Seeley G. Lodwick on ITC Impact Relief: The Canadian Swine/Pork Case

Seeley Lodwick, a former Under Secretary of Agriculture, is one of six authorized commissioners of the United States International Trade Commission (ITC). In this article he provides insights into the choices that U.S. producers must make in seeking protection from imports. The ITC in turn must make choices in responding to those who seek protection.

The comments and observations in this article are Mr. Lodwick's and are not necessarily those of the Commission. Also, they are based on the existing law. Congress is considering changing the trade remedy laws administered by the ITC in ways which could make a difference in the procedures and the criteria by which cases are judged. Obviously any changes Congress makes will affect the agricultural producer's choices in seeking trade remedy relief.

Mr. Lodwick did not participate in the pork case which he discusses because of a possible conflict of interest with his farming activities.

When an American producer of agricultural or manufactured products believes that imports are causing injury, he must choose which, of several trade remedy laws, to utilize in seeking relief. Major trade remedy laws concern: (1) Serious injury to U.S. industries by increasing fairly traded imports, (2) violations of U.S. patents, trademarks or copyrights, (3) interference of agricultural imports on U.S. Department of Agriculture's price support programs, and (4) injury or the threat of injury to U.S. industries by reason of subsidized or dumped imports.

In response, the ITC then faces a series of questions, including defining the product involved, determining exactly who the producers are, and whether or not they are entitled to relief under the trade law whose provisions the producers choose to invoke. The ITC must base its decisions on the criteria established by Congress for that particular law.

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The Swine/Pork Case

In November 1984, the National Pork Producers Council (NPPC), along with some U.S. pork packers, petitioned the ITC. The petition alleged that Canadian swine and pork exports were "subsidized" and were causing U.S. swine producers and pork packers material "injury." In July 1985, the ITC determined (1) that subsidized live swine producers from Canada were materially injuring U.S. swine producers but (2) that subsidized pork imports from Canada were *not* materially injuring U.S. packers. What transpired between November 1984 and July 1985, plus how and why it happened is the subject of this article.

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What Transpired

The Canadian swine/pork case is fairly representative of dumping/subsidy cases. Here's how it went:

May 1984 (prior to the filing of the case): Senate Finance Committee requests the ITC to investigate conditions of competition between the U.S. and Canadian live swine and pork industries.

November 1984: ITC publishes the results of its investigation.

NPPC and some U.S. pork packers file a petition at the ITC and at the Department of Commerce. The petition alleges "injury" to their industry from "subsidized" live swine and pork imports from Canada.

November 1984: Commerce rules initially that (1) NPPC, representing domestic live swine producers, and several domestic packers (who accounted for about 50 percent of the domestic swine slaughter, and who had joined with the NPPC) were domestic interested parties and, therefore, had "standing" to file a petition on behalf of that "industry," and (2) that "subsidies" did exist.

December 1984: ITC makes a preliminary determination of a "reasonable indication of injury" by reason of imports of live swine and fresh, chilled or frozen meat of swine from Canada.

June 17, 1985: Commerce makes a final determination that various Canadian federal and provincial programs "subsidized" Canadian exports to the U.S. at values of Can $0.044 per pound of live swine and Can $0.055 per pound of fresh, chilled or frozen pork.

June 25, 1985: ITC conducts public hearing.

July 1985: ITC completes its final investigation and reports its determination to the Secretary of Commerce. By a 2 to 1 vote, the ITC determines that U.S. swine producers were "injured" because of Canadian live swine imports. Based on this affirmative determination on live swine by ITC, Commerce directs the Customs Service to begin collecting countervailing duties of $0.044/lb on live swine retroactive to April 1985—thus offsetting the Canadian swine production "subsidies."

By a 2 to 1 vote, the ITC also determines that U.S. pork packers were "injured," but *not* by reason of Canadian pork imports. Because the ITC made a negative determination on pork, neither the ITC nor Commerce nor the Customs Service took any further action. However, both the NPPC and the Canadians appealed the determinations.

May 1987: Court of International Trade upholds ITC's ruling on pork.

Termination of Cases

The ITC may terminate cases of this type at the preliminary stage due to a lack of a reasonable indication of "in-

The old and the new. The ITC will soon move from its current location—the third oldest federal building in continuous use—to its new office building in Southeast Washington, DC.

About the ITC

The ITC's six Commissioners are appointed by the President and confirmed by the U.S. Senate for terms of nine years, unless appointed to fill an unexpired term. A Commissioner who has served for more than five years is not eligible for reappointment.

Not more than three Commissioners may be members of the same political party. The Chairman is designated by the President and serves for a two-year term. No Chairman may be of the same political party as his/her predecessor.

The ITC's purposes are:

—To determine whether domestic industries are entitled to relief under U.S. trade remedy laws

—To investigate and report on international trade subjects

—To inform the public about, and to assist small business with, U.S. trade remedy laws.

jury" or Commerce may terminate the case due to a lack of "standing" by the petitioner. During the final stage, Commerce may terminate the case due to a determination of no or de minimis "subsidy" margins or the ITC may find no "injury" or "threat of injury" or find "injury" or "threat of injury" but not "caused" by imports, thus terminating the case. Cases may also be terminated if petitioners withdraw their petition or if exporting countries or companies agree to stop the subsidies before the ITC's final determination.

It Could Have Been Different

The swine and pork subsidy case illustrates many safeguards built into the system and standardized determinations that are utilized. Decisions made by the institutions and choices made by the parties involved during the case affected the final outcome. These include Commerce's determination on "standing" and "subsidy" and the ITC's determination of "like product," "industry," "injury," and the "cause of injury." Parties may affect the case by the type of case chosen, the product selected, the support generated in the industry involved or the early termination of the case by either the petitioner or exporters to the United States. ITC decisions can be appealed to the Court of International Trade (CIT) and CIT rules can then be appealed to the Court of Appeals for the Federal Circuit.

Technical Determination by the ITC

In the Canadian live swine and pork case, the ITC decided there were two "like products" like the imported product: (1) live swine and (2) fresh, chilled and frozen pork and that there were two "industries": (1) live swine producers and (2) pork packers. Once the "like product" and "industry" are defined, then "injury" to the domestic "industry" must be determined.

By a 2 to 1 affirmative vote, the ITC found "injury" in both the live swine and the pork "industries." Injury to the swine "industry" was evidenced by (1) U.S. production of live swine and U.S. swine shipments declined from 1981 to 1982, increased in 1983 and declined again in 1984; and (2) U.S. profits per hog declined significantly from 1982 to 1984 though production numbers held steady.

"Injury" to the pork packing industry was evidenced by (1) the U.S. pork processing industry increased its production capacity from 1982 to 1985 but the existence of excess capacity in the industry resulted in a declining capacity utilization rate, and (2) profits declined from 1982 to 1984 despite increasing productivity and lower labor costs per unit processed.

Canadian imports of live swine were found to be a "cause" of "injury" to U.S. swine producers. Imports of live swine from Canada increased substantially from 1981-1984 and prices of U.S. barrows and gilts dropped from 1982 to 1984. One Commissioner noted that Canadian swine frequently undersold the U.S. product and that declines in U.S. hog prices generally coincided with increases in Canadian swine imports.

However, pork imports from Canada were not found to be a "cause" of "injury" to U.S. pork packers. Although pork imports from Canada increased 80 percent from 1981 to 1984, imports as a percent of U.S. consumption remained relatively low. In addition, U.S. pork prices generally rose with one Commissioner noting that Canadian pork imports frequently oversold U.S. pork.

The swine and pork subsidy case illustrates many safeguards built into the system.

The ITC Commissioners also determined, 2 to 1, that there was no threat to the U.S. pork "industry" by reason of Canadian pork imports. A decline in Canadian swine breeding potential, a low ratio of Canadian imports as a percent of U.S. consumption, a high Canadian consumption ratio, and fluctuating Canadian production figures did not indicate that Canadian pork imports posed a threat to the U.S. pork industry. The dissenting commissioner asserted that Canadian pork exports to the U.S. were likely to increase due to potential Canadian pork processing capacity, declining Canadian demand for pork coupled with constant Canadian swine inventories, the U.S. as the major pork export market for Canadian pork, and the possibility for product shifting with the imposition of a duty on swine.

Importance of Defining Industry

One of the more interesting issues that the ITC had to decide in the pork case was whether both the growers and processors are to be included in the definition of the "industry" producing a further processed product. Two factors were examined. The first was whether there was "a single, continuous line of production" implying that the raw product has one commercially significant end use.

In the case of swine, there is only one commercially significant end use, unprocessed pork—thereby constituting a single, continuous line of production. The second was whether there was evidence of a "commonality of economic interest" between growers and processors which may include financial links and/or interlocking ownership. In the swine/pork case the ITC found there was not the requisite "commonality of economic interest" since most sales of swine are on a cash basis and the prices for swine are not linked by contract to the prices of pork received by the packers. Also, few packers actually own swine producing facilities.

Including producers of raw agricultural commodities within the definition of a domestic processing industry is very important to agricultural dumping/subsidy cases. In the following two cases, ITC's ruling was based on circumstances which were both similar to—and different from—the swine/pork case.

In the case of red raspberries from Canada (1985), the ITC initially determined that both U.S. and Canadian growers produce a manufacturing grade of raspberries specifically for sale in bulk packs to remanufacturers producing jams, juices, and syrups. These raspberries are not sold as higher grade fresh raspberries, nor are they packed as retail or institutional frozen whole raspberries. The singular use of these raspberries constituted a "single, continuous line of production."

In addition the ITC found a "commonality of economic interest" since many of the growers sell their raspberries to packers on a price basis negotiated by growers' associations and packers with some growers bulk packing their own berries.

Consequently, growers and packers were considered one "industry" since both the "single, continuous line of production" and a "common economic interest" factors of the "industry" determination were present. By a 5 to 0 affirmative vote, the ITC found "dumped" Canadian red raspberries to be a "cause" of material "injury" to U.S. red raspberry growers and packers. (One of the affirmative votes was based on a "threat of injury.")

Pork imports from Canada were not found to be a "cause" of "injury" to U.S. pork packers.

In another case involving table wine from Italy and France (1984), the ITC found that 55 percent of the grapes suitable for use as ordinary table wine are so utilized (with the remainder being made into raisins or used for table grapes). The alternative uses for grapes reduced the degree of interdependence between grape growers and wineries. In addition, approximately 70 percent of California grapes were sold on a cash basis. The ITC included only wineries in its determination of "industry," since neither a "single, continuous line of production" or a "commonality of economic interest" with grape growers was found. By a 3 to 0 preliminary vote, the ITC determined that there was no reasonable indication that an "industry" in the U.S. was "injured" or "threatened by injury" by imports of "subsidized" or "dumped" ordinary table wine from Italy or France.

This finding was appealed, but the ITC determination was upheld by the Court of International Trade. Congress subsequently amended the definition of the term, "industry," making an exception so that in the case of wine and grape products the term includes the domestic producers of the principal raw agricultural product (on either a volume or share basis) if those producers allege material "injury" or "threat of material injury" as a result of imports of such wine and grape products.

Even with this redefinition of industry, the ITC in 1985 determined by a 5 to 0 preliminary vote that grape growers and wineries were experiencing material "injury," but not by reason of "subsidized" or "dumped" ordinary table wine imports.