Trade and Cattle: How the System Is Failing An Industry in Crisis

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I. INTRODUCTION

The importance of the cattle industry both to agriculture in the United States and to the overall U.S. economy is difficult to overstate. The single largest sector in agriculture for more than 40 years, the cattle industry currently has more than one million operators and has generated more than $30 billion in agricultural revenues annually for the last dozen years.[1] During the past several years, however, this vitally important sector of the American economy has been in a state of substantial economic crisis, a condition that largely persists today. Financially, the industry overall has incurred more than five consecutive years of substantial losses.[2] The years 1996-1998 were particularly grim, as prices for cattle plummeted and cow-calf operators and feedlots lost billions of dollars in equity.[3] Declining living conditions, the inability to replace aging equipment, and mounting debt have put tremendous stress on many producers and their families. The difficulties were so severe that in 1998 cattle pro-

1. For information regarding the farm receipts generated by cattle and calves, *see United States and State Farm Income Data, Table 5, by Commodity Groups and selected Commodities, United States and States, 1950-1998,* USDA/ERS (visited April 6, 2000) <http://www.econ.ag.gov/briefing/farmincome/finfidmu.htm>. For information regarding the number of producers in the industry, *see* USDA/NASS, CATTLE REPORT, January 1999 at 12.

2. Petitioner's Prehearing Brief. *Anti-dumping Duty and Countervailing Duty Investigations Concerning Live Cattle from Canada,* USITC Inv. 701-TA-386 (Final), and 731-TA-812 (Final) at 34, Table 2 (Sept. 30, 1999).

3. *See* discussion *infra* at section II.C.

ducers joined other farmers in protests along the U.S.-Canada border, impeding the in-flow of agricultural products from Canada including imports of cattle and beef.[4]

Concurrent with the downturn in the cattle industry are a number of developments in the international arena that have left the U.S. market for cattle and beef disproportionately more liberalized than corresponding markets in other countries. For example, U.S. bound tariffs for in-quota imports of fresh and chilled beef are between 4 and 10 percent, while the bound rates in countries such as Brazil, Indonesia, Japan, Korea and Mexico range from 32.5 to over 50 percent, and even applied rates are high.[5] Not surprisingly, despite U.S. competitiveness in cattle and beef, the United States is running a trade deficit in beef, with imports in 1998 totaling 2.64 billion pounds carcass weight and exports 2.16 billion pounds carcass weight.[6]

Although there has been significant liberalization of the cattle and beef markets in North America as a result of the Canada-U.S. Free Trade Agreement and the North American Free Trade Agreement, substantial imbalances in the movement of cattle across NAFTA borders still exist. In 1998, for example, U.S. imports of live cattle from Canada and Mexico exceeded 2 million head, while U.S. exports to both countries were only about 285,000 head.[7] The combined deficits in cattle and beef have aggravated the industry's difficulties by adding to the supply of cattle and beef at a time of already low market prices for cattle.

Different groups within the industry have pursued a variety of means to address the problems which beset the industry and to restore the producers to a level of economic profitability, including: (1) increasing cattle and beef producers' access to export markets; (2) using the Packers and Stockyards Act and the antitrust laws to address perceived harm in the U.S. market from concentration in the meat packing industry; (3) seeking changes in labeling and other regulations to provide cattle producers with a premium for their product; (4) seeking a restored share of the retail dollar for cattle producers; and (5) use of the trade

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4. *See, e.g., Farmers, Ranchers Stage Blockade at Canadian Border,* WASHINGTON POST, September 22, 1998 at A2; *Canada Requests WTO, NAFTA Consultations Over Farm Blockade,* INSIDE U.S. TRADE, Sept. 25, 1998.

5. *See* discussion *infra* at section III.B.4 and Table 7.

6. *See* USDA/ERS, *Livestock, Dairy And Poultry Situation And Outlook* December 1999 LDP-M-66 (Dec. 28, 1999), < http://usda.mannlib.cornell.edu/reports/erssor/livestock/ ldp-mbb/1999/ldp-m66.pdf> at 7.

7. *Id.*

remedy laws to help restore fair pricing to the U.S. market for cattle.

While some of these efforts, which have been pursued for several years, have yielded beneficial results, a large proportion of the cattle industry remains destitute. Indeed, a recent report from the U.S. Department of Agriculture forecasts a decline in farm and ranch income in 2000 that could reach a five-year low.[8] Many of the tools which have often yielded positive benefits to other industries are either not well-suited to assisting the cattle sector or may not be successful in time to save tens of thousands of ranching families. Special rules are needed to address the special circumstances of the cattle industry. The alternative – to permit the emptying of ranches and rural communities in much of America – is simply not an acceptable option.

In this article, we examine the condition of the cattle industry and why the solutions that have been and are being pursued are not working more expeditiously and effectively. Our discussion of the condition of the industry draws from not only USDA and other statistical data, but also from the written and oral testimony offered by hundreds of witnesses from the industry during the course of antidumping and countervailing duty investigations on live cattle from Canada in 1999. Many are members of Congress and government officials, others are senior officers from some of the largest farmers' and cattlemen's associations in the country, while others are producers who have been working all their lives in the industry.

Some efforts, such as the export-marketing opening initiatives and the antitrust litigation, are long-term partial solutions which have not as yet yielded the benefits anticipated, but which continue to be pursued and certainly provide potential answers to some of the issues. Conversely, the unsuccessful experience with other efforts, such as the trade remedy cases, suggest that the trade laws, as currently written and administered, are not well-suited to address the special needs of the cattle industry. We conclude with proposals that may prove more effective in helping the cattle industry obtain effective relief.

8. *See USDA report predicts farm income drop in 2000*, FARM BUREAU NEWS at 1 (Jan. 10, 2000).

II. THE DOMESTIC CATTLE INDUSTRY – PORTRAIT OF AN INDUSTRY IN CRISIS

A. OVERVIEW OF THE INDUSTRY

The domestic cattle industry is the single largest agricultural sector in the United States, whether measured in terms of the numbers of producers or the revenues it generates. In 1998, there were a total of 1.15 million cattle operations throughout the United States.[9] The vast majority of producers – more than 800,000 – are cow-calf operators who maintain the herds of brood cows and heifers which produce the calves that are raised for slaughter to produce beef. In 1998, the industry generated revenues totaling $33.7 billion year, or about 17 percent of total agricultural commodity receipts.[10] By comparison, the next closest agricultural commodity was dairy, with total receipts of $24.3 billion.[11] Cattle and calves have been the single largest revenue-producing agricultural sector in the United States dating back as far as the 1950s.[12]

The cattle industry constitutes a major part of the economies of nearly half of the states in the nation. According to the National Association of State Departments of Agriculture, "[c]attle production forms the largest segment of American agriculture. Beef cattle are raised in all 50 states . . . A healthy cattle industry is important to nearly every state's agricultural base."[13] Table 1 shows states in which cattle was one of the top six agricultural products in 1998.

The cattle industry also constitutes the livelihood for a substantial portion of Native Americans living on Indian reservations. Robert Miller, an Oklahoma rancher, Creek Indian and President of the Intertribal Agriculture Council, explains:

> . . . Indian reservations are on some of the most remote areas in the country. The IAC represents 85 tribes with thousands of individual producers, encompassing 56 million acres of agriculture trust land and thousands of acres of privately-owned land, with at least 7.5 million head of cattle. In some of these areas far distant from metropolitan areas, Indians cannot operate casinos or even farm that particular

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9. USDA/NASS, CATTLE REPORT, January 1999 at 12.

10. *United States and State Farm Income Data, Table 5, Cash Receipts, by Commodity groups and selected Commodities, United States and States, 1992-98*, USDA/ERS, (visited Aug. 6, 1999) <http://www.econ.ag.gov/briefing/farmincome/finfidmu.htm>.

11. *Id.*

12. *Id.*

13. R. Kirchhoff, NASDA, USITC Hearing, Live Cattle from Canada, T at 83.

Table 1.
States Where Cattle and Calves Are Among the Top Agricultural Commodities on the Basis of Cash Receipts, 1998

Cattle and Calves among Leading Commodities					
Ranks #1	Ranks #2	Ranks #3	Ranks #4	Ranks #5	Ranks #6
Texas	Alabama	Washington	Louisiana	Mississippi	Connecticut
Nebraska	West Virginia	Wisconsin	New York	Georgia	Florida
Kansas	Idaho	Virginia	New Hampshire	Michigan	Indiana
Colorado	Vermont	Alaska	California	Arkansas	South Carolina
Oklahoma	Oregon	Pennsylvania	Iowa	Minnesota	
South Dakota	Missouri	Kentucky	Illinois	Maryland	
New Mexico	North Dakota				
Tennessee					
Arizona					
Montana					
Utah					
Wyoming					
Nevada					

Source: USDA ERS Cash Receipts ranking data available at http://www.econ.ag.gov/briefing/farmincome/receipts/rankings/misc/rk50stat.wk1

land. Thus, a majority of their land is used for grazing. In these areas, cattle represent our number one source of income.[14]

Cattle are also a vitally important means by which the country derives value from vast amounts of land which otherwise would not be productive. In many areas, particularly in the West, the most suitable agricultural crop is forage, and the most economically productive use of such forage is as feed for ruminant animals, such as cattle.[15] Many of the areas are too low in population to support dairy industries, which means that most of the grazing and foraging is done by beef cattle.[16]

Cattle producers are stewards of the land, taking care to maintain the pastures and grasslands so they can sustain the cattle herds. According to the 1997 Agriculture Census, of the 932 million acres of land in farms, about 396 million – or 42.5 percent – consisted of land that was used for pasture or grazing of livestock.[17] The vast majority of livestock grazed on such land are cattle. Absent a vibrant and successful cattle industry, therefore, much of that land would simply fall into disuse.

14. *Live Cattle from Canada and Mexico*, Testimony of Robert Miller, President, Intertribal Agriculture Council, Invs. Nos. 701-TA-386/731-TA-812-813 (Preliminary), Staff Conference T. at 37.

15. *The Competitive Position of Canadian Live Cattle and Beef in U.S. Markets*, USITC, Pub. 1996, Inv. No. 332-241, at 12 (July 1987).

16. *Id.*

17. *1997 Census of Agriculture United States Data, Table 7*, USDA/NASS, <http://www.nass.usda.gov/census/census97/volume1/us-51/us_107.pdf>.

Cattle raising is frequently a small family business.[18] When cattle producers lose their jobs, it usually means they lose their homes, in many cases homes that have been in the same family for generations. "Eighty percent of cattle businesses have been in the same family for more than 25 years and 10 percent for more than 100 years."[19]

The cattle industry is often described as having three "sectors" – the cow-calf sector, the stocker-yearling sector, and the feedlot sector.[20] Cow-calf operators raise steers and heifers which are ultimately slaughtered for meat except for some bulls and heifers that are retained for breeding purposes. The calves they raise have a gestation period of about 9 to 11 months before being born. They are raised with their mothers until they are weaned, usually at 6 to 10 months.[21]

Stocker-yearling operators feed weaned calves on available forage or graze them on wheat pasture and silage. These animals are ultimately placed on feedlots where they are fed on high-energy rations such as corn and protein supplements, and some roughage for about 6 months, after which they may weigh between 900 and 1300 pounds or more and are between 15 and 24 months old.[22] They are then sold for slaughter to the packing houses.

All cattle are ultimately destined for slaughter to produce beef, although not all cattle proceed through each of these stages. For example, weaned calves weighing 600 pounds are

18. *See Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade*, USITC Pub. 3048, Inv. No. 332-371, at 2-5, 4-3 (July 1997). (stating "[t]here were nearly 1.2 million operations with cattle in the United States in 1996. Many of these operations are family owned and operated.").

19. *The U.S. Beef and Cattle Business Factsheet – January 2000*, NCBA, <http:// www.beef.org/ library/factsheets/fs_industry.htm>.

20. Some cattle terminology may be helpful to better understand the industry. *"Yearling"* / *"stocker"* – Weaned calf (5 to 10 months of age) put to graze on pasture or forage until it has gained enough weight to go to a feedlot (12 to 20 months of age). *"Feeder"* – Animal that is put into a feedlot for feeding of finishing rations (e.g., grain) for 90 to 150 days. *"Fed"* cattle (synonymous with *"fat," "finished"* and *"slaughter"* cattle) – Animal fed to slaughter weight in a feedlot. *"Non-fed cattle"* – Animal raised to slaughter weight by grazing on grass or pasture. *"Cull"* – Animal retained for breeding (e.g., beef cow or bull) that is sold for slaughter when no longer productive; dairy cow that has ceased efficient milk production. *See Live Cattle from Canada and Mexico*, USITC Pub. 3155, Invs. Nos. 701-TA-386 and 731-TA-812-813 (Preliminary) at I-4, I-5, I-6 (February 1999); *See also Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade*, USITC Pub. 3048 at 2-1, 2-2 (July 1997).

21. *See* USITC Pub. 3048, *supra* note 18, at 2-1.

22. *See* USITC Pub. 3048, *supra* note 18, at 2-1 – 2-2.

often sold directly to feedlots and put on feed.[23] Many producers operate "preconditioning lots." They purchase weaned calves and put them in a highly intensive medical and nutritional program for approximately 1-1/2 months, during which time the calves gain between 125 and 150 pounds. Thus conditioned for the stress of a feedlot environment, the calves are then sold by the operators to the feedlots.[24] And, as much as 15 percent of slaughter cattle are not fed in feedlots at all, but instead are grown to slaughter weights on pasture and are called "non-fed" cattle.[25] Further, cull cattle (beef cows and bulls that are no longer efficiently reproductive, and dairy cows), which are usually sold directly by the cow-calf operator to the packers, constitute about 20 percent of the total cattle slaughtered annually.[26]

A large proportion of cattle producers are involved in more than one stage of raising cattle. Cow-calf operators, for example, may do their own backgrounding entirely or may do part of the backgrounding before selling the cattle to another stocker/yearling operator. Stocker/yearling operators, as well as a large proportion of cow-calf operators, often will retain ownership in some or all of the cattle they send to feedlot. Conversely, some feedlots will acquire ownership in stocker cattle and set up toll arrangements with a stocker/yearling operation; a packer also may acquire feeder cattle and toll them out to a feedlot for finishing. There is, in short, a "significant degree of overlap between operations in all production stages. . . ."[27] The percentage of cow-calf producers who retain ownership of their cattle from birth to slaughter reached 32 percent in 1996.[28] More recently, in 1999, *Cattle Fax* reported that, on average, 72 percent of producers surveyed retain ownership of cattle.[29] Thirty-six percent of calves born in 1999 will be retained through the feedlot for sale to the packers.[30] Thus, although a large proportion of cattle

23. Petitioner's Prehearing Brief, *Anti-dumping Duty and Countervailing Duty Investigations Concerning Live Cattle from Canada*, USITC Inv. 701-TA-386 (Final), and 731-TA-812, (Final) at 10 (Sept.30, 1999).

24. *Id.*

25. *See* USITC Pub. 3048 at 2-2.

26. *See Id.* at D-15, Table D-19.

27. USITC Pub. 3155 at 9.

28. *See* USITC Pub. 3155 at 7, n. 26.

29. *Cow / Calf Focus*, CATTLE FAX, August 1999 at 3. The percentage of producers that retained ownership ranged between 63 and 78 percent depending on the region of the country.

30. *Id.* The percentage of calves retained through the feedlot ranged between 25 percent (in the Southeast region) and 51 percent (in the Midwest region).

may be sold two or three times between birth and slaughter, a sizeable proportion are also owned by the same producer up to the time of sale to the packer.

With respect to the economics of the industry, all cattle producers, regardless of their particular operation, are directly affected by the price of fat cattle sold to the packers. Adding to the competitive pressures that cattle producers face is the perishable nature of their product. Cattle for slaughter must be sold at their optimal weight in order to receive their best quality grades and hence their best prices.[31] The commodity nature of cattle combined with its perishable nature makes the cattle market extraordinarily sensitive to small changes in the amount of supply. "It is the supply-side that most effects long-term cattle prices as the production cycle moves through [its] phases . . . ."[32] Studies by the U.S. Department of Agriculture establish that the market for cattle is a national one, with price information rapidly disseminated through various channels.[33]

Of the different kinds of producers, feedlot operators are in the best position to control their costs by deciding how much they can afford to pay for feeder cattle and still earn a profit on their sales of the fed cattle. Feedlot operators also can "custom feed" cattle, or fatten the feeder cattle for a fee, but not actually purchase and take title to the cattle. Cow-calf operators, by contrast, have the least amount of control as they are primarily only selling the cattle they raise. The packing industry that buys the fed cattle from the feedlots to produce beef is highly concentrated. The three largest packers account for the vast majority of the cattle slaughter market in the United States.[34] Given the highly fragmented nature of the cattle industry and the enormous degree of concentration in the packing industry, cattle producers are, not surprisingly, price takers.[35]

31. *See Live Cattle from Canada*, USITC Pub. 3255, Invs. Nos. 731-TA-812 (Final) at 11 (November 1999).

32. John C. McKissick, *Beef Cattle Outlook and Marketing Strategies*, Department of Agricultural and Applied Economics, The University of Georgia, (Jan. 20, 1998) <http://www.ces.uga.edu/Agriculture/agecon/outlook/cattle/Gacat.htm>.

33. USDA/GIPSA, Concentration in the Red Meat Packaging Industry at p.3 (Feb. 1996).

34. *See* USITC Pub. 3255, *supra* note 30, at II-2.

35. USITC, Pub.3255, Staff Report, at V-1.

B. THE CATTLE CYCLE

The ebbs and flows of the cattle industry have followed a pattern of expansion and contraction often referred to as "the cattle cycle." The cycle is characterized by the accumulation and liquidation of cattle inventories. Past cycles have generally occurred in response to changes, or anticipated changes, in profits (prices received for cattle and prices paid for feed). Cattle supplies increase as operators expand their herds in response to increasing prices so they will have more calves to sell. As the supply increases, prices eventually peak and then begin to fall. As prices decline, cow-calf operators liquidate their herds in order to reduce the supply of cattle.[36]

The cattle cycle reflects the limited ability of cattle producers to respond to changes in market conditions because of the time required to raise the cattle until they are ready for sale to the packing houses. The decision whether to retain a heifer for breeding or send it to the backgrounders and feedlots, for example, is made when the heifer is about 9 months old so that she will have her first calf at two years. The calf itself has a gestation period of 9 to 11 months, and then 15 to 24 months of growing and feeding before it will be ready for sale to a packing house. Thus, cow-calf operators expand or liquidate their herds based on the market conditions they believe will prevail in two or three years.

Several factors can influence the length and severity of the cattle cycle. Higher market prices (profits) lead to increases in cattle inventory and lower market prices (losses from oversupply) lead to decreases in cattle inventory. The more longer the period of profitability in cow calf operations, the longer the expansionary phase will be. The longer the period of losses that are incurred, the longer will be the liquidation phase of the cycle.

Many producers in the industry believe that the current cattle cycle has not operated in the same manner as previous cycles. Leo McDonnell, a Montana rancher, owner of Midland Bull Test in Columbus, Montana, and President of R-CALF, puts it this way:

> If you compare where we are today [in 1998/99] with where we were at the same point in the last cattle cycle, prices are considerably lower than they should be. It's not normal. Other problems that the indus-

36. *See* USITC, Pub. 3048, at 2-7.

try has to contend with today were present back then as well, but that didn't stop prices from increasing when cattle supplies declined.[37]

Numerous industry observers in 1996 and 1997 had predicted that the decline in the cattle inventory that began in 1997 would lead to price increases for cattle. For example, then-president of the American Farm Bureau Federation Dean Kleckner told the governor of Montana in July 1996:

> My prediction is within two years . . . we're going to see an all-time high in fed cattle prices." He predicted prices will top the previous high of about 85 cents a pound and could reach the pinnacle of $1 a pound. . . . He said his forecast reflects the cyclical realities of supply and demand in agriculture.[38]

Similarly, the chairman of IBP, the nation's largest packer, told a meeting of South Dakota ranchers in December 1996 that "[i]t's just a short time until the cattle market is going to blow by 80 [dollars per 100 pounds] like a freight train."[39] The Chief Economist for the National Cattlemen's Beef Association wrote in his 1996 Final Review: "With declining cattle numbers and improving feed costs, cattle prices will generally post year-to-year improvements for the next four or five years."[40] P.J. Rathwell, an agricultural economist and professor at Clemson University, forecast the following:

> The decrease in cattle inventory numbers will have a definite beneficial impact on cattle prices this year and for the next several years. Three factors carry the greatest weight in determining calf price: the price of fed cattle, the price of corn, and the number of animals (inventory) in the marketplace. All three of these factors now point toward better times in the beef industry.[41]

As late as January 1998, *Cattle-Fax*, a leading industry resource for cattle price and other essential market information, forecast:

- Fed-cattle prices are expected to reach the mid-$70s in the spring of 1998. Seasonal third-quarter pressure puts price risk back to the mid- to upper-$60s, resulting in an annual average fed-steer price in the $70 to $72/cwt. range.

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37. ITC Hearing Transcript at 81.

38. *Kleckner sights record prices*, WESTERN LIVESTOCK REPORTER, July 10, 1996, at 1,6.

39. *IBP CEO Says Canadian Cattle Not Imports*, WESTERN LIVESTOCK REPORTER, Dec. 18, 1996, at 1,6.

40. Chuck Lambert, *National Cattlemen's Beef Association, 1996 Final Review* <http://www.beef.org/library/factsheets/fs_final_review.htm>.

41. P.J. Rathwell, *January 1, 1997 Cattle Inventory: The Cycle is Broken*, Management Marketing Memo 334, <http://www.cherokee,agecon.clemson.edu/mmm334.htm>.

- After posting the biggest year-to-year advance since 1979, feeder cattle and calf prices in 1998 will average about $5/cwt. higher compared to 1997. Competition for noticeably tighter supplies will be evidence, which will support a long-term, cyclical rally extending into 2000.[42]

The U.S. Department of Agriculture also predicted increasing cattle prices in its December 1997 *Livestock, Dairy and Poultry Situation and Outlook*: "[R]educed placements and large fed cattle marketings through late winter will lead to falling inventories and higher fed cattle prices beginning this spring and continuing through much of 2000."[43]

The industry's expectations, however, proved incorrect. Cattle prices which had been $66.47 per hundredweight in 1995 fell to $64.76 in 1996 – the lowest since 1986. Prices recovered in 1997 to $66.07 (the second-lowest since 1986), but then fell to $61.05 in 1998. Meanwhile, the cattle inventory, which reached a cyclical peak of 103.54 million head in 1996, had fallen to 99.74 million head in 1998.

Table 2 helps put both the price decline in 1998 and the price trends during the last twenty years into context. Table 2 shows cattle inventories, imports of cattle, imports of beef and veal converted to a cattle equivalent, and the changes in prices for fed steers from 1978 to 1998, both on an actual basis and adjusted for inflation. The table indicates that, as a general matter from 1978 up to 1994, two or more years of declines in cattle inventories typically were followed by increases in cattle prices. For example, the inventory during the previous cycle peaked in 1982 at 115.4 million head. Thereafter, the inventory declined to the cycle's trough in 1990. The period of 1982 to 1990 saw only one instance of year-to-year price declines in 1985 and 1986, and indeed the decline in 1986 was so small – less than one percent – as to be essentially flat. Thus, when the current cycle's inventory peaked in 1996 and then declined for two consecutive years in 1997 and 1998, the predictions that prices would rebound in 1998 were understandable. The price decline in 1998 is consistent with the view that the current cattle cycle is not operating in normal fashion.

Even more troubling is the substantial widening of the gap between actual prices and prices adjusted for inflation. From

42. *Cattle-Fax*, January, 1998.

43. USDA/ERS, *Livestock, Dairy and Poultry Monthly* December 1997 LDP-M-48 (Dec. 17, 1997), <http://usda.mannlib.cornell.edu/reports/erssor/livestock/ldp-mbb/1997/livestock_dairy_and_poultry_12.17.97.

Table 2.
Comparison of U.S. Cattle Inventories, Imports of Cattle and Prices for Nebraska Direct Steers 1100 lbs. 1978 – 1998

	Cattle Inventory as of Jan 1	Cattle Imports	Beef and Veal Imports*	Nebraska Direct 1100 cwt Steer Price	1978 Fed Steer Price Adjusted for Inflation	Price Below Inflation (1978 = 0)
	—— *Thousand of Head* ——			*$ / cwt*	*$ / cwt*	*$ / cwt*
1978	116,375	1,252.57	4,799.83	53.01	53.01	
1979	110,864	731.83	5,472.53	68.56	59.73	8.83
1980	111,242	680.67	4,649.39	67.64	68.16	0.52
1981	114,351	659.05	4,603.69	64.42	74.41	9.99
1982	115,444	1,004.20	4,396.09	65.34	75.83	10.49
1983	115,001	920.72	4,141.57	63.63	76.77	13.14
1984	113,360	753.17	3,828.99	66.79	78.67	11.88
1985	109,582	835.14	4,098.77	59.75	78.29	18.54
1986	105,378	1,404.85	3,995.24	59.25	76.02	16.77
1987	102,118	1,200.00	4,351.65	66.28	78.00	11.72
1988	99,622	1,331.74	4,420.10	71.19	81.13	9.54
1989	96,740	1,458.28	4,035.88	73.86	85.20	11.34
1990	95,816	2,135.00	4,417.96	78.56	88.23	9.67
1991	96,393	1,938.93	4,484.21	74.21	88.42	14.21
1992	97,556	2,255.27	4,539.52	75.24	88.89	13.65
1993	99,176	2,499.05	4,503.20	75.94	90.22	14.28
1994	100,974	2,082.50	4,307.31	68.56	91.35	22.79
1995	102,785	2,786.25	3,741.44	66.47	94.67	28.20
1996	103,548	1,966.60	3,648.13	64.76	96.84	32.08
1997	101,656	2,048.36	4,042.74	66.07	96.84	30.77
1998	99,744	2,036.75	4,439.07	61.05	94.38	33.33

Source: Data from USDA ERS Red Meat Yearbook and Agricultural Statistics. Data in Bold denote year-to-year price decreases. *Beef and Veal imports converted from carcass weight equivalent to head by dividing the average production of U.S. slaughter in pounds per head. Steer Price adujusted for PPI using IMF International Financial Statistics 1999 Yearbook at 926-927.

1978 to 1989, actual cattle prices averaged about $8.12 per hundredweight below inflation (using 1978 as the index). From 1991 through 1998, however, the average was $22.11 per hundredweight – nearly three times the gap in the prior cycle. From 1994 through 1998, the average difference was $29.43 per hundredweight.

Table 3 below shows the net trade position of the United States in cattle and beef. The United States increased its exports of beef in the last twelve years, but still runs a significant trade deficit on a weight basis. At the same time, imports of live cattle have increased substantially and the trade deficit in cattle has increased. Since imported cattle are ultimately slaughtered and converted to beef, a significant percentage of increased exports of beef simply reflect the conversion of imported cattle.

Table 3.
U.S. Imports and Exports of Live Cattle and Beef and Veal

	Live Cattle			Beef & Veal		
	Imports	Exports	Net Imports	Imports	Exports	Net Imports
		Head		*Thousands of Pounds, Carcass Weight*		
1987	1,200,481	130,698	1,069,783	2,293,360	611,090	1,682,270
1988	1,332,206	321,449	1,010,757	2,380,580	679,791	1,700,789
1989	1,459,415	169,140	1,290,275	2,175,351	1,061,939	1,113,412
1990	2,135,000	119,914	2,015,086	2,354,567	1,006,042	1,348,525
1991	1,939,054	310,962	1,628,092	2,406,496	1,188,370	1,218,126
1992	2,255,265	321,790	1,933,475	2,439,775	1,323,637	1,116,138
1993	2,499,046	153,416	2,345,630	2,401,332	1,275,045	1,126,287
1994	2,082,504	230,791	1,851,713	2,370,727	1,610,620	760,107
1995	2,786,245	94,548	2,691,697	2,103,473	1,820,814	282,659
1996	1,965,448	174,307	1,791,141	2,072,729	1,819,194	253,535
1997	2,046,352	282,344	1,764,008	2,344,225	2,058,530	285,695
1998	2,034,009	285,209	1,748,800	2,643,105	2,160,811	482,293

Source: Kansas State Livestock & Meat Marketing Web Site, http://www.agecon.ksu.edu/livestock/Livestock Databases/Trade Databases/montrade.xls.

C. PORTRAIT OF AN ECONOMIC AND HUMAN CRISIS

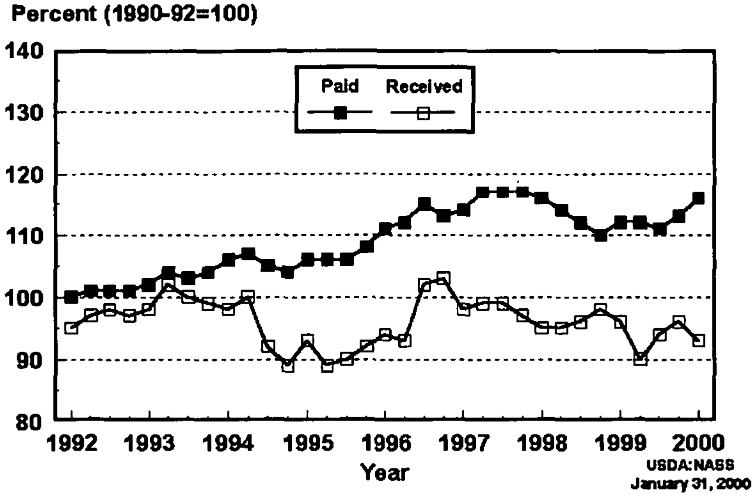
Three long-terms trends have signaled growing problems for the cattle industry. First, the prices that cattle producers must pay for supplies, fuel, and other necessities have been steadily increasing, while the prices they receive for their cattle have either been declining or remained flat. Evidence of this cost-price squeeze may be seen in USDA price indices for livestock farmers' prices paid and received seen below in Figure 1. Although prices paid by livestock farmers have risen, prices received by livestock farmers have remained well below what they were in 1990-92.

Second, the producer's share of the beef retail dollar has fallen from some 70 percent in the 1970s to below 50 percent in 1996, while the nominal farm-to-retail price spread has widened from 40 cents per pound to over $1.40 per pound.[44] In a word, cattle producers over the past three decades have received an ever-shrinking share of the retail dollar that consumers pay for beef. Figure 2 shows the changes in the farm share of the retail dollar for beef, the price the rancher has received for cattle, and the price the rancher would have received had the farm retail share remained at 1970 levels. Prices in Figure 2 are in constant 1970 dollars.

44. *See* W. Hahn,et al., *U.S. Beef Industry: Cattle Cycles, Price Spreads and Packer Concentration*, Economic Research Service, Technical Bulletin No. 1874, at 19, April 1999.

Figure 1

Livestock Farm Index: Prices Received and Prices Paid All Items, U.S., By Quarter



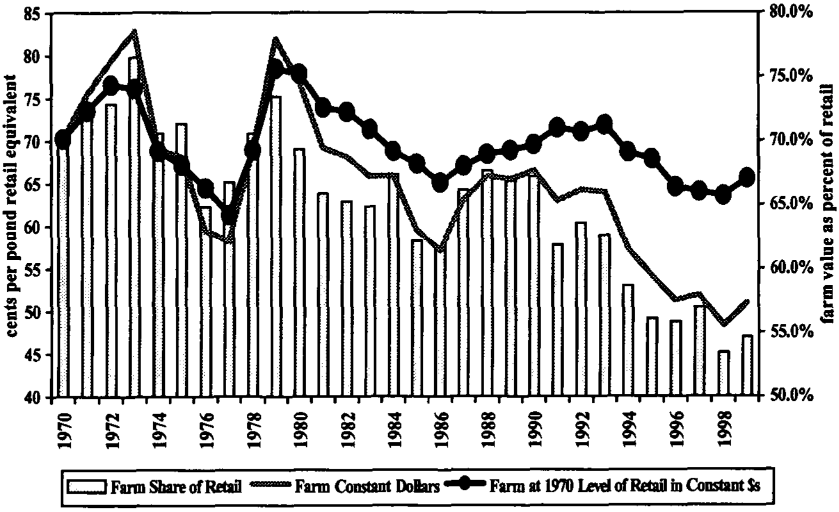
Source: USDA/National Agricultural Statistics Service, *http://www.usda.gov/nass/aggraphs/lvskfarm.htm*

Figure 3 shows the same illustration, but in actual dollars. If a rancher in 1997 received the same percentage of the retail dollar for beef as received in 1970, he would be receiving nearly $25-30 more per hundredweight. This phenomenon accounts for a substantial portion of the depressed prices received in the last decade and for a major part of the price/cost squeeze experienced, as much as $10 billion per year. This price depression can be seen in Table 4, which shows prices to farms for beef as reported by USDA, and prices that would have been needed to stay current with inflation. Prices are roughly one-third lower than they should be.

Source for Figures 2 and 3: USDA Economic Research Service. Data for 1970-1993 from Red Meat Yearbook at http://usda.mannlib.cornell.edu/data-sets/livestock/94006/bf-spread.wk1. Data for 1994-1999 downloaded from http://www.econ.ag.gov/briefing/meatbrif/prspd.wk1. Data converted to constant dollars using the BLS PPI for Food and Kindred Products

Figure 2

Choice Beef Values and Spreads - Farm Price vs. Retail Price
In Constant Dollars (1982=100)



Third, the industry itself is in a state of long-term contraction, as fewer new producers enter the industry to replace aging producers. The number of cow-calf operations, for example, has declined from more than 2.2 million in 1967 to 1.8 million in 1976 to about 800,000 in 1998.[45] According to Mary von Forrell, a rancher in Wyoming:

> The industry has an aging population. . . . [T]he American Hereford Association reported that for a member with registered cattle in production, the average age has increased to the age of 56. This is a major concern. . . . [T]hey are getting old, nobody is coming back to the ranches. And when we lose people born and raised on the ranch, there goes American production of agriculture.[46]

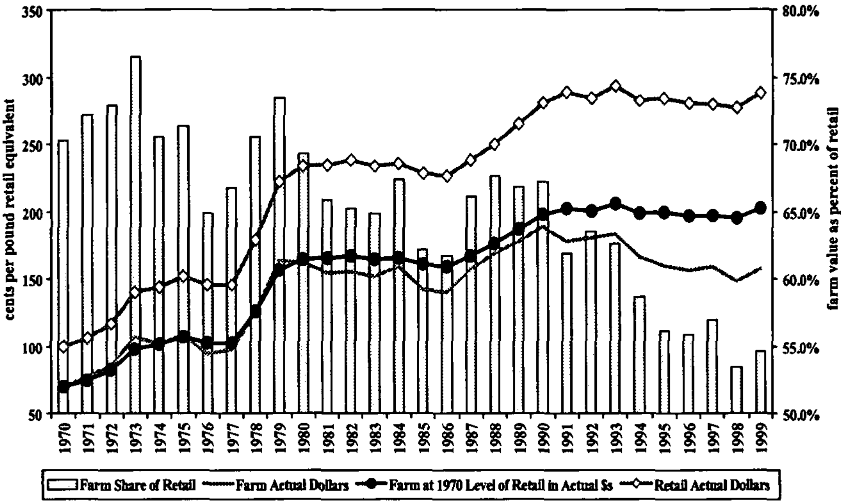
Robert Bruner, a leader in the cattle industry in east Texas, asserts, "[w]hen you lose an industry like this, you don't just rebuild it. The cattle industry takes generations to understand, much less build."[47]

Ranches over a century old can no longer sustain a family. Steven Anderson is the seventh generation of his family in Kansas. The original homestead from the 1850s was lost by a relative in the last few years. Anderson says that "[a]t the present

45. *Live Cattle from Canada,* USITC Pub. 3255, Inv. No. 731-TA-812, at 18, Nov. 1999.
46. Petitioners' Prehearing Br., *supra* note 23, App. Vol. 2, Ex. 13.
47. *Id.* at App. Vol. 2, Ex. 18.

Figure 3

Choice Beef Values and Spreads - Farm Price vs. Retail Price
In Actual Dollars



time, I'm throwing in my labor for free. I don't carry health insurance; I can't afford it. . . . I basically live like a third class citizen in a country that's ostensibly the most prosperous nation in the world."[48] George Cremer has struggled to keep his operation, homesteaded in 1909, in the family. His Montana neighbors have been less successful:

> Most of the ranches here started in the 1880's. Most of the young people growing up in the area are leaving. . . . [T]hese ranches are at the size now where one person can't make them work, yet the income won't support more. . .. The property will most likely end up being sold.[49]

Congressman Michael Simpson of Idaho reports, "Many of the producers in my district are not even making enough to cover the cost of production and are in jeopardy of losing their generation owned family operations."[50] Roy Stewart in Newport, Nebraska is in partnership with his son. Together, they are trying to buy out an operation that has been in the family since 1898, but they lost $123 a head in 1997: "Buying the land will be expensive. I don't know how we will manage."[51] Doug Tippet in Joseph, Oregon bought his father's cow-calf operation, but he does not see the next generation staying in agriculture:

48. *Id.* at App. Vol. 2, Ex. 71.
49. *Id.* at App. Vol. 2, Ex. 9.
50. *Live Cattle from Canada*, Hearing transcript at 70.
51. Petitioners' Prehearing Br., App. Vol. 2, Ex. 34.

Table 4.
Choice Beef Retail Value and Gross Farm Value

	Retail price	Gross farm value	Farm Value at 1970 Share of Retail	PPI for Food 1982=100	Adj Factor PPI for Food 1970=100	Gross Farm Value in 1970 Adj. For Inflation
		— *cents / pound* —			*cents / lb*	
1970	99.9	70.3	70.2	43.79	1.0000	70.3
1971	106.2	76.7	74.6	44.49	1.0160	71.4
1972	116.6	85.0	81.9	46.94	1.0719	75.3
1973	139.7	106.9	98.1	56.48	1.2898	90.6
1974	143.8	101.5	101.0	64.37	1.4698	103.3
1975	152.2	108.6	106.9	69.83	1.5947	112.0
1976	145.7	94.4	102.3	69.63	1.5899	111.7
1977	145.9	97.3	102.5	73.24	1.6725	117.5
1978	178.8	126.1	125.6	79.92	1.8249	128.2
1979	222.4	163.4	156.3	87.25	1.9924	140.0
1980	233.6	161.9	164.1	92.40	2.1100	148.2
1981	234.7	154.5	164.9	97.87	2.2348	157.0
1982	238.4	155.5	167.4	100.00	2.2835	160.4
1983	234.1	151.8	164.4	101.00	2.3064	162.0
1984	235.5	158.6	165.4	105.40	2.4069	169.1
1985	228.6	142.2	160.6	104.60	2.3886	167.8
1986	226.8	140.0	159.3	107.30	2.4502	172.1
1987	238.4	157.6	167.5	109.50	2.5005	175.7
1988	250.3	169.4	175.9	112.60	2.5713	180.6
1989	265.7	177.6	186.6	118.70	2.7106	190.4
1990	281.0	188.9	197.4	124.40	2.8407	199.6
1991	288.3	178.4	202.5	124.10	2.8339	199.1
1992	284.6	180.9	199.9	123.30	2.8156	197.8
1993	293.4	183.7	206.1	125.70	2.8704	201.6
1994	282.9	165.9	198.7	126.80	2.8955	203.4
1995	284.4	159.5	199.8	129.00	2.9458	206.9
1996	280.2	156.4	196.8	133.60	3.0508	214.3
1997	279.5	159.2	196.3	134.50	3.0714	215.8
1998	277.1	148.0	194.7	134.30	3.0668	215.4
1999	287.8	157.2	202.2	135.14	3.0860	216.8

Source: USDA Economic Research Service. Data for 1970-1993 from Red Meat Yearbook at http://usda.mannlib.cornell.edu/data-sets/livestock/94006/bfspread.wk1. Data for 1994 — 1999 downloaded from http://www.econ.ag.gov/briefing/meatbrif/prspd.wk1. PPI from Bureau of Labor Statistics for "Food and Kindred Products."

> Is anyone going to be able to talk the kids into staying in ranching? I don't think so. A lot of the young are leaving. [W]e work . . . 18 hours a day, seven days a week and . . . right now we're not making a profit.[52]

Even in the best of times, profitability in the cattle sector is generally characterized by relatively low profit margins, generally no more than 3 - 4 percent. Moreover, in many cases, reported "profits" are what the operator has left *before* payment of salaries to family members who have worked in the operation, and coverage of the operation's fixed costs.

52. *Id.* at App. Vol. 2, Ex. 68.

In the not-so-recent past, producers were prepared to deal with down turns by relying on equity and other resources generated during the up turn in the cycle. According to the theory of the cattle cycle, prices for cattle should increase as supplies decline. This in fact is what happened in the 1980s, when the cattle inventory fell from 109.6 million head in 1985 to 95.8 million head in 1990, and prices climbed from $58 - 60 per cwt. in 1984-85 to the mid-to-upper $70s in 1988-90. In the current cattle cycle, however, while the liquidation phase had been in progress since at least 1996, prices have not recovered appreciably. Indeed, as discussed earlier, 1998 prices fell to 1996 levels, which were among the lowest in recent years. The domestic industry did not experience the rebound in prices and profits that would normally be expected with smaller inventories. Many of the rules that used to operate in the cattle industry and in farming generally no longer appeared operable, as evinced by the story of one South Dakota cattle and grain farmer:

> At 75, Everett Myers . . . remembers the rule-of-thumb farmers lived by in 1946 when he got out of the Navy and started farming: When grain prices are down, livestock prices are up. That's not true anymore, says Myers, who still helps out at the Redfield Livestock Auction. "You can't count on live-stock or grain or anything," Myers said. "It's hard on the young people. There's no way they can make it." Gilbert Lutter, who owns the Redfield Livestock Auction, agrees that times are tough. He sees it in the cattle trade. "The low prices are hurting a lot of operators. It hurts our business to some extent. People delay their marketing." Lutter estimated that the same grade of cattle is selling now for $15 to $20 less a hundredweight than two years ago, even as producers' expenses continue to rise.[53]

House Democratic Leader Richard Gephardt confirms that the same is true in states such as Missouri where cattle producers also raise other agricultural products:

> Cattle-producing farms in Missouri are often small, diversified operations. In the past when prices on cattle were depressed, profits from other farm products compensated for livestock losses. However, given the current widespread farm crisis, the losses incurred by cattle operations have had no cover from other products. The result has been greatly expanded debt, a drastic curtailment of expenditures by cattle producers, and an extraordinary toll on Missouri cattle producers.[54]

Cattle producers in Florida, which ranked twelfth in the nation in 1999 in cattle inventory, likewise were experiencing sig-

53. L. Nixon, *Old Rules No Longer Apply*, ABERDEEN AMERICAN NEWS, Aug. 5, 1998, at B3.

54. Letter from Richard A. Gephardt, House Democratic Leader, to Lynn Bragg, Chairman US International Trade Commission 1 (Oct. 12, 1999).

nificant financial difficulties. According to Carl Loop, president of the Florida Farm Bureau:

> Our producers have been losing huge amounts of equity. USDA figures on cow-calf product cash costs and returns per bredcow for 1996 and 1997 . . . show losses of $134.99/head in 1996 and $57.05/head in 1997 for the Southeastern United States. Factoring in fixed costs and wages for the unpaid labor of family members translates into staggering losses of $406.34/head in 1996 and $315.84/head in 1997. We know from contact with our members that there have been substantial losses being incurred since at least 1996 which has stretched the ability of ranchers to stay in production. Many have been forced by banks to liquidate part of their herds or to sell their land or take other steps to reduce the banks' exposure in these times of depressed prices. We have seen a significant number of producers, including reasonably large producers, get out of cattle production in total or to a significant extent in the last five years.[55]

U.S. Department of Agriculture statistics show that the cattle industry sustained five consecutive years of financial losses from 1994 through 1998 inclusive.[56] The years 1996-1998 were especially grim as prices for cattle plummeted, producers lost billions of dollars in equity, and increasing numbers of individual operators were confronting economic ruin. The magnitude of the losses in some instances were so great as to exceed the sales price of the cattle.

USDA publishes data concerning profit and loss experience of cow-calf operations.[57] The data for 1990-1995 and 1996-1998 are summarized below in Tables 5 and 6. As shown, the industry earned operating profits on total cash expenses (variable and

55. Letter from Carl B. Loop, Jr., President, Florida Farm Bureau Federation, to Lynn Bragg, Chairman US International Trade Commission 2 (Sept. 29, 1999).

56. *See* Petitioner's Prehearing Brief at 34, Table 2 (citing to USDA/ERS Farm Costs and Returns Survey); USITC Pub. 3255, *supra,* at VI-2, VI-3, Tables VI-1 and VI-2.

57. *See* USDA/ERS. Farm Sector Performance—Program Overview, http://www.econ.ag.gov/briefing/farmincome//fspprog.htm. "Under Congressional mandate, USDA is required to develop annual estimates of the costs of producing crops and livestock. Estimates and forecasts of production costs are also required by USDA for use in program adjustments and policy analyses. While fulfilling these basic commitments, this project continues to bring cost estimates into conformance with newly revised conceptual standards established by the American Agricultural Economics Association Task Force on Commodity Costs and Returns Accounting. This will be accomplished for specific commodity estimates as adjustments are made in ERS farm-level surveys. Marketing and storage costs and returns are incorporated into the accounts as data are obtained through farm surveys. Resulting estimates are used to assess the relationship between total costs and returns, including costs of owner-supplied factors of production." *Id.*

fixed) from 1990 through 1993. In 1994 and 1995, cow-calf operators covered their variable costs.

Table 5.
Cow-Calf Costs and Returns 1990-1995

	1990	1991	1992	1993	1994	1995
			($/bred cow)			
Total gross value of production	441.59	438.23	413.56	430.18	389.21	331.92
Total variable cash expenses	315.66	316.49	314.52	328.61	329.91	321.82
Gross value of prod'n less variable cash exp.	125.93	121.74	99.04	101.57	59.3	10.1
Total fixed cash expenses	86.14	71.40	67.93	86.29	82.16	88.83
Total cash expenses	401.8	387.89	382.45	414.9	412.07	410.65
Gross value of production less cash expenses	39.79	50.34	31.11	15.28	*(22.86)*	*(78.73)*

Source: USDA/ERS, Farm Costs and Returns Survey http://www.econ.ag.gov/briefing/farmincome/car/cowcalf3.htm (visited April 11, 2000).

In 1999, USDA's Economic Research Service revised its methodology for calculating cow-calf costs and returns. The results for 1996 through 1998, shown below in Table 6, indicate that cow-calf operators could not cover operating costs. When the operator's total costs are factored in, the losses become even more staggering.

Table 6.
Cow-Calf Costs and Returns 1996-1998

	1996	1997	1998
		$ per bred cow	
Total gross value of production	318.18	414.27	402.98
Total operating costs	430.51	444.73	405.97
Gross value of prod'n less total operating costs	*(112.33)*	*(30.46)*	*(2.99)*
Total allocated overhead	387.24	450.59	450.42
Total cost listed	817.75	895.32	856.39
Gross value of production less total cost listed	*(499.57)*	*(481.05)*	*(453.51)*

Source: USDA/ERS, Farm Costs and Returns Survey http://www.econ.ag.gov/briefing/farmincome/car/ cowcalf3.htm (visited April 11, 2000).

A *Cattle-Fax* survey of cow-calf producers also confirmed the lack of profitablity in that sector:

> [O]nly 24% of cow/calf operators were profitable, compared to 45% in 1997. Forty percent of the respondents reported that their cow/calf operations were unprofitable. Lack of profits in 1998 was related directly

to the loss of equity in the feeding and stocker sectors, resulting in lower calf prices this past fall.[58]

Substantial financial losses have not been confined to the cow-calf sector. In that same issue, *Cattle-Fax* reported:

Stocker operators did not fare much better in terms of profits in 1998. Only 32% of the winter stocker operators and 22% of the summer stocker operators reported that they were profitable. Thirty-nine percent of the winter stockers and 53% of the summer stockers were unprofitable. . . . For the year, summer stocker operators lost about $60 per head on average.[59]

As for feedlots, in April 1999, *Cattle-Fax* reported that feedlot operators had "endured 19 consecutive months of losses and nearly $3 billion loss of equity since mid-1997. Cattle feeders have been profitable in only 21 out of the last 63 months [dating back to January 1994] (33%) in the cash market."[60] Individual losses have been staggering. One Wyoming feeder reports:

I'm 62 years old and I'm not very proud of the situation that I've gotten myself into recently. After a lifetime building up this operation, I have lost approximately $2,000,000 in equity over the past two to three years.[61]

The situation is similar in Kansas. Mike Callicrate acknowledges a million dollar loss in a single year at his feedyard in St. Francis.[62] Ivan Reimer, who feeds cattle in Meade, Kansas says, "We absolutely took a bloodbath in the market. . .." He adds:

The loss of equity these last two or three years has meant that we have had to draw on a line of credit or get a loan with the bank just to keep in operation. We have a line of credit we can't cover.[63]

From Iowa, Farmers' Union President John Whitaker agrees: "Last year [1998] was a devastating year in the cattle feeding industry."[64]

Such an extended period of losses is not normal in this sector. According to Clarence Newcomb, chairman of the Cattle Feeders Committee of the Colorado Cattlemen's Association:

This is an extended period of continuous losses in the feedlot segment that is unusual in the course of the history of the various cattle cycles. You could see two, three, four, five months, but normally we would return to profitability. To just go on and on and on like this, is totally

58. *Special Edition, January Cow-Calf Survey Results*, CATTLE-FAX, Jan. 1999, at 1.
59. *Id.*
60. XXXI CATTLE-FAX UPDATE 13, April 2, 1999 at 1.
61. Petitioners' Prehearing Br., App. Vol. 2, Ex. 25.
62. *Id.* at App. Vol. 2, Ex. 49.
63. *Id.* at App. Vol. 2, Ex. 57.
64. *Id.* at App. Vol. 2, Ex. 31.

> contrary to historical cattle feeding practices, and it's just tearing the heart out of some really good people.[65]

The extended downturn outlasted the resources of a vast proportion of producers. There was not a sufficient upturn in the market from 1996 to 1998 that would have allowed producers to retire debt and restore their equity position. According to John E. Johnson, president of the First Western Bank in Sturgis, South Dakota:

> One of the things that you learn about the cow-calf business is that we deal with cycles. And as a banker you have to finance on cycles. So when you are in a down cycle, you know that you may grow some debt. When you are in an up cycle, you hope that it is good enough that you are going to be able to get back on track and maybe make some improvements in the operation. The problem is . . . that the cow-calf industry does not cycle the way that it has for the last 50 years. We've got outside stimulus that is causing us to have problems. We believe that we should have been back into a rising price [in 1998], we should have been back into a position where our people were starting to eliminate some short term debt. Instead, we continue to see increasing carryover debt from the operating side.[66]

News accounts have reported on the substantial hardships that domestic cattle producers have faced:

> Montana farmers and ranchers say they face financial disaster unless commodity prices increase of the government acts to support agriculture . . . . Others expressed doubt that they or many of their neighbors would be in business unless there's a dramatic increase in prices coupled with key policy changes.[67]

One agricultural economist reported in 1997:

> Indications are that some other North Dakota beef cow producers are not going to make it through the current economic crunch . . . . [I]f you bring up the subject, individuals confirm that there are beef cow producers in their home communities under severe financial stress.[68]

Fully 24 Members of the United States Senate, representing 17 States, wrote to the U.S. International Trade Commission: "The crisis our cattle producers, their families and their communities are living through is very real."[69] Indeed, as discussed

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65. *Id.* at App. Vol. 2, Ex. 20.

66. *Id.* at App. Vol. 2, Ex. 4.

67. *Farmers and ranchers say financial disaster around the corner*, AGRI-NEWS, June 5, 1998 at 18.

68. Harlan Hughes, *Times, They Are Tough In North Dakota's Cow Country*, THE MARKET ADVISOR, Oct. 16, 1997 <http:\\www.ag.ndsu.nodak.edu>.

69. ITC Investigation; Letter to Lynn Bragg, Chairman U.S. International Trade Commission (Oct. 5, 1999) from Senate Minority Leader Thomas A. Daschle (D-SD), Senator Robert C. Byrd (D-WV), Senator Ernest F. Hollings (D-SC), Senator Max Baucus (D-MT), Senator Orrin G. Hatch (R-UT), Senator Conrad Burns (R-MT), Senator Christopher "Kit" S. Bond (R-MO), Senator Kent Conrad (D-ND), Senator Tom Harkin (D-IA), Senator Robert Bennett (R-

below, the repercussions to the cattle producers are felt in many ways that are not reflected on a profit and loss statement or in USDA statistics. Thirty-one Members of the House of Representatives, representing eight additional States, also wrote to the International Trade Commission, reiterating, "The economic crisis for our ranchers is real and is on-going."[70]

1. *Inability to afford health insurance*

Cattle producers who are unable to afford conventional health insurance have either increased their deductibles to the equivalent of catastrophic coverage, or have dropped the policies altogether. Allen McIntyre, with the West River Health Services Foundation in Hettinger, North Dakota, reports:

> Right now there are some people that don't have insurance and others that have the catastrophic plan, where they have the high deductible of $5,000. Even with the catastrophic plan they are not coming in for preventive medicine. Women aren't coming in for mammograms, and we have a high level of breast cancer in this area. Since they do not have insurance, they are not coming in for preventive care. This can lead to a mountainous medical bill. In fact, some people have been

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UT), Senator Ben Nighthorse Campbell (R-CO), Senator Larry Craig (R-ID),Senator Byron L. Dorgan (D-ND), Senator J. Robert Kerrey (D-NE), Senator Herbert H. Kohl (D-WI), Senator Paul Wellstone (D-MN),Senator Spencer Abraham (R-MI), Senator John Ashcroft (R-MO), Senator Michael D. Crapo (R-ID), Senator Michael B. Enzi (R-WY), Senator Tim Johnson (D-SD), Senator Blanche L. Lincoln (D-AR), Senator Gordon Smith (R-OR), and Senator Craig Thomas (R-WY). The following additional Senators wrote separately to the ITC expressing their support for cattle producers in their states: Senator Ron Wyden (D-OR); Senator Mike DeWine (R-OH); Senator Chuck Hagel (R-NE); and Senator Robert G. Torricelli (D-NJ).

70. ITC Investigation; Letter to the Lynn Bragg, Chairman U.S. International Trade Commission (Oct. 21, 1999) from House Minority Leader Richard Gephardt (D-MO), Congressman Ralph M. Hall (D-TX), Congressman James V. Hansen (R-UT), Congresswoman Marge Roukema (R-NJ), Congressman Clay Shaw (R-FL), Congressman Nicholas V. Lampson (D-TX), Congressman Wes W. Watkins (R-OK), Congressman Peter A. DeFazio (D-OR), Congresswoman Ileana Ros-Lehtinen (R-FL), Congressman Bill Barrett (R-NE), Congressman Charles T. Canady (R-FL), Congressman Lincoln Diaz-Balart (R-FL), Congressman Doc Hastings (R-WA), Congressman Scott McInnis (R-CO), Congressman John Mica (R-FL), Congressman-at-Large Earl Pomeroy (D-ND), Congresswoman-at-Large Barbara Cubin (R-WY), Congressman George R. Nethercutt, Jr. (R-WA), Congressman Marion Berry (D-AR), Congressman Merrill Cook (R-UT), Congressman-at-Large Rick A. Hill (D-MT),Congresswoman Darlene Hooley (D-OR), Congressman Jerry Moran (R-KS), Congressman Max A. Sandlin (D-TX), Congressman-at-Large John R. Thune (R-SD), Congressman Jim Turner (D-TX), Congressman Greg Walden (R-OR), Congresswoman Helen Chenoweth-Hage (R-ID), Congressman Rush Holt (D-NJ), Congressman Mike Simpson (R-ID), and Congressman Tom Udall (D-NM).

taken right off the farm, and they have lost the whole farm because of medical costs.[71]

Many livestock and cattle associations have programs that provide insurance to members. Jim Magagna, Executive Vice President of the Wyoming Stockgrowers Association, says that his Association's members have dropped some of the more important health insurance benefits, and particularly have dropped benefits that they were providing to any hired labor. "They have tried to keep their family benefits if at all possible. Their financial picture does not allow them to do more."[72]

The Oklahoma Farmers Union, with over 100,000 members, is one of the larger providers of insurance to rural families. President Philip Klutts reports that his insurance sales staff also see members trying to reduce premiums by lowering or dropping coverage.[73] Kansas Cattlemen's Association co-founder Michael Schultz observes the same pattern: "[M]any ranchers have either lost their life insurance or had to go to catastrophic coverage only."[74]

2. *Inability to afford hired labor*

Most cow-calf operators are family operations where a significant portion of the work is by family members. Hired laborers, both full-time and seasonal, will typically share the burden on any sizeable operation. With less and less income, however, many producers cannot afford even seasonal hired labor, which increases the workload on the family.

Don Freiberger, a rancher in Alliance, Nebraska, put it this way: "Since the market went down in 1994, the only way I have been able to cover my production costs was to get rid of all the paid labor."[75] According to Carolyn Petik, who raises cattle with her husband Jerry in Meadow, South Dakota:

> Ranchers in this area can't afford to hire more help, so we are doing things ourselves that we would otherwise hire an extra person to help with. I'm exhausted at night, and my neighbors are too. You can't measure statistically the degree of depression caused by overwork but it's there.[76]

71. Petitioners' Pre-hearing Br., App. Vol. 2, Ex. 46 at 2-3.
72. *Id.* at App. Vol. 2, Ex. 24 at 3.
73. *Id.* at App. Vol. 2, Ex. 80 at 2.
74. *Id.* at App. Vol. 2, Ex. 26 at 3.
75. *Id.* at App. Vol. 2, Ex. 69 at 2.
76. *Id.* at App. Vol. 2, Ex. 6 at 1.

Maury Kaercher, President of the Michigan Cattlemen's Association, reports the the inability to afford labor is actually forcing herd cut-backs among the 550 members of his association:

> [Farmers] struggle to find people to work on their farm but are unable to give them fair wage because income has dropped dramatically in agriculture, particularly within the livestock sector. They cannot afford to pay somebody to come in and work even though their wives left to work in town. As a result, they need to both work harder and reduce the size of the operation by liquidating the herd.[77]

R-CALF's Vice-President Kathleen Kelley, who ranches with her husband in Meeker, Colorado, points out the effects on children in a ranch family:

> [C]hildren are being drawn into doing more work. One woman expressed to me her concern about the safety of her children, in their early teens, who have been drawn into helping out because this particular family could not afford to hire other help.[78]

3. *Taking off-farm jobs to supplement income*

Meanwhile, even as their workloads increase, family members on a growing numbers of operations take off-farm and off-ranch jobs, either to obtain health insurance benefits that are otherwise unaffordable or to supplement the family income because the ranch income is insufficient. According to Horace McQueen, a Texas rancher and a former television agricultural news broadcaster for some 35 years, "We've got capable folks who are ranchers but who must get jobs working off the ranch to provide any protection against illness."[79]

J. Peter Carey and Carolyn Carey in California describe their niece and her husband: "He has taken a job as a buyer for an auction yard. She runs the guest house, and they run the ranch.... {T}hey are just working as hard as they can work, ... doing everything just to try to stay afloat."[80] On the other side of the country, in New Jersey, the story is all too familiar. John Hargreaves, President of the New Jersey Beef Industry Council reports that local cattle producers are "taking off farm work, working in construction jobs, driving trucks or working night jobs at factories. They take whatever they can."[81] Richard Tokash, speaking on behalf of the 2,600 members of the North Dakota Stockman's Association, captures a concern shared as

77. *Id.* at App. Vol. 2, Ex. 51 at 3.
78. *Id.* at App. Vol. 2, Ex. 1 at 3.
79. *Id.* at App. Vol. 2, Ex. 7 at 5.
80. *Id.* at App. Vol. 2, Ex. 21 at 5.
81. *Id.* at App. Vol. 2, Ex. 81 at 2.

far south as Texas, as far west as California, and as far east as New Jersey:

> It is important for this industry, and the U.S. economy as a whole, . . .for agricultural producers to be able to survive on their production income. We can't have an industry living off town jobs. We can't manage the land that way.[82]

4. *Maintenance of property and equipment; investment in breeding stock*

Efforts to economize and reduce costs also mean putting off purchases of new equipment such as tractors and balers. Charles Klaseen, a Colorado rancher and Chairman of the 4,500-member Rocky Mountain Farmers Union observes:

> Ranchers are not investing in new equipment and are not investing in those necessary things to maintain their operations. I can speak to that personally because I've got an old pickup . . . But I lost $139,000 last year from the operation and you just can't justify buying a $30,000 pickup . . . . As far as equipment, we just got a welder and we just weld and weld. . ..[83]

Congresswoman Helen Chenoweth sees an inability to perform once-routine maintenance in her home state of Idaho:

> Some ranches are falling into disrepair and not because their owners have lost interest in them; quite the contrary, . . . many ranchers can no longer afford to . . . treat for weeds and purchase new equipment or fix broken equipment and make other expenditures normally required to operate a ranch.[84]

Florida cattle producer Dallas Townsend explains the consequences of these kinds of cutbacks:

> When confronted with decreased revenues, you look at whatever expenses you can reduce . . . . There are the ones that you can control such as fertilizers, feed for the cattle and health programs. Anytime you start sacrificing in these areas, you lose productivity. If you are forced to reduce your fertilizer cost in order to deal with lower prices for your product, then productivity of that pasture is going to be less. You're not going to grow as much grass.[85]

Another disturbing trend is that many cattle producers are not able to reinvest in their breeding stock. Mary von Forell, who raises breeding bulls in Wyoming, reports:

> In terms of the volume of business that we've done over the last few years, that volume has dropped off significantly, about 40%. I am not getting bids from my customers. It used to be that if a rancher had a bull that was four or five years old, the bull would be sold. Many of our

82. *Id.* at App. Vol. 2, Ex. 32 at 3.
83. *Id.* at App. Vol. 2, Ex. 41 at 3-4.
84. *Live Cattle from Canada*, Hearing transcript at 55.
85. Petitioners' Pre-hearing Br. App. Vol. 2, Ex. 44 at 2.

> [customers] are trying to squeak another couple of years out of their bulls now. The age of their bulls is increasing.[86]

Carl Turner, an Angus breeder in Tennessee, sees the same problem:

> My customers for bulls are cow-calf operators producing for the commercial or slaughter market. I know they are suffering financially because I see that they don't have the money they used to have to invest in their genetics.[87]

Veterinarian Max Thornsberry, who is also President of the Missouri Cattlemen's Association, explains the importance of investing in genetics. "[W]hen you combine cross bred calves, [it improves] the ability to withstand disease. . .." As a result of lack of money to invest in breeding programs, he observes, "[t]he quality of our cattle has suffered significantly."[88]

Herman Schumacher, an R-CALF Director, summarizes the condition of hundreds of cow-calf operators that utilize his livestock auction services in Herried, South Dakota:

> Five or six years ago, you had a producer in excellent shape, with a strong breeding program, quality feeding, and first-rate equipment. You had another producer, a good producer, paying attention to his genetics, using good feeding techniques, and buying new model used equipment regularly. You also had the marginal producer. . .. Now the marginal producer is gone. The good producer has cut his expenses to the core and is replacing no equipment and no longer upgrading his genetics. The excellent producer is cutting back as well, keeping the quality there for now but neither growing nor improving. I don't know of any producer I would describe in excellent shape.[89]

5. *Loss of equity and increased levels of debt.*

As in many agricultural industries, cattle producers borrow against the equity in their operation, or use credit, to finance their expenses over the year, and ideally, paid down that debt with each year's sales. Over a series of cattle cycles, ranch equity is built up. The ranch subsequently might be purchased by a younger generation, or sold outside the family. Either way, the ranch owners provided for their retirement years with a lifetime of work and savings.

This pattern no longer seems to apply. Senator Mike Enzi of Wyoming commented about the situation facing many of his ranching constituents: "As an accountant and a member of the Senate Banking Committee, it's particularly disturbing for me

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86. *Id.* at App. Vol. 2, Ex. 13 at 3.
87. *Id.* at App. Vol. 2, Ex. 15 at 1.
88. *Id.* at App. Vol. 2, Ex. 29 at 5-6.
89. *Id.* at Vol. 2, Ex. 2 at 7.

to see the loss of equity . . . that was built up over lifetimes and, in some cases, over generations."[90] Congressman John R. Thune spoke of the need to "restore profitability" to cattle producers in his home state of South Dakota.[91]

Based in Iowa, James Schaben, President of the Livestock Marketing Association, buys calves from as far as West Virginia, Kentucky and other parts of the South for resale to local feeders. He says the last few years have seen "the biggest flight" out of the cow-calf sector he has seen in 20 years in the industry:

> I've been in discussion with . . . folks who tell me they're {going} through the equity in their operations pretty quickly. A lot of folks have to take jobs off the farm, lay off hired help, eliminate health insurance or stop upgrading equipment. In some situations they've been unable to maintain their land. You see all of that in this part of the country, throughout the whole part of the greater Midwest. . . .
> These people have watched equity erode and erode. [T]hey've mortgaged and remortgaged and mortgaged again. And you're finding the faction that are just throwing up their hands and saying, ". . .I'm 52 years old. I'm not going to waste everything I have. . .. I'm going to get out now while I've got some equity left." It's been absolutely horrible.[92]

For those who wait too long, the equity to support those retirement years disappears. Rancher Tom Palmer in Malad, Idaho shares a common story:

> [My wife and I are]getting up to about 60 years of age. We'd like to retire, but there is no way. . . .. My son would like to live here. But he can't afford to live here and make nothing. We are working every day. It's kind of hard to justify what you are doing.[93]

In California, Andy Peek handles sales of 400,000 cattle a year between his livestock auction and video sales business. He provides an overview of producers in the western part of the country:

> Some folks are trading equity for debt. . . . [W]e've watched a lot of them get so deep in debt that they use up the value of their land just trying to keep the cow herd together until times get better. They eventually end up losing not only the cow herd but the ranch as well.[94]

Kathleen Kelley has been involved in the crisis in the cattle industry, and in agriculture generally, in her role as Vice Chairman of the National Commission on Small Farms. She explains:

> Cattle operations are usually family-owned businesses that incorporate the family's home. Ranchers will go to any length to stay on the

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90. *Live Cattle from Canada*, Hearing transcript at 33.
91. *Id.* at 54.
92. Petitioners' Pre-hearing Br. App. Vol. 2, Ex. 78 at 5.
93. *Id.* at Vol. 2, Ex. 43 at 2.
94. *Id.* at App. Vol. 2, Ex. 16 at 2.

ranch and in their home. A protracted period of depressed prices such as we have been experiencing since at least 1995, has pushed a large number of ranchers to the breaking point. Families have tapped out their lending ability at banks. Many have run up substantial credit card debt to keep the ranch operating.[95]

The crisis is not isolated to one or a few regions of the country. A South Dakota banker reports:

> From discussions with my colleagues in the [American Bankers Association], I know that ranchers across the country are using up their equity, increasing their debt loads. It doesn't make any difference whether you are in the Southeast or the Midwest, the story is the same. Never in the history of this country has there been as much demand for Farm Service Agency guarantees . . .[96]

6. *Individual stress*

These and other repercussions exert enormous strains on families, marriages, and the emotions and psyches of individuals. South Dakota rancher Nolan Seim offers this devastating look into his community:

> Our local vocabulary now includes words that we have very seldom dealt with: domestic abuse, suicide, murder, marriage breakups and nervous breakdowns. The people that I speak on behalf of, for the most part, live at or below the poverty line.[97]

Texas Farmers Union president Wes Sims sees these same tragic consequences:

> Ranchers tend to blame themselves when the ranch fails. Many of the ranchers I know have become very depressed. The younger ones are under enormous economic stress. I see what I believe [are] lots of broken homes because of the stress. And . . . in the last 12 months I've had two individuals that I've known either all or most of my lifetime, that committed suicide. Neither individual would have been the type of individual you would ever have believed would have done something like that. They were always optimistic or they had good solid characters, solid families. There [were] no other outside problems [except] the stress from the inability to make a living.[98]

From South Dakota, a pastor wrote the International Trade Commission about the concerns of his congregation:

> One young rancher's wife called . . . asking for prayers concerning financing for her parent's ranch. She began to sob as she explained how serious the situation was. Also, I spent the best part of the day with another rancher . . . . He shared how that recently he and his wife,

95. *Id.* at App. Vol. 2, Ex. 1 at 3.
96. *Id.* at App. Vol. 2, Ex. 4 at 2.
97. *Id.* at App. Vol. 2, Ex. 30 at 2.
98. *Id.* at App. Vol. 1, Ex. 16 at 4.

working together in the field, broke down and wept because of the pressures on them.[99]

Senator Larry Craig of Idaho testified bluntly before the International Trade Commission: "I must tell you that in my 54 years, I have never sensed the despair that [ranching] families hold today. They see no future."[100] Congressman Earl Pomeroy of North Dakota added, "[t]he physical and emotional exhaustion is plain to see on the face of too many of my constituents . . . ."[101] In Oregon, Congressman Greg Walden reports, "[a] combination of longer hours working the ranch, second jobs in distant locations and the financial insecurity that has resulted from tough times has added significant stress to the people in my district."[102]

In what has traditionally been a family business, one of the sources of stress is for parents who feel they have not provided for their children. Don Stiles, who ranches with his father and a brother in Texas, relates:

> I got out of the service in 1971 and came back home. . . . I remember talking to my father. He said, "Remember one thing, son. People will always eat." I had a conversation with him within the last two years and he apologized for getting me back in the business. He said, "I guess I made a mistake." . . . . I'm not ready to quit yet, but I'm close.[103]

Richard Nielson, Vice President of the Utah Cattleman's Association, worries about how his son will fare:

> My son is planning on taking over the ranch when I retire, if he doesn't starve to death first. He's working two other jobs because . . . [he] can't live on what we can pay him. . . . It's a scary thing for a young man. I hope I don't get arrested for child abuse for giving him the ranch.[104]

7. *Adverse effects on communities*

The economic hardship endured by the cattle producers have devastating impacts on the communities in which they live. Dennis Olsen, a community organizer working in eastern Montana, explains:

> One thing that's happening in connection with the ranching industry problems is its effects on Main Street. Small towns are feeling it di-

99. Letter from Pastor Robert J. Cianci, Coal Springs Church of God, Meadow, South Dakota, to the Honorable Lynn M. Bragg, Chairman US International Trade Commission (Oct. 15, 1999).

100. *Live Cattle from Canada*, Hearing transcript at 35.

101. *Id.* at 44.

102. *Id.* at 66-67.

103. Petitioners' Pre-hearing Br. App. Vol. 2, Ex. 11 at 2.

104. *Id.* at App. Vol. 1, Ex. 52 at 8.

rectly. Ranchers are not buying what they used to buy and small businesses are clearly feeling that pain.[105]

According to Senate Democratic Leader Tom Daschle from South Dakota, the effect of depressed prices for cattle and other agricultural products has been "shops closed, entire neighborhoods . . . boarded up, and schools cannot stay open."[106] Fellow South Dakota Senator Tim Johnson added, "[m]embership in rural church and civic organizations fall. It unravels the whole fabric of rural America."[107] Senator Conrad Burns of Montana sees the same crisis and asks, "[w]hat happens to our tax bases in counties that rely on agriculture? Our public services, our roads, our schools?"[108] Senator Max Baucus of Montana, Senator Kent Conrad of North Dakota and Senator Craig Thomas of Wyoming also testified before the ITC regarding the adverse effects of lower cattle prices throughout rural communities.[109]

Businesses serving the cattle industry throughout the country are affected. Don Smith reports that his feed store in Laneville, Texas is only open two days a week.[110] Ward Williams, with the Ogala Sioux Livestock and Landowners Association, describes a western wear store in Jackson County, South Dakota, that cannot meet the minimum $10,000 order requirement for Levis, because local patrons "just don't have the money to buy clothes."[111] Don Craig sees businesses closing around Mena, Arkansas, a concentrated area of cattle production.[112] Mary Dora Carlson, the Beef Chairman for Women Involved in Farm Economics in Colorado, says:

It is so hard on the small towns and the locality because equipment sales, the machinery sales, where you buy your tractors or combines or

105. *Id.* at App. Vol. 2, Ex. 36 at 2.

106. *Live Cattle from Canada*, Hearing transcript at 14.

107. *Id.* at 41.

108. *Id.* at 23.

109. *Id.* at 19 (Testimony of Senator Baucus: "[I]t is critical to note that any negative impact on the industry as a result of unfair trade practices has the potential of dealing a devastating blow to the industry. And when I sa[y] industry, I mean the agricultural producer, the local businesses . . . the rural community at large. . . ."); 30-31 (Testimony of Senator Conrad: "[W]e can anticipate losing 30 percent of the ranchers in my state in the next 18 months if there is a failure to act. That is the hard reality of what we confront. That would have devastating consequences for my state."); and 27 (Testimony of Senator Thomas: "I urge you to fully consider the harm that has been experienced by Wyoming and the nation's cattle producers. It is vital to our economy.")

110. Petitioners' Pre-hearing Br., App. Vol. 2, Ex. 27 at 4.

111. *Id.* at App. Vol. 2, Ex. 37 at 2.

112. *Id.* at App. Vol. 1, Ex. 15 at 3.

> hay balers or whatever, they just aren't selling like they should be. And so they are suffering, the small towns.[113]

J. Berry Harrison, who represents District 10 in the Oklahoma Senate describes "[t]he denuding of the rural communities" in his district:

> Where we are losing businesses, we are almost losing entire communities, entire towns.... I have access to the sales tax receipts county by county. This year sales taxes have been down in at least half the cities. It varies according to the different communities. ... There is no doubt that the counties in my senate district with the highest concentration of cattle production have the worst performance compared with other counties in my area. . . . You even see it in the rural hospitals. We have communities where the hospitals are barely holding on because people going through these hospitals don't have insurance to pay their bills.[114]

Leland Swenson, President of the National Farmers Union, offers a broad perspective:

> One of the biggest impacts can be readily seen as one looks at the rural landscape.... The barbed wire fences that used to keep the cattle in are sagging and there are fewer people. A windmill is turning but no longer pumping water. One quarter of a mile down the road is where the last dairy in the country used to be. Nearby are empty Harvestore silos. ... Working at the feedyard are people who used to raise their own cattle, but have gone out of business. ... Scanning the horizon further, one can see empty corrals and empty farmsteads. The particular scene is in central Kansas, but it could be in any state that has depended on livestock production.[115]

8. *Ranching families at and below the poverty line*

It is a remarkable irony that the tiny proportion of the U.S. population that feeds the rest of the country is struggling to feed itself. The plight of many of America's producers is perhaps best described by Diana Oldfather, president of the Farmer's Market Cooperative Development Committee in Missouri. The Committee in 1999 looked at the conditions of farmers and ranchers in a nine county area: Phelps, Gasconade, Osage, Pulaski, Crawford, Dent, Texas, Miller and Maries. The survey covered 10,000 farmers and ranchers that run cattle in the area. The review showed that 44 percent of the families live off farm income alone. All of these families were below the poverty line. According to Oldfather:

113. *Id.* at App. Vol. 2, Ex. 48 at 3.
114. *Id.* at App. Vol. 2, Ex. 62 at 3.
115. Live Cattle From Canada, USITC Pub. 3255, Inv. Nos. 701-TA-386 and 731-TA-812 (Oct.1999) (Leland Swenson, President, National Farmers Union, testifying in support of the Petition to Impose Antidumping Duties on Imports of Live Cattle from Canada).

> The 10,000 farmers in all these counties produce $240 million worth of agricultural sales, yet they are all starving because of the prices they receive . . . Working on this project is difficult. It's devastating to even talk to and interview these people. They are literally standing at the food bank and welfare lines, they are collecting checks and subsidies from the government. And they are humiliated; they are devastated; they are losing their homes; you see it everywhere. Hunger relief agencies are popping up more and more. And the people just come in droves.[116]

In South Dakota, Nolan Seim observes the same crisis:

> Our local food pantry has seen a tremendous increase in need over the last several years. It would seem a bit ironic that those who produce this nation's food cannot afford to feed their own families. . . . We are the forgotten 2% of this nation's population upon whose labor and production 25% of our nation's jobs depend.[117]

Sheila Bickle in Montana speaks to the commitment and drive of this same fraction of the U.S. population:

> I don't think anyone owes agriculture a living at all. And I don't think the true producers want to be handed a living. In this country, you have less than 2% of the population able to feed not only our population but a large part of the world. Yet within the last two to three years, I'm seeing that we are becoming serfs of the land.[118]

In sum, a vitally important sector of the American economy and a critical source of protein and nutrition for consumers both here and around the world has producers who do not earn enough from the product they sell to put food on their own dinner table. We turn next to the efforts to address the industry's many problems.

III. USING TRADE RULES AND MECHANISMS TO IMPROVE THE CATTLE INDUSTRY'S CONDITION

Various groups in the cattle industry have pursued a variety of efforts to improve the industry's condition. The National Cattlemen's Beef Association (NCBA) and the American Farm Bureau Federation, for example, have identified as a high priority the use of trade negotiations and dispute settlement to open foreign markets and remove barriers to U.S. cattle and beef products. Producer associations, both within the cattle industry and in other agricultural sectors, are advocating legislation requiring country-of-origin labeling of imported beef at the retail

116. Petitioners' Pre-hearing Br., App. Vol. 2, Ex. 19 at 2.
117. *Id.* at App. Vol. 2, Ex. 30 at 3.
118. *Id.* at App. Vol. 2, Ex. 59 at 1.

level. Also, USDA's Agricultural Marketing Service is requesting comment on a change in current regulations governing the official grading of imported beef carcasses, including an option to require country of origin labeling on the beef cuts after fabrication in the United States.[119] Federal and state legislation has been enacted to require mandatory price reporting for purchases of cattle by packers. One group of feedlot operators and their cattle producers have sued certain packers, alleging antitrust violations arising from packer concentration. Finally, a large coalition of cattle and farmer associations and individual ranchers and producers supported the filing of antidumping and countervailing duty petitions on imported live cattle that were believed to be sold at unfairly low prices.

One common element to these efforts is their focus on rules and mechanisms governing trade and competition, whether in international or domestic markets. Trade negotiations and dispute resolution have proved effective in reducing barriers to U.S. exports of beef and cattle-related products, as evidenced by the overall increase in U.S. exports during recent years. Nevertheless, together with antitrust litigation, these tools do not work quickly and therefore are unlikely to yield immediate relief to the cattle industry.

Country of origin labeling is a regulatory, legislative and political issue which will either be adopted in some form or not. A recent report by the U.S. Department of Agriculture on country of origin labeling, which is discussed further below, presents some of the competing policy questions that Congress will have to address.[120]

Of all of these alternatives, the antidumping and countervailing duty laws are among the procedures currently in force which provide the possibility of obtaining relief in the short-term from economic harm caused by unfairly priced imports. That

119. *See* USDA, Agricultural Marketing Service [Docket Number LS-99-21] Request for Public Comments on the Official Grading of Imported Beef, Lamb, Veal and Calf Carcasses Under the Authority of the Agricultural Marketing Act of 1946, 65 Fed. Reg. 4780 (Feb. 1, 2000). USDA's advance notice of proposed rulemaking requested comment on three options: (1) discontinue the official grading of imported carcasses; (2) revise the grading regulations to require that the country of origin mark is retained on the component cuts after fabrication of an imported carcass that is federally graded; or (3) rise the grading regulations to eliminate the requirement that a country of origin mark be applied to imported carcasses. *Id.* Note that the proposal to extend the country of origin labeling requirement would apply *only* to component cuts of imported carcasses, and not to imported fabricated beef (e.g., hamburger).

120. *See* discussion *infra* at section III.D.

the cattle industry was ultimately unsuccessful in obtaining the kind of relief from unfair imports which other industries such as steel routinely receive raises the question of how well-suited these laws are to addressing the cattle industry's problems.

A. PREVIOUS EFFORTS TO ASSIST THE DOMESTIC CATTLE INDUSTRY: THE MEAT IMPORT ACTS OF 1964 AND 1979 AND NEGOTIATION OF VOLUNTARY EXPORT RESTRAINTS

Before examining the various tools that have recently been used in attempts to help the cattle industry, it is worth examining the tools that have been used in the last 40 years when the cattle industry was in distress. In 1964, Congress passed the Meat Import Act setting in place quotas on imports of beef and beef products, lamb and mutton. The quotas were based on the average annual importation of meat for the 5-year period ending on December 31, 1963.[121] The impetus for the quotas was the depressed state of the cattle industry:

> For some time the Committee on Finance has been concerned with the serious plight of the domestic cattle industry. This industry has been caught in the crossfire of rising production costs and decreased product prices. . . .
>
> [A] number of factors contribute to the present depressed condition of the domestic cattle industry. They include—
>
> (a) increases in the number of head of cattle
>
> (b) increases in the size of beef animals
>
> (c) increases in the availability of alternative meat products;
>
> (d) increases in the number of domestic animals slaughtered;
>
> (e) capital gains treatment on proceeds from sale of breeding stock; and
>
> (f) imports of foreign beef.[122]

The Finance Committee observed that from 1956 to 1963, annual imports of foreign beef had grown from 200 million pounds (carcass weight) to 1.7 billion pounds, while annual domestic consumption during the same period had increased some 3 billion pounds. "Thus, foreign beef accounted for one-half of the total increased domestic use of beef over the 8-year period 1956-63."[123] The Committee went on to find that although most do-

121. S. REP. No. 88-1167, (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3070.
122. *Id.* at 3071.
123. *Id.* at 3071. Based on the data in the Finance Committee report, it appears that the market share for imported beef increased from about 1.3 percent in 1956 (total consumption of 15.7 billion pounds, of which imported beef equaled 200 million pounds) to more than 9 percent in 1963 (18.6 billion pounds consumed, of which imports equaled 1.7 billion pounds). *Id.* During the same

mestic beef was used for table cuts and most imported beef was used for manufactured beef (e.g., hamburger), nevertheless "imported beef competes directly in the marketplace with domestic cow and bull beef, and indirectly with grain fed, table grade beef."[124] Another table in the report showed that "at the very time imports of beef were sharply rising, domestic beef prices were drastically falling."[125]

> This price data strongly suggests that imported meat has played an important part in creating the distressed market conditions in the cattle industry. The pressure on domestic prices of low-priced, foreign-imported beef discourages sale of domestic livestock and encourages their return to the range where they produce new calves and add more weight, thus intensifying the problems confronting the American cattlemen. . . . On the basis of the information presented to the committee, . . . your committee has concluded that beef imports have contributed heavily to the depressed conditions in the livestock industry and that remedial legislation is warranted.[126]

The remedy was imposition of quotas which were set at an adjusted base quantity. The base quantity (725.4 million pounds) would be increased or decreased annually according to a formula based on increases/decreases in the estimated domestic commercial production for that year and the preceding two years in comparison with the average annual domestic production during 1959-1963. The quotas were "triggered" when imports were expected to exceed 110 percent of the adjusted based quantity. The Secretary of Agriculture was required to publish the estimated quantity that would trigger the imposition of a quota, as well as the quantity of meat that, but for the law, would enter the United States.[127]

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period, the United States imported an average of 895,000 head of cattle each year, although the trend in imports was increasing in the later years as well. Between 1953 and 1956, for example, cattle imports never exceeded 315,000 head. But between 1957 and 1963, imports were never fewer than 663,000 head, and topped a million in 1958, 1961 and 1962. The Committee report does not specify what proportion of the imports consisted of stockers, feeders or fed cattle. *Id* at 3072. Interestingly, the Committee did not comment on the increase in imports of live cattle.

124. *Id.* at 3073.

125. *Id.* at 3073 (citing Tariff Commission Report on Beef, June 1964).

126. *Id.* at 3074.

127. S REP. NO. 96-465, at 2 (1979), *reprinted in* 1979 U.S.C.C.A.N. at 2657. The law also permitted the President to suspend the quotas or increase it above the adjusted base quantity in the event of overriding economic or national security interests, supplies of domestic beef and veal will not meet demand at reasonable prices, or trade agreements have been entered into which assure the policy of the act will be carried out. Interestingly, the Finance Committee report comments on the apparent failure of voluntary restraints by other trading

In 1979, Congress amended the Meat Import Act to modify the method for establishing quotas to "stabilize U.S. beef and veal production and prices at levels adequate to provide a fair return to domestic producers of beef and veal" and "to provide reasonable access to the U.S. market for imported beef and veal."[128] In the report that accompanied the legislation, the Senate Finance Committee reviewed the operation of the 1964 Act:

> In the first 14 full years that the Meat Import Act has been in effect, actual meat imports have exceeded the adjusted based quantity level eleven times and have exceeded the trigger level six times (but only barely in three of these six instances). In seven instances the President proclaimed the required quotas, but in six of those instances suspended them in view of overriding economic interests or short supply, and in the seventh instances (1976) he increased the quota level, again in view of overriding economic interests, to a level equal to the trigger level.[129]

The Committee's report also recounted that the Executive Branch had negotiated a series of agreements with major-meat exporting countries limiting meat imports.[130] The agreements established import restraints that were intended to maintain U.S. imports at levels just below the Meat Import Act's trigger level.[131] "Foreign governments have apparently preferred agreed restraints at this level to forestall unilateral quotas at the lower level of the adjusted base quantity. Each country was also thereby assured a defined equitable share of the total restraint level."[132]

In the meantime, the cattle industry was once again facing difficulties. A period of expanding domestic per capita consumption of beef from the late 1960s to 1973, despite rising prices and competition from other meats, had made the industry both prosperous and optimistic. Producers expanded their herds. But, beginning in 1973, domestic per capita beef consumption de-

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partners to sufficiently reduce the volume of imports, and the subsequent perceived need for imposition of quotas. 1964 USCAAN at 3071.

128. 1979 USCAAN 2654-55.

129. *Id.* at 2657-2658.

130. *Id.* at 2658. These agreements had been negotiated under the authority of Section 204 of the Agricultural Act of 1956, which authorized the President to negotiate agreements with foreign governments limiting exports to and imports into the United States of agricultural commodities and products.

131. *Id.* at 2658.

132. *Id.* at 2658. In 1978 and 1979, the total level of the restraint program was well above the trigger level, although still below projected imports in the absence of the agreements, because the President had determined there would otherwise be a shortage of meat at reasonable prices. *Id.*

clined. Cattle prices declined as well because of oversupply. "In 1976, prices were only 5 percent higher than those received at the outset of the period of herd expansion in 1967. The cost of production of beef, however, had nearly doubled between 1967 and 1976."[133]

> As a result of low prices, climbing costs of production, and an oversupply of cattle, producers began to liquidate herds. In 1976, production of beef and veal reached an all time high of 27 billion pounds. These high levels of production continued in 1977 and early part of 1978.[134]

The Finance Committee went on to observe that the large variations in beef and veal production and prices was severe both for producers and consumers. It had been generally agreed, for example, that "the domestic beef industry as a whole had been seriously hurt in 1974-1978."[135] "Faced with low prices and sharply rising costs, many producers, large and small, were forced out of the industry or went deeply into debt to ride out the cycle. . . . [W]ith prices remaining low, a massive herd liquidation has occurred, and with a record slaughter of cows, a period of sharply rising prices was in store for the consumer."[136]

The Committee also observed that imports played an "important role" in the cattle cycle:

> According to studies undertaken by the U.S. International Trade Commission, imports have supplied about 7 percent of U.S. consumption of beef in most years since the Meat Import Act because effective. . . . In 1978, however, domestic production declined and prices roe and imports supplied 8.4 percent of consumption. . . . [From January to March 1979]. . prices continued to rise rapidly and imports supplied 11 percent of consumption (an increase of 33 percent from year-earlier levels) as domestic production declined 10 percent. The Department of Agriculture has projected that imports of beef during 1979 will be equivalent to 10 to 12 percent of U.S. consumption.[137]

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133. *Id.* at 2661.

134. *Id.* at 2661.

135. *Id.* Interestingly, in 1977, cattle and beef producers filed a petition under Section 201 of the Trade Act of 1974, seeking temporary relief from imports of cattle and beef. Relief was denied because the International Trade Commission determined there was insufficient evidence that increased imports of cattle and beff were a "substantial cause" or serious injury to the industry. USITC, *Live Cattle and Certain Edible Meat Products of Cattle*, Inv. No. 201-25, Report to the President Under Section 201 of the Trade Act of 1974, USITC Pub. 834 (Sept. 1977).

136. 1979 USCAAN 2661.

137. *Id.* As with the 1964 Act, Congress' focus was on imports of beef, not cattle. The International Trade Commission had issued a section 332 report in 1977, at the request of the Finance Committee, that examined the conditions of competition in the U.S. cattle and beef markets. With regard to cattle imports, the ITC reported that between 1967 and 1976, cattle imports had fluctuated

Under the 1964 Act, the quotas moved in the same direction as domestic production of beef. "[T]he adjusted base quantity increases in any year when domestic beef and veal production is estimated to increase and decreases when such production is estimated to decline."[138] This was problematic since it meant that increases and decreases in imports magnified the effects of the swings in the industry, "which results in consumers periodically paying very high prices and producers periodically suffering severe losses, causing many of them to leave the industry."[139]

Congress' response was to introduce a countercyclical factor based on per capita U.S. commercial domestic cow beef production which would "remove the destabilizing effect of imports under the present law on the U.S. market."[140]

> Under the bill, any limitation proclaimed by the President would permit more imports in times of low U.S. production and rising prices, thus increasing U.S. supply and having a price retarding effect beneficial to consumers; less imports would enter in times of high U.S. production and falling prices, thus decreasing U.S. supply and having the effect of maintaining U.S. prices to avoid severe losses to domestic producers. . . . Added stability in the beef and veal industry should provide an economic climate which encourages investment in cost-reducing technology, improvements in productivity, better breeding stock, pasture improvements, better machinery and equipment and better veterinary programs. Because of increased efficiencies which can be attained by the domestic industry ins a more stable price and production environment, improvement in the quality, certainty of supply, and price of beef will benefit the consumer.[141]

Thus, during the period from 1964 through 1994, Congress and the Executive Branch used quotas in conjunction with a series of bilateral agreements with major meat-exporting countries to assist the domestic cattle and beef industry. The quotas were intended not to exclude beef imports, but rather to control the flow of imports so that they would not magnify the more

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considerably. "Imports in 1967 amounted to about 740,000 head of cattle; from 1968 to 1973, about 1 million head a year entered the U.S. market. Imports dropped sharply in 1974 and 1975, a period of sharply declining cattle prices in the United States. By 1975, approximately one-third as many head of cattle were imported as in 1972. In 1976, imports rose to almost 973,000 head, a level comparable with that of the late 1960's and early 1970's." USITC, *Conditions of Competition in U.S. Markets Between Domestic and Foreign Live Cattle and Cattle Meat Fit for Human Consumption*, Inv. No. 332-85, USITC Pub. 842 (November 1977) at 79. The majority of the imports (almost 80 percent) consisted of stocker and feeder cattle between 200 and 699 pounds from Mexico. *Id.*

138. 1979 USCAAN 2655.

139. *Id.* at 2661.

140. *Id.* at 2661-62.

141. *Id.* at 2662.

harsh effects of the cattle cycle both with respect to producers and consumers.

B. USE OF TRADE AGREEMENTS TO LIBERALIZE MARKETS FOR BEEF

The United States also has used trade agreements to open foreign markets to U.S. beef exports, as well as open the U.S. market to imports.

1. U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement

The United States phased out its import restrictions on cattle and beef with respect to Canada through the United States - Canada Free Trade Agreement (CFTA), which entered into force in 1989. The CFTA prohibited the United States from introducing, maintaining, or seeking quantitative restrictions on meat imports from Canada, hence making the Meat Import Act no longer applicable to Canada.[142] The CFTA also provided for the reciprocal phase out of duties over a 10-year period on imports of live cattle and fresh, chilled or frozen beef and veal.[143] However, beef and veal were subject to accelerated duty elimination: fresh or chilled beef and veal carcasses received a duty of "Free" effective April 1, 1990; duties on frozen carcasses and other fresh/chilled and frozen cuts were variously reduced to zero effective July 1, 1991 and July 1, 1993.[144] With the entry into force of NAFTA on January 1, 1994, these free rates of duty applied to Mexico as well as to Canada.[145]

2. The Uruguay Round Agreements

The Uruguay Round Agreements saw a number of agreements and changes in U.S. law with respect to cattle and beef. Countries agreed to reduce tariffs, for example, although members are granted an implementation period to meet specific requirements for Agriculture.[146] The implementation period is six years for developed country Members and ten years for develop-

142. *See* USITC, *Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade*, USITC Pub. 3048 (July 1997) at 4-3.
143. *Id.*
144. *Id.*
145. *See Id.*
146. *See* WTO, Article 18:6 of the Agreement on Agriculture.

ing country Members.[147] No reduction commitments are required for least-developed developing country Members.[148]

Perhaps the most significant change coming to U.S. law coming out of the URA was the repeal of the Meat Import Act, which was replaced with a system of tariff-rate quotas on imports from non-NAFTA countries. The in-quota amounts agreed to under the URA were 15 percent higher than what the Meat Import Act had allowed.[149]

The Uruguay Round negotiations also included a U.S./Korea Record of Understanding providing for access to the Korean beef market; Japanese duty reductions applicable to beef; and reductions in subsidies and other government incentives for cattle and beef exports.[150] The United States also entered into a side agreements with Argentina and Uruguay for each to ship up to 20,000 metric tons annually of fresh, chilled or frozen beef to the United States.[151]

3. *Assessing the success of trade negotiations in opening foreign markets to U.S. cattle producers*

One indicator of the relative success of trade negotiations and agreements for cattle and beef is to examine the levels of exports. USDA statistics indicate, for example, that U.S. exports of beef have increased from about $1.99 billion and 425 thousand metric tons in 1993 to $2.326 billion and 714 thousand metric tons in 1999.[152]

Recent trends in global trade in beef and cattle nevertheless indicate that trade flows remain relatively constricted, save for a limited number of markets such as the United States. The Third Annual Report on The International Markets for Meat, published in 1997, gives some idea of both how limited international trade in beef actually is and how very open the U.S. market is to imports, relative to other markets. The United States was the leading importer of beef in the world in 1997 with a forecast of 1.034 million metric tonnes (MT), while other more populous trading partners such as the EC imported only a fore-

147. *See* WTO, Article 18:6 of the Agreement on Agriculture.
148. *See* WTO, Article 18:6 of the Agreement on Agriculture.
149. USITC Pub. 3048 at 6-1.
150. *Id.*
151. *Id.*
152. USDA/FAS, *Status of Meat and Product Exports in 1999*, <http://www.fas.usda.gov/dlp/circular/1999/99-10LP/UStrade/tab1&2.pdf>. *See also* Table 3, *supra*.

casted 380,000 MT.[153] Conversely, the EC enjoyed a substantial trade surplus in beef in 1997, with a forecast of 910,000 MT in exports.[154] Only a relative handful of countries had any significant imports of beef and veal.[155] More recent data from USDA's Foreign Agricultural Service indicates that these trends are continuing. In 1999, the United States imported 1.3 million metric tons of beef and veal (carcass weight equivalent), while other more populous countries and regions imported far less, including the European Union (323,000 MTs); Brazil (54,000 MTs); and China (6,000 MTs).[156] While the United States exported 1.056 million metric tons that same year, the EU exported 810,000 MTs, Brazil exported 550,000 MTs, and China exported 36,000 MTs.[157] Indeed, many countries continue to maintain significant tariffs on cattle and beef, as seen in Table 7.

4. *Current negotiations*

More recent efforts to improve U.S. cattle and beef producers' access to foreign markets include the United States-Canada Record of Understanding (ROU) regarding agricultural trade, which was signed in December 1998. The purpose of the agreement was to promote more open and fairer bilateral trade in the full spectrum of agricultural products.[158] Of particular relevance to the cattle industry was that portion of the agreement expanding the so-called "Northwest Cattle Project" that facilitates imports of U.S. feeder cattle into Canada.[159] To qualify

153. *See* International Bovine Meat Agreement, *The International Markets for Meat*, Aug. 1997, Third Annual Report (Geneva), Table 1, at 8.

154. *Id.*

155. *Id.* at 56.

156. *See* USDA/FAS, FAS Online, Livestock Tables, http://www.fas.usda.gov/dlp/circular/ 2000/00-03lp/livestock.html#Beef and Veal (visited April 11, 2000). Figures are preliminary.

157. *Id.* Figures are preliminary.

158. Record Of Understanding Between The Governments Of Canada And The United States Of America Regarding Areas Of Agricultural Trade, Department of Agriculture and Agri-Food Canada, <http://www.cfia-acia.agr.ca/english/corpaffr/ international/recorde.shtml>.

159. The Northwest Cattle Project, the implementation of which was announced on October 1997, was a trade agreement between the United States and Canada that would waive specific animal-health testing requirements to facilitate the cross-border shipment of U.S. live cattle to Canada. The project initially covered the states of Montana and Washington. *See* C. Lambert and G. Weber, *Live Cattle Trade Agreement with Canada*, (Jan./Feb. 1998) <http://www.beef.org/NCBA>. The first load of U.S. cattle were shipped in November 1997 to a Canadian feedlot. See *Pilot Working*, BEEF BUSINESS BULLETIN, No. 5 (National Cattlemen's Beef Association) Dec. 5, 1997, at 4. The initial results did not meet expectations, as Canadian health restrictions continued to be per-

Table 7.
Selected Bound and Applied Tariff Rates on Cattle and Beef

Country	Bound tariff rate/live cattle*	Bound tariff rate/ fresh, chilled, frozen beef**	Applied tariff rate/ fresh, chilled, frozen beef**
Brazil	0.0 %	55%	13-15%
China***	18%	32.5 – 40%	45%
Colombia	70%	108%	20%
Guatemala	15%	63%	0% for in-quota; 30% for over-quota
Hungary	40%	71.7%	15% for under EU-quota/ 25% for under GATT-quota/77.5% for other
Indonesia	40%	50%	Not available
Japan	¥ 38,250 – 63,750 / head (depending on weight)	50%	45%
Korea	40%	40%	42%
Mexico	37.5%	45%	20-25%
Singapore	10%	Not reported.	Not reported.
Thailand	30%	50%	Not reported.
Venezuela	40%	25%	Not reported.

*HTS 0102.90
** HTS 0201./0202.
*** China is not yet a member of the WTO and thus does not have "bound rates."
Source: Bound tariffs: USDA/FAS, FAS Online Country Information, WTO Tariff Schedules available online at www.fas.usda.gov/scriptsw/wtopdf/wtopdf_frm.idc.; Applied rates: USDA/FAS Annual Livestock Attache Reports for 1999, available online at http://www.fas.usda.gov/scriptsw/attacherep/default.htm.

to export feeders to Canada, states must be officially free of bovine brucellosis and tuberculosis and be classified by Canada as low risk for bluetongue.[160] As of December 1999, six states — Alaska, Hawaii, Idaho, North Dakota, Montana and Washington

ceived as too strict, thus discouraging Canadian feedlots from participating. *NW Pilot Project*, BEEF BUS. BULL., No. 21, (National Cattlemen's Beef Association) May 1, 1998, at 5. During the initial months, fewer than 1,000 head of U.S. feeder cattle had been shipped, prompting the president of the National Cattlemen's Beef Association to write to the U.S. Secretary of Agriculture, urging him to work with the Canadian government to make the project effective. *NW Pilot Project*, BEEF BUS. BULL. NO. 23, (National Cattlemen's Beef Association) May 15, 1998, at 5. Regulatory adjustments by Canadian authorities led to increases in exports the following year of approximately 51,000 feeders. *See Exports to Canada Increase,* BEEF BUS. BULL., Vol. 22, Issue 25 (National Cattlemen's Beef Association) May 14, 1999, at 5. It was also reported that the United States and Canada had agreed in December 1998 to expand the program to 26 states. *Id.*

160. Record Of Understanding Between The Governments Of Canada And The United States Of America Regarding Areas Of Agricultural Trade, at annex 2 Department of Agriculture and Agri-Food Canada, <http://www.cfia-acia.agr.ca/english/corpaffr/ international/recorde.shtml>.

– had been approved for participation in the program. In the 1998-99 season, 51,009 head of U.S. feeder cattle were imported under the project, compared to 1,000 head the previous year. In the first eight weeks of the 1999-2000 season (which began on October 1), U.S. feeder cattle exports to Canada totaled 92,972 head. The Northwest Cattle Project (renamed the Import Requirements for Restricted Feeder Cattle Program) benefits U.S. feeder cattle producers by providing access to a broader market. Canadian feedlot operators, in turn, benefit from an additional source of feeder cattle.

Other trade negotiation efforts in which the cattle industry has a stake include the Free Trade Area of the Americas and renewed talks on agriculture within the WTO.[161] These negotiations are in their early stages and will hopefully contribute to the finding of solutions.[162]

C. USE OF DISPUTE RESOLUTION TO OPEN FOREIGN MARKETS

Use of dispute settlement mechanisms provided for in international trade agreements have been another means by which the United States has attempted to open foreign markets and eliminate barriers to exports of U.S. cattle and beef products. Since the implementation of the Uruguay Round Agreements and the establishment of the WTO's Dispute Settlement Mechanism, there have been approximately one dozen disputes that are directly or indirectly related to trade in cattle and beef. Table 8 summarizes the various proceedings.

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161. Work towards a Free Trade Area of the Americas began on December 11, 1994, when President Clinton and the 33 other democratically-elected leaders in the Western Hemisphere met in Miami, Florida for the first Summit of the Americas, agreeing to conclude negotiations no later than the year 2005. On April 18-19, 1998, President Clinton and his 33 counterparts initiated the Free Trade Area of the Americas negotiations at the Summit of the Americas meeting in Santiago, Chile. Nine negotiating groups were established, including groups on agriculture, and market access. *See Request for Public Comment Regarding Negotiations Toward a Free Trade Area of the Americas*, 64 Fed. Reg. 72715 (Dec. 28, 1999). The objectives of these groups is to negotiate, *inter alia*, the reduction and elimination of tariffs and non-tariff barriers within the Western Hemisphere.

162. *See Agricultural Trade Symposium*, 9 MINN. J. GLOBAL TRADE 1 (Winter 2000).

Table 8.
WTO Consultations/Dispute Settlement Proceedings Involving Cattle and Beef Products

Dispute	Summary of Dispute	Status
Korea—Measures Concerning the Testing and Inspection of Agricultural Products (WT/DS3 and WT/DS41) (US) (April 1995 and May 1996)	The dispute involves testing and inspection requirements with respect to imports of agricultural products into Korea. The measures are alleged to be in violation of GATT Articles III or XI, Articles 2 and 5 of the Agreement on Sanitary and Phytosanitary Measures (SPS), TBT Articles 5 and 6 and Agriculture Article 4.	Bilateral agreement reached whereby Korea adopted common international shelf-life standards for beef and other products. WTO considers case to still be pending consultaitons due to the fact that the bilateral agreement did not cover sterilized milk products, which were part of the original complaint.
Hungary—Export Subsidies in Respect of Agricultural Products (WT/DS35) (Argentina, Australia, Canada, New Zealand, Thailand and US) (March 1996)	Dispute alleges that Hungary violated the Agreement on Agriculture (Article 3.3 and Part V) by providing export subsidies in respect of agricultural products not specified in its Schedule, as well as by providing agricultural export subsidies in excess of its commitment levels. Panel was requested on 9 January 1997 and established on 25 February 1997. On 30 July 1997, Australia, on behalf of all the complainants, notified the DSB that the parties to the dispute had reached a mutually agreed solution, which required Hungary to seek a waiver of certain of its WTO obligations.	Hungary's commitment to eliminate the export subsidies expires 2001. General Council granted the waiver.
EC-Measures Affecting Meat and Meat Products (Hormones) (US WT/DS26) (April 1996)	US requested a panel on 25 April 1996. A panel was established on 20 May 1996. Panel found that EC ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with Articles 3.1, 5.1 and 5.5 of the SPS Agreement. On 24 September 1997, the EC notified its intention to appeal certain issues of law and legal interpretations by the Panel. The Appellate Body, inter alia, upheld the Panel's finding that the EC import prohibition was inconsistent with Articles 3.3 and 5.1 of the SPS Agreement, but reversed the Panel's finding that the EC import prohibition was inconsistent with Articles 3.1 and 5.5 of the SPS Agreement. The Appellate Body report and the Panel report, as modified by the Appellate Body, were adopted on 13 February 1998. On 16 April 1998, EC requested that the "reasonable period of time" for implementation of the recommendations and rulings of	Ban on hormone treated beef and beef by-products remains; US authorized to, and did, suspend concession on various products including beef and beef by-products. Case is discussed *infra*.

Dispute	Summary of Dispute	Status
	the DSB be determined by binding arbitration, pursuant to Article 21.3(c) of the DSU. The Arbitrator found the reasonable period of time for implementation to be 15 months from the date of adoption (i.e. 15 months from 13 February 1998).	
Paskistan—Export Measures Affecting Hides and Skins (WT/DS107/1) (EC) (November 1997)	Dispute concerns a Notification enacted by the Ministry of Commerce of Pakistan prohibiting the export of, *inter alia*, hides and skins and wet blue leather made from cow hides and cow calf hides. EC contends that this measure limits access of EC industries to competitive sourcing of raw and semi-finished materials.	Consultations pending.
Australia—Subsidies Provided to Producers and Exporters of Automotive Leather (US—WT/DS126/1) (May 1998)	US requested panel on 11 June 1998 in respect of prohibited subsidies allegedly provided to Australian producers and exporters of automotive leather, which allegedly involve preferential government loans of about A$25 million and non-commercial terms and grants of about A$30 million. Panel was established on 22 June 1998. The Panel found that the loan from the Australian Government is not a subsidy contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement, but that the payments under the grant contract are subsidies within the meaning of Article 1 of the SCM Agreement, which are contingent upon export performance within the meaning of Article 3.1(a) of that Agreement. Panel report was adopted on 16 June 1999.	Panel determined that Australia had failed to withdraw the prohibited subsidies and thus had not taken measures to comply with the Panel's recommendations. US may request to suspend concessions.
Slovak Republic—Measures Concerning Importation of Dairy Products and the Transit of Cattle (WT/DS133/1) (Switzerland) (May 1998)	Dispute concerns concerns measures imposed by the Slovak Republic with respect to the importation of dairy products and the transit of cattle. Switzerland contends that these measures have a negative impact on Swiss exports of cheese and cattle. Switzerland alleges that some of these measures are inconsistent with Articles I, III, V, X and XI of GATT 1994, Article 5 of the SPS Agreement, and Article 5 of the Import Licensing Agreement.	Consultations pending.
US—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada (WT/DS144/1) (Canada) (September 1998)	This dispute concerns certain measures imposed by the US state of South Dakota and other states, prohibiting entry or transit to Canadian trucks carrying cattle, swine, and grain. Canada contends that these measures adversely affect the importation into the United States of cattle, swine, and grain originating in Canada. Canada alleges violations of the SPS Agreement; the TBT Agreement; the Agreement on Agriculture; and Articles I, III, V, XI and XXIV:12 of GATT 1994. Canada also makes a claim of nullification or impairment of benefits accruing to it under the cited	Consultations pending.

Dispute	Summary of Dispute	Status
	Agreements. Canada invoked Article 4.8 of the DSU for expedited consultations in view of the perishable nature of the goods in question.	
Japan—Tariff Quotas and Subsidies Affecting Leather (WT/DS147/1) (EC) (October 1998)	Dispute concerns management of the tariff quotas for leather and the subsidies allegedly benefiting the leather industry and "Dowa" regions in Japan. EC contends the system leads to a situation that deters foreign companies from establishing in Japan for purposes of importing leather directly. The EC also contends that subsidies which were granted are specific and that the total value of these different subsidy programmes is liable to cause serious prejudice to its interests. The EC alleges violations of the Import Licensing Agreement and the Subsidies Agreement.	Consultations pending.
Argentina—Measures on the Exports of Bovine Hides and Import of Finished Leather (WT/DS155) (EC) (December 1998)	This dispute concerns measures taken by Argentina on the export of bovine hides and the import of finished leather. The EC alleges that the *de facto* export prohibition on raw and semi-tanned bovine hides (implemented in part through authorization granted by the Argentinian authorities to the Argentinian tanning industry to participate in customs control procedures of hides before export)is in violation of GATT Articles; XI:1 (which outlaws *de jure* export prohibitions and measures of equivalent effect); and X:3(a) (which requires uniform and impartial administration of laws and regulations) to the extent that personnel of the Argentinian Chamber for the tanning industry are authorized to assist Argentinian customs authorities. The EC also claims that the "additional value added tax" of 9 per cent on imports of products into Argentina; and the "advance turnover tax" of 3 per cent based on the price of imported goods imposed on operators when importing goods into Argentina; are in violation of GATT Article III:2 (which prohibits tax discrimination of foreign products which are like, directly competitive or substitutable to domestic products). EC requested establishment of a panel on 3 June 1999. Panel was established on 26 July 1999.	Matter is pending before the panel.
Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (WT/DS161/1) (US) (February 1999)	This dispute concerns (1) an alleged Korean regulatory scheme that discriminates against imported beef by *inter alia*, confining sales of imported beef to specialised stores, limiting the manner of its display, and otherwise constraining the opportunities for the sale of imported beef and (2) allegations that Korea imposes a markup on sales of imported beef, limits import authority to certain so-called "super-groups" and the Livestock Producers Marketing Organization ("LPMO"), and	Matter is pending before the Panel.

Dispute	Summary of Dispute	Status
	provides domestic support to the cattle industry in Korea in amounts which cause Korea to exceed its aggregate measure of support as reflected in Korea's schedule. U.S. contends these restrictions apply only to imported beef, thereby denying national treatment to beef imports, and that the support to the domestic industry amounts to domestic subsidies that contravene the Agreement on Agriculture. U.S. requested a panel on 15 April 1999, and a Panel was established on 26 May 1999.	
US—Countervailing Duty Investigation with respect to Live Cattle from Canada (WT/DS167/1) (Canada) (March 1999)	Concerns initiation of a countervailing duty investigation by the US with respect to live cattle from Canada. Canada contends that initiation was is inconsistent with US obligations under the Subsidies Agreement, including that the written application filed with the US Department of Commerce was not made by or on behalf of the domestic industry, and that there was not, sufficient information provided with respect to the measures or actions alleged to be subsidies, for purpose of initiating an investigation under the SCM Agreement; and that the measures or actions alleged to be subsidies either are not, in law or fact, subsidies within the meaning of the Subsidies Agreement, or do not confer more than a *de minimis* level of countervailing subsidy. Canada also believes that this initiation of investigation is inconsistent with US obligations under the Agreement on Agriculture relating to "due restraint".	Consultations pending.
EC—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (WT/DS174/1) (US) (June 1999)	Dispute concerns alleged lack of protection of trademarks and geographical indications for agricultural products and foodstuffs in the European Communities. US contends that EC Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications and does not provide sufficient protection to pre-existing trademarks that are similar or identical to a geographical indication. US considers this situation to be inconsistent with the EC's obligations under the TRIPS Agreement.	Consultations pending.

Source: WTO, "Overview of the State-of-Play of WTO Disputes," available online at www.wto.org/wto/dispute/e-14feb00.doc.

Some disputes, such as the United States' dispute with Korea, have resulted in resolution of the problem and opening of the market. In that case, the United States had complained about Korean regulations regarding the testing and inspection of agricultural products, including beef. Under the agreement reached by the two countries, Korea agreed to adopt common international shelf-life standards for beef and other products.

Perhaps the best known of the disputes concerning beef has also possibly been the most frustrating from the cattle and beef industry's perspective: the dispute with the European Union over its ban on imports of hormone-treated beef. The European Union ("EU") adopted a directive on livestock production which, effective January 1, 1989, banned the use of growth promoting hormones in livestock production. The ban also applies to meats and meat products imported into the EU on or after January 1, 1989. The ban had effectively eliminated most U.S. red meat and meat product exports to the EU, costing the industry an estimated $97 million per year.[163]

Following the entry into force of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") on January 1, 1995, the United States instituted in May 1996 formal dispute settlement proceedings under the WTO's Dispute Settlement Understanding ("DSU").[164] The legal crux of the dispute was the scientific validity of the rationale for the ban, namely, purported concerns that use of growth-promoting hormones in cattle could harm humans who consume the beef that is produced. The EU also had a political concern, namely, the growing unpopularity of so-called genetically-modified food among European consumers and farmers. Of course, the political concern would not be a sufficient legal basis to keep the ban in place if the panel found it to be inconsistent with the EU's obligations under the SPS Agreement.

In August 1997, the WTO panel issued its report, which found that the hormone ban was indeed not based on scientific evidence, a risk assessment, or relevant international standards. Consequently, the ban contravened the EU's obligations under the WTO SPS Agreement.[165] Indeed, scientific evidence presented during the panel process showed that beef growth hormones do not present any quantifiable human health risk.[166]

163. *See* USTR, 1996 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 98 (1996); *see also* Implementation of WTO Recommendations Concerning EC-Measures Concerning Meat and Meat Products (Hormones); Notice of the imposition of 100 percent ad valorem duties on certain articles", 64 Fed. Reg. 40638, 40639 (July 27, 1999).

164. *See* USTR, 1997 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 105 (1997). Canada initiated a second WTO case against the EU restrictions in October 1996. *Id.*; *see also* 64 Fed. Reg. . *supra* note 156, at 40639.

165. *See* EC Measures Concerning Meat and Meat Products (Hormones)-Report of the Panel, August 18, 1997, WT/DS26/R/USA.

166. USTR, 1999 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 112 (1999).

The EU appealed the panel decision to the WTO Appellate Body. On January 16, 1998, the Appellate body affirmed the panel's finding that the hormone ban was not consistent with the EU's obligations under the SPS Agreement.[167] The DSB subsequently adopted the Panel and Appellate Body reports in February 1998.

Having established that the EU's ban was inconsistent with the SPS Agreement, there remained the issue of implementation. The EU requested four years to implement the DSB recommendations to bring itself into compliance with the SPS Agreement. The United States objected that it could not agree to such a long period for implementation. The matter was thus referred to a WTO arbitrator, who determined that the reasonable period for implementation was 15 months, which period would expire on May 13, 1999.[168]

At the DSB meeting on 28 April 1999, the EU informed the DSB that it would consider offering compensation in view of the likelihood that it may not be able to comply with the recommendations and rulings of the DSB by the deadline of May 13, 1999.[169] The United States, in accordance with Article 22 of the DSU, requested authorization from the DSB to retaliate against the EU and its member states by suspending tariff concession on imports totaling $202 million.[170] The EU, pursuant to Article 22.6 of the DSU, thereupon requested arbitration as to the level of suspension of concessions requested by the United States, and the DSB referred the issue to the original panel for arbitration. The arbitrators issued their report on July 12, 1999. The report concluded that the level of nullification suffered by the United States to be equal to US$116.8 million.[171] Effective July 29, 1999, the United States imposed 100 percent ad valorem tariffs on selected imported products from 14 of the EU member states.

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167. *See* EC Measures Concerning Meat and Meat Products (Hormones) – Report of the Appellate Body, AB-1997-4, WT/DSU26/AB/R (Jan. 16, 1998).

168. *See* 64 Fed. Reg. at 40639.

169. *See*, EC Measures Concerning Meat and Meat Products (Hormones)-Status Report of the European Communities- Addendum, May 11, 1999, WT/DS26/17/Add.4.

170. *See*, EC Measures Concerning Meat and Meat Products (Hormones)-Recourse of the United States to Article 22.6 of the DSU, May 11, 1999, WT/DS26/19. Canada also requested authorization to impose its own retaliation on imports from the EU equaling CDN$75 million in value. *Id.*

171. *See*, EC Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration under Article 22.6 of the DSU , Decision of the Arbitrators, July 12, 1999, WT/DS26/ABR. The level of nullification suffered by Canada was CDN$11.3 million.

The level of trade affected by the action equaled $116.8 million.[172] The increased tariffs remain in place as the EU, in effect, elected to pay the penalty for not conforming its directive to meet the requirements of the SPS Agreement.

From the perspective of an industry such as cattle, which is in need of immediate or short-term relief, the Beef Hormone case illustrates a number of shortcomings in the dispute settlement system. First is the simple factor of time. In cases in which a dispute is not resolved at the consultation stage, the proceedings can last several years. In this case, the proceeding was initiated in May 1996. The EU appealed the Panel's decision; proposed a period for implementation of four years (possibly anticipating that the United States would reject it and request arbitration), went through arbitration over how long the period for implementation should be, and then went through arbitration again over the issue of the amount of retaliation to be authorized. The issue, of course, is not whether the EU (or any WTO member) should be able to exercise its rights, but simply recognizing that dispute settlement can be very lengthy and thus unlikely to offer immediate relief to a long-suffering industry.

The second lesson is that even when the complaining party prevails on every ruling, there is no guarantee that the foreign market will be opened. The EU appears more willing to have 100 percent tariffs imposed on certain of its exports to the United States than it is to remove the ban. Thus, the ban on imports of beef containing growth hormones remains in place and the U.S. cattle industry is not much better off than when the process began.

D. MANDATORY COUNTRY-OF-ORIGIN LABELING

Federal law requires most imports, including many food items, to bear labels informing the "ultimate purchaser" of their country of origin.[173] The Federal Meat Inspection Act also requires imports of beef and other meats to be clearly labeled as to their country of origin.[174] However, country of origin labeling is

172. *See* 64 Fed. Reg. 40639.

173. *See, e.g.,* 19 U.S.C. §1304(a) ("[E]very article of foreign origin. . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article. . . will permit in such manner as to indicate to an ultimate purchaser in the United States. . . the country of origin of the article.")

174. *See* 21 U.S.C. §620(a) (requiring imported meat to be "marked and labeled as required by . . . regulations for imported articles").

not required for imported meat or meat products that are further processed in the United States. As well, beef produced from imported cattle that are slaughtered in the United States also requires no designation as to the country of origin of the cattle.[175]

On February 1, 2000, USDA's Agricultural Marketing Service (AMS) published a notice requesting public comment on official grading of imported beef.[176] AMS stated that it is considering several options, including revising the grading regulations to require that the country of origin mark be retained on the component cuts after fabrication of an imported carcass that is Federally graded.[177] Thus, insofar as imported carcasses are concerned, it appears that country of origin labeling up to the retail level could be achieved through rulemaking rather than legislation.

Nevertheless, legislation also has been introduced in Congress to require country-of-origin labeling on certain meat products at the retail level.[178] Supporters of country of origin labeling have in large measure been groups and associations of farmers and ranchers who produce cattle, the raw material product. Proponents of country of origin labeling identify consumers' right to know and improved marketing among the reasons for supporting such measures.[179] As to the latter point,

175. *See* MANDATORY COUNTRY OF ORIGIN LABELING OF IMPORTED FRESH MUSCLE CUTS OF BEEF AND LAMB (USDA/FSIS, January, 2000) at 9 [hereinafter COUNTRY OF ORIGIN LABELING].

176. Requests for Public Comments on the Official Grading of Imported Beef, Lamb, Veal and Calf Carcasses Under the Authority of the Agricultural Marketing Act of 1964, 65 Fed. Reg. 4780 (2000). [Under current regulations, imported carcasses of beef and other meat products are eligible for grading (i.e., "prime", "choice", etc.) provided that they are in compliance with all applicable standards and are marked with the country of origin. The National Cattlemen's Beef Association had submitted a request in June 1999 that USDA discontinue the official grading of imported beef carcasses. Other groups, including the American Meat Institute, the National Meat Association, and the Canadian Embassy, had submitted letters endorsing the continuation of official grading of imported carcasses]. *Id.*

177. *See id.*

178. *See, e.g.,* H.R. 1144, 106th Cong. (1999). Several bills mandating country of origin labeling on various livestock products were introduced in the 105th Congress as well. None of the bills were passed. Instead, the Conference Report accompanying the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 directed USDA to conduct a study on the potential effects of mandatory country of origin labeling of imported fresh muscle cuts of beef and lamb. *See* COUNTRY OF ORIGIN LABELING, *supra* note 168, at 5.

179. *See, e.g., Country of Origin Labeling, 1999: Hearings Before the Subcomm. On Livestock an Horticulture of the House Comm. on Agriculture*, 106th

they contend that labeling will increase revenues for American grown or raised food and will thus put more money in producers' pockets.

Opposing groups include many members of the beef processing and distribution sector, including packers and retailers. They counter that country-of-origin labeling bears no relation to food safety and would not raise U.S. commodity prices. They argue that it would impose excessive and costly regulatory burdens on retailers and others in the marketing system and on consumers, be difficult to enforce, and—by imposing new non-tariff trade barriers—undermine ongoing U.S. efforts to reduce other countries' trade barriers and expand international markets for U.S. products.[180]

The Conference Report which accompanied the Agriculture, Rural Development, Food and Drug Administration, and Re-

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Cong. (1999). "Oregon's cattlemen do not want foreign beef to be passed off as a U.S. product and feel strongly that consumers need to know what they are eating and feeding their families." *Id.* At 10 (statement of Hon. Greg Walden, Representative from the State of Oregon). "NCBA believes that through country-of-origin labeling we can improve our ability to market U.S. beef and ensure that we are getting the full value for resources we are spending to promote our product." *Id.* At 48-49 (statement of George Swan, President, National Cattlemen's Beef Association).

> We feel that it is important to change the current practice of allowing cattle to be imported into the United States and then when processed, carry the USDA inspection label. This misleads consumers into thinking they are buying a U.S.-produced product. . . . We also believe that it is important that beef produced in the United States should be able to proudly display the American flag and be labeled as such. This gives consumers the knowledge they need to make decisions as to where their food is produced.

Id. At 50 (statement of Dean Kleckner, President, American Farm Bureau Federation).

180. *See, id.*,

> Using country-of-origin labeling as protectionist trade policy will clearly invite retaliation from key trading partners. . . . [W]ith certain exceptions, country of origin has never been a significant factor in meat purchasing decisions of American consumers. . . . If country-of-origin labeling requirements were imposed, AMI believes that the cost would exceed any quantifiable benefit.

Id. At 87-88. (statement of Patrick Boyle, President and CEO, American Meat Institute).

> [T]here is just simply no evidence that existing requirements fail to protect the food safety for products in the United States as they appropriately should. . . . . As to consumers' right-to-know, we believe the overriding consumers' right-to-know is that the products they are offered for sale and they are buying are safe products regardless of where they come from.

Id. At 83-85 (statement of Timothy Hammonds, President and CEO, Food Marketing Institute).

lated Agencies Appropriations Act, 1999 directed the U.S. Department of Agriculture to study and report on the potential effects of mandatory country of origin labeling of imported fresh muscle cuts of beef and lamb until those products reach the ultimate consumer.[181] FSIS issued its report in January 2000. The report identifies a variety of costs that implementation of a labeling requirement would entail, including the cost of segregating and preserving imported product identity, the direct cost of labels, enforcement costs, and market disruption costs. FSIS also estimates that there would be efficiency losses and lost business costs associated with segregating product by country of origin. "Some firms may choose to avoid imported cuts in order to avoid incurring the costs of segregation and control systems for imported meat cuts, and the penalties of non-compliance."[182] Presumably, those firms would instead purchase domestically-produced beef, although USDA does not acknowledge this possibility.

As to benefits, the report's Executive Summary states:

> Although some circumstantial evidence suggests the possibility that consumers in the United States distinguish domestic beef. . . from imported beef. . . , there is no direct or empirical evidence to suggest that a price premium engendered by country of origin labeling will be large or persist over the long term. Indeed, if consumers do distinguish goods depending on their country of origin, strong incentives exist for industries to act without government intervention, i.e., on a voluntary basis.
>
> There is no evidence that the market for providing such information has failed. There is, therefore, no economic efficiency argument for mandatory country of origin labeling for products to the point of retail sale. however, some have argued that there is a "benefit" to consumers' right to know but, at this time, that benefit is not quantifiable.[183]

FSIS acknowledges that in certain countries such as Japan and France, studies show consumers are willing to pay a premium for domestic beef versus imported beef.[184] However, "differences found in France and Japan are relevant to the United States only to the extent that United States consumers' preferences are like preferences of French and Japanese consumers."[185]

FSIS observes that "[e]ven if consumers cannot taste any difference between domestic and imported products," they might nevertheless pay a premium for domestic product "just because

181. *See* COUNTRY OF ORIGIN LABELING, *supra* note 168, at 1.
182. *Id.* at 2.
183. *Id.* at 2-3.
184. *Id.* at 18.
185. *Id.* at 18.

they are domestic products."[186] Of course, if the consumer has no way of knowing whether the beef he or she is purchasing is domestic or imported in the first place, the question arises how they would be able to associate taste differences to the product's origin as opposed to some other reason, such as the breed of the animal or whether the animal was grass or grain-fed.

FSIS' finding that there are no measurable or quantifiable benefits to country of origin labeling is also curious given the very contrary findings by agencies such as the Federal Trade Commission about the value of "Made in the USA." In this regard, the FTC published in December 1997 a notice in the *Federal Register* recounting its "comprehensive review of 'Made in USA' and other U.S. origin claims in product advertising and labeling."[187] The FTC had historically required that a product must be wholly domestic or all or virtually all made in the United States to substantiate an unqualified "Made in USA" claim. In May 1997, the FTC issued Proposed Guides for the Use of U.S. Origin Claims, under which a marketer could make an unqualified U.S. origin claim if there was a reasonable basis substantiating that the product was substantially all made in the United States. The Proposed Guides also included two "safe harbors" under which an unqualified U.S. origin claim would not be considered deceptive.[188] The FTC received 1,057 comments representing 1,165 commenters, including 963 individual commenters, 24 members of Congress, and two consumer organizations.[189]

> The consumer commenters overwhelmingly opposed the proposed Guides and generally supported an "all or virtually all" standard or advocated a specific percentage, usually 90% or, more often, 100%. Many commenters stated that " 'Made in USA' means what it says' or expressed similar sentiments. Several commenters asserted that changing the current standard would confuse consumers wishing to buy American products, leaving them unable to determine whether a product was truly made in the United States. Individual consumers also stated that they buy American products to support fellow Ameri-

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186. *Id.* at 18.

187. "Made in USA" and Other U.S. Origin Claims, 62 Fed. Reg. 63,756 (1997).

188. *See id.* One safe harbor encompassed products that were last substantially transformed in the United States and whose U.S. manufacturing costs constituted 75 percent of total manufacturing costs. The second safe harbor applied to products that had undergone two levels of substantial transformation in the United States (that is, the product's last substantial transformation occurred in the United States and the last substantial transformation of each of its significant inputs took place in the United States). *See id.*

189. *See id.* at 63,757.

> cans and expressed concern that lowering the standard would lead to a loss in American jobs.[190]

The FTC also noted:

> An overwhelming number of consumers told the Commission . . . that they prefer buying U.S.-made goods; they want to be able to rely on a simple and clear standard; and, they feel very strongly that the current standard should be retained. The comments also underscore the fact . . . that consumer awareness of the globalization of the economy has not necessarily changed consumers' beliefs about those products actually labeled "Made in USA."[191]

The FTC's experience certainly appears to differ from the tentative finding by FSIS that "some circumstantial evidence suggests the possibility that consumers in the United States distinguish domestic beef and lamb from imported beef and lamb. . . ."[192] FSIS' suggestion that producers are free to distinguish imported and domestic goods on a voluntary basis[193] overlooks the fact that the packers and processors, who buy the cattle from the feedlots and deliver the beef to the supermarkets, oppose labeling requirements in the first place. Several packers are importers of cattle and carcasses from Canada and thus would not have an incentive to distinguish imported beef from domestically-produced beef.

Finally, FSIS identifies various possible implications for international trade arising from mandatory country of origin labeling. FSIS notes that Article IX, Marks of Origin, of the General Agreement on Tariffs and Trade (GATT) (1994) "allows imported products to be labeled with their specific country of origin at the time of import so long as the marking requirement does not seriously damage the imported products, materially reduce their value, or unreasonably increase their costs."[194] FSIS then states: "If mandatory labeling requires a label with the word 'imported,' rather than a specific country of origin, it might be challenged as not qualifying as a 'mark of origin,' and, therefore, constituting a prohibited restriction."[195]

In fact, Article XI contains no prohibition on identifying products as "imported." It simply requires that any marking requirements applied to imports from one country be "no less favorable than the treatment accorded to like products of any

190. *Id.* at 63,758.
191. *Id.* at 63764-65.
192. COUNTRY OF ORIGIN LABELING, *supra* note 168, at 2-3.
193. Id. at 3.
194. *Id.*
195. *Id.*

third country."[196] FSIS' analysis raises a concern about FSIS' familiarity with international trade rules.

As well, the WTO Committee on Rules of Origin is currently working on proposals to establish uniform rules for identifying the country of origin for meat of bovine animals among other products. The Tenth Report of the Technical Committee on Rules of Origin to the Committee on Rules of Origin identified several proposals, including:

- the country in which the animal was born;
- the country in which the animal was fattened from a weight of 330 kg or less to a weight of 450 kg. or more or the country in which the animal was born;
- the country in which the animal was fattened for 6 or more months before slaughtering; or the country in which the animal was born; and
- the country in which the animal was born and raised; or the country in which the animals was fattened for at least 3 months.[197]

The Technical Committee's work makes clear not only that mandatory country of origin labeling is consistent with WTO obligations, but also that pending alternatives include identifying the country in which the animal was born from which the meat was then produced.

FSIS also expresses concern that mandatory country of origin labeling "could have a potentially damaging effect on United States exports of beef . . . if countries that import United States beef reciprocate with equal or even more stringent mandatory country of origin meat labeling."[198] According to Representative Helen Chenoweth-Hage, however, some 32 countries already have mandatory country of origin labeling requirements, including countries that are major export markets for U.S. beef.[199] FSIS' failure to take such existing requirements into account

196. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, art. IX (1).

197. *See* G/RO/22/Add.1, Tenth Report of the Technical Committee on Rules of Origin to the Committee on Rules of Origin (13 March 1998) at 80.

198. COUNTRY OF ORIGIN LABELING, *supra*, at 3.

199. *See Country of Origin Labeling, 1999: Hearings Before the Subcomm. on Livestock and Horticulture of the House Comm. on Agriculture, supra* note 172 at 13. "And America is sort of behind the 8-ball when it comes to country-of-origin meat labeling, because there are exactly 32 other countries that already require country-of-origin meat labeling, including Argentina, Brazil, Bosnia, Chile, Costa Rica, El Salvador, Guatemala, Hungary, Indonesia, Israel, Korea, Malaysia, Mexico, Philippines, the Arab countries, Venezuela. . . ." *Id.* at 13 (statement of Helen Chenoweth-Hage, Representative from the State of Idaho).

similarly raises concerns about the extent of FSIS' actual familiarity with the interface between country of origin labeling requirements and international trade issues.

E. EFFORTS TO RESTORE COMPETITION TO THE U.S. MARKET

1. *The Packers and Stockyards Act*

Prompted by the Federal Trade Commission's investigation into the amount of control exercised by the Nation's five largest meat packing and livestock and meat marketing firms, the Packers and Stockyards Act ("P&S Act") was enacted on August 15, 1921[200] to secure the free and unburdened flow of livestock across the nation from producers to consumers by regulating the business of stockyards and their participants.[201] Motivated in part by concern over exorbitant charges, duplicate commissions, and deceptive pricing practices, "all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other," Congress established a regulatory scheme to be administered by the Secretary of Agriculture.[202] The purpose of the P&S Act is "to assure fair competition and fair trade practices, to safeguard farmers and ranchers. . .to protect consumers. . .and to protect members of the livestock, meat, and poultry industries from unfair, deceptive, unjustly discriminatory and monopolistic practices. . ."[203] The P&S Act enumerates several different practices as unlawful for packers to be engaged in, including engaging in unfair, unjustly discriminatory, or deceptive practices; making or giving undue or unreasonable preference or advantage to any particular person or locality; and selling or transferring to, or buying or receiving from, any other person any article for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article or of restraining commerce.[204]

Although concentration in the packing industry declined after the 1920s, it has increased sharply in the last several years. In 1998, some four packing companies accounted for 81 percent of fed cattle and 33 percent of cull cattle slaughter in the United

200. Packers and Stockyards Act of 1921, 7 U.S.C. §181.
201. SeeStafford v. Wallace, 258 U.S. 495, 514 (1922).
202. Id. at 515; see 7 U.S.C. § 228(a).
203. H.R. REP. NO. 85-1048 at 2 (1957), reprinted in 1958 U.S.C.C.A.N. 5212, 5213.
204. *See* 7 U.S.C. §192.

States.[205] Particular practices that are of concern include use of forward contracts which does not contain a firm base price, and packer-owned feedlots where the cattle are not sold in an open, public market.[206] Another practice is the conditioning of sales on the non-reporting of prices.[207]

Concerns about concentration and integration focus on the effects on prices and the price discovery process. The structure of an industry (e.g., number and size distribution of firms) is influenced by the supply of its inputs, demand for its products, and nature of its production technology. Structure in turn influences competitive behavior and performance of the industry. Firms in a concentrated processing industry that utilize a specialized input such as meat animals may be able to reduce prices paid to suppliers of those animals.[208]

Some observers fear that increases in vertical integration and coordination may amplify the potential for exercise of market power. There is concern that large packers may use vertical coordination arrangements as a means of blocking their smaller competitors from sources of supply, or as a mechanism for discriminating among livestock sellers. At the least, vertical coordination arrangements reduce the prevalence of open-market transactions, thereby restricting the availability of market infor-

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205. USITC Pub. 3255, *supra*, at IV-1.

206. *See, e.g.*, The Western Organization of Resource Councils, *Petition for Rule-making on Captive Supply Procurement Practices under the Packers and Stockyards Act*, at 1, (visited at 3/18/2000). <http://www.usda.gov/gipsa/lateadd/petition.pdf> USDA's analysis of the WORC petition concluded as follows:

> The team finds no compelling evidence to suggest that anything other than basic economic conditions determined the general price level of the fed cattle market. After weighing the economic arguments supplied by WORC, commentors (supporting and opposing), and other information assembled by the team, we could not definitively conclude that spot prices were affected or manipulated by captive supplies. The economic evidence does not indicate the use of captive supplies is a violation of the Act. Therefore, we conclude that promulgating the rules suggested by the petition is unwarranted.

USDA, Grain Inspection and Packers and Stockyards Administration, Packers and Stockyards Program, *Review of Western Organization of Resource Councils (WORC) Petition for Rulemaking*, at iv, <http://www.usda.gov/gipsa/lateadd/worchmpg.pdf>.

207. *See* GIPSA Release No. 61-98, *USDA To Investigate Non-Reporting of Price in Livestock Sales*, <http://www.usda.gov/gipsa/ newsinfo/release/61-98.htm>.

208. U.S. Department of Agriculture, Grain Inspection, Packers and Stockyards Administration, *Concentration in the Red Meat Packing Industry*, Introduction, February 1996.

mation.[209] Many of these same observers believe that USDA has not been adequately enforcing the provisions of the Act.[210]

2. *Mandatory Price Reporting*

Another effort to restore competitiveness to the cattle and beef industry entails legislation at the state and federal levels to mandate reporting by packers of the prices they pay for cattle, including formula and forward contract prices, as well as negotiated purchases. For example, in 1999 Congress passed the Livestock Mandatory Reporting Act.[211] The law directs the Secretary of Agriculture to establish a program of live cattle price information reporting that will—

(1) provide timely, accurate, and reliable market information;
(2) facilitate more informed marketing decisions; and
(3) promote competition in the cattle slaughtering industry.[212]

Section 941 of the law requires the Secretary of Agriculture to publish proposed regulations to implement the provisions of the law within 90 days of enactment.[213] The legislation become law on October 22, 1999, which means that the deadline for publishing proposed regulations expired in January 2000. The Department of Agriculture published its notice of proposed rulemaking on March 17, 2000.[214]

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209. *Id.* Some industry observers argue that livestock prices are lower due to increased efficiency and lower costs realized by large packers, and by vertical coordination arrangements, and that these gains more than offset any adverse effects of large market shares and higher concentration levels. They argue that without the economies of scale, consumer prices would be higher, livestock prices would be lower, and fewer animals would be sold.

210. *See* Testimony of Herman Schumacher, Herried, South Dakota, Before the Senate Agriculture Committee, *Livestock Issues*, <http://www.senate.gov/ ~agriculture/98hear.htm.

211. *See* Livestock Mandatory Reporting Act of 1999, Pub.L. 106-98, H.R. 1906, Title XI. <http://thomas.loc.gov/cgi-bin/query/D?c106:1:./temp/ ~c106rrcwG5:e166638>.

212. *Id.* at §222.

213. *See id.* at §941(b).

214. *See* USDA, Agricultural Marketing Service [No. LS-99-18], Livestock and Grain Market News Branch: Livestock Mandatory Reporting, 65 Fed. Reg. 14562 (Mar. 17, 2000). The current price reporting system is voluntary. "Market News relies upon voluntary cooperation from the livestock, red meat, grain and wool industry." *Id.* at 14652. "The proposed rule would require the reporting of market information by certain livestock packers and livestock product processors and importers who annually slaughter an average of 125,000 cattle or 100,000 swine, or slaughter or process an average of 75,000 lambs. Importers who annually import an average of 5,000 metric tons of lamb are also required to report." *Id.* The reporting requirements include the "details of all transactions involving purchases of livestock . . . . This program is intended to provide information on pricing, contracting, for purchase, and supply and de-

3. *Use of Antitrust Law*

Another effort to address the cattle industry's difficulties is the use of antitrust laws. Cattle producers have filed an antitrust case against meat packers in an attempt break up packer concentration. *Pickett vs. IBP*[215] concerns issues of packer concentration and anticompetitive marketing, with the plaintiff representing 10 cattle producers from across the United States.[216] The producers filed the lawsuit in July 1996 against IBP, the largest of U.S. beef packers with an estimated 38 percent market share, alleging that the company was in violation of the antitrust provisions of the Packers & Stockyards Act (P&SA).[217] The plaintiffs contend that packer concentration permits anticompetitive market manipulation to occur. The plaintiffs' principle request is for injunctive relief. Plaintiff producers want IBP to cease and desist activities that, they claim, continue to lead to violations of the antitrust provisions of the Packers & Stockyards Act [P&SA], such as market-price control and "captive supply."[218] Their secondary request is for compensation to producers for said violations. Finally, plaintiffs also have asked that the court rule this a "class-certified" case so all cattle producers—in all segments of the production chain—will be entitled to damages from IBP.[219] The court certified the matter as a class action in April 1999.[220]

During the pendency of the motion to certify the class, the U.S. Department of Agriculture and Secretary of Agriculture

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mand conditions for livestock, livestock production, and livestock products, that can be readily understood by producers, packers, and other market participants. . . . In some instances, mandatory reporting will provide new information which has never been reported under the existing voluntary reporting program. AMS anticipates that this information will provide the basis for newly published market news reports not previously provided for under voluntary reporting, including reports covering . . . forward contract and formula marketing arrangement cattle purchases [and] packer-owned cattle. . . ." *Id.* at 14652-53.

215. Pickett v. IBP, Inc., 182 F.R.D. 647 (M.D. Ala. 1998).

216. *Id.* They are Henry Lee Pickett of Alabama; Sam Britt of New Mexico; Mike Callicrate of Kansas; Patrick Goggins of Montana; Paul Horton and David Smith of Oklahoma; Lovell Blain, Jim Bower and Stayton Weldon of Texas; and Johnny Smith of South Dakota. *Id.*

217. *Id.*

218. "Captive supply" refers to cattle that are purchased in non-spot market transactions, e.g., pursuant to formula contracts or forward contracts, or where the cattle are owned by the packer during feeding.

219. Factual and procedural background outlined on Cattlemen's Legal Fund <http://www.nobull.net/legal>.

220. *See* Memorandum and Order, Pickett v. IBP, Inc., 182 F.R.D. 647 (M.D. Ala. 1998) (No. 96-A-1103-N).

Dan Glickman were invited to file an *amicus curiae* brief on the propriety of class certification and other issues. On May 29, 1998, Glickman responded with a brief, noting that P&SA sections 209 and 210 were meant to allow for private action in district court. USDA's brief further stated that plaintiffs filing such action have routinely sought injunctive relief in addition to monetary remedies, and that there can be no question that plaintiffs selected the proper, and only, forum open to them. Further, USDA provided that legal precedent and the intent of Congress clearly allowed injunctive relief.[221] The case is still pending. Thus, as with trade negotiations and dispute settlement, resort to the antitrust laws is a longer-term approach.

IV. EFFORTS TO RESTORE FAIR TRADING CONDITIONS TO THE U.S. CATTLE MARKET THROUGH TRADE REMEDY LAWS

The issue of the impact of trade flows in cattle and beef on the domestic cattle industry has been examined on numerous occasions. In 1977, for example, cattle and beef producers filed a petition under Section 201 of the Trade Act of 1974, seeking temporary relief from imports of cattle and beef.[222] Relief was denied because the International Trade Commission determined that imports were not a substantial cause of serious injury to the domestic cattle industry.[223] Beginning in 1977, the International Trade Commission conducted four general fact-finding investigations under section 332 of the Tariff Act of 1930 concerning competition and conditions of trade in the cattle and beef sector.[224]

One group of domestic cattle producers began their own research into the volumes of imports of cattle and beef, and the impact those imports were having on the industry during the nadir of domestic prices in 1996-98. Those producers, who

221. Curt Anderson, *Cattlemen To Proceed In Fed Lawsuit*, AP National Story, June 2, 1998.

222. *See* Live Cattle and Certain Edible Meat Products of Cattle, USITC Pub. 834, Inv. No. 201-25, (Sept. 1977).

223. *See id.* at 5.

224. *See* Conditions of Competition in the U.S. Markets Between Domestic and Foreign Live Cattle and Cattle Meat for Human Consumption, USITC Pub. 842, Inv. No. 332-85, (1977); The Competitive Position of Canadian Live Cattle and Beef in U.S. Markets, USITC Pub. 1996, Inv. No. 332-241 (1987); Live Cattle and Beef: U.S. and Canadian Industry Profiles, Trade and Factors of Competition, USITC Pub. 2591, Inv. No. 332-328 (1993); Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, USITC Pub. 3048, Inv. No. 332-371 (1997).

formed an organization called the Ranchers-Cattlemen Action Legal Foundation ("R-CALF"), concluded that imports of live cattle from Canada and Mexico were likely being sold in the United States at dumped and subsidized prices, and were a cause of economic injury to domestic producers.

On October 1, 1998, R-CALF filed petitions requesting imposition of antidumping and countervailing duties on imports of live cattle from Canada and imposition of antidumping duties on imports of live cattle from Mexico.[225] Eliminating dumped and subsidized imports of live cattle from the U.S. market would either raise prices of Canadian and Mexican cattle or result in a reduction of the supply of cattle in the United States. Either way, relief was likely to help restore domestic prices to profitable levels or at least reduce the level of losses. Ultimately, the investigations resulted in findings of (1) dumping of live cattle from Canada; (2) de minimis subsidies on live cattle from Canada; (3) no reasonable indication of material injury, or threat of material injury, to a domestic industry by reason of dumped imports of live cattle from Mexico; and (4) no material injury or threat of material injury by reason of dumped imports of live cattle from Canada. Thus, the investigations were terminated and the industry ultimately was denied relief.

Although the investigations were unsuccessful, they are nevertheless instructive for policy makers to examine because they reveal various policies and practices in the current administration of the laws which make them ill-suited to providing effective relief to the cattle industry. Assuming that the trade remedy laws should be equally effective for all industries, including highly fragmented, agricultural industries such as cattle, we examine the laws' shortcomings (as administered) and offer policy prescriptions and legislative amendments to help make them more effective for future cattle petitions.

A. OVERVIEW OF THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

Antidumping and countervailing duty investigations will result in the imposition of remedial duties on imports where it is determined that the imports subject to investigation (1) are be-

225. *See* Petition Requesting Imposition of Countervailing Duties on Imports of Live Cattle from Canada; Petition Requesting Imposition of Antidumping Duties on Imports of Live Cattle from Canada; Petition Requesting Imposition of Antidumping Duties on Imports of Live Cattle from Mexico, dated October 1, 1998.

ing sold or are likely to be sold in the United States at less than fair value ("LTFV") prices (i.e., dumping) and/or are benefiting from countervailable subsidies; and (2) a domestic industry is materially injured or threatened with material injury, or the establishment of a domestic industry is materially retarded, by reason of the imports subject to investigation.[226] The investigations proceed simultaneously before two federal agencies: the Office of Import Administration in the U.S. Department of Commerce ("Commerce"), which is responsible for determining whether the imports are being dumped and/or subsidized; and the U.S. International Trade Commission ("ITC"), which determines whether an industry is materially injured or threatened with material injury, or the development of an industry is materially retarded, by reason of the dumped and/or subsidized imports.[227]

Investigation must complete five stages before Commerce will issue an antidumping duty order or countervailing duty order: (1) initiation/standing; (2) preliminary injury determination by the ITC; (3) preliminary determination of dumping or subsidy by Commerce; (4) final determination of dumping or subsidy by Commerce; and (5) final injury determination by the ITC.[228] The process typically begins with the filing of a petition simultaneously with both Commerce and the ITC by a domestic "interested party,"[229] on "behalf of a domestic industry."[230]

Commerce determines whether the petition meets the statutory requirements and whether it has been filed by or on behalf of a domestic industry, and must make its determination within 20 days after filing. If Commerce determines that the petition does not allege all the elements necessary or information reasonably available to the petitioner supporting the allegations, and/ or if the petition has inadequate industry support, then the case

226. *See* 19 U.S.C. §§1671, 1673.

227. *See* Tariff Act of 1930, 19 U.S.C. §1677 (1-2) (1999).

228. For ease of presentation and organization, we discuss the ITC's preliminary and final injury determinations in the cattle investigations together in Section VII, *infra*.

229. The statute identifies seven categories of interested parties, including the governments of the foreign countries in which the subject merchandise is produced; the foreign manufacturers, producers or exporters, or U.S. importers, of the subject merchandise; U.S. manufacturers, producers or wholesalers of the domestic like product; labor unions or recognized group of workers that are representative of the domestic industry; and trade or business associations or other associations, a majority of whose members is composed of interested parties who manufacture, produce or wholesale the domestic like product. *See* 19 U.S.C. §1677(9).

230. 19 U.S.C. §1671a(b)(1), 19 U.S.C. §1673a(b)(1).

will terminate.[231] An affirmative finding initiates the investigation and the case moves forward at the International Trade Commission.[232]

In the second stage, the ITC must determine within 45 days of filing whether there is "a reasonable indication" that a domestic industry is materially injured or threatened with material injury, or the establishment of an industry is materially retarded, by reason of imports of the subject merchandise.[233] Although Commerce's deadline for determining whether to initiate does not expire until 20 days after filing, the ITC immediately begins its investigation. An affirmative determination by the ITC means that the case proceeds at Commerce, while a negative preliminary injury determination terminates the case.

In the third stage, Commerce preliminarily determines whether merchandise is being sold in the United States at less than fair value or is benefiting from a countervailable subsidy. An affirmative determination results in suspension of liquidation of the entries of the subject imports.[234] Thereafter, during the pendency of the investigation, an importer must post a cash deposit, bond or security on the subject merchandise in an amount equal to the dumping margin or subsidy rate.[235] The importer, faced with increased liability due to the margins, either may pay the foreign producer a higher price or, if the im-

231. *See* 19 U.S.C. § 1671a(c)(3), 19 U.S.C § 1673a(c)(3). On June 29, 1999, a coalition of domestic crude oil producers filed antidumping and countervailing duty petitions on imported crude oil from Iraq, Mexico, Saudi Arabia and Venezuela. There, the Department of Commerce ultimately dismissed the petitions for lack of adequate industry support. *See* Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed. Reg. 44,480 (1999). This was the first time that a petition was dismissed by Commerce for reasons of inadequate industry support since the implementation of the industry support provisions as part of the Uruguay Round Agreements Act.

232. *See* 19 U.S.C. §1671a(c)(2), 19 U.S.C §1673a(c)(2).

233. *See* 19 U.S.C. §1671b(a)(1), 19 U.S.C. §1673b(a)(1). If Commerce extends the deadline for initiation because it is polling the industry or otherwise determining industry support, then the ITC's deadline for the preliminary injury determination is also extended to a maximum of 65 days after the filing of the petition. *See* 19 U.S.C. §1671b(a)(2)(A)(ii), 19 U.S.C. §1673b(a)(2)(A)(ii).

234. *See* 19 U.S.C. §1671b(d), 19 U.S.C. §1673b(d). Suspension of liquidation means that imports of subject merchandise can be cleared through customs, but the final duties to be collected on said goods will not be quantified or assessed until the question of dumping or subsidy is resolved. The importer is, however, required to post a cash deposit, bond or some other security to guarantee against potential future liability. The value of the security is based on the preliminary dumping or subsidy margin. *See* 19 U.S.C. §1671b(d), 19 U.S.C. §1673b(d).

235. *See* 19 U.S.C. §1671b(d), 19 U.S.C. §1673b(d).

porter is related to the foreign producer, may try to raise the selling price in the United States. In either case, the imported product no longer has the same price advantage vis-à-vis the domestic product. Depending on the size of the preliminary margin, the liability may be prohibitive and the imports simply stop entering the U.S. market. Thus, the preliminary affirmative determination is frequently the first point in time when the domestic industry obtains relief in the market from unfairly-low priced imports. If the dumping margin or subsidy rate is below a *de minimis* level, then the preliminary determination is negative and there is no suspension of liquidation.[236] However, the investigation does not terminate.

In the fourth stage, Commerce proceeds to verify the information submitted by the foreign respondents. These are, in essence, supposed to be reasonably detailed audits of the responses and the respondent's records that were used in preparing the responses. The parties have an opportunity to submit legal briefs and argument before Commerce issues its final determination in which the margins may change. An affirmative determination means that the ITC will proceed to its final injury determination while a negative determination terminates the investigation.

The final stage of the investigation is the ITC's final injury phase. The ITC typically begins issuing revised questionnaires and collecting data after Commerce makes its preliminary determination. Parties have the opportunity to comment on the draft questionnaires, prepare briefs and present argument and testimony at a formal public hearing before the ITC. The ITC then votes and makes its determination. An affirmative decision results in issuance by Commerce of the antidumping and/or countervailing duty order, while a negative determination ends the case.

Complete antidumping investigations typically take one year to complete, while countervailing duty investigations usually require less time.[237]

236. *See* 19 U.S.C. §1671b(b)(4)A, 19 U.S.C. §1673b(b)(3). In an antidumping investigation, a margin that is below 2 percent is deemed *de minimis*. *See* 19 U.S.C. §1673b(b)3. In a countervailing duty investigation involving imports which are not from a developing country, the threshold is 1 percent. *See* 19 U.S.C. § 1671b(b)(4)A.

237. *See generally* 19 U.S.C. §1671, 19 U.S.C. §1673.

B. LIVE CATTLE FROM CANADA AND MEXICO: DETERMINING INDUSTRY SUPPORT FOR THE PETITIONS

The first substantial obstacle that the cattle industry encountered in the antidumping and countervailing duty cases was demonstrating industry support for the petitions. The sheer size of the industry in terms of the numbers of producers combined with the lack of any accessible central database of producers led Commerce to conclude that it would have to poll the industry. This resulted in a costly and time-consuming exercise that was exacerbated by a conservative approach to calculating industry support that imposed significant costs on the petitioner.

1. *Statutory Elements for Determining Industry Support*

The statute requires that, for an investigation to be initiated, the petition itself or in combination with other producers or producer groups must account for at least 25 percent of total domestic production and at least 50 percent of that portion of the domestic industry expressing support or opposition to the petition:

> For purposes of this subsection, the administering authority [Commerce] shall determine that the petition has been filed by or on behalf of the industry, if—
>
> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion or the industry expressing support for or opposition to the petition. . ..[238]

If the petition does not contain information establishing industry support that accounts for more than 50 percent of production of the domestic like product, the statute requires Commerce to poll the industry or use other information to determine industry support.[239] Where the industry is comprised of a large number of producers, Commerce may determine industry support using any statistically valid sampling method to poll the industry.[240] The Statement of Administrative Action to the

238. 19 U.S.C. § 1673a(c)(4)(A).

239. *See* 19 U.S.C. §1673a(c)(4)(D). If there is opposition to a petition, producers that are related to foreign producers of the subject merchandise will be excluded, and producers that import the subject merchandise may be excluded, for purposes of determining industry support.

240. *See* 19 U.S.C. §1673a(c)(4)(D)(ii).

Uruguay Round Agreements Act adds that, when sampling is required, "a primary source of information for Commerce will be information contained in the petition and placed on the record by domestic interested parties."[241]

2. *Petitioner's Efforts to Demonstrate Industry Support*

The first place Commerce will look to determine if the industry support requirement is satisfied is the petition itself. Collecting information on industry support with respect to the cattle industry presented a number of challenges for the petitioner. For example, the domestic cattle industry has in excess of one million producers and is highly fragmented and decentralized. Most cattle producers keep the precise numbers of cattle which they own or sell confidential. Consequently, while there are cattle producers' trade associations in virtually every state in the country, such associations do not typically collect or maintain detailed information about the numbers of cattle which their members own or sell. Although R-CALF's petitions contained information on some 6,000 individual producers and 46 trade associations that supported the cases, they were not able to determine at the time of filing the total value or number of cattle represented by those supporters.[242]

Petitioner requested that, to the extent Commerce was not able to satisfy itself from the face of the petition and petition amendments that the industry support requirements had been satisfied, that Commerce then employ a statistically valid sampling method to poll the industry. R-CALF proposed that Commerce use a simple random sample. R-CALF also proposed that Commerce conduct the sample by telephone, and estimated that a sample of 900 producers would yield statistically valid results (i.e., support, oppose, neutral).[243]

Commerce determined it could not conduct such a random sample because it did not have access to a sufficient database of individual producers. R-CALF therefore continued to collect signatures and letters from individual ranchers and associations. By the time Commerce finally determined to initiate all three investigations, R-CALF had submitted 13 supplements to the petitions which contained signatures from more than 30,000

241. SAA at 192, *reprinted in* H. Doc. 103-316, v. 1 at 862 (1994).

242. *See* Petition at 8.

243. *See* Petition at 8-12.

ranchers and farmers producing cattle and letters of support from some 124 trade associations.[244]

3. *Commerce's Analysis of Industry Support*

(a) Measuring Production

Commerce encountered numerous challenges as it endeavored to determine industry support. The imports within the scope of the petitions included all beef cattle and calves used to produce beef for human consumption, including steers, heifers, calves, beef cows and culls. Specifically excluded from the scope were dairy cows and purebred cattle used for breeding purposes.[245]

The first issue was how to measure production of a competing domestic like product that corresponded to the imports within the scope of the petitions. Normally, Commerce determines industry support using an annual production or sale figure for the industry as a denominator. In the cattle industry, however, a cow may be sold more than once in any 12-month period (e.g., from a cow-calf operator to a backgrounder and from a backgrounder to a feedlot) and thus could be counted in the production of more than one operation. Defining "production" as the processing/sale of live cattle over a one-year period would result in total production being exaggerated by multiple counts of the same cattle.[246]

The petitioner had proposed as alternative measures of U.S. production on a 12-month period: (1) the number of calves born in U.S. cattle operations in a year, or (2) the number of cattle slaughtered in a year.[247] Commerce declined to follow these proposals because of concern that either measure would give disproportionate weight to one particular sector of the industry at the expense of the other sectors (i.e., number of calves born would give too much weight to cow-calf operators while the number of cattle slaughtered would give too much weight to feedlots).[248]

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244. R-CALF, Eighteenth Supplement to the Petition Requesting Imposition of Countervailing Duties on Live Cattle from Canada and Fifteenth Supplements to the Petitions Requesting Imposition of Antidumping Duties on Imports of Live Cattle from Canada and Mexico, at Exhibit C (Dec. 21, 1998).

245. *See* Petition at 13-15.

246. *See* Petition on Live Cattle from Canada and Mexico: Determination of Industry Support, Dep't Comm., A-122-833 (Dec. 1988) [hereinafter Industry Support Memo].

247. *Id.* at 4.

248. *See id.* at 5.

Instead, Commerce determined to use USDA cattle inventory statistics as a proxy for production. "Reliance on inventory figures, which represent a snapshot of the industry at a given moment in time, obviates the risk of over-counting due to multiple sales of given cattle in a 12-month period. An inventory approach also accords the views of each segment of the U.S. live cattle industry a fair and proportionate weight."[249]

(b) Polling the Industry

The sheer size of the industry in terms of the numbers of producers presented a second challenge. Given the large number of producers, a comprehensive examination of all individual producers within the statutory deadlines was not feasible.[250] Commerce also noted that it did not have a comprehensive list of all such producers so that it would be able to contact them. The only known database was maintained by the U.S. Department of Agriculture, which was proscribed by law from sharing the information with Commerce without the consent of the individual producers.[251] Consequently, the USDA database also was not available to develop a random sample.

Commerce decided to poll trade associations of cattle producers, including national, regional, state and local chapters of cattle producer associations or associations which had many cattle producer members, such as the National Cattlemen's Beef Association, the National Farmers Union and the American Farm Bureau Federation, Women in Farm Economics (WIFE), and the National Farmers Organization.[252] "By focusing on associations, we could effectively canvass the country and obtain a reasonable measure of opinions with respect to the petitions by a broad segment of the industry."[253]

The decision to use trade associations also raised a number of questions. The petitions contained signatures from thousands of individual producers, many of whom either (1) did not belong to any associations; (2) belonged to associations which did not

249. *Id.* Ultimately, the cattle inventory denominator was adjusted to conform to the scope of the petition by excluding dairy cattle and purebred cattle used for breeding. *See id.* at 6.

250. *See id.*

251. *See* Industry Support Memo, *supra* note 238, at 6, n. 15 (citing 7 USC §2276, Chesapeake Bay Fdn. V. USDA, 11 F. 3d 211, 217 (DC Cir. 1993).

252. *See id.* at 7, n. 17, 12. Altogether, Commerce polled 237 associations. *See id.* at Appendix 2. NCBA requested that Commerce rely on the responses of its affiliated state associations in lieu of its own response. *See id.* at 12.

253. *Id.* at 7.

take a position on the petitions; or (3) belonged to associations which opposed one or more of the petitions. Commerce "considered that it would be appropriate to give weight to such views, provided that we could account for the overlap that would arise if these individual producers belonged to associations that also expressed their views."[254]

Ultimately, Commerce conducted a telephone survey of a random sample of 150 individual producers and determined that, measured on the basis of head of cattle, 46 percent of individual producers belonged to no association at all.[255] Altogether, Commerce had expressions of support from individual producers which accounted for over 5.8 million head of cattle with respect to the Canadian petitions and nearly 3.4 million head of cattle with respect to the petition on Mexico.[256] Commerce reduced these headcounts reported by individual producers by 54 percent on the assumption that 54 percent were represented by trade associations.

A second issue was overlapping memberships among state associations and among national associations and other associations. Petitioner had pointed out that there could be some degree of common membership in certain of the associations. "Overlap would arise where a given cattle producer belonged to more than one association within a given state; also a county organization might belong to a state association, which might belong to a national association, such that an individual producer might be counted at several different levels of organization."[257] There was also the related question of how Commerce should resolve conflicting positions between individuals and associations (e.g., individual supported the petitions while association opposed).

Petitioner proposed a methodology for counting overlapping association votes such that an *individual's* vote would not be overriden by an association to which that individual is a member, and a local, regional or state association's vote would not be overriden by the national association, where the positions conflict.[258] Commerce partially adopted this approach with respect to resolving conflicts between a state association and its affili-

254. *Id.* at 7, n. 16.
255. *See id.* at 13.
256. *See* Industry Support Memo, *supra* note 238, at 13.
257. *Id.* at 7-8.
258. Letter from Petitioner's to William Daley, Secretary of Commerce, 8 (Nov. 6, 1998) [hereinafter Letter].

ated local association by including the cattle numbers of both associations in its calculation.[259]

Commerce never directly addressed the issue of conflicting positions between individual producers and associations. However, its decision to reduce the headcounts of individual producers supporting the petitions by 54 percent based on the telephone poll in effect resulted in deciding against giving weight to the vote of individual producers which conflicted with an association's position. As noted, Commerce simply assumed that 54 percent of the individual supporters were represented by associations.

(c) Estimating the Inventory of the Intertribal Agriculture Council

One of the associations that early on expressed support for all three petitions was the Intertribal Agriculture Council ("IAC"), an organization of 84 American Indian Tribal Governments which control some 82 percent of the 56 million acres of Indian land in the contiguous United States.[260] IAC estimated that its member tribes accounted for some 7.5 – 7.7 million head of cattle.[261]

Although Commerce generally accepted the estimates of cattle inventories provided by all other associations (provided they did not exceed the inventory total for the state), Commerce did not accept IAC's estimate:

> In its initial response. . . the IAC provided an estimate of 7.5 million head of cattle. . . . This figure was based on the results of a survey of cattle on Indian lands conducted by the Bureau of Indian Affairs, which yielded an estimate of slightly under 1.5 million head of cattle. The IAC adjusted this figure by a multiplier of 5, noting that BIA had been found to have greatly underestimated the head of cattle on reservations in Montana, and that such undercounting should be inferred to have taken place on other Indian lands. . . .
> [T]he record does not support the contention that the extent of undercount found in Montana is typical of the extent of undercount on Indian lands in other states. . . .
> However, the IAC and petitioner have provided other census data that allow for a reasonable estimate of the number of head of cattle on Indian lands. These data are (1) the acreage of Indian grazing lands in each state. . . and (2) the average number of head of cattle per acre in each state. . . .[262]

259. *See* Industry Support Memo, *supra* note 238, appendix 6 at 8.
260. *See id.* at 14. The IAC's members also control about half of the Native Corporation lands in Alaska. *See id.*
261. *See* Affidavit of Gregory E. Smittman, Executive Director of IAC.
262. Industry Support Memo, *supra* note 238, at 14-15.

Commerce adjusted the resulting total by adding the number of cattle found to have been undercounted in the survey for Montana, but made no other adjustments to the state totals to allow for possible undercounting.[263] Commerce then multiplied this sum by 82 percent, the ratio of Indian lands accounted for by the IAC's member tribal governments and arrived at a figure of 3.3 million – less than half IAC's own estimate.[264]

(d) Estimating the Inventory of the Livestock Marketing Association

The Livestock Marketing Association (LMA) is an association of livestock auction and terminal markets, video auctions and commission firms as well as cattle dealers and buyers throughout the United States. In its letter of support for the three petitions, LMA estimated that its members accounted for approximately half of all the cattle marketed each year (i.e., approximately 36-40 million).[265]

Commerce's Industry Support Memo confirmed that wholesalers meet the statutory definition of domestic interested party and thus their views must be taken into account in determining industry support, and that LMA's members are wholesalers within the meaning of the statute. "It is plain that LMA alone could have filed a petition on behalf of the U.S. cattle industry."[266]

There still remained the issue of how to count the cattle that LMA's members handled. Petitioner had proposed two alternatives. First, Commerce could have simply used the volume of marketings and added it to other support figures (taking into account possible double-counting). That approach would have conformed to the plain language of the statute to include wholesalers in the standing calculation. Second, Commerce could have elected to treat LMA as a proxy for the cow-calf operators, backgrounders and feedlots whose product LMA's members help market. Under such an approach, petitioner noted, LMA's inventory figures would have to be adjusted upward to take account of the fact that not all cattle are marketed every year. Since LMA accounted for about half of all marketings, Commerce could have treated LMA as representing about half of all the cattle in its measure of total applicable inventory (i.e., the

263. *See id.* at 15, n. 32.
264. *See id.* at 15-16.
265. *See id.* at 16.
266. *Id.* at 17.

denominator). Using this approach, LMA would have accounted for about 46 million head of cattle.[267]

Instead, Commerce determined to consider LMA's role with respect to inventory not otherwise accounted for by producers taking a position (support, oppose, neutral) with respect to the petitions.[268] "Of the total inventory of cattle within the definition of domestic like product as of January 1, 1998, which is approximately 86,611,354 head, we have obtained expressions of support, opposition, or neutrality accounting for over 65 percent with respect, for example, to the Mexican petition, leaving over 26,000,000 head of cattle unaccounted for."[269] Commerce observed that since LMA accounts for half of all sales of cattle, it would be reasonable to infer that LMA would be involved in the sale of half of the cattle unaccounted for in Commerce's poll, or about 13 million head. Commerce adjusted this figure further downward to account for the fact that "only about 37 percent of cattle inventory is sold in a given year."[270] Commerce acknowledged that this figure included only the sales of slaughter cattle and not the sales of calves, yearlings or feeders and that it consequently conservatively understated the amount of inventory that LMA's members would sell in a 12-month period.[271] Thus, Commerce ultimately determined that LMA accounted for about 5 million head of cattle for the Mexico petition and 4.5 million head for each of the Canadian petitions – about 10 percent of the amount that petitioner's approach had yielded.[272]

(e) Issues arising from the industry support determination

The industry support issue could have been far more easily resolved had USDA been legally permitted to share its database of producers with Commerce. Commerce could have then used that database to do a random sample within the first 40 days after the filing of the petition.

Since that option was not available, however, Commerce proceeded to poll the industry by using trade associations. This was a reasonable decision, but was made more costly and time-consuming than necessary by the conservative approach that Commerce adopted in assessing the responses of the associa-

267. *See* Letter, *supra* note 250, at 8-9.
268. *See* Industry Support Memo, *supra* note 238, at 18.
269. *Id.*
270. *Id.*
271. *See id.* at 18, n. 37.
272. *See id.* at 18.

tions. For example, Commerce had conducted a telephone survey of randomly selected producers which indicated significant overlap among associations in certain key states such as Montana, South Dakota, North Dakota, Iowa and Kentucky. Commerce "conservatively assumed a very high degree of overlap in associations supporting the petitions and *no* overlap in associations opposing the petitions."[273] For many states (e.g., Florida, Nebraska, Oklahoma and Texas), for purposes of assessing support for the petitions, Commerce included *only* the largest association, while in those same states, Commerce included *all* associations that expressed opposition.[274] Commerce's methodology made no allowance for counting the support from individual producers whose associations opposed the petition (e.g., by reducing the number of association cattle by the number of the individual's cattle). Commerce's methodology thus likely undercounted supporters while overcounting those in opposition. It also disenfranchised individual producers who supported the petition but belonged to associations which either took no position or which opposed the petition.

As to R-CALF's two largest supporting associations, Commerce scrutinized the cattle inventory estimates provided by the IAC, but largely performed no similar examination of any other association's inventory estimate.[275] Commerce's estimate of cattle accounted for by LMA's members greatly reduced the totals which would otherwise have been reasonable and supportable for Commerce to have adopted. It bears noting that had Commerce adopted petitioner's proposals for estimating the cattle accounted for by LMA, then LMA alone would have provided support sufficient to meet the statutory industry support requirements.

It is understandable that Commerce would adopt such a conservative approach in anticipation of legal challenges by respondents to its industry support determination. Indeed, the Government of Canada subsequently requested consultations and the establishment of a dispute settlement panel with regard to Commerce's decision to initiate the countervailing duty investigation.[276] It nevertheless establishes troubling precedents

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273. *Id.* at 12 (emphasis added).

274. *See* Industry Support Memo, *supra* note 238, appendix 9 at 2.

275. Where an association's estimate of its members' cattle inventory exceeded the USDA figures for that state, Commerce required the association to refigure its estimate. *See id.* at 8, n. 19.

276. *See* United States – Countervailing Duty Investigation with respect to Live Cattle from Canada, March 19, 1999, (WT/DS167/1) <www.wto.org/wto/

that are likely to make it harder, not easier, for a similarly fragmented industry to demonstrate industry support in a future case. Such an outcome runs contrary to the Congressional concerns about the costs to producers (particularly small ones) of pursuing trade remedies.[277]

C. COMMERCE'S COUNTERVAILING DUTY INVESTIGATION

Foreign governments subsidize the industries in their countries when they provide financial assistance that benefits the production, manufacture or exportation of goods. Subsidies can take many forms, such as direct cash payments, credits against taxes, and loans at terms that do not reflect market conditions. While subsidies are beneficial to the industry or firm receiving them, they also can cause trade distortions and harm to industries in other countries by, for example, enabling the subsidized industry to increase its production and export of a particular product when, in the absence of the subsidy, it would not have been able to do so. Subsides which lead to trade distortion thus induce increased investment in the exporting country in the subsidized industry while also inducing disinvestment in the industry in the importing country which is unable to compete with the subsidized imports.

1. *The Statute*

The statute defines a countervailable subsidy as a government practice which provides a financial contribution, provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. The "contribution"

dipuste/e-14feb00.doc>. Canada contended that the initiation of the investigation is inconsistent with US obligations under the Subsidies Agreement, including, *inter alia*, that the petition filed with the US Department of Commerce was not made by or on behalf of the domestic industry. *See id.*

277. *See, e.g.*, H.R. Rep. No. 40-100, 172-73 (1987). "Committee members have received many complaints about the costs and complexities of seeking statutory relief and are aware of a number of small firms which have not even tried to seek relief because they . . . find the process to be too cost prohibitive." *Id.* at 173.

must be provided to a person and a benefit is thereby conferred.[278]

A countervailable subsidy also must be "specific." According to the statute, a subsidy is specific if it is (1) an export subsidy, (2) an import substitution subsidy; or (3) a specific domestic subsidy as a matter of law or fact.[279]

A domestic subsidy is specific to an enterprise or industry or group thereof as a matter of law if the program expressly limits access to the subsidy. A subsidy is specific to an enterprise or industry or group thereof as a matter of fact if one or more of the following factors exist:

> (1) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (2) An enterprise or industry is a predominant user of the subsidy.
>
> (3) An enterprise or industry receives a disproportionately large amount of the subsidy.
>
> (4) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.[280]

In evaluating a subsidy under these factors,[281] Commerce will consider the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation. In addition, a domestic subsidy is also specific if it is limited to an enterprise or industry located within a geographical region within the jurisdiction of the authority providing the subsidy.[282]

In addition to these requirements, Commerce will "disregard any *de minimis* countervailable subsidy. [A countervailable subsidy is *de minimis* if] the aggregate of the net countervailable subsidies is less than 1 percent *ad valorem* or the equivalent specific rate for the subject merchandise."[283] In the cattle case for example, a 1 percent *ad valorem* subsidy rate would be roughly equivalent to C$41 million as the Canadian

278. *See* 19 U.S.C. §1677(5)(B).

279. *See* 19 U.S.C. §1677(5A).

280. 19 U.S.C. §1677(5A)(D).

281. The countervailing duty statute implements all of the definitions and requirements found in Agreement on Subsidies and Countervailing Measures. *See*, Agreement Establishing the World Trade Agreement, Annex 1A, Agreement on Subsidies and Countervailing Measures, Part I.

282. *See* 19 U.S.C. §1677(5A)(D)(iv).

283. 19 U.S.C. § 1671b(b)(4)A.

cattle industry annually averages nearly C$410 billion in total sales.[284]

2. *R-CALF's Subsidy Allegations*

R-CALF alleged in its petition that the federal and provincial governments of Canada were providing Canadian cattlemen tens of millions of dollars in subsidies through 34 programs ranging across nearly all the provinces in Canada, and varying in size and scope. Chief among the alleged subsidies was the Canadian Wheat Board's control of feed barley exports and the resulting artificially depressed prices of feed barley in Canada. Other alleged subsidies included cattle-specific loan programs (e.g., Alberta Feeder Associations Guarantee Program), grant programs (e.g., Net Income Stabilization Account; Saskatchewan Beef Development Fund), other programs such as the Beef Industry Development Fund and the Canada-Alberta Beef Industry Development Fund; range improvement programs such as the Alberta Public Grazing Lands Improvement Program and the Saskatchewan Crown Land Improvement Policy; programs that had previously been found countervailable in other investigations, such as the Technology Innovation Program Under the Agri-Food Agreement, the Feed Freight Assistance Adjustment Fund and the Western Diversification Program; tax rebates and programs under which the government provided goods or services (e.g., Saskatchewan Livestock and Horticultural Facilities Incentives Program; Prairie Farm Rehabilitation Community Pasture Program); and Provincial Crown Lands Programs.[285]

Commerce ultimately determined that 13 of the 34 programs alleged in the petition conferred countervailable subsidies.[286] However, the actual amount of the benefit, when allocated across the whole of Canadian cattle industry, totaled less than the *de minimis* cut off of one percent.[287] Consequently, Commerce issued a negative determination.

284. Commerce, *Countervailing Duty Investigation of Live Cattle from Canada, Calculations for Final Determination*, Public, at p.3 (10/12/99)

285. *See* Petition 29-109.

286. *See* Final Negative Countervailing Duty Determination; Live Cattle From Canada, 64 Fed. Reg. 57,041-57,047 (1999).

287. *See id.* at 57,040; Commerce, *Countervailing Duty Investigation of Live Cattle from Canada, Calculations for Final Determination*, Public, at p.2 (10/12/99).

3. *Narrow Interpretation of the Countervailing Duty Laws May Close Avenues of Relief for Domestic Industries*

It is ultimately, of course, within the Department of Commerce's mandate to decide cases, interpret and administer the countervailing duty laws of the United States. Certain policy interpretations made years before the *Live Cattle from Canada* case was filed have substantially reduced the reach of the law to numerous government subsidies that are likely trade-distorting.

(a) The Specificity Test as Applied to Agriculture

The countervailing duty investigation of live cattle from Canada is illustrative of the limited effectiveness of the countervailing duty law with respect to agricultural products in general and to the live cattle industry in particular. For example, the specificity test in the countervailing duty statute is intended to "function as an initial screening mechanism to winnow out *only* those foreign subsidies which are *truly broadly available* and *widely used throughout an economy*."[288] Thus, the provision of public roads, water and electricity as part of new industrial zones is not a countervailable subsidy.[289] The policy question then arises whether the "specificity" test should be interpreted so that agriculture is an industry and hence broad-based agricultural subsidies are within the reach of the countervailing duty law. This question was one which arose during the cattle case.

The issue of the impact of foreign agricultural subsidies on the ability of U.S. farmers and ranchers to compete both in foreign and domestic markets has long been a significant concern to Congress. In 1988, for example, Congress included among the trade negotiating objectives of the United States in the GATT Uruguay Round trade negotiations "creating a free and more open world agricultural trading system by resolving questions pertaining to export and other trade-distorting subsidies. . . ."[290]

The issue of agricultural subsidies has continued to be a source of substantial contention in current trade negotiations. Agricultural subsidies are in fact a central focal point for the United States in the Next Round of WTO negotiations. On the eve of the recent Seattle Ministerial United States Trade Repre-

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288. Statement of Administrative Action at 929 (emphasis added).

289. *See* Certain Steel Structural Shapes from Luxembourg, 47 Fed. Reg. 26,331, 26,333 (Dep't Commerce 1982) (prelim.).

290. Omnibus Trade and Competitiveness Act of 1988, §1101(a)(7)(C), 19 U.S.C. §2901.

sentative Barshefsky called for "eliminating, and prohibiting in the future, all export subsidies, and substantially reducing trade-distorting domestic supports."[291] The WTO Seattle Ministerial in December 1999, failed to achieve the objective of starting a new round of multilateral trade negotiations in substantial measure because certain WTO members, including the EU, Japan, Korea and others, resisted sweeping agricultural reform commitments within the agenda.[292]

The purpose of the specificity test and the concerns about agricultural subsidies, taken together, might lead one to conclude that the countervailing duty law would be an effective means for domestic agriculture to obtain relief from subsidized imports. However, since at least 1983, Commerce has taken the position that the agricultural sector constitutes "more than a single group of industries within the meaning of the Act."[293] Subsequent pronouncements have similarly provided that Commerce "will not consider a domestic subsidy program specific solely because it is limited to the agricultural sector."[294] Rather, the subsidy must be specific as to a particular subset of the agricultural sector. Consequently, government programs that broadly support agricultural production are not typically actionable under the countervailing duty law.

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291. Ambassador Charlene Barshefsky, Toward Seattle: The Next Round and America's Stake in the Trading System, Address Before the Council on Foreign Relations (October 19, 1999), in <http://www.ustr.gov/speeches/index.html>. Congressional leaders have also highlighted the importance of this issue. *See The Administration's Preparations for the 1999 World Trade Organization Ministerial Before the House Comm. on Agriculture*, 106th Cong. 2 (1999) (opening remarks of Rep. Larry Combest, Chairman, Committee on Agriculture).

292. EU member states in Seattle did not display a commitment to agriculture reform, which was "quite evident" in their rejection of the draft language laying out the terms for future agriculture negotiations in the WTO, Barshefsky charged. This must change because agriculture will be the heart of new negotiations in the WTO. "If you can't get agreement on an agriculture text, there's no reason to move forward," she said. "The U.S. and EU will work closely to try to "arrive at greater commonality" in this area, even if they do not come to a full agreement."

Barshefsky Urges EU to Scale Back Agenda for WTO Round, INSIDE U.S. TRADE, December 24, 1999, at 3 (quoting U.S. Trade Representative Charlene Barshefsky).

293. Fresh Asparagus from Mexico, 48 Fed. Reg. 21,618, 21,621 (Dep't Commerce 1983) (final neg. determination).

294. Countervailing Duties, 63 Fed. Reg. 65,348 , 65,357 (Dep't Commerce 1998) (final rule). The courts have upheld this interpretation. *See also* Roses Inc. v. United States, 15 Ct. Int'l Trade 465, 474 (1991) ("While there is room for debate on the meaning of the statutory words, Commerce's interpretation is within the realm of acceptable definitions.").

Whether Commerce's interpretation is a sound one is open to debate. On the one hand, the interpretation essentially views "agriculture" as a sector that is distinct from "manufacturing." Presumably, subsidies which generally benefit the manufacturing base of a country's economy (e.g., change in the tax law to allow accelerated depreciation of plant and equipment) would not be regarded as specific.[295]

On the other hand, in developed countries, agriculture is a very small part of the overall economy. The USDA 1997 Census of the Agriculture, for example, reported that the United States had 1.911 million farms and 1.042 million operators in total, (less than one percent of the entire workforce).[296] In Canada, as of 1996, there were 387,550 farm operators altogether and 276,548 farms.[297] Commerce's interpretation that a sector of the economy which employs such a small percentage of the workforce is not a "specific group of industries" is difficult to reconcile with the instruction that only those subsidies which are "truly broadly available" and "widely used throughout an economy" should be found non-specific.[298] As well, the interpretation ensures that the law will not be used to address what are widely recognized as trade distorting subsidies, and that the affected industries will therefore have to go to other fora.

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295. As well, the United States provides various subsidies to agriculture such as the emergency loans and grants in the 1998 farm bill. The concern is expressed in some quarters that such subsidies could make U.S. agricultural exports the target of foreign countervailing duty investigations were the Commerce Department to impose duties on every imported agricultural product which benefited from some foreign subsidy that was "generally available" to agriculture in that country. However, such "emergency" subsidies would not be actionable if they qualify as "Green Box" domestic support measures in the WTO Agreement on Agriculture (i.e., no or minimal trade-distorting effects or effects on production). *See* Statement of Administrative Action at 716 and 937.

296. *See* USDA, *1997 Census of the Agriculture, Highlights of Agriculture: 1997 and 1992* (visited Mar. 9, 2000) <http://www.nass.usda.gov/census/census97/highlights/usasum/us.txt>.

297. *See* Statistics Canada, Profile of Farm Operators Classified by Occupation and Sex, 1991 and 1996, Canada (visited Mar. 9, 2000) <http://www.statcan.ca/english/censusag /apr26/ can1.htm> and *see* Statistics Canada, *Farm Population, 1991 and 1996, Canada* (visited Mar. 9, 2000) <http://www.statcan.ca/english/censusag/apr26/can3.htm>.

298. *See* Statement of Administrative Action at 929, 930 ("The specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout the economy. Conversely, the specificity test was not intended to function as a loophole through which narrowly focussed subsidies provided to or used by discrete segments of an economy could escape the purview of the CVD law.") *Id.* at 930 (emphasis in original).

In the cattle case, Commerce's interpretation of specificity proved important with regard to the National Insurance Stabilization Act (NISA). NISA allows agricultural producers to set aside funds to cover cyclical downturns in their income. The initial portion of the producer's deposit is matched by the federal government, plus an additional amount may be deposited by a producer without matching government contributions.[299] NISA is a $200 million national program available in all provinces.[300] Most agricultural products are eligible and qualifying commodities vary by province.[301] Because of Commerce's specificity interpretation, the program would be actionable only if cattle producers were disproportionate users of the program and the program was thus *de facto* specific.[302] Based on the program's compensation pattern, Commerce rejected this claim and found "that NISA assistance is not limited to a specific enterprise or industry, or group of enterprises or industries. Therefore, we determine that assistance received by cattle producers under the NISA program is not countervailable."[303] Use of the countervailing duty provisions of the trade law are therefore much more difficult for any agricultural industry as all broadly available foreign agricultural subsidy programs are exempted from the scrutiny of the law.

(b) "Uncreditworthiness" in the Context of a Fragmented Industry

Government loans to foreign producers can be a subsidy if they are issued on terms inconsistent with commercial considerations.[304] Pursuant to Section 771(5)(E)(iii) of the Tariff Act of 1930, as amended,[305] Commerce will find that a countervailable benefit has been conferred if:

> (ii) in the case of a loan, if there is a difference between the amounts the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market. . .
> (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in the guarantee fees, between the amount the

299. *See* Live Cattle from Canada, 64 Fed. Reg. 57,040, 57,054 (Dep't Commerce, 1999) (determination).
300. *See* AGRICULTURE AND AGRI-FOOD CANADA, 1998-99 REPORT ON PLANS AND PRIORITIES 32 (1998).
301. *See* 64 Fed. Reg. 57,054.
302. *See id.*
303. *See id.*
304. 19 U.S.C. §1677(5)(B).
305. 19 U.S.C. §1677(5)(E)(iii).

> recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority. . ..

In order to select a comparable commercial loan, Commerce will normally place primary emphasis on similarities in the structures of the loans (*e.g.*, fixed interest rate v. variable interest rate), the maturities of the loans (*e.g.*, short-term v. long-term), and the currencies in which the loans are denominated.[306] If however Commerce finds that the company receiving a government-provided long-term loan was "uncreditworthy", then Commerce will calculate an adjustment to *raise* the benchmark interest rate to reflect the increased risk.[307] In the case of the cattle industry, however, subsidy theory met a practical problem: namely, how does one show that some 100,000 plus Canadian ranchers are "uncreditworthy"?

In conducting a creditworthy analysis Commerce commonly examines three, non-exclusive factors:

> Current and past indicators of a firm's financial health calculated from that firm's financial statements and accounts,
> The firm's recent past and present ability to meet its costs and fixed financial obligations with its cash flow, and
> Future financial prospects of the firm including market studies, economic forecasts, and projects or loan appraisals.[308]

Commerce examines the financial performance of a company for a number of years prior to the target year.[309] If the company's

306. Countervailing Duties, 62 Fed. Reg. 8,818, 8,849 (Dep't Commerce 1997) (notice).

307. *See id.* at 8849-50.

308. *See* Customs Duties, 19 C.F.R. §351.505(a)(4)(i) (1999). For a more detailed discussion of the Department's creditworthiness criteria, *see*, Certain Steel Products from France, 58 FR 37,304, 37,306 (Dep't Commerce 1993) (determination); Certain Steel Products from the United Kingdom, 58 Fed. Reg. 37,393, 37,395 (Dep't Commerce 1993) (determination).

309. Steel Wire Rod from Venezuela, 62 Fed. Reg. 55,014, 55,019 (Dep't Commerce 1997) (determination).

[SIDOR's] financial picture in the three years prior to 1991 was erratic. . .. SIDOR's real revenue growth was negative in 1988 and 1989, and, after making an adjustment for inflation, the company's profit margin was negative in each of the three years preceding 1991. According to Venezuelan commercial bankers, this is a key factor in evaluating a company's ability to meet its debt obligation. *See Memo Re: Meetings with Commercial Bankers* at 3. While the bankers also stated that they would lend to Venezuelan companies with a debt-to-equity ratio of up to 300 percent, they further indicated that a key factor would be whether the company had survived the crises of the economy. This cannot be said of SIDOR. The company's own projections at the time made clear that without the [Government of Venezula's] conversion of SIDOR's external debt, the company would not have been able to meet its debt obligations. *See* SIDOR [Verification Report] at Exhibit 21 and the "Equityworthiness" discussion above.

financial performance is such that the company in question would not have been able to obtain commercial financing at commonly available interest rates then it is deemed "uncreditworthy".[310] For uncreditworthy companies, Commerce uses as the discount loan rate applied to loans given to the company, the highest long-term fixed interest rate commonly available to firms in the country plus an amount equal to 12 percent of the prime rate.[311]

In order to sustain an uncreditworthiness allegation, the Department has "established a policy . . . that an uncreditworthy allegation must be made on a company-specific basis."[312] Central to Commerce's requirement is that the investigation of "uncreditworthiness" creates an additional and heavy administrative strain on its resources.[313] When allegations are made for large, publicly traded entities, such as a steel company or some other manufacturing company, financial performance data is readily available. It is therefore normally not difficult for petitioners to examine public records such as SEC filings, corporate press releases, corporate annual reports or similar sources of information which disclose information about a company's profit and loss record. "Company specific" information is therefore available and the potential creditability of petitioner's allegations can be accurately determined before complex investigations are initiated without undue strain on Commerce.[314]

However, as there are over 100,000 Canadian farms that raise beef cattle, and given that the industry is not concentrated, it was quite simply impossible for the petitioner to compile company-specific information with respect to a significant or representative number of cattle producers. Furthermore, it was

310. Countervailing Duties, 62 Fed. Reg. 8,818, 8,850 (Dep't Commerce 1997) (notice).

311. *See e.g.,* Certain Steel Products From Brazil, 58 Fed. Reg. 37,295, 37,298 (Dep't Commerce 1993) (determination); Grain-Oriented Electrical Steel From Italy, 59 Fed. Reg. 18,357, 18,358 (Dep't Commerce 1994) (determination).

312. Fresh and Chilled Atlantic Salmon from Norway, 56 Fed. Reg. 7,678, 7,683 (Dep't Commerce 1991) (determination).

313. Countervailing Duties, 63 Fed. Reg. 65,348, 65,368 (Dep't Commerce 1998) (final rule).

314. As an example, in *Structural Steel Beams,* Commerce stated "Petitioners have also alleged that Kangwon was uncreditworthy from 1991 through 1998. Based upon the information provided by petitioners, including financial ratios, we are initiating an investigation of Kangwon's creditworthiness for the years 1991 through 1998." Structural Steel Beams from the Republic of Korea, 64 Fed. Reg. 42,088, 42,090 (Dep't Commerce 1999) (notice).

particularly difficult to obtain company-specific financial information in this industry because most farms/ranches are not publicly owned and, therefore, are not required to publish their financial statements. On the other hand, industry data were available, were representative of the industry of a whole, and established a reasonable basis to conclude that Canadian cattle operations were "uncreditworthy" for purposes of applying Commerce's countervailing duty regulations and practice.

The Commerce Department recognized this dilemma and provided that alternative information could be submitted which showed that the Canadian cattle industry, in general, was unable to obtain long-term financing from commercial sources.[315] In the absence of company-specific information, petitioner placed on the record reasonably available industry-wide evidence of *industry-wide* uncreditworthiness.[316] Canadian statistics showed that home market cattle prices had been below the cost of production for the last 12 months prior to the filing of the petition and both home market and export prices had been below the cost of production from January through August 1998.[317] Furthermore, the losses incurred by the Canadian cattle industry were persistent on a national basis over several years. Consider the following:

(1) A 1995 Special Issue of the *Canadian Journal of Economics*, "Farms, Farm Families, and Farming Communities," showed that in 1991, low income cow-calf operations in Ontario had negative net returns, and average income operations were marginally profitable.[318]

(2) Over the period 1994-1996, the Canadian cattle industry as a whole suffered deep and persistent losses, as shown by *Statistics Canada* data:

315. Live Cattle from Canada, 63 Fed. Reg. 71,889, 71,892 (Dep't of Commerce 1998).

316. Original Petition at p.40-42 and Table 6b.

317. *Id.*

318. *See* Original Petition Exhibit 16b at p.190.

Average Canadian Cattle Farm Revenues Operating Expenses, Depreciation and Losses

	1994	1995	1996
		C$/farm)	
Cattle Farms			
Farm revenues	122,130	129,267	119,894
Operating expenses	113,246	120,495	111,875
Net cash income	8,884	8,773	8,019
Depreciation	18,417	19,996	18,632
Profit (loss)	(9,533)	(11,223)	(10,613)

Note: Data provided by *Statistics Canada* for "Average Farm Revenues, Operating Expenses and net Cash Income per Farm by Farm Type," only include farm revenues, operating expenses and net cash income. To calculate depreciation, Statistics Canada's on-line statistical database was consulted to obtain the ratio of depreciation to operating expenses.

Thus, at least over the period 1994-1996, the Canadian cattle industry on a national basis suffered substantial losses. Moreover, on a regional basis, producers in every major cattle-producing region were unprofitable during at least fiscal year 1998. Thus, there was evidence on which Commerce could have easily concluded that the industry as a whole would not receive long-term loans from normal commercial sources. It follows, therefore, that *a substantial portion of the individual producers were uncreditworthy on a company-specific basis.*

Commerce declined to accept this methodology and rejected petitioner's uncreditworthiness allegation.[319] Specifically, Commerce stated: "[T]he petitioner has not provided specific evidence indicating that the current financial condition of the Canadian cattle industry will continue into the future or any other information directly supporting the conclusion that the industry has been unable to obtain long-term commercial financing."[320] "Specific" and "direct" evidence, however, is typically not available when analyzing a fragmented foreign industry such as the Canadian cattle industry. It is also open to question as to how petitioner could or should have known that it had to show the Canadian industry's poor financial condition would "continue into the future" when all precedent showed that Commerce examined financial data retrospectively. The current interpretation of the uncreditworthy requirement of the statute seems to prevent a fragmented domestic industry from receiving proper redress for the benefits given to its foreign competi-

319. *See* Live Cattle from Canada, 63 Fed. Reg. 71,892.
320. *Id.*

tors.[321] Use of the trade laws is thus rendered even more difficult for fragmented industries such as the cattle industry.

4. The Administration of the International Trade Law Creates Inherent Dilemmas which Impede the Ability of Domestic Industries to Receive Redress

Administering the international trade law presents a dilemma for the Department of Commerce. They are instructed by the Congress to both investigate and then adjudicate the laws. In their role as investigator, Commerce must aggressively gather the facts of a case, yet as the adjudicator of the law Commerce would seemingly have to play a more neutral role. The balance that must be struck between these dual roles is difficult and becomes even more challenging when the Department investigates a fellow sovereign under the countervailing duty laws. These difficulties all were exhibited in the Live Cattle from Canada case.

The petitioning domestic industry does not have discovery rights under the international trade law. Unlike civil lawsuits, the interests that harmed industries seek to protect cannot be enforced by direct requests for information, mandatory disclosure of documents or depositions of critical witnesses. Petitioners assemble a case from publicly available information, the constructed case attempts to provide information regarding the nature and quantity of the unfair trading act which is then given to Commerce. Sources for data include public laws or decrees, public budgetary data showing government outlays, company financial reports, research reports on companies, etc. While highly probative, such information rarely tells the whole story and direct information from the foreign parties involved in the case must be analyzed. Petitioners, however, cannot directly ask for any documents from the foreign party. Rather, Commerce is empowered with the investigatory authority and thus has the responsibility to request and analyze information.

A petitioner's role, after presenting a plausible case to Commerce, is to examine the information provided and point out inconsistency, provide suggestions for additional information requests, as well as how such information fits within the law. As active as petitioners are and can be under the law, the inves-

321. Had Commerce chosen to follow petitioner's logic the workload would not have been great. For example, they could have sampled producers in order to substantiate or reject an uncreditworthiness allegation based on actual responses to questionnaires.

tigation and the discovery power is controlled by Commerce. In administering the law, however, Commerce must also adjudicate the dispute before it. In that role Commerce should seemingly be, as all good judges are, neutral and objective in its examination of the facts. This can obviously cause an internal dilemma. If Commerce is a zealous and aggressive investigator, the conduct of the investigation can color and shape the ultimate decision in a case; the zealous investigator may in effect taint the neutral judge. If, on the other hand, Commerce attempts to be as neutral as possible, then the collection of factual data may be impeded by a determined foreign party. In turn, without true and complete facts the decision made by Commerce may be corrupted. This internal conflict is made even more difficult when the foreign party is a foreign, sovereign government. In such a setting all the deferences that are traditionally granted to foreign sovereigns, and best left to a conflict of laws course, also enter into play.[322]

322. When Congress passed the Trade Agreements Act of 1979 implementing the changes to U.S. trade law that were agreed upon in the Tokyo Round GATT negotiations, Congress added to the antidumping and countervailing duty laws a provision requiring verification of foreign responses to antidumping and countervailing duty questionnaires. Congress explained the reason for the provision, stating "Numerous complaints have been made regarding the current practices on verification of information submitted . . . in antidumping and countervailing duty proceedings, *particularly information submitted by foreign governments.*" S. Rep. 96-249, at 98 (emphasis added). One example from this period illustrating inappropriate deference is the case of ASG Industries Inc., v. United States, 610 F.2d 770 (C.C.P.A. 1979). In that case domestic float glass manufacturers petitioned the Treasury Department for the imposition of a countervailing duty on imports of float glass from West Germany alleging that German manufacturers received benefits under various government programs. *See id.* Treasury initially determined that imports of float were indeed benefiting from West German government subsidies. *See id.* at 773. Treasury later reversed its position because: "[t]he German Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions." *See* 610 F.2d at 780. The Customs Court affirmed Treasury's determination. *See* ASG Industries, Inc. v. U.S., 82 Cust. Ct. 1 (1979). On appeal the appellate court found that Treasury's determination lacked an adequate factual basis. *Id.* at 775. In the Court's words, "the statement that '[t]he German Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions' is totally inadequate.. . . [T]he statement that Treasury was 'advised' is hardly a factual basis supporting the conclusion that there was no bounty or grant." *Id.* at 778. The Court stated that Treasury's finding of "no net benefit" to the foreign manufacturer "must be established by facts—not by mere allegations of the foreign government or of the enterprises receiving the bounty or grant." *Id.* Thus the Court held that the agency can not simply accept the unsupported statements

In the specific example of the cattle case the full participation of the petitioner and the role of Commerce was made more difficult by the nature of the parties investigated and the timing of the information provided. One of the most critical subsidy allegations made by petitioner was the question of whether the Canadian Wheat Board was providing an indirect subsidy to the cattlemen in Canada. The CWB has exclusive authority to market Canadian feed and malting barley in export markets. In the Canadian domestic market, the CWB has exclusive marketing authority only with respect to malting barley. R-CALF alleged that the CWB's pooling system[323] sent distorted market signals to Canadian farmers, and that the system of marketing feed bar-

of a foreign government in a countervailing duty investigation. The same principle underlay Congress' enactment, in the 1979 Trade Act, of the requirement that information relied upon by the agency in a trade investigation be verified.

Thus, when section 782(i) of the Tariff Act of 1930 was amended, Congress required Commerce to "verify all information relied upon in making . . . a final determination in an investigation." 19 U.S.C. §1677m(i). Where information is not verifiable because it was submitted late or not at all, or an interested party significantly impedes an investigation, then Commerce is authorized to rely on "information available," including information provided by the petitioner. 19 U.S.C. §1677e. In the case of *Industrial Nitrocellulose from France*, for example, the government of France refused to supply data "required to prove or disprove the petitioner's allegation that military sales provide a [subsidy]." Industrial Nitrocellulose from France, 48 Fed. Reg. 11,971, 11,972 (Dep't Commerce 1983). As a result, Commerce resorted to "best information . . . . available." *Aff'd Hercules, Inc. v. United States*, 11 CIT 710, 729 (1987) (upholding the use of "best information available" where France refused to submit data that would establish whether production of the subject merchandise was profitable.). In the context of disclosure of verification exhibits, the government of Thailand has argued that government documents obtained in a countervailing duty investigation should not be subject to the same rules as business proprietary documents obtained in an antidumping case. The Court of International Trade rejected the argument as "meritless." Allied Tube & Conduit Corp. v. United States, 13 CIT 698, 704, n.7 (1989). Thailand also argued that principles of international comity should prevent the release of confidential government information. The court rejected this argument, holding that the statute permitted a foreign government, as much as a private party, to withdraw documents from the record if it objected to their disclosure. *See id.*, n.8. Conceptually, these cases illustrate that after the Trade Act of 1979, foreign governments in countervailing duty investigations should be treated in the same manner as would private parties in antidumping investigations.

323. The pooling mechanism is the defining feature of the CWB's operations. The CWB operates a separate "pool" for each of the four crops under its authority (wheat, durum wheat, feed barley and "designated" or malting barley). Pooling means that the CWB pays every farmer the same amount for a given quantity and quality of grain based on the weighted-average price received for all the barley marketed in the pool year, regardless of when in the crop year the farmer sells to the CWB and regardless of the specific sales prices the CWB realizes on the individual sales of that grain. CWB characterizes the pooling mechanism as a risk management tool designed to protect farmers from ad-

ley in Canada imposed excessive costs on farmers who wished to export, with the result that feed barley exports were less than they otherwise would be. As a result, R-CALF alleged more feed barley was made available on the domestic market, which artificially lowered prices paid by Canadian cattle producers. R-CALF contended that Commerce should find the Canadian Wheat Board Act and its regulations *de jure* specific because they provide an indirect "financial contribution" which was expressly limited to Canadian livestock and poultry farmers.[324] While not an explicit export restriction such as ones which had been investigated and found countervailable by Commerce in prior cases, the CWB's control over, and operations in, the feed barley market had similar results as such export restrictions.[325] The Canadian Wheat Board (CWB) is a state trading enterprise.[326] As such unique factual and procedural issues arose for both petitioners and Commerce.

In 1996 a GAO study highlighted the problems and concerns that governments and individuals have with STEs. "STEs that have monopoly buying authority for certain domestic products may gain advantages as a result of their overall control of the domestic supply."[327] In turn, these advantages can be trade distorting, such as where STE authority allows cross-subsidization

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verse price fluctuations that may occur throughout the year. *See* 64 Fed. Reg. at 57,048.

324. 19 U.S.C. § 1677(5)(D).

325. *See* Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,605 (Dep't Commerce 1992) (determination); Leather from Argentina, 55 Fed. Reg. 40,212 (Dep't Commerce 1990) (notice).

326. WTO Committee on State Trading Enterprises, Notification Pursuant to Article XVII.4.a of the GATT 1994 and Paragraph 1 of the Understanding on the Interpretation of Article XVII - CANADA, G/STR/N/1CAN (Sept. 29, 1995). Article XVII defines state trading as occurring where a WTO member "establishes or maintains a state enterprise . . . or grants to any enterprise . . . exclusive or special privileges." Agreement Establishing the World Trade Agreement, Annex 1A, Article XVII of the General Agreement on Tariffs and Trade 1947, as amended. The article however, does not define either "state enterprise" or "privileges". One result of the Uruguay Round included the Understanding on the Interpretation of Article XVII which provides the following working definition for state trading enterprises:
"Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports." WTO Understanding on the Interpretation of Article XVII, paragraph 1.

327. NAT'L SEC. AND INT'L AFFAIRS DIV., GEN. ACCOUNTING OFFICE, CANADA, AUSTRALIA, AND NEW ZEALAND – POTENTIAL ABILITY OF AGRICULTURAL STATE ENTERPRISES TO DISTORT TRADE (1996).

between domestic and foreign markets or between foreign markets.[328] Government financial support for STEs involving either direct and indirect subsidies also provides advantages for STEs over their private competitors in world markets thus distorting world trade patterns. "Additionally, relationships between STEs and foreign buyers can provide advantages through the ability to charge different prices in different markets."[329] The United States has consistently placed and continues to place reform of agricultural STEs high on its agenda for WTO negotiations.[330]

Moreover, special U.S. concerns regarding the CWB itself are contentious, and involve an on-going conflict over the price effects and role of the CWB. An October 1999 General Accounting Office report on the CWB begins with this opening line:

> U.S.-Canadian grain trade has been a source of contentious debate between the two countries over the past dozen years as Canadian wheat exports to the United States have increased.[331]
>
> Indeed, the conflict over the CWB is also a contentious issue within Canada as farmers have protested the government's monopoly control over grain.[332] These protests involve civil disobedience, legal challenges, referendum votes, and illegal exportation of grain to the United States.[333]

Further adding to the concerns about the CWB were practical issues regarding the ability of anyone to adequately investigate the Wheat Board. The GAO reported that: "[t]he CWB discloses only limited information about its prices for the wheat

328. *Id.* Cross-subsidization can occur when an STE sells products at a loss in one market and finances those losses through highly profitable sales in another market.

329. *Id.*

330. Ambassador Charlene Barshefsky, American Agriculture in the New Round, Testimony Before the House Committee on Agriculture (October 20, 1999) in <http://www.ustr.gov/testimony/barshefsky_31.html>.

331. NAT'L SEC. AND INT'L AFFAIRS DIV., GEN. ACCOUNTING OFFICE, U.S. AGRICULTURAL TRADE – CANADIAN WHEAT ISSUES 2 (1998).

332. The GAO report samples some of the massive and conflicting academic literature which examines the role of the CWB. *Id.* Appendix III, at 70-78.

333. *See, e.g.,* Terry Johnson, *Wheat Board Rebellion, Canadian Growers Eye Profits in the U.S.,* FARM J., April 1997, at <http://www.access.gpo.gov/su_docs/aces/aces160.shtml>; David Lees, *Against the Grain: Andy McMechan Picked a Fight With the Canadian Wheat Board Over Who Could Sell His Crops and Ended Up in Jail. But Even if the Courts Said He Was in the Wrong, A Lot of Farmers Say the Wheat Board Isn't Right,"* FIN. POST (TORONTO), Mar. 1, 1997 at 14; K. Archibald, *Barley Growers in a Dilemma* CALGARY HERALD, Dec. 6, 1996 at A23 ("Polls and a plebiscite in Albertta have shown that most farmers want the freedom to choose how to market their grain – on the open market or through the Canadian Wheat Board."). Provincial governments also have sued the Canadian Wheat Board over its grain delivery programs. *See, e.g.,* Alberta v. Canadian Wheat Board, , 138 F.T.R.186 (1997).

and barley that it sells to its trading partners. U.S. officials believe that the lack of transparency in the CWB's prices may provide it with more flexibility than is found among private grain traders."[334] The CWB is so secretive that the Canadian embassy wrote, in objecting to disclosure of certain documents to petitioner counsel, that:

> The information in question is extremely commercially sensitive. It has never been disclosed outside the CWB without the CWB's express authorization, including in a legal proceeding in *any* jurisdiction. Indeed, it has never been disclosed to the Government of Canada by audit or otherwise, and the Government of Canada does not have access to the pricing information for which [access is requested].[335]

This level of secrecy and the significant magnitude of the issues surrounding CWB heightened petitioner's concerns about access to information. As indicated above, from the petitioner's perspective the success or failure of an investigation is in many respects controlled by the diligence with which Commerce investigates the foreign party and asks for critical pieces of information. From Commerce's perspective the secrecy of the CWB and the sensitivity of the issues surrounding the Wheat Board undoubtedly magnified the internal tensions the agency has in every case.

The Canadian Wheat Board Act (C-24) was originally enacted in 1935. The CWBA established the Canadian Wheat Board as a government agency accountable to Parliament "with the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada.[336] Originally enacted

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334. NAT'L SEC. AND INT'L AFFAIRS DIV., GEN. ACCOUNTING OFFICE, U.S. AGRICULTURAL TRADE – CANADIAN WHEAT ISSUES 41 (1998).

335. Government of Canada, Live Cattle from Canada- Objection to Disclosure of Certain Information under Administrative Protective Order, Public, at p.2 April 27, 1999.

336. Canadian Wheat Board Act, R.S.C., ch. C-24, §5 (1985). In *Saskatchewan Wheat Pool v. Canada* [1993] 107 D.L.R. 190, 195, the court briefly reviewed the CWBA's early history:

The Canadian Wheat Board Act, 1935, S.C. 1935, c. 53, was first enacted in that year. At first the Act, and the board established under it, dealt only with wheat. Initially, the Canadian Wheat Board did not have exclusive control over the marketing of wheat, but by amendments to the Act in 1947, c. 15, such exclusive control was conferred on the board. By amendments to the Act in 1948, c. 4. S. 5, Parliament enacted enabling legislation in the form of s. 29A of the Act, providing for the exclusive control by the Canadian Wheat Board over the interprovincial and international trading to oats and barley.

On June 11, 1998, the Canadian Parliament approved Bill C-4, which made certain amendments to the Canadian Wheat Board Act to the structure and status of the CWB. Prior to the amendments, the CWB consisted of three federally-appointed commissioners, with an 11-member, farmer-elected Advisory Committee. As amended, the CWB Act provides for a 15-member board of dias a voluntary organization, the CWB was made compulsory in 1943.[337] From 1935 until 1949, the CWB's control covered wheat only. In 1949, the CWB was granted exclusive authority over the domestic and export trading of oats and barley.

In the 1974/75 period, by regulation, the domestic trading of, *inter alia,* feed barley was removed from the CWB's control. The exclusion of feed barley for domestic sale from the CWB's control was the result of dissatisfaction and complaints from Canadian livestock producers who were upset about the high cost of feed grain. The Western Stock Growers' Association, a group of Canadian cattlemen, has summarized this issue as follows:

> By the 1970s. . .[w]ith respect to CWB domestic feed pricing policies, livestock producers had no confidence that the prices they were paying were reasonable and based on competitive world prices. The CWB's domestic selling price had no visible relationship to world feed grain prices and had no floor price consisting of the initial price plus freight and expected CWB handling costs. Feed grain users complained they were being ripped off.[338]

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rectors, ten of whom will be elected by farmers, with the other five, including the president, to be appointed by the Governor in Council. The CWB Act amendments also changed the status of the CWB from a Crown corporation to a mixed enterprise agency. In addition, the CWB Act amendments provide farmers with additional and more flexible pricing options, and allow the CWB to establish a contingency fund to guarantee adjustments to initial payments or to cover losses. See generally, Act to Amend the Canadian Wheat Board Act, Bill C-4, S.C. 1998, c.17 found at <http://canada.justice.gc.ca/FTP/EN/Regs/>. Although the CWB Act amendments made significant changes to the CWB's corporate structure, they did not change the essential operations of the CWB. The CWB is still empowered to act as a monopoly seller of wheat and barley, the government still provides financial guarantees, and the CWB is still subject to government direction and control. In sum, even after the 1998 amendments to the CWB Act, the CWB still maintains its three "pillars": (1) single-desk selling; (2) price pooling; and (3) government guarantees.

337. *See* W. STOCK GROWERS' ASS'N, A RESPONSE TO BILL C-72, AN ACT TO AMEND THE CANADIAN WHEAT BOARD ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS, (1997) <http://www.cattle.ca/cattle%5Forganizations/wsga%2D9w6/briefs/cwb%5Fall.htm>.

338. *Id.* Another study has also noted that the price and supply availability of feed grain to livestock feeders were considerations in removing CWB control over domestic feed grain sales:

> CWB control over interprovincial shipments of feed grains became a public issue during the grains crisis in 1969 to 1972. Farmer border crossings (provincial borders, not the U.S. border) lead [sic] to much publicized RCMP arrests in 1969 and 1970. Western farmer dissatisfaction with excessive controls on feed grains, and eastern feeder concerns with the price and supply availability were important factors leading to the Feed Grain Policy changes in the 1970s. Some changes were made in 1974, and by 1976, the domestic feed grain market had returned to a reasonably open system with restoration of unimpeded interprovincial shipments and futures of oats, barley and feed wheat.

Such historical statements fueled petitioner's allegations. This however, was not the first time that the CWB's restrictions on feed barley exports had been cited as conferring subsidies on Canadian cattle producers. The CWB's benefits to Canadian ranchers were brought to prominence in 1998 by the NCBA which stated, "that this price advantage on barley gives Canadian cattle feeders up to a $60 per head advantage on production costs [vis-à-vis U.S. feeders]."[339] This assertion was supported by Canadian barley farmers and ranchers during Senate hearings discussing the possible reform of the CWB. In field hearings during 1998, Canadian barley farmers stated that they believed Canadian feed barley prices would equal world market prices if the CWB control over exports were removed.[340] In later testimony Canadian cattlemen urged their Senators not to change the CWB because the current marketing structure of the CWB depressed feed barley prices which resulted in lower input costs to ranchers.[341]

Commerce ultimately determined that the CWB in fact has extensive control over the feed barley export market and that its operations in that market can, and do, have a major impact in the domestic feed barley market.[342] Thus, as a legal matter,

Colin A. Carter & R.M.A. Loyns, The Economics of Single Desk Selling of Western Canadian Grain (March 1996), at Section III at 3 (subsection "Some Relevant CWB and Operational Issues").

339. *NCBA Moves To Eliminate Barley Import Barriers*, NCBA Press Release (June 17, 1996) <http://www.beef.org/newsroom/ncba/archive/nr_barl_ncba.html>.

340. Proceedings of the Standing Senate Committee on Agriculture and Forestry, 36th Parl., 1st sess. (Can. 1998) (statement of Doug Robertson, representative of the Western Barley Growers' Association) <www.parl.gc.ca/36/1/parlbus/commbus/senate/com~e/ agri-e/08eva-e.htm>.

341. During the question and answer period of the Senate Standing Committee on Agriculture the following exchange occurred:

Senator Ghitter (of Alberta): I found your argument somewhat remarkable in this sense. I have always regarded the cattlemen as being great free traders and wanting to be in global markets. I have heard those arguments during my years in Alberta, but if I am reading you right, you do not want the grain producers to have that same opportunity. You do not want them to have the opportunity to share in the betterment of their price and product. *You want to depress their prices so that you can take the advantage of it and add value to your product*, but you do not want them to get value. Am I misreading what you are saying, or is that what I am hearing?

Mr. Prentice: You have us figured.

Proceedings of the Standing Senate Committee on Agriculture and Forestry, 36th Parl., 1st sess. (Can. 1998) (statement of John Prentice, Director of the Canadian Cattleman's Association) <http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/agri-e/09eva-e.htm>. (emphasis added).

342. *See* 64 Fed. Reg. at 57048.

CWB control over feed barley exports would be actionable under the statute depending on whether such control conferred a benefit on Canadian cattle producers by reducing the cost of feed barley. Hard data therefore came to the forefront in determining whether the CWB's actions conferred a subsidy.

The original questionnaire,[343] issued January 28, 1999, instructed GOC, as follows:

> Please report the total volume and value of all export sales of barley (separately for feed and malt barley) on a monthly basis, by country of destination, for the period April 1, 1997 to July 31, 1998. State the quantity measure and value basis (e.g., fob, ex-farm, ex-elevator, etc.). Identify the source of such information and the manner in which it was collected.[344]

In response to this query, the GOC submitted export statistics compiled by *Statistics Canada*, and import statistics compiled by the U.S. Census Bureau.[345] The GOC then went on to claim that the *Statistics Canada* did not separate malt barley from feed barley.[346] Yet, at all times the CWB had data showing precisely what was requested.

The CWB not only could separate feed barley from malt barley sales, but it could further identify individual transactions by point of sale and identify the grade shipped and discounts applied. The CWB regulates all barley for human consumption within the designated area in Canada and all barley, malt or feed, for export.[347] Because feed grade barley is not restricted for domestic sale, the CWB must be able to distinguish feed grade and malt barley to prevent illegal off-Board sales and otherwise perform its function.

In its Second Supplemental questionnaire issued on April 13, 1999, Commerce specifically instructed the GOC to provide

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343. Questionnaires serve as the main Commerce investigative tool. Commerce's Antidumping Manual provides that "[t]he questionnaire should describe all the essential information necessary to conduct an investigation or review for the individual respondent that is involved." Department of Commerce, Antidumping Manual, ch. 4, p.1 (Jan. 22, 1998).

344. U.S. Department of Commerce, Original Questionnaire in the Countervailing Duty Investigation of Live Cattle from Canada, Question 15 (Jan. 28, 1999).

345. *See* Government of Canada, *Monthly Canadian Barley Export Data for Period: April 1997-July 1998*, Questionnaire Response, Public, Exhibit 19 (3/14/99).

346. *See Id.*

347. *See* Government of Canada, *Countervailing Duty Investigation of Live Cattle from Canada, First Supplemental Questionnaire Response* at 8 (4/16/99); *see also* Canadian Wheat Board Act, Ch. 24, § 32(1) (1998) and ch. C-4 § 47(1); Canadian Wheat Board Regulations, C.R.C C-397 § 14(1) and 16(2) (1997).

"actual sales information, not secondary sources" for export sales of barley.[348] In its April 22 response, the GOC provided an exhibit which was purported to provide export prices. The April 22 data provided were in fact adjusted in an undisclosed manner, making it impossible even to discover the *average* of actual sales prices. Indeed, the Canadian submission did not reveal *actual* export prices obtained by the CWB for Canadian feed barley. Instead, it contained a series of adjustments as if barley were shipped by rail first to Vancouver and then to Lethbridge.[349]

In the third questionnaire, Commerce again sought critical export pricing data, and asked several questions designed to obtain actual feed barley export prices so that these price might be compared with domestic Canadian feed barley prices. For example, question 38 sought a breakdown of the figures in provide in Canada's April 22 submission (Exhibit 32), by pricing category and without the (undocumented) freight adjustments:

> For the POI, break down your reporting in Exhibit 32 . . . into quarterly averages reported separately for each of the seven "pricing categories." Do not make the freight adjustments made to arrive at the figures in Exhibit 32. Explain what each pricing category represents.[350]

With respect to question 38, the GOC refused to respond. Instead of the pretense that *Statistics Canada* is the only source for relevant information, GOC in this case refused to supply data maintained by the CWB because such information might reveal individual transaction prices or might disclose marketing practices:

> Individual sales would be disclosed if the sales were divided in the seven "pricing" categories, because of the number of sales involved. Further disclosure of the pricing categories including explaining what each pricing category would represent, or of sale by pricing category, would also reveal commercial selling practices, individual transaction, and/or customers.[351]

To object that revealing the quarterly average prices by grade would disclose marketing strategy or actual prices is only to claim that such information might deserve confidential treat-

348. Department of Commerce, Second Supplemental Questionnaire in the Live Cattle from Canada Investigation, Question 2 (April 22, 1999).

349. *See* Commerce Memorandum, *Adjustment of CWB prices reported in GOC's April 22, 1999 response at Exhibit 32* (May 3, 1999).

350. Department of Commerce, Third Supplemental Questionnaire in the Live Cattle from Canada Investigation, Question 38 (June 8, 1999).

351. Government of Canada, 3d Supplemental Questionnaire Response, Public, at.36 (July, 6 1999).

ment.[352] It cannot be grounds, however, for withholding the data outright. With respect to question 37 of the third supplemental questionnaire, the GOC likewise refused to provide freight rates to U.S. destinations because it might "disclose the customer's identity as the number of sales and customers is limited."[353] Yet, again, such a claim might support proprietary treatment; it does not support the failure of the GOC to supply the relevant data at all.

With respect to question 42 of the third supplemental questionnaire, GOC resorted to the same tactics used in the original response: it claimed that *Statistics Canada* could not separate feed and malt barley sales.[354] Yet, of course, the CWB itself maintained the relevant export figures.

All the relevant data to answer these questions were in the hands of the CWB. From the petitioner's perspective these CWB actions, or inactions, should have compelled Commerce to act. As an investigator such actions seemingly frustrate and impede the investigation. In some cases when Commerce deals with an individual private company, lack of cooperation,[355] withholding of information or untimely provided information can lead to use of facts otherwise available[356] and adverse inference.[357] In the *Stainless Steel Sheet and Strip in Coils from Germany* case Commerce found that respondent:

> had three opportunities spread over four months to provide the Department with a complete listing of its U.S. sales. In response to its failure to do so, as adverse facts available, we are applying the highest non-aberrational margin calculated based on KTN's [respondent's] correctly reported CEP transactions to the unreported sales and have in-

352. *See, e.g.*, 19 U.S.C. § 1677f(a)(4), 19 C.F.R. § 351.105(c) (identifying grounds for proprietary treatment).

353. Government of Canada, 3d Supplemental Questionnaire Response, Public, at p.35 (7/6/99).

354. *See* Government of Canada, 3d Supplemental Questionnaire Response, Public, at 38-39 (7/6/99) ("[n]o method has been found to further disaggregate these data,".).

355. *See* Photo Albums and Filler Pages from Korea, 50 Fed. Reg. 43,754, at 43,755-56 (1985):

> It is the obligation of respondents to provide an accurate and complete response prior to verification so that the Department may have the opportunity to fully analyze the information and other parties are able to review and comment on it. The purpose of verification is to establish the accuracy of a response rather than to reconstruct the information to fit the requirements of the Department.

356. *See* 19 U.S.C. §1677e(a).

357. *See* 19 U.S.C. §1677e(b).

> cluded these transactions in our calculation of the overall weighted-average margin.[358]

This was done even though the respondent company had provided a complete packet containing copies of each of the relevant invoices which the Department later included on the record as a verification exhibits.[359] Nor is this a unique instance. Private parties have, under other circumstances, also been penalized for their lack of responsiveness by the application of "facts available".[360] During verification information was provided to Commerce that the CWB had previously not placed on the record, as an example the actual export prices and transactions of barley to the United States were verified by Commerce.[361] As highlighted above, said prices had not been disclosed, except in summary form, at anytime during the course of the investigation.[362] Such tactical behavior denied the domestic industry the ability to fully engage in the investigation of subsidies in this case.[363]

Commerce's dual and conflicting roles may have worked to prevent it from acting. Perhaps as part of Commerce's statutory imperative to be a neutral judge, its role as investigator was curtailed. If true, then a profound and systemic problem arises in the administration of the trade laws. If Commerce does not zealously investigate a foreign government, the burden of proving an allegation falls ever more heavily upon petitioning parties. While perhaps large, multinational companies can shoulder such a burden, fragmented and diverse groups can not. The financial burden placed on petitioners may under the circum-

358. Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany, 64 Fed. Reg. 30710, 30732 (1999).

359. *See Id.*

360. *See, e.g.*, SSAB Svenskt Staal AB v. United States, 15 CIT 202, 213 (1991) (upholding the use of "best information available" where SSAB failed to submit data concerning a grant program). "Best information available" is the term for the predecessor statute which had provisions roughly equivalent to facts otherwise available and adverse inference.

361. *See* Department of Commerce, Verification Report for the Government of Canada regarding the Canadian Wheat Board, Public, at 34 (Aug. 27, 1999).

362. R-Calf Comments Requesting Cancellation of Verification, Public, at 2-8 (July 23, 1999).

363. Extensive pricing data were submitted for feed barley prices in Canada, the United States and in third country markets. Depending on the comparison used, the data showed both that prices in Canada for feed barley were lower than export prices, and that there was no difference, or that export prices were lower than domestic prices. R-Calf, Commerce Dept. Case Brief, Public, at p.3-34 (Sept. 3, 1999). The pricing data which Commerce ultimately relied upon generally showed that Canadian domestic prices were higher than export prices during the last months of the period of investigation (April 1, 1997 – March 31, 1998). *See* 64 Fed. Reg. at 57051-52.

stances above rise to such a level that the only fully effective users of the countervailing duty and dumping laws will soon be major companies with vast resources. As the evidentiary burdens (in the form of data collection and investigation) on petitioners rise, domestic industries with more limited resources will find it more difficult to succeed and the trade laws become increasingly less useful.

D. COMMERCE'S ANTIDUMPING INVESTIGATION

"Dumping" occurs when the imports that are the subject of an investigation are being sold or offered for sale in the country of importation at prices that are less than fair or normal value.[364] Normal value may be based upon one of three alternatives: prices in the country of exportation, prices for export to third-countries, or constructed value.[365] Country-of-export prices are the preferred basis under the statute and are in general used unless home market sales are below cost or are insufficient in quantity to form a viable market.[366] Where sales in the home market are at prices below the cost of production or are inadequate in number, Commerce may resort to third-country prices, but these prices, too, must not be below cost and the volume sold must be adequate.

Because below-cost prices for sales in substantial quantities over an extended period of time are rejected as a basis for normal value, cost of production in effect sets the lower bound on normal value. Under the statute, if home market and third country sales are rejected, normal value is constructed and equals the sum of materials costs, labor costs, overhead costs, selling, general and administrative (SG&A) expenses and profit.[367]

Two principal issues in the antidumping investigation on live cattle from Canada raise questions about the administration of the law when applied to an industry such as live cattle: (1) the representativeness of the data base; and (2) preventing apparent "gaming" of the investigation by respondents. We address these in turn.

364. *See* 19 U.S.C. § 1673d(a)1; *see also* BRUCE CHUBB, UNITED STATES FOREIGN TRADE LAW, vol. I, ch. 21 (1991).

365. 19 U.S.C. § 1677b(a).

366. 19 U.S.C. §§ 1677b(a)(1)(B), 1677b(b).

367. 19 U.S.C. § 1677b(e).

1. Whether Commerce's selection of respondents assured sufficient representativeness of exports

The "general rule" set out in the statute requires that Commerce calculate individual dumping margins for each known exporter and producer of the subject merchandise.[368] The Canadian cattle industry, however, consists of some 100,000 individual producers.[369] This made calculation of individual dumping margins for every exporter impracticable. In these circumstances, the statute provides two methods for selecting a "reasonable number of exporters or producers by limiting its examination to:"

> (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering 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.[370]

In the case of an industry with over 100,000 producers, a random sample would have required Commerce to (1) obtain a complete listing of all producers or at least all exporters, and (2) select a large number of companies in order to produce a statistically valid sample.[371] Assuming Commerce were able to obtain from Canada a complete listing of the universe of exporters, a statistically valid sample would be expected to reflect the diversity of exporters, producers and types of products indicated by the U.S. import statistics and Canadian export statistics.[372] That is, cattle imports into the United States from Canada consisted of feeder cattle, culls, and fed steers and heifers ready for immediate slaughter. Feeder cattle and cull cattle are produced by cow-calf operations. Slaughter cattle are typically produced by feedlots.[373] Hence, to reasonably reflect the diversity of cattle that make up the imports, it would have been necessary to in-

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368. *See* 19 U.S.C. §1677f-1(c)(1).

369. Canada's Beef Cattle Producers, *Cattle Production and the Environment Just Facts* <www.cattle.ca/cca/environment/justfactsfull.htm>.

370. 19 U.S.C. § 1677f-1(c)(2).

371. *See* Petition at 10-12 (and authorities cited therein); R-Calf Response to Canadian Cattlemen at 4 (Oct. 19, 1998) (at least 384 survey respondents are needed for large populations).

372. *See* R-CALF Questionnaire Comments at 3 (Jan. 20, 1999).

373. Feeder cattle are also produced by "backgrounders," who place weaned cattle on pasture (grass) or feed and raise them to a weight suitable for sale to a feedlot operator. Many backgrounders, however, are also cow-calf operators or feedlot operators. Indeed, NCBA statistics indicate that in the United States, some 60% of all 1996 survey respondents were diversified operations, including more than one of the following types of operations: cow/calf, stocker, back-

clude both cow/calf and feedlot operators in a sample or respondent pool.

Commerce invited the parties on both sides to submit names of known producer/exporters. R-CALF provided a list of 18 producer/exporters while the Canadian Cattlemen's Association provided an initial list of 28 producer/exporters, which it later expanded to 35 entities. R-CALF had urged Commerce to select producers: (1) at random in order to minimize self-selection by the respondents; (2) from the four major cattle exporting provinces of Canada (Alberta, Manitoba, Ontario and Saskatchewan); (3) that included not only feedlots but also cow-calf operators and backgrounders, in order to reflect the diversity of cattle that constitute the imports, i.e., feeders, culls and fed cattle. R-CALF also proposed that the respondents selected should not result in excluding from the dumping analysis sales of custom fed cattle (i.e., feedlots that fatten cattle for a fee but do not take title to them), since such cattle are more prevalent when slaughter cattle prices are low. Inclusion of custom feedlots would, therefore, be more representative of actual conditions in the market. Commerce could include in the respondent pool either cow-calf operations that retain ownership of custom-fed cattle or, alternatively, custom feedlots themselves, in which case Commerce could capture the normal values of the custom feedlots' suppliers.[374]

The Canadian respondents argued that it would not be feasible for Commerce to investigate all of the significant producers and exporters, and that instead Commerce should rely on the five or six largest companies from among those exporters that own their own cattle. The Canadian respondents argued further that the investigation's complexity would be further increased if Commerce selected companies that obtained cattle from numerous suppliers. Finally, the respondents contended that there was no basis in the law or the regulations to support R-CALF's proposal that Commerce take into account either geographical location or type of operation, including whether the respondent dealt in custom feeding.[375]

Commerce ultimately elected to investigate the six largest known producers/exporters.[376] The reasons given were a lack of

grounding lot, seedstock, feedlot, and/or crop farming. NCBA, *Special Edition, July Cow-Calf Survey* (July 1996).

374. Department of Commerce Memorandum, Selection of Respondents at 3-4 (Feb. 26, 1999).

375. *See id.* at 4.

376. *See id.* at 6.

administrative resources and personnel to investigate any more than six entities and a concern that because "live cattle are inherently different from the manufactured or processed agricultural products that the Department typically encounters in antidumping investigations," novel and complex issues were likely to arise.[377] Commerce also selected three feedlot operators from Alberta (the largest cattle-producing province in Canada), two from Saskatchewan and one from Ontario.[378] Commerce noted that at least two of the feedlots engaged in custom feeding.[379]

While Commerce's decision to rely on the six largest known producer/exporters was consistent with the statute, other aspects of the respondent selection raise concerns about the administration of the statute in a case involving a highly fragmented industry with numerous producers such as live cattle. As is the case in any investigation where Commerce's pool of selected respondents is limited to the largest producer/exporters, such respondents are likely to have lower production costs than other, smaller producer/exporters. Part of the rationale of selecting the largest producer/exporters, however, is that they likely account for a significant volume of the subject imports and thus their prices and costs would be representative of most of the subject imports in the market. And, indeed, Commerce concluded that the six respondents it had selected accounted for a significant percentage of total export volume, given the "very large number of producers in Canada."[380]

However, in most cases, Commerce typically examines *all* home market and export sales of selected respondents. In *Live Cattle*, for reasons that were never explained in the public record, Commerce did not examine sales of custom fed cattle. Instead, Commerce calculated the dumping margins based on the costs and prices of sales of the respondents' self-produced cattle. In the case of one respondent, Commerce collected cost data for six suppliers of that respondent's traded cattle.[381] The data

377. *See id.* at 4-5. Commerce noted that three of the entities included multiple affiliated entities which Commerce had determined to "collapse" into a single entity to avoid the potential for manipulation of price or production. *Id.* at 6, n. 10.

378. *See* Department of Commerce Memorandum, Selection of Respondents at 6 (Feb. 26, 1999).

379. *See id.*

380. *See id.*

381. *See* "Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada," 64 Fed. Reg. 56,739, 56,745 and 56,750 (Oct. 21, 1999).

were largely unusable to determine whether the suppliers' sales were below cost, however, because the suppliers did not maintain the types of records that allowed them to track and report product-specific costs.[382] Consequently, Commerce used the respondent's reported acquisition cost for the traded cattle, which it adjusted by adding the average loss of the suppliers.[383]

Thus, Commerce's database was not as representative as it could have been in two respects: (1) it did not include cow-calf operators and backgrounders who exported feeder cattle and cull cattle to the United States; and (2) it did not include the selected respondents' sales of custom-fed cattle (and thus the costs of their customers). This compounded the problem that is always present when Commerce selects only the largest producer/exporters, namely, that the data will be biased to reflect lower production costs.

Indeed, after the investigations were terminated, the Canadian Cattlemen's Association confirmed that this had been their strategy:

> CCA officials planned the Canadian strategy. They were allowed to put together a list of feedlots they felt would represent the industry. They chose feedlots large enough to have low costs so the Americans wouldn't have any chance to suggest Canadians sold cattle below cost of production.[384]

The extent to which Commerce's selection likely affected the magnitude of the dumping margins may be inferred from the dumping margins that R-CALF had alleged in its petition. Specifically, the dumping margins ultimately found by Commerce ranged between 3.86 and 15.69 percent, with one feedlot obtaining a rate of *de minimis*.[385] This range was comparable to the dumping margins that had been estimated in the petition for feedlots.[386] However, the petition also had estimated dumping margins for Canadian cow-calf and backgrounding operations. Those margins ranged, in the case of Alberta, between 3.69 to 48.82 percent for cow-calf; in Manitoba, between 1.54 and 45.73

382. *See* 64 Fed. Reg. 56,752.

383. 64 Fed. Reg. 56,752.

384. Mary MacArthur, *Dumping Investigation Grueling, Biased, Costly*, THE WESTERN PRODUCER, 1999 <http://www.producer.com> (raising a question as to the completeness of the list of producers compiled by the Canadian respondents, and whether other large producers with higher costs may have been omitted from the list).

385. 64 Fed. Reg. 56,759.

386. *See* Petition Requesting Imposition of Antidumping Duties on Imports of Live Cattle from Canada at 25 (estimating that dumping margins for feedlots in Alberta ranged between 10.32 and 14.38 %).

percent for cow-calf and 9.51 to 19.48 percent for backgrounder; in Saskatchewan, between 11.92 and 13.83 percent for backgrounder; and in Ontario, between 40.61 and 101.80 percent for cow-calf.[387] These margins were based on constructed value as the data that had been collected for the petition showed substantial below cost sales and massive losses in the Canadian market throughout all sectors of the industry.

The fact that the database never provided for the possibility to determine whether such dumping margins existed raises the question of the extent to which administrative convenience can be permitted to override a petitioning industry's right to obtain as complete relief from dumped imports as possible. One solution would be either for Commerce to promulgate regulations or Congress to amend the statute to ensure that respondent selection will provide for actual representativeness of the subject imports when such imports are at various stages of development and reflect varying levels of costs for different producers.

2. *Concerns over "gaming" and agency steps to prevent it*

As discussed above, the Canadian Cattlemen's Association, following the completion of the investigation, acknowledged that their strategy had been to identify the largest low-cost producers to minimize the likely dumping margins. Of course, the CCA had been asked by Commerce to comment on exporters who should receive questionnaires. If the CCA in fact did not report all known exporters, then there is a serious question as to the *bona fides* of the investigation. Court have ruled that agencies have the inherent right to protect the integrity of their proceedings.[388] Indeed, agencies can reopen cases *sua sponte* where such actions appear tainted.[389] It is not clear why Commerce has not pursued this issue.

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387. *See id.*

388. *See, e.g.,* Alberta Gas Chemicals, Ltd. v. Celanese Crop., 650 F. 2d 9, 12 (2d Cir. 1981).

389. *See, e.g.,* United States v. Sioux Tribe, 616 F.2d 485, 493 (Ctl Cl.), cert. denied, 446 U.S. 953 (1980) ("It is a well established principle that an administrative agency may reconsider its own decision. 'The power to reconsider is inherent in the power to decide.'"); Greene County Planning Board v. Federal Power Commission, 559 F. 2d 227, 1976), cert. denied, 434 U.S. 1086 (1978) ("agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions. . . ."); Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[I]t is often the case that reconsideration of a prior decision, within a reasonable period of time, is absolutely essential to the even administration of justice. . . . [I]t may be imperative for the tribunal to consider new developments or newly discovered evidence in order to facilitate the or-

Similarly, on the day that Commerce was scheduled to issue its preliminary dumping determination, one respondent, Schaus, submitted a supplemental response and pre-verification corrections which substantially altered its reported costs. The earlier-submitted data had yielded a dumping margin of 5.43 percent, while the corrected data yielded a dumping margin of 15.69 percent, nearly three-fold higher. Because the submission of the corrected data was so close to the issuance of the preliminary determination, Commerce did not have an opportunity to incorporate those corrections into its preliminary dumping calculations. Commerce announced, however, its intention to "examine the [revised] data further and, if . . . errors corrected result in a rate that differ substantially from the rates as calculated for this preliminary determination, we may issue an amended preliminary determination."[390]

Schaus subsequently announced that it would decline to participate in verification of its data and sought to withdraw all questionnaire responses from the record of the investigation.[391] Schaus claimed that it did not have the resources or the recordkeeping needed to satisfy Commerce's verification requirements.[392] Such action by Schaus in other circumstances would have led Commerce to use "facts available" against Schaus, presumably the highest margins alleged. Such action would have been substantially more adverse to Schaus than the use of its revised data. Why a company, having generated revised cost data, would then penalize itself by withdrawing from the investigation is not understandable in isolation.[393]

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derly and just resolution of conflict. More frequently, reconsideration is often the sole means of correcting errors of procedure or substance.").

390. 64 Fed. Reg. 56742.

391. *See* 64 Fed. Reg. 56742. As Commerce does not have subpoena authority, responses to Commerce questionnaires are voluntary. *Id.* at 56743.

392. *See* 64 Fed. Reg. 56,742.

393. The peculiarity of Schaus' conduct was further compounded by the fact that Schaus elected to withdraw from verification even though it had certified the accuracy of the revised data that was submitted to the Commerce Department only a few days earlier. Commerce officials were visibly troubled by Schaus' conduct, as was made clear by the comments of Commerce Department officials Richard Moreland and Gary Taverman at the Commerce September 1, 1999 hearing:

> TAVERMAN: . . . . We often hear from petitioners that we too easily accept information that is submitted by respondents at face value. I think typically our response is we have no reason to think that the information isn't accurate. If it's certified to be accurate, we can't disregard it.
>
> The case of Schaus, right before the prelim they give us a significantly revised response which quadruples its margin certifying it to be cor-

Under the statute, however, Commerce is supposed to disregard in the calculation of a margin for companies not investigated (the so-called "all others rate") "any margins determined entirely" on the basis of facts available.[394] Had Commerce followed normal practices, all other Canadian producers would have received a much lower cash deposit rate. Such an outcome would invite "gaming" by foreign producers. Commerce explained in its final determination the potential implications of Schaus' decision:

> If the Department were to base Schaus' final margin on the facts available rather than the proprietary information in its questionnaire responses, Schaus' margin would be excluded from the calculation of the 'all others' rate. . . . Thus, . . . [Schaus'] desire to withdraw its questionnaire response from the record could seriously undermine the effectiveness of the antidumping remedy in this case. . . .[395]

Since Commerce had used a respondent pool limited to six producer/exporters, the weighted average verified margin from those six producers would serve as the dumping margin for all other exporters of live cattle to Canada if an order had been imposed. It is a reasonable inference that Schaus was thus seeking to have a substantially higher "information available" margin imposed on itself while avoiding having the 15.69 percent margin based on its proprietary data boost the all others' rate. Commerce declined to return Schaus' data and instead retained it and used it to calculate the all others rate.[396]

> rect. Within days after that they drop out of verification presumably because the data can't be verified.
>
> What are we to make of this? How does this fit into the whole certification process? How does it fit into the facts available issue as to whether or not we should consider Schaus' information?
>
> . . . . There seems to be a disconnect there.
>
> . . . .
>
> MORELAND: . . . . I think that is what I have found most disturbing about this entire exercise. I also recognize when the resubmission came in it didn't come to my knowledge fundamentally until the day that I had to sign off on the notice. I heard about it through petitioner's counsel.
>
> What I found most distressing about this period is that no one was talking to us about the difficulties here. . . . I think the point is that the changes were so massive that someone had known for weeks before we got anything.

U.S. Department of Commerce, International Trade Administration, Hearing, *In re Anti-dumping Investigation of Live Cattle from Canada*, Case No. A-122-833, Hearing T. at 105-109.

394. 19 U.S.C. §1673d(c)(5)(A).

395. 64 Fed. Reg. 56,743.

396. *See* 64 Fed. Reg. 56,743.

Although Commerce's decision not to return Schaus' data and to use it in the calculation of the dumping margin reduced the potential harm that might otherwise have occurred, it does not provide a strong disincentive to game the process. Schaus' actions were against its own interest. This implies the action was taken on behalf of the larger group. Commerce, at a minimum, should have investigated whether stronger actions were warranted. The implications of what went on were not lost on Commerce:

> While there is no statutory provision expressly dealing with the withdrawal of business proprietary information once it has been submitted, the courts have recognized 'the inherent power of an administrative agency to protect the integrity of its own proceedings.' . . . [citation omitted]. Thus, the agency has the discretion to deny a respondent's request to withdraw information where it is necessary to preserve the fundamental integrity of the process and the remedial purpose of the law.[397]

If the only cost for "discovered" gaming is that the agency will use the information it would have used in a non-gaming situation, then Commerce is inviting parties to game the process.

V. THE INTERNATIONAL TRADE COMMISSION'S INVESTIGATIONS

In antidumping and countervailing duty investigations, the ITC determines whether a domestic industry is materially injured or threatened with material injury, or whether the establishment of a domestic industry is materially retarded, by reason of imports that are determined by the Department of Commerce to be sold at dumped prices or to have benefited from a countervailable subsidy.[398] The investigations of *Live Cattle from Canada and Mexico* reveal both systemic problems with the injury provision of the law as written and as currently interpreted by a majority of commissioners that made it ineffective in addressing the harm that imports were causing the domestic cattle industry.

A. LIKE PRODUCT AND DOMESTIC INDUSTRY ISSUES

A threshold issue for any industry that is contemplating filing an antidumping petition is to ensure that the scope of the petition is sufficiently broad so that relief obtained is effective. Where essentially the same product is being imported in differ-

397. 64 Fed. Reg. 56,743.
398. *See* 19 U.S.C. § 1671(a)(2), § 1673(a)(2) (citations omitted).

ent forms, it is important that the petition is able to reach the imports in all the forms in which they are entered. The construction of the statute and ITC precedent, however, prevented the cattle industry from framing a petition that would reach the totality of imported product which was believed to be causing harm – namely cattle *and* beef. As discussed below, the evolution of the law years before R-CALF filed its petitions immediately limited the potential relief that the industry could obtain.

1. Background

Before the ITC reaches the specific issues of injury and causation (or threat), the ITC must first identify the relevant domestic "like product" and the domestic industry. The term "industry" means:

> the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product.[399]

The term "domestic like product," in turn, means:

> a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . ..[400]

The "article subject to investigation" are the imports which Commerce is examining to determine if they are dumped and/or subsidized.

The ITC typically uses a six-factor test to determine what products are like the imports that are subject to investigation. These include: physical characteristics and end uses; interchangeability; channels of distribution; production processes, facilities and employees; customer and producer perceptions; and price.[401] Where, however, the product in question undergoes several distinct stages of production, the ITC employs a "semi-finished/finished" product analysis to determine whether a product at an earlier stage of the production process is "like" a finished or further processed product.[402] The factors employed in this analysis include:

> (1) Whether the upstream article is dedicated to the production of the downstream article or has independent uses;
> (2) Whether there are perceived to be separate markets for the upstream and downstream articles;

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399. 19 U.S.C. §1677(4)(A).
400. 19 U.S.C. §1677(10).
401. *See* Live Cattle from Canada and Mexico, USITC Pub. 3155 at 4, n.2.
402. *See* Live Cattle from Canada and Mexico, Invs. Nos. 701-TA-386 (Preliminary) and 731-TA-812-813 (Preliminary), USITC Pub. 3155 at 6 (Feb. 1999).

(3) Extent of the differences in the physical characteristics and functions of the upstream and downstream articles;
(4) Extent of the differences in the costs or value of the vertically differentiated articles;
(5) Significance and extent of the processes used to transform the upstream into the downstream articles.[403]

The purpose of the semi-finished product analysis is "to identify a product or products, the producers of which are in as similar a position as possible to one another *vis-à-vis* the subject imports."[404]

Although Commerce defines the scope of the imported product or products which are subject to investigation, the ITC defines the domestic like product or products that compete with the imports, and hence the domestic industry. "Although the Commission must accept the determination of Commerce as to the scope of the imported merchandise being sold at LTFV, the Commission determines what domestic product is like the imported articles Commerce has identified."[405] Thus, for example, while Commerce might define the scope of the investigation as consisting of a single "class or kind" of merchandise, the ITC could, and has, defined two or more like products and domestic industries that compete with the imported product within the scope of investigation.[406] Conversely, Commerce could define the scope as consisting of multiple classes or kinds of merchandise while the ITC finds a single like product and domestic industry.[407]

2. *The Processed Agricultural Products Provision*

In the case of the cattle industry, an antidumping order limited to imports of live cattle might be only partially effective

403. Stainless Steel Bar from Brazil, India, Italy, Japan, and Spain, Inv. Nos. 731-TA-678 through 682 (Preliminary), USITC Pub. 2734 at I-12 (Feb. 1994).

404. *Id.* at I-11.

405. Extruded Rubber Thread from Indonesia, USITC Pub. 3191, Inv. No. 731-TA-787 (Final), at I-3 (May 1999).

406. *See, e.g.,* Cellular Mobile Telephones and Subassemblies Thereof from Japan, USITC Pub. 1786, Inv. No. 731-TA-207 (Final), at 4, n. 4, 6 (Dec. 1985). (Commerce's scope of investigation included cellular mobile telephones ("CMTs"), CMT transceivers, CMT control units, and certain subassemblies. ITC defined eight separate like products: CMTs and seven major subassemblies that " 'compartmentalize' certain functions common to every CMT.").

407. *See* Certain Brake Drums and Rotors from China, USITC Pub. 3035, Inv. No. 731-TA-744 (Final), at 4, n.9 (April 1997). (ITC "may find a single like product corresponding to several different classes or kinds defined by Commerce.") (citing Hosiden Corp. v. Advanced Display Manufacturers, 85 F.3d 1561, 1567-68 (Fed. Cir. 1996).

since imports of beef also put pressure on cattle prices by adding to the overall supply of beef. Using the ITC's finished/semi-finished product factors discussed *supra*, it is certainly arguable that cattle and beef should properly be considered a single product and industry. All cattle eventually are used to make beef, which satisfies the first factor. The factor with respect to differences in costs or value is arguably satisfied since most of the value of the finished product – beef – is already present in the animal when it arrives at the packing house. Meeting the other requirements would turn on interpretation of the factors. Whether, for example, there are perceived to be different markets for cattle and beef could be answered either in the affirmative (all cattle are destined for use to make beef) or in the negative (live cattle are sold at auctions, or in feedlots, etc. while beef is sold by packers to retailers and other distributors, who in turn sell it to consumers).

There is also precedent that supports the concept that cattle and beef should be viewed as a single industry for purposes of a trade remedy investigation. For example, in 1977, the ITC conducted a Section 201 investigation that was initiated pursuant to a petition filed by the National Association of Meat Promoters, the Meat Promoters of South Dakota, the Meat Promoters of North Dakota, the Meat Promoter of Montana, and the Meat Promoters of Wyoming.[408] There, the ITC defined the domestic industry as "cattle growers who raise cattle for slaughter or for further feeding, feedlot operators who further finish or fatten cattle on grain prior to slaughter, slaughterers, and processors who are engaged in the manufacture of beef and veal products including ground beef, sausages, and other meat products"[409] Further, in the 1979 legislative history of the antidumping and countervailing duty laws, Congress contemplated that cattle and beef constituted a single industry:

> Because of the special nature of agriculture. . .. special problems exist in determining whether an agricultural industry is materially injured. For example, in the livestock sector, certain factors relating to the state of a particular industry within that sector may appear to indicate a favorable situation for that industry when in fact the opposite is true.

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408. *See* USITC Pub. 834, *supra*, at 4.

409. USITC Pub. 834 at 5. The ITC ultimately determined that imports of live cattle and certain meat products of cattle fit for human consumption were not being imported into the United States "in such increased quantities as to be a substantial cause of serious injury, or the threat of serious injury, to the domestic industry. . . . Specifically, we find that imports are not a substantial cause of the injury complained of by the petitioners, whether or not there are increased imports." *Id.*

> Thus, gross sales and employment in the *industry producing beef* could be increasing at a time when economic loss is occurring, i.e., *cattle herds are being liquidated* because prices make the maintenance of the herds unprofitable.[410]

Early post-Tokyo Round antidumping and countervailing duty investigations involving agricultural products such as *Lamb Meat from New Zealand* and *Frozen Concentrated Orange Juice from Brazil* suggested that the ITC would view growers and processors of agricultural products as members of the same industry. In each of those cases, the ITC found the producers of the raw product (lamb and round oranges, respectively) to be part of the same industry as the processors of the processed product (lamb meat and frozen concentrated orange juice). In each of those investigations, the ITC noted that Congress had admonished the ITC to take notice of the special circumstances that are often presented in trade remedy investigations involving agricultural products. For example, in *Lamb Meat from New Zealand,* the ITC stated:

> Were we to exclude the growers (of live lamb) from the scope of this domestic industry, we would effectively preclude a significant portion of the domestic industry from any relief against subsidized imports. Such an anomalous result was not intended by Congress, as indicated by the legislative history. . .. Congress foresaw special problems in the application of the countervailing duty provisions of the Trade Agreements Act of 1979 to agricultural products.[411]

After citing the language from the Senate Finance Committee Report which appears *supra,* the ITC noted the Committee's reference to

> the "industry producing beef," which clearly includes packers and processors, and "cattle herds," which encompasses ranchers and feeders. Thus, it is clear that Congress not only anticipated this very issue, but also contemplated the inclusion of processors and growers in one industry. 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 industry to preclude an assessment of material injury to an adversely impacted segment of a meat producing industry.[412]

One Commissioner initially used the same approach to include growers of swine and processors of pork in the same industry in the preliminary investigation of *Live Swine and Pork from*

410. S. Rep. No. 96-249, 96th Cong., 1st Sess. 88 (1979) (emphasis added).

411. Lamb Meat from New Zealand, USITC Pub. 1191, Inv. No. 701-TA-80 (Preliminary), at 8-9 (Nov. 1981) (citing S. Rep. No. 96-249, 96th Cong., 1st Sess. 88 (1979) (emphasis added).

412. *Id.* at 9-10 (emphasis added).

Canada.[413] Nevertheless, in the final investigation, the ITC concluded that swine growers and pork processors were not part of a single industry, as well as concluding that live swine and fresh, chilled or frozen pork were two separate like products. With regard to defining the domestic industry, the ITC stated:

> [T]he Commission has exercised discretion in defining an agricultural industry, relying on the following factors. First, the Commission has considered the extent to which the raw product enters into a single line of production resulting in the processed product. Second, the Commission has examined the degree of economic integration between growers and packers, often looking at the legal relationships between the two groups. For example, if there is substantial interlocking ownership, if there are shared revenues, or if, contractually, the prices paid to producers directly control the prices to growers, then both groups can be more certainly affected in a like manner.
>
> Initially, we note that the "single, continuous line or production" standard has been met in that the raw product is primarily sold in only one market, and the primary purpose of raising slaughter hogs is to produce pork meat. The requisite integration of economic interest in this investigation, however, is lacking. Less than 5 percent of packing facilities are owned by the growers. Virtually none of the grower facilities are owned by packers. Further, the petitioners have conceded that the prices for hogs are not linked by contract to the prices received by the packers.
>
> While the absence of a legal relationship between growers and packers is not determinative of the absence of economic integration, we are unpersuaded . . . that an integration of economic interest can be reflected solely by a high price correlation between live swine and fresh, chilled, or frozen pork. We, therefore, cannot find that growers should be included into [sic] a single industry with packers producing pork.[414]

In 1988, the definition of "industry" was amended to codify the ITC's approach in cases involving processed agricultural products. Subsection E was added to the definition of "industry" to provide:

> [I]n an investigation involving a processed agricultural product produced 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, in-

413. *See* Inv. No. 701-TA-224 at 13 (documenting the opinion of Commissioner Eckes).

414. Live Swine and Pork from Canada, USITC Pub. 1733, Inv. No. 701-TA-224 (Final), (July 1985), *reprinted in* 7 ITRD at 2285, 2288.

clude price, added market value, or other economic interrelationships.[415]

The "single continuous line of production" requirement is met where:

(I) the raw agricultural product is substantially or completed devoted to the production of the processed agricultural product; and

(II) the processed agricultural product is produced substantially or completely from the raw product.[416]

In assessing the coincidence of economic interest between the producers of the raw product and of the processed product, the ITC is directed to consider, among other factors that it deems relevant,

(I) if price is taken into account, . . . the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product; and

(II) if added market value is taken into account, . . . whether the value of the raw agricultural product constitutes a significant percentage of the value of the processed agricultural product.[417]

Subsequently, the pork industry filed another countervailing duty petition against fresh, chilled and frozen pork from Canada. The ITC referred to the new subsection (E) of the definition of "industry" as well as its analysis in *Live Swine and Pork* to once again exclude hog growers from the scope of the industry.

> In light of the new provisions of the 1988 Act, we determined that the domestic pork industry is composed of pork packers alone. We believe the nature of the industry has not changed in four years since the *Live Swine* decision. Revisiting the criteria applied in the *Live Swine* case, the packers and growers continue to profit at different points in the cycle, packers continue to need Canadian pork to fulfill demand, and while the record shows only one packer in opposition to the petition, many stated no position. Notwithstanding high price correlation and low value added, vertical integration remains at a minimum, trading is still conducted at arms length, and . . . profitability figures of the packers and the growers continue to show an inverse relationship.[418]

Thus, the definition of "industry" has gone through changes since 1979 which should be of concern to industries such as cattle that produce a raw agricultural product which is subsequently further processed to produce meat for human

415. 19 U.S.C. §1677(4)(E).

416. 19 U.S.C. §1677(4)(E)(ii).

417. 19 U.S.C. §1677(4)(E)(iii). Congress also included a provision that the new subsection would cease to have effect if the United States Trade Representative notified Commerce and the ITC that the provision is "inconsistent with the international obligations of the United States." 19 U.S.C. §1677(4)(E)(v).

418. Fresh, Chilled or Frozen Pork from Canada, USITC Pub. 2218, Inv. No. 701-TA-298 (Final) (Sept. 1989), *reprinted in* 12 ITRD at 1380, 1383-84.

consumption. The ITC's decisions in *Live Swine* and *Fresh, Chilled and Frozen Pork*, and the codification of those decisions in the processed agricultural products provision greatly reduce the range of agricultural imports which the growers of the raw product can reach unless the growers and the processors are integrated or otherwise appear to have uniform commercial interests. Processors such as packers who use competing imports of the raw product as leverage to reduce prices for the domestic raw product presumably would not have an interest in bringing a petition against such imports when they are being dumped or subsidized. In agricultural sectors such as cattle that are not yet highly vertically integrated, growers are put into the anomalous position of either obtaining the cooperation of their packer/processor customers (whose principal interest is getting the raw product at the lowest possible price) to support a case on the processed agricultural product as well as the raw product, or filing a petition the scope of which is limited to the raw agricultural product. It is not self-evident how this development in the statutory definition of "industry" serves the interests of domestic producers whom the law was intended to protect from injurious dumped and subsidized imports. If U.S. law is not, or cannot, be changed, then the United States must develop other mechanisms to permit U.S. agricultural interests to protect themselves from import problems.

B. THE ITC'S PRELIMINARY INJURY DETERMINATION

In its preliminary injury determination, the ITC declined to cumulate the imports of live cattle from Canada and Mexico, and ultimately issued a negative preliminary determination with respect to Mexico, thus terminating the investigation. Whether or not correct on the merits, the decision illustrates the problems that arise from a policy standpoint when the preliminary test becomes more than a "gatekeeper" function. Certainly, the problems faced by the industry were more than "negligible." Whether or not imports would ultimately be deemed a "cause" of those problems, a standard that excluded Mexican imports from full consideration raises obvious policy concerns.

1. *The Legal Standard for Preliminary Injury Investigations*

The legal standard for preliminary injury determinations requires the ITC to determine whether there is a "reasonable indication" that a domestic industry is materially injured or threatened with material injury by reason of allegedly subsidized and dumped imports.[419]

In applying this standard, the ITC weighs the evidence before it and determines whether "(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation."[420] The purpose of the preliminary determination is to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade."[421] However, termination of investigations at the preliminary stage is to be the exception, not the rule. Although the legal standard "involv[es] a process of weighing the evidence," it does so "under guidelines requiring clear and convincing evidence of '*no* reasonable indication', and no likelihood of later contrary evidence, [which] provides fully adequate protection against unwarranted terminations. Indeed, those guidelines weight the scales in favor of affirmative and against negative determinations."[422] The ITC's task, in short, is

419. American Lamb Co. v. United States, 785 F. 2d 994, 1001 (Fed. Cir. 1986).

420. *Id.*

421. *Id.* at 1002-3.

422. *Id.* at 1001 (emphasis in original). Other courts, including the Supreme Court, have commented on the "clear and convincing" evidentiary standard. Their discussion accords with the Federal Circuit's view that the standard should protect against unwarranted terminations. *See, e.g.,* Buildex Inc. v. Kason Industries, Inc., 849 F. 2d 1461, 1463 (Fed. Cir. 1988) ("The 'clear and convincing' standard of proof is an intermediate standard which lies between 'beyond a reasonable doubt' and a 'preponderance of the evidence." Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979); *see also* SSIH Equip. S.A. v. United States Intl'l Trade Comm'n, 718 F.2d 365, 380, 218 USPQ 678, 691 (Fed. Cir. 1983) (Nies, J., additional views). Although not susceptible to precise definition, "clear and convincing" evidence has been described as evidence which produces in the mind of the trier of fact "an abiding conviction that the truth of {the} factual contentions are "highly probable." Colorado v. New Mexico, 467 U.S. 310, 316, 104 S.Ct. 2433, 2437-38, 81 L.Ed.2d 247 (1984).

In Cruzan v. Director, Missouri Health Dept., 497 U.S. 261, 285, n. 5, 111 L.Ed.2d at 246, n5 (1990), the Supreme Court observed that, "The clear and convincing standard of proof has been variously defined in this context [patients' rights cases] as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," *In re* Westchester County Medical Center *ex rel.* O'Connor, 72 NY2d 517, 531, 531 NE2d 607, 613 (1988) (O'Connor), and as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable {the factfinder} to come to a clear conviction, without hesitancy, of the truth of the to "weed. . . out 'those cases which were clearly without merit.'"[423]

2. *Cumulation of Imports in Injury Investigations*

(a) Background and legislative history concerning the cumulation provision

Section 771(7)(G)(i) of the Tariff Act of 1930,[424] requires the ITC to assess the aggregate volume and impact of dumped and/or subsidized imports from different countries where the petitions are filed simultaneously and investigations are initiated on the same day "if such imports compete with each other and with the domestic like products in the United States market."[425] Such aggregated assessment is termed "cumulation." The cumulation provision was first formally added to the law in 1984 based on the recognition that dumped or subsidized imports from multiple countries can simultaneously cause harm to the domestic industry:

> [C]ompetition from unfairly traded imports from several countries simultaneously often has a hammering effect on the domestic industry. This hammering effect may not be adequately addressed if the impact of the imports are analyzed separately on the basis of their country of origin. The cumulation requirement is thus an effort to make the application of the injury analysis more realistic in terms of recognizing the actual effects of unfair import competition.[426]

Prior to 1984, cumulation had been exercised on a discretionary, case-by-case basis by the Commission. The reason for writing the provision into the statute was "to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries."[427] The Ways and Means Committee noted in its report on the legislation that it "believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about by virtue of several simultaneous unfair acts or practices."[428]

As originally introduced, the legislation mandated cumulation "if (1) marketing of the goods in question into the United

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precise facts in issue." *In re* Jobes, 108 NJ, at 407-408, 529 A2d, at 441 (N.J. 1987) (quotation omitted). . . ."

423. *American Lamb*, 785 F. 2d at 1002.

424. 19 U.S.C. §1677(7)(G)(i).

425. *Id.*

426. H.R. REP. NO. 100-40, pt. 1, at 130 (1987), H.R. CONF. REP. NO. 100-576, at 620-21 (1988).

427. H.R. REP. NO. 98-725, 98th at 37 (1984).

428. *Id.*

States is reasonably coincident, and (2) there is a reasonable indication that the imports in question will have a contributing effect on causing, or threatening to cause, material injury to the domestic industry."[429] The language was amended to "substitute criteria requiring cumulation if imports from two or more countries of like products subject to investigation compete with each other and with like products of the domestic industry in the U.S. market."[430] The reason for the change was explained as follows:

> The Committee amended the criteria to permit cumulation of imports from various countries that each account individually for a very small percentage of total market penetration, but when combined may cause material injury. The requirement in the bill as introduced that imports from each country have a 'contributing effect' in causing material injury would have precluded cumulation in cases where the impact of imports from each sources treated individually is minimal but the combined impact is injurious. The Committee does intend, however, that the marketing of imports that are cumulated be reasonably coincident.[431]

When Congress amended the law to mandate cumulation, it was also responding to particular criticism about ITC hesitancy to cumulate, particularly in preliminary injury determinations:

> The law now permits the International Trade Commission to combine or "cumulate" imports from different countries when making injury determinations in antidumping and countervailing duty investigations. Cumulation makes sense; death by one or one hundred blows is equally fatal. The ITC, however, has been hesitant to cumulate imports at all and extremely reluctant to do so in preliminary injury investigations. . . . We believe that it would be helpful to amend the statute to require cumulation in certain circumstances, Such an amendment would help to ensure that domestic industries are not denied relief because of an unwise exercise of discretion by the Commission.[432]

The ITC's reviewing courts have endorsed a liberal construction to the cumulation provision. The Court of International Trade, for example, observed in *Bingham & Taylor*, "To the extent that . . . other statutory provisions . . . . are *in pari materia* with the cumulation provision, they must be harmo-

429. *Id.*

430. *Id.*

431. *Id.; see also* H.R. CONF. REP. NO 98-1156, at 174 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5290, 5291.

432. *Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means,* 98th Cong., 1st Sess. 197, 203 (1983) (statement of Adolph J. Lena) (emphasis added), *cited in* Bingham & Taylor, Div. v. United States, 627 F. Supp. 793, 798 (CIT 1986).

nized with the clear congressional purpose in broadly mandating cumulation."[433]

(b) The ITC's Approach to Cumulation

In assessing whether subject imports compete with each other and with the domestic like product, the ITC generally considers four factors:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
> (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
> (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
> (4) whether the imports are simultaneously present in the market.[434]

"While no single factor is determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the subject imports compete with each other and with the domestic like product. Only a 'reasonable overlap' of competition is required."[435]

(c) The Issue of Cumulation in the ITC's Preliminary Determination Concerning Live Cattle from Canada and Mexico

When R-CALF filed its petitions on live cattle from Canada and Mexico, it observed that the majority of imports from Canada consisted of fed cattle ready for slaughter while imports from Mexico consisted primarily of feeder and stocker calves that would go to pastures or feedlots for feeding, but would ultimately be sold for slaughter to U.S. packers. R-CALF then pointed to the importance of assessing the imports of feeder and fed cattle in the aggregate:

> It is essential that imports of feeder cattle be included in any measure of market penetration. . . . Imports of feeder cattle from Mexico at prices that reflect very large margins of dumping (i.e., in excess of 100 percent) affect the U.S. industry in two ways. The first, immediate impact is on the cow-calf operator with weaned calves and backgrounded feeders ready to sell to feedlots. The second, deferred impact is at the slaughter level. The imported feeders, once they are fed in the feedlots,

433. Bingham & Taylor v. United States, 627 F. Supp. 793, 798 (CIT 1986), *aff'd* 815 F.2d 1482 (Fed. Cir. 1987).
434. USITC Pub. 3155 at 11.
435. *Id.*

> add to the volume of available fed cattle, thus depressing prices. . . . Imports of feeder cattle artificially inflate the actual level of domestic consumption (i.e., cattle slaughter) that is attributable to the domestic industry, and thus dilute the impact that imports of slaughter cattle are having on the industry. . . . Most measures of domestic consumption of cattle and production of beef include imported feeder cattle as "domestic" cattle, when, in fact, the domestic cow-calf operator has not benefited from the sales of those particular cattle.[436]

Elsewhere, the petitioners stressed that because cattle are commodities, it is the overall supply that drives price levels in the market. The markets are sensitive both to cattle ready for slaughter and cattle becoming ready "on feed."

Responses to ITC questionnaires also indicated that domestic producers perceived Canadian, Mexican and domestic cattle as interchangeable:

> Twenty-nine of the 40 responding cattle associations reported that Canadian and Mexican live cattle are used interchangeably. Of the 11 that reported they are not, 3 reported Canadian are better quality, 2 reported that Mexican cattle are feeders while Canadian are fed, 5 reported other reasons, and 1 gave no reason. One of 3 responding purchasers, a feedlot, reported that Canadian and Mexican cattle are interchangeable.[437]

Further, imported feeder cattle often were purchased and fed in formula programs or under contract to supply particular packers. Those end-use customers had the ability to choose between Canadian and Mexican (as well as domestic) cattle to fill their packing plant capacity.[438] There were no technical or physical reasons that would prevent feedlots or packing plants from purchasing either Canadian or Mexican cattle. Although the majority of Mexican imports were not finished cattle at the time of importation, there was no dispute that they were destined for finishing and slaughter at the time of importation.

Further, the ITC collected data for the period covering 1995 through 1997 and the first ten months of 1999.[439] Imports of Mexican stocker and feeder cattle that entered the United States in 1997 or 1998, for example, would be ready for slaughter a year or so later at the time that imports of fed cattle from Canada were entering. Thus, as a factual matter, imported Mexican cattle fed in the United States were being sold to packers at the same time as imports of Canadian fed cattle during the period examined by the ITC. It is not clear why the market-

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436. R-CALF Mexico Petition at 59.
437. USITC Pub. 3155 at II-9.
438. Petitioners' Supplemental Post-Conference Brief at 14.
439. *See* USITC Pub. 3155 at C-3, Table C-1.

ing of such import cattle after fattening would not be "reasonably coincident" with imports of fat cattle from Canada.[440]

In looking at cumulation, a majority of the ITC, however, did not address this marketing reality. Instead, they determined that imports of Mexican and Canadian cattle were insufficiently fungible with each other to find a reasonable overlap of competition. The majority focused on the condition of the animals on the day they crossed the border. That is, the bulk of imports from Canada were fed cattle ready for immediate slaughter while most of the imports from Mexico were stocker and feeder cattle.

> The record reveals that live cattle that have not been fed to slaughter weight are not substitutes for cattle ready for slaughter, i.e., fed or fat cattle. Cattle not at the slaughter stage will not produce the same type of marketable beef in terms of quality grades and sized pieces. Typically, stocker cattle have not developed to the stage where they are suitable to be placed on feedlots. . . .
>
> [A]bout 95 percent of imports from Canada consists of cattle in the slaughter or feeder stage, while only about four percent of imports from Mexico consists of cattle in this stage. Conversely, some 96 percent of imports from Mexico consists of cattle in the calf or stocker stage, while only four percent of imports from Canada consists of cattle in these stages. Moreover, even the small percentage (3.7 percent in 62 1997) of imports from Canada that appear to be stocker/feeder cattle, where most of the overlap occurs, are significantly greater in size than the stocker/feeder cattle from Mexico. . . . This suggests that such imports may be at different points in the stocker/feeder stage of development. Because cattle in different stages are poor substitutes for each other, imports from Canada and imports from Mexico are poor substitutes for each other.[441]

The decision not to cumulate the imports had significant consequences. The ITC proceeded to make an affirmative preliminary determination as to Canada but a negative preliminary determination as to Mexico on the basis that the Mexican cattle were simply too small in volume to have had any impact on the domestic industry, thus terminating the latter investigation.[442] Presumably, had the ITC cumulated the imports, both investiga-

440. *See* H.R. REP. No. 98-725, at 37 (1984).

441. USITC Pub. 3155 at 13. Based on the finding that the cattle were entering at different stages of development, the ITC also found that the imports moved in different channels of distribution (i.e., Canadian fed cattle were sold to packers while Mexican stockers were sold to backgrounders and feeders were sold to feedlots. The ITC majority also proceeded to find that there was relatively little geographic overlap, although it made clear that it placed little weight on this factor because of the limited fungibility at the point of importation. *Id.* at 13.

442. *See* USITC Pub. 3155 at 23-28.

tions would have moved forward. The exclusion of Mexican imports from the case also had consequences for the ITC's final injury investigation as to Canada, as discussed *infra*.

From a policy perspective, the ITC's interpretation of the cumulation provision is problematic in a number of respects. First, by deciding at the preliminary stage that Mexican and Canadian cattle did not compete, the ITC screened out a case that was hardly "frivolous" or "without merit." As discussed above, there was no question that imported Mexican cattle fed in the United States were being sold to the same packers that were purchasing imported fed Canadian cattle (and, for that matter, fed cattle that had been born and raised in the United States). The ITC, however, never addressed in its opinion the argument that Mexican stocker and feeder cattle, while perhaps not fungible with Canadian fed cattle on the day of importation, certainly were fungible after being fed to slaughter weights. In essence, the ITC required the imports to be fungible with each other on the day of importation in order to find that the imports compete. Second, because the ITC had never before failed to cumulate at the preliminary stage on the basis that the imports were not fungible because they were at different stages of development, the domestic industry may have been caught off-guard. As a consequence, there was little time (or evidence) addressed to the issue of competition between cattle at different stages of development.

Third, most importantly, by excluding Mexico, the ITC was unable to address the overall impact of *aggregate* supply on U.S. prices.

As mentioned, the ITC's decision appeared to depart from earlier cases in which finished and unfinished imports from different countries entered the United States. Specifically, prior to these investigations, the ITC had routinely cumulated imports from multiple countries even where such imports entered the United States at different stage of production or finishing.[443]

443. *See, e.g.,* Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand, USITC Pub. 2401, 731-TA-520 and 521 (Preliminary), (July 1991); Certain Carbon Steel Butt-Weld Pipe Fittings from France, India, Israel, Malaysia, Korea, Thailand, United Kingdom and Venezuela, USITC Pub. 2767, Invs. Nos. 701-TA-360 and 361, 731-TA-688-695 (Preliminary) (Apr. 1994) (cumulating imports of finished and unfinished fittings); Certain Granite from Italy and Spain, USITC Pub. 2016, Invs. Nos. 701-TA-288 and 289, 731-TA-381and 382 (Preliminary) (Sept. 1987) (cumulating imports of rough sawed granite slabs, face-finished granite slabs, and finished dimensional granite); Certain Cased Pencils from the People's Republic of China and Thailand, USITC Pub. 2713, Invs. Nos. 731-TA-669 and 670 (Preliminary) (Dec. 1993) (cu-

Mexican and Canadian respondents in the cattle cases had argued that imported stocker and feeder cattle became U.S. cattle by the time they were fed to slaughter weights.[444] The implication of this argument was that imported stocker and feeder cattle lost their status as "imports" for purposes of evaluating on a cumulative basis the impact they had together with imported fed cattle on the domestic industry. The ITC's precedent suggested the argument was not consistent with previous interpretation of the statute. In several cases concerning butt-weld pipe fittings, for example, the ITC had included both finished and unfinished fittings in the definition of "like product" in part because of "the lack of any independent market for unfinished pipe fittings."[445] The ITC had likewise included in the domestic industry "fully integrated producers, converters of unfinished pipe fittings and combination producers."[446] Having identified the relevant like product and domestic industry as consisting of the product and producers at different stages of finishing, the ITC proceeded to cumulate finished and unfinished imports where the imports of "unfinished pipe fittings . . . are finished by domestic producers . . . and sold as domestic product."[447]

There are interesting parallels between the cattle cases and the butt-weld pipe fittings cases. The Canadian and Mexican imports entered at different stages of production, but dedicated to the same end use. They were ultimately sold to the same purchasers, namely, the packers, three of which accounted for a large majority of purchases. The *Pipe Fittings* cases would appear to stand for the proposition that imports need not be directly fungible with each other on the day of importation where they ultimately compete with each other and the domestic like product for the same end use and for sale to the same purchasers. Further, that line of cases suggests a construction of the statute, and the cumulation provision in particular, under which the fact that an unfinished imported article undergoes additional processing in the United States before sale to the ultimate consumer does not efface that article's status as an import for

mulating "raw" and cased pencils). This was also the first time since the mandatory cumulation provision was made law in 1984 that the ITC had decided not to cumulate imports in a preliminary determination on the basis that there was insufficient fungibility among the imports.

444. USITC Pub. 3155 at 8, n. 33 (summarizing arguments presented by Mexican and Canadian respondents).

445. USITC Pub. 2767 at I-7.

446. *Id.* at I-8, n. 16.

447. USITC Pub. 2401 at 17-18.

purposes of cumulation. Had the article not been imported in the first place, it would not have been finished and sold in the United States in competition with finished imports from other countries and with the finished domestic like product. Cumulation in these circumstances would "make the application of the injury analysis more realistic in terms of recognizing the actual effects of unfair import competition."[448] Thus, the *Pipe Fittings* line of cases hews to Congress' intent that the cumulation provision should be broadly mandated,[449] necessitating a more flexible approach by the ITC.

Prior determinations are generally not regarded as binding on the ITC.[450] Nevertheless, where, as here, there is a long line of decisions in which the ITC has cumulated finished and unfinished imports, the decision in a *preliminary* investigation not to cumulate premised primarily on a lack of fungibility between imports on the day of importation, even if legally permissible, raises concern about the predictable administration of the law. It would be important to know, for example, whether the ITC's interpretation of the statute has evolved to the point that cumulation requires imports to be fungible with each other on the day of importation.[451] Parties' only basis on which to judge whether their particular claim has sufficient merit to proceed are prior investigations and the ITC's explanation of the reasons for its determination.

3. *The ITC's Negative Preliminary Determination as to Mexico*

Having determined not to cumulate the imports of Canadian and Mexican cattle, the ITC proceeded to examine whether there was a reasonable indication that imports of Mexican cattle were causing or threatening to cause material injury. The ITC recognized that live cattle were a generally substitutable commodity product and that even relatively small volumes can have

448. H.R. REP. No. 100-40, Part I, at 130 (1987).

449. *See* Bingham & Taylor v. United States, 627 F. Supp. 793, 798 (CIT 1986), *aff'd* 815 F.2d 1482 (Fed. Cir. 1987).

450. *See* Citrosuco Paulista, S.A. v. United States, 704 F. Supp 1075, 1087-88 (CIT 1988) (citations omitted). ("[E]ach investigation is *sui generis*, involving a unique combination and interaction of many economic variables; and consequently, a particular circumstance in a prior investigation cannot be regarded by the Commission as dispositive of the determination in a later investigation.").

451. Such a "daily" approach to cumulation would appear to be inflexible and arbitrary. Although cases could be screened out using this approach, query whether this was Congress' intent.

significant effects in a price-sensitive cattle market.[452] With respect to Mexico, the discussion focused primarily on the volume of the Mexican imports and the market share they held:

> The volume and market share of subject imports from Mexico have been small throughout the period of investigation. The quantity of imports. . . declined over 50 percent from 1995 [4.4 percent] to 1997 [1.8 percent]. While there has been a slight increase . . . in interim period [January-October] 1998 [1.5 percent] compared to interim period 1997 [1.4 percent], the imports remain at historically low levels. . . . [W]e conclude that the small volume of subject imports from Mexico and their market share, even in the context of the conditions of competition for this industry, are not significant.[453]

Given the finding that import volumes were not significant, it was not surprising that the ITC proceeded to find that the imports had not adversely affected domestic prices and had not adversely impacted the domestic industry.[454]

Here again, the ITC's reasoning, even if legally permissible, raises a number of concerns from the perspective of predictability in the administration of the law. Prior ITC cases involving price-sensitive fungible commodity products resulted in affirmative determinations even with very low market penetration by the subject imports.[455] Indeed, the statute does not require imports to be increasing, or even necessarily to be in the market, for an affirmative determination. The ITC has recognized in previous investigations that the mere presence of an offer at a given price level can have a substantial impact on the level of U.S. price.[456] Thus, fact patterns in previous cases similar to those in the cattle investigations had led to affirmative determinations.

Yet here, the ITC screened out the case at the preliminary stage. Given the legislative history and case law regarding the legal standard for preliminary determinations, the ITC's decision begs the question of whether the benefit of the doubt should not have been given to a domestic industry that was obviously

452. *See* USITC Pub. 3155 at 18, 22.

453. USITC Pub. 3155 at 23.

454. *See* USITC Pub. 3155 at 24-26.

455. *See, e.g.*, Certain Carbon Steel Products from Spain, USITC Pub. 1331, Inv. No. 701-TA-155, 157, 158, 159, 160, and 162 (Final), (December 1982). (Market shares for four categories of imports examined were as follows: hot-rolled carbon steel plate: 0.9 – 2.3 percent; cold-rolled carbon steel sheet: 0.1 to 0.5 percent; galvanized carbon steel sheet: < 0.6 to 1.8 percent; carbon steel structural shapes: 1.5 to 4.5 percent. ITC made affirmative final determinations as to each category of imports.).

456. *See, e.g.*, Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1970, Inv. No. 731-TA-326 (Final), (April 1987) at 45-46.

massively injured in a case involving a price-sensitive commodity product.

Not only did the ITC focus largely on the size and overall trend in the import volumes and market share of Mexican cattle, but they also omitted in their discussion mention of two facts that could have cast the data in a very different light. First, the imports from Mexico in 1995 were unusually high – 1.6 million head and 4.4 percent of domestic consumption – because of the peso devaluation and a severe drought.[457] By using the peak 1995 year for import volumes as a base, therefore, it was not surprising that the ITC found an overall decline in the volumes. If the ITC started its analysis with 1996, though, the trend was increasing by some 48 percent from 1996 to 1997 and by 5 percent in the interim 1998 period compared to interim 1997.[458] Thus, an apparently arbitrary practice looking at import data contributed to preventing the case from going forward to a final investigation (in which 1995 data would have been excluded from the period of investigation).

Further, an earlier ITC section 332 investigation of the effects of NAFTA and the Uruguay Round Agreements Act on cattle and beef had specifically concluded that the increased imports of feeder cattle from Mexico in 1995 had contributed to declining prices for feeder cattle in the United States in 1996.[459] Given these facts, the "clear and convincing evidence" standard, prior ITC cases involving similarly fungible and price-sensitive products where low volumes and market shares were found to be significant, and the undisputed injured state of the domestic industry, the petitioners understandably found the ITC's decision to resolve the conflicts in the evidence against the domestic industry at the preliminary stage difficult to fathom.

C. THE ITC'S FINAL NEGATIVE INJURY DETERMINATION IN LIVE CATTLE FROM CANADA

1. *Elements for Showing Injury, Threat of Injury and Causation*

To make an affirmative injury determination, the ITC must find that a domestic industry is materially injured, or threatened with material injury, or the establishment of an industry is materially retarded, by reason of imports that are de-

457. Live Cattle from Canada and Mexico, Staff Conference T. at 93; USITC Pub. 3155 at IV-3, Table IV-2.
458. USITC Pub. 3155 at IV-2.
459. USITC Pub. 3048 at 2-16.

termined to be dumped or subsidized.[460] This causation standard in the antidumping and countervailing duty laws has generally been viewed as the least stringent among the various trade remedy laws.[461] The dumped or subsidized imports need only cause or threaten "material injury," which is defined as "harm which is not inconsequential, immaterial, or unimportant,"[462] for the domestic industry to receive relief.

The statute sets forth several factors which the ITC must take into account in its analysis, including (1) the volume of the subject imports; (2) the effect that subject imports are having on domestic prices for the like product; and (3) the impact of the subject imports on the domestic producers of domestic like products in the United States.[463] In evaluating the volume of the subject imports, the ITC must consider whether the volume of the imports, or any increase in that volume, is significant either in absolute terms or relative to production or consumption in the United States.[464] In evaluating the effect of imports on domestic prices, the ITC is directed to consider whether there is significant underselling and whether the effect of the imports otherwise depresses domestic prices, or prevents price increases which would otherwise have occurred, to a significant degree.[465] Finally, in examining the impact of the imports, the ITC must consider "all relevant economic factors which have a bearing on the state of the industry"[466] and must evaluate those factors

460. *See* 19 U.S.C. §1671(a)(2); §1673(a)(2).

461. *See, e.g.,* Eric P. Salonen, *'One Tomato, Two Tomato. . .' Selection of Trade Remedy Laws in the Florida-Mexico Tomato Conflict*, 11 FLA J. INT'L L. 371, 371 (1997) (comparing the injury and causation tests in the antidumping and safeguard laws).

462. 19 U.S.C. §1677(7)(A).

463. *See* 19 U.S.C. §1677(7)(B)(I) – (III).

464. 19 U.S.C. §1677(7)(C)(i). The statute does not require there to be an increase in the volume of imports in order for the ITC to find the volume of imports to be significant. However, it should be noted that Article 3.2 of the WTO Antidumping Agreement provides: "With regard to the volume of the dumped imports, the investigating authority shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member."

465. 19 U.S.C. §1677(7)(C)(ii).

466. 19 U.S.C. §1677(7)(C)(iii). The factors include, but are not limited to, actual and potential declines in output, sales, market share, profits, productivity, return on investments, capacity utilization; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; actual and potential negative effects on the existing development and production efforts of the domestic industry, and, in an antidumping case, the magnitude of the margin of dumping. *Id.* at (iii) (I) – (V).

"within the context of the business cycle and conditions of competition that are distinctive to the domestic industry."[467]

Congress instructed in the legislative history that no single factor can give decisive guidance as to whether an industry is materially injured by imports:

> For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant. Similarly, for one type of product, price may be the key factor in making a decision as to which product to purchase, and a small price differential resulting from the amount of the subsidy or the margin of dumping can be decisive; for others, the size of the differential may be of lesser importance.[468]

The statute also sets forth ten factors the ITC must consider in evaluating whether a domestic industry is threatened with material injury by reason of dumped or subsidized imports. These include: existing unused production capacity or imminent, substantial increases in production capacity, in the exporting country that is likely to result in substantially increased imports into the United States; a significant rate of increase in the volume or market penetration of the subject imports; whether the imports are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports; inventories of the subject merchandise (both in the exporting country and in the United States); and the potential for product-shifting if production facilities in the foreign country which could be used to produce the dumped or subsidized article are currently being used to produce other articles.[469] If there is a countervailable subsidy, the ITC also must take into account the nature of the subsidy, including whether it falls with the provisions of the WTO Subsidies Agreement concerning prohibited subsidies (Article 3) or serious prejudice (Article 6.1), and whether imports are likely to increase.[470]

Taken together, these factors require the ITC to project the future availability of additional imports (either through existing inventories, existing surplus foreign capacity or increases in foreign capacity, or shifts of third country exports to the Untied States), the likelihood that imports will increase to injurious levels, and the likely impact of imports on domestic prices. The existence of antidumping or countervailing duty orders in third

467. 19 U.S.C. §1677(7)(C)(iii).
468. S. REP. No. 96-249, at 88 (July 1979).
469. *See* 19 U.S.C. §1677(7)(F)(i).
470. *See* 19 U.S.C. §1677(7)(F)(i)(I).

countries is also a relevant factor.[471] The ITC must consider whether material injury would occur "unless an order is issued. . . ."[472] A threat determination "may not be made on the basis of mere conjecture or supposition."[473]

Injury or threat of injury must be "by reason of" the imports. Neither the statute nor the legislative history defines what "by reason of" means, although the 1979 Senate Finance Committee report provides some guidance in how the provision is to be administered:

> In determining whether injury is 'by reason of' less-than-fair-value imports, the ITC now looks at the effects of such imports on the domestic industry. . . .
>
> Current law does not, nor will [the new statute], contemplate that the effects from less-than-fair-value imports be weighed against the effects associated with other factors (*e.g.*, the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry) which may be contributing to overall injury to an industry. Nor is the issue whether less-than-fair-value imports are the principal, a substantial, or a significant cause of material injury. Any such requirement has the undesirable result of making relief more difficult to obtain for industries facing difficulties from a variety of sources; industries that are often the most vulnerable to less-than-fair-value imports.
>
> Of course, in examining the overall injury to a domestic industry, the ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports. . . .
>
> While injury caused by unfair import competition, such as less-than-fair-value imports, does not require as strong a causation link to imports as would be required in determining the existence of injury under fair trade import relief laws, the Commission must satisfy itself that, in light of all the information presented, there is a sufficient causal link between the less-than-fair-value imports and the requisite injury.[474]

The Statement of Administrative Action to the Uruguay Round Agreements Act and case law have also expounded on the causation standard. Consistent with the 1979 legislative history, they make clear that the Commission "need not isolate the injury caused by other factors from injury caused by unfair imports. Rather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the

471. *See* 19 U.S.C. §1677(7)(F)(iii).

472. 19 U.S.C. §1677(7)(F)(ii).

473. *Id.*

474. S. REP. NO. 96-249 at 74-75 (1979).

subject imports."[475] The subject dumped imports need not be the only cause of injury or even as important a cause as some other factor; it is sufficient that the unfairly traded imports contribute in a more than *de minimis* manner to the injury suffered by the domestic industry.[476] As the Court of International Trade ruled in *Taiwan Semiconductor v. United States*:

> That the injurious effects from other sources may be greater than the effect of the subject imports is not determinative, so long as the Commission reasonably finds that the subject imports' contribution to the overall harm is material. Therefore, the Commission need not weigh (i.e., determine which is greater or lesser) causes in complying with the "by reason of" standard.[477]

Importantly, the fact that the industry's difficulties may be caused in part by the industry itself does not negate the possibility that dumped imports are also causing material injury. "To borrow a principle from tort law, importers take the domestic industry as they find it."[478]

2. *The ITC's Final Determination in Live Cattle from Canada*

As discussed in Section II, *supra*, the domestic cattle industry has been and continues to be in a devastated economic condition. The record before the ITC was replete with examples of the difficulties that ranchers and farmers raising cattle had experienced. Indeed, the crisis in the industry was so severe that an unprecedented fourteen members of the House and Senate appeared before the ITC during its hearing to alert the Commissioners to the problems that their rancher constituents were facing.[479] The ITC acknowledged the injured condition of the industry, albeit in a mere three sentences in a 21-page, single-spaced opinion.[480] The ITC, however, attributed the evidence of injury to the cattle cycle only, and not to the Canadian imports: "Weak performance by the domestic industry is expected during

475. *See* Taiwan Semiconductor Industry Assoc. v. United States, No. 99-57, slip op. At 12 n.9 (CIT June 30, 1999), available at <http://www.uscit.gov/slip-op.html>.

476. *See, e.g.*, Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (CIT 1988).

477. Slip Op. 99-57 at 14-15.

478. Iwatsu Electric Co. Ltd., v. United States, 758 F. Supp. 1506, 1518 (CIT 1991).

479. *See* ITC Hearing T. at 2 (Congressional appearances).

480. USITC Pub. 3255 at 21. The ITC summarizes the industry data in two extended footnotes. *Id.* at n.147 and 148.

the liquidation phase of the cattle cycle, and is not unique to this agricultural industry."[481]

The ITC's negative determination appeared to be driven by two principal factors. First, the ITC found that the imports were small, declining and concentrated in so-called "secondary markets" such as the Pacific Northwest.[482] The second, and related factor, was the ITC's finding that price discovery between the primary and secondary markets for cattle were asymmetrical, that is, prices in the secondary markets affects prices in the primary feeder belt states to a much lesser extent.[483] According to this view, whatever impact the imports may have had on prices in the secondary markets was not transmitted to any significant extent to the rest of the national market for cattle.

Although the ITC also identified other factors to support its decision, the agency did not address a few key points. First, the ITC had acknowledged that "a relatively small volume of imports of an agricultural commodity product may be significant in light of the effect of that small volume on prices."[484] In prior investigations involving agricultural commodities, the ITC had found even smaller market shares of subject imports to be sufficiently significant to warrant an affirmative determination.[485] For example, in *Live Swine and Pork from Canada*, the ITC had made an affirmative threat determination where the imports of Canadian swine had reached market share of 2.6 percent during the period of investigation.[486] As in *Live Cattle*, the ITC had found in *Swine* that prices were "very sensitive to changes in supply."[487] Yet, in *Live Cattle*, where import market share had increased from 2.9 percent in 1995 to 3.8 percent in 1996 and remained at 3.4 percent in 1998, the ITC found imports were not

481. USITC Pub. 3255 at 22.

482. *See id.* at 13 ("The quantity of subject imports from Canada is small and declined . . . during the period of investigation."); 14 ("Live cattle imports from Canada held a small and decreasing share of the U.S. market over the period of investigation. . . . "); (Almost 80 percent of subject imports entered states other than the primary feeder belt states (Texas, Kansas, Nebraska, Colorado, and Iowa) and thus the great majority of subject imports entered states that are considered secondary markets, such as Washington, Utah and Pennsylvania.").

483. USITC Pub. 3255 at 18-19.

484. *Id.* at 16.

485. There have even been cases where import market share of less than 1 percent was sufficient to warrant an affirmative outcome. *See, e.g.,* Certain Carbon Steel Products from Spain, USITC Pub. 1331 *supra*, n. 456.

486. Live Swine and Pork from Canada, *supra* note 408, Inv. No. 701-TA-244 (Final), 7 ITRD at 2291.

487. 7 ITRD at 2291.

significant. It is not clear what is so different between the cattle and swine industries and markets that would help reconcile the different outcomes.

The statute calls for consideration of the business cycle and the conditions of competition that are distinctive to the industry. In most investigations, the ITC collects data for the three-year period prior to the filing of the petition, which is sufficient to comply with the statutory instruction. In previous investigations, however, the ITC also has recognized that adhering to its typical three-year period of examination would not sufficiently take into account the business cycle and conditions of competition distinctive to the industry in those cases.[488]

In this case, the ITC did not address the fact that import penetration during the 1995-99 cattle cycle time period (i.e., the price trough) was significantly higher than that at the same stage of any previous cattle cycle. By emphasizing the decline in the import volumes over 1996-98, the ITC implicitly suggests that the industry waited too late to file its petitions, and ignores that import penetration had reached a historical high point.[489]

Moreover, with a fairly well-defined cycle of peaks and troughs, it is understandable that the industry waited until 1998 to see whether the upward turn in the cycle would resume. The ITC's decision to limit the period of investigation to a three year window of time in an industry that has a well-defined business cycle that regularly runs 8 to 12 years in effect penalizes such an industry that waits to bring a case until it can discern whether a current downturn is truly "cyclical" or due to other factors.

As to the question of asymmetrical price discovery, the ITC did not address evidence showing a high correlation between cattle prices in the Pacific Northwest and other regions of the country.[490] Moreover, the ITC's discussion of the concentration

488. *See, e.g.*, Fresh Atlantic Salmon from Chile, USITC Pub. 3116, Inv. No. 731-TA-768 (Final) (July 1998) (examined four-year period); Frozen Concentrated Orange Juice from Brazil, USITC Pub. 1970, Inv. No. 731-TA-326 (Final) (April 1987) (examined four year period); Softwood Lumber from Canada, USITC Pub. 2530, Inv. No. 701-TA-312 (Final) (1992) (six-year period).

489. The ITC acknowledged that, if imports for 1995 were included, the overall trend showed an increase, but found the increase was not significant because "the increase was small in absolute and relative terms and because subject imports declined each year after the initial increase from 1995 to 1996." USITC Pub. 3255 at 13-14.

490. Petitioner's Post-Hearing Br., Exhibit 5 ("Correlations between weekly prices for fed cattle in various regions Texas Panhandle, Kansas, Nebraska, Colorado, Iowa, Montana and Montana + Pacific NW").

of imports in the Pacific Northwest did not respond to testimony of domestic ranchers living in the region who shipped their cattle outside the region in search of higher prices because packers were buying the Canadian imports.[491]

More important, neither was there discussion of the evidence that showed domestic prices for cattle increasing following the Commerce Department's preliminary dumping determination in July 1999 and the suspension of liquidation and posting of cash deposits by importers.[492] It is not clear why evidence showing an increase in domestic prices following the cessation of dumping through the posting of cash deposits is not sufficient evidence of causation.

Reviewing courts will uphold the ITC's final determinations if they are supported by "substantial evidence" and are otherwise in accordance with law.[493] The standard is generally recognized as deferential, which may foster as a primary objective the drafting of opinions to withstand judicial challenge. However, that ought not be the agency's priority. Issues such as those highlighted above which would appear to be important to the decision would also appear to deserve discussion. For the sake of the U.S. industry that comes to the ITC seeking relief, the opinion should explain clearly and directly why the evidence they presented was insufficient. The agency should ensure, in

491. *See, e.g.*, Petitioner's Prehearing Br., Appendix Vol. 2, Ex. 65 (Statement of Margene Eiguren, Jordan Valley, Oregon (selling calves to a Texas feedlot to be finished and slaughtered)); Ex. 68 (Statement of Doug Tippet, Lyle County, Oregon (previously sold cattle in the Northwest, but now shipped to different places)).

492. *See* Petitioner's Post-hearing Br. at Ex. 15, Statement of Les Messinger, Member of the Chicago Mercantile Exchange ("[T]he futures market for cattle bottomed out on July 1, 1999 at $61.30-35/cwt. The Department of Commerce announced the results of its preliminary determinations on July 1 and published the results on July 8, 1999. During the next 60 days, the futures market for live cattle rallied by $5 ½ per cwt, off the board, to $67 per cwt., which is a significant increase. The prices have continued to rally up to the present time and are currently around $70 per cwt. . . . [S]ince the Commerce Department's preliminary determination was issued, the cattle futures market has seen a price rally of $8-9 per cwt., in a span of about 3 months, a very significant, robust and rapid recovery."). Numerous industry participants also reported increases in spot prices for cattle following Commerce's preliminary determination. *See, e.g.*, Petitioner's Prehearing Br., App. Vol. 2, Ex. 2 (Statement of Herman Schumacher); Ex. 8, (Statement of Lloyd DeBruycker); Ex. 16 (Statement of Andy Peek); Ex. 21 (Statement of J. Peter Carey and Carolyn Carey).

493. *See, e.g.*, Goss Graphic System, Inc. v. United States, 33 F Supp. 2d 1082, 1085 (CIT 1998).

short, not only that the users of the law are fairly treated, but that they *perceive* fairness in the final outcome.

The agency also ought to be concerned with providing greater guidance to prospective parties as to how the statute is likely to be construed and applied in future cases. To the extent that an opinion only cites the evidence that supports the outcome and does not explain why contrary evidence and prior agency practice relied upon by the losing party were insufficient, the opinion does little to advance the principle of predictability in the administration of the law. Rather, combined with a deferential standard of judicial review, the approach fosters the perception, if not the actuality, of arbitrary government.

D. PROPOSALS TO MAKE THE INJURY PROVISIONS OF THE STATUTE MORE EFFECTIVE FOR THE LIVE CATTLE INDUSTRY

As the foregoing discussion illustrates, there are several aspects of the injury provisions of the antidumping and countervailing duty laws and in the manner of their interpretation and administration by the ITC which require revision if the law is to be made more effective in addressing harm caused to an industry such as cattle by unfair imports. First, Congress should reexamine the operation of the processed agricultural products provision. Where, as in the case of cattle and beef, the grower of the raw product provides more than 50 percent of the value of the finished beef product that is sold to consumers, and where there is ample evidence that imports of the downstream product (beef) impact the prices of the upstream product (cattle), then the growers should be able to bring a case against the upstream and downstream products.[494]

Second, with respect to cumulation, the Congress should consider an amendment that would require the ITC to consider the extent of overlap of competition between finished and unfinished imports from different countries at the time they are finished and ready for sale to the end-user.

Third, Congress should clarify the legal standard for preliminary investigations. The function should be a "gatekeeper" to screen out truly frivolous cases, and not to resolve conflicting evidence against a petitioning industry before there is an opportunity for the issues to be fully developed.

494. It should be noted that such an amendment might also require revision of the like product and domestic industry provisions in the WTO Antidumping and Subsidy Agreements.

Fourth, Congress should clarify that even low import penetration — or offers to sell prior to importation – can impact domestic prices.

Fifth, public understanding of the administration of the injury provisions of the law would be improved significantly with increased predictability and greater guidance from the ITC. Determinations which clearly explain why particular evidence was insufficient or prior precedent was not applicable will withstand the scrutiny of a reviewing court. A more important objective, however, should be for the ITC to help prospective parties (as well as the parties in any particular case) to fully understand why a key issue was decided a particular way, especially where the same issue in prior cases involving similar fact patterns was decided differently. While the explanation likely will not always meet with universal agreement, it nevertheless would serve to increase universal understanding about the administration of an important remedial law. It also might help the ITC itself to test the soundness of its decisions by having commissioners ask themselves, "What is it about X in this case that is different from X in previous cases?"

Finally, Congress may want to consider having more frequent oversight hearings to periodically review the ITC's administration of the law. Such hearings would provide an opportunity to elicit individual Commissioner's views on their construction of the statute, which also would provide greater guidance to private parties contemplating a possible case.

VI. PROPOSALS TO HELP THE CATTLE INDUSTRY OBTAIN RELIEF

Throughout this article, we have reviewed the devastated condition of the cattle industry, the various possible sources of the industry's problems, and various efforts to address those problems. The possible sources of the industry's problems include an inequitable trade environment, declining share of the retail dollar spent on beef, disadvantageous negotiating position vis-à-vis the packers, ineffective enforcement of existing competition laws, and unfair imports.

At bottom, the industry has limited ability to address the kinds of collapses in commodity prices that occurred in recent years. There are no controls on imports of cattle and imports tend to compound problems facing producers during downturns. Likewise, tariff-rate quotas on beef do not apply to product from NAFTA countries. With concentrated purchasers and fragmented sellers, the ability to obtain a fair price on a perishable product is greatly impaired. What has been seen in the last cattle cycle has been a flattening of the upswing in prices during periods of reduced herd size with no corresponding elimination of the downside of the market.

The mandatory price reporting required by P.L. 106-78 will help some when implemented in fact. While U.S. law has permitted some agricultural producers to work together through marketing orders or cooperatives, such laws are largely unworkable for an industry with as many producers as cattle. Some mechanism must be developed to address such price collapses and the enormous financial and personal harm they cause to ranchers and their families. Possible approaches which may need to be taken together include:

- Vigorous enforcement of existing law, including the Packers and Stockyard Act;
- Development of bilateral (US-Canada), plurilateral (NAFTA, FTAA) or multilateral (WTO) rules to address special needs of perishable agriculture including livestock;
- Establish floor prices for cattle and beef;
- Emergency agriculture financial payments for cattle producers;
- Prohibit packers from owning cattle before slaughter or participating in forward contracts; prohibit sale to packers other than for a price certain at time of sale;
- Modifying US trade laws or their construction to make relief available quickly for agricultural producers when prices fall below cost of production (e.g, standing requirements, inability to address imported beef as well as live cattle, cumulation of cattle at different stages of growth and injury standard as applied to commodity products like cattle).

It bears noting that each of these approaches presents actual and potential problems, including, for example, cost to government; agency resistance and compatability with international obligations.

Other issues include reducing concentration in the packing sector. Certain parts of the United States have few if any slaughter facilities. This can result in cattle producers having no effective competition for their cattle. Efforts to open facilities by new entrants into these marketing areas have not been successful. The capital and regulatory costs of entry into the slaughter business are very high. Producers in other countries (e.g., New Zealand) have experimented with smaller size facilities which can permit cattle producers to have greater control over their destiny, appeal to niche markets and can be more environmentally friendly by reducing the concentration of waste, etc. in a given geographical area. The U.S. government should consider providing loans or seed money for the experimentation of mini-slaughter facilities to be located in areas not currently served where there is significant cattle production.

Another critical issue is health care. As the discussion in Section II, *supra*, amply demonstrates, many ranching families have lost their health insurance, been forced to limit insurance to catastrophic healthcare or been forced to work jobs off of the ranch to get insurance. The government should consider providing health care coverage for ranchers and farmers in periods of depressed prices. Criteria for eligibility for such assistance should only go to those who are losing their coverage or are being forced to sharply limit their coverage because of cash flow problems. Many people who have worked all their lives are finding themselves unable to maintain protection because of the lack of income. Obviously, if the fundamental problem of depressed prices can be fixed, ranchers and farmers will not need the government's assistance in obtaining health insurance.

These and other approaches should be explored quickly and thoroughly. Key for survival of cattle producers and rural America is the restoration of fair prices. Whatever steps can be taken to restore pricing to a rational level and permit efficient producers to survive and prosper should be supported.