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Foreign Trade Remedy Investigations of U.S. Agricultural Products

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SUMMARY

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Foreign Trade Remedy Investigations of U.S. Agricultural Products

Foreign countries appear to be making greater use of punitive measures affecting U.S. agricultural exports. These measures, corresponding to duties the United States has long imposed on imports found to be traded unfairly and injuring U.S. industries, have the potential to reduce the competitiveness of U.S. agricultural exports in some foreign markets. Recent changes in U.S. agricultural policy, including over $23 billion in "trade aid" payments in 2018 and 2019 to farmers affected by higher Chinese tariffs on certain U.S. products, may increase the likelihood of foreign measures that adversely affect U.S. agricultural trade.

The imposition of anti-dumping and countervailing duties is governed by the rules of the World Trade Organization (WTO) and of WTO's 1995 Agreement on Agriculture (AoA). Under the AoA, member countries agreed to reform their domestic agricultural support policies, increase access to imports, and reduce export subsidies. The AoA spells out the rules to determine whether policies are potentially trade distorting. If a trading partner believes that imported agricultural products are being sold below cost ("dumped") or benefit from unfair subsidies, it may impose anti-dumping (AD) or countervailing duties (CVD) on those imports to eliminate the unfair price advantage.

In recent years, a number of trading partners have challenged imports of U.S. agricultural products, even initiating repeated or multiple investigations into the same products. Moreover, since 2004, trading partners have expanded the scope of U.S. subsidies that they consider subject to punitive duties. In some cases, programs other than those that the United States reports to the WTO have been the subject of foreign government investigations. These have included subsidies for biodiesel and ethanol, export credit guarantees, farm ownership and operating loans, and export promotion programs. The trade aid in 2018 and 2019 has raised new questions from some WTO members, which may perceive these payments as providing an unfair advantage for the U.S. agricultural sector.

The U.S. government and the affected industries have multiple avenues to challenge these investigations. They may participate in the investigation to present evidence, for example, that certain subsidies are permissible under WTO rules or that the imposition of duties is not justified. U.S. exporters may also challenge an AD or CVD ruling under certain free trade agreements or bring a claim via the WTO dispute settlement process. However, the WTO Appellate Body, which hears appeals of cases from WTO dispute settlement panels, currently lacks a sufficient number of members to adjudicate disputes because the United States has blocked the appointment of members to replace those whose terms have expired.

The United States and other members have indicated an interest in WTO institutional reform that could address dispute settlement, as well as other issues pertinent to agricultural trade. Congress could consider oversight on whether U.S. negotiating objectives adequately balance maintaining multilateral disciplines on agriculture subsidies, a longtime U.S. objective, with protecting U.S. agricultural exports from potentially damaging AD and CVD investigations initiated by U.S. trading partners. Congress might also consider whether the practices in U.S. investigations should be modified to minimize their exposure to analogous challenges in the future.

Additionally, Congress might review whether U.S. farm program spending fully complies with U.S. spending commitments under the AoA. In this regard, options for Congress might include limiting the Administration's use of its spending authority under the Commodity Credit Corporation Charter Act, which was used to make the trade aid payments during 2018 and 2019 without congressional input or oversight.

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Introduction

Foreign countries appear to be making greater use of trade measures to address alleged dumping and subsidization of U.S. agricultural exports. These measures could reduce the competitiveness of U.S. agricultural exports in some foreign markets. Recent changes in U.S. agricultural policy, including over $23 billion in "trade aid" payments in 2018 and 2019 to farmers affected by higher Chinese tariffs on certain U.S. products,[1] may increase the likelihood of foreign measures that adversely affect U.S. agricultural trade.

Trade remedy measures, primarily in the form of anti-dumping and countervailing duties, is governed by the World Trade Organization (WTO). This report describes the relevant WTO rules and explains how the trade aid payments may have made the United States more vulnerable to foreign government trade actions. It then describes several recent foreign measures affecting U.S. exports of certain agricultural products. A concluding section discusses potential options for Congress in addressing concerns that such measures could affect U.S. exporters.

Trade Remedies Under the WTO

Under the WTO agreements, importing countries can use their domestic procedures to investigate whether imports from the United States are being traded unfairly and are injuring domestic industries. If the answer in both cases is affirmative, the WTO permits the trading partner to levy additional duties (known as trade remedies) on the imported products that are causing the injury. These actions to protect domestic producers do not require the country initiating the investigation to ask the WTO to investigate or resolve the dispute.[2]

Two main types of remedies are involved:

1. Anti-dumping duties (ADs) may be imposed on an imported product found to be sold for "less than its normal value" and injuring or threatening injury to a domestic industry. The WTO defines *normal value* as the comparable price for the "like product" in the ordinary course of trade when destined for domestic consumption in the exporting country.[3] ADs may be levied for a maximum of five years and re-imposed if a review finds a likelihood of continued threat of injury to a domestic industry.[4] WTO members had 1,919 AD measures in force as of June 30, 2019.[5]
2. Countervailing duties (CVDs) may be imposed on imported products found to be unfairly subsidized and to be injuring or threatening injury to a domestic industry.[6] WTO rules require that a country terminate any CVDs no later than five years after they are first imposed. However, the duties can be extended if a subsequent review determines that the foreign subsidy still exists and is causing

[1] See CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*, by Randy Schnepf et al.; and CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*, by Randy Schnepf.

[2] However, countries are required to notify the WTO of such actions under Article 25.11 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

[3] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994, Article 2.1.

[4] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994, Article 11.3.

[5] WTO, *Report of the Committee on Anti-Dumping Practices*, G/L/1344, G/ADP/26, November 21, 2019.

[6] WTO, General Agreement on Tariffs and Trade, 1994, Article VI.

or likely to cause injury to a domestic industry.[7] WTO members had 195 CVD measures in force on June 30, 2019.[8]

As an alternative to an AD or CVD investigation, a country claiming to be affected by dumping or unfair subsidies may file a complaint with the WTO. Such a complaint may be adjudicated by a WTO legal panel. The United States has taken this approach frequently: Through April 2019, it had brought 46 cases on agriculture to the WTO, of which 34 were decided fully or partially in favor of the United States.[9] However, the WTO's Appellate Body, which hears appeals of panel findings, has effectively become non-functional due to the United States' decision to block the nomination of members to the Appellate Body. This deprives the Appellate Body of a quorum and effectively renders it unable to resolve disputes.[10]

The WTO rules concerning trade remedies apply to merchandise imports in general. However, special provisions apply in considering what types of government assistance to the agricultural sector are considered to be "subsidies" in CVD investigations or WTO proceedings. In particular, although agriculture subsidies are covered by the Agreement on Subsidies and Countervailing Measures (SCM Agreement), they are also disciplined by the Agreement on Agriculture (AoA).

WTO Agreement on Agriculture and U.S. Farm Subsidies

The AoA established a multilaterally agreed-upon set of trade rules concerning national agricultural policies—including domestic farm support, agricultural export subsidies, and restrictive import controls—for the first time. Under the agreement, reached in 1995, WTO member countries pledged to reform their domestic agricultural support policies, increase access to imports, and reduce export subsidies. To accomplish this, countries were to freeze ("bind") protection and subsidies at base-period levels and then institute annual reductions from those bound levels.[11]

WTO commitments varied across three member groupings: developed, developing, and least-developed countries. Article 15 of the AoA recognized the special needs of developing and least-developed countries by granting them special rights or extra leniency—termed Special and Differential Treatment—in the implementation of their policy commitments.[12] The United States has designated itself a developed country in the WTO. The AoA required developed countries to implement reforms over a six-year period (1995-2000). Developing countries received special

[7] SCM Agreement, Article 21.3.

[8] WTO, *Report of the Committee on Subsidies and Countervailing Measures*, G/L/1341, G/SCM/155, November 20, 2019.

[9] Extracted from WTO, "Disputes by Member," case total reported as of April 23, 2019, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

[10] For more on this, see CRS Legal Sidebar LSB10385, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, by Brandon J. Murrill.

[11] WTO, AoA, Legal Text, 1995, https://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm.

[12] The WTO does not have specific and transparent criteria for designating a country as "developing" or "developed." Instead, member countries may self-designate. For the definition of *least-developed countries*, see WTO, Understanding the WTO: The Organization, "Least-Developed Countries," https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

treatment, with a longer, 10-year implementation period (1995-2004) and less stringent reductions.[13]

Peace Clause

During the AoA's early years, Article 13, known as the Peace Clause or "due restraint" clause, protected member countries from challenging one another's domestic support and export subsidy measures through countervailing duty (CVD) actions—provided that these measures complied with certain requirements set out in the AoA.[14] However, these measures have been open to challenge since the Peace Clause expired in 2004.[15]

Domestic Support Commitments Defined by AoA

With respect to domestic support, WTO member countries agreed to (1) categorize and report domestic support spending programs according to the degree that they distort market conditions and (2) to implement disciplines—including limitations and gradual reductions—on domestic agricultural subsidies, especially on the most trade-distorting policies.[16] The AoA spells out the rules for countries to determine whether their policies are potentially trade distorting; how to calculate the costs of any distortion using a specially defined indicator, the "Aggregate Measure of Support" (AMS); and how to report those costs to the WTO in a public and transparent manner.[17] While the AMS is subject to a spending limit that must be reported (known as a country's "amber box" support), the AoA provides four potential exemptions from the AMS spending limit:

1. If a program's outlays are considered to be minimally trade distorting or non-trade distorting (in accordance with specific criteria listed in Annex 2 of the AoA), then it may qualify as a "green box" program and not be included in the AMS.
2. If program spending is trade-distorting but has offsetting features that limit the production associated with support payments, then the programs may qualify as "blue box" programs and not be included in the AMS.
3. If AMS outlays for a specific commodity are sufficiently small relative to the output value of that commodity (product-specific de minimis), they may be exempted.
4. If aggregate AMS outlays are small relative to the value of total agricultural production (non-product-specific de minimis)—then they may be exempted.

[13] Many developed countries have questioned the authenticity of several self-designated "developing" countries and recommend that a more formal procedure be established before a country is able to benefit from developing country status.

[14] Exemption was allowed if cumulative outlays on such measures did not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

[15] WTO, AoA, 1995, Article 1.f. There has never been a definitive statement as to when the Peace Clause expired, with the only WTO panel to address it finding that, at the earliest, it expired January 1, 2004, but could have expired at later points in 2004.

[16] WTO provisions dealing with domestic support are discussed in more detail in the following section of this report, "Domestic Support Commitments Defined by AoA."

[17] For more information, see CRS Report R45940, *U.S. Farm Support: Compliance with WTO Commitments*, by Randy Schnepf.

Any AMS left over after applying these four exemptions constitutes the "amber box."

U.S. Domestic Support Commitments Under AoA

Under the AoA, the United States has committed to limit its spending on amber box programs (i.e., outlays on the types of programs deemed most market distorting) to $19.1 billion per year. Farm program outlays are cumulative, and compliance is based on annual aggregate spending on program payments that do not qualify for one of the four exemptions discussed above.[18]

Farm support programs can potentially violate WTO commitments in two principal ways: first, by exceeding the amber box spending limit, and second, by generating market distortions that spill over into the international marketplace and cause significant adverse effects for other market participants. In general, U.S. farm support outlays should be evaluated against both of these criteria when assessing whether the United States may be in violation of its WTO commitments. This discussion focuses on the first potential pathway for a violation: excessive spending.[19]

Since the WTO's establishment, the United States has generally met its WTO amber box spending commitment. However, U.S. compliance has hinged on judicious use of the de minimis exemptions in a number of years (for example, 1998, 1999, and 2000), which permit it to exclude certain spending from being considered under its amber box limit (**Figure 1**). To date, no WTO member has challenged these exemptions.

Increasing U.S. Farm Support Since 2010

Since 2010, U.S. outlays on potentially market-distorting farm programs have been trending upward (**Figure 1**). From 2011 through 2016, AMS outlays (amber box plus de minimis exemptions) averaged $14.6 billion per year. U.S. AMS spending is estimated to have been higher in 2017-2019 based on CRS's compilation of U.S. Department of Agriculture (USDA) program data. For example, outlays in 2017 are estimated to have been $16.5 billion. However, the projected classification of $10.1 billion in program spending as de minimis exemptions would limit amber box outlays to $6.3 billion.

The addition of the Administration's ad hoc Market Facilitation Program (MFP) payments—the bulk of USDA's trade aid payment—in 2018 and 2019[20] are projected to push total AMS outlays to around $22 billion in 2018 and potentially in excess of $23 billion in 2019, well above the U.S. amber box spending limit. Whether the United States will be in violation of its spending commitment will depend on the extent to which de minimis exemptions apply for those two years.[21]

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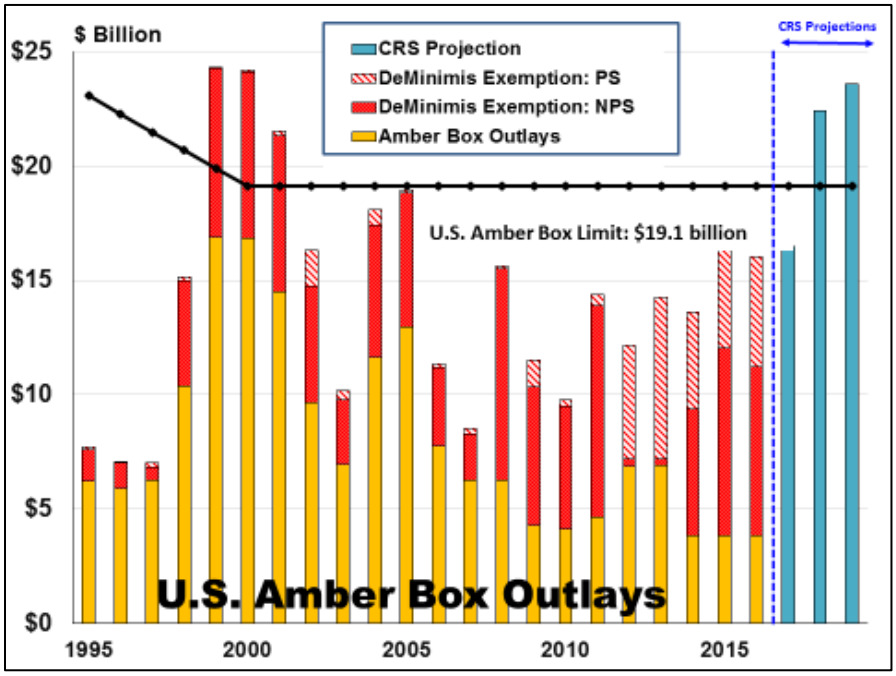
[18] CRS Report R45940, *U.S. Farm Support: Compliance with WTO Commitments*, by Randy Schnepf.

[19] For a discussion of the second pathway—market distortions—see CRS Report R45940, *U.S. Farm Support: Compliance with WTO Commitments*, by Randy Schnepf.

[20] In 2018, MFP allocation was $10 billion of a total of $12 billion in trade aid payments, while in 2019 MFP allocation was $14.5 billion of a total of $16 billion in trade aid payments. MFP payments made to the farm sector were valued at $8.6 billion in 2018 and about $10.7 billion in 2019. For details regarding trade aid payments, see CRS Report R45310, *Farm Policy: USDA's 2018 Trade Aid Package*, by Randy Schnepf et al.; and CRS Report R45865, *Farm Policy: USDA's 2019 Trade Aid Package*, by Randy Schnepf.

[21] These projections hinge on several as-yet-unknown factors, including market prices, output values, and program outlays under traditional countercyclical Agriculture Risk Coverage and Price Loss Coverage programs. If the final prices are higher than currently projected, then program payments under Agriculture Risk Coverage and Price Loss Coverage could be smaller than those used in this analysis. This could decrease both aggregate non-product-specific outlays and the possibility of exceeding the amber box spending limit.

Figure 1. U.S. Amber Box Compliance, Historical and Projected



Source: PS = product specific; NPS = non-product-specific. Compiled by CRS from official U.S. notification to the WTO for 1995-2016. Years 2017-2019 are compiled by CRS from USDA payment and farm income data as of February 5, 2020, and CBO baseline projections for farm program outlays (January 2020).

Notes: The United States has yet to notify the WTO of its domestic support outlays beyond 2016. Thus, it is unknown how USDA will categorize new spending programs, such as the Market Facilitation Program. As a result, CRS does not distinguish between amber box and de minimis spending for the projected years 2017, 2018, and 2019. For a projected breakout, see CRS Report R45940, *U.S. Farm Support: Compliance with WTO Commitments*, by Randy Schnepf.

As an increasing amount of subsidies flow into exemption categories, they are more likely to come under greater scrutiny for their distortive impacts on international markets. This could lead to challenges within the WTO dispute settlement system, or countries could use their own domestic trade remedy procedures to limit imports found to cause injury to their domestic producers.

Certain types of subsidies described in Annex 2 of the AoA—including general subsidies allocated to research, assistance to disadvantaged regions, assistance to promote adaptation to new environmental regulations, and other non-specific payments—were declared exempt from countervailing duty actions under the Peace Clause. It is uncertain whether these subsidies continue to remain non-actionable given that the Peace Clause has expired.[22]

AD and CVD Investigations into U.S. Agriculture

This section provides several examples of anti-dumping (AD) and countervailing duty (CVD) investigations that major U.S. trading partners have conducted into U.S. agricultural products. While the Peace Clause exempted CVD actions on agricultural subsidies, countries have tended to initiate both CVD and AD investigations simultaneously on the same product. The use of AD

[22] WTO, "Subsidies and Countervailing Measures: Overview," notes 1 and 2, December 31, 1999, https://www.wto.org/english/tratop_e/scm_e/subs_e.htm.

and CVD investigations reveal the potential conflicts confronting U.S. agriculture in the international marketplace. They also illustrate the steps that the United States and U.S. industry may take to challenge such investigations.

Mexico

Between 1997 and 2002, Mexico conducted AD investigations into several U.S. agricultural exports, including high fructose corn syrup, live swine, beef, long-grain white rice, and certain Red Delicious and Golden Delicious apples. Each of these cases resulted in affirmative determinations that the U.S. products were being sold in Mexico at less-than-fair value (i.e., were being "dumped") and that this "dumping" had injured Mexico's domestic industries. Consequently, Mexico imposed ADs on each of these products.

In response to the Mexican investigations (except with respect to apples), the United States initiated WTO proceedings to challenge the ADs Mexico imposed. In each case, the United States alleged that the investigating authority violated the WTO Anti-Dumping Agreement[23] by committing several procedural errors (e.g., failure to explain sufficiently how prices of domestic and exported goods were compared) and substantive errors (e.g., failure to calculate the sale price of domestic and exported goods at the same level of trade).[24] The WTO found that Mexico violated the Anti-dumping Agreement during investigations of high-fructose corn syrup and long-grain white rice.[25] Following these determinations, Mexico removed the duties on rice. However, Mexico refused to remove the duties on high-fructose corn syrup until U.S. exporters prevailed in a dispute challenging these duties under the North American Free Trade Agreement (NAFTA).[26] The United States' claims with regard to live swine did not proceed beyond the initial request for consultations.[27]

In addition, U.S. exporters challenged Mexico's ADs on Red Delicious and Golden Delicious apples under NAFTA. The NAFTA panel concluded that the investigating authority erred by, among other things, relying on industry information from eight years prior to the investigation, which did not indicate whether the products were still being dumped or injuring the Mexican industry.[28] After conducting a second investigation, the Mexican authority determined there was

[23] Article VI of the General Agreement on Tariffs and Trade of 1994 outlines the general basis for imposing ADs. A more detailed agreement on the subject, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1994 (known as the Anti-Dumping Agreement), sets forth substantive and procedural rules that apply to these duties.

[24] WTO, *Mexico-Definitive Anti-Dumping Measures on Beef and Rice*, Request for the Establishment of a Panel by the United States, WT/DS295/2, September 19, 2003; WTO, *Mexico-Measures Affecting Trade in Live Swine*, Request for Consultations by the United States, WT/DS203/1, July 13, 2000; WTO, *Mexico-Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Request for the Establishment of a Panel by the United States, WT/DS132/2, October 14, 1998; WTO, *Mexico-Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Request for Consultations by the United States, WT/DS101/1, September 15, 1997.

[25] WTO, *Mexico-Definitive Anti-Dumping Measures on Beef and Rice*, Appellate Body Report, para. 350(b)-(c), WT/SD295/AB/R, December 20, 2005. Although the name of the case includes beef, the United States' complaint about the anti-dumping investigations was limited to rice. See also WTO, *Mexico-Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States*, Panel Report, paras. 8.1-8.2, WT/DS132/R, February 24, 2000.

[26] Food and Agriculture Organization of the United Nations, *FAO Rice Market Monitor*, vol. IX, no. 3, September 2006, 21, http://www.fao.org/tempref/docrep/fao/009/ag040e/ag040e00.pdf; U.S. International Trade Commission, *The Year in Trade 2002: Operation of the Trade Agreements Program*, August 2003, p. 134, note 92, https://www.usitc.gov/publications/332/pub3630.pdf.

[27] WTO, *Mexico-Measures Affecting Trade in Live Swine*, DS203, accessed January 21, 2020, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds203_e.htm.

[28] NAFTA Binational Panel Report, *In the Matter of the Review of the Final Determination of the Anti-dumping Duty*

insufficient evidence to demonstrate injury and terminated the ADs.[29] However, Mexican producers continued to express concerns with imports of U.S. apples. In 2014, Mexico opened another anti-dumping investigation into U.S. apples but terminated it in 2016 after finding that, despite some price discrimination that favored U.S. apples, such discrimination did not cause material injury to the domestic industry.[30]

Canada

In 2005, Canada's investigating authorities, the Canadian Border Services Agency and Canadian International Trade Tribunal, opened AD and CVD investigations into imports of unprocessed grain corn from the United States.

These authorities issued preliminary affirmative findings of dumping and subsidization, injury, and causation.[31] With regard to the CVD investigation, the Canadian Border Services Agency determined that the following U.S. farm programs[32]—all managed by USDA—provided subsidies to producers: direct and counter-cyclical payments, non-recourse marketing assistance loans and loan deficiency payments, and federal crop insurance premium support.[33]

Following these initial findings, the United States filed a request for consultations at the WTO. It alleged that the Canadian International Trade Tribunal violated the Anti-Dumping Agreement and SCM Agreement by failing to address factors that it was required to consider, such as the volume of imports. Additionally, the Canadian International Trade Tribunal allegedly improperly relied on a "supposed correlation between past injury to the Canadian domestic industry and an alleged decline in US domestic price" to prove causation.[34]

After a hearing and receiving submissions from interested parties, including U.S. industry representatives and the Office of the U.S. Trade Representative,[35] the Canadian International Trade Tribunal issued a negative injury and causation finding. Specifically, it found that currency fluctuations caused domestic price changes, and therefore the imported grain corn did not injure

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Investigation on Imports of Certain Red Delicious Apples and Golden Delicious Apples from the United States of America, paras. 54-55, MEX-USA-2006-1904-2, October 15, 2009.

[29] USDA, Foreign Agricultural Service (FAS), *SE Eliminates Duties on U.S. Apples*, March 2, 2010, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=SE%20Eliminates%20Duties%20on%20U.S.%20Apples_Mexico_Mexico_3-2-2010.

[30] FAS, *Mexico Revokes Anti-Dumping Duties on U.S. Apples*, June 7, 2016, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Mexico%20Revokes%20Anti-dumping%20Duties%20on%20U.S.%20Apples_Mexico_Mexico_6-7-2016.

[31] Canadian International Trade Tribunal, *Statement of Reasons, Unprocessed Grain Corn: Preliminary Injury Inquiries*, November 30, 2005, https://decisions.citt-tcce.gc.ca/citt-tcce/a/en/353633/1/document.do; Canadian Border Services Agency, *Statement of Reasons Concerning the Making of a Final Determination of Dumping and Subsidizing Respecting Unprocessed Grain Corn, Excluding Seed Corn (for Reproductive Purposes), Sweet Corn, and Popping Corn, Originating in or Exported from the United States of America*, para. 5, nos. 4214-10 and 4218-20, March 30, 2006, https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1347/ad1347f-eng.html#12.

[32] For more on this issue, see CRS Report R45525, *The 2018 Farm Bill (P.L. 115-334): Summary and Side-by-Side Comparison*, coordinated by Mark A. McMinimy.

[33] For more on this issue, see CRS Report R43448, *Farm Commodity Provisions in the 2014 Farm Bill (P.L. 113-79)*, coordinated by Randy Schnepf; Canadian Border Services Agency, *Unprocessed Grain Corn*, para. 77, Nos. 4214-10 and 4218-20.

[34] WTO, Request for Consultations by the United States, WT/DS/338/1, March 22, 2006.

[35] Canadian International Trade Tribunal, *Unprocessed Grain Corn: Statement of Reasons*, paras. 8-11, May 3, 2006, https://decisions.citt-tcce.gc.ca/citt-tcce/a/en/353480/1/document.do.

or threaten to injure the domestic industry.[36] The United States did not take any further action on its WTO request.

China

In 2009, China initiated AD and CVD investigations into U.S. broiler products, which included various chicken parts. In its AD investigation, China concluded that U.S. producers were selling at less-than-fair value and injured Chinese producers. Based on these findings, China imposed ADs.[37] During its CVD investigation, China determined that direct subsidies to U.S. producers of broiler products injured Chinese producers. Further, it determined that U.S. subsidies to producers of corn and soybeans indirectly subsidized producers of broiler products (i.e., "pass through" subsidies) and injured Chinese producers. China concluded that the subsidies for corn and soybeans financially benefitted U.S. producers of broiler products because such subsidies reduced the cost of feed for the poultry, thereby reducing the cost of production of U.S. broiler products.[38]

The United States challenged these duties at the WTO, claiming China acted inconsistently with the Anti-Dumping Agreement and SCM Agreement. With regard to the Anti-Dumping Agreement, the United States first alleged several procedural errors during the investigation, including China's failure to disclose how it adjusted U.S. producers' records, which allegedly contained mistakes, when calculating the normal value of the exported broiler products. Second, it alleged substantive errors, including that the investigating authority improperly disregarded U.S. producers' records to calculate the imported product's normal value.[39] As to the SCM Agreement, the United States alleged that China failed to require the petitioners who asked China to initiate the investigation to provide non-confidential summaries of any confidential information included in their submissions to the investigating authority.[40] The United States also alleged that China improperly calculated the subsidy amount for several U.S. producers, thereby violating the SCM Agreement, which prohibits imposing CVDs "in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit."[41] In particular, the United States objected to China calculating the size of the pass-through subsidy by multiplying the subsidy by the quantity of corn and soybeans purchased by the broiler product producers. According to the United States, this overstated the size of the pass-through subsidy because the broiler product producers also used the corn and soybeans purchased to feed chickens that did not qualify as "broiler products."[42]

A WTO panel agreed with the United States and ordered China to conduct a new investigation.[43] After this reinvestigation, the United States requested a WTO compliance panel, alleging that

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[36] Canadian International Trade Tribunal, *Unprocessed Grain Corn: Statement of Reasons*, paras. 103-106.

[37] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Panel Report, WT/DS427/R, September 25, 2013.

[38] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, para. 7.257, note 423.

[39] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Request for the Establishment of a Panel by the United States, WT/DS427/2, December 9, 2011.

[40] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Panel Report, para. 7.26.

[41] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Panel Report, para. 7.236 (quoting Article 19.4 of SCM Agreement).

[42] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Panel Report, paras. 7.238-7.242.

[43] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, Panel

China again failed to conduct the investigation in conformity with the Anti-Dumping Agreement and SCM Agreement.[44] The compliance panel found in favor of the United States, after which China withdrew the duties.[45]

In February 2018, China initiated AD and CVD investigations into U.S. sorghum.[46] As part of the CVD investigation, China indicated it would assess whether the following programs provided subsidies: (1) crop insurance, (2) price loss protections, (3) agricultural risk protections, (4) marketing assistance loans, (5) export credit guarantees, (6) market access programs, and (7) the foreign market development partner program.[47] In May 2018, China decided to terminate the investigation, finding that imposing duties "does not conform to the public interest" because it would negatively affect Chinese consumers of livestock products, which rely on sorghum for feed.[48]

European Union

In 2013, the European Union (EU) imposed ADs on bioethanol from the United States, finding that the imported bioethanol was being dumped in the EU and injured EU producers. Because the EU lacked information sufficient to determine how much each ethanol producer's price was below cost, it applied a single AD on all U.S. producers.[49]

A group of U.S. trade associations challenged the EU's decision to impose a single AD before the EU courts. The EU General Court invalidated the EU's decision, stating that it had sufficient information from four U.S. producers to establish individual AD rates for those producers.[50] On appeal, the European Court of Justice (ECJ), which serves as the court of last resort for the EU, set aside the General Court's determination on procedural grounds.[51] After the ECJ issued its

Report, paras. 8.1-8.3.

[44] WTO, *China-Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, DSU Panel Report, WT/DS427/RW, para. 1.4, art. 21.5, February 28, 2018.

[45] FAS, *China Withdraws AD CVD Measures on U.S. Poultry*, GAIN Report No. 18006, March 2, 2018, http://www.agriexchange.apeda.gov.in/MarketReport/Reports/China_Withdraws_AD_CVD_Measures_on_U.S._Poultry_Beijing_China_Peoples_Republic_of_3-2-2018.pdf.

[46] FAS administers foreign market development and promotion programs, which USDA does not consider to be trade distorting.

[47] China Ministry of Commerce, *MOFCOM Announcement No. 13 of 2018 on Countervailing Investigation Against Imports of Grain Sorghum Originating in the United States*, February 4, 2018, http://english.mofcom.gov.cn/article/policyrelease/buwei/201802/20180202710853.shtml.

[48] China Ministry of Commerce, *MOFCOM Announcement No. 44 on Terminating the Anti-Dumping and Countervailing Investigation Against Imports of Grain Sorghum Originating in the United States*, May 19, 2018, http://english.mofcom.gov.cn/article/policyrelease/buwei/201805/20180502746783.shtml; FAS, *MOFCOM Drops AD and CVD Investigations of Imports of U.S. Sorghum*, May 18, 2018, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=MOFCOM%20Terminates%20AD%20and%20CVD%20Investigations%20on%20U.S.%20Sorghum_Beijing_China%20-%20Peoples%20Republic%20of_5-18-2018.

[49] *Official Journal of the European Union*, "Council Implementing Regulation (EU) 157/2013 of 18 February 2013 Imposing a Definitive Anti-Dumping Duty on Imports of Bioethanol Originating in the United States of America," O.J. (L49) 10, February 22, 2013.

[50] Case T-276/13, Growth Energy and Renewable Fuels Ass'n v. Council of the European Union, ECLI:EU:T:2016:340, paragraph 245, June 9, 2016.

[51] Case C-465/16, Council of the European Union v. Growth Energy and Renewable Fuels Ass'n, ECLI:EU:C:2019:155, February 28, 2019.

judgment, the EU performed a review of the anti-dumping duties, which were set to expire. It found a "lack of a likelihood of recurrence of dumped exports" and terminated the duties.[52]

Peru

In July 2009, Peru initiated an AD and CVD investigation into imports of biodiesel from the United States following a "sudden increase in volume of 700% of U.S. biofuels exports" into Peru. Its investigating authority, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI), determined that U.S. biodiesel was being dumped in Peru and injuring its domestic producers. Further, it found that several federal tax incentives for mixers, retailers, biodiesel users, and small producers of biodiesel constituted subsidies that allowed the industry to produce and sell biodiesel at a lower cost than possible without such incentives. Peru concluded that the U.S. tax incentives decreased the Peruvian industry's ability to compete in Peru's domestic market, thereby injuring its domestic industry. As a result, Peru imposed CVD on pure biodiesel and diesel blends greater than 50% biodiesel from the United States.[53] Peru renewed these duties in 2016.[54]

Also in 2009, Peru concluded a CVD investigation into U.S. cotton, ultimately finding that there were no grounds on which to impose duties.[55]

In 2017, Peru launched a CVD investigation into imports of ethanol from the United States.[56] INDECOPI identified 33 federal and state programs as subsidies for the production of ethanol and for the main input of ethanol—corn. These programs included direct transfers and tax benefits for ethanol producers and direct transfers of funds to corn producers, the latter of which INDECOPI classified as pass-through subsidies to ethanol producers.[57] INDECOPI then found that, during the period of investigation, the market share and profits for Peruvian ethanol producers decreased even though the national market for ethanol expanded. Based on these indicators, INDECOPI concluded that the U.S. subsidies, which gave U.S. producers an advantage in the market, injured Peru's domestic industry and therefore imposed CVDs.[58] The United States is appealing this final determination. During the investigation, the Office of the U.S. Trade Representative "worked

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[52] *Official Journal of the European Union*, "Commission Implementing Regulation of 14 May 2019 Repealing the Anti-Dumping Duty on Imports of Bioethanol Originating in the United States of America and Terminating the Proceedings in Respect of Such Imports, Following an Expiry Review Pursuant to Article 11(2) of the Regulation (EU) 2016/1036 of the European Parliament and of the Council," O.J. (L126) 4, May 14, 2019.

[53] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 041-2010/CFD/INDECOPI*, August 16, 2010, https://indecopi.gob.pe/documents/20182/143803/Inf041%20_Biodiesel%20-%20Subvenciones.pdf; INDECOPI, August 17, 2010, https://www.indecopi.gob.pe/documents/20182/143803/Res%20151-2010%20_Biodiesel_Subsidios.pdf; and FAS, *Peru: Biofuels Annual*, p. 7, https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Biofuels%20Annual_Lima_Peru_6-27-2012.pdf.

[54] FAS, *Peru: Biofuels Annual—Peru's Biodiesel Production Expected to Resume Amidst a CVD Investigation of U.S. Ethanol*, September 20, 2017, https://apps.fas.usda.gov/newgainapi/api/report/downloadreportbyfilename?filename=Biofuels%20Annual_Lima_Peru_9-20-2017.pdf.

[55] FAS, *Peru: Cotton Update*, December 15, 2009, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Cotton%20Update_Lima_Peru_12-15-2009.

[56] FAS, *Biofuels Annual*, December 11, 2019, https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Biofuels%20Annual_Lima_Peru_11-04-2019.

[57] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 036-2018/CDB-INDECOPI*, October 31, 2018, para. 432, https://www.indecopi.gob.pe/documents/51763/356074/Inf+036-2018+-+Informe+Final+Etanol+-+VERSI%c3%93N+P%c3%9aBLICA.pdf/b0d217a5-d36a-c211-82a2-8f5b7443f533.

[58] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 036-2018/CDB-INDECOPI*, paras. 10-14.

with U.S. industry to provide critical input for [Peru's] investigation that mitigated the potential harm to U.S. ethanol exports to Peru."[59]

Peru also opened an investigation into U.S. yellow corn in July 2018. INDECOPI assessed the effects of nine federal programs—all managed by USDA—that allegedly constituted subsidies: (1) export credit guarantees, (2) agriculture risk coverage, (3) price loss coverage, (4) marketing assistance loans, (5) federal crop insurance, (6) supplemental coverage option, (7) farm ownership loans, (8) operating loans, and (9) guaranteed farm loans.[60] Peru then issued a preliminary finding that its domestic industry suffered injury from the significant increase in yellow corn imports from the United States. The injury was determined to have resulted from both the imports' increased market share and a sales price that was lower than what domestic producers could offer.[61] Further, after evaluating other economic factors that might be harming the domestic industry (e.g., limited access to credit), INDECOPI determined that the evidence suggested that the injury to Peru's industry was caused by imports of U.S. yellow corn.[62] In January 2020, however, INDECOPI determined that the significant increases in imports of yellow corn did not significantly impede increases in domestic sales prices or cause significant deterioration in the economic and financial performance of the domestic producers. As it found no injury to the domestic producers, INDECOPI recommended that the investigation conclude without imposing CVDs.[63]

Challenges to U.S. Agricultural Products: A Broader View

These AD and CVD disputes highlight several patterns and nuances to trade remedy cases involving agricultural products.

First, U.S. trading partners began conducting the CVD actions against U.S. products in 2005, soon after the expiration of the Peace Clause (Article 13 of the AoA), which had exempted trade-distorting agricultural subsidies from CVD actions if the subsidies met certain conditions.[64] CVD actions against non-agricultural products were common prior to 2005, but the Peace Clause's expiration has increased the number of such actions concerning agriculture. Moreover, the United States, Japan, and the EU account for the bulk of global government outlays to support agriculture. Many emerging economies and developing countries do not have notable outlays of

[59] Office of the U.S. Trade Representative, *2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program*, March 22, 2019, https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf.

[60] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 026-2018/CDB-INDECOPI*, July 12, 2018, para. 7, note 7, and para. 107, https://www.indecopi.gob.pe/documents/1902049/4099489/INFORME+026-2018.PDF.pdf/3df6d1c7-49d3-d75c-0a16-29e7aaa435bd.

[61] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 026-2018/CDB-INDECOPI*, paras. 212-18.

[62] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 026-2018/CDB-INDECOPI*, paras. 255-57.

[63] Technical Secretariat of the Supervision Commission of Dumping and Subsidies, *Informe No. 002-202/CDB-INDECOPI*, January 8, 2020, paras. 926-39, https://www.indecopi.gob.pe/documents/1902049/3783049/INFORME+002-2020CDB.PDF/a5e8ad0c-5c66-e00f-db19-36ea17644a9f.

[64] Note that the expiration of the Peace Clause affected countervailing actions because agricultural subsidies were no longer protected after its expiration. Anti-dumping actions are not based on subsidized exports and are not affected by the expiration of Peace Clause.

trade-distorting support to their farm sectors and may see developed-country agricultural-support practices as endangering the well-being of their domestic farm sectors. This dynamic may be seen in the CVD cases discussed above that Peru, a developing country, initiated.

Second, trade remedy actions against U.S. imports often involve repeated or multiple investigations into the same U.S. products (e.g., Mexican investigations into apples and the Peruvian and Canadian investigations into corn) and reflect long-standing tensions between trading partners about perceived advantages that producers from some countries have over others.

Third, as seen in Peru's investigations into ethanol and China's into broiler products, at least some WTO members have argued that subsidies to raw inputs (e.g., corn and soybeans) should be considered part of the subsidies to the investigated products (i.e., pass-through subsidies). The United States has used the concept of pass-through subsidies in its CVD investigations in the past, and trading partners have complained about this in several WTO disputes.[65]

Fourth, national investigating authorities often open, at the request of domestic industries, both AD and CVD investigations into a product at or near the same time (e.g., China's investigation into broiler products). This may reflect uncertainty as to whether perceived injury to domestic producers results from subsidies provided by a government or public body or rather from industry practices that lead to sales at less-than-normal value or price discrimination. It may also reflect a litigation strategy designed to maximize a domestic industry's chances of obtaining more favorable market conditions by imposing ADs, CVDs, or both.

Fifth, the United States and its industries may challenge ADs and CVDs imposed on their products through multiple avenues. When a country conducts an AD or CVD investigation, the United States and its industries may seek to represent their interests by participating in the investigation. During the proceedings, the U.S. government or domestic industry may provide evidence justifying mitigation of the duties ultimately imposed or the imposition of no duties. U.S. exporters may also challenge finalized AD and CVD measures under NAFTA (where relevant), or, if it enters into force, the United States-Mexico-Canada Agreement. The United States could also bring a claim via the WTO dispute settlement process, alleging violations of the Anti-Dumping Agreement or the SCM Agreement. However, as mentioned above, the WTO's Dispute Settlement Body currently lacks a quorum of members on its Appellate Body, and thus it cannot hear appeals of panel decisions.

Sixth, the legal issues raised by the United States about how foreign investigating authorities have conducted their AD and CVD investigations may raise questions about the United States' own practices. For example, some of the practices that China used to investigate U.S. broiler products, including China's decision to ignore historical cost allocation from foreign producers, were "modeled on U.S. [Department of Commerce] practices."[66]

The United States is not the only WTO member to face questions about, and challenges to, its agricultural programs. The United States has initiated several AD/CVD investigations into the

[65] See, for example, WTO, "United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China," Appellate Body Report, WT/DS379/AB/R, March 25, 2011; and WTO, "United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada," Appellate Body Report, WT/DS257/AB/R, February 17, 2004.

[66] Thomas J. Prusa and Edwin Vermulst, "China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States: How the Chickens Came Home to Roost," *World Trade Review*, vol.14, no. 2 (2015), pp. 287, 332.

agricultural programs of other WTO members, including hard red spring wheat from Canada, ripe olives from Spain, and tomatoes from Mexico.[67]

The U.S. CVD case against Spanish olives may raise concerns about U.S. practices. The EU has expressed concerns that even when the EU has followed its WTO commitments regarding agricultural subsidies, its major trading partner—the United States—has questioned its use of non-trade-distorting subsidies. It further warns that "US duties could open a Pandora's box in connection with domestic support and pave the way for further unilateral measures on agricultural imports from the EU. The United States itself is an important user of similar agricultural support schemes, such as the Environmental Quality Incentives Program and direct payments by the Farm Service Agency, as notified to the WTO."[68] In other words, the EU is suggesting that U.S. payments for conservation programs, outside the United States' WTO amber box commitments, could be subject to CVD investigations.

Issues for Congress

Since December 2019, the WTO dispute settlement system has been limited in its ability to adjudicate disputes due to an insufficient number of members serving on the Appellate Body. As a result, U.S. trading partners may be further inclined to use their domestic trade remedies to address their concerns instead of raising the issues in direct challenges before the WTO. For example, instead of challenging a subsidy as violating WTO commitments, a WTO member may choose to challenge the effects of such a subsidy through a domestic CVD investigation. In particular, given increasing levels of U.S. support for the farm sector, U.S. farm support programs may increasingly become a target for CVD investigations.

A country might also justify relying on its national AD and CVD procedures because of cost considerations. The cost of bringing a case before domestic legal institutions might be considerably less than initiating a challenge through the WTO's dispute settlement process. While any national authority's AD and CVD investigations can be challenged before the WTO, a national authority can easily find itself spending significant resources defending its determinations in addition to the resources expended during the domestic investigation process.

The United States and other members have indicated an interest in WTO institutional reform that could address dispute settlement, as well as other issues pertinent to agricultural trade. First, Congress may consider oversight on whether U.S. negotiating objectives adequately balance maintaining multilateral disciplines on agriculture subsidies, a longtime U.S. objective, with protecting U.S. agricultural exports from potentially damaging AD and CVD investigations initiated by U.S. trading partners.

Second, Congress could consider whether the U.S. approach to AD and CVD investigations should be revised. As mentioned above, some of the practices for AD or CVD investigations of agricultural imports adopted by U.S. trading partners—and that the United States has successfully challenged before the WTO—are similar to U.S. practices. Congress may consider whether the

[67] See Request for the Establishment of a Panel by Canada, *United States-Determination of the International Trade Commission in Hard Red Spring Wheat from Canada*, WTO Doc. WT/DS310/2 (June 11, 2004) (alleging violations of Anti-Dumping and SCM Agreements); Request for Establishment of a Panel by the European Union, *United States-Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WTO Doc. WT/DS577/3, May 17, 2019 (alleging violations of GATT Article VI and the SCM Agreement); "Fresh Tomatoes from Mexico: Suspension of Anti-Dumping Duty Investigation," 84 *Federal Register* 49,987, September 24, 2019.

[68] European Parliament, "US Duties on Imports of Spanish Ripe Olives," March 2019, http://www.europarl.europa.eu/RegData/etudes/ATAG/2019/635558/EPRS_ATA(2019)635558_EN.pdf.

practices in U.S. investigations should be modified to minimize their exposure to analogous challenges in the future.

Third, the United States, Canada, and Mexico have created a third method of settling disputes over AD and CVD determinations in NAFTA and its successor, the United States-Mexico-Canada Agreement. This arrangement, unique among the United States' trade agreements, involves binational panels that have authority to issue binding decisions. This system, which came about due to concerns that domestic courts hearing challenges to AD/CVD determinations might be biased in favor of their own countries' industries, has its critics.[69] Congress could consider whether a binational panel review system would be desirable in future trade agreements.

Fourth, Congress might review whether U.S. farm program spending fully complies with U.S. spending commitments under the AoA. In this regard, one option for Congress could be to limit the Administration's use of its spending authority under the Commodity Credit Corporation Charter Act,[70] which was used to make large, ad hoc trade aid payments to the U.S. farm sector during 2018 and 2019 without congressional input or oversight.

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[69] See, for example, John S. Baker Jr. and Lindsey Keiser, "NAFTA/USMCA Dispute Settlement Mechanisms and the Constitution," *University of Miami Inter-American Law Review*, vol. 50, no. 1 (2019).

[70] For more on this issue, see CRS Report R44606, *The Commodity Credit Corporation: In Brief*, by Megan Stubbs.