TRADING REMEDIES TO REMEDY TRADE: THE NAFTA EXPERIENCE

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The Leycegui and Cornejo paper presents interesting information which may not be generally known in the agricultural community. My comments aim to summarize some of the findings and raise some questions in light of my experience and biases. The paper covers all sectors in its analysis of trade remedy laws but my remarks are limited to the agricultural sector.

ANTI-DUMPING AND COUNTERVAILING DUTIES

In their description of anti-dumping (AD), countervailing duties (CVD) and safeguard provisions, the authors note the original *intent* of each. The *intent* of AD and CVD laws was to respond to the economic impact of unfair trade practices. Interestingly, according to one of our workshop participants, the first AD law was instituted in 1904 in Canada to offset under-invoicing of imports and had nothing to do with price discrimination and other alleged unfair pricing practices (Kerr, 2001). Similarly, the *intent* of safeguards was to respond to the impact of trade concessions, that is, import surges following the reduction in import duties.

With the possible exception of CVD laws, which intend to respond to the impact of government subsidies, the gap between original intent and current practice for the use of AD and safeguards is now often large. For the most part, the identification of specific unfair trade practices is rarely associated with the use of AD laws. Recent uses of U.S. safeguards—wheat gluten, lamb, steel—have not been associated with specific tariff concessions. Rather, the investigations have been in reaction to import surges, regardless of the cause. I note that one of my favorite cases—a U.S. safe-

[1] Comments in this paper represent the personal views of the author and do not reflect official views of the U.S. Government.

guards investigation into Mexican brooms made from broomcorn—was filed in reaction to tariff concessions granted under NAFTA, but other recent agricultural cases were not.

In the review of the use of trade remedy laws in North America, one is struck with the overwhelming dominance of AD over CVD laws. Why? Are AD laws easier to use? Is the fact that a petitioner does not have to allege or to prove any unfair trade practice, unlike a CVD petition where actionable subsidies must be found, a factor in the higher rate of use? One also notes that the success rate for AD use in NAFTA countries is generally higher than for CVD (although slightly lower in the United States).

The authors note that the NAFTA success rate for all three countries against their NAFTA partners is lower—and in some instances, considerably lower—than the average success rate against all countries. This result raises interesting questions. Are industries or sectors bringing frivolous cases as a means to foster protection when they feel the pinch of competitive imports? Or have the appeal provisions in NAFTA had an effect on national authorities' investigations and findings, as suggested in the paper. If the latter is true, the appeal process may have been effective in reducing the use of trade remedy laws for protectionist purposes.

One suspects the national officials involved in investigations would not agree that they treat a NAFTA investigation differently from a non-NAFTA investigation. In addition, they would get in trouble if they did because the statutes governing the investigation do not provide for different procedures for NAFTA countries. (Different AD procedures are available in the United States for non-market economies, and perhaps in Mexico and Canada as well.)

One can sum up for the three countries all the investigations that involved food and agricultural products—prepared foodstuffs, animal products, vegetables—to get a broad agricultural share of total cases. For the United States, the share is five percent, for Mexico six percent and for Canada nine percent. It would be interesting to explore some measures about whether this share represents "a little or a lot" of cases for agricul-

ture. Should one use agriculture's share of the GDP as a benchmark or agriculture's share of total exports or imports? One question people ask, of course, is whether agricultural products are resorting to the use of trade remedy laws more often now than in the past. Given the recent history of some prominent cases—Mexican tomatoes, U.S. apples, U.S. high fructose corn syrup, Canadian live cattle, U.S. corn, Canadian greenhouse tomatoes, U.S. tomatoes—the intuitive response is yes but one needs an acceptable measure to answer the question.

USE OF TRADE REMEDY LAWS

The authors present a benchmark method to try to answer the question about the intensity with which NAFTA countries use trade remedy laws. However, I question one aspect of the method that "we can expect that the [Mexico's] imports are relatively high for the size of the market." The size of market is not necessarily related to imports. It would also be interesting to see a separate "intensity of use" index or measure for agricultural products.

The data presented in their Figure 1 show that initiations in NAFTA countries fell in the 1994–99 period compared to the 1987–93 period. If one believed in an exchange rate theory of AD/CVD laws—that is, the number of initiations should increase as a country's currency strengthens and imports are encouraged—the United States should have initiated more cases after 1995 than before. That does not seem to be the case. The opposite would hold for Canada and Mexico, so an exchange rate theory works better for them, as the authors mention. Even though the number of initiations fell, what about the total value of the affected trade? Is it relevant to examine the value of trade relative to the number of initiations? A good measure to assess the use of trade remedy laws, before and after the establishment of a free trade area, would help answer many questions.

The discussion about eliminating AD laws in a free trade area and replacing them with competition policy ("the high ground proposal") has much merit, especially since the application of AD laws seems to have less and less to do with the idea of countering unfair trade practices (and cer-

tainly nothing to do with under-invoicing). At least the current U.S. administration, as it has gone forward with a self-initiated safeguards investigation on steel, has linked the trade remedy action with an attempt to address underlying excess capacity problems and potential unfair practices. One does not expect the United States to support such a "high ground" approach any time soon. But agricultural interests in NAFTA countries need to take a hard look at the potential costs and benefits of such an approach if the intensity of use of AD cases is indeed increasing.

As an aside, the United States would, of course, have to retain its right to use AD laws in at least one agricultural sector as long as the Canadian Wheat Board exists because of its alleged unfair trade practices. It is most curious that GATT Article XVII, Annex I, Paragraph 1 allows a state trading enterprise to price discriminate "for commercial reasons," but the dumping provisions subject a private, presumably fully commercial enterprise to a stricter test, that being no selling in third country market below the price in the home market. But we can discuss these issues in the session on the U.S. 301 case.

In the discussion on appeals, one notes that agriculture accounts for a disproportionate share of the appeals relative to the number of initiations, and that there are more reviews of AD than of CVD cases. One wonders how many of the reviews were agricultural AD cases. As many have argued, agriculture and dumping are an especially bad fit because of the nature of agricultural products and trade. Does this NAFTA review process offer any evidence in that regard?

The discussion about the NAFTA negotiations on safeguards highlights one key difference between the WTO and NAFTA; NAFTA requires compensation and the WTO does not (for the first three years of use). The authors state the intent in NAFTA was to minimize the use of safeguards. The compensation language was indeed a major U.S. objective. The U.S. negotiators assumed that Mexico was more likely to resort to safeguards because Mexico was facing greater structural adjustment as a result of higher average tariffs, more non-tariff barriers, and generally less competitive industries relative to the United States. How ironic that the first

country to bring a NAFTA safeguards case was the United States, and of course it was a good one—broomcorn brooms. The compensation provisions allowed Mexico to retaliate on a product that is more familiar to agricultural audiences than brooms—U.S. high fructose corn syrup. But that is a subject for another conference.

CONCLUSION

My experience and analysis confirm that neither safeguards nor AD are useful tools for restoring competitiveness. Neither tool is being used in a manner consistent with the original intent. The economic logic and application of data in AD cases are flawed, as outlined by Dr. Loyns (2003). Certainly recent U.S. experience with our own safeguards is problematic, having lost one NAFTA case and two WTO cases, even after an appeal. Perhaps a better argument can be made for CVD laws, but the authors show that CVD law is used much less often than AD laws.

The authors are to be commended for an informative paper that raises good issues and stimulates many questions, but definitive answers to questions about the use and effects of trade remedy laws require further exploration.

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