Sustainable Production Agriculture in the Face of Foreign Commodity Dumping: Achieving Effective Antidumping and Countervailing Duty Determinations

by

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SUSTAINABLE PRODUCTION AGRICULTURE IN THE FACE OF FOREIGN COMMODITY DUMPING: ACHIEVING EFFECTIVE ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS

I. INTRODUCTION

International trade agreements, like the Canada and U.S. Free Trade Agreement (CUSTA),[1] and the North American Free Trade Agreement (NAFTA),[2] have broken down trade barriers between the United States, Canada, and Mexico.[3] This has resulted in increased movement of goods between these countries.[4] Although these agreements have sought to level the playing field between the United States and the other countries involved, significant imbalances exist with respect to certain agricultural commodities.[5] These imbalances may be partially caused by the "dumping" of products into the U.S. by other countries.[6] Dumping is the sale of goods into other countries at less than the goods' fair market value.[7] Cheap imports flooding into this country have caused depressed

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1. CUSTA established a free trade zone between the United States and Canada. Won W. Koo & Ihn H. Uhm, *U.S.-Canadian Grain Disputes*, 9 MINN. J. GLOBAL TRADE 103 n.2 (2000). CUSTA was designed to eliminate barriers to trade, facilitate fair competition, liberalize investment conditions, establish dispute resolution procedures, and lay a foundation for further cooperation between the United States and Canada. *Id.* Under the agreement, tariffs were to be eliminated and rules for determining the origination of goods for preferred treatment under CUSTA were established. *Id.*

2. NAFTA, implemented in 1994, created a free trade zone that encompassed the United States, Canada, and Mexico. *Id.* at 103 n.3. This agreement included Mexico and is patterned after CUSTA, with modifications designed to rectify problems experienced under CUSTA. *Id.*

3. NAFTA: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS (Judith H. Bello et al. eds., 1994).

4. Delvin J. Losing, Note, *Comity in the Free Trade Zone*, 74 N.D. L. REV. 737, 737 (1998).

5. Terence P. Stewart et al., *Trade and Cattle: How the System is Failing an Industry in Crisis*, 9 MINN. J. GLOBAL TRADE 449, 453 (2000) (identifying cattle imports into the United States exceeding two million head from Canada and Mexico, while U.S. exports to those countries amounted to only 285,000 head).

6. *See generally id.*

7. BLACK'S LAW DICTIONARY 518 (7th ed. 1999). Dumping is "[t]he act of selling . . . large quantit[ies] of goods at less than fair value[s] [and/or] [s]elling goods abroad at less than the market price at [the] home market." *Id.* "Dumping involves selling abroad at a price that is less than the price used to sell the same goods at home (the 'normal' or '*fair*' value)." *Id.* (citing RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS § 6.1 (1995)).

commodity prices,[8] leading producer organizations to start formal trade action.[9]

Farmers and ranchers faced with depressed domestic commodity prices view formal legal action, in the form of trade litigation, as one possible way to raise domestic prices.[10] The prospect of high countervailing duties[11] on imported goods, which would have the effect of raising domestic prices, appeals to commodity producers; therefore, they encourage such legal action.[12] This action, though, comes at a high price.[13] The producer organizations involved must have substantial financial resources because the costs of trade litigation are quite high.[14] Producers' efforts can be further frustrated when the opposition to the legal action has virtually unlimited financial resources, such as a foreign government.[15]

However difficult the foregoing financial obstacles make successful litigation, domestic producers' efforts are further frustrated by the government agencies in charge of handling trade disputes.[16] These agencies have shown a less than predictable pattern of resolving unfair dumping issues.[17] Because the costs and obstacles involved in trade litigation are high, producer organizations need to know, even before

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8. R-CALF Says "No New Imports," Ranchers-Cattlemen Action Legal Fund (R-CALF USA), *available at* http://www.rcalf.com (last visited Nov. 14, 2001) (on file with author) (stating that the resulting trade litigation pursued by the R-Calf organization was initiated because of lower domestic commodity prices caused by cheap imports entering into the country); *see also* Koo & Uhm, *supra* note 1, at 111 (stating that the U.S. domestic price for durum wheat decreased by about eleven percent annually for the period 1994-1996 as a result of increased Canadian imports of durum wheat into the United States).

9. North Dakota Wheat Commission News Release, *N.D. Wheat Commission to File Section 301 Against Canada, available at* http://www.ndwc/news.com (Sept. 7, 2000).

10. Chara McMichael, *R-CALF Scores a Victory,* R-CALF USA, *available at* http://www.rcalf.com (last visited Nov. 14, 2001) (on file with author) (indicating that importers, upon a ruling by the International Trade Commission, would be required to post a $30 to $50 per head bond, which would offset industry costs totaling more than $1 billion).

11. BLACK'S LAW DICTIONARY 523 (7th ed. 1999). A countervailing duty is a duty imposed on imported goods that is designed to protect the "domestic industry by offsetting subsidies given by foreign governments to the manufacturers of the imported goods." *Id.*

12. *R-CALF Says "No New Imports," supra* note 8.

13. *And We're Selling Raffle Tickets,* R-CALF USA, *available at* http://www.rcalf.com (Mar. 18, 1999) (stating that R-CALF's contract for legal services for its antidumping litigation amounted to $1.7 million).

14. *Id.*

15. *See id.* (stating the Canadian Government spent over $10 million defending against R-CALF's suit).

16. Stewart et al., *supra* note 5, at 585.

17. *Id.*; *see also* Koo & Uhm, *supra* note 1, at 113 (stating that a transportation subsidy by the Canadian Government was not an export subsidy since it applied to all shipments of goods, not just grain, and did not distinguish between goods destined for domestic use in Canada or those destined for export).

they start litigation, what is required for trade litigation to end successfully.[18]

In order to provide the reader with a clearer understanding of what is expected when contemplating trade litigation, this Note attempts to illustrate and explain what the relevant governing agencies consider when faced with an antidumping petition. Part II gives a brief overview of the governmental agencies and their responsibilities when acting on antidumping petitions. Part III discusses each respective agency's requirements and the criteria that a petitioner will likely have to prove to successfully complete litigation. Part IV discusses the options available pending an unfavorable determination by an agency. Part V briefly discusses the implications that unfair trade practices have had on agricultural states like North Dakota. Finally, Part VI concludes by contemplating future concerns.

Particular detail is given to the most common issues encountered by agricultural petitioners in an antidumping investigation. The investigating bodies may, however, consider other issues unique to a particular industry when conducting an investigation. This Note is not intended to be an all-encompassing guide to any specific investigation. It is, however, a general overview of some of the typical issues faced by agricultural commodity producers when contemplating antidumping and countervailing duty litigation.

II. GOVERNMENT AGENCIES RESPONSIBLE FOR INITIAL ANTIDUMPING AND COUNTERVAILING DUTY DETERMINATIONS

Antidumping legislation has a long history in the United States, beginning with the Unfair Competition Act of 1916.[19] This Act made it a crime to import goods into the United States at prices less than the actual market value, if the importation was made with the intent of injuring or destroying a U.S. industry.[20] Current fair trade enforcement measures can be traced back to the Tariff Act of 1930,[21] which was revised by the Trade Agreements Act of 1979.[22] Congress' purpose in

18. Stewart, *supra* note 5, at 505.

19. Unfair Competition Act, ch. 463, § 801, 39 Stat. 798 (1916) (codified as 15 U.S.C. § 72 (1994)).

20. *Id.*

21. The Tariff Act of 1930, also known as the Smoot-Hawley Tariff Act, is contained in chapter 4 of title 19 of the UNITED STATES CODE. 19 U.S.C. §§ 1202-1677n (1994). The Act imposes tariffs on "[a]ll articles imported into the customs territory of the United States from outside thereof." Revised Tariff Schedules, 19 U.S.C.A. § 1202(1) (West 1978).

22. Robert Mordhorst, Comment, International Trade Administration v. International Trade Commission: *The Scope of Antidumping/Countervailing Duty Investigations Issue*, 9 GEO. MASON U. L. REV. 147-48 (1986) (providing a brief synopsis of the history of trade regulation in the United States);

implementing these antidumping laws was to establish procedures to protect domestic industries that were injured by unfair trade practices in international trade disputes.[23]

The law has evolved to establish two governmental administrative agencies, the International Trade Administration of the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC).[24] These agencies are responsible for implementing the current antidumping and countervailing duty laws as enacted by Congress.[25] Although both agencies play a part in making antidumping and countervailing duty determinations, they have decidedly different roles.[26]

The DOC determines whether imports are being "dumped" into the domestic market or are benefiting from subsidies implemented by the importing country's government.[27] The DOC also determines the margin of dumping.[28] Investigations conducted by the DOC focus on distinctive business dealings by particular businesses or governments in order to compute dumping margins unique to those situations.[29] The DOC makes an inquiry into the detailed production of individual producers and, in the case of producer organizations, into the production of that association's individual members.[30] The DOC does this so that it may better evaluate the impact of imports on the domestic industry.[31]

The ITC, on the other hand, reaches a single conclusion in each of its final determinations.[32] This means that the ITC makes one final determination, or conclusion, based on the effects that the imports have on the industry as a whole, not several conclusions regarding individual producer injuries, as is the case with DOC determinations.[33] For the ITC to reach an affirmative conclusion of material injury to the domestic industry, it must find that the domestic industry has been injured, that it

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see also 19 U.S.C. § 2504 (1994) (establishing procedures for U.S. laws relating to countervailing and antidumping duties under the Trade Agreements Act of 1979).

23. Judith A. Smith, Note, American Lamb Co. v. United States: *More Protection or Less for the Domestic Industry*, 36 AM. U. L. REV. 983 (1987).

24. 19 U.S.C. §§ 1671-1677n (1994).

25. *Id.*

26. *Id.*

27. *Id.* §§ 1671(a), 1671e(a).

28. *Id.* § 1673e(a), (c)(3). The margin of dumping is the difference between the foreign market value and the U.S. domestic price, and it is used to determine the value of the subsidy on the imported goods. *Id.*

29. 19 C.F.R. § 351.402 (2001).

30. Florex v. United States, 705 F. Supp. 582, 586 (Ct. Int'l Trade 1989). In determining standing in a material injury determination regarding fresh cut flowers from Mexico, the DOC considered information on a flower by flower basis, and this information provided relevant information regarding individual growers' relationships to the trade association and the industry as a whole. *Id.*

31. *Id.*

32. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

33. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988). ITC material injury determinations do not involve the individual weighing of causes; rather they determine whether the imports in question cause injury to the domestic industry as a whole. *Id.*

is threatened with material injury, or that the establishment of a domestic industry is materially retarded by the imports.[34]

The ITC bases its material injury conclusions in part on the findings as determined by the DOC in its prior individual investigations of the industry.[35] The ITC does not make determinations regarding particular companies or government practices, but rather its determinations concern the industry as a whole.[36] In making its determinations, the ITC normally relies on comparisons of indicative or characteristic data concerning the industry overall, rather than on comparisons of particular transactions.[37] Parties desiring review of alleged antidumping activity usually file petitions with each agency simultaneously.[38]

III. PROCEDURES AND CRITERIA EMPLOYED BY THE RESPECTIVE GOVERNMENTAL AGENCIES IN ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS

Upon the filing of a petition, a normal antidumping proceeding involves five stages.[39] The first stage involves the International Trade Administration (ITA), which is the international trade division of the DOC.[40] The ITA (hereinafter encompassed by reference to the DOC) decides whether to commence an investigation.[41] The initial decision by the DOC to proceed is contingent on the petition alleging the required elements for implementing an antidumping duty, based on information "reasonably available to the petitioner supporting the allegations."[42] The first stage also includes the DOC's determination of the petitioner's standing.[43]

The second stage of the proceeding follows only when there has been an affirmative determination by the DOC in the first inquiry.[44] This stage consists of the ITC's preliminary determination as to

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34. 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1).

35. *Id.*

36. Calabrian Corp. v. U.S. Int'l Trade Comm'n, 794 F. Supp. 377, 384 (Ct. Int'l Trade 1992).

37. Negev Phosphates, Ltd. v. U.S. Dep't of Commerce, 699 F. Supp. 938, 949 (Ct. Int'l Trade 1988).

38. American Lamb Co. v. United States, 785 F.2d 994, 998-99 (Fed. Cir. 1986). The procedures for filing a petition are discussed in detail *infra* Part III.A.

39. *American Lamb*, 785 F.2d at 998.

40. *Id.*

41. *Id.*

42. *Id.* (citing 19 U.S.C. § 1673a(c) (1994)).

43. Stewart et al., *supra* note 5, at 515. To determine standing, the DOC asks whether the party who has filed the unfair trade petition is the proper party to bring the action regarding the goods at issue. *Id.*

44. *American Lamb*, 785 F.2d at 998.

"'whether there is a reasonable indication' that a domestic industry is being materially injured, or threatened with material injury."[45]

The third stage in the process can only move forward following an affirmative finding by the ITC.[46] This stage consists of the DOC's preliminary determination as to whether there is a "reasonable basis to believe or suspect" that the imported goods are being sold, or are likely to be sold, at less than fair market value.[47]

An affirmative determination as to subsidies will still allow the imported goods in question to be cleared through customs.[48] The final duties to be collected will not be assessed until the dumping investigation is resolved.[49] However, the importer will be required to post some type of bond in order to guarantee against a possible adverse dumping and countervailing duty determination in the final stages of the investigation.[50]

Following an affirmative preliminary determination by the DOC, the fourth stage, which is similar to the third stage and is conducted within seventy-five days of the preliminary investigation, involves a final determination by the DOC respecting the sale of the imported goods.[51] If the DOC's final determination of antidumping or countervailing duties is in the affirmative, the fifth step is for the ITC to make its final and ultimate determination of material injury.[52] If the ITC determines that material injury exists, or that there is a threat of material injury, then the DOC issues an antidumping order.[53]

If any of the determinations by either the DOC or the ITC are found insufficient to support the allegations in the petition, or if the findings are in the negative with regard to the petitioner, the investigation is terminated.[54] To summarize, the investigation consists of: (1) initiation and/or standing; (2) preliminary injury determination by the ITC; (3) preliminary determination of dumping or subsidization by the DOC; (4) final determination of dumping or subsidization by the DOC; and (5) final injury determination by the ITC.[55]

The DOC's preliminary and final determinations essentially evaluate similar criteria, as is the case with the ITC's preliminary and final

45. *Id.* (citing 19 U.S.C. § 1673a(c)).
46. *Id.*
47. *Id.* (citing 19 U.S.C. § 1673b(b)(1)).
48. 19 U.S.C. §§ 1671b(d), 1673b(d) (1994).
49. *Id.*
50. *Id.*
51. American Lamb Co. v. United States, 785 F.2d 994, 998 (Fed. Cir. 1986).
52. *Id.*
53. *Id.* at 999.
54. *Id.* at 998-99.
55. Stewart, *supra* note 5, at 515.

determinations.[56] This Note will therefore combine the preliminary and final determinations as to each agency and analyze the process as one stage with regard to that agency. It is important to remember, however, that each and every determination by that respective agency must be fully concluded with a favorable decision in order for the petitioner's claim to move forward.[57]

The next sections of this Note provide a general overview of the criteria used by the respective agencies in making determinations regarding antidumping and countervailing duty investigations.[58] The DOC's preliminary investigation procedures are analyzed first, followed by an analysis of the ITC's preliminary investigations.[59] Since the DOC's preliminary and final determinations are similar, and the latter is essentially a review of the former, these determinations are considered together.[60] Finally, there is a brief overview of the ITC's final determination involved in antidumping and countervailing duty investigations.[61]

A. THE DOC'S DETERMINATION OF INITIATION AND STANDING

Initiation of an unfair trade proceeding is actually part of the process in determining standing, and it is satisfied when a sufficient petition is filed by an interested party.[62] To be satisfactory, the petition must be filed by an interested party on behalf of an industry that alleges the necessary elements of unfair trade activity, coupled with the information reasonably available to the petitioner to support those allegations.[63]

Standing essentially consists of two separate determinations by the DOC, and it is established if a petitioner is an interested party and files a petition on behalf of a domestic industry that produces a product that is "like"[64] the product being imported.[65] An interested party may consist of manufacturers, producers, certified unions or trade and business associations that either manufacture or represent industries that manufacture a "like product."[66] Accordingly, any agricultural producer could file a petition on his or her own behalf, or on behalf of an organization

56. *See generally* Citrosuco Paulista v. United States, 704 F. Supp. 1075 (Ct. Int'l Trade 1988).
57. *Id.*
58. *See infra* Part III.A-D.
59. *See infra* Part III.A-B.
60. *See infra* Part III.C.
61. *See infra* Part III.D.
62. Florex v. United States, 705 F. Supp. 582, 585 (Ct. Int'l Trade 1989) (commencing district court review of the agency's findings by first establishing whether the petitioner had standing).
63. 19 U.S.C. § 1673a(b)(1) (1994).
64. A "like product" is one that is like, or in the absence of like, most similar in characteristics and uses to the article being imported that is the subject of the allegations. 19 U.S.C. § 1677(10) (1994). *See infra* text accompanying notes 76-87.
65. 19 U.S.C. § 1673a(b)(1).
66. *Id.* § 1677(9)(C)-(F) (1994).

or association representing the producer's industry, and qualify as an interested party.[67] This requirement is probably the easiest obstacle to overcome in an antidumping investigation.[68]

The DOC can overcome problems with standing by simply initiating its own investigation proceedings "sua sponte," or on its own accord.[69] In the case of an individual petition, however, the petition must represent at least twenty-five percent of the total domestic production of the like product.[70] In the case of petitions filed by producer associations or organizations, the same twenty-five percent representation applies.[71] Additionally, at least fifty percent of those producers, or organizations representing the like product, must express support for the petition.[72]

For the DOC to determine industry support, however, it must first determine what products make up the industry.[73] It does this by determining what domestically produced products are most like the product allegedly being dumped.[74] At this stage, the DOC conducts its own "like product" analysis in order to evaluate whether a petitioner has standing.[75]

Like product is defined as "a product which is like, or in absence of like, most similar in characteristics and uses with, the article subject to an investigation."[76] It may be easier to understand what is not a "like product" when conducting this analysis; for example, grapes and table wine are considered different products.[77] Dairy cows, purebred cattle, and cattle used for breeding were specifically excluded from a cattle dumping investigation because the scope of the petition only included beef cattle and calves used to produce beef for human consumption.[78] In an antidumping petition concerning frozen concentrated orange juice, the DOC excluded producers of round oranges designated for the fresh

67. *Id.*

68. S. REP. No. 249, at 63 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 449 (stating that the committee intended that the standing requirements be administered to provide opportunity for relief for the petitioner or his industry and to prohibit petitions filed by those with no interest in the final outcome of the investigations).

69. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1084 (Ct. Int'l Trade 1988) (finding it unreasonable for the DOC to terminate an antidumping investigation due to inaccuracies in the petition when there was evidence of dumping).

70. 19 U.S.C. § 1673a(c)(4)(D)(i).

71. *Id.*

72. *Id.*

73. Initiation of Antidumping Duty Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 18,377 (Apr. 25,1996).

74. *Id.*

75. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1200 (Ct. Int'l Trade 1988).

76. *Id.* (citing 19 U.S.C. § 1677(10) (1994)).

77. American Grape Growers v. United States, 604 F. Supp. 1245, 1247 (Ct. Int'l Trade 1985).

78. Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed. Reg. 71,889 (Dec. 30, 1998).

market from intervening in the investigation as an interested party.[79] Round orange producers were excluded since round oranges were not the same product as frozen concentrated orange juice.[80]

On the other hand, the DOC determined that live swine, fresh pork, chilled pork and frozen pork were all like products for purposes of an initial investigation.[81] Also found to be like products, but manifesting significant differences in the stages of production, were salmon, whether fresh caught or from fish farms.[82] In addition to the variation in origin of the fish, like product was determined to include fish that were "dressed"[83] or "cut."[84] In the cattle investigation mentioned earlier, all cattle intended for slaughter were included in the domestic like product.[85] When like product is used to determine industry support, initial determinations allow for a very broad inclusion of agricultural products, although at differing stages of production.[86] As will be shown later in this Note, however, that generous view of like product is not always followed in subsequent investigations of that product.[87]

Once a like product has been determined and an industry defined, the DOC can focus on that part of the industry to determine industry support for the petition in accordance with the relevant statute.[88] This determination can be difficult depending on the nature of the industry as well as the associations that represent it.[89] In many of the industries unique to production agriculture, there may be thousands or millions of producers who do not subscribe to a general association or organization

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79. *Citrosuco*, 704 F. Supp. at 1082. Round oranges did not have the same characteristics and uses as did frozen concentrated orange juice. *Id.* Although eighty-five percent of round oranges grown in Florida were used in the manufacture of some type of frozen concentrated orange juice, they were nevertheless not enough like one another in order to satisfy the like product analysis. *Id.*

80. *Id.*

81. Initiation of Countervailing Duty Investigation: Live Swine and Fresh, Chilled and Frozen Pork Products From Canada, 49 Fed. Reg. 47,079 (Nov. 30, 1984). Because the DOC recognized that Congress wished special consideration for agricultural interests in antidumping investigations and contemplated the inclusion of growers and processors in the same industry, the DOC determined the four types of products to be like products. *Id.* The determination was contingent on the parties showing that the grower and processor industries were vertically integrated in order to further the investigation. *Id.*

82. Initiation of Antidumping Duty Investigation: Fresh Atlantic Salmon From Chile, 62 Fed. Reg. 37,027 (July 10, 1997).

83. *Id.* "Dressed" was defined as whole salmon that had been bled, gutted, and cleaned with the head removed or attached, the tail removed or attached, and/or the gills either removed or attached. *Id.*

84. *Id.* "Cuts" included crosscuts or steaks, lengthwise cuts or fillets, butterfly cuts, any combination of those cuts and salmon that was minced, shredded or ground. *Id.*

85. Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed Reg. 71,890 (Dec. 30, 1998).

86. *Id.*

87. *See generally* Ranchers-Cattlemen Action Legal Fund (R-CALF) v. United States, 74 F. Supp. 2d. 1353 (Ct. Int'l Trade 1999).

88. 19 U.S.C. § 1673a(c)(4)(D)(I) (1994).

89. Stewart et al., *supra* note 5, at 519.

that represents their views.[90] An accurate measure of industry production must be assessed in order to determine whether the majority of the domestic production favors the petition.[91]

Further problems arise when attempting to determine the support of the domestic industry in which the same goods can be bought and sold more than once in one year.[92] In such a situation, the DOC may use United States Department of Agriculture statistics in order to indicate the domestic production.[93] The DOC relies on these figures in order to provide a clearer picture of the industry in an isolated instance, therefore eliminating the risk of over-counting due to multiple sales in a twelve-month period.[94]

To more accurately gauge industry support where large fractional groups represent an industry, the DOC may attempt to determine support by polling the trade associations that represent the industry.[95] When trade associations are polled to ascertain industry support, the individual signatures supporting the action must be given appropriate weight to determine industry support.[96] To calculate the proper weight to give the signatures in relation to the poll of the associations, the DOC may conduct a telephone survey of a random sample of individual producers.[97] This is done in order to determine the relative membership in the polled associations.[98] The calculation of individual producer support is then reduced by the percentage of polled individuals that claim some type of association representation.[99] This adjustment is necessary since members cannot be counted once as an individual in support of the petition and then again as a member of an association which supports the position.[100]

Even where the statutorily mandated majority of producers have not signed the petition, the DOC has indicated that lack of a majority itself does not indicate that other members of the industry do not support the

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90. *Id.*

91. 19 U.S.C. § 1673a(c)(4)(D)(ii).

92. Stewart et al., *supra* note 5, at 520-21. The definition of "production" as the sale of live cattle over a one year period would result in total production being exaggerated by recounting the same cattle more than one time. *Id.*

93. *Id.*

94. *Id.*

95. Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico, 63 Fed. Reg. 71,886 (Dec. 30, 1998) (stating that concerning associations, the DOC could effectively canvass the country and ascertain a reasonable measure of industry opinions with respect to the petitions).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* (finding a reduction by fifty-four percent, the number of individual cattle producers who had signed petitions as a result of the telephone poll of individual producers, indicating that fifty-four percent of those producers were represented by some type of industry association).

100. *Id.*

petition.[101] The mere filing of the petition by an industry association is some indication of support for the petition, since it is unlikely that an association would take action without the support of its membership.[102] A majority of an association's membership could therefore account for a major share of the individual producers within an industry.[103] Industry support based on association membership will probably only succeed where there is very little, if any, domestic opposition to the petition.[104]

Domestic opposition to an antidumping petition is not always fatal, however, since the domestic fraction of the industry that may be benefiting from the dumping may be excluded from the total industry numbers used to determine support for the petition.[105] When some producers are involved with the exporters or importers or are themselves importers of the allegedly subsidized or imported merchandise, the term "industry" may be applied in appropriate circumstances so as to exclude such producers from those included in the industry.[106] However, the exclusion of certain producers may be subject to limitations, such as excluding only those producers whose total imported volume of the product, in relation to total production, exceeds certain levels.[107]

Finally, even if a petitioner cannot show that a petition is actively supported by a majority of the domestic industry, the DOC has wide authority regarding whether to dismiss the action.[108] It is not, either statutorily or by its own administrative rules, required to dismiss the action.[109]

Once initiation and standing have been satisfied, the petitioner must allege and provide evidence of unfair trade practices by the importing country or countries, or it must allege that the domestic industry is being materially injured by the foreign imports.[110] Even when there appears to

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101. Florex v. United States, 705 F. Supp. 582, 587 (Ct. Int'l Trade 1989) (stating that when only 92 members of a 260-member organization signed the petition, that was sufficient to show industry support when there was no indication that any faction of the domestic industry did not support the petition).

102. *Id.* at 587-88.

103. *Id.* at 588.

104. *Id.*

105. 19 U.S.C. § 1677(4)(B) (1994).

106. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1085 (Ct. Int'l Trade 1988). Some domestic processors who imported more than fifty percent of their total production from Brazil were too closely related to the importing country's industry, thereby benefiting from lower priced goods. *Id.* As a result, those processors were subsequently excluded from the industry support calculations. *Id.*

107. *Id.* Producers who imported less than fifty percent of their total production from Brazil were not excluded from the calculations of industry support. *Id.*

108. *Id.* at 1085.

109. *Id.* *Citrosuco* affirms that, in some instances, it would be onerous to preclude relief to affected industries under the antidumping and countervailing laws by requiring the petitioners to affirmatively establish that they have the support of the majority of the industry. *Id.*

110. 19 U.S.C. § 1673a(c) (1994).

be no substantiated evidence of subsidies by the importing country, the investigation may still proceed if material injury to the domestic industry can be shown.[111] Relevant information garnered from the U.S. Department of Agriculture or another government agency in support of injury allegations, may be all that is required to support moving the investigation to the next stage.[112]

In any event, relevant evidence that clearly shows that the importing country is providing subsidization that is directly benefiting the importer of the like product is required in order to prove that the subsidization is unfair.[113] That evidence most commonly takes the form of sales of a product by the importing country at less than the cost of its production.[114] This indicates that the goods are being dumped into the domestic market due to subsidization.[115] Sufficient findings of standing and injury, or unfair subsidization by the DOC, will allow the matter to proceed to the second stage, in which the ITC will make its initial injury determination.[116]

B. PRELIMINARY INJURY DETERMINATION BY THE ITC

The ITC has forty-five days from the date of the filing of the petition to decide "whether there is a reasonable indication" that a domestic industry is being injured or threatened with injury by the imported products.[117] For purposes of antidumping and countervailing duty investigations by the ITC, "industry" is defined as domestic producers of a like product.[118] A separate "like product" analysis is required since the ITC makes its determinations based on the unique combination of economic variables as a whole within the industry, as compared to the individualized determinations made by the DOC.[119] In

111. Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed. Reg. 71,889, 71,890-91 (Dec. 30, 1998).

112. *Id.*

113. *See generally id.* When subsidized government loans were made to agricultural producers as a whole in the importing country, the DOC failed to find unfair subsidization since the producers of cattle were not the predominant users benefiting from the subsidy, and the province where the subsidization occurred only accounted for seven percent of the cattle produced in Canada. *Id.*

114. Initiation of Antidumping Duty Investigation: Fresh Atlantic Salmon from Chile, 62 Fed. Reg. 37,027, 37,029 (July 10, 1997). The cost of production was based on a commissioned report by the Alaska Department of Commerce and Economic Development as well as from financial statements from two of the foreign producers. *Id.*

115. *Id.*

116. American Lamb Co. v. United States, 785 F.2d 994, 998 (Fed. Cir. 1986).

117. *Id.*

118. 19 U.S.C. § 1677(4) (1994).

119. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1087 (Ct. Int'l Trade 1988). Particular circumstances in prior investigations are not dispositive of the ITC in its later investigations. *Id.* The ITC's determinations are based on an independent evaluation of the factors considering the unique economic factors involved in each situation in relation to the industry as a whole. *Id.*

determining material injury to the domestic industry, the ITC must first engage in its own "like product" analysis and then make a determination as to what entities make up the domestic industry.[120] Only when these two factors have been determined can the ITC make its preliminary determination as to the threat of material injury and/or actual material injury.[121]

1. *The ITC's Like Product Analysis*

While the ITC must accept the DOC's like product determination regarding the sale of imported goods at less than fair market value, only the ITC determines which domestic product or products are most like the imported article defined by the DOC.[122] Like products are those products that are like, or in the absence of like, most similar in characteristics and uses to the imported article, that is the subject of the investigation.[123]

> The requirement that a [like] product be "like" the imported article should not be interpreted in such a narrow fashion as to permit minor differences in physical characteristics or uses to lead to . . . conclusion[s] that the product and article are not "like" each other, nor should the definition of "like product" be interpreted in such a fashion to prevent consideration of an industry adversely affected by the imports under [the] investigation.[124]

In analyzing "like" product in the domestic industry, the ITC considers six factors, including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) customer and producer perceptions; (5) common manufacturing facilities and production employees; and, when appropriate, (6) price.[125] The ITC determinations are made with consideration of the particular facts at issue in a case-by-case basis.[126] Thus, determinations as to what are, and what are not, like products can vary greatly, with no clear definition of what constitutes a like product.[127]

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120. *Id.* (developing a four-step inquiry for determining material injury).

121. *Id.*

122. Algoma Steel Corp. v. United States, 688 F. Supp. 639, 644 (Ct. Int'l Trade 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989). While the DOC makes like product determinations based on the similarity of the domestic product to the imported product for the industry as a whole, the ITC conducts its own like product analysis in order to determine which products individually are most like the imported product. *Id.*

123. 19 U.S.C. § 1677(10).

124. S. REP. NO. 96-249, at 90-91 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476-77.

125. Calabrian Corp. v. U.S. Int'l Trade Comm'n (USITC), 794 F. Supp. 377, 381 (Ct. Int'l Trade 1992).

126. Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990).

127. *Id.* "[E]very like product determination 'must be [made] on the particular record at issue'

In distinguishing different types of fish, species that were significantly more marketable for human consumption and therefore generally higher in value, were not like products to the imported species at issue; the imported species were of lower grade and not as widely used for the fresh market.[128] Like products were found, however, in suspect imports of tomatoes where tomato concentrates, canned peeled tomatoes, and tomato juice were sufficiently similar in characteristics and uses.[129] Since the tomato products shared a common source and other common characteristics like flavor, aroma, appearance, and texture, they were found to be like products.[130] Further, the ITC found that the uses for the various tomato products were interrelated in that they were all used in a variety of forms with processors generally producing more than one type of product.[131]

In contrast, raspberries that were bulk-packed for retail or institutional use and those used for the fresh-market were found not to be like products, since they had different characteristics and uses.[132] In an investigation of honey products, both raw and processed honey products,[133] were found to be like products.[134] The definition was not expanded, however, to include sweeteners other than honey, even though they could be substituted for honey.[135] The products were not like honey in spite of the fact that they had similar characteristics in degree of sweetness, hygroscopic[136] abilities, viscosity,[137] and emulsion stability.[138] Although consumers readily substituted honey for other

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and the 'unique facts of each case.'" *Id.* (citing Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1169 (Ct. Int'l Trade 1988)).

128. FINAL DETERMINATION OF COMM'N (Investigation No. 701-TA-257), U.S. INT'L TRADE COMM'N (USITC), CERTAIN FRESH ATLANTIC GROUNDFISH FROM CANADA, USITC Pub. 1844, at 345, May 1986, *available at* 1986 ITC LEXIS 1844, at *6.

129. FINAL DETERMINATION OF COMM'N (Investigation No. 104-TAA-23), USITC, CERTAIN TOMATO PRODUCTS FROM GREECE, USITC Pub. 1594, at 5, Oct. 1984, *available at* 1984 ITC LEXIS 163, at *8.

130. *Id.*

131. *Id.*

132. FINAL DETERMINATION OF COMM'N (Investigation No. 731-TA-196), USITC, CERTAIN RED RASPBERRIES FROM CANADA, USITC Pub. 1707, at 3, June 1985, *available at* 1985 ITC LEXIS 167, at *4.

133. PRELIMINARY INVESTIGATION NO. 731-TA-722, USITC, HONEY FROM THE PEOPLE'S REPUBLIC OF CHINA, USITC Pub. 2832, at 10, Nov. 1994, *available at* 1994 ITC LEXIS 778, at *20. Processed honey products included honey containing more than fifty percent natural honey by weight and could include other sweeteners as the balance of the product. *Id.*

134. *Id.* at *24.

135. *Id.* at *22.

136. Hygroscopic is the ability to readily take up and retain moisture; for example, salt is somewhat hygroscopic. WEBSTER'S THIRD NEW INT'L DICTIONARY 1110 (1993).

137. Viscosity is the tendency of a liquid to flow slowly resulting from the friction of its molecules. WEBSTER'S THIRD NEW INT'L DICTIONARY 2557 (1993).

138. An emulsion is a material consisting of a mixture of liquids that do not dissolve into each other and having droplets of one liquid dispersed throughout the other, such as an emulsion of oil and water. WEBSTER'S THIRD NEW INT'L DICTIONARY 745 (1993). *See also* HONEY FROM CHINA, *supra* note 133, at *22.

sweeteners, flavor and price differentiated the products.[139] Price was also an important distinguishing factor to the industrial market, as was the limited industrial substitution possibilities.[140]

When a semi-finished product's final processing renders a final product not easily distinguishable as to which semi-finished product it was produced from, like products will likely be determined.[141] For example, three categories of semi-finished orange juice products were found to be like products even though the categories had different shelf lives, storage methods, concentrations, and purchasers.[142] The commission found that all three categories were eventually consumed as one final like product, namely orange juice.[143]

As can be seen from these examples, there is no clear definition for what constitutes a like product. In fact, individual members of the commission usually do not unanimously agree on what constitutes a like product within a given antidumping determination.[144] A majority of the commissioners must simply make their determination based on conclusions founded on "legally sufficient reasoning."[145] When the ITC's determination is at issue, the soundness of the ITC's legal approach, including the concurring and dissenting views of the commissioners, and the extent to which the legal underpinnings of its determination are accepted by the individual commissioners, will be considered legally sufficient reasoning.[146]

It is important for the domestic industry to draft its antidumping countervailing duty petition in a way that will ensure that the action will encompass what is essentially the same product entering the country in many different forms.[147] Although the like product analysis is far from an exact science, the ITC seems to focus its analysis on the end product that will be consumed by either the public or industry when making its

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139. HONEY FROM CHINA, *supra* note 133, at *22.

140. *Id.* Salad dressing and sauces were the only substitutable alternatives identified by the investigation. *Id.*

141. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1087 (Ct. Int'l Trade 1988).

142. *See generally id.* The industry was made up of single strength orange juice which can be consumed directly; frozen concentrated orange juice used in manufacturing and requiring the addition of up to seven units of water per unit of concentrate; and frozen concentrated orange juice for the retail market, requiring about three units of water to be added to each unit of concentrate before it can be consumed. *Id.*

143. *Id.* at 1087.

144. *Id.* at 1088 (stating that there is no statutory requirement for each of the commissioners to agree on the same like product definition).

145. *Id.* at 1089.

146. BMT Commodity Corp. v. United States, 667 F. Supp. 880, 882 (Ct. Int'l Trade 1987).

147. Stewart et al., *supra* note 5, at 558-59.

determination as to what makes up a like product within the domestic industry.[148]

2. *Determination of the Domestic Industry*

Closely related to the like product analysis is the determination of what constitutes the domestic industry for purposes of determining injury.[149] As described in 19 U.S.C § 1677(4)(E), industry means all the producers of a domestic like product, or the producers whose collective output of the domestic like product constitutes a major proportion of the total domestic production of the product.[150]

When an antidumping investigation involves agriculture, the "processed agricultural product" analysis, is used to further define the industry.[151] In an investigation involving a processed agricultural product from any raw agricultural product, the producers or growers of the raw agricultural product may be considered part of the industry producing the processed product if:

> (I) the processed agricultural product is produced from the raw agricultural product through a single continuous line of production; and
> (II) there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and the processors of the processed agricultural product based upon relevant economic factors, which may, in the discretion of the Commission, include price, added market value, or other economic interrelationships.[152]

The single continuous line of production requirement is satisfied if the raw agricultural product is substantially or completely devoted to the production of the processed agricultural product and the processed agricultural product is produced substantially or completely from the raw product.[153] When price is taken into consideration, the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product will be used in determining the "coincidence of economic interest" in accord with the second part of the statute.[154] When added market value is taken into account, whether the value of the raw agricultural product constitutes a significant

148. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1086 (Ct. Int'l Trade 1988).
149. 19 U.S.C. § 1677(4)(A) (1994).
150. *Id.*
151. *Id.* § 1677(4)(E).
152. *Id.*
153. *Id.* § 1677(4)(E)(ii).
154. *Id.* § 1677(4)(E)(iii).

percentage of the value of the processed agricultural product helps determine the coincidence of economic interest.[155] The ITC uses this two-factor test to determine whether there is merely a conventional buyer to seller relationship, or if there is an inextricably intertwined relationship of economic interests that would support the determination of a single unified industry.[156]

The ITC determined that the producers of round oranges could be included in the same industry as the processors of frozen concentrated orange juice since, "an average 73 percent of all [U.S.] round oranges are processed into some form of juice, that 96 percent of all oranges processed are round oranges, and that 84 percent of all juice oranges . . . are processed into some type of orange juice."[157] Interestingly, in this case, the ITC excluded growers of other types of oranges grown for the fresh market from the industry.[158]

Including some but not all round oranges in an industry of frozen concentrated orange juice may not seem reasonable at first. However, the decision may be easier to understand if one considers the single line of production analysis with regard to the frozen concentrated juice industry.[159] Substantially all of the oranges produced that were not destined for the fresh market entered a single line of production resulting in the end product of frozen concentrated orange juice.[160] Frozen concentrated orange juice was processed primarily from oranges not destined for the fresh market.[161] Therefore, only those oranges used in juicing, and not those destined for the fresh market, could be included in the domestic industry.[162]

Similar reasoning was used by the ITC in determining that other products were essentially a single line of production.[163] For example, in the lamb industry, substantially all of the lamb produced and processed is ultimately consumed by the public as meat products.[164] Growers of red raspberries who also maintained packing facilities were also considered as a single industry along with all other growers and packers of bulk packed raspberries.[165] Growers and packers who produced for the

155. *Id.*
156. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1090 (Ct. Int'l Trade 1988).
157. *Id.*
158. *Id.* at 1091.
159. *Id.* at 1090.
160. *Id.* at 1092.
161. *Id.*
162. *Id.*
163. *See, e.g.*, PRELIMINARY INVESTIGATION NO. 701-TA-80, USITC, LAMB MEAT FROM NEW ZEALAND, USITC Pub. 1191, at 592, Nov. 1981, *available at* 1981 ITC LEXIS 241, at *9.
164. *Id.*
165. RASPBERRIES FROM CANADA, *supra* note 132, at *8.

fresh market or for the retail/institutional market were not part of the domestic industry.[166] Tomato growers were treated similarly; only growers of tomatoes for processing could be included in an industry including tomato concentrates, canned peeled tomatoes, and tomato juice.[167] In a preliminary investigation by the ITC, a single industry was found in the production and manufacture of honey since the producer beekeepers engaged in some level of processing.[168] The producers were found to be involved in part of the production of the finished product by virtue of the fact that they extract honey from the comb and pump it into settling tanks prior to additional filtration and repackaging by subsequent processors.[169]

The swine industry received similar treatment with regard to the single line of production analysis since the producers and packers produced pork as a single end use product.[170] However, producers were excluded from the domestic industry for like product purposes because they lacked the significant economic ties required under the statute.[171] Integration of economic interest was lacking partly because less than five percent of the packing facilities were owned by the growers.[172] The prices that producers received for the live hogs were not linked by a contract to the prices received by the packers for the meat products.[173] The ITC determined that the packers and producers profited at different points in the hog production cycle.[174] Since the packers' profits were earned at the final stage of production, and the producers' profits were earned upon the sale of the goods to the packers, producers were excluded from the industry.[175] Even though there was relatively little value added between the production and processing, vertical integration in the industry was found to be at a minimum.[176] Trading in live hogs was conducted at arms' length, and lower prices for producers translated into higher margins for the processors, which indicated an inverse economic relationship.[177]

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166. *Id.*

167. TOMATO PRODUCTS FROM GREECE, *supra* note 129, at *10-*12.

168. HONEY FROM CHINA, *supra* note 133, at *29.

169. *Id.*

170. PRELIMINARY INVESTIGATION NO. 701-TA-298, USITC, FRESH, CHILLED, OR FROZEN PORK FROM CANADA, USITC Pub. 2158, at 8, Feb. 1989, *available at* 1989 ITC LEXIS 32, at *15.

171. *Id.*

172. *Id.*

173. *Id.*

174. FINAL DETERMINATION OF COMM'N (Investigation No. 701-TA-298), USITC, FRESH, CHILLED, OR FROZEN PORK FROM CANADA, USITC Pub. 2218, at 106, Sept. 1989, *available at* 1989 ITC LEXIS 263, at *10.

175. *Id.*

176. *Id.*

177. *Id.*

Even where some type of informal economic integration exists, producers are not automatically included in the processing industry.[178] In another case, testimony indicated that at least ninety percent of New England fish was sold through some type of reciprocal agreements in which the processor would agree with one or more producers that he would buy their catch, and they in turn would agree to supply fish to the processor.[179] The ITC determined that although these were agreements to supply and purchase, it was not at a determined price, and the agreements were not widespread.[180] It was further alleged that the price paid to the producers was simply based on the daily demand for the product and not on some type of formal agreement.[181] In finding that the producers and processors should not be included together in the processing industry, the ITC interpreted the law as requiring that the producers and processors function as a single industry, rather than in a supplier/buyer relationship.[182]

Inclusion of producers in the domestic industry was further hampered by the processors' strong opposition to inclusion of the producers in the domestic industry.[183] Processor opposition undermined the producers' claim of significant economic integration, indicating that the producers and packers had differing interests and therefore did not function as a single industry.[184]

Adequate economic integration in the frozen concentrated orange juice industry existed, however, since the vast majority of the sales were non-arms' length cash sales.[185] The growers and processors participated in cooperatives, full and partial participation plans, and intra-company transfers to sell the oranges used in the production of orange juice.[186] A substantial number of the growers shared the risk with the processors through ownership in the cooperatives or by contractual agreements that directly linked the producer's return on his orange production to the processor's return on the juice.[187] Further indications of economic commonality were evidenced by the fact that orange prices and orange juice prices showed similar patterns of increases and decreases over a period of ten years prior to the filing of the petition.[188]

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178. GROUNDFISH FROM CANADA, *supra* note 128, at *9.
179. *Id.* at *9-*10.
180. *Id.*
181. *Id.* at *10 n.17.
182. *Id.*
183. *Id.* at *11.
184. *Id.*
185. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1092 (Ct. Int'l Trade 1988).
186. *Id.*
187. *Id.*
188. *Id.* at 1093.

The orange juice case has one similarity to the Canadian groundfish case, in that there was also processor opposition to including the producers in the industry.[189] This opposition was not important to the determination in the orange juice case, however, because the processors who opposed inclusion of the producers in the definition of the industry were more dependent on the imports than those processors who supported the petition.[190] Because the processors' opposition was primarily designed to secure a supply of cheap imported orange juice, the ITC found those processors did "not adequately reflect the economic interests of all the extractors."[191] The processors' opposition was therefore not given undue emphasis in deciding the issue of the commonality of interests between growers and extractors.[192] In the *Groundfish Determination,* the dependency of the opposing fish processors on the imported goods was not addressed by the ITC, and producers were subsequently excluded.[193]

If there is a single line of production and an interdependent economic relationship, the ITC will usually find a common industry.[194] In fact, the ITC may even find a common industry based on a weak determination of economic commonality if there is an established single line of production, especially with regard to agriculture.[195] Following the ITC's determination that frozen lamb from New Zealand was like the domestic fresh lamb product, the ITC proceeded to determine whether the producers and packers in the domestic industry were integrated.[196] Since the production of lamb meat began with the breeding and raising of mother sheep and ended with the slaughter of lambs and packing of lamb meat, the ITC found the industry to be highly integrated.[197] The definition of a single line of production was satisfied since the industry started with only one raw product (lambs) that yielded only one commercially significant end product (lamb meat).[198] Integration was

189. *Id.*
190. *Id.*
191. *Id.* at 1216.
192. *Id.*
193. GROUNDFISH FROM CANADA, *supra* note 128, at *10-*11.
194. *See generally* Citrosuco Paulista v. United States, 704 F. Supp. 1075 (Ct. Int'l Trade 1988).
195. LAMB MEAT FROM NEW ZEALAND, *supra* note 163, at *7-*8.
196. *Id.* at *8-*9.
197. *Id.* The sole purpose of the industry was to produce, at each step of the process, a uniform end product. *Id.* The stages of breeding sheep and raising the lambs by the producer to the stages when the carcasses were cut and packaged by the end processor were all steps in preparing the product for the consumer market. *Id.*
198. *Id.* This single line of production is distinguishable from some industries in which there is a high degree of substitution of input products, and the end product could be put to more than one end use. *Id.*

established even though only three of the five packers included producers who were involved in the full production process.[199]

Even where there is a single continuous line of production in agricultural situations, producers are occasionally excluded from the definition of the domestic industry because a sufficient common economic interest cannot be shown.[200] When this occurs, a significant part of the domestic industry is precluded from any relief against subsidized imports.[201] In agricultural antidumping determinations, Congress specifically contemplated the inclusion of producers in the definition of the domestic industry.[202] Congress realized that although there may be indications that an industry may be prospering, certain sectors within that industry might not be faring so well.[203]

Recent ITC determinations seem to have deviated away from this line of thinking, however, and producers who cannot show the requisite economic commonality have sometimes been summarily excluded from the domestic industry.[204] The ITC's irregularity with regard to industry definitions provide raw agricultural producers with little certainty as to what segments of the industry will be included in the definition of the domestic industry for investigation purposes.[205]

There is little incentive for a processor or packager of raw agricultural products to seek antidumping relief if those processors are utilizing the imported goods in their production.[206] A producer is therefore left with the options of getting the cooperation of the processors, which is unlikely if those processors are using the imported product due to its

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199. *Id.* (noting that the packers accounted for fifty percent of the domestic production). Involvement in the full production process required initial production, feeding and slaughtering of lambs, and the packing of the lamb meat. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at *14 ("It is clear that Congress recognized the highly interdependent nature of the livestock sector of the economy, and did not intend the statutory definition of the industry to preclude an assessment of material injury to [producers]. . . .").

203. *Id.* at *12. For example, gross sales and employment within a sector of an agricultural industry could be increasing at the same time as, or as a result of, liquidation in another sector due to losses in that sector. *Id.*

204. *See generally id. Compare* PORK FROM CANADA, *supra* note 174, *with* R-CALF v. United States, 74 F. Supp. 2d 1353, 1355-56 (Ct. Int'l Trade 1999) (citing Preliminary Investigation No 701-TA-386, USITC, LIVE CATTLE FROM CANADA AND MEXICO, Feb. 1999 [hereinafter LIVE CATTLE FROM CANADA AND MEXICO]). In determining what segments constituted the domestic cattle industry, the ITC determined that cattle at each stage of development were dedicated to progression to the next stage and would eventually be developed into cattle ready for slaughter, thus resulting in industry integration. *R-CALF*, 74 F. Supp. 2d at 1355-56. This integration was found even though the feeders and finishers are usually not the same entity and are rarely, if ever, the initial producer of the cattle. *Id.* Further, the profitability ratios of the entities along the cycle are inverse to each other. *Id.* This analysis can be contrasted with the ITC's determinations with respect to the swine industry. *See supra* text accompanying notes 170-177.

205. Stewart et al., *supra* note 5, at 565.

206. *Id.*

price favorability, or filing a petition with a limited scope so as to include only the raw domestic product.[207] However, Congress did not intend that the statutory definition of industry should be construed so as to exclude an adversely affected segment of an agricultural industry.[208] The purpose of the preliminary injury determination is to "weed out" those unnecessary and costly investigations that are clearly without merit, cause costly administrative burdens, and act as an impediment to trade.[209]

3. *The Material Injury Determination*

Upon defining like product and what segments make up the domestic industry, the ITC must then determine "whether there is a reasonable indication" that a domestic industry is sustaining material injury, or is threatened with material injury, due to the import dumping alleged in the petition.[210] The "reasonable indication" standard requires that the ITC issue a negative determination and terminate its investigation only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of material injury; and (2) no likelihood exists that contrary evidence will arise in the final investigation.[211] In making its determinations under the reasonable indication standard, the ITC uses the best information available, meaning that all the evidence both supporting and not supporting the petition should be evaluated.[212]

In determining actual material injury to the domestic industry, several factors can be considered.[213] A decline in the acres under production, as well as a decline in the total production of the raw agricultural product over a period of time, can indicate material injury.[214] A decline in gross revenue as well as net income margins for producers and processors may also be a factor.[215] Fewer workers involved in the processing of the raw agricultural product and fewer hours worked, as well as a drop in production of the finished product, can provide a helpful indication of injury.[216]

Activities in the country of origin of the imported product can also provide evidence of material injury.[217] For example, in the orange juice industry the importing country increased its production of oranges over

207. *Id.*
208. S. REP. No. 96-249, at 88 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 474.
209. American Lamb Co. v. United States, 785 F.2d 994, 1002 (Fed. Cir. 1986).
210. *Id.* at 998.
211. *Id.* at 1001.
212. *Id.*
213. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1102 (Ct. Int'l Trade 1988).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

the course of the investigation from 195 million boxes to 329 million boxes of oranges.[218] Prices for oranges in the importing country also led domestic price trends both upward and downward, and the only year that domestic producers saw an increase in financial operating results was the same year that imports declined.[219] These factors together persuaded the ITC to find that the domestic frozen concentrated orange juice industry was materially injured by the foreign imports.[220]

Negative injury determinations, although somewhat rare in agricultural dumping petitions, may be found where the volume and market share of the imports were so small over the course of the investigation so as to provide no significant effect on domestic prices.[221] For example, volumes and market share of imported Mexican cattle were at historically low levels and were declining.[222] At the same time, prices received by domestic producers of stocker and feeder cattle had increased for three years prior to the filing of the petition.[223] Weak prices in the domestic industry were attributed to the domestic industry's cyclical liquidation phase, and not the small and decreasing Mexican imports.[224] This appears to be a more rigid standard than previously adhered to by the ITC, however, since narrow market shares have in the past been adequate to find an affirmative preliminary determination of injury.[225]

Distorted volumes may also be perceived when the period of investigation is restricted to certain dates.[226] Imports from Mexico in 1995 were unusually high, amounting to 4.4% of the domestic consumption, due to the devaluation of the peso and severe drought in Mexico.[227] Since the investigation period started in 1995, the period started with an unusually high import volume that was reflected a year later as a decline when the economic and environmental situation changed in Mexico.[228] It is easy to see why the ITC perceived that imports were declining since the time frame did not account for extrinsic evidence of import

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218. *Id.*

219. *Id.* at 1102-03.

220. *Id.* at 1103.

221. R-CALF v. United States, 74 F. Supp. 2d 1353, 1358 (Ct. Int'l Trade 1999).

222. *Id.*

223. *Id.* (citing LIVE CATTLE FROM CANADA AND MEXICO at 23 (stating imports declined 50% from 4.4% of domestic production in 1995, to 1.8% in 1997, with a small increase in 1998 to 1.5%)).

224. *Id.*

225. *See, e.g.*, FINAL DETERMINATION OF COMM'N (Investigation No. 701-TA-155), USITC, CERTAIN CARBON STEEL PRODUCTS FROM SPAIN, USITC Pub. 1331, Dec. 1982, *available at* 1982 ITC LEXIS 196, at *26 (finding market shares for four different types of imported steel ranging from a low of 0.1% to 0.5% to a high of 1.5% to 4.5%).

226. Stewart et al., *supra* note 5, at 576.

227. *Id.*

228. *Id.* Had the investigation been started a year earlier in 1994, the import totals for 1995 would have been seen as an increase, because that year's import volumes were substantially less. *Id.*

performance.[229] Had the ITC started its investigation in 1996 the determination would have revealed a forty-eight percent increase from 1996 to 1997, and a five percent increase from 1997 to 1998.[230] An arbitrary selection of investigation periods can make or break an antidumping petition since a negative finding will terminate the investigation and will also preclude further relief for the industry pending another filing.[231]

The ITC is not bound by prior decisions regarding its previous investigations.[232] For example, the ITC chose to terminate its investigation into imported Mexican feeder cattle in spite of the fact that it had concluded in an earlier investigation that Mexican feeder cattle had contributed to domestic price declines.[233]

Petitioners should also be aware that lower domestic prices might not always be found to be indicative of dumping by an importing country.[234] The ITC has found that even the mere presence of an offer to sell imported goods into the domestic market at certain price levels, without making actual sales, can have an impact on domestic prices.[235]

The Mexican cattle investigation was part of a broader investigation which also included cattle imported from Canada.[236] These investigations were determined separately, however, since the ITC decided not to cumulate[237] the imports from these two countries in making its preliminary injury determination.[238] In its preliminary injury determinations, the ITC "shall cumulatively assess the volume and effect of imports of the subject merchandise from all countries . . . if such imports compete with each other and with domestic like products in the [U.S.] market."[239] When determining material injury, cumulation of imports from importing countries cannot be considered where there has been (1)

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229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. R-CALF v. United States, 74 F. Supp. 2d 1353, 1358 (Ct. Int'l Trade 1999) (citing LIVE CATTLE FROM CANADA AND MEXICO at 2-16). The ITC's investigations are made on a case-by-case basis, and unless situations are significantly similar, different conclusions are permitted. *Id.* at 1357.

234. *See, e.g.*, FINAL DETERMINATION OF COMM'N (Investigation No. 731-TA-326), USITC, FROZEN CONCENTRATED ORANGE JUICE FROM BRAZIL, USITC Pub. 1970, at 183, Apr. 1987, *available at* 1987 ITC LEXIS 235, at *67.

235. *Id.* When Brazil had a domestic surplus of frozen concentrated orange juice, and it made offers to liquidate that product at less than fair value, and the U.S. market price reacted negatively even though there were no other sales at that given time. *Id.*

236. *R-CALF*, 74 F. Supp. 2d at 1358.

237. To cumulate is to combine, to enlarge by successive additions. WEBSTER'S THIRD NEW INT'L DICTIONARY 553 (1993). In antidumping investigations, cumulation is the combining of all countries that import a like product in order to determine material injury. *R-CALF*, 74 F. Supp. 2d at 1369.

238. *R-CALF*, 74 F. Supp. 2d at 1358.

239. 19 U.S.C. § 1677(7)(G) (1994).

a negative preliminary injury determination with respect to imports from that importing country; (2) a termination of an antidumping petition against that country; (3) certain unilateral agreements beyond the scope of this Note, and; (4) an agreement with the United States establishing a free trade area, unless the ITC determines that a domestic industry is materially injured or threatened with material injury from imports of that country.[240] Cumulation was mandated "to eliminate inconsistencies in [ITC] practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries."[241]

For imports to be cumulated, they must compete with one another and with the domestic product at the time of importation.[242] In order to determine whether the subject imports compete with each other, and thus find that there is cumulation, the ITC considers four factors: (1) the degree of fungibility[243] between the products; (2) the presence of sales or offers to sell in the same geographic markets; (3) the existence of common or similar channels of distribution; and (4) the simultaneous presence of imports in the market.[244]

In the cattle investigations, fungibility was not satisfied since the cattle from Canada and Mexico were poor substitutes for one another.[245] Almost ninety-five percent of the Canadian cattle weighed more than 700 pounds and were made up mostly of fed cattle ready for immediate slaughter.[246] Of the Mexican cattle, ninety-six percent were between 198 and 704 pounds and were at the yearling or stocker[247] stages of development.[248] The ITC found that the two weight classifications of cattle were poor substitutes for each other as they entered the country at different stages of development.[249]

Additionally, the Canadian cattle tended to be British breeds that produced a higher priced prime and choice quality graded meat.[250] In contrast, the Mexican cattle were mostly Brahman or Brahman-crosses,

240. *Id.*

241. *Report Together With Dissenting and Additional Views, Trade Remedies Reform Act of 1984, Before the House Comm. on Ways and Means*, 98th Cong. 37 (1984) (statement of Rep. Rostenkowski, Member House Comm. on Ways and Means).

242. *R-CALF*, 74 F. Supp. 2d at 1370.

243. Fungible is defined as being regarded as commercially interchangeable with other property of the same kind; corn and wheat are fungible whereas land is not. BLACK'S LAW DICTIONARY 684 (7th ed. 1999). Fungible goods are goods that are interchangeable with one another; goods that by nature or trade usage are the equivalent of any other unit. *Id.* at 702.

244. Wieland Werke, AG v. United States, 718 F. Supp. 50, 52 (Ct. Int'l Trade 1989).

245. *R-CALF*, 74 F. Supp. 2d at 1357.

246. *Id.*

247. *Id.* Yearling or stocker stages of development for live cattle include cattle that have not been fed to slaughter weight and are therefore not yet suited for the processing market. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

and those breeds produced lower grade meat.[251] Even though imports may be perceived to have different qualities, the ITC could still cumulate the imports if it found that the end purchasers asserted that there was no difference in the quality of the goods.[252] Cumulation could not have occurred in the cattle case, however, since the final purchasers, the packers and processors, were benefiting from the lower priced imports.[253] As a result of this benefit, they would likely have vigorously indicated that the different breeds produced different final products, thus preventing cumulation of the imports.[254]

Besides fungibility, the second factor the ITC must consider when determining if the subject imports compete with each other is geographic overlap.[255] Geographic overlap occurs when imported goods compete with each other in regional markets within the domestic industry.[256] If the majority of imports from one country enter and compete in a different region of the country than the imports of another competing country, overlap will not exist.[257]

The third factor, channels of distribution, is met if substantially all of the subject imported goods from the different countries are used for primarily the same purpose.[258] For example, in the imported cattle investigation, Mexican cattle were sold to stockers and feeders, while the Canadian cattle went directly to the slaughter facilities or packing houses.[259] The different destinations for the imported products precluded a finding of similar channels of distribution.[260]

The fourth factor, simultaneous presence in the market, is satisfied when all the suspect imports are present in the domestic industry at the same time during the period of investigation.[261] In the cattle case, both the Mexican and Canadian cattle were being imported into the United

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251. *Id.*

252. Wieland Werke, AG v. United States, 718 F. Supp. 50, 54 (Ct. Int'l Trade 1989). Some domestic purchasers of brass perceived some brass to be of a higher quality, and the driving force appeared to be pricing in the marketplace over quality as the most influential factor in purchases; subsequently the ITC could cumulate the imports. *Id.*

253. R-CALF v. United States, 74 F. Supp. 2d 1353, 1357 (Ct. Int'l Trade 1999).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* at 1372. Because the Mexican cattle were found primarily in the processing facilities in the southern United States, and the Canadian cattle were used mostly in the northern areas, geographic overlap was determined to be insignificant. *Id.* This was in light of the fact that some Mexican cattle were found in processing facilities in Idaho, indicating that Mexican cattle were present near the United States-Canada border. *Id.*

258. *Id.* at 1373.

259. *Id.* at 1372.

260. *Id.* at 1373, n.19.

261. *Id.*

States at the same time during the period of investigation.[262] None of the four factors considered alone is determinative in analyzing the outcome for cumulation, nor is the four-factor test all inclusive.[263] The four-factor test is used by the ITC as a framework to determine whether the subject imports from other countries compete with each other.[264]

Not a part of the four-factor test, but part of the cumulation analysis nonetheless, is the cumulation of finished and unfinished imported products in the domestic industry.[265] The ITC has shown its willingness to cumulate these two categories of imported products in past determinations.[266] In the cattle investigation, the cattle ready for slaughter were not cumulated with those destined for domestic feedlots and sale in the domestic market as domestic product.[267] The ITC stated that the transformation of feeder cattle to slaughter cattle required a year to complete and added as much as two-thirds to the size and weight to the cattle.[268] As a result, the unfinished product underwent a "substantial transformation."[269] This "substantial transformation" analysis distinguished the cattle investigation from prior cumulation determinations by the ITC.[270]

4. *The Threat of Material Injury Determination*

Material injury, discussed previously, and threat of material injury, discussed in this section, are the thrust of the preliminary injury determinations since a negative determination regarding them will result in termination of the investigation.[271] The threat of material injury to a domestic industry, as determined by the ITC, consists of, among other relevant factors, nine general provisions as provided by statute.[272] While

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262. *Id.*

263. Goss Graphics Sys. v. United States, 33 F. Supp. 2d 1082, 1086 (Ct. Int'l Trade 1998).

264. *Id.*

265. R-CALF v. United States, 74 F. Supp. 2d 1353, 1373-74 (Ct. Int'l Trade 1999).

266. PRELIMINARY INVESTIGATION NOS. 731-TA-520 AND 521, USITC, CERTAIN BUTT-WELDED PIPE FITTINGS FROM CHINA AND THAILAND, USITC Pub. 2401, at 17-18 (July 1991), *available at* 1991 ITC LEXIS 2401, at *34-*36 (cumulating finished and unfinished pipe fittings even though the unfinished fittings were finished by the domestic industry and sold as a domestic product).

267. *R-CALF*, 74 F. Supp. 2d at 1375.

268. *Id.*

269. *Id.*

270. *Id.*

271. American Lamb Co. v. United States, 785 F.2d 994, 996 (Fed. Cir. 1986).

272. 19 U.S.C. §1677(7)(F)(i) (1994). The statute states the ITC should consider:

> (I) the nature of [a countervailable] subsidy,
> (II) any existing unused production capacity or imminent, substantial increase in production capacity . . . indicating the likelihood of substantially increased imports . . . taking into account the availability of other export markets to absorb . . . additional exports,
> (III) a significant rate of increase of . . . volume or market penetration of . . . the subject [imports] indicating the likelihood of substantially increased imports,

each factor is important, the ITC is not required to discuss each and every factor in its determination.[273] The most frequently used of the nine factors are discussed below.

Increased production, without markets other than the domestic market being imported into, constitutes one of the primary factors when determining threatened material injury.[274] Increased orange tree planting in the importing country, coupled with an insignificant increase in exports to countries other than the United States, was found to constitute a threat of injury considering the large amount of orange juice shipped to the United States.[275] Market penetration of the imported goods was observed when domestic orange production declined, while imports increased substantially and did not decline in response to increased domestic production.[276]

Another factor, price depression, is satisfied when the import price is lower than the domestic price over the course of the investigation, and sharp drops in domestic processed and raw product prices correspond with increased import volumes.[277] Increasing inventories in the importing country can also signal a threat of material injury if inventories in the importing country are greater than in the United States, especially when those inventories can easily be shipped into the country.[278] Further, products that do not even meet U.S. standards for importation can be considered in a threat of injury determination if those "below standard" products can be blended with higher quality goods in order to

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(IV) whether [the] imports . . . are entering at prices . . . likely to [depress] domestic prices, and . . . likely to increase demand for further imports,
(V) inventories of the subject [goods],
(VI) the potential for product-shifting . . . in the [importing] country, which can be used to produce the subject [goods but] are currently being used to produce other [goods],
(VII) in any investigation under this title which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the [ITC] under section . . . 1671d(b)(1) or 1673d(b)(1) [of this title] with respect to either the raw agricultural product or the processed agricultural product (but not both),
(VIII) the actual and potential [adverse] effects on existing development and production efforts [within] the domestic industry,
(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury [due to the] imports.

Id.

273. Asociacion Colombiana de Expertadores de Flores v. United States, 704 F. Supp. 1068, 1073 (Ct. Int'l Trade 1988).

274. 19 U.S.C. § 1677(7)(F)(i)(II).

275. Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1095 (Ct. Int'l Trade 1988). The ITC found that the increased imports to countries other than the United States were only recent exports and did not evidence a long term trend. *Id.* at 1096.

276. *Id.* at 1097.

277. *See id.* at 1098 (finding Brazilian frozen concentrated orange juice prices were partly responsible for the decrease in domestic prices).

278. *Id.* at 1099.

bring them up to acceptable standards for importation.[279] Volume decreases of the imported goods in the domestic market have a contrary effect on ITC determinations of material injury, as do lower inventories of goods in the importing country.[280]

5. *Likelihood of Contrary Evidence Determination*

The ITC's last consideration in its preliminary determination is whether there is a likelihood that contrary evidence to its findings will surface in the final investigation.[281] "The [ITC] is not required to determine whether there is a reasonable indication *additional* information may be collected."[282] If the negative determination is based on the weight of the evidence in the record, and "upon comprehensive and complete information using [the best available evidence, then] there [is] a rational basis for the . . . conclusion that no likelihood exists that contrary evidence will arise in [the] final investigation."[283]

Securing a favorable determination by the ITC requires establishing a solid case in the initial petition.[284] The case must be backed up with solid evidence of ascertainable levels of below market sales of the imported goods.[285] The ITC's past determination analysis, showing deference to the petitioner in antidumping cases, appears to be more stringent in the recent past.[286] The petitioner is required to show actual material injury caused by importation of the product and not merely cyclical downturns or other extrinsic factors not directly related to the imported product.[287]

C. THE DOC'S PRELIMINARY AND FINAL DETERMINATION OF SALES AT LESS THAN FAIR VALUE

When the ITC makes an affirmative determination of a reasonable indication of material injury, the DOC, within 160 days of the petition filing date, preliminarily determines whether the subject goods are being sold, or are likely to be sold, at less than fair market value.[288]

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279. *Id.* at 1100.
280. R-CALF v. United States, 74 F. Supp. 2d 1353, 1380 (Ct. Int'l Trade 1999).
281. American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986).
282. *R-CALF*, 74 F. Supp. 2d at 1381.
283. *Id.*
284. Stewart et al., *supra* note 5, at 575.
285. *Id.*
286. *Id.*
287. *Id.* at 576.
288. American Lamb Co. v. United States, 785 F.2d 994, 996 (Fed. Cir. 1986).

1. *Determination of Foreign Subsidization*

Government subsidies to importing industries can result in sales of those goods into the United States at less than fair value, making those foreign subsidies countervailable[289] upon importation of the product from foreign countries.[290] The definition of a countervailable subsidy is broad.[291] It can be any subsidy, provided by a government, that provides a financial contribution or provides any form of income or price support to that government's producers.[292] A countervailable subsidy can be a payment to a funding mechanism to provide a financial contribution to a person or entity in another country whose products are imported into the United States.[293] The subsidy must be specific in that it must be either: (1) an export subsidy, (2) an import substitution subsidy, or (3) a specific domestic subsidy as a matter of law or fact.[294] Any subsidies that are "de minimis" will be disregarded.[295] The subsidies are de minimis if the combined countervailable subsidies are less than one percent "ad valorem."[296]

The DOC rejected a Canadian subsidization program where individual producers deposited funds into an account whereby those funds were matched, dollar for dollar, by the government.[297] The program was available to producers of various commodities, and it was available nationwide.[298] Because cattle producers were not specifically targeted or disproportionate users of the program, the DOC rejected the program as a countervailable subsidy.[299] Conversely, however, countervailable duties can be found when the sole beneficiaries are not the producers

289. BLACK'S LAW DICTIONARY 354-55 (7th ed. 1999). A countervailable subsidy is a foreign government's subsidy on the manufacture of goods exported into another country, giving rise to the importing country's entitlement to impose a countervailing duty on the goods if their import caused, or threatens to cause, material injury to the domestic industry. *Id.*

290. Stewart et al., *supra* note 5, at 527.

291. *See generally*, 19 U.S.C. § 1677(5) (1994).

292. *Id.*

293. *Id.*

294. 19 U.S.C. § 1677(5)(A). The statute defines an export subsidy as a subsidy that is, in law or in fact, contingent on export performance, alone, or as one of two or more conditions. *Id.* An import substitution subsidy is a subsidy that is contingent on the use of domestic goods over imported goods, alone or as one of two or more conditions. *Id.*

295. 19 U.S.C. § 1671b(b)(4)(A) (1994).

296. *Id.* "Ad valorem" is the percent of subsidy in the importing country in relation to the total sales of the subject product sold in that country. Stewart et al., *supra* note 5, at 529 (citing COMMERCE, COUNTERVAILING DUTY INVESTIGATION OF LIVE CATTLE FROM CANADA, CALCULATIONS FOR FINAL DETERMINATION, Public, at part 3 (Oct. 1999)).

297. Live Cattle from Canada, 64 Fed. Reg. 57,040, 57,054 (Oct. 22, 1999).

298. *Id.*

299. *Id.*

themselves, but are businesses operated in a region targeted for economic stimulation subsidies.[300]

The DOC must also consider the importing industry's use of government loans to determine whether they are issued on terms that are inconsistent with accepted commercial loan transactions and thereby subsidized.[301] If the entity receiving the benefit of the government loan is determined to be "uncreditworthy,"[302] the DOC is directed to raise the interest rate it uses to reflect the additional risk.[303] In agricultural determinations, proving that foreign producers are not creditworthy can be difficult.[304] Since the importing industry is usually made up of thousands of producers, evaluating each and every foreign producer's credit would be impossible.[305]

The DOC stated that alternative information could be provided to show that the industry in general could not obtain long term financing from commercial sources, thereby establishing a subsidized loan.[306] The information regarding the general condition of the importing industry's credit unavailability must be based on specific evidence indicating that the current financial situation creating the credit situation will continue into the future.[307] It is not clear what is required of a petitioner in order to prove specific issues of an industry's financial stability, when that industry is made up of thousands of producers and processors.[308]

2. *Calculations of Dumping Margins*

Once the DOC has established what constitutes a subsidy, it is required to calculate the individual dumping margin for each known exporter and producer of the imported merchandise.[309] In situations in which the importing industry is made up of thousands of producers, as is

300. Comeau Seafoods, Ltd. v. United States, 724 F. Supp. 1407, 1413-14 (Ct. Int'l Trade 1989). The DOC found a countervailable subsidy program when, due to difficult economic times, a region of the country was entitled to low interest loans and other government assistance. *Id.* Since the commercial fishing operations were located in the region and benefited from the programs, the DOC found that the program and its subsides were countervailable. *Id.* at 1415. This determination was in light of the fact that the program was available to all businesses in the region and not just to the producers of the imported fish at issue in the investigation. *Id.*

301. 19 U.S.C. § 1677(5)(B) (1994).

302. Stewart et al., *supra* note 5, at 534.

303. Countervailing Duties, 62 Fed. Reg. 8818, 8849-50 (Feb. 16, 1970) (to be codified at 19 C.F.R. pt. 351).

304. *Id.*

305. Initiation of Countervailing Duty Investigation of Live Cattle from Canada, 63 Fed. Reg. 71,889, 71,892 (Dec. 30, 1998).

306. *Id.*

307. *Id.*

308. *Id.*

309. 19 U.S.C. § 1677f-1(c)(1) (1994).

common in agriculture, two methods of sampling the industry are available.[310] The DOC may limit its antidumping investigation to either:

> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administrating authority at the time of selection, or
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.[311]

In complex agricultural determinations, the DOC employs the second method of determining dumping margins using only a handful of the importing country's largest producer-exporters.[312] This method is chosen because the DOC does not have the administrative resources and personnel required to evaluate large fractional industries typical in agriculture.[313] The sample industry's cost of production and sales prices are then determined and compared in order to establish a margin of dumping.[314]

D. THE ITC'S FINAL INJURY DETERMINATION

The final injury determination by the ITC is essentially a reconsideration of the preliminary injury determination discussed above.[315] The factors that are considered in the final determination are the same factors that are used in the preliminary determination with the inclusion of the dumping margin determined by the DOC as an additional factor.[316] In addition to the factors outlined in the preliminary determination finding, the ITC looks for evidence of the importing country significantly underselling the domestic industry.[317] The magnitude of the margin of

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310. *Id.* § 1677f-1(c)(2).

311. *Id.* § 1677f-1(c)(2)(A)-(B).

312. Stewart et al, *supra* note 5, at 552 (citing Dep't of Commerce Memorandum, Selection of Respondents at 3-4 (Feb. 26, 1999) (on file with author)).

313. *Id.*

314. Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada, 64 Fed. Reg. 56,738, 56,745, 56,750 (Oct. 21, 1999). If, for example, the foreign country's cost of production is calculated at $50.00 per unit, and representative sales in the United States of the foreign product are determined to be $35.00 per unit, the margin of dumping will be calculated at $15.00 per unit. *Id.*

315. 19 U.S.C. § 1673d(c)(2) (1994); *see also* Citrosuco Paulista v. United States, 704 F. Supp. 1075, 1075 (Ct. Int'l Trade 1988) (outlining the ITC's final determination findings).

316. Eric P. Salonen, *"One Tomato, Two Tomato . . ." Selection of Trade Remedy Laws in the Florida-Mexico Conflict*, 11 FLA. J. INT'L L. 371, 391 (1997).

317. FINAL DETERMINATION OF COMM'N (Investigation Nos. 731-TA-736 & 737), USITC, LARGE NEWSPAPER PRINTNG PRESSES AND COMPONENTS THEREOF, WHETHER ASSEMBLED OR UNASSEMBLED, FROM GERMANY AND JAPAN, USITC Pub. 2988, at 15 (Aug. 1996), *available at* 1996 ITC LEXIS 536, at *30. An unusually important factor in making an affirmative injury determination was the disproportionately large dumping margin, which had a more influential role on the outcome of the

dumping,[318] as well as the evaluation of the statutory factors and other relevant factors within the "context of the business cycle and conditions of competition . . . distinctive to the affected industry" are evaluated to determine injury.[319]

Additionally, unlike the preliminary determination, the ITC may hold hearings at the request of the parties to further evaluate domestic injury.[320] Due to preclusion by the statute, these hearings are not trial-type hearings, subject to the Administrative Procedure Act requirements relating to adjudicatory hearings.[321] If the final injury determination is affirmative as to material injury or threat of material injury, the ITC continues the retroactive suspension of liquidation and the posting of cash deposit, bond, or other security previously ordered by the DOC in its determinations of sales at less than fair market value.[322]

IV. JUDICIAL REVIEW OF ITC AND DOC DETERMINATIONS

Judicial review is available in the Court of International Trade for any negative preliminary determination[323] and for any final determination of either the ITC or the DOC.[324] Decisions by the respective agencies will only be overturned if the determinations are found "to be arbitrary, capricious, an abuse of [administrative] discretion, or otherwise not in accordance with [the] law."[325]

The court will not conclude that the agency's determination is the only one that could have been made, nor will the court impose its own interpretation of the issue in question.[326] The agency's determination is acceptable if its interpretation of the statute is sufficiently reasonable to be accepted by the court.[327] The agencies come before the court with the presumption that their actions are valid and not an abuse of administrative discretion.[328]

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determination than in a typical case. *Id.*

318. FINAL DETERMINATION OF COMM'N (Investigation No. 731-TA-748), USITC, ENGINEERED PROCESS GAS TURBO-COMPRESSOR SYSTEMS FOR JAPAN, USITC Pub. 3042, at 22-23 n.125 (June 1997), *available at* 1997 ITC LEXIS 261, at *52. The final decision to buy by a domestic purchaser greatly depends on the price of the goods and the fact that the magnitude of the dumping margin contributed to the importer's success in obtaining a major sale from a domestic company, therefore having an adverse effect on the domestic industry. *Id.*

319. 19 U.S.C. § 1677(7)(C) (1994).

320. *Id.* § 1677c(a)(1) (1994).

321. *Id.* § 1677c(b).

322. *Id.* § 1673d(c)(4)(A) (1994).

323. *Id.* § 1516a(a)(1) (1994 & Supp. II 1996).

324. *Id.* § 1516a(a)(2).

325. *Id.* § 1516a(b)(1)(A).

326. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

327. Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 39 (1981).

328. 28 U.S.C. § 2639(a)(1) (1994).

The law vests the agencies with broad discretion,[329] entitling their determinations to tremendous deference.[330] Therefore, a plaintiff must accompany any request for a change in agency action with evidence that the agency's actions were not permissible or were not based on sound facts or a sound interpretation of those facts.[331] Without more, the agency's conclusions will be upheld by the courts as based on legally sufficient reasoning.[332]

V. THE IMPACT OF UNFAIR TRADE PRACTICES ON NORTH DAKOTA

What does all this mean for agricultural states like North Dakota, when all of this litigation and administrative review occurs halfway across the country in Washington, D.C.? Not surprisingly, there are local impacts as a result of producer frustration with administrative and judicial review, as well as what is perceived as congressional inattention to, or ineffectiveness in, dealing with the plight of rural agriculture.[333] As early as 1998 local grain producers blockaded the ports of entry at Pembina and Portal, North Dakota, in order to stop Canadian grain trucks from entering the country with foreign grain.[334] Similar demonstrations were held in Montana a year earlier.[335]

Besides direct producer involvement, the North Dakota Wheat Commission (NDWC) has asked the ITC "to survey U.S. hard red spring and durum wheat importers and exporters."[336] The request was made in order "to summarize [the] conditions of wheat trade between the United States and Canada."[337] This is an effort by the NDWC to show a variety of trade distorting practices by the Canadian Wheat Board (CWB).[338] The NDWC contends that unfair practices by the CWB and the Government of Canada have hurt domestic wheat sales as well as U.S. wheat

329. Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983).
330. *Id.*
331. *Id.* at 1581-82.
332. *Id.*
333. *See* Mikkel Pates, *Farmers Protest at Border: Grain Growers Stop Canadian Trucks Again*, THE FORUM, Dec. 7, 1998, at A1.
334. *Id.*
335. *Farmers Block Border Roads to Protest Trade Policy*, MPLS.-ST. PAUL STAR-TRIBUNE, Dec. 7, 1998, at B4.
336. *International Trade Commission Assisting With Investigation*, 18 DAKOTA GOLD, Apr. 2000, at 1.
337. *Id.*
338. *Id.*

sales abroad.[339] The ITC's findings are scheduled to be available by January 22, 2002.[340]

The NDWC, along with other state wheat commissions, is actively pressuring Washington to readdress CUSTA and NAFTA.[341] Those organizations state that CUSTA and NAFTA do not adequately address ongoing trade distorting policies engaged in by Canada.[342] Other, more indirect actions have been taken by both politicians and local producers in order to counter some of the damaging effects of unfair trade practices by other countries.[343] North Dakota Representative Earl Pomeroy and South Dakota Senator Tim Johnson have introduced legislation requiring that cattle be born, raised, and slaughtered in the United States in order to be labeled "Made in the U.S.A."[344] It is hoped that by providing consumers with information designed to clearly distinguish U.S. beef from that of other countries, consumers will choose the U.S. product thereby increasing the domestic market share.[345]

The North Dakota Wheat Commission was established over forty years ago to promote the economic well-being of domestic grain producers.[346] Trade litigation can also cause new producer groups to be formed.[347] The formation of the cattle producer organization R-CALF (Ranchers-Cattlemen Action Legal Fund) was a direct result of trade litigation over the unfair dumping of Canadian cattle into this country.[348] These organizations, and others, continue to work behind the scenes to improve domestic production agriculture in the face of various adversities, not the least of which is unfair trading by foreign countries.[349]

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339. *Id.*

340. *NDWC Requests Deadline Extension in Investigation of Canada*, *available at* www.ndwheat.com/in/news/news_detail.asp?ID=159 (Sept. 27, 2001).

341. *Congressmen Hear About Need for Reform of Canada's Wheat Trading Regime*, 18 DAKOTA GOLD, June 2001, at 1.

342. *Id.*

343. *R-CALF USA Seeks Grassroots Support for Country of Origin Labeling*, 2 THE CATTLEMEN'S NEWSLETTER, Summer 2001, at 5.

344. *Id.*

345. *Id.* at 5, 6.

346. *See* N.D. Wheat Comm'n, *available at* http://ndwheat.com/wc/index.asp (last visited Sept. 12, 2001).

347. R-CALF Says "No New Imports," *supra* note 8.

348. *Id.*

349. *See generally id.*; *see also* R-CALF USA, *available at* http://rcalf.com (last visited Nov. 14, 2001); Mont. Grain Growers Ass'n, *available at* http://mgga.org (last visited Sept. 12, 2001).

VI. CONCLUSION

Agricultural producers, faced with limited resources and an industry that seems to lack unity with regard to many issues, trade being only one, suffer to a disproportionate degree in relation to other industries when pursuing trade litigation.[350] Congress recognized this situation as a potential problem and subsequently enacted legislation designed to provide a more equitable remedy to agriculture.[351] In spite of this congressional intent, some agency opinions rely disproportionately on evidence supporting the agency's or the opposition's position.[352] This is often done without sufficiently addressing the petitioner's point of view or the contradicting evidence, thereby precluding effective relief for agriculture.[353] When that evidence is addressed, it is usually downplayed as being insignificant.[354] This creates a problem for petitioners concerning the predictability of the administration of trade laws.[355]

Congress' intent in passing trade litigation was to protect the domestic industry from unfair trade competition.[356] As a result, agriculture has had special laws enacted on its behalf, because Congress realized the fragmented and fragile nature of that industry.[357] It is difficult to understand how, in light of a more rigid application of trade administration laws and an unpredictability in interpreting those laws, that goal of protection is being met.[358] Producers and trade organizations will need to continue to pressure Congress to enact specific legislation pertaining to agricultural producers in particular, in order to circumvent some of the administrative policies that prevent agriculture from obtaining adequate remedies.[359]

International trade is an important issue in the global economy, although laws providing for the enforcement of unfair trade practices are not well tailored to the agricultural sector.[360] Producers and the associations that represent them, to persevere under the current laws, will need to

350. Stewart et al., *supra* note 5, at 518-24.

351. 19 U.S.C. §1677(4)(E) (1994) (providing procedures and criteria for including producers in the definition of an industry when those producers would have been otherwise excluded under the statute defining the domestic industry).

352. *See generally* R-CALF v. United States, 74 F. Supp. 2d 1353 (Ct. Int'l Trade 1999).

353. *Id.*

354. *Id.*

355. *Id.*

356. Smith, *supra* note 23, at 983.

357. LAMB MEAT FROM NEW ZEALAND, *supra* note 163, at *9-*10.

358. *See* Smith, *supra* note 23, at 998.

359. *See* Stewart et al., *supra* note 5, at 484-85.

360. *Id.* at 453-54.

make sure that the petitions for which they seek relief are based on sound factual evidence.[361]

That evidence must stand up to the many challenges imposed by the opposition, as well as the rigid tests imposed by the respective agencies. All the foregoing, together with agriculture's fractionalized nature and apparent difficulty in developing a uniform consensus regarding the issues, will make future trade relief an uphill and costly battle.

Steven Thuesen

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361. *See generally* R-CALF v. United States, 74 F. Supp. 2d 1353 (Ct. Int'l Trade 1999).