



Título del Trabajo:

THE UNITED STATES- ARGENTINA HONEY CASE AND
THE CASE AGAINST ANTIDUMPING LAWS

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I INTRODUCTION

The failure of the Fifth Ministerial Conference in Cancun² was not only a setback for the Doha Round, but also for the World Trade Organization's efforts to enhance international trade as means to growth and development. The group of developing countries led by Brazil, China, India and South Africa, known as G-22, made the first step towards a new balance in the multilateral trading system. Agriculture was considered a key issue if the new Round was meant to succeed.

It will certainly take time and a great deal of political will to get countries back to the negotiating table, but the benefits will outweigh the costs. Substantial poverty reduction in the world will be achieved by tackling agricultural protection. Poor countries mainly produce agricultural products and intensive labor products such as textiles usually facing protective – developed markets. Subsidies in the OECD account for more than US\$ 300,000 million targeted at agricultural products originating in developing countries. Annual subsidies at the OECD are equivalent to six times the direct economic aid those countries provide for the poor countries.³ Developing countries are responsible for seriously committing themselves and reducing agricultural barriers – tariff and non- tariff – in order to facilitate trade liberalization towards an equity free trade world.

Anti-dumping⁴ laws and its enforcement continue to be a major problem when it comes to international trade relationships as they turn into non-tariff barriers.⁵ Even when the WTO system provides guidelines and some discipline to AD laws, it fails to prevent their abuse by certain country members. Therefore, AD laws remain an important issue, not only at the multilateral level, but also at the bilateral trade level.⁶

Argentina and the US have a conflicting trade agenda. Agricultural products are at the centre of disputes because Argentina is a very competitive country and the US heavily protects its domestic industries.⁷ In one of the most recent cases brought against Argentine exports, Argentine beekeepers faced the powerful and well organized American Honey industry. In spite of a worldwide

² Mexico, September 2003

³ Alieto A. Guadagni, Executive Director at the World Bank, *World Trade Liberalization and the Millennium Development Goals*, Conference at the Colegio de España, Paris, France (September 2003)

⁴ Hereinafter AD

⁵ We will not address subsidies and countervailing duties (CVD) but most of the critics of AD laws apply to subsidies and CVD

⁶ Even when we advocate for a successful multilateral trade negotiations we are completely aware of the risks of stagnation in the multilateral process. The US is willing to pursue bilateral or regional trade agreements instead. Robert Zoellick made it perfectly clear when he argued that while WTO country members analyze the future, the US would not wait; and it would pursue free trade with countries willing to do things. See article in *La Nacion*, Argentine newspaper, September 24th, 2003; available at: <http://www.lanacion.com.ar> (last visited 9/24/03)

⁷ Some of the agricultural products are: sugar, cheese, peanuts, oranges, lemon, honey, etc.

recognition of the Argentinean honey industry's competitiveness, steep antidumping duties were imposed against honey from Argentina by the US Department of Commerce on December 10th, 2001.⁸

This paper will focus on the Anti-dumping honey case between Argentina and the US, highlighting some trade and development aspects of those measures against Argentina as well as problems with the law enforcement - mainly at the US Department of Commerce level.⁹ General conclusions will be drawn from the honey case to argue that the US has abused its AD laws and that they lack economic and political sense.

For a better understanding, this paper is divided as follows: Part II contains a general overview on international trade, development and antidumping laws; Part III is dedicated to the US-ARGENTINA AD honey- dispute and comments on trade and legal aspects of the case; Part IV addresses the impacts of the antidumping measures of the US-ARGENTINA honey case; Part V assesses the US antidumping law considering the: (i) Antidumping law and its administration by the Federal Government; (ii) main flaws in AD law enforcement; (iii) dumping margin calculation, methodology, the 'facts available' standard, the extent and form of requested information by the administrative agencies to foreign companies and dumping vs. price discrimination; Part VI includes few recommendations to improve the Antidumping law enforcement; and the conclusion is in Part VII.

II GENERAL OVERVIEW ON INTERNATIONAL TRADE, DEVELOPMENT AND ANTIDUMPING LAWS

Broadly defined, antidumping is international price discrimination. It happens when an exporter sells merchandise in the importing country at a price significantly below that at which it sells like merchandise in its home country. A stricter definition states that antidumping occurs when the exporter sells its merchandise in the importing country at a price below its costs of production. For the practice to be punished imports must cause or threaten to cause material injury to an established industry in the importing country or retard the establishment of a domestic industry.¹⁰ The importing country may impose an antidumping duty on the dumped merchandise in the form of a dumping margin.¹¹

⁸ Julio J. Nogues, *US Contingent Protection against Honey Imports: Development Aspects and the Doha Round*, revised draft, World Bank Policy Research Working Paper 3088, June 2003, p.1, available at: <http://www.worldbank.org> (last visited September 18th, 2003).

⁹ Even when the International Trade Commission has an important role in the process – to determine the existence of injury to domestic industries caused by exports – most troublesome aspects of enforcement are at the DOC level.

¹⁰ Raj Bhala, *Rethinking Antidumping Law*, 29 GW J. Int'l L. & Econ. 1, 4,9 (1995)

¹¹ The dumping margin is the difference between the prices for the merchandise in the exporter's home market and the importer country.

The underlying philosophy of AD policy has been supported by arguments that AD laws are: (i) "vital to the maintenance of fair trade because they deter and offset the value of predatory dumping and subsidization in the US market by foreign governments or exporters";¹² (ii) useful as a bargaining chip to countries with trade barriers to the American products; (iii) useful to stop American job losses due to foreign – cheaper – imports; etc.

However, the evidence does not support these arguments. As it will be discussed later in this paper, the predatory argument is a weak one, and even weaker at the international level, and the methodology for the calculation of dumping margin is inaccurate and in many aspects divorced from basic accounting practices. Because of these inaccuracies and the idiosyncrasies of the laws, competitive companies are often found guilty even when they were not dumping in the US market.

With regard to the use of AD laws as a bargaining chip, evidence suggests that they have not been an effective dissuasive tool so far. To the contrary, empirical evidence demonstrates that the traditional users – such as the US, Australia, the EU and New Zealand-, are facing a growing group of new users – namely South Africa, Mexico, Brazil, Argentina.. "As the number of users of AD cases filed annually grow, it is increasingly difficult to identify the motives of the users of AD and to argue that increased usage signals merely an increase in unfair trade".¹³ Moreover, an analytical study including AD cases filed to the GATT/WTO during the 80's and 90's, rejects the notion that the rise in AD activity can be solely explained by an increase in unfair trade.

In fact, strategic motives are significant in the explanation for the upward trend in the use of AD laws.¹⁴ Specifically, three-quarters of all AD filings patterns for the 1980 – 1998's period are consistent with the 'club effect' and with 'retaliation motives'. Moreover for traditional users both economic and strategic motives are important but for the new users strategic motives are more important than the economic ones.¹⁵

Actually, antidumping is the most prevalent instrument for imposing new import restrictions. In the 1980's AD laws were used by developed countries; however after WTO agreements came into force in 1995, developing countries

¹² Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. Int'l L. & Bus. 491, 24 (Spring 1993)

¹³ Thomas J. Prusa – Susan Skeath, *The Economic and Strategic Motives for Antidumping Filings*, Working paper 8424, National Bureau of Economic Research, p. 1 (August 2001) Available at: <http://www.nber.org/papers/w8424>

¹⁴ *Id.* Strategic motives such as being part of the 'club'(the country has previously used AD protection) and 'retaliation'(referred to a country filing AD specifically against those countries that had previously named it in the past)

¹⁵ *Id.*, p.23. These findings are consistent with evidence found by Bloningen and Bown in Bloningen Bruce A., *US Antidumping Filings and the threat of Retaliation*, Mimeo, University of Oregon (2000) and Bown, Chad P., *Antidumping in the US: The Channels of Foreign Retaliatory Threats*, Mimeo, Brandeis University (2001) respectively.

have been frequently using them.¹⁶ Furthermore, per dollars of imports, ten developing countries have initiated at least five times more AD cases than the US, historically one of the most frequent users. When comparing countries, transition economies are the ones with the highest intensity of AD cases against them while developed economies the least intensity. "As compared to developed economy exporters, developing economy exporters are almost three times more intensely targeted".¹⁷

The AD usage has been under great criticism from both economic and legal points of view. In a significant number of AD cases, the actual problem is a loss of comparative advantage and economists generally agree that - except for predation - dumping is basically harmless for the importing country. Moreover "consumers in the importer country benefit from the lower price of imported goods. Empirical evidence suggests that these gains outweigh the costs to producers in the importing country, measured by reduced profits and to their employees in terms of reduced employment".¹⁸

Many scholars advocate for a repeal of AD laws, asserting that the laws are unnecessary: injury to an industry caused by imports can be better addressed by safeguard or escape laws; AD laws create perverse incentives for the exporters and they have a chilling effect on competition.¹⁹

In addition, there is strong evidence of abuse in the law enforcement and inconsistency with the rationale of antitrust law and economic theory.²⁰ Specifically a biased administrative methodology usually finds dumping when a fair accounting even of pricing below cost would not and most of the import sales allegedly unfair under AD rules would have never been questioned under competition law if the case involved a domestic company selling in the domestic market.²¹ In other words, most of cases would have failed the most

¹⁶ Developing countries since the Uruguay Round (1995-99) initiated 559 cases, developed countries 463 and even transition economies entered cases: Poland, Czech Republic and Slovenia. See, J. Michael Finger, Francis Ng and Sonam Wangchuk, *Antidumping as Safeguard Policy*, December 2001, available at: <http://www.worldbank.org> (last visited September 14th, 2003)

¹⁷ *Id.*, p.6 – Underlined is mine.

¹⁸ Raj Bhala, *Rethinking Antidumping Law*, 29 GW J. Int'l L. & Econ. 1, p 4, (1995)

¹⁹ When an AD case is filed, customers and importers face uncertainty on possible liability and importers who might be harmed by dumping penalties hesitate to do business with a foreign supplier under investigation. Not to mention the additional obstacle posed by the lack of due process and few chances to successfully counter argue the dumping charges.

²⁰ AD policy triggers incentive for foreign producers to raise the prices to lower the probability of being hit by AD action and allows domestic producers to increase their prices. It also result in efficiency losses since investigated companies must shift their resources from productive activities to defensive, asset protecting activities. For detailed explanation See, Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. Int'l L. & Bus. 491 (Spring 1993) pp 20-24, available at Lexis Nexis (last visited August 10th, 2003)

²¹ Particularly interesting is the predatory pricing (pricing below costs of production) argument since much of the theory upon which AD policy is built takes for granted that predatory pricing exists and is widespread. First of all low prices benefit consumers and encourage competition. Secondly, companies selling below costs of production lose money in every sale and help create new low cost competitors. Unless there is evidence of the company's ability to afford selling at low prices, gain market share, drive out competitors to raise prices once the competitors are out of the market (recoup), low prices benefit

rigorous standards of evidence applicable under the antitrust law. Moreover, there is evidence that constructed cost methodology overstates profits rates, that data on selling below costs is based on questionable measures of costs and when accurate data is available there is no proof of same low prices available in the home markets.

All these findings support the statement that the Uruguay Round Agreement did not change the nature of the AD practice. Even when the WTO Agreement set out some guidelines to country members and AD is permitted not a mandatory practice, the abuses of these laws make neither economic nor political sense.²² Specifically, the text of post Uruguay Round AD law is ambiguous, and pays no attention to the cost structure of petitioners and respondents. It has been acknowledged that petitioners in an AD case have numerous opportunities to manipulate a dumping margin calculation to obtain the maximum margin, that the injury provisions allow petitioners to successfully claim that injury was caused by dumped imported merchandise, and that revocation of an AD order is difficult to obtain.²³

The Doha Round and its Development Agenda should be the appropriate forum to discuss and - if not abandon – the introduction of amendments to AD laws aimed at significantly reducing the discretionary practices of the country members when enforcing the AD rules as well as to make them consistent with the economic theory.

This step will be a good starting point to enhance a freer trade multilateral system consistent with a Development – Pro-Poor - Agenda. There is sufficient cross – country evidence that trade liberalization and openness to trade increases the growth rate of income and output. Moreover some studies suggest that ‘trade does seem to create, even sustain higher growth’.²⁴ Last but not least, there is a relevant link between trade, growth and the poor. ‘Trade liberalization can be expected to help the poor overall given the positive association between openness and growth’.²⁵

The Doha Round and its promise for development are at stake so far. Unless trade barriers in the agricultural sector are slashed substantial reduction in global poverty will not be achieved.²⁶ The explanation is pretty straightforward: most of the world’s poor work in agriculture, 70% of the world’s poor live in rural areas and earn their income from agriculture and most of the world’s protection is aimed at agriculture which is among the most

competition. Moreover, “as long as trade barriers are non-existent, it is impossible to drive out all competitors and capture the market”, For details See: Robert W. McGee, op.cit.

²² Economically they harm consumers and import and job related industries. From a public policy point of view they are inappropriate as they just benefit small powerful group of interest.

²³ Raj Bhala, *Rethinking Antidumping Law*, 29 GW J. Int’l L. & Econ. 1, p 19 and subseq (1995)

²⁴ Bernard Hoekman, Constantin Michalopoulos, Maurice Schiff and David Tarr, *Trade Policy*, p.2, available at: <http://www.worldbank.org> (last visited August 14th, 2003)

²⁵ *Id.*

²⁶ Other crucial issues to development outcomes are: labor-intensive manufactures; services; trade facilitation, and special treatment for developing countries.

distorted sectors in international trade. "Reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade"²⁷...

Protection measures include: subsidies, tariffs and non-tariff barriers. The abuse of AD laws is clearly a non-tariff barrier in all the economy sectors including the agriculture sector which - by the way - is one competitive area for various developing countries.

In fact, developing countries not only are highly competitive in their agricultural sector but also they do not dump their products posing a challenge to protected industries in developed countries; as is the case with Argentina. Because the real concern with dumping is the protection of domestic industry from international competition²⁸ AD laws turn into the perfect tool to drive efficient exporters out of the developed markets.

To set an example, the U.S. is one of the world's leading sources of dumped agricultural commodities such as: wheat, corn (maize), soybean, rice and cotton. Studies show that the levels of dumping hover around 40% for wheat, between 25% and 30% for corn (maize), 30% for soybeans, 20% for rice and - in 2001 - 57% for cotton. In other words, this means that wheat is sold 40% less than it costs to produce and cotton 57% less!²⁹

There is no doubt that developing countries are not likely to succeed in their efforts to compete in the world markets if all these restraints stay in place.

It is time for developed countries to take the leadership and move forward on the international trade agenda. As it has correctly been pointed out: "Despite the fact that protection, tariff peaks and antidumping measures shield powerful lobbies, rich country leadership in reducing this protection is a prerequisite for a pro-poor development outcome".³⁰

Reality –however- seems to go the opposite way. The U.S. – Argentina honey case is a valid example.

III THE US-ARGENTINA HONEY CASE³¹

III. 1. TRADE ASPECTS OF THE CASE

III. 1. a) Argentine honey and global markets.

²⁷ Keep in mind that protection facing developing country exporters in agriculture is 4 to 7 times higher than in manufactures in the North and 2 to 3 times higher in developing countries. For details see, GEP, note 7. Underlined is mine.

²⁸ *Id.*

²⁹ Institute for Agriculture and Trade Policy, Unites States Dumping on Agricultural Markets, pp 2-3; available at: <http://www.iatp.org> (last visited September, 2nd, 2003)

³⁰ *Id.*

³¹ As mentioned before honey imports from Argentina were imposed antidumping duties ranging from 32.6% to 183.8%. A countervailing duty was also imposed accounting for 5.9% (due to the Argentinean reimbursement tax program). We will not address the issue of CVD in this paper..

Argentina holds one of the leading positions in the honey production industry. The Latin American country had been considered as the world's largest exporter as far as back in 1974. Historically, Argentina has been a quality supplier due partly because of its experience in the European and Japanese honey markets.³²

For the year 2000, Argentina was the major exporting country – 93,000 tons- among the leaders; namely Canada, China, Germany, Mexico and the US.³³ Its international competitiveness has been acknowledged by several studies and statistical data.³⁴ Argentina accounted for 14% of honey supply in the international market in 1990 and increased its exports up to 24% of the world market in 2000. This increase is higher than China's³⁵ for the same period, as Chinese exports only increased 17%.³⁶ Moreover, in 2002 – in the first part of the year - the tonnage exported by Argentina surpassed that of China by 74%.³⁷

Argentine honey exports growth accelerated from 1996. According to one expert, it can not be exclusively explained by the 1995 AD measure imposed by the US on the Chinese exports, but also to the competitiveness of the industry.³⁸

On the other hand, the US has become more dependent on imports, despite Government supported programs being in place for decades, in addition to AD measures against China.

According to FAO statistics, the average import- production ratio was 41% during 1989-1991 and for 1998-2000 period that figure went up to 80%. The increase occurred against a stagnant output. In terms of production quantities, for the 1989-1991 period, production was 90,000 tons while in 1998-2000 production was 96,423 (7% increase). "The US stagnation occurred in spite of subsidies and protectionist policies while Argentina' growth happened quite naturally".³⁹

In terms of quality, differences in natural comparative advantage can explain the relative trade performance between the US and Argentina: the overall score for Argentina is 9.0 and for the US is 4.5, taking into consideration taste, color, drums, purity and crystallization.⁴⁰ According to US importers, Argentine honey is of a very high quality and some packers prefer it to

³² Alberta, Agriculture, Food and Rural Development, *Competition for World Honey Markets*, Alberta, Canada, April, 2001, p.51, available at: [http:// www.agric.gov.ab.ca](http://www.agric.gov.ab.ca) (last visited October 8th, 2003) Hereinafter, Alberta Study

³³ Supra note 7, p.3

³⁴ See FAO data base

³⁵ China was the most important world exporter in 1990-2000 accounting for one third of world exports.

³⁶ Supra note 7 pp2-3

³⁷ *Id.*

³⁸ For details see, Julio Nogues, *op.cit.*

³⁹ Supra note 7, p.5

⁴⁰ Supra note 7, p.6

domestic honey as it is clearer.⁴¹ In conclusion, Argentina is cost competitive, produces good quality honey and markets its product very well.

III 1. b) The US honey industry.

Honey production is a declining industry in the US and has enjoyed governmental protection for over 50 years. Protection has taken many forms, including loan programs, and guaranteed purchase programs. These programs have introduced great market instability because the main goal of the programs was to diminish risks to producers by eliminating the risks so that they could sell their product even when prices were declining. The 1995 Farm Bill, the 2002 Farm Bill and the Agriculture Appropriation Act (2001) contain protection measures to support American honey producers at the expense of American consumers and jobs in import – related businesses. The Agriculture Appropriation Act established an implicit subsidy, at the rate of 25%, at the time of the program's introduction.

In addition to the aforementioned statutory protection, in 1994, the American Beekeeping Federation (ABF) and the American Honey Producers Association (AHPA) requested an investigation against China's imports alleging dumping practices. After a preliminary affirmative injury determination, China and the US concluded an 'agreement' and the investigation was suspended. As a consequence, China restricted its exports to the US market to a maximum of 20,000 tons of honey per year. A quick look at statistical data from the previous three years supports the statement that the agreement meant 30% less Chinese honey exports to the US. The five - year agreement expired on August 1st, 2000. In September 2000, the industry requested another antidumping investigation against China and Argentina⁴² .⁴³ At that time Argentina and China's exports accounted for 79% of US honey imports.⁴⁴

III 2. LEGAL ASPECTS OF THE CASE

III 2 a) Background:

Following the domestic industry request, the AD investigation against honey from Argentina was initiated.⁴⁵ On May 11, 2001 the DOC issued the Preliminary Determination of sales at less than fair value against the Argentine exports.⁴⁶ days after the publication of the preliminary determination in the

⁴¹ Larry Rother, *US and Argentina Fight over Honey*, New York Times, March 5, 2002 available at www.globalpolicy.org (last visited October 9th, 2003)

⁴² As mentioned, a subsidy investigation of the Argentine product was also requested.

⁴³ For a historical overview see, Julio Nogues, *op. cit.*, pp 7-10

⁴⁴ Data available at <http://www.beekeeping.com>

⁴⁵ The applicable and cited Statutes and Regulations are those provisions in the Tariff Act of 1930 - with amendments effective January 1, 1995- and regulations codified at 19 CFR part 351 (2000)

⁴⁶ See, Notice of Preliminary Determination of Sales at less than Fair Value: Honey from Argentina, 66 FR 24108 (May 11, 2001)

Federal Register.⁴⁷ The period of investigation (POI) was July 1, 1999 through June 30, 2000 covering three main honey exporters: Radix S.R.L. (Radix), Asociacion de Cooperativas Argentinas (ACA) and ConAgra Argentina⁴⁸ and 12 randomly selected beekeepers unaffiliated with the exporters.

The products covered by the investigation were: natural honey, artificial honey containing more than 50% natural honey by weight, preparations of natural honey containing more than 50% natural honey by weight and flavored honey.⁴⁹ The subject merchandise included all colors and grades of honey whether in liquid, creamed, comb, cut comb or chunk form and whether packed for retail or in bulk form.

After the Department of Commerce (DOC)⁵⁰ issued the preliminary determination, the petitioners, ACA and Radix⁵¹ submitted case briefs. Rebuttals from all the parties were also submitted to the DOC for consideration, and a public hearing was held on August 28, 2001. Specifically on June 11, 2001 and June 18, 2001 respondents ACA and Radix submitted additional factual information regarding the cost of production of honey in Argentina, which was disputed by the petitioners. The DOC verified responses submitted by ACA and Radix at their respective headquarters in Buenos Aires during June 2001. On August 24, 2001 a proposed agreement of suspension was initialed by the respondents and a representative of the DOC. After comments On November 21, 2001 the DOC issued the Amended Final Determination of Sales at Less than Fair Value on Honey from Argentina⁵²

III 2 b) Main issues disputed at the DOC

As in most of the antidumping investigations, the DOC's assessment of the dumping margin is troublesome, particularly when it comes to estimating the costs of production (COP). The main issues in this case were: (i) the use of facts available and adverse facts standards; (ii) the calculation of COP; (iii) treatment of the middlemen reseller expenses; (iv) calculation of the general and administrative (G&A) and indirect expenses; (v) calculation of the testing expenses; (vi) accounting for differences in physical characteristics in merchandise; (vii) the German warranty expenses; (viii) the inventory

⁴⁷ 66 FR 30143 (June 6th, 2001)

⁴⁸ Others were: Honey Max SA, Nexco SA, Cia Europea Americana SA, Foodway SA, Cia Inversora Platense SA, Miel Ar, Miel Gibbons and Times SA.

⁴⁹ Memorandum to Faryar Shirzad Assistant Secretary from Joseph A. Spetrini Deputy Assistant Secretary AD/CVD Enforcement Group III; 2001 WL 1172645 (ITA). Pages are not available for the public version of the document. Hereinafter, *Memorandum*

⁵⁰ Hereinafter DOC

⁵¹ Radix was allowed to re-enter the investigation on June 12, 2001 after having withdrawn on May 1, 2001

⁵² 66 FR 58434

carrying costs; and (ix) the level of trade (LOT) adjustment.⁵³ Following is a more detailed discussion of each issue.

The use of facts available and adverse facts available⁵⁴

Petitioners requested the DOC to draw an adverse inference against respondents regarding the COP data used in the calculation of dumping margin alleging that respondents: (i) willfully withheld cost information demanded from the Agency; (ii) untimely filed requested information, and (iii) submitted unreliable information that was prepared at the request of the Argentine Secretary of Agriculture. Respondents rebutted those allegations. ACA contended that they fully cooperated with the DOC by responding within the applicable deadlines to the Agency's numerous requests and by facilitating the verification process in Buenos Aires.⁵⁵ Moreover, ACA argued that even when ACA had no control over the beekeepers and could not oblige them to keep verifiable records and respond to the DOC, ACA assisted the DOC's attempts to acquire COP information from the selected beekeepers. In other words, ACA stated that it had acted to the best of its ability, as required by law. The DOC acknowledged that independent beekeepers are members of a highly fragmented industry and that exporters have no control over them, and that ACA and Radix fully participated in the investigation.⁵⁶ This was crucial to the respondents in order to be exempted from the application of an adverse facts inference. Respondents argued that it was impossible to gather reliable, verifiable and consistent information from the twelve unaffiliated beekeepers.⁵⁷ However, adverse facts were attributed to ConAgra pursuant to

⁵³ Other issue was the tax reimbursement. We will not discuss it since it is part of the CVD outside the scope of this paper.

⁵⁴ Section 776 (a) of the Trade Act 1930 provides that: "if any interested party or any other person—(A) withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c) (1) and (e) section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information can not be verified as provided in section 782 (i), the administering authority and the Commission shall, subject to section 782 (d), use the facts otherwise available in reaching the applicable determination under this title". The statute also requires that certain conditions be met before the Department may resort to the facts otherwise available. Where the Department determines that a response to a request for information does not comply with the request, section 782 (d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782 (e) of the Act disregard all or part of the original and subsequent responses, as appropriate. Section 782 (e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the appropriate requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that can not be used and if the interested party acted to the best of its ability in providing the information. Where all these conditions are met, and the Department can use the information without undue difficulties, the statute requires it to do so.

⁵⁵ Over 200 pages in responses

⁵⁶ 2001 WL 1172645 (ITA); A- 357-812 Investigation, Public Document, Comment 1, October 4, 2001

⁵⁷ See, Honey from Argentina, Investigation No.a-357-812, Reply brief on behalf of Asociacion de Cooperativas Argentinas, p. 1, Wilmer, Cutler & Pickering, August 14, 2001. Respondent alleges that

section 776 (b) of the Act, as the record did not reflect cooperation by that particular respondent.

(ii) The calculation of COP

Following the statutory proceedings, the DOC first attempted to estimate costs by obtaining information directly from honey producers. The main obstacle to doing this in the instant case was locating the producers, because in Argentina honey producers are "independent, family – business, located in inaccessible areas of the country".⁵⁸

Not surprisingly, many of the producers were difficult to locate. The DOC, however, attempted to establish a sample of twelve beekeepers by sending its sophisticated, detailed questionnaire in English to the beekeepers, requiring specific information about each business and sales of honey. It must be noted that beekeepers, for the most part, are ordinary people who live in the rural areas of Argentina and do not have foreign language skills or accounting knowledge.⁵⁹ Needless to say, the DOC's attempt to gather beekeeper COP data failed.

Unable to obtain information directly from the beekeepers to estimate the COP, the DOC, used its discretionary powers to reconstruct costs and assess a dumping margin. While the DOC could have used market-oriented approaches such as export prices to markets other than the US – specifically to Germany, where Argentina exports heavily,⁶⁰

The DOC used instead an inaccurate methodology and based its numbers on an unreliable study of honey production to come up with a constructed value (CV) of the subject merchandise. The DOC based its COP estimations on a "second rate journal called *Gestión Apícola* that had been print for a brief number of months before the petition was filed and has by now gone out of print".⁶¹ Nonetheless, that journal was not only characterized as 'best available evidence' by the DOC, but also the only piece of evidence that the DOC used. The Agency characterized the studies published by the Journal as 'independent' evidence, prepared by an independent author; and not in anticipation or response to an AD investigation.

However; it is fairly obvious that the studies presented in *Gestión Apícola* had been conducted for the Petitioner's purposes: the Journal's estimations presented serious accounting flaws aimed at finding dumping margin. This

adverse facts applied to ACA because of unaffiliated beekeepers lack of compliance with questionnaires, would have been perverse.

⁵⁸ Honey from Argentina, Investigation No.a-357-812, Case brief on Behalf of Asociacion Cooperativas Argentinas, Public Version, p. 1, Wilmer, Cutler & Pickering (August 27, 2001) Hereinafter Case Brief ACA

⁵⁹ The complexity of questionnaires and the lack of understanding to the beekeepers that were able to locate was confirmed by the ACA's legal defense.

⁶⁰ See Julio Nogues *op cit.*

⁶¹ *Supra* note 7, p.12.

was the evidence that the DOC relied on to estimate COP. This decision raises serious concerns about the DOC's impartiality during AD investigations for the following reasons.

First, there was a change in the accounting methodology used in the cost studies done by Gestión Apícola in 1997, and the studies prepared and published in 1999. The 1997 studies applied a standard by-product calculation to beekeeper nuclei production.⁶² . Revenue from nuclei was subtracted from total cost and the honey cost of production was calculated by dividing the remaining costs by kilograms of honey produced.⁶³ Suddenly, and without any explanation, a new calculation methodology was applied to the studies. The main consequence of this new calculation was to exclude the nuclei and not consider them at all. This new calculation suspiciously coincided with the petitioner's interest.

The DOC accepted estimates of costs published in the magazine, such as US\$ 0.58 dollars per lb, in September 1999. An independent Canadian study had estimated the same costs at US\$ 0.47 dollars. But there was no attempt on behalf of the Agency to look at any other evidence except the Journal with the higher cost estimates. Data presented in the studies published in Gestión Apícola, invariably led to an increased likelihood of finding a dumping margin because it overstated the costs and improperly assessed the beekeeping practice in Argentina. "Separating the costs of production of honey and other products instead of assigning all costs to honey would have reduced the costs of production from US\$1.36 dollars per kilograms to US\$1.04 dollars per kilograms or US\$0.47 dollars per lb which coincides with the estimate presented in the Alberta study (2001, page 57)".⁶⁴ Gestión Apícola overestimated several times the costs of wax replacements and feeding costs (over estimated by 51%) and the costs of health care of the beehives (over estimated by 33%).⁶⁵

Moreover, the DOC by virtue of considering Gestión Apícola an independent study worthy of the facts available standard, relied completely on it – even when the studies lacked the logic of modern mathematics. "In the March 1999 study, for example, revenues of \$3,000 from nuclei, \$180 from virgin wax and \$4357 from honey are summed and reported as total income. When calculating cost of production, however, the petitioners' studies appeared to disregard the nuclei entirely".⁶⁶

⁶² Explain what a nuclei is

⁶³ Case Brief ACA, p.3

⁶⁴ Supra note 7, p.13

⁶⁵ *Id*

⁶⁶ Similar calculation problems occur in each of the studies presented by the petitioners: although adjusted cost is \$9184 and total honey produced is 5250 kg, the total cost of production is \$1.36 per kg. There is no explanation in those studies on the departure of the accounting principles. See, Case Brief ACA, p.4

For the purpose of the final determination and despite the questions raised by respondents, the DOC used the Journal and based COP and profit for constructed value (CV) on the average of the 1999 studies from Gestión Apícola. The Agency stated that a change in the cost allocation methodology did not appear unreasonable as the value of the nuclei production changed significantly from 1997 to 1999. In its language: "We do not have any reason to conclude that the cost provided and the allocation methodologies used in the cost studies are not reflective of some producer's costs in Argentina, or the industry in Argentina as a whole".⁶⁷ There is no evidence in the public record that the DOC at least attempted to develop a logical explanation for the calculation problems pointed out in the ACA Case Brief. In fact, from the public record, it can be concluded that those questions remained unanswered.

The DOC decided on the merits by simply stating that there was no reason to doubt that those were not the costs of the Argentine producers. This unfortunate lack of legal soundness did not consider the negative economic consequences of the ruling on the respondents

Second, as mentioned before, studies published by Gestión Apícola overestimated wax costs by assuming that beekeepers would annually renew one third of the wax in each hive and would pay to purchase the full amount of that wax. They also overestimated the percentage of queens replaced each year by a typical beekeeper. Beekeeping practice in Argentina is to replace only one third of the frame wax in the breeding boxes and to renew wax in the honey boxes every eight years.⁶⁸

It would have been appropriate for the Agency to use its inquisitorial powers to find the truth, since it is pretty clear that the accuracy of the information was strongly contested. Unfortunately, the DOC rested its decision on the failure of the Argentine honey producers to provide the Department with the COP information. The DOC insisted on relying on the Gestion Apicola studies by merely stating that: "We continue to believe that these studies represent the most relevant, contemporaneous, and specific data available on the record of this proceeding for purposes of determining the cost of production for honey. As the study appears to capture all costs relating to producing honey, and appears to allocate these costs to all products produced using a reasonable methodology, we have relied on the study as non-adverse facts available for the final determination".⁶⁹

⁶⁷ 2001 WL 1172645 (ITA), October 4,2001 – A 357-812 Investigation, Public Document provided by the respondents

⁶⁸ The DOC disregarded the affidavit presented by ACA regarding this facts. The agency based its decision solely on the circumstance that it was prepared by a government official – therefore assuming bias of the Argentine Government and implicitly questioning the good faith of the Foreign Government. Moreover, the author of this paper is familiar with the honey production in Argentina and agrees with the respondents in the sense that the affidavit reflects what the beekeeping practice in Argentina is.

⁶⁹ ACA Case Brief, Comment 2. (Publication page references are not available for this document).

(iii) The Middlemen reseller expenses

There was also a dispute over the middlemen reseller expenses for purposes of the COP and CV calculations. According to the Petitioners, the DOC preliminary determination underestimated the average COP and CV of Argentine honey because it failed to include the selling, general and administrative expenses and profits of 'middlemen' resellers.⁷⁰ They contended that the small numbers of exporters in Argentina compared to the vast number of honey producers confirmed the exporter's reliance upon middlemen. They argued that the COP and CV calculations therefore should reflect all the expenses actually incurred on honey exported to the U.S., including the expenses and profits of these brokers.⁷¹ On the other hand, respondents contended that Petitioner's position on this issue exaggerated the role of the middlemen, which was only to negotiate a sale to the exporter and instruct the beekeepers to deliver a certain quantity of honey. The DOC included the costs of middlemen as expenses incurred by producers and exporters and allocated them in the G&A and selling expenses of ACA and Radix when calculating the COP.⁷²

(iv) General and administrative (G&A) and indirect expenses

Allocation methodology for indirect selling expenses and accountability for G&A expenses was also contested. Regarding Radix's accountability, the DOC accepted Radix's methodology, because Radix had allocated its indirect selling expenses to honey and other products in its own accounting records. Moreover, the majority of expenses reported were properly verified by the DOC. As for ACA, the dispute was over a volume-based methodology used in calculating indirect selling expenses. Petitioners argued that the volume-based methodology took away from honey and that a value-based methodology would result in a more fair match between expenses and sales revenue. ACA's defended using a volume-based methodology for calculating indirect selling expenses because a significant amount of the work performed by the export department is volume dependent. The DOC adopted the volume based methodology and recalculated - in its final determination - the indirect selling expenses merely stating that "[t]he Department's normal practice is to calculate indirect selling expenses based on a value-based rather than volume-based methodology", without any further explanation.⁷³

In addition, there was a controversy over the G&A expenses calculation in ACA's records. Petitioners claimed that ACA's country-wide G&A expenses were not included in the DOC preliminary analysis and that it should be done based on the respondent's audited financial statements. ACA argued that the

⁷⁰ Also referred as brokers and collectors (*acopiadores* in Spanish)

⁷¹ Memorandum, comment 3.

⁷² However no adjustment was made in the Final Determination.

⁷³ Memorandum, comment 11.

DOC in its preliminary determination correctly noted that G&A expenses had been included in the total cost calculated by Gestion Apicola. ACA's selling expenses had been added to the average COP of the five studies published in Gestion Apicola. Moreover, the respondent claimed that, as it had demonstrated during the verification process, the indirect selling expenses included administrative expenses related to sales, namely real estate, secretarial support, gas, electricity, telephone and supplies.

Nonetheless; the DOC's position was to agree with petitioner's⁷⁴ It seems that the DOC, for the sake of easy margin calculations, decided that "ACA begins and ends with its export department".⁷⁵

(v) Testing expenses

As for the testing expenses dispute, the issue was whether to classify them as indirect or direct selling expenses in all the markets or just in the German market.⁷⁶ In spite of evidence that testing expenses were directly related to sales to Germany – as a required condition of the German buyers- the DOC decided that testing expenses should be considered as indirect selling expenses allocated over sales to all markets, based on the DOC's practice.⁷⁷

(vi) Differences in physical characteristics in merchandise

ACA requested a normal value adjustment based on differences in the subject merchandise sold in the U.S. and in Germany. Honey which meets the German requirements is not an identical product to that sold by ACA to their U.S. customers. In other words, German strict sanitary standards make a difference in the product and involve additional variable selling costs.⁷⁸ That means that the market value of antibiotic and phenol free honey is, at a minimum, \$80 per metric ton higher than the market value that is not certified antibiotic and phenol free.⁷⁹

⁷⁴ ACA's administrative departments on which G&A calculations were based earned substantial income from provision of various services to member cooperatives and others. These earnings and expenses associated with such earnings are not recorded in ACA's financial statement. The income if not offset expenses associated with the respondent's administrative departments, should have been properly accounted for in the denominator use to calculate the G&A and interest expense ratios.

⁷⁵ For a detailed explanation See, *Re: Honey from Argentina Ministerial Errors*, Investigation No. A-357-812, Document submitted to the Honorable Donald Evans, Secretary of Commerce by Wilmer, Cuttler & Pickering. (October 22, 2001)

⁷⁶ Honey exported to Germany should be tested against antibiotic and phenol. Those expenses and its characterization were in dispute.

⁷⁷ It seems that the evidence on tested honey -not meeting the German requirements and re sold in the US market- was enough to conclude that ' record does not unequivocally demonstrate expense associated with this activities'. See *Memorandum*, Comment 14

⁷⁸ Laboratory testing

⁷⁹ *Memorandum*, comment 17

The DOC agreed with the petitioner's position. They ruled that because all third country sales were sold at prices below the COP⁸⁰ they based NV on CV; and CV by definition is a construction of the product as sold in the U.S.; therefore no adjustment was proper⁸¹

(vii) German warranty expenses

There was an issue regarding ACA's warranty worksheet and its interpretation. Basically the petitioners argued that the respondent in its calculation of German warranty expenses incorrectly included expenses that were not related to returns. ACA contended that claimed warranty expenses were limited to those additional expenses incurred as a direct result of the rejection of honey by German customers. The DOC re-calculated ACA's Germany warranty expenses and included only those expenses associated with ACA's original sales to Germany returned to Argentina, and excluded freight and movement expenses associated with transporting the resold honey to the U.S.

(viii) Inventory carrying costs

Radix disputed the petitioner's request to include inventory carrying costs in the CV arguing that the petition was an outdated DOC policy. The DOC did not include the inventory carrying costs in the final determination since the Agency acknowledged that that was not the current DOC practice.

(ix) Level of trade (LOT)

ACA contended that because all of its customers in Germany are packers and all customers in the U.S. are importers, the impact on price comparability can not be seen by examining ACA's prices at different levels of trade ("LOT") in a single market. Respondent argued that they provided important additional selling services to the German customers, which are honey packers, and took on the functions normally performed by importers in the U.S. market. The respondent submitted an affidavit to provide for an adequate proxy for the LOT differential and pursuing section 773 (a) (1) (B) of the Trade Act, requested for a LOT adjustment.

One more time the DOC sided with the petitioners because they were not convinced – based on record- that the varying degree to which warranty

⁸⁰ There is no economic rationale on this statement considering that there is over 25,000 beekeepers in Argentina, it is a family business, the industry is a highly fragmented one and most of the beekeepers have few hives. There is no way for them to sell below cost without being out of business in just few months.

⁸¹ The DOC based its ruling on section 773 (a) (6) (C) (ii) of the Statute

services had been provided were sufficient to determine the existence of different market stages.⁸²

In conclusion, administrative proceedings and the DOC administration of AD laws were intended to benefit the petitioners. In other words, rules and practice are neither aimed at seeking the truth nor toward guaranteeing due process. It was almost impossible for respondents to successfully counter act the domestic industry's allegations.

IV) IMPACTS OF THE AD MEASURES

IV) a) PRICE IMPACTS IN THE US

As a result of the dumping margin, wholesale prices went up rapidly in the U.S. According to U.S. importers, in a few months, the cost of a pound of white honey went from US\$0.50 dollars a pound to US\$0.80 dollars as an immediate consequence of the gap in honey availability, due to the disappearance of Argentine honey from the market. Needless to say, American consumers were directly affected by the protection measure.

On the other hand, the International Trade Commission (ITC) when determining if injury to domestic industry was being caused by 'dumped and subsidized imports' it considered the: (i) recent behavior of import volumes; (ii) effect of imports on domestic prices and; (iii) other factors that might account for any injury that is being experienced by the industry. During the period under investigation, imports had an important increasing trend: from 60,000 tons in 1998 to 83,000 ton in 1999, to 90,000 tons in 2000 and continued increasing during the first semester (quarter?) of 2001 while the ITC was running the investigation. If slow growth in domestic production is considered, the participation of imports in apparent consumption increased from 28.4% in 1998 to 36.8% in 1999, to 37.7 in 2000.

The ITC decided to cumulate imports from Argentina and China, therefore increasing the probability of finding injury in the domestic industry.⁸³ The Agency decided that the effects of imports in domestic prices had a negative impact.

Lower prices from 1995 can be partially explained by Argentina's presence in the international markets as well as by evidence of declining profits and problems in repayments of loans by beekeepers. Nonetheless the ITC issued a positive determination of domestic injury due to the Argentine honey import.

However, it must be stressed that the ITC findings are in fact the consequence of bad economics such as to consider whether imports are having an impact on the fiscal costs of honey supporting programs and normal effects of declining industries unable to match international competition.

⁸² *Memorandum*, Comment 18

⁸³ *Supra* note 7, p 17

Citing an experienced businessman: "We really don't have a clue how we are going to meet the requirements of the U.S packing industry over the next 12 months. What we have now is a situation I have never seen before in 27 years of business, on that in the long run is going to benefit nobody", Nicholas Sargeantson, president of Sunland International, an importer in New Canaan, Conn. said.⁸⁴

In conclusion, the AD investigation drove out the Argentinean honey from the American market – in spite of its quality and better price – provoking price increasing and harming consumers as well as import –related jobs and business.

IV) b) IMPACTS OF THE AD MEASURES IN ARGENTINA

There are important trade effects following the AD and CVD investigation and the subsequent imposition of duties on Argentine honey. Although there are two main causes of disruption to the honey market, namely the imposition of duties and findings of antibiotics in Chinese honey in 2002, this paper will focus on the former.⁸⁵

Devastating effects on Argentina's honey exports started when the U.S. Administration began the AD investigation proceedings. In 2001, U.S. honey imports from Argentina declined by 55%. Even when there was an apparent market substitution with honey imports from Vietnam, Mexico and Uruguay, overall U.S. imports during 2001 were 26% below the 2000 recorded level.⁸⁶

There is a direct cause between the AD investigation and declining honey imports from Argentina: "starting in May 2001, shortly after the preliminary affirmative determination by the DOC and six months in advance of the final decision, imports began to crawl down through the zero axis line raising the fears of a major collapse of Argentina's honey industry".⁸⁷ This is a typical effect of an AD investigation: during the period of investigation imports are reduced by roughly half the decrease that might be expected if AD duties would have been imposed from the beginning of the investigation.⁸⁸

Even when duties imposed on Argentina's honey benefited other export markets – such as Germany – the protective measure and ban on Chinese exports created a supply shortage that "led to a process of accelerated increases in honey prices around the world."⁸⁹

⁸⁴ Larry Rother, *US and Argentina Fight over Honey*, New York Times, March 5, 2002 available at www.globalpolicy.org (last visited October 9th, 2003)

⁸⁵ For an analysis on trade impacts in 2002 following the sanitary induced import ban on China, see Julio Nogues, *op.cit.*

⁸⁶ *Supra* note 7, pp.25-26 citing USITC source.

⁸⁷ *Id.*

⁸⁸ *Supra* note 7, pp 27-28 citing Staiger and Wolak

⁸⁹ *Supra* note 7, p.29

There is no doubt that under these circumstances consumers are harmed. It is not easy to calculate the trade protective measures against Argentina and the price increase isolating China's ban on imports. However, taking into account that in the year 2000, honey consumption in the U.S. was 179,143 tons and the retail price was \$7 per kilo, it was estimated that the extra costs that U.S. consumers would pay on account of AD and CV duties was \$238 million dollars.⁹⁰

Last but not least at all, there are important negative social impacts of the AD measures on Argentina, namely the increasing poverty effects on the Argentine honey industry.⁹¹

As mentioned before, Argentina is the leading exporter of honey, largely benefiting from low cost production, plentiful floral sources, reliable and internally competitive marketing channels and good honey quality.

However, at the time of the imposition of AD duties, due to the price levels the income of Argentine beekeepers –and even some exporters- had declined significantly. "High interest rates and taxation levels exacerbated the problem".⁹² It was pretty unclear how well producers could survive in low-priced markets. Producers with high fixed costs and substantial debt were under great financial stress with high interest prevailing. In fact, some preliminary reports acknowledged that beekeepers were exiting the market by abandoning their hives.⁹³

The honey industry in Argentina is composed mainly of small producers. Most of them own a low number of bee colonies; "only 11% of beekeepers maintained over 300 hives and the vast majority of Argentina's 18,000 beekeepers appear to approach beekeeping as a sideline affair".⁹⁴ Small producers have less than 50 beehives⁹⁵.

In Argentina, only 3% of producers are big producers while the rest of the producers are distributed as follows: 12% own from 350 to 500 beehives; 75% own between 20 and 350 beehives and 10% own less than 20 beehives.⁹⁶ The honey industry in Argentina, according to the Alberta Study, provides employment to around 60,000 people, most of them being family members. Simple math- calculation indicates that for most Argentine producers, honey sales allow an extremely low standard of living: In 1998 annual net income for honey producer was US\$0.30 dollars per kilo. Assuming

⁹⁰ For details on the assumptions and calculations, See Julio Nogues, *op. cit.* pp.31-33

⁹¹ The consequence of the American market shut down to the Argentine honey has not only trade and social related effects but political impact on the bilateral relationship between the US and Argentina. Growing Anti-Americanism feelings and an increasing popular demand for results from the alignment to the US foreign policy in the 1990's are the most obvious manifestations of the Argentines' discontent.

⁹² Alberta Study, p.72

⁹³ *Id.*

⁹⁴ Alberta Study, p.51

⁹⁵ Big producers are those who have more than 500 beehives

⁹⁶ *Supra* note 7, p.31

that each beehive produces 35 kilos of honey, a 300 - beehive producer makes net US\$3,150 dollars or US\$300 dollars per month.⁹⁷

Argentine honey producers - as in many others parts of the world - make their living from honey production. A free competitive world is instrumental to raising their living standards. It seems that the U.S. – one of the biggest honey importers – will continue to hit developing countries in spite of their fair, competitive agricultural industry. Moreover, one lesson to be learned from the last decade is that: “becoming a successful honey exporter⁹⁸ is more likely to make beekeepers from exporting countries poorer rather than richer. In this way an industry that is very close to poor people all over the world and that should be fostered and stabilized, is in fact being severely harmed by discriminatory trade policies”.⁹⁹

V. THE US ANTIDUMPING LAW

V. 1) THE AD LAW AND ITS ADMINISTRATION

The AD laws have been part of U.S. law for decades.¹⁰⁰ The current law is based in the 1979 Act¹⁰¹ with minor modifications.¹⁰² The most important amendment is that of 1984 that requires injuries to be assessed by cumulating imports from competing countries that are being subject to investigation.¹⁰³ This amendment allowed the ITC to cumulate Argentine and Chinese honey imports for the purpose of the injury to the domestic industry determination.

The US statutory prohibition of dumping reads as follows:

“It shall be unlawful for any person importing or assisting importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of the exportation to the

⁹⁷ Buenos Aires, Santa Fe, Cordoba, Entre Rios and La Pampa, are the most important provinces for honey production.

⁹⁸ As mentioned before Argentina is extremely export –oriented with production over 93,000 tons and consumption only at 5,000 tons. Top exporter in 2000 was the Association of Argentine Coops (ACA), followed by Conagra and Honey Max – 24,000 tons, 9,650 tons and 8,950 tons respectively

⁹⁹ Supra note 7,p.34

¹⁰⁰ For an historical review of the AD legislation in the USA, See: Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. Int'l L.& Bus. 491, 2,3 (Spring 1993) Available at Lexis Nexis (last visited August 10th, 2003).

¹⁰¹ The Trade Agreements Act of 1979 incorporated the 1930 Tariff Act's dumping provisions. It took effect January 1, 1980 the same day the GATT Antidumping Code entered into force in the USA.

¹⁰² One important consequence of the AD revision was the government's decision to shift the administration of the AD laws from the Treasury Department to the Commerce Department. It increased the imposition of AD penalties on foreign companies.

¹⁰³ This amendment allowed the ITC to cumulate Argentine and Chinese honey imports increasing the likelihood of finding dumping

United States, in the principal markets of the countries of their production, or of other foreign countries to which they are commonly exporting after adding to such market value or wholesale price, freight, duty, and other charges or expenses necessarily incident to the importation and sale thereof in the United States: Provided, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States".¹⁰⁴

Two governmental administrative agencies are in charge of enforcing the AD and CV laws as enacted by Congress: International Trade Administration (ITA)¹⁰⁵, a division of the Department of Commerce (DOC) and the International Trade Commission (ITC). Both have different roles. On one hand, the DOC determines whether imports are 'dumped' into the US market¹⁰⁶ and also determines the margins of dumping. The DOC focuses on individual businesses in order to compute dumping margins unique to those situations. Questionnaires are detailed regarding production by individual producers or an association's individual members.¹⁰⁷

On the other hand, the ITC makes one determination based on the effects that imports have on the domestic industry as a whole.¹⁰⁸ In order to issue an affirmative determination, the ITC findings must support the argument that imports have materially injured the domestic industry; that imports are threatened with material injury or that imports are retarding the establishment of domestic industry.¹⁰⁹ The ITC usually relies on comparisons of indicative or characteristic data to reach its final decision.¹¹⁰

Normally an AD proceeding involves five stages. The first one includes the DOC, which decides whether to start an investigation. This decision is contingent on a petition alleging the required elements for implementing an AD duty based on information "reasonably available to the petitioner supporting the allegations".¹¹¹ This stage also includes the petitioner's standing issue.

¹⁰⁴ 15 U.S.C. 72 (1988)

¹⁰⁵ Hereinafter we will make reference to the DOC.

¹⁰⁶ In the case of Subsidies, it determines whether imports are benefiting from subsidies implemented by the importing country's government.

¹⁰⁷ Steven Thuesen, *Sustainable Production Agriculture in the face of Foreign Commodity Dumping: Achieving Effective Anti Dumping and Countervailing Duty Determinations*, 77 N. Dakota L. Rev. 453, 2, (2001) Available at Lexis Nexis, last visited August 14th, 2003)

¹⁰⁸ ITC does not make determinations regarding specific companies.

¹⁰⁹ 19, U.S.C. 1671 d (b) (1), 1673 d (b) (1)

¹¹⁰ The investigation must be completed in 235 days from the date the petition was filed. Under certain circumstances preliminary AD investigation can be extended for 50 more days and the final determination for 60 more days.

¹¹¹ Steven Thuesen, *op. cit.*, p.3

If there is an affirmative preliminary determination by the DOC, the International Trade Commission (ITC) makes a preliminary determination on whether there is a reasonable indication that domestic industry is being materially injured, threatened with material injury or its establishment is being retarded.¹¹² This is the second stage of the proceedings.

The third stage follows an affirmative finding by the ITC. It consists of the "DOC's preliminary determination as to whether there is a reasonable basis to believe or suspect that the imported goods are being sold, or are likely to be sold, at less than fair market value".¹¹³ Even when final duties will not be collected until the dumping investigation is finished the importer will be required to post some type of bond to guarantee against possible adverse dumping duty determination at the end of the proceedings.

The fourth stage is conducted within 75 days of the preliminary investigation and involves a final determination by the DOC regarding the sale of imported goods.

If final determination is affirmative, the fifth step is for the ITC to make its final determination of material injury and finally the DOC issues the AD order.

If either the DOC or ITC determinations are insufficient to support the allegations of the petitioner or findings are negative, the investigation is over.¹¹⁴

The DOC has a decisive role in the AD investigations. It decides whether to start the administrative procedure and the standing issue as well as the dumping margin. A sufficient petition is to be filed by an interested party; that means it must be filed on behalf of an industry that alleges the necessary elements of unfair trade coupled with information reasonable available to the petitioner. Standing includes analyzing if the domestic industry produces a "like product" (like those being imported) as well as if the interested party filing the petition represents¹¹⁵ industries that manufacture the "like product" in the domestic market.¹¹⁶ However this is a simple petition and no high evidence standards to support the petition are required.

The ITC has the final word to determine which domestic product or products are most like the imported article defined by the DOC. Six factors are considered by the ITC in order to determine the 'like product': (i) physical characteristics and uses; (ii) interchangeability; (iii) channels of distribution; (iv) customer and producer perceptions; (v) common manufacturing facilities and production employees; and (vi) when appropriate, price.¹¹⁷ There is no

¹¹² The ITC has 45 days from the date of the petition was filed to make the preliminary decision.

¹¹³ *Id.* Note 113

¹¹⁴ *Id.*

¹¹⁵ Individual petitions must represent at least 25% of the total domestic production of the like product. This also applies to petitions filed by associations or organizations.

¹¹⁶ 19, U.S.C. 1677(10) . Like or most similar in characteristics and uses to the article imported and subject to investigation.

¹¹⁷ Steven Thuesen, *op. cit.*, p.5

clear definition on what constitutes 'like product' and decisions are made on a case by case basis, introducing a great deal of uncertainty.

As for the material injury determination, the ITC must assess whether there is 'a reasonable indication' that a domestic industry is being or is threatened by material injury because of the imports alleged in the petition. The reasonable indication standard requires the ITC to issue a negative determination only if: (i) the record as a whole contains a clear and convincing evidence that there is no material/threat of injury and (ii) there is no likelihood that contrary evidence will arise in the final investigation. In addition, the ITC, like the DOC, uses the 'facts available' information' standard.

When the ITC preliminary and affirmatively concludes that there is a reasonable indication of material injury,¹¹⁸ the DOC preliminary determines¹¹⁹ whether the subject goods are being/likely to being sold at less than fair market value.¹²⁰ As mentioned, the DOC is in charge of calculating the dumping margin.

The final injury determination by the ITC is basically a reconsideration of the preliminary decision. The same factors considered in the previous determination are considered and the dumping margin calculation by the DOC is included in the analysis.

If final injury determination is affirmative as to material/threat injury the ITC continues retroactively the suspension of liquidation and the posting of cash deposit or other securities previously ordered by the DOC when determined that sales were made at less than fair market value.¹²¹

V. 2) MAIN FLAWS IN THE ENFORCEMENT OF THE AD LAWS

Main critics to the administration of AD laws are related to the lack of due process in the administrative proceedings and the broad discretionary power granted by the Congress to the agencies.

The AD proceeding has been described as a process with a massive discovery request to the respondents consisting of a burdensome production of documents with detailed information; where the sole authority of the serving party- the DOC- decides the deadline, the extent and the format of the requested information; where the serving party is at the same time the judge to rule on the adequacy of the response, on the merits of the objections that might be raised by the required party and the ultimate decision maker in the issue on which the information was requested. Moreover, even when the decision maker may hold hearings at the request of the parties prior to final

¹¹⁸ The ITC is not bounded by its previous decisions

¹¹⁹ The DOC has 160 days within the petition' filing date.

¹²⁰ Steven Thuesen, *op. cit*, p 11

¹²¹ For a detailed analysis of the administrative proceedings in both agencies, see Steven Thuesen, *op.cit*, pp 2-13.

decisions, these hearings are not trial –type hearings subject to the Administrative Procedure Act (APA) requirements to adjudicatory hearings. Lastly, the serving party has the authority to impose sanctions for failure to comply with minor details of questionnaires.

Few people will affirm that these proceedings are part of the American legal system since as they raise concerns of due process: investigative and judicial functions are within a single agency. Unfortunately, “this is the inquisitorial system that Congress ordained for the administration of AD and countervailing duty provisions of Title VII of the Tariff Act of 1930”.¹²²

As for the discretionary powers of the agencies, the law vests the DOC and ITC with broad discretion and the Judiciary has up-held the use of such a discretion up to a great extent.¹²³ Before courts, the agencies’ acts are presumed to be valid and not an abuse of the discretionary power. Therefore, decisions will only be overturned by the courts if found to be ‘arbitrary, capricious, an abuse of (administrative) discretion, or otherwise not in accordance with the law’.¹²⁴ This means that most of the times final decisions rest on administrative agencies.

We will comment on two aspects directly related to the use of discretionary powers on behalf of the administrative agencies when enforcing the laws and regulations. They are: the facts available standard and the cost of production calculation, including dumping margin calculation at the DOC level.

V. 2) a) REQUEST FOR INFORMATION FROM THE FOREIGN COMPANIES. THE FACTS AVAILABLE STANDARD

A standard questionnaire from the DOC demands information covering all sales as well as sales in the company’s home market for a six month period.

The DOC questionnaires are sent to the primary foreign producers of the ‘subject merchandise’ (imported products). They are usually comprised of 4 parts: Section A seeks information on the company’ corporate structure and affiliations, distribution process, sale process, accounting and financial practices and the products under investigation generally.

Section B deals with the company’s sales of ‘such or similar’ merchandise in the comparison market. The comparison market is normally the foreign producer’s home market¹²⁵ and the DOC requests information on products sold, selling prices, quantities sold, customer class, transportation, warehousing expenses, insurances, warranties, rebates and everything related

¹²² Robert W. McGee, *The Case to Repeal the Antidumping Laws*, p.3, 13 NW. J. Int’l L. & Bus. 491 (Spring 1993). Available at Lexis Nexis (last visited August 10th, 2003).

¹²³ Judicial review is available in the Court of International Trade.

¹²⁴ Steven Thuesen, *op. cit*, p.13

¹²⁵ However if the home market is considered not ‘viable’ a third country export market can be assessed as the comparison market.

to home-market sales.¹²⁶ The detailed information for each sales transaction made during the period of investigation is used to calculate the 'foreign market value' or normal value "In other words, the benchmark against which US prices are compared".¹²⁷

Section C is similar to Section B but is related to sales made in the US. However this section includes more information related to transportation and selling process. In addition, when the US importer is related to the foreign respondent, dumping calculation does not include the prices of the importer but on a constructed export price (CEP) based on the price of resale by the related importer to the first unaffiliated customer.

Section D is dedicated to the costs of producing the subject merchandise and the foreign such or similar merchandise such as: labor costs, production quantities, material costs, overhead, etc. The information must include a detailed unit cost element for every product subject to the investigation that was sold in both markets.¹²⁸

The data must be in a mandatory computer tape format.¹²⁹ The DOC will only accept IBM compatible computer tapes, and "much of what it demands is not useful but is demanded to avoid criticism from the petitioner for not being thorough enough".¹³⁰ The information requested by the DOC can be overly burdensome and costly.¹³¹ "Companies that refuse to supply information do it at their own risk, since the DOC has no qualms about pulling numbers out of the air to construct estimated figures if the company does not provide them".¹³² The average AD questionnaire is seventy pages long, single spaced, they are written in English and most of the time pages are to be distributed by the requested company within its different divisions- or employees- in order to obtain the data to be gathered and sent back to the DOC. In addition, the DOC sets tight deadlines and on site investigations of all records by US investigators.

One of the most troublesome aspects in this phase is that refusal to comply or the lack of information as required by the DOC is taken as a confession of guilt, paving the way for high possible dumping margins.¹³³

¹²⁶ Brink Lindsey and Dan Ikenson, *Antidumping 101. The Devilish Details of "Unfair Trade" Law*, p.4, CATO institute, Trade Policy Analysis, No.20, (November 26, 2002)

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ The DOC has power to determine what information is enough, when and how it should be presented. Appealing these issues are time-consuming, costly and there is a small probability to succeed.

¹³⁰ Robert Mc Gee, *op. cit.* p.3

¹³¹ Matsushita withdrew from an AD case involving small business telephone systems: it was onerous and costly. On a Friday afternoon a demand from the Commerce Department to translate and respond 3,000 pages regarding financial information was due the following Monday morning. Case cited in Robert Mc gee, *op. cit.* p.4

¹³² *Id.*, p.4

¹³³ *Id.*

The WTO – Antidumping Agreement-provides legal support to country members dealing with the implementation of AD laws: “in cases in which an interested party refuses access to, or otherwise does not provide necessary information within a reasonable time or significantly impedes the investigation, decisions may be made in the basis of facts available”.¹³⁴ Therefore, country authorities are allowed to make determinations based on facts contained in the application for the initiation of the investigation by the domestic industry.¹³⁵

The US has been abusing the WTO legal provisions. Studies estimate 20% reduction of the US baseline dumping margin after rules changed following the WTO Antidumping Agreement implementation in 1995. However greater extensive and intensive use of discretionary practices had already compensated for the Uruguay Round effects by the end of 2000. Evidence shows that the upward trend in US dumping margins is caused by evolving discretionary practices at the DOC – disregarding any significant role for country composition of investigated cases or legal changes. The increasingly higher dumping margins trend was particularly due to the DOC’s use of ‘adverse facts available’ standard¹³⁶ (apart from costs of production test, and cost data to construct normal value).¹³⁷

As argued by Blonigen, there is strong evidence of systematic changes in the DOC discretionary practices – not required by law- and most of them involving the use of ‘facts available’ standard. When looking at cases treated in the early 80’s and in the late ‘80’s it is clear that at the beginning of the decade the DOC was willing to work with respondents during the investigation process in order to include their information as ‘facts available’. Nonetheless this is not the case in the late 80’s when the agency started to apply the ‘adverse facts available’ standard even when companies failed to provide one portion of the questionnaire. The DOC unlike in the early 80’s started to disregard any information provided for the foreign companies after the preliminary decision was reached.

The impact of discretionary practices in the use of ‘adverse facts available’ standard and costs of production tests reflects in the final calculation of dumping margins. Calculated dumping margin normally is based on a comparison of the export price with either charged in the exporter’s home market or its production costs it might appear that one is a justifiable provision.

However, “foreign prices or costs are typically privately-held information of the exporter so that foreign firms need some incentive to cooperate in an investigation. This incentive in practice has been provided by the potential use

¹³⁴ Antidumping Agreement (1994) p,154

¹³⁵ AD Agreement, Annex II, p.168

¹³⁶ See, 19 C.F.R. § 353.37 (1991)

¹³⁷ Bruce Blonigen, *Evolving Discretionary Practices of US Antidumping Activity*, University of Oregon and NBER, p 3 (April 2003).

of the domestic firm's allegations about foreign firm's dumping margin. Since domestic firm has an obvious incentive to overstate the dumping margin when laying out its case, the exporter faces the possibility of very high duties if it does not cooperate".¹³⁸

The DOC making use of the 'facts available' – usually that provided by the petitioners - is able to come up with the numbers it needs, disregarding any chance of using information partially submitted by the respondents.

Even when DOC regulations made it clear that the use of "adverse inferences" could be justified if the foreign respondent was perceived as deliberately uncooperative, "the 'facts available' data is a significant threat".¹³⁹ In other words, the DOC distinguishes between use of 'facts available' for cooperating firms and 'adverse facts available' for non-cooperating firm or non-responsive firms.¹⁴⁰ In the latter case, the DOC" employs 'adverse facts available' in the most adverse manner as a punitive measure".¹⁴¹

Had not the requested information been complex enough, if foreign firms were found by the DOC to be only 'partially cooperative' all the information provided by the respondents could be thrown out, with facts available used in its place.¹⁴²

This is a misfortunately frequent DOC' practice and it has been increasing over the last 20 years. The average percentage of cases using "facts available" in the first 5 years of the sample is 10.6%, whereas the latter five years' average is 39.6% with the majority of these decisions using 'adverse facts available'. This is to say that by the early 90's about 40% of the USDOC dumping margin decisions were based on information supplied by the domestic petitioners!".¹⁴³

In order to have a general idea of the impact of this practice vis a vis the use of information obtained directly from the respondents, data for the period between 1995-1998 shows that the average final dumping margin imposed by the DOC using facts available standard is 95.58% versus an overall sample average of 44.68%. The magnitude of the difference is outstanding.

The DOC mostly uses information provided by the petitioners which is usually biased against foreign producers. "In fact because of the way the Commerce

¹³⁸ Michael Moore, 'Facts available' Dumping Allegations: When will Foreign Firms Cooperate in Antidumping Petitions?, Department of Economics and the Elliott School, George Washington University, p.2 (April 29th, 2002)

¹³⁹ See Moore, *op.cit.*, for recent cases.

¹⁴⁰ The key change in the use of 'facts available' was a policy set by the DOC in the 1987-88 antifriction bearing cases against multiple cases. See Bruce A. Blonigen, *op.cit.* p. 12

¹⁴¹ Bruce A. Blonigen, *op. cit.*, p. 7

¹⁴² Michael Moore, *op.cit* p.3

¹⁴³ Bruce A. Blonigen, *op. cit.* p. 10

Department can construct imaginary prices, it is entirely possible that it can find dumping even when prices are the same worldwide".¹⁴⁴

Defenders of AD laws argue that these laws preserve a 'level playing field' on which domestic and foreign producers can compete based on who makes the best product at a lowest cost. However as proved by Lindsey and Ikenson, 'dumping is defined in such a way that even perfectly innocent import competition is classified as unfair, then the distinction between antidumping measures and garden-variety protectionism collapses-and even antidumping supporters should admit there is a problem that needs fixing".¹⁴⁵

In other words, there are "little dirty secrets of antidumping, the methodological quirks and biases that results in finding of dumping even when the US prices of imported goods are identical to or even greater than the prices charged by the foreign producers of those goods in their own home markets. Once those quirks and biases are understood, the illusion that the AD law in its current form restricts only 'fair trade' cannot be sustained".¹⁴⁶

We will get into the details in the following section.

V. 2) b) CALCULATION OF DUMPING MARGIN

The most important aspects of the methodology for the calculation of dumping margin is the product definition and the determination of the next most similar product since the first step in the process is to compare U.S. and foreign market prices. Products are defined by the DOC considering specific products characteristics and according to the Agency's determination about what is necessary for model matching. This practice adds complications to the preparation of sales and costs records in response to the DOC questionnaire. It would be easier and more accurate to stand by the respondent's record-keeping control.

Usually the product as defined by the DOC is different from the product as defined by the respondent.¹⁴⁷ The DOC creates its own product code: 'Control Number' (CONNUM) which reflects the relevant characteristics of the product. Matching across size will occur if there is no match across materials in the same size.

Dumping calculations are determined by comparing adjusted US to adjusted-home –market prices and never made on actual sales prices.

Selling in different markets involves costs and expenses that the DOC assess. Many of the expenses are deducted from gross selling prices and others are used to offset or limit deductions made from gross prices in a particular

¹⁴⁴ Lindsey and Ikenson, *op.cit.*, p.5

¹⁴⁵ *Id.*, p.3

¹⁴⁶ *Id.*, p.2

¹⁴⁷ *Id.*, p.5

market.¹⁴⁸ For instance, all discounts, rebates,¹⁴⁹ and movement expenses,¹⁵⁰ are deducted from gross selling prices in both markets. Selling expenses are divided into direct¹⁵¹ and indirect¹⁵² selling expenses. Adjustments are made for all direct expenses in both markets; however indirect selling expenses are given different treatment in both markets: “they are deducted from US prices under certain situation – so called constructed export price (CEP) transactions- but are not always deducted, at least not entirely, from the prices of the home market products”.¹⁵³

There is another adjustment regarding the level of trade. It means to consider the class of customer to make the proper comparison. If the home market customers are retailers or end users and the US customer are wholesalers adjustments are to be done since differences prices reflect the different nature of the customer’s business.

Last but not least there are adjustments related to the difference in merchandise. “The DOC makes a difference in merchandise (DIFMER) adjustment when prices of non-identical products are compared”.¹⁵⁴ Adjustment is calculated as the difference in variable costs of manufacturing the distinct products instead of comparing the net US price and the net home-market price.

Sales in the US are classified within one of two categories: (i) Export price (EP) sales transactions between the exporter and an unaffiliated importer and; (ii) constructed export price (CEP) sales are transactions in which the importer is affiliated with the exporter, therefore transactions are considered unreliable for dumping calculations. In this case the DOC deducts from US prices indirect selling expenses and estimated profits on US operations.¹⁵⁵

Once products in both markets are defined by the DOC but before matching home market sales to the US sales, the Agency filters out some home market sales with 2 tests:

(i) The arm’s length test: Its goal is to determine whether sales to affiliated customers in the home market have been made at prices and on terms comparable with those to unaffiliated customers and;

(ii) The cost test, which purpose is to eliminate sales in the home market at prices lower than the full cost of production. This analysis is conducted at the CONNUM level. If 80% or more of the sales are made at net prices at or above full costs of production, sales passed the cost test and enter into the pool of potential matches for the US sales.

¹⁴⁸ *Id.* p.6

¹⁴⁹ Incentives provided by companies to customers to entice early payments or pass along savings.

¹⁵⁰ Costs incurred by the seller to transport merchandise from the factory to the customer.

¹⁵¹ Expenses made to facilitate specific sales, such as advertising expenses.

¹⁵² Costs not directly attributable to specific sales, such as salaries, rent, etc.

¹⁵³ Lindsey and Ikenson, *op.cit.* p.7

¹⁵⁴ *Id.*

¹⁵⁵ Lindsey and Ikenson, *op.cit.* p. 8

If no comparable sales are found at arm's length prices and above costs of production, a constructed value (CV) is used as a valid alternative. "CV is an estimation of what the product would have sold for if it had been sold in the home market".¹⁵⁶ CV can be used when home-market sales still remain but none of the eligible home –market CONNUM are considered appropriate matches for the US products.

Once net prices in both markets were calculated and sales failing to pass the arm's length and costs tests were excluded from the home market data base, the DOC determines which products to compare – model matching process -. Preference is given to identical products. In absence of identical product, the next most similar product is sought for comparing prices. In some cases the ultimate match may have different characteristics from those of the US CONNUM. If the product is similar and the difference in variable costs is no more than 20% of the total costs of manufacturing the US product, it will be the selected match. If no matches satisfy the DIFMER test, the US product is compared with constructed value.¹⁵⁷

Then it is time for dumping margin calculation. "The dumping margin is based on a comparison of the average US net price for each CONNUM during the period of investigation with its normal value. Normal value is either the average net price of the most similar home market product during the same period or in the absence of such or similar product, constructed value".¹⁵⁸

Normal value is converted into US dollars and is known as foreign unit price in dollars (FUPDOL). FUPDOL minus the average US price (USPR) equals the unit margin of dumping (UMARGIN). The impact of unit margin is determined by the volume of sales of the US product in question (QTYU). The total amount of dumping is also referred as the total potentially uncollected dumping duties (TOTPUDD) and is the sum of all positive EMARGINS.

It is important to keep in mind that all price comparisons that account for negative dumping margins because FUPDOL was less than USPR are set equal to zero. "The practice of disregarding negative dumping margins is known as zeroing because the negative dumping amounts are treated as equivalent to zero".¹⁵⁹ Finally, the level of dumping is expressed on an ad valorem basis to determine an antidumping rate.

As shown by the Argentine honey case, the administration of the AD law by the DOC leaves no room for a successful challenge to the Agency's practice and its own views on behalf of the respondents. Even when regulations allow for LOT adjustment it is not always the case. The same comment is valid for classifying expenses as direct or indirect and the list goes on.

¹⁵⁶ Lindsey and Ikenson, *op.cit.* p .9

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Lindsey and Ikenson, *op.cit.* p. 10

V. 3) DUMPING vs. PRICE DISCRIMINATION.

The US AD law is concerned with international price discrimination. Even when AD supporters argue that AD can take form of price discrimination or below cost export sales, from a practical point of view “the AD law does not attempt to measure whether subject imports are sold below their costs of production. The closest it ever comes is when US prices are compared with constructed value – which equals costs of production plus some amount of profit. This artificial price is used as surrogate for normal value when comparison market prices are unavailable....Most importantly when US prices are compared with constructed value what is measured is whether the US sales are sold below some designated benchmark of profitability”.¹⁶⁰ There is no economic rationale – but an arbitrary decision – in establishing 18% percentage of profitability in the AD investigations.

The US law assumes that international price differences are the result of underlying market distortions in the home market. Even when that is a questionable assumption¹⁶¹ it can be taken for granted in order to raise the following question: how well does the AD law measure the international price discrimination?.

The answer is “not well at all. All too often, methodological quirks and biases in the US law work to conjure dumping margins out of thin air”.¹⁶² Main critics on this issue are related to the effect of price fluctuations, the arm’s length test, the exclusion of below-cost sales, the use of CV, the model matching process, the DIFMER adjustment, the asymmetric treatment of indirect selling expenses, the CEP profit and the Zeroing practice.¹⁶³

Because AD investigations compare average home-market and US prices over a course of a year period, if prices fluctuate during the year then differences in sales volumes can generate different annual average prices, even if identical prices were charged in both markets. In this cases price fluctuations might have nothing to do with unfair trade and still companies may be found guilty of dumping due to an imperfect methodology.¹⁶⁴

As for the arm’s- length test – which assumes that affiliated customers may receive a more favorable treatment than unaffiliated ones in terms of sales – the way it has been applied means the exclusion of home market sales to affiliated customers who paid lower prices. However, if affiliated customers paid higher prices those sales are not excluded from consideration. The effect of excluding the sales to affiliated customers only when prices are lower than

¹⁶⁰ Linsey...Footnote 17. p.47-48. Underlined is mine

¹⁶¹ Other reason than unfair trade may explain price differences.

¹⁶² Id. p10.

¹⁶³ We will just summarize on this topics. For a complete analysis and a Hypothetical case study, See Lindsey and Ikenson, *op. cit*, pp 10-28

¹⁶⁴ *Id.* p.12

sales to unaffiliated customers is a raise in average prices in the comparison market; therefore the impact is a raise in dumping margins.¹⁶⁵

The cost-test has been deemed as one of the most egregious methodological distortions in the current AD practice.¹⁶⁶ Theory behind AD laws is that foreign producer enjoys artificial advantage because of a sanctuary market at home. Therefore trade barriers and other restrictions on competitions allow artificially high prices in the home market and foreign producers cross subsidize unfairly cheap export sales. The purpose of the cost test is to exclude from consideration sales made in the home market at prices lower than the full cost of production. US sales are then compared only to the highest priced home market sales. It has been argued that if price differences between export market and home market exist it can not be fairly determined if all the lowest home-market prices are excluded from comparison.¹⁶⁷

In addition to a misconceived cost test the situation gets worse if considering the way it is applied. "Specifically, individual net prices are compared to average annual costs. But if unit costs fluctuates over the period of investigation....then the comparison of individual prices to average costs can yield perverse results".¹⁶⁸ Empirically the cost test is one of the most relevant causes of inflated dumping margins.¹⁶⁹

Constructed value – a cost based approximation of normal value- is calculated by adding to the cost of producing the US merchandise an estimated amount for home market selling expenses and profit. These amounts are estimated on the averages of only those sales that pass the cost and the arm's length tests. Therefore even if a substantial portion of home market sales are made at a loss only the expenses and profits of the profitable sales are considered to calculate the averages for constructed value. "A finding of dumping based on comparing US prices to CV does not show that the US sales are below cost; it shows only that they fall below some arbitrary benchmark for profitability. Such a finding has no relevance whatsoever to any plausible theory of unfair trade".¹⁷⁰

Moreover, product definition and model matching can be trapped in technicalities. The more broadly identical products are defined the greater the chance that dumping margins could be generated risking a comparison between apples and oranges. However making a product definition specific increases the likelihood that dumping margins are a consequence of arbitrary distinctions. Hypothetical cases show that in spite of a foreign companies may not be engaging in price discrimination, it may be found guilty of dumping.

¹⁶⁵ This asymmetry in treatment by using the arm's length test was found inconsistent with the WTO AD Agreement. See, Lindsey and Ikenson, *op.cit*, p 12.

¹⁶⁶ Lindsey and Ikenson, *op.cit*, p.13

¹⁶⁷ The existence of below-cost sales is an affirmative evidence of the absence of a sanctuary market.

¹⁶⁸ Lindsey and Ikenson, *op.cit*, p.15

¹⁶⁹ See a detailed explanation and cases in Lindsey and Ikenson, *op.cit*, pp15-16

¹⁷⁰ *Id.* p.16.

“Random chance and unavoidable arbitrary distinctions can thus play a role in determining the final outcome of a dumping determination. The dumping margin reflects not unfair trade, but methodological forthcomings.”¹⁷¹

In addition to indirect selling expenses deduction from the US price in CEP situations, the CEP profit deduction (estimated profits in the US selling operations) make things worst. These deductions are not corresponded by deductions from normal value. This asymmetry increases the dumping margins artificially.¹⁷²

Last but not least, the zeroing practice becomes the biggest distortion in the calculation of dumping margins. “By ignoring ‘negative’ dumping margins (i.e., instances in which US prices are higher than home market prices) The DOC employs a ‘heads I win, tails you lose’ strategy for maximizing dumping margins”.¹⁷³

It seems that AD laws are not doing a fine job when it comes to distinguish fair from unfair trade practices.¹⁷⁴

VI. RECOMMENDATIONS

Considering the theoretical and practical problems earlier discussed we advocate for the repeal of the AD laws, including the WTO-Antidumping Code.

That will be our first option. Instead a good – limited safeguard system should be implemented. It will deal with imports and domestic industries in an effective way, without justifying or disguising unfair trade practices in order to implement the protection measures. A good safeguard system might help governments to separate trade interventions serving to their national interest to those that will not pursue that goal. However even when interventions might be justified under the national interest objective they should support openness and liberalization policies. Efficient safeguard procedures would consider not only those benefiting from them but also the losers due to the imposition of import restrictions. Legal standing and economic analysis related to the ‘losers’ of import restrictions should be included in the administrative procedures. Last but not least, import restrictions should be limited in time and discretionary powers to manipulate the deadlines should be avoided.¹⁷⁵

Our second best - option will be a modification to the WTO Antidumping Agreement¹⁷⁶ aimed at limiting the discretionary practices of the AD

¹⁷¹ *Id.* p.17

¹⁷² *Id.* 21

¹⁷³ In 17 out of 18 DOC cases examined by Lindsey and Ikenson, zeroing was the most significant cause of dumping margins.

¹⁷⁴ Many AD laws worldwide follow the US model – therefore these critics are applicable.

¹⁷⁵ See Finger, *op cit* for details and guidelines proposed regarding a better safeguard mechanism.

¹⁷⁶ We think the language of the Trade Promotion Authority granted by the Congress to the Executive Power regarding the AD laws and enforcement is not a legal obstacle for discussing and negotiating the proposed modifications.

authorities in the country members. In other words, setting out tight guidelines for filing a case, for dumping margin calculations, including review of costs of production for both petitioners and respondents – to minimize ‘strategic’ –political – motivation for AD filings as well as to prevent rent-seeking, will be a first step in the right direction.

The third and importantly alternative will be a statutory amendment of the US AD law. Modifications should include the administrative proceedings before the ITA/DOC since investigated parties lack of an impartial tribunal and the Agency is pretty vulnerable to political pressure.¹⁷⁷

As it has rightly been pointed out, the fact that ITA almost never absolves a respondent on dumping allegations does not prove itself a bias but plants serious doubts about the agency's impartiality when enforcing the AD laws.¹⁷⁸ The criticism comes not only from the practitioners or scholars but from the United States Court of International Trade (CIT) as well. In overruling an ITA decision and ordering the agency to reimburse penalties to a Japanese ball-bearing manufacturer, Judge Nicholas Tsoucalas stated that the DOC repeatedly ignored and disobeyed decisions of the CIT. In another, case regarding the ITA's propensity to take advantage of every minor failure by the respondents to comply with the voluminous and detailed questionnaires, Judge Musgrave stated that ITA's “predatory ‘gotcha’ policy does not promote cooperation or accuracy”.¹⁷⁹

Specifically, we agree with the proposal of submitting the AD proceedings to the Administrative Procedure Act (APA) and adding Administrative Law Judges (ALJ) to rule in the proceedings.¹⁸⁰ The main benefits from that proposal are: (i) AD charges will be decided by a different authority (AJL) than the one running the AD investigation (DOC) reducing or eliminating the perception of partiality; (ii) the issues involved in an AD investigation will appropriately be considered in a trial-type hearing by an ALJ; (iii) it will solve the surprise changes in methodology, in differential treatment to the parties (unlike the DOC's officials AJL are insulated form informal contacts by parties or their attorneys) and; (iv) it will -in the long run - reduce the number of appeals.¹⁸¹

In addition, we propose rule modifications in order to make a distinction regarding the type and characteristics of the respondents. The US AD law provides no distinction between the size and type of foreign industries under investigation neither consider the nationality of the company to identify if the respondent is from a developing country.

¹⁷⁷ Michael A. Lawrence, *Bias in the International Trade Administration: The Need for Impartial Decision Makers in the United States Antidumping Proceedings*, p.1, 26 Case W. Res. J. Int'l L. 1, Winter 1994. Available in Lexis Nexis (Last visited August 15th, 2003)

¹⁷⁸ *Id.* p.2

¹⁷⁹ *Id.*

¹⁸⁰ The proposal is detailed in Michael A. Lawrence in the *op.cit.* However, the idea had been proposed by Professors Jackson and Davey in 1991 (Administrative Conference).

¹⁸¹ *Supra* note 175, p.7

The same burdensome, detailed 300 average response to the questionnaires is demanded by the DOC to a multinational corporation and to a small - family agricultural-business, as we discussed in the Honey case. Just to set a pretty obvious example of inappropriate demands from the DOC let us remind you that for many companies in the agricultural sector coming from developing countries tax income is not a fiscal obligation and that rural producers - if do - keep their records of cash income and expenses they do on pieces of papers. However the DOC applies the General Accepted Accounting Procedures (GAAP) to them disregarding any specific situation on behalf of the respondents or their domestic laws.. In other words, " The American AD laws does not make any distinction about how big you are, your level of development, or your type of industry. It has one questionnaire, one set of rules, and very little flexibility for developing countries".¹⁸²

Last but not least, the use of facts available standard in the proceedings should be modified as well. It is contrary to a rule-based system to disregard an entire piece of information – over an average 300 pages in response- just because the respondent failed to comply with minor aspects of the questionnaires, many times due to non-existent information or practice in the respondent's home country.

We are fully aware of the political impact of these proposals and that it might sound unrealistic in the near future. A great deal of political will and courage is a pre-requisite to start the process but the challenge is worth; benefits to the overall international trade system will outweigh the costs.

From a political - international - point of view we are confident that they will contribute to shape a coherent free-trade policy while at the same time significant improvements to the North / Developed – South /Developing countries' dialogue can be expected.

VII CONCLUSION

The lack of significant progress on international trade negotiations is to be placed within the complex current economic context. Even when there are some signs of a turnaround in the US, Europe seems to loose momentum, Japan is not doing as well as expected and the Chinese economy continues to bustle along but some concerns are still over SARS consequences. As for Latin America, there is confidence in Brazil, Argentina and Mexico-; nonetheless economic recession in Venezuela and political difficulties in the Andean countries 'weigh down regional performance'.¹⁸³ Moreover, low commodity prices get Africa into trouble. To sum up, "Today's growth is far short of the

¹⁸² Leslie Glick, *Symposium: Comments on the Administration of US Unfair Trade Practice Law: Missed Opportunities in NAFTA*, 1 US-Mex. L. J. 185, p. 2 (1993) Available in Lexis Nexis (last visited August 15th, 2003)

¹⁸³ World Bank 2003, *Global Economic Prospect 2004*, p.xiii, available at: <http://www.worldbank.org> (last visited September 30th, 2003) Hereinafter GEP04

pace necessary to make significant dents in the poverty headcount to achieve the Millennium

The Doha Round and its promise for development are at stake so far. Unless trade barriers in the agricultural sector are slashed substantial reduction in global poverty will not be achieved.¹⁸⁴ The explanation is pretty straightforward: most of the world's poor work in agriculture, 70% of the world's poor live in rural areas and earn their income from agriculture and most of the world's protection is aimed at agriculture which is among the most distorted sectors in international trade. "Reducing protection in agriculture alone would produce roughly two-thirds of the gains from full global liberalization of all merchandise trade"¹⁸⁵ ...

Rich countries account for two-thirds of world trade and comprise nearly three quarters of world GDP, so their domestic policies – most evident in agriculture- have the greatest effect on the global marketplace. Subsidies in the OECD countries account for US\$ 330 billion, of which some US\$250 billion goes directly to producers. The effect is to stimulate overproduction in high cost rich countries and shut out potentially more competitive products from poor countries. The net effect of subsidizing the relatively rich in wealthy countries at the expense of adverse price penalties for the products of the relatively poor in developing countries is to aggravate global income inequalities. In other words, 'subsidies make the relatively rich richer and the poor even poorer'.¹⁸⁶

Even if Cancun is considered as a setback - not a failure - of the Doha Round, there is no doubt it was a lost opportunity for developed countries to seriously committing themselves to internal farm reforms and providing developing countries with valuable trade offs for its own commitments. Agriculture, AD law and its abuse, non farm trade, access to patented drugs, special and differential treatment are vital issues to the developing world.

Provided significant progress is made on those trade areas, no important advance should be expected on investment, competition, trade facilitation and government procurement¹⁸⁷ as required by the developed countries in the scope of the multilateral trade system.

There is sufficient cross – country evidence that trade liberalization and openness to trade increases the growth rate of income and output. Moreover some studies suggest that 'trade does seem to create, even sustain higher

¹⁸⁴ Other crucial issues to development outcomes are: labor-intensive manufactures; services; trade facilitation, and special treatment for developing countries.

¹⁸⁵ Keep in mind that protection facing developing country exporters in agriculture is 4 to 7 times higher than in manufactures in the North and 2 to 3 times higher in developing countries. For details see, GEP, note 7. Underlined is mine.

¹⁸⁶ GEP04

¹⁸⁷ Known as the 'Singapore issues'

growth'.¹⁸⁸ Last but not least, there is a relevant link between trade, growth and the poor.

The link of overall growth to poverty alleviation has been demonstrated in cross-country analysis and in individual countries as well.¹⁸⁹ 'Trade liberalization can be expected to help the poor overall given the positive association between openness and growth'.¹⁹⁰

Moreover, many developing countries have already made sound market – oriented reforms – assuming high social costs as it is the case of Argentina - in order to substantially encourage foreign investment and reduce trade barriers.¹⁹¹

However, in most of the economy sectors where developing countries are highly competitive – namely agriculture¹⁹² - they face strong lobbies and biased AD law enforcement on behalf of the developed countries. The US Argentina Honey case is a valid example.

Argentine honey producers as in many other parts of the world make their living –or survive – on honey production. As mentioned before the Argentine Honey Industry is composed mainly by small not - related producers, scattered around the country. The industry has internationally been acknowledged as leading in the world markets since it is cost competitive, produces good quality and markets very well.

AD duties imposed by the U.S. hit mainly small producers – less than 500 beehives- driving them out of the American market just to protect the domestic – already protected – industry.

It seems that when developing countries sell low - priced products they dump but when it is the case of developed countries they are efficient and competitive.

It is time for developed countries to take the leadership and move forward on the international trade agenda. As it has correctly been pointed out: "Despite the fact that protection, tariff peaks and antidumping measures shield powerful lobbies, rich country leadership in reducing this protection is a prerequisite for a pro-poor development outcome".¹⁹³

It would be greatly beneficial if developed countries take the lead and repeal the WTO Anti Dumping Code as well as its own AD laws. If that is not possible

¹⁸⁸ Bernard Hoekman, Constantin Michalopoulos, Maurice Schiff and David Tarr, *Trade Policy*, p.2, available at: <http://www.worldbank.org> (last visited August 14th, 2003)

¹⁸⁹ Although the links from specific trade policy instruments to trade outcomes and growth is less clear, the basic association between increased trade and growth is clear. See, *Box 1 Trade and poverty: what are the links?*, in GEP04.

¹⁹⁰ *Id.*

¹⁹¹ Argentina was involved in sound privatization and deregulation process and important law amendments were made in order to encourage foreign direct investment in the 1990's.

¹⁹² Not to mention the steel industry

¹⁹³ *Id.*

sound modification of the current AD laws and their implementation to prevent abuses might be the first step in the right direction.

We are completely aware of the great amount of political will governments will have to invest in order to get reforms negotiated and implemented. Strong opposition from sectors benefiting from protective laws and policies will lobby against reforms; however those sectors traditionally harmed by protective measures such as consumers and import - related business will stand by reformers if they are educated on the positive effects of the liberalization.

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