase of the negotiations, participants may indicate the provisions for which they seek clarification and improvement. Requests for attention submitted so far include the methods for calculating “normal value” and for cumulating imports in antidumping investigations. Additionally there is a need to consider better harmonization of trade remedy laws across WTO members. While implementing a measure in some countries requires approval by panels of experts, in other countries single individuals may possess the same authority.

A special concern for agricultural trade is the expiration of Article 13 of the Agreement on Agriculture at the end of 2003. Unless a new agreement makes similar provisions, all agricultural subsidies will become open to CVD challenges. **AO**

Anita Regmi (202) 694-5161
aregmi@ers.usda.gov

David Skully (202) 694-5236
dskully@ers.usda.gov



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