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Trade Litigation in Agriculture: Limiting the Abuse of Trade Remedies

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The World Trade Organization (WTO) is based on the rule of law but is anchored in the political economy of the member states. The multilateral trade rules are backed up by a system of litigation, through dispute settlement panels, that complements (rather than supercedes) rules found in national laws and in bilateral and regional trade agreements. Trade litigation at the WTO serves two essential functions: to clarify and interpret the agreements that have been negotiated in the WTO; and to prevent abuses that would diminish the benefits that countries derive from WTO membership and disturb the balance of benefits and obligations negotiated by the political process.

This paper focuses on two aspects of trade litigation of particular interest to agriculture: the use of trade remedies by importing countries concerned about injury to domestic farm sectors, and the complaints by exporters about the subsidies used by importers and competing exporters that harm their own overseas markets.[1]

Many countries have domestic legislation for trade remedies – anti-dumping and countervailing duty provisions and safeguards against import surges. Regulating such trade remedies in the WTO is an essential part of the process that prevents abuse and maintains the political balance struck in trade negotiations. However, trade remedy litigation can also be pursued in ways that do not necessarily serve the multilateral trade system. In the course of interpreting agreed rules, the dispute settlement system can appear to extend the boundaries of political agreement. Litigation then begins to take the place of negotiation. Subsidy, dumping and safeguard countermeasures can occasionally become instruments of protection, either of import sectors through aggressive use of trade remedies, or of export sectors, through the extension of commercial competition into the legal arena.

[1] Other areas of WTO trade litigation deal with issues such as discrimination among suppliers, discriminatory treatment of imported goods once they have entered the domestic market, and the allocation of quotas. These issues often involve agricultural products but, are not discussed in this paper.

**Note:* *This paper was revised with the input of the membership of the IPC at Plenary Meetings in November 2003 and May 2004. However, the views are those of the authors' and should not be attributed to any other individual IPC member.*

Agriculture has its own set of trade rules on safeguards and subsidies, specified in the Uruguay Round Agreement on Agriculture (URAA), but is also subject to most of the other WTO rules.[2] In the past, agricultural conflicts relating to abuse of trade rules were frequently litigated in the GATT, but until recently the agricultural rules in the URAA have been subject to only limited interpretation in the more structured legal processes of the WTO.[3] However, with some prominent cases before panels, this is about to change.

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Negotiated concessions on agriculture are an integral part of the balance of interests and advantages inherent in the WTO, and abuse of the rules (inadvertent or deliberate) can change that balance. But, judicial interpretations can also disturb the perceived balance of advantages that countries derive from the WTO. Can trade litigation be confined to the constructive interpretation of the WTO agreements, to prevent abuse and to support the basic aims of the WTO? Or, is trade litigation also being used as an alternative to trade negotiation? Is trade litigation being used as a disguised import barrier to protect domestic industry or enhance an export industry? What is the dividing line between the enforcement of the rule of law and the provision of an avenue for protection? How can one distinguish between appropriate implementation of accepted trade remedies and the harassment by exporters by exploiting the opportunity for legal challenges?

These questions are particularly timely. Article 13 of the URAA, known as the Peace Clause, expired at the end of nine years (December 2003), and members are now able to invoke some of the provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which up to now have not been available to agriculture. In particular, countries have the right to argue that subsidized production is causing serious prejudice to an exporter. It remains to be seen whether the end of the Peace Clause will precipitate a flood of challenges to test how the general subsidy rules apply to agricultural markets and whether this in turn will intensify pressure to reintroduce some sort of Peace Clause in the Doha Development Round. In this regard the results of the current US - Cotton Panel are particularly interesting.

A number of developing countries have expressed concerns that the URAA has not significantly reduced support to developed country farmers, even if the nature of that support has indeed changed to conform to the WTO obligations. In the WTO, as well as in bilateral and regional agreements, such countries are searching for mechanisms that would enable them to ensure that developed country subsidies do not undermine their own agricultural sectors. These countries may choose to exercise their right to challenge agricultural subsidies through the dispute settlement mechanism.

This paper focuses on key issues surrounding the use of trade litigation in agriculture, particularly in the pursuit of trade remedies. The paper explores how countries can reduce the potential for such litigation to become a form of trade harassment and a backdoor way for uncompetitive sectors to perpetuate protection at the expense of the trade system. It makes modest suggestions as to how the existing rules and procedures can be refined to maximize the benefits that countries get from transparent and acceptable trade remedies.

Evolution of Trade Remedy Rules

Even before the General Agreement on Tariffs and Trade (GATT) came into force in 1947, national trade legislation in several countries authorized the use of trade remedies against imports (anti-dumping and countervailing duties and emergency import safeguards). However, the formation of the GATT marked the first international

[2] Another set of rules with considerable significance for agriculture is contained in the SPS Agreement. This brief will not address the parallel issues of the interpretation of the SPS agreement through panels and the use of SPS rules for protection.

[3] The Dispute Settlement Understanding (DSU) introduced by the Uruguay Round strengthened the dispute settlement process in a number of ways, including removing the ability of individual countries to block the formation of a panel or the adoption of a panel report. It also introduced an Appellate Body to review, on request, the legal basis for panel findings.

attempt to codify such trade remedies multilaterally to ensure greater transparency and consistency in approach and application. In the 47 years between the founding of the GATT and the formation of the WTO, there were a number of attempts to clarify and elaborate the conditions under which trade remedies, particularly import countermeasures, could be invoked. During this period, national legislation in the developed countries was progressively amended to bring it into conformity with evolving international norms.

A number of observers have noted the proliferation of trade remedy measures since the end of the Uruguay Round, and others have stressed their potential for abuse (Gifford, 2001, 2002). Trade remedy action can increase for several reasons: the legal basis for trade remedies can be expanded so that more situations are covered; there may be increased use of subsidies and dumping (the number of anti-dumping cases tend to increase when there are economic downturns) leading to more challenges; or there may be an increased willingness of national authorities to pursue such remedies without any change in the rules or increase in subsidies or injury from imports. This increased activity can also indicate an attempt to gain market advantage by importing firms to impose costs on exporters (or trading firms) that have to defend themselves against challenge.

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Developing countries have begun to take a more active role in the use of import trade remedies and of dispute settlement to protect their export interests through serious prejudice claims. Even if the comparative peace between the US and the EU on challenges to each others' domestic policies continues, the challenges to the subsidy policies of those two WTO members by developing country members is likely to be intensified. Reductions in and improved disciplines on conventional trade barriers constrain the ability of governments to insulate internal markets from what is still a heavily distorted international market. This has accentuated their search for more easily triggered WTO compliant trade remedies, such as special agricultural safeguards.

Trade Remedies in the WTO

Trade remedies are largely used by importing countries. Under certain defined conditions, WTO members may temporarily increase import protection beyond the levels bound in their tariff schedules. Anti-dumping duties and countervailing (anti-subsidy) duties may also be used to offset so-called "unfair" competition if imports from a specific country causes, or threatens to cause, material injury to a domestic industry.[4] Emergency safeguard measures, such as a temporary increase in import duties or the imposition of quantitative import restrictions, may also be employed under defined circumstances. In this case, trade remedies are applied against all imports, even against "fair" imports, if those imports are determined to have caused or threaten to cause serious injury to a domestic industry.

Exporters can also complain about subsidies, either those granted by importing countries that restrict trade by favoring domestic producers or those granted by competitors that distort competition in third markets. However, the problems of demonstrating injury or serious prejudice may be inherently more complex if the exporter sells into several foreign markets. The evidence for serious prejudice through the depression of world market prices has proved particularly difficult in WTO jurisprudence (Josling and Tangermann, 2003).

The definition of a subsidy, and how to detect and measure the extent of a subsidy's impact on trade, is vitally important in applying trade remedy rules. Multilateral trade litigation often challenges the actions of countries to see whether they constitute WTO-legal subsidies or not. The definition of agreed disciplines on agricultural subsidies is therefore central to the smooth operation of the trade system.

[4] The WTO distinguishes between anti-dumping actions that primarily target individual firms, and countervailing duty actions that aim to offset government subsidies. This distinction has some legal significance: subsidies are potentially illegal under the WTO, whereas dumping, a private commercial action, is not illegal in the WTO. So WTO rules cover the conditions under which subsidies are allowed, and the procedures that countries must follow when responding to subsidies granted by other countries and to dumping by foreign firms.

The WTO provides impartial dispute settlement when members differ in the interpretation of their contractual rights and obligations to take trade remedies. So trade remedies themselves can become the subject of further litigation at the multilateral level. WTO panels are called upon to decide on several stages of trade remedy proceedings: the legality of the original action, the procedures used by national authorities in determining remedies, and the allowable sanctions that can be imposed in cases where countries are found not to comply with WTO rules. Each of these stages can be abused for protectionist purposes to the detriment of the trade system, and to the credibility and acceptability of its rules.

Trade Remedies in Agriculture

Agricultural trade was covered by the original GATT rules on trade remedies. Under the GATT's trade remedy provisions (Article VI for anti-dumping and countervailing duties and Article XIX for import safeguards) no distinction was made between agricultural and non-agricultural products, although there was a special recognition that, in certain circumstances, price or income stabilization programs for "primary commodities" were presumed not to result in material injury to other countries in the sense of Article VI.

The treatment of subsidies was covered by Article XVI of the GATT. Originally, Article XVI had two stipulations. Countries that granted or maintained "any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or reduce imports of any product into its territory" were required to notify the other country concerned (in writing) of the extent and nature of the subsidies, of the estimated effect of the subsidies on the quantity of trade, and the reason for granting the subsidy (Article XVI:1). If the trade impact caused or threatened "serious prejudice" to the interests of other countries, discussions had to take place with a view to "the possibility of limiting the subsidization." However, these steps were clearly inadequate to deal with the pervasive use of subsidies in several areas, including agriculture, and in particular did little to curb the use of export subsidies.

As a consequence, Article XVI was expanded in 1957 by requiring countries to eliminate export subsidies on non-primary products. But it took the negotiation of a separate Subsidies Code in the Tokyo Round to elaborate the treatment of subsidies so that rules could be applied. The Subsidies Code itself had to be revised in the Uruguay Round, emerging as the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The Uruguay Round widened the distinction between the treatment of agriculture and other sectors. Because of the Peace Clause negotiated at the end of the Uruguay Round, agricultural subsidies have until now been covered exclusively by the URAA, and have not been subject to extensive trade litigation. With the expiry of the Peace Clause, the possibility of invoking the serious prejudice provisions of the SCM Agreement with respect to agricultural subsidies raises important questions for the trade system.

Over the history of the GATT, the use of trade remedies in agriculture has been surprisingly low given agriculture's share of world trade.[5] However, in the period before the URAA, much of agriculture did not need any special trade remedy provisions because of the phalanx of import barriers protecting most agricultural sectors. Until the URAA began to be implemented in 1995, high unbound tariffs, import quotas, outright import prohibitions, variable import levies and other forms of minimum import price systems were so pervasive in agriculture that there was only limited interest in initiating the lengthy litigation process required to invoke trade remedies. The high level of ongoing import protection for most agricultural products (as well as the complex web of technical regulations which apply to their sale and distribution) helps to explain why agricultural products account for a significantly smaller share of total trade remedy actions than their share of world trade would suggest.

Until the URAA began to be implemented in 1995, high unbound tariffs, import quotas, outright import prohibitions, variable import levies and other forms of minimum import price systems were so pervasive in agriculture that there was only limited interest in initiating the lengthy litigation process required to invoke trade remedies.

[5] The fact that agriculture is typically a sector of small and medium-sized businesses would suggest that anti-dumping cases would in any case be limited. However, the prevalence of government subsidies might be expected to engender a number of countervailing duties.

Not surprisingly, the agricultural sectors that most often sought trade remedies were those with relatively low tariffs, bound against increase in the GATT. These actions were concentrated in the fruit and vegetable and the meat and livestock sectors. Somewhat perversely, because of their relatively low bound tariffs, the chief users of agricultural trade remedies in the pre-WTO period were the traditional net exporters, the US, Canada, Australia, and New Zealand. It is not surprising that the EU did not pursue trade remedies in this period, given the high levels of protection afforded by the variable import levy system and the paucity of tariff bindings.

Even after the Uruguay Round results have been fully implemented, high levels of import protection remain widespread in agriculture. Though all agricultural tariffs were bound and most non-tariff barriers were converted into tariffs, the most import-sensitive agricultural sectors are now protected by tariff rate quotas (TRQs). These TRQs are characterized by relatively small volumes subject to low tariffs, often with prohibitive over quota tariffs. In one sense, the TRQs take the place of trade remedies, by limiting import surges and making it less likely that foreign subsidies can have an effect on domestic markets.

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To encourage countries to convert their non-tariff barriers into tariffs, the Uruguay Round provided for a special agricultural safeguard. In contrast to traditional trade remedies that require a determination of injury or threat of injury before a provisional countermeasure may be employed, the only requirement to use a special agricultural safeguard is that import volumes are above, or import prices are below, benchmark levels. However, recourse to special safeguards has been relatively low, suggesting that restrictive tariff rate quotas have so far been more than adequate to provide backup as well as normal protection.

Because they did not convert their non-tariff barriers into tariffs, developing countries have few products eligible for special safeguards, and rely instead on (generally high) single stage tariffs. Some have used variable tariffs embodied in price band mechanisms, though the legality of those has now been successfully challenged in the WTO. Countervailing duties are relatively rare in agriculture, except on trade between Canada and the United States. However, since the Uruguay Round, there has been a marked increase in the use of anti-dumping actions. The most frequent users have been concentrated in Latin America (e.g. Brazil, Mexico and Argentina). As the number of cases increases so their relevance for agricultural trade will become more marked.

On the export side, the attempt to introduce disciplines on agricultural export subsidies in the Tokyo Round proved ineffectual, and it was not until the URAA that effective disciplines were imposed on such subsidies. However, as noted earlier, recourse to the serious prejudice provisions of the SCM Agreement was precluded for agriculture during the Peace Clause.

Potential for Abuse of Trade Remedies

Governments require an operationally effective system of trade remedies to continue down the politically difficult path of trade liberalization. While the potential for abuse of trade remedies has long been recognized, as witnessed by the numerous efforts over the years to make national trade remedy systems more transparent and consistent with international norms, most observers would conclude that such provisions are necessary. Governments will never surrender the right to take countermeasures against unfair trade practices and will fight just as hard to maintain the right to take temporary safeguard actions against “fair” but seriously injurious imports.

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How can the trade remedy system be modified to make it less vulnerable to abuse? For agriculture, the key question is whether it makes sense to seek reforms within the general trade remedy system or to develop agriculture-specific solutions, following the precedent of the special agricultural safeguard agreed in the Uruguay Round? However, in order to identify possible solutions, it is first necessary to identify which aspects of the current trade remedy system are most vulnerable to abuse.

The current system of trade remedies is built on a framework of checks and balances. In cases where private sector complaints are filed, normally where dumping or foreign government subsidies are suspected, the petitioner must first persuade the relevant government agency to initiate an investigation. Once an investigation is launched, sufficient *prima facie* evidence of dumping or the existence of a subsidy must be found before a provisional (anti-dumping or countervailing) duty can be applied. Either countermeasures are confirmed or duties are refunded following a final determination of injury or threat of injury. In some countries (e.g. Canada and the United States) the determination of injury is made by an administrative tribunal, usually operating at arms length from the government, while the determination of dumping or subsidization is made by a government agency. However, bifurcated systems are the exception and most countries use a single agency to conduct dumping/subsidy investigations and injury determinations.

Many trade experts contend that the system as a whole is an open invitation to litigate, and that even if a final determination ultimately denies a petition, the system is biased towards giving the petitioner its "day in court" which usually means the application of countermeasures before injury is determined. An exporter is thus vulnerable to the application of provisional countermeasures that can last up to four months in the case of anti-dumping and countervailing duties and 200 days in the case of safeguards, even if the final determination rules against provisional countermeasures.

Anti-Dumping

Inherently, the trade remedy most vulnerable to abuse is anti-dumping, in part because the primary definition of the dumping margin, the difference between export prices and the domestic price for the same good, has been supplemented by two alternative definitions. These are (1) the difference between the highest export price to a third market, if no domestic price is available, and the export price to the importer in question; and (2) the difference between the cost of production in the exporting country, plus a reasonable addition for selling costs and profit, and the export price to the importing country. This gives considerably more scope for the determination of dumping margins and for the use of constructed costs, which can be contentious.

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As the trade remedy system has become more complex and quasi-judicial, the legal costs have themselves become increasingly onerous for small exporters. These exporters may be faced with the choice of paying several million dollars in legal fees to protect their interests or facing a system where the "facts available" are supplied by the petitioner in the importing country. Although the petitioner is also faced with high legal costs, they may be relatively small compared to the benefits provided by increased protection, even if such protection is only provisional.

From an agricultural perspective, the constructed-cost definition of dumping is most vulnerable to abuse. Unfortunately, this definition is increasingly used by the investigating authorities because of the difficulties in measuring domestic prices in agricultural markets. Measuring the costs of production of an agricultural product is inherently more difficult than estimating the costs in a manufacturing process. Many economists would argue that, given the large number of producers, the heterogeneous nature of the industry and the simplifying assumptions that need to be made, unambiguously measuring costs of production is impossible. Moreover, agricultural products are vulnerable to periods of low prices during which producers may not cover the full costs of production and certainly not enjoy a normal profit. As price takers, primary producers are normally unable to price on a cost plus basis, as is typically the case with manufactured products.

Subsidies and Countervailing Duties

The URAA classifies agricultural subsidies into export subsidies and domestic subsidies. The former are defined and declared in members' schedules and were reduced by agreement in the Uruguay Round. The latter are subdivided into amber, blue and green box measures. Amber box subsidies have also been reduced. There have been few calls for legal interpretation of the URAA definitions of agricultural subsidies or the way in which

countries have interpreted their obligations in the schedules. For example, no panel has been asked to rule on the appropriateness of the particular category in which a subsidy has been placed by the government concerned.[6]

However, the disciplines on subsidies in the non-agricultural sectors are somewhat different. The SCM Agreement defines three categories of subsidies: prohibited, actionable and non-actionable. The SCM Agreement also spells out the rules governing the application of countervailing duties. It applies to subsidies on agricultural products, except when the subsidies conform to the Agreement on Agriculture. The relevant provision of the SCM Agreement defines subsidies that are specific to a particular industry, and thus actionable (SCM Agreement Article 2). In Articles 5 and 6 the Agreement describes a range of situations under which such specific subsidies can be challenged if they cause injury or serious prejudice. The Agreement specifies the evidence needed to sustain such a challenge. Though there are a number of legal hurdles to overcome, particularly in the demonstration of causality between the subsidy and the injury claimed, there are precedents for the use of quantitative techniques to surmount these obstacles. Thus the SCM Agreement represents a potentially powerful discipline on agricultural subsidies if its provisions continue to be applied (Steinberg and Josling, 2003).

Two WTO cases have addressed the question of agricultural subsidies. The Canadian Dairy case and the US Cotton case offer an indication as to what might lie ahead in this area. The Canadian Dairy case was the first panel to report on an alleged violation of the Uruguay Round schedules on export subsidies. The case became even more significant when the Appellate Body ruling on a follow-up case (to determine whether the Canadian government had brought its policy into conformity with WTO obligations) directed the panel to test whether the cost of the milk to the export processors was less than the cost of production incurred by the farmers. The panel reconvened and decided that since most farmers produced for both the domestic (at administered prices) and the foreign market (at market prices) that they in effect sold the milk, over and above their domestic market allotment, at a "subsidized" price below their production cost.

The ruling is significant because it implicitly questions the distinction made in the URAA between domestic support and export subsidies. If selling farm products for export (or processing for export) at a price less than the cost of production is indeed to be regarded as an export subsidy then any situation where high, administered domestic prices coexist with exports might be shown to be contrary to the WTO – or at least would need to be counted against export subsidy commitments (Josling, 2003). In other words, the legal avenue has made obvious what the compromises leading up to the URAA had obscured: that the root cause of trade problems is high domestic prices set by farm policy, and that these have not been effectively reduced by the constraints on "at the border" instruments or domestic subsidies. The impact of the Canadian dairy case on the approach taken by exporters toward farm policies in other countries can be seen in the subsequent challenge brought by Brazil, Australia and Thailand against the EU sugar subsidies, presently being discussed by a panel.

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Brazil's case against the US upland cotton program demonstrates a more direct approach to restraining subsidies through judicial rather than political (negotiations) channels. After three rounds of unsuccessful consultations, in January 2003 Brazil requested the formation of a panel to adjudicate the dispute. Brazil claimed that in the year up to July 2002, the value of such subsidies amounted to $4 billion, relative to the market value of the crop of $3 billion. Cotton production in the US had surged, despite low prices and a strong dollar. The market share of US cotton had steadily risen, despite the strong presumption that such cotton was being sold at less than the cost of production. Current US support levels for cotton are higher than the URAA base level, the 1992 marketing year. Brazil contended that each of these programs involve a financial contribution to the upland

[6] Levels of export and domestic subsidies must be notified to the WTO each year, and changes in subsidies under the domestic support restrictions have to be notified if they involve switching to non-constrained (green, blue or *de minimis* amber box) support.

cotton sector and thus fall within the scope of GATT Article XVI, and are subject to the constraints of the SCM Agreement, including Articles 5 and 6.

If the Cotton Panel maintains Brazil's contention and its ruling is upheld on appeal, the landscape for domestic support may change radically.

The panel has ruled against the United States, but the specifics were not public at the time of this paper's publication. The panel's ruling will shed further light on the relationship between domestic subsidies and export market performance. The policies in question are not simply the traditional subsidies contingent on exports but include marketing loans, loan deficiency payments, direct payments, counter-cyclical payments and export credits. Indeed, many of the core programs of US farm policy are coming under the WTO judicial microscope. If the Panel maintains Brazil's contention and its ruling is upheld on appeal, the landscape for domestic support may change radically (Josling, 2003).

Safeguards

Developed countries are the major beneficiaries of the Special Safeguard in the URAA. Of the 137 WTO members that notified TRQs, only 38 reserved the right to use SSGs in their URAA schedule of commitments. The percentage of agricultural tariff lines covered by SSGs ranges from less than one percent for many developing countries to 9 percent for the United States, 12 percent for Japan, 31 percent for the European Union, 49 percent for Norway and 59 percent for Switzerland (IATRC, 2001). Product coverage is concentrated in dairy for the United States; cereals for Japan; and meat, dairy products, fruits and vegetables for the European Union.

Despite the broad coverage across products, few SSG actions have been taken. Since 1995, only the European Union, Japan and the United States have notified SSG actions in almost all years. In practice, the SSG provision appears to have been used to balance internal markets in those countries. In the case of the United States, the application of price-triggered SSG duties on relatively small quantities of individual dairy product imports signaled to exporters that their products would face routinely applied SSG duties when trying to gain access to the U.S. market.[7] The European Union has used the SSG, in concert with other policies and regional agreements, to balance internal markets for perishable fruits and vegetables by restricting imports (IATRC, 2001). The relatively restrained use of the SSG can be attributed partially to historically high international and national prices for many agricultural products which did not trigger efforts to limit imports. Overall, the special safeguard provisions of the Agreement on Agriculture appear not to have been widely used as a haven for countries seeking to avoid their liberalization commitments.

Overall, the special safeguard provisions of the URAA appear not to have been widely used as a haven for countries seeking to avoid their liberalization commitments.

The SSG has not been widely available to developing countries. The current Doha Round of trade talks are addressing whether such a special safeguard mechanism (dubbed SSM) would be a satisfactory alternative to devices, such as price bands, that have proved problematic in implementation. This limited use of an agricultural SSM, as a complement to more general trade remedies, could contribute significantly to a compromise in the negotiations if it allows developing countries, both in political and economic terms, to accept more substantial tariff reductions.

Limiting the Potential for Abuse

The heart of the debate over trade remedies in agriculture is whether such remedies promote or hinder trade reforms. Anti-dumping duties, countervail measures and safeguards are legal options in the face of injurious import pressures. An operationally effective trade remedy system is necessary to sustain the political support for freer trade. But, excessive resort to such remedies can be deleterious to the trade system. As agriculture's high tariff barriers are reduced, there will be increasing political pressure on governments to invoke trade remedies in

[7] The US has also used the price-trigger to place additional duties on peanuts and sugar-containing products.

order to shield domestic producers from competition. Such pressure will be greater the deeper the tariff cuts achieved. If the Doha Round is successful in significantly reducing tariff protection in agriculture, there is a very real risk that the number of agricultural trade remedy cases will increase and the benefits of tariff liberalization nullified. Moreover, the number of trade remedy cases brought by developing countries is increasing as their trade remedy bureaucracies become more sophisticated.

Agriculture-specific countervail and anti-dumping provisions would run counter to the widespread desire to fully integrate agriculture under the general trade rules.

Expanding disciplines on the use of general trade remedy provisions in the WTO will be difficult, given the powerful array of special interest groups, in particular the steel and textile and clothing lobbies, that make full use of current rules. It was difficult enough to agree to initiate modest negotiations on improving the interpretation of the Anti-Dumping Agreement at the launch of the Doha Round. Changes to the general trade remedy system are therefore likely to be incremental rather than fundamental. If this assessment is correct, then more progress might be possible in the context of agriculture-specific solutions, building on the precedent of the special agricultural safeguard. However, agriculture-specific countervail and anti-dumping provisions would run counter to the widespread desire to fully integrate agriculture under the general trade rules. Thus, governments would have to weigh carefully the advantages of an agriculture-specific solution against the disadvantage of creating more differences between the agricultural and non-agricultural trade rules.

Given the particular vulnerability of the anti-dumping system in agriculture to abuse, one possible solution might be to eliminate provisional duties in cases where constructed costs of production are used to determine dumping. In these situations anti-dumping duties would only apply after a final determination of injury. Because of the difficulty in accurately determining costs of production for agricultural products, such a provision could discourage the overuse of constructed costs. Eliminating *the threat* of injury as a justification and requiring a determination of *actual* injury would also go a long way to help contain the potential for trade remedy abuse.

Modifications to the countervail system are also likely to be controversial. The aim should be to allow countervailing duties when appropriate but not as a way of giving long-term protection to inefficient sectors. Consideration should be given to making it easier for developing countries to use such remedies when facing developed country subsidies. For example, where WTO members have notified subsidies as “trade-distorting” it seems that the burden of proof might be put on the subsidizing country to show that no injury or serious prejudice is caused to a complainant country. If the conditions for constructing costs in anti-dumping cases are tightened, relaxing standards for the application of countervailing duties could be politically necessary to maintain the balance between importers and exporters.

The definition of subsidies, particularly in the agricultural area, is one of the issues that seems to be likely to give rise to tensions. The US-Cotton and EU-Sugar panels will help to clarify the legal position, but this could raise political problems for countries as they attempt to bring their policies into compliance.

The definition of subsidies, particularly in the agricultural area, is one of the issues that seems to be likely to give rise to tensions. The US-Cotton and EU-Sugar panels will help to clarify the legal position, but this could raise political problems for countries as they attempt to bring their policies into compliance. And from an economic perspective, it is important that the focus of disputes, as well as of negotiations, remain on the most trade-distorting support methods and that trade remedies should not result in further restrictions to trade negotiations.

It may be easier to modify the agricultural safeguard provisions. A major concern of developing countries in particular, is they are expected to reduce their tariff protection in the face of massive support provided to producers in most developed countries. Assuming the Doha Round will still leave significant disparities in the levels of support between countries, there is a plausible argument that some form of special agricultural safeguard with simple quantitative triggers should be made available to all countries and products, not just those that were subject to tariffication in the Uruguay Round.

One such mechanism would be to allow countries, when faced with imports benefiting from defined trade-distorting subsidies in the exporting country, to be able to quickly trigger countermeasures without the need to demonstrate injury. This could be tied to a trigger, such as the determination that the trade-distorting subsidies (all non-green support, including *de minimis*) exceed a certain threshold (e.g. X per cent of the value of the product in the subsidizing country). In these circumstances there would be no need for provisional countervailing duties: a breech of the threshold would automatically trigger a final determination.

The prospects for reform of export trade remedies are more promising. There are encouraging signs of a political will to phase out all forms of export subsidies. Moreover, the outcomes of the Sugar and Cotton panels should help to clarify the current subsidy provisions of the URAA and the SCM Agreement and to give negotiators a clearer picture of what needs to be done to make them more operationally effective.

One of the major accomplishments of the Uruguay Round was the strengthening of the dispute settlement system. However, no system is perfect. Developing countries, particularly those that are small or poor, have difficulty bringing cases before the WTO. Moreover, if they prevail in those cases but fail to get relief, they may have little effective way of imposing sanctions. So the issue of technical assistance for the bringing of cases is important, as is the question of collective actions and even of collective sanctions.

There is always a risk that, in trying to clarify ambiguous provisions in the WTO, panels and/or the Appellate Body may sometimes appear to go well beyond the intentions of the original negotiators. Nevertheless, while it is always possible to second guess some of the finer details of a dispute settlement finding, few would argue for a return to the immediate post-Tokyo Round practice, when defendants could block the adoption of Panel reports they did not like. The rule of law cannot prevail without an operationally effective system of dispute settlement and the present system appears to be basically sound. While there may be a need for some fine-tuning, fundamental changes do not appear to be necessary.

The rule of law cannot prevail without an operationally effective system of dispute settlement and the present system appears to be basically sound. While there may be a need for some fine-tuning, fundamental changes do not appear to be necessary.

At the end of the day, the credibility of the agricultural trade rules will depend on the outcome of tough political negotiations. An effective dispute settlement system is a necessary but not a sufficient condition for a successful rules-based multilateral trade system. Litigation is not a substitute for negotiation. The rules themselves need to be clear and enjoy as much political support as possible. Creative ambiguity will always pose problems for a rules-based system.

Modifications of WTO rules on import trade remedies and serious prejudice challenges will not be easy to negotiate. Although an agriculture-specific solution might provide opportunities for self-contained trade-offs, adding more difficult issues to an already overloaded agricultural negotiating agenda could be counterproductive. While there are good arguments for strengthening the defenses against abuse of trade remedies in agriculture, many countries would prefer not to further complicate an already politically charged negotiating agenda. The real question is: how much worse does trade remedy abuse have to get before countries are willing to tackle the tough issues of trade remedy reform?

REFERENCES

Gifford, M.N. (2001). “North American Agricultural Trade Disputes: A Canadian Perspective”, Paper presented to the seminar on “North American Agricultural Trade Relationships: Policy Challenges for 2002 and Beyond,” Chicago, August 8.

Gifford, M.N. (2002). “Canada/US Agricultural Trade Issues: A Canadian Perspective”, Paper presented to the “Great Lakes Forum on Agriculture”; State College, Pa., June 11.

IATRC (2001). *Market Access: Issues and Options in the Agricultural Negotiations.* International Agricultural Trade Research Consortium, Commissioned Paper No. 14, University of Minnesota.

Josling, Tim and Stefan Tangermann (2003). “Production and Export Subsidies in Agriculture: Lessons from GATT and WTO Disputes Involving the US and the EC,” in Mark Pollack and Ernst-Ulrich Petersmann (ed.) *Transatlantic Economic Disputes,* Oxford University Press, Oxford.

Josling, Tim (2003). “Domestic Farm Policies and the WTO Negotiations on Domestic Support,” Paper presented to the Conference on “Agricultural Policy Reform and the WTO: Where are we heading?” held at Capri (Italy), June 23-26.

Steinberg, Richard H. and Timothy E. Josling (2003), “When the Peace Ends: The Vulnerability of EC and U.S. Agricultural Subsidies to WTO Legal Challenge,” *Journal of International Economic Law*, Vol. 6(2), pp. 369-417.

Trade Litigation in Agriculture: Limiting the Abuse of Trade Remedies

By: Mike Gifford and Tim Josling

The World Trade Organization (WTO) is based on the rule of law but is anchored in the political economy of the member states. The multilateral trade rules are backed up by a system of litigation, through dispute settlement panels, that complements (rather than supercedes) rules found in national laws and in bilateral and regional trade agreements. Trade litigation at the WTO serves two essential functions: to clarify and interpret the agreements that have been negotiated in the WTO; and to prevent abuses that would diminish the benefits that countries derive from WTO membership and disturb the balance of benefits and obligations negotiated by the political process.

Trade remedies are an essential part of the process that prevents abuse and maintains the political balance struck in trade negotiations. However, trade remedy litigation can also be pursued in ways that do not necessarily serve the multilateral trade system. In the course of interpreting agreed rules, the dispute settlement system can appear to extend the boundaries of political agreement. Litigation then begins to take the place of negotiation. Subsidy, dumping and safeguard countermeasures can occasionally become instruments of protection, either of import sectors through aggressive use of trade remedies, or of export sectors, through the extension of commercial competition into the legal arena.

Trade Litigation in Agriculture: Limiting the Abuse of Trade Remedies, identifies key issues in agricultural trade litigation, particularly in the pursuit of trade remedies. The paper explores how countries can reduce the potential for such litigation to become a form of trade harassment and a backdoor for uncompetitive sectors to perpetuate protection at the expense of the trade system. It suggests revisions of existing rules and procedures to reduce the potential for abuse and to maximize the benefits that countries get from transparent and acceptable trade remedies.

About the IPC

The International Food & Agricultural Trade Policy Council (IPC) convenes high-ranking government officials, farm leaders, agribusiness executives and agricultural trade experts from around the world and throughout the food chain to build consensus on practical solutions to food and agricultural trade problems.

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