

**DEFINITION OF DOMESTIC INDUSTRY FOR PERISHABLE,
SEASONAL AGRICULTURAL PRODUCTS**

Communication from the United States

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of the United States.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(06)/112), also be circulated as a formal document.

In an earlier submission to the Negotiating Group on Rules, the United States suggested that Members clarify and improve the rules as they pertain to anti-dumping and countervailing duty proceedings concerning perishable and seasonal agricultural products, for the benefit of both domestic producers and exporters involved in such proceedings.¹ Several other Members have also raised the issue of perishable products.²

During the Uruguay Round, Members recognized and addressed the special characteristics of perishable, seasonal agricultural products in certain agreements. For instance, in the special safeguard provisions of Article 5 of the Agreement on Agriculture, Members provided that shorter time periods, and different reference prices for different periods, could be used in the analysis when determining whether to impose safeguard measures on perishable and seasonal products.³ Furthermore, in the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Members agreed to expedited dispute settlement procedures in cases of urgency, including those that concern perishable goods.⁴

¹ See TN/RL/W/72 dated 19 March 2003.

² See, e.g., TN/RL/W/6 dated 26 April 2002, Anti-Dumping Illustrative Major Issues, Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey.

³ Article 5.6 of the Agreement on Agriculture states that "[f]or perishable and seasonal products, the conditions set out above shall be applied in such a manner as to take account of the specific characteristics of such products. In particular, shorter time periods under subparagraph 1(a) and paragraph 4 may be used in reference to the corresponding periods in the base period and different reference prices for different periods may be used under subparagraph 1(b)."

⁴ See Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 4.8 states "[i]n cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel." See also Article 12.8, which states "[i]n order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties

The Anti-Dumping Agreement ("ADA") and the Agreement on Subsidies and Countervailing Measures ("ASCM") currently contain no special provisions concerning perishable, seasonal agricultural products; however, because of their special characteristics, it can be uniquely difficult for the producers of these products to obtain meaningful relief from injurious dumping and/or countervailable subsidization. The difficulty that arises is associated, in particular, with the definition of the domestic industry, as provided in Articles 4 and 16 of the ADA and ASCM, respectively. In this paper, the United States addresses this problem and suggests that the ADA and ASCM be clarified and improved to take into account the special circumstances faced by producers of perishable, seasonal agricultural products, and to allow those authorities to tailor the remedy narrowly to avoid affecting imports that are not competing with an injured domestic industry. The United States reserves the right to raise additional issues that pertain to clarifying and improving the rules for producers of perishable, seasonal agricultural products in the future.

Issue

Because of distinct conditions of competition, producers of perishable, seasonal agricultural products, which have short marketing periods, can face unique challenges in obtaining timely relief from injuriously dumped or subsidized imports.

If an agricultural product is seasonal, producers in different geographical areas within the territory of a single Member may have different marketing seasons for their product. Similarly, the seasonal nature of certain agricultural products can lead to situations in which the marketing season of imports will only partially overlap with overall domestic production; thus, only those domestic producers whose marketing season happens to correspond with the marketing season of the imports will face direct import competition. In such cases, the relevant domestic industry should encompass only those producers that seasonally compete with the imports. However, Articles 4 and 16 of the ADA and ASCM, respectively, contain no provision for authorities to examine only the affected segment of such an industry for purposes of confirming industry support or standing.

This situation is exacerbated by the perishability of certain agricultural products. If such products could be stored more effectively, imports would likely be spread more evenly throughout the year in order to meet customer demand. Similarly, domestic producers would have the ability to refrain from marketing their products until a more advantageous time. The uniquely short shelf-life of perishable products, however, precludes taking such an approach.

The ADA and the ASCM do not expressly provide for investigating authorities to structure their investigations in a way that captures these unique circumstances where a limited universe of domestic producers of perishable, seasonal agricultural products competes with imports during a limited marketing season. The ADA and the ASCM do not specifically authorize authorities to limit the pertinent industry to domestic producers that market their products only during seasons in which they face direct import competition.⁵ By the same token, current rules do not explicitly address

to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months."

⁵ It is the interrelationship between the seasonality and perishability of the agricultural products in question that gives rise to unique problems under the ADA and ASCM. Therefore, this paper relates only to agricultural products that are both seasonal and perishable. To be regarded as "seasonal and perishable," agricultural products must meet the following conditions: (1) the products are fresh or chilled products falling under the following HS2002 tariff codes: 0701, 0702, 0703, 0704, 0705, 0706, 0707, 0708, 0709, 0803, 0804, 0805, 0806, 0807, 0808, 0809, 0810; (2) the products are marketed in raw form for consumption without "further processing" ("further processing" refers to e.g. crushing, juicing, canning, or any other process that transforms the product from its raw form); and (3) the products normally are marketed within eight weeks after harvesting.

whether authorities may limit their analysis to relevant imports during the marketing season in question.

Lacking a specific rule to address the situation, authorities faced with an allegation of dumping or subsidization of a perishable, seasonal agricultural product may have little choice but to investigate all imports of the subject merchandise, including those imports that do not compete in any real commercial sense with the perishable, seasonal products of the domestic producers. Thus, the current agreement is both too narrow and too broad: domestic producers of perishable, seasonal agricultural products find it difficult to obtain a remedy against injurious dumping or subsidization. However, when they are successful, the remedy may include in its coverage imports that are not competing with the perishable, seasonal products of the injured domestic industry.

The Rules Group should deal with the absence of clear rules regarding the unique issues raised by perishable, seasonal agricultural products. Therefore, the United States recommends that the Rules Group clarify the definition of domestic industry in Articles 4 and 16 of the ADA and ASCM, respectively, to account more clearly for the difficulty producers of perishable, seasonal agricultural products have in obtaining relief from injurious dumping and countervailable subsidization.

The suggested improvements may also benefit exporters by permitting an authority to structure any measures ultimately imposed in a manner that will not affect imports of perishable, seasonal agricultural products that do not compete with the perishable, seasonal agricultural products of the injured domestic industry. The United States recommends that the Rules Group clarify that measures may be structured in such a manner.

Recommendation

Like the Agreement on Agriculture and the DSU, the ADA and the ASCM should more clearly recognize and better address the special characteristics of perishable, seasonal agricultural products in order to make the anti-dumping and countervailing duty remedies more accessible to all producers of such products. Specifically, the Rules Group should clarify and improve the definition so administering authorities in appropriate circumstances can define the domestic industry in the context of particular seasonal markets. The Rules Group should also address any changes necessary to ensure that resulting measures may be structured in a way that reflects the seasonal nature of the perishable agricultural product in question.

Proposed Amendments to the ADA and ASCM

[ADA Article 4.1(iii-iv)] [ASCM Article 16.3bis]

- (iii) Investigating authorities may interpret the term "domestic industry" as referring to a seasonal domestic industry if the authorities find that the following circumstances exist:
 - (a) the product under consideration and the like product meet the following criteria:
 - (1) the products are fresh or chilled products falling under the following HS2002 tariff codes: 0701, 0702, 0703, 0704, 0705, 0706, 0707, 0708, 0709, 0803, 0804, 0805, 0806, 0807, 0808, 0809, 0810;
 - (2) the products are marketed in raw form for consumption without "further processing" ("further processing" refers to e.g. crushing, juicing, canning, or any other process that transforms the product from its raw form); and

- (3) the products normally are marketed within a discrete season ("the marketing season") that concludes no later than eight weeks after the end of the period in which the crops are harvested; and
- (b) a major proportion of all sales of the like product during the marketing season are made by producers that sell all or almost all of their production of the like product during that marketing season.
- (iv) When the investigating authorities find that the circumstances specified in paragraph (iii) exist, the seasonal domestic industry shall consist of those domestic producers that sell the perishable agricultural product during the marketing season.
 - (a) When the investigating authorities determine that a seasonal domestic industry exists, the authorities may limit the period of investigation for determining [dumping][countervailable subsidization] to a period corresponding to the relevant marketing season.
 - (b) When the investigating authorities determine that a seasonal domestic industry exists, the authorities may make an affirmative injury determination only if the authorities find that the [dumped][subsidized] imports are causing injury to the seasonal domestic industry.
 - (c) When the investigating authorities have found that [dumped][subsidized] imports injure a seasonal domestic industry, the importing Member shall levy [anti-dumping][countervailing] duties only on products imported during marketing seasons corresponding to the marketing season identified in the investigation.

[Note: Reference to new Article 16.3 bis to be added in ASCM Article 16.1]
