S. HRG 99-461

ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS OF AGRICULTURAL PRODUCTS

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

DECEMBER 9, 1985

Printed for the use of the Committee on Finance

U.S. GOVERNMENT PRINTING OFFICE

57-469 O WASHINGTON : 1986

COMMITTEE ON FINANCE

BOB PACKWOOD, Oregon, *Chairman*

ROBERT J. DOLE, Kansas
WILLIAM V. ROTH, JR., Delaware
JOHN C. DANFORTH, Missouri
JOHN H. CHAFEE, Rhode Island
JOHN HEINZ, Pennsylvania
MALCOLM WALLOP, Wyoming
DAVID DURENBERGER, Minnesota
WILLIAM L. ARMSTRONG, Colorado
STEVEN D. SYMMS, Idaho
CHARLES E. GRASSLEY, Iowa

RUSSELL B. LONG, Louisiana
LLOYD BENTSEN, Texas
SPARK M. MATSUNAGA, Hawaii
DANIEL PATRICK MOYNIHAN, New York
MAX BAUCUS, Montana
DAVID L. BOREN, Oklahoma
BILL BRADLEY, New Jersey
GEORGE J. MITCHELL, Maine
DAVID PRYOR, Arkansas

WILLIAM M. DIEFENDERFER, *Staff Director*
MICHAEL STERN, *Minority Staff Director*

SUBCOMMITTEE ON INTERNATIONAL TRADE

JOHN C. DANFORTH, Missouri, *Chairman*

WILLIAM V. ROTH, JR., Delaware
JOHN H. CHAFEE, Rhode Island
JOHN HEINZ, Pennsylvania
MALCOLM WALLOP, Wyoming
WILLIAM L. ARMSTRONG, Colorado
CHARLES E. GRASSLEY, Iowa
STEVEN D. SYMMS, Idaho

LLOYD BENTSEN, Texas
SPARK M. MATSUNAGA, Hawaii
DAVID L. BOREN, Oklahoma
BILL BRADLEY; New Jersey
GEORGE J. MITCHELL, Maine
DANIEL PATRICK MOYNIHAN, New York
MAX BAUCUS, Montana

CONTENTS

ADMINISTRATION WITNESS

WITNESSES

ADDITIONAL INFORMATION

COMMUNICATION

ANTIDUMPING AND COUNTERVAILING DUTY INVESTIGATIONS OF AGRICULTURAL PRODUCTS

MONDAY, DECEMBER 9, 1985

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE
OF THE COMMITTEE ON FINANCE,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in room SD-215, Dirksen Senate Office Building, Hon. John C. Danforth (chairman) presiding.

Present: Senators Danforth, Heinz, Grassley, Matsunaga, and Baucus.

[The press release announcing the hearing follows:]

[Press Release]

TRADE SUBCOMMITTEE SCHEDULES DECEMBER 9 HEARING ON S. 1629

Legislation addressing antidumping and countervailing duty investigations of agricultural products will be reviewed in a December 9 hearing before the Committee on Finance's Subcommittee on International Trade, Chairman Bob Packwood [Oregon] announced today.

Senator Packwood said the Subcommittee would examine S. 1629 at the hearing beginning at 2 p.m., Monday, December 9, 1985, in Room SD-215 of the Senate Dirksen Office Building in Washington. Senator Packwood said Senator John C. Danforth [Missouri], Chairman of the Subcommittee on International Trade, would preside at the hearing.

S. 1629 would amend the Tariff Act of 1930 to treat certain agricultural products as "like products" for purposes of antidumping and countervailing duty investigations.

S. 1629 was introduced by Senator Charles Grassley [Iowa] on September 11.

Senator DANFORTH. This is a hearing on S. 1629, which is a bill that was introduced some time ago by Senator Grassley. It was triggered by the well-known pork product matter. And Senator Grassley feels very, very strongly about this subject. He has been pushing this legislation for some time.

My own view is that he has a very good point, and my hope is that we can move this legislation ahead.

I am happy this afternoon to have as our first witnesses Ms. Lyn Schlitt, General Counsel, International Trade Commission, and Ms. Judith Bello, Deputy General Counsel, USTR.

Ms. Schlitt, go right ahead.

Ms. SCHLITT. Good afternoon.

Senator DANFORTH. Before you start, Senator Grassley has just walked through the door. Do you have a——

Senator GRASSLEY. Yes, I do.

Senator DANFORTH. I thought you might. I thought Senator Grassley just might have a comment. After he finishes the shower——

Senator Grassley.

Senator GRASSLEY. Mr. Chairman, I would like to take this opportunity to thank you for holding this hearing this afternoon to hear testimony on legislation I introduced on September 19, 1985: S. 1629.

Specifically, the legislation would require the International Trade Commission, in cases determining material injury to our domestic industry, to treat producers of raw initially processed agricultural products as members of the same industry, provided that the latter is produced in a single continuous line of production from the raw product.

The need for this legislation became apparent when, on July 25, 1985, the ITC ruled in its countervailing duty determination involving live swine and fresh chilled and frozen pork from Canada, that hog producers and pork packers were not of a like product, and therefore not members of the same industry. The ITC drew this conclusion even though it agreed that fresh, chilled, and frozen pork is produced from live swine through a single continous line of production.

What the Commission was apparently looking for was a legal connection among the industry such as instances of packing facilities being owned by producers or contractual relationships between hogs and pork prices.

The Commission found that material injury was created by the import of live Canadian hogs, but not by Canadian pork products. This logic is hard to understand since our producers must compete for the same consumer market, regardless of whether that competition comes from live hogs or slaughtered hogs.

Pork can only be produced from hogs and hogs are completely devoted to the production of pork. The value of hogs represents approximately 90 percent of the value of fresh, chilled, and frozen pork produced by pork packers. In short, it is hard to imagine an agricultural product whose producers are more closely aligned.

The Commission's decision is devastating, not only to our pork producers, but also to other producers of agricultural products which come to the ITC for assistance in the future. I am pleased to see some of those industries represented at today's hearing.

Finally, Mr. Chairman, my legislation restores the rights of our producers to defenses against unfair trade practices. It will confirm the intent of Congress, as manifested in the 1979 legislative history, that raw and initially processed agricultural products whose producers are economically interdependent are to be considered producers of a like product for the purpose of the trade laws. My bill does not expand current law beyond what was originally intended by Congress, nor does it represent an attempt to cover processed products which are not fully interdependent with the raw product in question.

Mr. Chairman, I look forward to the testimony that will be presented this afternoon and I would hope that the committee would see fit to act favorably on this important legislation in an expeditious manner shortly thereafter.

Senator DANFORTH. Senator Baucus, do you have any comments?
Senator BAUCUS. No, Mr. Chairman.
Senator DANFORTH. Ms. Schlitt.

STATEMENT OF LYN SCHLITT, GENERAL COUNSEL, INTERNATIONAL TRADE COMMISSION, WASHINGTON, DC

Ms. SCHLITT. Thank you.

I am Lyn Schlitt, General Counsel of the U.S. International Trade Commission. I am joined by my colleague, Gracia Berg, the Assistant General Counsel.

As you know, the Commission does not take positions regarding legislation. Accordingly, my comments will be limited to describing the Commission's practice in dumping and countervailing duty investigations of agricultural products.

The Commission conducts antidumping and countervailing duty investigations which require the Commission to determine whether a domestic industry is materially injured by reason of dumped or subsidized imports. Thus, the Commission must identify the appropriate domestic industry to determine whether that industry is materially injured, and, if so, whether the injury was by reason of imports subject to investigation.

To do so, the Commission must first identify the domestic industry. The term "industry" is defined by statute as the domestic producers as a whole of a like product or those producers whose collected output of the like product constitutes a major proportion of the total domestic production of that product. Like product, in turn, is also defined by statute as a product which is like, or in the absence of like, most similar in characteristics and uses with the article subject to an investigation.

Thus, the domestic industry is made up of U.S. producers of a product like the imported product subject to investigation. As these are bifurcated investigations, it is the Department of Commerce that identifies the product subject to investigation.

To define the domestic industry, the Commission must determine what constitutes the product which is like the imported product. This is a factual determination primarily based on essential characteristics and uses. Once that finding is made, the Commission then identifies the domestic producers of that like product. The domestic industry is made up of the domestic producers of a finished product like an imported finished product; producers of raw material incorporated into finished products are usually not considered part of the domestic industry. They are in the nature of suppliers for that industry.

The statute does not contain a specific provision that tells the Commission to deal with the agricultural sector differently with respect to industry definition. However, the Senate report on the Trade Agreements Act of 1979 did identify the difficulty of dealing with the injury question with respect to agriculture, and directed the Commission to take particular care with that.

While there is no explicit statutory direction to define agricultural industries differently, in light of the legislative history and within the statutory context of like product and domestic industry,

the Commission performs an extra step in analyzing the domestic industry in agricultural cases.

In processed agricultural product cases only, the Commission determines whether the producers of the raw materials, that is, the growers, as well as the processors of the finished product operate as a single industry producing the finished like product. For example, flour is a processed agricultural product. Flour mills, pretty clearly, are producers of flour. But the Commission also asks a second question: Are the farmers who grow the wheat also producers of flour within the meaning of the statute? Are farmers and millers one industry?

In a number of agricultural investigations, the Commission has considered several evidentiary factors in determining whether growers and processors constitute a single industry producing the processed product, including whether there is a single, continuous line of production without diversion from the raw material to the processed agricultural product, and evidence of whether there exists an integration of economic interest and/or a legal relationship between the growers and the processors.

The Commission has also stated that these determinations of industry are to be performed on a case-by-case basis, and it will consider other additional evidence that growers and producers are part of a single industry.

There is no legal test or tests. It is a factual inquiry.

If the growers and producers do not operate as a single industry, the Commission, pursuant to the current statute, must determine that growers should not be included in the processing industry. Although the growers may well be affected by the outcome of the decisions as suppliers of raw material usually are, the impact of imports on growers is not part of the evaluation of whether processors are materially injured by reason of the imports which are subject to investigation.

As I have described, Commission practice in these cases has developed through interpretation of existing legislation. I understand a bill has been introduced to amend that legislation. Of course, any clarification of legislative intent would be very useful and helpful.

I will be happy to answer any questions. Some of the recent cases are in litigation so I will not be able to discuss those particular cases in detail and may have to refrain from comment.

Thank you very much.

Senator DANFORTH. Thank you.

[The written statement of Mr. Schlitt follows:]

WRITTEN STATEMENT OF LYN M. SCHLITT

My name is Lyn Schlitt. I am General Counsel for the United States International Trade Commission. I am joined by my colleague Gracia Berg, Assistant General Counsel. The Commission does not take positions regarding trade bills. Accordingly, my comments will be limited to describing the Commission's practice in antidumping and countervailing duty investigation of agricultural products.

The Tariff Act of 1930, under which the Commission conducts antidumping and countervailing duty investigations, requires the Commission to determine whether a domestic industry is materially injured by reason of dumped or subsidized imports. Thus, the Commission must identify the appropriate domestic industry to determine whether it is materially injured, and if so, whether that injury was by reason of the subsidized or dumped imports subject to investigation.

To do do, the Commission must first identify the domestic industry. The term "industry" is defined by statute in section 771(4)(A) as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product." "Like product," in turn, is defined in section 771(10) as a "product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . .". Thus, the domestic industry is made up of U.S. producers of the product like the imported product subject to investigation. (In these bifurcated investigations, the Department of Commerce identifies that imported product.)

Accordingly, to define the domestic industry, the Commission must determine what constitutes the domestic product which is "like" the imported product subject to investigation. Like product is a factual determination primarily based on essential characteristics and uses. Once that finding is made, then the Commission identifies the domestic producers of that "like product." Typically, the domestic industry is made up of the domestic producers of a finished product "like" a finished imported product. Producers of raw material input into finished products are usually not considered part of the domestic industry; they are simply suppliers to that industry.

The statute contains no provision directing the Commission to deal with industry definition in the agricultural sector in a special manner nor does it state that the domestic industry should be treated differently in an investigation of processed agricultural products than in any other type of investigation. However, the Senate Report on the Trade Agreements Act of 1979 does state that, because of the special nature of agriculture, special problems exist in determining whether an agricultural industry is materially injured. The Report cited the livestock sector as an example of this point, noting that the processors may appear to be profitable when, in fact, the ranchers are liquidating their herds. S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979).

While there is no explicit statutory direction to define agricultural industries differently, in light of the legislative history directing the Commission's attention to agricultural products, within the statutory context of "like product" and "domestic industry," the Commission performs an extra step in analyzing "domestic industry" in agricultural cases. In processed agricultural product cases only, the Commission determines whether the producers of a raw material, i.e. the growers, as well as the processors of the finished product, operate as a single industry producing the processed "like" product. For example, flour is a processed agricultural product. Flour mills are pretty clearly producers of flour. But the Commission asks a second question in these cases. Are the farmers who grow the wheat also producers of flour within the meaning of the statute? Are farmers and millers one industry? If they are not a single industry, but two industries, they may well have different and conflicting interests.

In a number of agricultural investigations, the Commission has considered several evidentiary factors in determining whether growers and processors constitute a single industry producing a processed agricultural product, including whether there is a single, continuous line of production without diversion from the raw material to the processed agricultural product, and evidence of whether there exists an integration of economic interest and/or legal relationship between the growers and the processors. The Commission has also stated that determinations of industry are to be on a case by case basis, and that it would consider other evidence that growers and producers are a single industry. Commission opinions consider these issues as evidentiary factors. There is no legal test or tests, but a factual inquiry. The Commission looks at these factors to determine whether the growers, in fact, operate as a part of the industry producing the processed product.

If they do not operate as a single industry, the Commission, pursuant to the statute, must determine that the growers should not be included in the processing industry. Although the growers may be affected by the outcome of the decision as suppliers of raw material usually are, the impact of imports on growers is not part of the evaluation of whether processors are materially injured.

The Commission's negative determinations in recent agricultural investigations have been based upon its analysis regarding whether there was any material injury or threat thereof by reason of the subject imports. The Commission has considered 16 agricultural products in countervailing duty and antidumping cases during the period from 1982 through 1985, and has issued negative determinations with respect to 6 of these products. In 3 of the 6 negative determinations, the Commission did not include growers in the domestic industry. In each of those three cases, the Commission based its negative determination on its finding that material injury was not by reason of the subject imports. Accordingly, the requisite causal nexus was lacking.

Just to briefly clarify, the total number of cases that I just discussed, refers to the number of products considered. Commission investigations are further subdivided according to the number of countries involved and according to whether the cases are countervailing duty or antidumping investigations.

As I have described, the Commission's practice in these agricultural cases has developed through interpretation of existing legislation. I understand that a bill has been introduced to amend that legislation. Of course, any clarification of legislative intent would be helpful.

I would be happy to answer any questions you might have. Because some of our cases are in litigation, however, I cannot discuss those particular cases in detail and may have to refrain from comment. Thank you.

STATEMENT OF JUDITH HIPPLER BELLO, DEPUTY GENERAL COUNSEL, OFFICE OF THE U.S. TRADE REPRESENTATIVE, WASHINGTON, DC

Senator DANFORTH. Ms. Bello.

Ms. BELLO. Thank you very much, Mr. Chairman.

My name is Judy Bello. I am the deputy general counsel to the U.S. Trade Representative. I have submitted a written statement that could be incorporated into the record. However, to best use your time here this afternoon, I would simply like to make several points.

Two of these concern timing. The first point, as I am sure you are aware, is that unhappy domestic parties in the swine-pork case have appealed to the Court of International Trade. This is in accordance with the judicial review provisions that the Congress enacted in the Trade Agreements Act of 1979.

As a general matter, we think, the most effective use of the U.S. Government's resources—both within the Congress, the courts, and the executive branch—is simply to let this process have an opportunity to work. And, of course, a bill introduced at this point in time, while the case is still on appeal, could be viewed as premature.

The second point, also regarding timing, has to do with the dispute settlement proceeding underway currently in Geneva. Again as you are probably aware, the European Community has challenged our application of the wine-grape provision effected last year in the Trade and Tariff Act, which directed the Industrial Trade Commission to consider U.S. grape growers as part of the U.S. wine-producing industry.

The Commission recently and unanimously found no reasonable indication of injury caused by imports, and that investigation was terminated. We have, on that basis, asked the European Community to terminate as moot the dispute settlement proceeding. It has declined, largely on the basis that the ITC decision is likewise being appealed to the Court of International Trade.

We have asked the EC at least to suspend the dispute settlement proceeding pending the outcome of that litigation, But again, it has declined. So the timing of this bill presents some awkwardness for me, on behalf of the administration, to comment upon the relevance of our international obligations. Our brief in the wine dispute settlement proceeding is due December 20, for example, and oral argument before the panel is scheduled for January. So the timing of the bill renders it awkward to say publicly very much

about our international obligations under the GATT, the Subsidies Code, and the Antidumping Code.

My third comment, very briefly, is simply to question whether this bill achieves its intended objective. As Mrs. Schlitt is more qualified to explain in detail, in the pork case (which was the principal origin of the bill), the Commission found injury to the pork producers as well as the swine producers; however, they didn't find the requisite causation. We suggest that if this bill were enacted, it is unclear whether the result would be more or less favorable to the domestic industry. As I read the bill, the result could be an entire affirmative, or it could equally be an entire negative. The outcome would be uncertain, and that uncertainty should be considered during deliberations on this bill.

In conclusion, we would be happy to continue the process we have already begun of working with subcommittee members and their staff on the bill. We regard the antidumping and countervailing duty laws as one of the principal bulwarks in our defense against unfair trading practices. They were significantly amended last year to improve them, and the administration cooperated in that effort. We will continue such cooperation.

We simply make the point that, as you will not be surprised to hear, we are very anxious that any bill be consistent with our agricultural exporting as well as importing interests, and our international obligations. And we recognize that you, of course, want to ensure that any bill that might be enacted later would, in fact, remedy the problem that you perceive.

And with that preface I invite any questions you may have.

Senator DANFORTH. Thank you both very much.

[The written statement of Ms. Bello follows:]

WRITTEN STATEMENT OF JUDITH HIPPLER BELLO, DEPUTY GENERAL COUNSEL, OFFICE OF THE U.S. TRADE REPRESENTATIVE

Mr. Chairman and Members of the Committee, I am pleased to appear this afternoon to express the views of the Administration concerning S. 1629, a bill that proposes to amend the definition of "like product" in the antidumping and countervailing duty laws.

The Administration appreciates the concerns of Senator Grassley, the bill's sponsor, and understands their origin in the International Trade Commission's final determination (in its investigation of Live Swine and Pork from Canada) that although a U.S. industry is materially injured by reason of imports from Canada of live swine, a U.S. industry is not injured or threatened with injury by reason of Canadian imports of fresh, chilled or frozen pork. The purpose of the bill is to try to ensure that for certain agricultural raw and processed products, the Commission would find injury to the U.S. processors if it find injury to the raw material producers.

As the Committee is aware, the ITC's decision in the swine and pork case has been appealed to the U.S. Court of International Trade, under the judicial review provisions enacted by the Congress as part of the Trade Agreements Act of 1979. That act enhanced the reviewability of countervailing duty and antidumping decisions by the courts. The availability of judicial review ensures that the decisions reached in antidumping and countervailing duty cases are in accordance with the law. We think that this scheme, established by the Congress, should be allowed to operate as intended in the Pork case. As a general rule, then, the Congressionally established judicial review process should be allowed to work and particular cases should not be reversed by legislation. Since S. 1629 responds to a specific determination of the Commission that has been challenged by dissatisfied domestic parties in the court, as authorized by the Congress, we think S. 1629's proposal is premature.

In addition, we are wary of generalized solutions to a particular problem. In some cases, for example, the proposed amendment could hurt U.S. agricultural producers facing import competition. If forced to consider raw and processed products as a

single product despite significantly differing economic conditions faced by their respective producers, the Commission could find no injury from either raw or processed imports rather than possible injury from one but not the other. And as a major agricultural exporting nation, we also have concerns about possible applications of such an amendment to our exports.

We also note that the European Communities has challenged the United States on a closely related issue in the GATT Subsidies Code. The EC is complaining about our application of a provision of the Trade and Tariff Act of 1984 that requires the Commission to consider grape growers as part of the wine industry for purposes of antidumping and countervailing duty petitions filed up to November 1986. As it behooves us to do so, we are vigorously defending that recently enacted Congressional provision in the ongoing dispute settlement proceedings in Geneva. We would prefer not to comment further on the international rules while that case is being considered under international dispute settlement, but clearly we need to proceed with care and deliberation in this area.

As the President announced in his speech September 23rd to the President's Export Council, the Administration is willing to work with the Congress on any trade legislation that has as its object the promotion of free and fair trade. We think the antidumping and countervailing duty laws, which S. 1629 would amend, are a fundamental defense against unfairly traded imports, an we are proud of our record in enforcing them in a vigorous and timely manner. We believe that the Trade and Tariff Act enacted last fall significantly improved these laws, and we worked closely with the Congress—particularly the Senate Finance and House Ways and Means Committees—in that mutual effort. We would again like to work with you, and in fact have already begun this process with regard to S. 1629 with the Senate Finance Committee staff. We will continue our study of S. 1629 and our work with Members and Committee staff on it.

Senator DANFORTH. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

In the first instance, my first question will be directed to you, Ms. Schlitt. I know that you may be reluctant to discuss the pork investigation since it still may be or still is in litigation, but I would like to have you realize that the bill in and of itself addresses a whole range of agricultural products which are affected by that decision so my question to you is: Does the decision in the pork case run consistent with similar cases in its findings or has the Commission found differently on other agricultural cases with similar circumstances to the pork case?

Ms. SCHLITT. Senator Grassley, I can't, as you noted, address directly the pork case. The method of analysis that was used in that decision as well as other agricultural industry decisions, I have described. The Commission looks to determine what is the like product and then the domestic industry. It has looked at, in connection with determining whether they are one industry, looks to continuous line of production—has looked to integration of economic interests and legal integration and would look to other evidentiary factors that would indicate that producers and growers were a single industry. Certainly, in that respect, it is consistent. As to the facts of the individual case, these cases are decided on a case-by-case basis by the facts of the case as presented to the Commission as part of the record.

Senator GRASSLEY. Well, to the extent that there may be some difference particularly in agricultural cases, could you give me your view of whether or not in this case there might be a need for some type of legislative guidance, and would it not be in the best interest at this point? And my legislation, of course, does provide some of that guidance.

Ms. SCHLITT. Senator, as I noted, the current law does not have a specific provision that deals with this issue, addressed directly to

agriculture. The Commission has derived their approach to this issue, from the statutory language, which does not distinguish between an industrial product and an agricultural product, and also derived it somewhat from the legislative history, which, again, does not deal with industry but with injury.

As to whether it would be a good idea, I certainly defer to you. I think if you want the Commission to deal specially with this issue, clear legislative direction would be helpful.

Senator GRASSLEY. Well, I would only present it in the view that all parties involved have made very clear that the legislation itself is not as definitive as it ought to be and particularly where legislative history would make a determination for special consideration for agricultural industry. And then maybe in this particular instance that special consideration not be given to the extent that we in Congress who were here in 1979 felt that it should have been responded to. Then it would seem to me from your standpoint legislation clearing this up would make your job easier as well as make public policy very clear.

Ms. SCHLITT. Well, I am not trying to make my job easier, but in terms of clarifying congressional intent, it could be clearer. If the intention is to deal with industry definition differently, the legislative history of the 1979 act addresses the question of material injury in agricultural cases, but does not specifically direct the Commission to deal with industry definition in some special way. And if that is Congress' intent, I think, it could be made clearer.

Senator GRASSLEY. In the case of pork, again, the obvious follow up of the ITC's decision was that instead of so much live pork coming into the country there has been a diversion now to the pork being slaughtered or the hogs being slaughtered in Canada and fresh pork, chilled pork, coming into the country.

Now when the ITC investigates a particular case, does it take into consideration the question of possible diversion like that?

Ms. SCHLITT. The statute provides that the Commission can look—and the Commission has in, I believe, it was groundfish—the Commission has looked at injury and found injury with respect to the imported raw product and threat with respect to the processed product. So that you would look at what the impact of the imposition of relief on one sector would be on another sector. There is a provision of the law that provides for the Commission to consider certain types of product shifting. The statute provides that the Commission should look at all economic factors, and that would, in my view, permit the Commission to look at even broader product shifting issues than is specifically provided for in the statute. And I do believe that the Commission now has the power to do that. It has done that in at least one recent case, and could do it in others—it should look at that issue in every case.

Senator GRASSLEY. All right. Do you know in this particular case when they did make a division between live pork being injured and the processed pork coming into the country not injuring our industry whether or not that shift, if it did take place, would be a threat to the processors in America as an industry?

Ms. SCHLITT. I believe that at least one of the Commission opinions, which is a matter of record, addressed the possibility of a

shift, and found that there was not a threat on the facts of the case in the record before it at the time.

Ms. BELLO. If I could just note, Senator Grassley, the pork opinion does specifically address that issue. Basically, the law requires that any threat of injury be real and imminent. On the basis of the facts available to the Commission at the time of its decision, the majority opined and concluded that the threat was too speculative; that it was not real and imminent.

I am aware that in view of subsequent increases in imports of processed pork products, some private parties believe a different result would be obtained in a new investigation.

Senator GRASSLEY. Do you want to go on to some of the others?

Senator DANFORTH. All right.

Senator Baucus.

Senator BAUCUS. Thank you, Mr. Chairman.

Ms. Bello, I would like to address generally what specific benefits and, second, what specific problems you have generally with Senator Grassley's bill. It seems to me the present law is a little vague. The present law tends to make it more difficult for growers and processors not only to petition together but to be treated together in any action taken by the ITC or other bodies. And it seems to me that the Grassley bill is at least a step in trying to solve that problem not only in trying to be more specific, but also to make it a little more—make the practice conform a little bit more to reality. That is, in many cases, the result affecting the processors is as disadvantageous as in some form in current practice as is the result to the growers.

So my first question is: What specific benefits, from the ITC's point of view, do you see in the Grassley bill? And then what specific problems do you see with it in administering it from the Commission's point of view?

Ms. SCHLITT. If it is your intent that the Commission ought to treat growers and processors as a single industry, this is clearer. There is no special definition now. It is my view that the Commission has gone pretty far in trying to deal with this issue on the basis of the existing legislative language, the language of the existing statute.

Senator BAUCUS. Do you think this bill goes too far?

Ms. SCHLITT. Oh, no, sir, I'm not saying that, I'm saying that given what the Commission is dealing with like product and domestic industry as defined in the current statute, the Commission has had to go somewhat far in its analysis to accommodate the possibility—and, in fact, having found in some cases—that growers are part of the industry producing the processed product. This would make clear that the Commission has been going in the correct direction, at least the direction Congress intends. That would give clear direction to the Commission that this is the appropriate——

Senator BAUCUS. Would the Commission suggest any changes?

Ms. SCHLITT. Pardon me?

Senator BAUCUS. Would the Commission suggest any changes, any amendments, to this bill?

Ms. SCHLITT. The Commission's analysis now deals with growers and processors in terms of domestic industry. Who are the producers within the domestic industry? It does not deal with finding the

raw material and the processed material to be a single like product. I don't know, frankly—we would, if we are directed to do so, of course—don't know how you think about them as one product. There are differences between them in characteristics and uses. However, in terms of looking at them as a single industry which is comprised of both growers and processors, the Commission has done this in the past and understands the approach and could do it in the future.

Senator BAUCUS. My question is whether or not the Commission has any suggested changes. Would the Commission want to change this bill in any way, suggest any amendments?

Ms. SCHLITT. The Commission does not comment directly on legislation. We have provided some technical suggestions with respect to——

Senator BAUCUS. Do you have any personal amendments you would like to see adopted?

Ms. SCHLITT. I think that if Congress wants these groups to be treated as a single industry that it should clarify that. And I think it makes more sense to me, as I understand how the Commission has operated in the past, to deal with it in terms of domestic industry as opposed to like product, because I think it would be difficult to——

Senator BAUCUS. So you are saying personally you generally agree with the bill?

Ms. SCHLITT. Pardon me?

Senator BAUCUS. If the intent of Congress is to try to address this general problem, then you are telling us that even though the Commission does not have a view on the bill that you personally believe this is generally in the right direction? Or do you have any personal suggestions you might want to give to us to amend the bill?

Ms. SCHLITT. The bill would amend, or direct the Commission mandatorily to deal with what the Commission has currently dealt with discretionarily as evidentiary factors, that is, a single continuous line of production, and economic integration.

I do have some concern that if there is a mandatory—if the law is mandatory and these issues are dealt with as a test as opposed to evidentiary factors, it will impair the Commission's ability to look at other facts that may be relevant to a particular industry.

Senator BAUCUS. I agree with you. I think the Commission should have that ability.

Ms. Bello, do you have any comments on this?

Ms. BELLO. Yes, Senator. As the President announced in his speech in September, the administration is happy to cooperate with the Congress on all trade legislation that has as its aim the promotion of free and fair trade. We have begun that process with respect to this bill, and we have made some very specific suggestions.

The main question you asked, however, was what I see as the advantages and disadvantages of the proposed bill. To answer that question fully would require some consideration of the relevance of our international obligations, under the Subsidies and antidumping codes. As I indicated earlier, I'm happy to do that with you or your staff at your convenience in some more private setting. I'm reluctant to do it in this very public setting.

Nonetheless, I note that we have suggested to staff that the bill could perhaps be more effective—and certainly improved from our standpoint—if it focused on the criteria for injury and threat of injury rather than the definition of like product. Like product is a term addressed in some detail in the two codes to which I referred. We think that the bill could be substantially improved if it were directed toward the criteria for threat of injury rather than a like product or even an industry definition.

Senator BAUCUS. Do you think with a lower threshold threat test that you could better address some of these questions?

Ms. BELLO. The advantage of an amendment to threat of injury criteria as opposed to "like product" or "industry" definitions is that threat and injury are concepts much more loosely defined in our international agreements.

Like product and industry, have more specific definitions. Consequently, amendments to those definitions are more difficult.

We also note that in the pork case, for example, injury was found to the pork producers as well as the swine producers; the problem was instead causation. It seems to us that at least with respect to the pork case—although differing agricultural cases were decided on different grounds—a more effective bill would aim at threat of injury rather than at the issue of who produces the like product.

Senator BAUCUS. Thank you very much.

Senator DANFORTH. Senator Matsunaga.

Senator MATSUNAGA. Thank you, Mr. Chairman.

Do I properly understand that the ITC has taken no position on the bill? You are not supporting; you are not opposing? Am I correct?

Ms. SCHLITT. Yes.

Senator MATSUNAGA. What about the U.S. Trade Representative's Office? Officially, are you supporting or opposing the Grassley bill?

Ms. BELLO. Officially, speaking on behalf of the administration, we cannot support the bill in its present form. Yet, I hasten to add that we are happy to continue to cooperate with Senator Grassley and any other members of the subcommittee interested in the underlying issues, to try to forge a bill that does serve our agricultural exporting as well as importing interests and is consistent with our international obligations.

Senator MATSUNAGA. Do you perceive any potential problems with GATT in considering the growers and processors to be producers of a like product?

Ms. BELLO. As I indicated, the GATT and code issues, in a very closely related case, are currently being disputed between the U.S. and the European Community. Basically, Europe has challenged our inclusion of U.S. grape growers as part of the wine industry in the recent investigation—which was terminated, but which nonetheless is being appealed to the U.S. Court of International Trade, so that Europe remains very interested.

So respectfully I am unable to comment in this public forum on those issues in any detail, since they are the subject of a very live controversy proceeding in Geneva.

Senator MATSUNAGA. So do I understand you to say that adoption of the Grassley bill might even cause further problems?

Ms. BELLO. Senator, I would rather not speculate on the consistency of Senator Grassley's bill with our international obligations. What I would like to say is that we would like to work with Senator Grassley and other interested subcommittee members to see if we cannot fashion something which meets everyone's concern more effectively than perhaps the current bill.

Senator MATSUNAGA. In the mid-1970's you will recall a countervailing duty, CVD, order was imposed on imports of sugar from the EC. Would anything in the Grassley bill result in a change in that order? Ms. Schlitt or Ms. Bello?

Ms. BELLO. All products subject to orders at the Commerce Department undergo an annual review in which the level of sales at less than fair value or subsidies is reviewed. And in the context of those reviews, Commerce reviews whether certain products fall within the definition of the class or kind of merchandise under investigation.

Now this is awfully technical, but I hasten to point out that Commerce looks at class or kind of merchandise, whereas the Commission looks at the definition of industry which, in turn, is based upon the definition of like product. So, actually, there is not 100-percent overlap between what the Commerce is doing on the subsidy and sales at less their fair value side and what the Commission is doing on the injury side. The pork case is, perhaps, an excellent example.

There the Commerce Department under Alan Holmer, while he was still the Deputy Assistant Secretary for Import Administration, treated swine and processed pork as one single class or kind of merchandise. To the contrary, the Commission—in construing the definitions of industry and like product—treated them separately. So the two agencies are not entirely in accord on this issue.

The Commission does not annually make injury determinations as does the Department of Commerce for subsidies and dumping. But, I think the answer to your question is that if there is an outstanding subsidy or dumping order on a product, which the Commerce Department under section 751 of the act does review on an annual basis, then the issue whether a particular product falls within the class or kind of merchandise is a live one. Another example other than pork is a dumping investigation of portable electric typewriters from Japan. An issue subsequently developed whether that order covered electronic typewriters or sophisticated word processors. Commerce determined that the order on electric typewriters is broad enough to cover electronic typewriters, the word processor issue remains unresolved. Regarding televisions, too, there is a similar issue. There is a dumping order on televisions from Japan. There currently is an issue about how far the coverage of that order extends. Likewise, there was a dumping case on bicycle speedometers, and the question was whether the order covered speedometers used on exercycles as opposed to bicycles.

So the scope of class or kind of merchandise is an open issue. There is precedent at the Department of Commerce for construing rather broadly the definition of class or kind. And one of the most recent developments—which may be of great interest to you—is Commerce's announcement Friday of its self-initiated dumping investigation on 256K RAMs and above from Japan. As we all read

in the Washington Post on Saturday, if any duties were assessed, Commerce has said they would apply to future generations of chips as well. The basis for that indication by Commerce is the likelihood that it would interpret future generations of chips beyond 256K RAMs as falling within the same class or kind of merchandise.

Senator MATSUNAGA. Sugar, of course, is unique and stands by itself. I was expecting a much briefer answer, but being an attorney myself, I understand the response.

Ms. BELLO. I apologize.

Senator MATSUNAGA. Ms. Schlitt.

Ms. SCHLITT. The Commission did investigate under section 104 "Sugar From the European Community", to determine whether the United States industry would be materially injured or threatened with material injury by reason of revocation of the outstanding CVD order on sugar from the European Community.

With respect to your question of whether the industry would have been treated differently or defined differently under the proposed legislation, in that case the Commission did find the growers and processors and refiners to be a single industry because of the close economic relationship among growers, processors, and refiners in the production of sugar, and that they would all be affected by the removal of that order.

Ms. Bello referred to a threat. In that particular case, the Commission determined that revocation of the order would threaten material injury to that single domestic industry as so defined, and the order is still outstanding.

Senator MATSUNAGA. Thank you very much. My time is up.

Senator DANFORTH. Senator Grassley, do you have further questions?

Senator GRASSLEY. Yes, if I could.

Before I ask a couple more questions of the ITC, I would like to just comment on what Ms. Bello said. With all due respect to you or the administration, when you have a dual consideration—and I don't say it is not a legitimate dual consideration of the interest of the farmer on the one hand and then our international treaty obligations on the other—that is kind of tantamount to saying to heck with the farmer because, you know, I have gone through too much of the European Community's subsidization of their exports or the last GATT consultation meetings in November 1982 that I attended where they did not even want agriculture to be discussed. They did not even want to talk about having it on the agenda; and then see how we get pushed around by the Japanese when we want them to import a little more agricultural products.

And I know that there is some progress probably being made. But, you know, the progress is that they are talking now and they were never talking before. But I do not expect to live long enough to see very much change of direction just from the talk.

And I guess that is what leads me to seek redress from the ITC. And when that cannot be done, then to change legislation to make it easier. So, I just say that because I think that we all always ought to be reminded that progress in this area is practically nonexistent. Or if there is progress now, it is just progress in the procedure and no progress in the substance.

Ms. BELLO. Senator, may I be permitted to make two brief comments?

Senator GRASSLEY. Sure.

Ms. BELLO. One is that, as I noted, our sole concern is not international obligations. Our concerns also encompass the interests of our farmers exporting their products. We have to expect that any rules we fashion will be applied against our agricultural exports by our trading partners. And, therefore, we are very concerned that any rules fashioned by the Congress be those that we are prepared to live with as they affect our agricultural exports as well as they may assist our farmers who are facing severe import conditions.

Senator GRASSLEY. And I don't argue with the legitimacy of that. I expressed my vote on the textile bill against it as an indication that I am concerned about retaliation. But, I think I see the maintenance of the status quo pretty much a policy of our Government. And that is what I dislike.

Ms. BELLO. The other brief comment I would like to make, Senator, is that, as you know, the administration is emphasizing the importance of agriculture in the context of a new round of trade negotiations. We are pushing just as hard as we can for a new round. We have recently made progress by persuading a majority of the GATT contracting parties to establish a preparatory committee.

We have also shown our concern for farmers and European agricultural policies in particular by recently instituting a complaint under the GATT subsidies code against European export subsidization practices for wheat. So we are taking measures along those lines. I can very well appreciate the views of you and your constituents that these tend to be rather long-term measures rather than results that we will see next week.

Senator GRASSLEY. I would like to ask a question based upon the decision that the ITC made on the Canadian pork. And I ask this about if there would ever be a procedure ever followed against the import of the European Economic Community pork products, and there is a dramatic increase in those.

And I would submit for the record, Mr. Chairman, a study by Glen Grinds at the University of Missouri, an agricultural economist, on the tremendous increase in pork from the European Community; just dramatic increase between the first 6 months of 1984 and the first 6 months of 1985.

[The information from Senator Grassley follows:]

ITC final ruling places duty on Canadian hogs, but not pork

After over a year of investigative study and numerous hearings, the U.S. International Trade Commission (ITC) announced its final decision on NPPC's countervailing duty petition in late July.

ITC ruled the U.S. pork industry is being materially injured by Canadian live hog imports but not by Canadian pork products. Thus the ruling paves the way for a permanent countervailing duty on Canadian hogs by the U.S. Commerce Department, but eliminates the duty on Canadian pork imports.

Canadian live hog importers will be subject to a duty of $3.21 per cwt. U.S. dollars.

NPPC has expressed its disappointment of ITC's ruling and is expected to decide shortly which appeal process it will pursue.

ITC's decision will not substantially reduce material injury to the U.S. pork industry, because Canada will ship more pork product into the U.S.," says Glenn Grimes, University of Missouri Agricultural economist.

Official figures from USDA's Foreign Agricultural Service (FAS) for June 1985 indicate the duties were having more effect on limiting Canadian live hog imports than on imports of fresh and chilled pork.

Canadian live hog imports for June 1985 were seven percent less than for June 1984. Live hog imports for the first six months of 1985 are still 43 percent above 1984, but have declined each month since preliminary duties were placed on live hogs in April.

Canadian fresh and chilled pork imports declined in April and May 1985, but increased 43 percent in June 1985 compared to year earlier figures. For the first six months of 1985, 29 percent more fresh and chilled pork has been imported into the U.S. than in 1984.

Frozen pork imports declined by 21 percent in June, and for first half 1985 are running 33 percent behind last year's figures.

At mid-year 1985, Grimes estimates a $2.14 to $4.88 per cwt. impact on U.S. hog prices, equalling $215 to $490 million. Total Canadian live hog and pork imports now represent 4.39 percent of all pork consumed in the U.S. ■

Canadian Live Hog and Pork Imports to U.S. Six-Month Comparison

	1985	1984	% Change
Live Hogs (no. head)	862,199	603,682	+43%
Fresh and Chilled Pork (metric tons)	76,353	59,257	+29%
Frozen Pork (metric tons)	14,067	18,347	-33%

SOURCE: USDA Foreign Agricultural Service.

Estimated Impact of Canadian Hog/Pork Imports on U.S. Pork Producers

Year	Cwt. Impact	Total Impact
1982	$1.19-$2.97	$236-$579 million
1983	$1.12-$2.80	$236-$583 million
1984	$1.86-$4.67	$381-$940 million
1985*	$2.14-$4.88	$215-$490 million

*Six-month comparison

SOURCE: Glenn Grimes, University of Missouri ag economist.

Canadian imports as a percent of U.S. pork consumption = 4.39 percent

EEC Pork Imports to U.S. Six-Month Comparison

	1985	1984	% Change
Fresh and Chilled Pork (metric tons)	1,768	[illegible]	+1,909%
Frozen Pork (metric tons)	39,830	16,169	+146%
Boned, Canned Pork (metric tons)	46,224	35,600	+30%
Total Pork (metric tons)	95,037	57,569	+65%

SOURCE: USDA Foreign Agricultural Service.

Estimated Impact of EEC Pork Imports on U.S. Pork Producers

Year	Cwt. Impact	Total Impact
1985*	$1.67-$3.80	$167-$382 million

*Six-month comparison

SOURCE: Glenn Grimes, University of Missouri ag economist.

EEC imports as a percent of U.S. pork consumption: 3.42 percent

EEC pork imports up 65% for first six months of 1985

Subsidized pork imports from the European Economic Community (EEC) to the U.S. were 57 percent greater in June 1985 than for the same period a year ago. With the June shipments, EEC's total six month pork import levels are running 65 percent above those of a year ago.

Boned, canned and frozen pork represent over 90 percent of the total EEC pork imports, with a large share coming from Denmark.

American producers and packers continue to feel the impact from EEC imports. "Producer prices have been impacted from $1.67 to $3.80 per cwt. so far in 1985," says Glenn Grimes, University of Missouri agricultural economist, "which adds up to a decline in producer income of $167 to $382 million."

EEC pork imports for first half 1985 represent 3.42 percent of the pork consumed in the U.S., according to Grimes.

In response to the growing EEC subsidized pork import problem, NPPC asked the Senate Finance Committee this past spring to request an International Trade Commission (ITC) investigation of the situation. ITC is presently conducting a study, and has scheduled an EEC import hearing for late September ■

Japanese producers expand pork production

Japanese pork production increased 4.8 percent during January-April, 1985, compared to the same period last year. This points to lower pork imports than previously forecast, said USDA officials.

In a recent report of world production and trade, USDA indicated some Japanese producers have decided to step up pork production despite government recommendations against expansion.

According to the U.S. Agricultural counselor in Tokyo, producers have been encouraged by strong pork prices and stable feed costs. Current conditions indicate Japan's 1985 pork production will exceed the two percent increase forecast earlier ■

Ontario Corn Producers may retaliate

The Ontario Corn Producers Association has called for a study to determine whether government subsidies paid to U.S. farmers who sell corn in Canada are unfair, and thus grounds for a duty. The move by the Ontario group is interpreted as possible retaliation for the U.S. imposing a countervailing duty on Canadian hogs.

In addition, the Ontario Corn Producers have asked for a study to determine whether U.S. corn contains enough aflotoxin to constitute a health threatening situation. This action is aimed at a current ban by several U.S. states on Canadian hog imports because of the alleged health threat from using the antibiotic chloramphenicol.

Chloramphenicol has been banned by the Food and Drug Administration for use in food producing animals in the U.S., and was recently banned for the same purposes in Canada ■

Senator GRASSLEY. But, regardless, it leads me to this question: As a result of the decision by the ITC now in order to get standing is it going to be necessary for the meat packers on the one hand singly, or the meat packers, plus the pork producers, going to have to file a petition to get standing? If we would have a hypothetical case coming up in the future.

Ms. SCHLITT. Hypothetical case on some hypothetical product.

Senator GRASSLEY. Well, I don't want to emphasize that. There probably will be such a case. And I guess I am interested in knowing from what you decided in the case of Canadian pork and if it is going to be necessary to have both, just the packer or the packers and the growers.

Ms. SCHLITT. The statute requires that a petition be filed on behalf of the domestic industry by a member of the industry as defined in the statute. In order to file a case, the processors would have to file a petition.

Ms. BELLO. Senator, if I could just contribute something to that discussion. Although, of course, I am from the USTR and don't speak in this regard on behalf of Commerce. Actually I am very glad to see Senator Heinz joining us at this particular time, because I think standing is an issue in which he is particularly interested.

I consulted with Commerce just this morning about this issue: what would happen in a hypothetical future case if only the grower of the raw material filed a case against imports of a processed product, provided that there was a single, continuous line of production and integration of economic interest between the two industries. And, obviously, Commerce's preference in that circumstance would be to urge the would-be petitioner to go out and find a cooperative or at least one member of the processing industry to join in the petition.

However, Commerce stressed to me that this actually was a case of first impression; that they are not sure what they would do, and that they have never refused to initiate a petition against imports of a processed product because it was filed solely by growers of the input product.

In the pork case, for example, they did consider that the swine and processed pork products were the same class or kind of merchandise. Hypothetically, you could deduce that the Commerce Department, which decides whether to initiate an investigation (in consultation, of course, with the Commission) might take the view that since processed pork and swine are the same class or kind of merchandise, then it might be appropriate to consider a petition if it were brought solely by swine producers without the support of pork processors.

But it is a case of first impression. I certainly do not speak for, nor intend to bind, Commerce. And Commerce, of course, while it is responsible for making this decision, would consult with the Commission on the issue.

Ms. SCHLITT. Senator, I did say that the processors would have to join in a petition. In my view, as the statute is currently written, of course, they could be joined with the growers in filing a petition.

I am not aware of a case that has been filed solely by the growers without a processor joining.

Senator GRASSLEY. One last question. And this question is general; not related specifically to my legislation. But I ask it to try to determine if there is some rationale for lack of affirmative action on agricultural cases as opposed to industrial cases. But my question is based on an article in the Journal of Commerce that Commissioner Seeleg Lodwick gave these statistics: He finds that the ITC finds that only 9 percent of the agricultural cases in the affirmative while in 50 percent of the cases are nonagricultural cases that are found in the affirmative.

Ms. SCHLITT. Senator, as I referred to in my prepared testimony, the Commission has considered 17—it did say 16, but we added a more recent case, that is pistachios—17 agricultural products in countervailing and antidumping cases since 1982. Now when I say agricultural products, the way investigations are numbered, if there were several countries, that would be multiple cases. In terms of the number of products the Commission has looked at, they have looked at 17. And of those 17 cases, there have been negative determinations by the Commission in 6. There have been some negative either preliminary or final determinations by the Department of Commerce as well, so the number of products in which relief was granted is less than that.

But I am not—those are the statistics and I believe they are accurate with respect to cases since 1982.

Ms. BELLO. If I could just add an observation. Lyn, if you disagree, please correct me. Senator, I believe part of the difficulty may be that more often in agricultural cases than in industrial cases, the producers concerned tend to be very small businesses that are not concentrated. And in those types of cases the Commission, which makes its injury finding on the basis of responses to questionnaires which it sends out, often find a significantly lower response rate. This makes it more difficult perhaps—although, I certainly don't speak for the Commission—to find injury or threat of injury. The agricultural cases are like to the small business cases in that respect, while there may be a difficulty involved, it is in the nature of the organization of the industry in the U.S.

Ms. SCHLITT. It is true that in agricultural cases the Commission gets a lower response rate to its questionnaires than it does often in industrial product cases. It is also true, however, that it is an area in which there is, in many cases, a better data base available within the U.S. Government than there are in some other industries because we are able to use, and often do use, USDA statistics—in part tempered by and in connection with responses to questionnaires. And that is very often better data than we have available in some industrial product investigations.

Senator GRASSLEY. Just for the record, and then I am done, that is from the Journal of Commerce, May 21, 1985, page 17a, the article that I referred to that C.D. Lodwick wrote.

Senator DANFORTH. I understand that it is the position of both the ITC and the USTR, meaning USTR, the administration, that you would welcome clarification, legislative clarification, in this area.

Ms. BELLO. We would certainly welcome it, provided the clarification was consistent with our agricultural exporting interests and our international obligations.

Senator DANFORTH. Well, you want the bill to be a good one, but you do welcome legislation. You do not want us to file this in a circular file, do you? You want us to work on this area?

Ms. BELLO. No, Mr. Chairman, we are not stone walling. We are very happy to continue the effort.

Senator DANFORTH. No; I'm asking you what you want us to do. You do think that this is a fruitful area for Congress to pursue?

Ms. SCHLITT. As I said, the Commission does not take positions on legislation, but——

Senator DANFORTH. Ms. Schlitt, believe me, I understand that But you want us to clarify it. It would be helpful if we clarified it.

Ms. SCHLITT. I think that some clarification would be helpful. And, of course——

Senator DANFORTH. Do you agree with that, Ms. Bello.

Ms. BELLO. I never oppose useful clarification.

Senator DANFORTH. All right. Is there any reason why agricultural products should be treated differently from other kinds of products? Should this be an agricultural product bill?

Ms. BELLO. Intellectually, it is very hard to say why there ought to be different definitions for agricultural and industrial products. The reason that there has been some special treatment of agriculture in the 1979 report and in the special rules for agriculture under the definition of industry is political rather than intellectual or legal, if you will.

Senator DANFORTH. What is your view? Do you think we should pursue agricultural products alone or do you think we should pursue the general subject?

Ms. BELLO. Our view normally is that provided we meet our exporting concerns and our international obligations, we are happy to see it be as general as possible. But if there is a problem with respect to either of those other interests, then we would rather have the bill be as narrow as possible.

Senator DANFORTH. All right.

Ms. Schlitt, is this difficulty which Senator Grassley has pointed out in his bill—does this pertain peculiarly to agricultural products or does this pertain also to other kinds of products?

Ms. SCHLITT. I agree with Ms. Bello that it is difficult intellectually to make the distinction.

Senator DANFORTH. How about historically?

Ms. SCHLITT. A case that comes to mind, unfortunately, at the moment is a section 201 investigation in 1980, which, of course, was not under title 7, of automobiles in which automobile parts manufacturers came in and said, "we are affected so we should be part of the industry."

I think that it is possible that the same issue could come up in other industrial products cases. And, indeed, it has.

Senator DANFORTH. I can understand the origin of the definition of what is a like product. I can understand the reason for wanting a broad definition. The reason for wanting a broad definition is to prevent loopholes. Right? If you have very narrow definitions of what is a like product, that is, if a like product is one that is identical to the one that is involved in the case, then you distill the invitations for loopholes. Correct?

I will just give you a hypothetical example. Suppose Canada is shipping live pork into the United States and a dumping case is brought against live pork, and it turns out that after winning that case the Canadians set up slaughterhouses on the border and then ship in processed pork. That clearly is a loophole, and I can understand the reason for wanting a broad definition of what a like product is—to avoid loopholes. But I cannot understand what the argument is for a narrow definition. Maybe there is one.

Ms. SCHLITT. Senator, the Commission conducts its investigation of whether there is material injury and whether that injury is by reason of imports of the products subject to investigation. On a broader definition of like product, there is a possibility that the injury which is being caused, may be diluted. And it may be more difficult to get relief than if one defined a narrow like product and a narrow industry and looked at imports on that like product on that industry and their impact on that industry.

So sometimes it sounds very good to say, well, let us have a broad like product definition, a broad industry definition, but that could take an import penetration level of 25 or 30 percent and knock it down to 2 or 3 percent.

Ms. BELLO. I would just like to add that one of the key ways in which trade counsel earn their fees is by examining very carefully the issue of the breadth of the like product definition that they urge the Commission to take. The Commission currently has discretion, to define it more broadly, as they have done in many other agricultural cases. They did not do so in the pork case, but they have done so in many other cases. So they currently have the discretion, while the bill would eliminate this discretion.

But as Ms. Schlitt pointed out, this isn't always—to delete that discretion and to require the growers and the processed product producers to be treated as one is not necessarily always going to be better for the U.S. industry. Sometimes it will be better and it means you will get the favorable——

Senator DANFORTH. Would it make any sense to have a different definition for the determination of injury than for the imposition of a remedy? Is that possible to do? As I understand it, if you have a very broad definition, it might not be possible to win a case. On the other hand, if you have won the case and the remedy is so narrow that anybody who wants to can escape it just by changing the product a little, it really is not a remedy at all because you have a different definition for the remedy than you do for the injury finding.

Ms. BELLO. Under our international obligations, of course, we are unable to impose any dumping or countervailing duties except upon products that are subsidized or sold at less than fair value and are injurious. So if you found subsidies or sales at less than fair value and injury on a narrow class, you would be clearly——

Senator DANFORTH. Fashioning a remedy that was certain to be abated. That would just be a dry run, wouldn't it?

Ms. BELLO. In many cases we have seen the following phenomenon. An order is issued on an upstream product. Diversion than occurs, and a new case is instituted on a more processed product. The complaint by the industry is that is very time consuming and expensive.

Senator DANFORTH. Oh, you can just go round and round and round.

Ms. BELLO. Yes.

Senator DANFORTH. And as soon as you plug that hole, another one pops up, right?

Ms. SCHLITT. The Commission has dealt with that issue and, I believe, has the power to deal with that to a certain extent by means of the threat provision in the statute. As I mentioned, in groundfish, the Commission found injury to one industry and threat to another.

I think that the power is there now, and that analysis is done in cases right now.

Senator DANFORTH. It did not help the hog people.

Ms. BELLO. The Commissioners examined threat in the hog case. They simply found that on the facts of that particular case, the threat was not real and imminent; that it was too speculative. In other cases, they have decided differently.

Senator DANFORTH. It follows the night to day, doesn't it? That is, you shut off hogs, you are going to get pork.

Ms. BELLO. The specific reasoning in the pork case was that the means of transport were not, in the majority's view, sufficiently available for there to be any meaningful, significant diversion into the U.S. market of processed pork products. Now one may disagree with that highly factual finding, but current law would have allowed the Commission to reach a contrary result. And, in fact, in other cases it has reached a different result.

Senator DANFORTH. Let me just say this: If both of you think that it would be fruitful for us to try to clarify this—Senator Grassley has been very active, very energetic in pursuing his bill. You said earlier, Ms. Bello, that it is difficult for the administration to find the right time—it seems to me that it would be something perhaps that could be pursued over the Christmas recess.

Ms. BELLO. We would be happy to.

Senator DANFORTH. And if you could just give us some guidance—we are not asking the administration to issue proclamations or anything. If you could just help out in the drafting of the bill. We do want to do something constructive.

I have to say that my own worry is that the definition is too narrow; it is really going to be a sham. And I am also worried about broader definitions, I guess.

But if the administration could be of help to us. I have spoken with Senator Grassley about this before, and it would be my hope that he could get his bill through—and, obviously, the legislative process is one that invites modification of any bill as it is introduced. But it is my hope that he could get his bill enacted in the very near future. We would hope to have the help of the administration in doing that.

Ms. BELLO. We would be glad to assist.

Senator DANFORTH. Senator Heinz.

Senator HEINZ. Thank you, Mr. Chairman.

First of all, I apologize that I could not be here for the beginning of the testimony, but the subject is one that I am more than familiar with. And it is an area where the principles that Senator Grass-

ley is working toward are very important. I compliment him on his bill, and you, Mr. Chairman, for holding this hearing.

It does seem to me that as Ms. Bello and Ms. Schlitt pointed out, intellectually there is no rational justification for treating agricultural products and industrial products differently. Did I understand both of you correctly?

Ms. BELLO. Yes, you did.

Senator HEINZ. Ms. Schlitt?

Ms. SCHLITT. Yes.

Senator HEINZ. Second, there are very similar instances to the hog-pork problem, the fresh and canned mushroom problem, the apple-apple juice problem, in, among other things, TV's, and TV tubes which were actually dumped at one time by the Japanese. Autos and auto parts have also been mentioned. And I am sure Ms. Schlitt could give us many other examples.

Do any other examples come to mind, Ms. Schlitt?

Ms. SCHLITT. One that comes to mind that I have looked at in the past has been 52-100 bearing steel, which is a steel which is uniquely formed for use in the manufacture of bearings. And my understanding is given its price and value, it does not make much sense to put it into anything else. So it is a product that is used by bearing manufacturers to make bearings, and, therefore, would be something like a single, continuous line of production. I don't know about economic integration. Frankly, I do not recall the facts. It has been a while since I have looked at it. But it is a product that poses a similar question.

Senator HEINZ. So my point is, I guess, which you confirmed, that there are a lot of similar industrial instances and that what is right and proper in terms of good trade policy against dumping and subsidies is not only good for agriculture, it is good for anybody else who has the same kind of problem.

Let me return to the issue Senator Danforth got into, which is how you fashion a provision that does not permit an immediate end run. I guess there are a variety of ways you can do it. Now Senator Grassley approaches it by the definition of like product. A second means of doing it is through perhaps a broader definition of threat of injury. A third possibility is definition of industry. And there are various ways that Senator Danforth suggested of having the injury finding subject to one set, definitional set, and the remedy subjected to another definitional set.

Let us assume that you share Senator Grassley's, Senator Danforth's, my concern about this problem. Which is the best way to address it?

Ms. Bello, do you want to try that?

Ms. BELLO. Informally working with the committee's excellent staff, we have already suggested that far and away the best approach is on threat of injury criteria rather than like product or industry definitions. Industry would be my second choice, and like product would be my third choice.

Senator HEINZ. I think we all understand some of the problems with the like product area. Could you talk for a minute about why going the threat of injury route is preferable to a definition of industry or whether they cannot—why it has to be one or the other?

Ms. BELLO. There are two basic reasons. One is that "threat of injury" and "injury" are terms that are more broadly defined in the relevant international agreements than are the terms "like product," and "industry"—which is defined in terms of "like product." So while I do not want to take a position on the relevance of international obligations, nonetheless, I think we have more scope when we are dealing with threat and injury than with the terms "like product" or "industry."

Second, in the pork situation, for example, I think that the U.S. agricultural and industrial interests concerned would benefit and find more effective a bill that addressed the issue of threat. If you combine processed and unprocessed products as one like product some cases will be total losers and others winners. In the losing cases, the less prosperous producers—whether of processed or unprocessed products—will be very unhappy indeed to be drug down by the fact that the people that they work closely with happen to enjoy better economic conditions, and, therefore, the Commission may find no injury.

A third reason may be more my fear than actual reality. But "like product" is a term related to the term "class or kind of merchandise," which is what Commerce looks at. My understanding is that this bill only tries to address what happens at the Commission and not at the Department of Commerce. I would like to ensure that that is everyone's understanding, including the trade bar's, so that the bill does not generate arguments about what Commerce should be doing in construing the term "class or kind of merchandise."

Senator HEINZ. Ms. Schlitt, would you rank the means of addressing this the same way? And would a more sweeping definition of threat of injury be as effective at trying to plug what I will call the downstream loopholes or sometimes the upstream problems that those of us up here are trying to get at?

Ms. SCHLITT. I do not know whether it is ever possible to plug all the problems because, as one's definition of industry becomes broader, as I have pointed out before, the elements of injury and causation may be diluted. So that you may have a very broad definition of industry, but, therefore, find that injury to it is not by reason of the imports subject to investigation.

Senator HEINZ. So you would rate threat of injury higher as a means of getting at the problem?

Ms. SCHLITT. Well, right now, the Commission has both of these vehicles in the statute as it now exists, and it provides some flexibility and ability for the Commission to look at like products within the context of the statute, and look at domestic industry and injury and causation and threat of material injury, and, of course, material retardation.

The Commission does this case by case, fact by fact. It is true that, maybe in some cases, the Commission's determinations may occasionally not be popular, but in terms of the flexibility of the vehicle to get at these problems, the Commission makes an effort to do it within the context of the statute.

I think that there is already within the statute the general provision that the Commission may look at all economic concerns, in-

cluding threat of product shifting. And the Commission has, in fact, done that.

I think rather than being broader—what you are proposing in terms of the possibility that I understand with respect to threat—is, it would be more specific. It would say in agricultural cases specifically look at the possibility of threat. The Commission looks at threat anyway and looks at product shifting anyway.

I favor, I guess, the most flexible approach the Commission can take to try to get at the problems of the industry and deal with them as we find them, as opposed to the law being so codified that there may be times when there is a problem the Commission cannot get to within the context of the statute. The problem outside of the context of the statute is not within the Commission's purview.

Ms. BELLO. Briefly, Senator Heinz, I would just like to concur with that and express that the current law does have the flexibility that is needed that does not ensure that they will reach an affirmative outcome in every single case. There will always be some cases in which the domestic industry loses. And with much sympathy for them, nonetheless, I would point out that that is the basis of the old adage that hard cases make bad law. We would not like to see some negative results lead to changes in the law that on the whole are not wise or in the best interest of the U.S. industry as a whole.

Senator HEINZ. Very well.

Just one clarification from Ms. Schlitt. You indicated that if we wanted to give special precedence to agriculture we could say something like look specifically at threat of injury in agricultural cases. Your view, as you expressed it a moment ago, is that we should treat agriculture and industrial manufacturing alike, as I understood it.

Ms. SCHLITT. I believe that they are treated identically under the statute; that by reason of the legislative history, the Commission has done a little bit different or additional analysis with respect to agriculture. It is difficult to make some of the distinctions that you have pointed out of why, intellectually, there is a distinction between industrial and agricultural products. As to whether there should be a distinction, I do not think it is appropriate for me to express a view.

Senator HEINZ. Very well. Thank you very much.

Senator DANFORTH. Thank you both very much.

The next panel consists of Mr. Ron Kahle, National Pork Producers Council; Frederick von Unwerth, on behalf of the Washington Red Raspberry Commission, the Oregon Caneberry Commission, the Cling Peach Advisory Board and the Pacific Coast Canned Pear Service; Tom Cook, National Cattlemen's Association; Mr. Robert Wray, U.S. Land Industry.

Mr. von Unwerth, is that the Oregon Caneberry Commission?

Mr. VON UNWERTH. It is.

Senator DANFORTH. Have I missed something in my years not having tried a caneberry?

Mr. VON UNWERTH. Well, the Oregon Caneberry Commission also represents red raspberry growers. I have not tasted a caneberry either.

Senator DANFORTH. Oh. Is there such a thing as a caneberry? I thought this was cranberry with a typo.

Mr. VON UNWERTH. Caneberries are all types of berries that grow on canes, and would include raspberries. There is not, as I know of, a distinct caneberry.

Senator DANFORTH. All right. Thank you.

Well, so far you have done an excellent job representing them.

Mr. Kahle, would you like to proceed?

Mr. KAHLE. Yes.

STATEMENT OF RON KAHLE, PRESIDENT, NATIONAL PORK PRODUCERS COUNCIL, KEARNEY, NE, ACCOMPANIED BY MARK ROY SANDSTROM, ESQ., THOMPSON, HINE & FLORY, WASHINGTON, DC

Mr. KAHLE. Mr. Chairman, Senator Danforth, and members of the subcommittee, my name is Ron Kahle. I am a pork producer from Kearney, NE. We have a family operation raising hogs from birth to market.

I am also president of the National Pork Producers Council, and am testifying today on behalf of the 110,000 members of the council, the largest commodity dues-paying organization in the United States.

I am accompanied today by Mr. Mark Sandstrom, counsel for the pork producers.

The National Pork Producers Council is particularly concerned about the treatment of agricultural commodity products under the U.S. trade laws. Of the 11 unfair trade injury investigations concerning agricultural products filed with the ITC over the last 3½ years, only one case ended in an affirmative determination. This success rate of 9 percent compares with an approximate rate of 50 percent for cases concerning industrial products.

This poor track record results in part from the ITC's failure to recognize that agricultural products are different from industrial products in that most agricultural products, such as hogs, must be treated or processed before they can be sold.

Thus, producers and initial processors of agricultural commodities are both affected by imports of the initially processed product. Senate bill 1629 introduced by Senator Grassley, and supported by other Senators on the committee, defines producers and initial processors of commodities linked by a single, continuous line of production as part of the same industry. This legislation would allow commodity producers to file petitions against subsidized or dumped exports of the initially processed product. Thus, pork producers could use the trade laws to obtain relief from unfairly treated pork imports.

Since imports of the processed product affect all elements of the industry, it simply makes sense to allow producers, as well as processors, to petition for relief.

The interest of NPPC in this legislation derives from a recent countervailing duty investigation involving subsidized swine and pork from Canada. In that investigation, the ITC found that pork producers and pork packers were producers of different products. The ITC further found that while pork producers were being in-

jured by imports of subsidized swine from Canada, pork packers were not being injured by imports of fresh, chilled and frozen pork from Canada.

As a result of the ITC's determination, on August 15 of this year the Department of Commerce issued a Countervailing Duty Order imposing duties on imports of Canadian live swine, but not imposing duties on Canadian pork. Canadian imports are now shifting from live swine to fresh pork; thereby, eliminating much of the beneficial effect which the countervailing duties on live hog would have on domestic producers and packers.

In September, Canadian pork exports were 20 percent higher than the average for the first 7 months of this year before the duties on live hogs went into effect.

In essence, the U.S. pork producers and packers have won the battle, but lost the war.

The ITC determination in the case of Canadian imports has come at the same time that pork imports from other countries are also increasing; particularly, from the European Community. Comparing imports from the EC for the first 6 months of 1984 and the first 6 months of 1985, USDA figures reveal that there has been a 156 percent increase in imports of fresh, chilled and frozen pork from EC producers and processors. These imports are, of course, also subsidized under EC's common agricultural policy.

Congress stated in the legislative history of the Trade Agreements Act of 1979 that agricultural commodities require special attention with respect to the application of the injury provision of the countervailing duty and antidumping statute. In applying this legislative intent in past cases, the ITC developed a two-part test to determine whether raw and processed agricultural commodities are like products.

Unfortunately, in applying this test, the ITC has focused increasingly on legal relationships within an industry and has ignored economic relationships between the commodity producers and processors.

Senate bill 1629 provides that producers and processors of agricultural commodities shall be considered producers of like products and members of the same industry, if the raw and processed commodities are wholy or substantially linked through a single, continuous line of production.

This legislation would require the ITC to apply the injury provision of the countervailing and antidumping statute to agricultural commodities in a manner which reflects the realities of the way such commodities are produced, priced and sold.

In the case of pork, this legislation would have increased the chances that ITC would have found Canadian imports were causing injury to the entire industry, including packers. The impact of imports of both swine and pork would have been properly combined so that the actual and total impact of Canadian imports would have been taken into consideration by the ITC.

I appreciate the opportunity to present this testimony on behalf of the National Pork Producers Council, and would be happy to answer any questions you might have.

Senator DANFORTH. Thank you, Mr. Kahle.

[The written statement of Mr. Kahle follows:]

WRITTEN STATEMENT OF RON KAHLE, PRESIDENT, NATIONAL PORK PRODUCERS COUNCIL

Summary of Principle Points

Testimony of the National Pork Producers Council

Domestic producers of agricultural commodities are being injured by subsidized, dumped or otherwise unfairly traded imports of agriculture goods. While the industrial sector of the economy generally receives proper relief under the trade laws, the agricultural sector has had relatively poor success.

Agricultural products are different from industrial products in that most agricultural products must be treated or processed before they can be sold to end users or manufacturers. Both the producers and those who process agricultural goods into a form enabling sales to end users are elements of the same industry. Since the entire industry is affected by unfairly traded imports of semi-processed commodities, relief should be available to all elements of the industry.

As the law is presently interpreted by the International Trade Commission, a producer of a raw commodity would not have standing to bring a countervailing duty or dumping action against an importer of the initially processed product because a commodity producer is deemed to produce a product different from the semi-processed product. Thus, pork producers would not have standing to bring a case against imports of fresh or frozen pork. This legalistic interpretation ignores the reality of the agricultural sector.

Senate Bill 1629, introduced by Senator Grassley (R Iowa) and supported by other senators on the Committee, clarifies the law in respect to subsidized or dumped agricultural imports. S.1629 would define producers and initial processors of products linked by a single continuous line of production as part of the same industry, thereby, enabling either or both to file a petition to prevent subsidized or dumped imports.

To illustrate the effect of an ITC decision regarding an agricultural product, a countervailing duty order has been issued imposing duties on live swine from Canada, but not on imports of fresh pork from Canada. The consequence of the ITC decision is that Canadian producers are now slaughtering the live hogs into fresh, chilled or frozen pork before sending the product over the border, eliminating much of the beneficial effect to domestic producers and packers. Canadian pork imports are up 20% since the decision was made.

S.1629 applies to all agricultural products and is supported by the National Pork Producers Council, the American Farm Bureau, the National Cattlemen's Association and lamb and raspberry producers and processors, among others.

TESTIMONY

Before the

United States Senate Committee on Finance,
International Trade Subcommittee

S.1629
a Bill to Amend the Tariff Act of 1930

December 9, 1985

My name is Ron Kahle and I am a pork producer from Kearney, Nebraska. I am also President of the National Pork Producers Council (NPPC), and am testifying today on behalf of the 110,000 members of the Council, the largest commodity dues paying organization in the U.S. I am accompanied by Mr. Mark Roy Sandstrom, Counsel to the NPPC.

The National Pork Producers Council is particularily concerned about the treatment of agricultural commodity products under the U.S. trade laws. We are specifically speaking of situations where agricultural products produced abroad are subsidized or dumped in the United States or otherwise unfairly traded. Pork producers are supportive of fair and equitable trade, but in some agricultural sectors there is little or no competition because of subsidized or dumping of imports that prevent U.S. producers from being able to compete on an equal basis.

Under U.S. trade statutes, agricultural commodities have not been given the kind of relief industrial commodities receive. When looking at the track record of agricultural cases, the message is clear. The attached article, written by Commissioner Seeley Lodwick of the International Trade Commission (ITC), explains that of the 11 unfair trade injury investigations concerning agricultural products filed at the ITC over the last 3 1/2 years, only one case ended in an affirmative determination. This success rate of 9% compares with an approximate rate of 50% for cases concerning industrial products. The recent decision of the ITC in the countervailing duty investigation concerning imports of subsidized swine and pork from Canada, exemplifies the difficulties which producers of agricultural commodities have in obtaining relief from unfairly traded imports under the U.S. trade statutes.

The problem may be due to a lack of understanding of the basis upon which agricultural products are traded. Agricultural products are different from industrial products in the sense that most agricultural products must be treated or processed before they can be sold to end users or manufacturers. While they cannot be sold as is, they can be initially processed to yield a marketable good -- for example, slaughtering live hogs into fresh pork. That means pork producers and initial processors work together to produce a product and therefore are part of the same industry.

In addition, the impact of unfair trade practices in the agricultural sector differs from that found in the industrial sector. When the ITC has examined agricultural products it has applied the same test as with industrial products, looking for specific instances of price undercutting, for example, rather than examining the effect of supply on the price of commodities in the marketplace.

Agricultural markets function differently than industrial markets. In the agricultural sector, an increase in supply decreases the prices of our products. Take, for an example, pork which is a commodity just as swine is a commodity and both are traded on the commodities market. Pork prices fluctuate from day to day with changes in supply and demand, and they have a direct relation to the price of hogs. Increases in the supply of pork have negative effects on both pork and hog prices.

Senate Bill 1629, introduced by Senator Grassley (R. Iowa) and supported by other senators on the Committee, addresses a necessary clarification of the Trade Act of 1930 to reflect the way imported products affect agricultural products. Senate Bill 1629 defines producers and initial processors of products linked by a single continuous line of production as part of the same industry. This would allow pork and other commodity producers to file a petition preventing subsidized or dumping of imports of the initially-processed

product. Since imports of the processed product affect all elements of the industry, it simply makes sense to allow producers as well as processors to petition for relief. As it stands now, pork producers could not bring a countervailing duty action against imports of fresh pork because producers are not considered part of that industry producing that product, even though imports of fresh pork certainly affect pork producers.

Similarly, cattlemen could not bring a case against beef imports being dumped or subsidized, because cattlemen would be considered producers of live cattle and not producers of fresh beef. Without this clarification of legislative intent reflected in S.1629, cattlemen would have no other recourse since live cattle are not imported into this country for human consumption. The same dilemma is applicable to many commodity producers in the agricultural sector. Even though an import of an initially processed version of their product would have dire effects on their businesses, they may have no standing to complain. S.1629 applies to all raw agriculture products. The bill would clarify the intent of Congress with regard to the application of the countervailing and antidumping statutes to agricultural commodities.

The interest of the NPPC in this legislation derives from a recent countervailing duty investigation involving subsidized swine and pork from Canada. In that investigation

the ITC found that pork producers and pork packers were producers of different products. The ITC further found that while pork producers were being injured by imports of subsidized swine from Canada, pork packers were not being injured by imports of fresh, chilled and frozen pork from Canada. The ITC underestimated the impact of the Canadian imports, treating imports of swine and pork from Canada separate and apart from each other.

As a result of the ITC's determination, on August 15, 1985, the Department of Commerce issued a countervailing duty order imposing duties on imports of Canadian live swine, but not imposing duties on Canadian pork. The consequence of the ITC decision is that Canadian packers will now slaughter the live hogs into fresh, chilled or frozen pork before sending the product over the border, thereby eliminating much of the beneficial effect which the countervailing duties on swine would have on domestic producers and packers. With the raw and initially processed products so integrally related, duties on only one do little to help the domestic industry. In essence, the U.S. pork producers and packers have won the battle, but lost the war.

Indeed, the expected shift from hogs to pork has already begun. Imports of Canadian hogs are down over the volume of imports prior to the ITC's decision. On the other hand, Canadian statistics reveal a 10% increase in pork exports

to the U.S. in August (the month in which duties on swine went into effect) over the average monthly export figure for January-July 1985. In September, Canadian pork exports to the U.S. rose even further to a level 20% higher than the average for the first seven months of this year.

The ITC's determination in the case of Canadian imports has come at the same time that pork imports from other countries are also increasing, particularly from the European Community ("EC"). Comparing imports from the EC for the first six months of 1984 and the first six months of 1985, USDA figures reveal that there has been a 156% increase in imports of fresh, chilled and frozen pork from EC producers and processors. These imports are, of course, also subsidized under the EC's Common Agricultural Policy ("CAP"). With overall imports increasing dramatically, the ITC's pork decision was particularly untimely.

Congress stated in the legislative history of the Trade Agreements Act of 1979 that agricultural commodities require special attention with respect to the application of the injury provisions of the countervailing duty and

antidumping statute.[1/] Special concern was expressed in the case, for example of raw and initially processed products, particularly in the case of livestock. In applying this legislative intent in past cases, the ITC developed a two part test to determine whether raw and processed agricultural commodities are like products.[2/] If so, producers of the raw commodity are deemed to be members of the same industry as the processors and can seek relief under the trade statutes against imports of the processed product.

Unfortunately, the ITC, has focused increasingly on legal relationships within an industry and has ignored economic relationships between the commodity producers and processors. In the pork industry, although both pork producers and packers share a significant commonality of economic interest resulting from the nature of the pork market, the second prong of the

---

1/ Senate Finance Committee Report on the Trade Agreements Act of 1979:

> "Because of the special nature of agriculture, . . . special problems exist in determining whether an agricultural industry is materially injured."

The report went on to imply that there was a special relationship, for example, between cattle farmers and processors. S. Rept. No. 96-249, 96th Cong., 1st Sess. 88 (1979).

2/ See Lamb Meat From New Zealand, Inv. No. 701-TA-80 (Preliminary), USITC Pub. No. 1191 [3 ITRD 1725] (1981); Frozen Concentrated Orange Juice From Brazil, Inc. No. 701-TA-184 (Final), USITC Pub. No. 1406 [4 ITRD 1693] (1983); Fish, Fresh, Chilled or Frozen, Whether or Not Whole, But Not Otherwise Prepared or Preserved From Canada, Inv. No. 701-TA-40 (Final), USITC Pub. No. 1066 [2 ITRD 53-1] (1980).

ITC's legal test was not satisfied because only 4-5% of pork producers actually own packing plants. Nonetheless, it is very clear to individuals familiar with pork and other agricultural commodities, that the economic interdependence of producers and processors and the impact of imports upon them is the same regardless of whether 5% or 90% of the processing plants are owned by producers. In the ITC's decision to impose a requirement of such legal relationships is both inappropriate and irrelevant. This view was supported in a dissenting opinion of ITC Vice Chairman Liebeler, one of three Commissioners voting in the case.[3/]

Realistically, the Commission should have focused on economic relationships in examining the injurious impact of subsidized or dumped imports on agricultural commodities. Moreover, where the processed product is produced from the raw commodity substantially or wholly through a single continuous line of production, that fact in and of itself demonstrates sufficient commonality of economic interest to satisfy the like product test. Pork producers have a firm opinion on this point, since it is difficult to conceive of any other commodity which better satisfies the single continuous line of production test.

3/ Live Swine and Pork from Canada, Inv. No. 701-TA-224 (Final), USITC Pub. No. 1733 (1985).

S.1629 provides that producers and processors of agricultural commodities shall be considered members of the same industry if they meet either of two tests articulated in the bill. If the raw product and the processed product are wholly or substantially linked through a single continuous line of producton, then such raw and processed products are deemed to be like products and the producers and processors of the products are deemed to be members of the same industry. If producers and processors can demonstrate sufficient commonality of economic interest, which will likely include a showing of some degree of a single continuous line of production relationship, they can also be considered members of the same industry. Evidence of legal relationships may be considered, but the bill emphasizes that the key relationships are economic, whether they be imposed contractually or by the nature of the market.

This legislation would require the ITC to apply the injury provisions of the countervailing and antidumping statute to agricultural commodities in a manner which reflects the realities of the way such commodities are produced, priced and sold and by the way the producers and processors are affected by unfairly traded imports. In the case of pork, this legislation would have increased the chances that the ITC would have found that Canadian imports were causing injury to the entire industry, including packers. The impact of imports of

both swine and pork would have been properly combined so that the actual and total impact of Canadian imports would have been taken into consideration by the ITC.

In addition, the bill would insure that producers of raw commodities have standing to file petitions for relief under these statutes against subsidized or dumped imports of the processed commodity. As an example, cattlemen could bring cases against unfairly traded beef imports causing injury to the producers. Since the live animal is generally not imported (pork is an exception), livestock producers would be precluded from bringing cases against meat imports, unless their industries happened to be sufficiently vertically integrated under the ITC's present policy. There is great support for the bill. For example, at the hearings before two House Agriculture subcommittees on the House companion bill, H.R. 3328, representatives from the American Farm Bureau, the National Pork Producers Council and the lamb and raspberry industries testified in favor of the legislation. The National Cattlemen's Association also supports this legislation.

For the reasons raised in my testimony, the NPPC urges the Committee to do all it can to insure that agricultural commodity producers are given fair and effective treatment under the trade laws. In particular, the enactment of S. 1629 is needed, since such legislation is crucial to protect the agricultural sector from unfairly traded products.

I appreciate the opportunity to present this testimony on behalf of the National Pork Producers Council, and would be happy to answer any questions you might have.

ITC Official Reveals Data on 'Unfair Trade' Cases

By SEELEY G. LODWICK
International Trade Commissioner

(The following reflects Mr. Lodwick's personal views, not necessarily that of the International Trade Commission.)

Growth in the U.S. trade deficit continues unabated. Debate over the causes has intensified to unprecedented levels yet remains confused.

Newspaper editors and television commentators, whether in Boston or in Boise, espouse their own viewpoints and explanations about the trade deficit and its effect on the workers, companies, banks, and communities in our nation and even on political relations with nations beyond our shores.

Many assert that some unfair practices of our trading partners are an important cause of the problem.

By offering some little-known statistics about the cases brought before the International Trade Commission under "unfair trade" laws, over the last three and one-half years, this article hopefully will clarify some of the ways and wherefores of some trade issues associated with unfair subsidization and dumping.

The ITC is a bipartisan, quasi-judicial agency established by Congress to make decisions under U.S. trade law in order to provide relief for U.S. industries that are suffering injury from imports.

The role of the ITC is interpretive. It does not make law nor does it make or advocate policy.

The focus of this article will be on the laws covering the unfair subsidization and dumping of foreign products imported into the United States — practices which effectively mean that these imports are sold at unfairly low prices in competition with U.S. producers.

The subsidy and dumping provisions are contained in Title VII of the Tariff Act of 1930. The law allows a domestic industry, which believes that it is being "materially injured" by unfairly traded imports, to file a case before the ITC.

Further, if the industry prevails in its suit, the U.S. government will impose a remedy of an additional duty on the unfairly traded imports equal to the amount of the subsidy or dumping origin.

Let me begin with some definitions. "Unfairly" traded imports are those that 1) are sold in the United states for less than fair value, that is, or below their price in their home market or a third country, below their cost of production; or 2) are benefiting from certain foreign government subsidies.

When the domestic industry files a petition under Title VII, it does so simultaneously with the Department of Commerce and the ITC. The Department of Commerce determines the existence and extent of the unfair trade practice. The ITC determines whether the unfairly traded imports are a cause of material injury or threat thereof to the domestic industry producing a product like imported one.

This ITC determination is know as an "injury test", i.e. testing whether or not the unfair imports are a cause of material injury.

The U.S. grants imports an injury test before asserting duties to conform with our obligations under the General Agreement on Tariffs and Trade, an international agreement to which most trading nations subscribe.

While this may make it more difficult for U.S. industries to obtain relief from imports, the concern is also true since it is also more difficult for our foreign trading partners to arbitrarily apply similar duties to U.S. exports.

The statute defines material injury as "harm which is not inconsequential, immaterial, or unimportant." The statute also specifically directs the commission to consider certain factors when making its determination of material injury.

These factors include the volume of imports, the effect of imports on prices of the like U.S. product, and the impact of imports on the domestic industry, as demonstrated by factors, such as the number of employees, plant capacity, and profit.

Of great importance is the fact that the ITC applies the provisions of U.S. trade law to each case equitably. Each case, whether it be a $500,000 industry producing wood-wind instrument pads or the multi billion dollar steel sector, is decided based on the facts presented to the official record.

The final decision of the ITC in Title VII cases is appealable only through the federal courts.

The statute also defines the amount of time the ITC is allowed to consider the unfair subsidization and dumping cases brought before it.

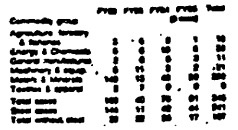
Depending on the individual circumstances, the domestic industry should know within a year of the time the case is filed at the ITC whether or not it is successful.

A brief review of the results of the unfair subsidization and dumping cases before the commission during the past three and one-half years is helpful in identifying which domestic industries are utilizing the unfair trade laws, what success they are having in gaining relief, and against whom cases are brought.

In fiscal 1982, 140 Title VII cases were filed before the ITC; in fiscal 1983, 43; in fiscal 1984, 76; and a total of 61 cases were filed in the first six months of fiscal 1985.

Generally, more dumping cases were filed than subsidy cases over the total period; by a margin of three to two.

The table below summarizes how these Title VII cases were distributed among broad commodity groupings.



The number of cases in the minerals and metals category is particularly high since this area includes a large number of steel petitions.

These petitions, filed by the major U.S. steel companies in recent years, have been part of their overall strategy to combat import competition. The peak filings in 1982 related to a push for a negotiated restraint program with the European Community, the fall in filings in 1983 related to the industry's concentration on another type of import relief case, covering all carbon steel and products, that was filed to coincide with the 1984 presidential election, and the canceled increase in 1984 related to the industry's push to get the administration to finalize promised voluntary restraint agreements with major suppliers.

In the first half of 1985 the steel strategy seems to be one of filing many cases against smaller, non-traditional supplier countries outside the restraint agreements.

This may be due to a fear that importers will shift to the smaller suppliers or it may be a strategy to pressure the administration to sign agreements with more countries.

When steel cases are omitted from the total, the caseload has been fairly stable since 1982. Note that the non-steel cases filed cover a broad spectrum of commodities. Interestingly, the group filing the fewest ITC cases is textiles and apparel including footwear, perhaps reflecting the fact that these industries are concentrating their efforts in other areas.

For the textiles industry, the dispute settling mechanisms may be in the Multi-Fiber Arrangement, a GATT agreement administered for the United States by the Department of Commerce, while the footwear industry is pursuing another type of import relief case under U.S. trade laws.

The question asked most often about the filings before the ITC is, how successful are industries in gaining relief from unfairly traded imports?

This is where confusion can really run rampant. The answer depends entirely on how one devises a method to count the successes.

Let me explain. When a domestic industry case comes for a vote at the ITC, the ITC initially determines only whether or not there is a reasonable indication of material injury or threat thereof to the domestic industry due to unfair imports.

If the determination is in the negative in this initial stage the case is terminated. If the determination is in the affirmative, the ITC conducts a further and more extensive investigation which often includes a public hearing.

Then the ITC makes its final determination as to whether there really is material injury or threat thereof to the domestic industry due to unfair imports.

In the last three and a half years the ITC has voted in the affirmative in 73 percent of its initial determinations, thereby continuing the cases.

This computation does not include the cases that were pending or dismissed. Cases can be dismissed because the Department of Commerce found no unfair margins of subsidization or dumping, or because petitioners obtained some alternative relief and withdrew their petition, or because of other miscellaneous reasons.

Over this same period of time the ITC has voted in the affirmative in 73 percent of its final determinations, thereby granting relief to the domestic industry.

Again, this computation is made under the same conditions as described for the initial determinations.

On the average, for each 100 petitions filed at the ITC during the last three and a half years, one finds 22 cases found in the affirmative, 35 cases found in the negative, 34 cases pending, and 10 cases dismissed.

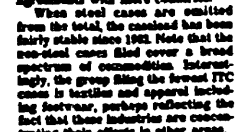
The comparable averages for just the steel cases are virtually the same — 22 affirmative, 34 negative, and 44 pending or dismissed.

Incidentally, the total value of all unfair imports from which relief has been granted over the three and one-half years is $3.9 billion, of which approximately $2.0 billion is represented by steel imports.

Let me briefly mention the countries against whom relief is sought by our domestic industries. With respect to dumping, of the 36 dumping orders imposed since 1980, six have been placed on industries within Japan, five on the Peoples Republic of China, four on the Republic of Korea, and three each on the Federal Republic of Germany, Taiwan, and Brazil.

With respect to the 41 subsidy/countervailing duty orders imposed since 1982, nine were placed on imports from Spain, eight on Brazil, five each on France and the Republic of Korea, and 4 each on Belgium/Luxembourg and the United Kingdom.

The following table shows the success rate for cases by commodity groupings.



Sixty-five percent were imposed against six countries of Western Europe. (There are also countervailing duty orders outstanding that are placed on countries by the Department of Commerce alone.

(These countries do not receive the benefit of an injury test on subsidized imports by the ITC because they are not signatories to certain international agreements.)

What conclusions can we draw from all of this? Several. One is that domestic producers have filed a large number of cases at the ITC in recent years. These producers represent a wide variety of commodities, from agriculture to textiles, including steel and steel products, which strongly dominate the number of cases.

Domestic producers have filed cases against companies and countries throughout the world. Overall, for every 100 domestic producers who filed cases at the ITC seeking import relief under the subsidization and dumping laws of the United States during the past three and one-half years, 22 relief orders have been awarded.

The total value of imports covered by relief orders over this period is $3.9 billion, approximately 1 percent of the total value of U.S. imports for 1984.

Although the success numbers and the values appear small and low, the application of trade relief against unfairly traded import competition, as afforded by the U.S. trade administration and dumping laws, may be of great significance to the continued viability of certain U.S. industries, however large or small they may be.

Mr. Lodwick has been a commissioner with the International Trade Commission since August 1983.

Journal of Commerce, May 21, 1985, Pg. 17A

STATEMENT OF FREDERICK VON UNWERTH, KILPATRICK & CODY, WASHINGTON, DC; ON BEHALF OF THE WASHINGTON RED RASPBERRY COMMISSION, THE OREGON CANEBERRY COMMISSION, THE CLING PEACH ADVISORY BOARD AND THE PACIFIC COAST CANNED PEAR SERVICE

Senator DANFORTH. Mr. von Unwerth.

Mr. VON UNWERTH. Thank you, Mr. Chairman.

My name is Rick von Unwerth, and I am a member of the law firm of Kilpatrick & Cody. I appear today on behalf of the Oregon Caneberry and Washington Red Raspberry Commissions, whose raspberry growers my firm recently represented in an antidumping case against bulk-packed red raspberries from Canada, and we are now representing in a countervailing duty case against Canada. I am also here on behalf of the Cling Peach Advisory Board and the Pacific Coast Canned Pear Service.

We thank you for the opportunity to appear here today, and particularly thank you for giving consideration to S. 1629. This bill is useful and necessary legislation, and we support it as an important improvement over existing law.

The bill properly rejects the ITC's current practice of requiring both a single, continuous line of production and a commonality of economic interest. The satisfaction of either of these criteria should be sufficient, as this bill recognizes.

The bill also rejects the ITC's practice in applying the commonality of economic interest test of requiring significant legal relationships between growers and processors. As vice chairman Liebeler has noted, such a requirement makes little economic sense.

The ITC has worked itself into something of a vexatious legal box by adopting a rigid threshold test for determining whether or not growers of a raw agricultural product should be included in the domestic industry in antidumping and countervailing duty cases. That really should not be the question.

It should not be difficult to decide that growers are, in fact, part of the industry for most agricultural products, and particularly those that are produced by the growers primarily for processing and sale as the end product under investigation.

The real question is the weight which should be given to the economic condition and impact of import on those growers in determining injury and whether relief should be granted. If, contrary to the condition of processors, growers of an agricultural product are either suffering or prospering because of conditions in alternative markets for their raw products, then their condition should not be given much weight in making the injury determination.

On the other hand, when most of the growers' output of a commodity goes into the processed product under investigation and where the raw product constitutes most of the value of that product, grower conditions should be paramount in determining the effect of imports on the industry.

Bulk-packed red raspberries are a good example. Virtually all red raspberries of manufacturing grade are packed in bulk containers and then sold to processors of jams, jellies, yogurt, and similar products. The packer, who in many cases is also the grower, simply runs the berries across a belt where they are washed, sorted and

then dropped into 28-pound buckets like this or 400-pound metal drums. No syrup, juice, or water is added.

The red raspberry grower devotes 3 years to getting his plants into full production, and he produces bulk-packed raspberries on a year-round basis. The independent packer produces everything from fish to vegetables, and only packs raspberries 6 to 8 weeks a year.

Under these circumstances, it seems perfectly clear that imports have a much greater impact on growers than on independent packers. And the Commission clearly must consider growers in determining the conditions of the industry.

Likewise, the clingstone peach and Bartlett pear growers are primarily in the business of producing canned peaches and canned pears. They take years to bring their trees to full production. Their livelihood from peaches and pears depends on the production and sale of canned products. About three-quarters of all clingstone peaches and Bartlett pears go into canned peaches and pears.

If dumped or subsidized products depress the price of canned peaches or canned pears, the clingstone peach or the Bartlett pear grower clearly suffers the consequences. In our view, these growers are more the producers of the like product than the packer.

The point is that while the weight given to the growing versus the processing side of the industry may vary from case to case, the growers should not be totally excluded from consideration except in cases where it is clear that grower conditions are so unrelated to that of the processors and so unrelated to that of the imported product at issue that it would serve no evidentiary purpose to consider their condition.

The ITC and its general counsel appear to us to be frustrated with the rigid tests they have developed for determining whether growers are in or out. They are searching for a better approach. Congress should give it to them by enacting legislation along the lines of Senator Grassley's bill. It provides a clear test and reflects the realities of agricultural markets.

Should the committee stick with the like product definitional approach, we have two relatively minor suggestions. First, in setting the quantitative standard for a single, continuous line of production in paragraph C of the bill, we would suggest that the word "completely" be deleted from the test both times it is used. The phrase "substantially or completely" is apt to be confusing. And "completely" is already subsumed in the lower threshold standard of "substantially."

Second, I would suggest that the phrase "to the extent that" be replaced with the simple word "if" in paragraph C. "To the extent that" seems to unnecessarily qualify and perhaps confuse what is otherwise a very clear and reasonable test.

We would agree, however, with Ms. Schlitt and Ms. Bello that the problem could be addressed logically another way, such as the definition of domestic industry and the injury test.

Mr. Chairman, on behalf of red raspberry, clingstone peach, and Bartlett pear growers, I thank the chairman and the subcommittee for considering S. 1629.

Senator DANFORTH. Thank you, sir.

[The written statement of Mr. von Unwerth follows:]

WRITTEN STATEMENT OF FREDERICK H. VON UNWERTH, ON BEHALF OF THE OREGON CANEBERRY COMMISSION, THE WASHINGTON RED RASPBERRY COMMISSION, THE CLING PEACH ADVISORY BOARD, THE PACIFIC COAST CANNED PEAR SERVICE, INC.

SUMMARY OF PRINCIPAL POINTS

Under existing law, the domestic industry is defined as "the domestic producer as a whole of a like product." That definition may embrace both growers and processors of a processed agricultural product. The ITC, however, has gotten itself into a legal box by creating and perpetuating a rigid two-prong test to decide whether growers are within such industries. The Commission is frustrated with the application of that test and is searching for a better approach. Congress should give it one.

Our clients--growers of processing raspberries, canning peaches, and canning pears--support S. 1629 as a much needed improvement over existing law. It eliminates the unnecessary ITC requirement of both a single, continuous line of production and also a commonality of economic interests. It rejects the unnecessary ITC practice of requiring significant legal relationships between growers and processors.

We suggest, however, (1) that the legislation be aimed at the definition of "domestic industry" rather than "like products" and (2) that the single continuous line of production test be changed to a less rigid test focusing on whether the raw product is primarily produced for the production of the processed product at issue.

Good morning, Mr. Chairman, members of the Subcommittee. My name is Rick von Unwerth and I am a member of the law firm of Kilpatrick & Cody. I appear today on behalf of the Oregon Caneberry and Washington Red Raspberry Commissions, whose raspberry growers my firm recently represented in an antidumping case against bulk packed red raspberries from Canada and whom we are now representing in a countervailing duty case against Canada. I am also here on behalf of the Cling Peach Advisory Board and the Pacific Coast Canned Pear Service, Inc., whose canning peach and canning pear growers have become increasingly concerned about imports of canned peaches and canned pears.

Products of Concern

Raspberries produced for processing are only commercially grown in Washington and Oregon. In those two states, over 90 percent of the entire raspberry crop is packed and virtually all berries of manufacturing grade are packed in bulk containers. Bulk packed raspberries are then sold to processors of jams, jellies, yoghurt, etc. The packer--who may also be the grower--runs the berries across a belt where they are washed, sorted, and then dropped into 28 pound pails or 400 pound metal drums. No syrup, juice, or water is added. Over one-third of the crop is packed by grower-packers.

Clingstone peaches, which are only grown in California, account for over 90 percent of U.S. production of

canned peaches. About 70-75 percent of the Clingstone peach crop goes into canned peaches, and about 20-25 percent into canned fruit mixtures. The canneries pit, skin and slice the peaches, sort them into cans of various sizes, add either a syrup, natural juice, or water, and seal and heat treat the cans. About one-half of the crop is processed by grower-owned cooperatives.

Bartlett pears, grown in Washington, Oregon, and California, are virtually the only pear variety used for canning. About 75 percent of the Bartlett pear crop goes into canning, with the remainder sold in the fresh market. About three-fourths of the Bartlett pears delivered to canneries go into canned pears, with about one-fifth to one-quarter going into canned fruit mixtures. The cannery skins and cores the pears, sorts them into cans of various sizes, adds syrup, natural juice, or water, and seals and heat treats the cans. About one-half of the canned output is by grower-owned cooperatives.

Definition Of Domestic Industry Under Existing Law

As a threshold matter, in every antidumping or countervailing duty case before it, the U.S. International Trade Commission ("ITC") must define the scope of the domestic industry to be examined in the investigation. The Commission then determines whether that industry is materially injured or threatened with material injury by

reason of imports which the Department of Commerce has determined are either subsidized or dumped. The injury determination often depends on how the domestic industry is defined--both in agricultural and industrial product cases.

The domestic industry is statutorily defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[1] "Like product," in turn, is defined as a "product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation . . . ."[2]

In agricultural product cases, the ITC has generally addressed two factors in deciding whether growers are within the industry producing a processed product--first, the extent to which "the agricultural product enters a single, continuous line of production resulting in one end product," and second, the extent to which there is a "commonality of economic interest between the growers and processors, either in the form of interlocking ownership or economic integration in the sense of shared revenues."[3]

---

1 19 U.S.C. § 1677(4)(A).

2 19 U.S.C. § 1677(10).

3 Certain Table Wines From France and Italy, Inv. Nos. 701-TA-210 and 211 (Preliminary).

The basis for the "single, continuous line of production" factor is the Commission's concern that it would skew the data to include growers where their raw product goes into products other than the processed product at issue. For example, grape growers were excluded from the industry producing wine because 45 percent of grapes by volume are sold in the table grape and raisin markets and over half of grower revenues are derived from table grapes and raisins. Grape growers might be suffering due to depressed prices for table grapes and raisins rather than dumped wine imports.

The basis for the "commonality of economic interest" factor is the Commission's concern that growers only be included if they are similarly injured by the imports and can benefit as much as the processors from import relief. The Commission does not want to find injury based on the growers' situation and then award relief that will only benefit the processors.

The application of these factors resulted in the inclusion of growers in the industry producing red raspberries packed in bulk containers and the exclusion of growers from the industries producing canned peaches with sugar, canned pears with sugar, and canned fruit mixtures with sugar, as I explain below.

Certain Red Raspberries From Canada

In Certain Red Raspberries From Canada,[4] the ITC agreed with petitioners in defining the like product as red raspberries packed in bulk containers, excluding all other types of berries, fresh-market red raspberries, and retail/institutional packed berries. The Commission also agreed with petitioners in defining the domestic industry to include both growers and packers of red raspberries packed in bulk containers.[5] The Commission found that 100 percent of manufacturing grade berries move into a continuous line of production from the growers to the packers. The Commission further found a substantial degree of interlocking ownership, with 35 percent of the crop grown by self-packers, and also found that depressed prices for bulk-packed berries hurt growers as well as packers.

Notwithstanding that determination, Vice-Chairman Liebeler, in a pending countervailing duty case against red raspberries from Canada, has asked the parties to fully brief the grower/packer issue, noting that "the two-part test currently followed by the Commission is open to serious legal and economic criticism."[6] Moreover, the ITC's General

---

4 Inv. No. 731-TA-196 (Final).

5 Chairwoman Stern found injury to packers and thus chose not to decide whether growers were also part of the domestic industry.

6 Certain Red Raspberries From Canada, Inv. No. 701-TA-254 (Preliminary).

Counsel opined in a memorandum to the Commission[7] that the statutory definition of the like product would, if followed strictly, exclude the growers of red raspberries from the industry.

Sugar Content Of Certain Articles From Australia

In Sugar Content Of Certain Articles From Australia,[8] the imported articles under investigation were canned Bartlett pears, canned clingstone peaches, and canned fruit mixtures, all containing sugar. The Commission defined three separate like products: (1) U.S. canned Bartlett pears containing sugar, (2) U.S. canned clingstone peaches containing sugar, and (3) U.S. canned fruit mixtures containing sugar. The Commission then determined not to include growers within the industries producing these three products. In doing so, the Commission heeded the advice of its General Counsel to "be extremely careful when expanding the definition of industry in an agricultural product case . . . ." According to the General Counsel, there is nothing in the statute or its legislative history that necessarily permits the inclusion of growers, because the statutory rule is that the industry must be defined strictly in terms of producers of the like product.[9]

---

7 GC-I-104 (June 6, 1985).

8 Inv. No. 104-TAA-26.

9 GC-I-177 (August 28, 1985).

Another Interpretation Of The Statute

I disagree with the General Counsel's interpretation of the statute. As I read the statute, "the domestic producers as a whole of a like product" may include growers as well as processors of a processed agricultural product. For example, the red raspberry grower is primarily in the business of producing red raspberries packed in bulk containers. In my view, he is more the producer of that like product than the packer, who merely washes the berries, places them in a container, and sends them to cold storage to await delivery to a jam manufacturer. The red raspberry grower devotes three years to getting his plants into full production and he "produces" bulk pack raspberries on a year around basis. The packer produces everything from fish to vegetables and only packs raspberries six to eight weeks a year.

Likewise, the clingstone peach grower is primarily in the business of producing canned peaches. He takes four years to get a tree to full production and his livelihood from peaches depends on the production and sale of canned peaches and, to a much lesser extent, on the production and sale of canned fruit mixtures.

Likewise, the Bartlett pear grower is primarily in the business of producing canned pears. He takes eight years to get a tree to full production. About 75 percent of

the Bartlett pear crop goes to canneries, of which three-quarters go to canned pears and the remainder to fruit mixtures. If dumped or subsidized products depress the price of canned pears, the Bartlett pear grower suffers the consequences.

The Commission's concerns that including growers may skew the domestic industry data or result in relief that only benefits the processors are insufficient grounds for excluding growers in most cases. Including growers within the industry does not require the Commission to give the same weight to their economic condition as it gives to the processors. In an industry where all or substantially all of the growers' output goes into the processed product and where the raw product constitutes most of the value of the processed product--e.g., red raspberries packed in bulk containers--the growers' condition should be given greater weight than that of the processors. On the other hand, in an industry where only a bare majority of the growers' output goes into the processed product and where the raw product constitutes only a small portion of the value of the processed product--e.g., table wine--more weight should be accorded to the economic condition of the processors than to the condition of the growers. In other cases--such as canned pears and canned peaches--where a substantial majority of the raw product goes into the processed product

and where the raw product constitutes a substantial portion of the value of the processed product, equal weight might be given to the condition of growers and processors.

The point is that while the weight given to the growing versus the processing side of the industry may vary from case to case, the growers should not be totally excluded from consideration except where it is clear that their condition is so unrelated to that of the processors and the imported product at issue that it would serve no evidentiary purpose to consider their condition.

Clarifying Legislation Is Needed

The ITC has gotten itself into a legal box by creating and perpetuating a rigid two-pronged test to decide whether growers are within the industries producing processed agricultural products. The Commission and its General Counsel appear frustrated with the application of that test. They are searching for a better approach. Congress should enact clarifying legislation to give the ITC direction.

To begin with, Congress should explicitly endorse the Commission's past decisions which have included growers within domestic industries, such as the decisions involving red raspberries packed in bulk containers, lamb meat, frozen concentrated orange juice, and fresh Atlantic ground fish.

In addition, the Congress should specify criteria for future determinations that comport with common sense and economic reality. We would propose the following:

1. Primary purpose for growing the raw agricultural product

If the primary purpose of growing the raw agricultural product is for the production of the processed agricultural product at issue, the growers should be included in the domestic industry. For example, red raspberry growers produce primarily for bulk pack production, and clingstone peach and Bartlett pear growers produce primarily for canned peach and canned pear production.

If most grower revenues from the raw product are derived from its utilization in the processed product at issue, the growers clearly have a stake in the outcome of the investigation of the processed product and have "standing" in a legal sense. The growers' economic condition is also relevant to whether the domestic industry is injured. The greater the growers' dependence on the processed product at issue, the more weight their economic condition should have in determining whether the industry as a whole has been injured.

2. Common economic interests

Alternatively, if the growers of the raw agricultural product have substantially common economic interests with the processors of the processed product at issue, the

growers should be included within the domestic industry. Indicia of common economic interest should include the extent to which prices received by growers are dependent upon prices received by processors, whether growers and processors are co-petitioners in the investigation or otherwise jointly support the petition, and whether growers and processors would each benefit from the imposition of anti-dumping or countervailing duties.

S. 1629

Our clients support S. 1629 as a much needed improvement over existing law. The Bill properly rejects the ITC's practice of requiring both a single, continuous line of production and a commonality of economic interests. The satisfaction of either criterion should be sufficient.

The Bill also rejects the ITC's practice, in applying the commonality of economic interest test, of requiring significant legal relationships between growers and processors. As noted by Vice-Chairman Liebeler, such a requirement "makes little economic sense."[10]

On the other hand, we would propose that the legislation be aimed at the definition of "domestic industry" rather than the definition of "like product," so

---

10 Live Swine And Pork From Canada, at 21, Inv. No. 701-TA-224 (Final).

as to better comport with the existing statutory scheme. We would further propose that "the single continuous line of production" provision might be changed to a less rigid test focussing on whether the raw product is primarily produced for the production of the processed product at issue. In particular, we would object to the requirement that "the raw product [be] substantially or completely devoted to the production of the more advanced product" and that "the more advanced product [be] produced substantially or completely from the raw product."

Conclusion

On behalf of red raspberry, clingstone peach, and Bartlett pear growers, I thank the Chairman and his subcommittee for considering S. 1629. The fact is that without these growers there would be no U.S. industries producing red raspberries packed in bulk containers, canned peaches, and canned pears. They deserve protection from dumping and subsidies as much as the processors who form the other half of the industries producing these products.

STATEMENT OF TOM COOK, STAFF DIRECTOR, FOREIGN TRADE, NATIONAL CATTLEMEN'S ASSOCIATION, WASHINGTON, DC

Senator DANFORTH. Mr. Cook.

Mr. COOK. Thank you, Mr. Chairman.

My name is Tom Cook. I am the staff director of Foreign Trade for the National Cattlemen's Association.

The NCA supports Senate bill 1629; commends Senator Grassley for introducing this legislation. We have followed the activities of the pork industry in its efforts before the International Trade Commission. We find it hard to believe and accept the ITC's ruling which differentiates between swine and pork as it impacts the domestic industry.

The ITC ruling that hog producers and pork processors were not producers of like product and consequently were not members of the same industry is baffling and unacceptable. This same situation could happen to the beef-cattle industry and other agricultural producers.

If the ITC needs a more distinct direction in defining and interpreting trade remedy laws written by Congress, so be it. Senate bill 1629 does what is needed to clarify the relationship between producer and processor in a single line of production.

The United States is the world's largest importer of beef. And as cattle producers, we do have some assurances of predictability and stability on the import issue because of the Meat Import Act of 1979. However, this act does not address unfair trading practices of other countries.

We are constantly monitoring the trade practices of these other countries as related to beef. The European Community, for instance, is said to have over 1 million metric tons of beef in government storage. This huge amount of beef represents a threat to all beef trading countries in the world. It is being placed in other markets with the help of substantial export subsidies and represents a threat to the U.S. beef industry.

As far as we are concerned, beef is beef whether it is walking around in the pasture on four legs or being imported in a 60-pound box gross.

Therefore, to reiterate, the NCA commends you and supports your efforts with Senate bill 1629, and will work with you and representatives of other industries affected, including pork, to seek a satisfactory solution to this problem.

Thank you.

Senator DANFORTH. Thank you, Mr. Cook.

[The written statement of Mr. Cook follows:]

WRITTEN STATEMENT OF TOM COOK, ON BEHALF OF THE NATIONAL CATTLEMEN'S ASSOCIATION

My name is Tom Cook, I am the Staff Director of Foreign Trade for the National Cattlemen's Association.

The NCA supports S.1629 and commends Senator Grassley for introducing this legislation.

We have followed the activities of the pork industry and its efforts before the International Trade Commission. We find it hard to believe, and accept, the ITC's ruling which differentiates between swine and pork as it impacts the domestic pork industry.

The ITC ruling that hog producers and pork processors were not producers of like product and consequently were not members of the same industry, is baffling and unacceptable. This same situation could happen to the beef cattle industry and other agriculture producers.

If the ITC needs a more distinct direction in defining and interpreting trade remedy laws written by Congress, then so be it. S.1629 does what is needed to clarify the relationship between producer and processor in a single line of production.

The United States is the world's largest importer of beef. As cattle producers, we do have some assurances of predictability and stability on the import issue because of the Meat Import Act of 1979. However, this act does not address unfair trading practices of other countries.

We are constantly monitoring the trade practices of other countries as related to beef. The European Community, for instance, is said to have over 1,000,000 metric tons of beef in government storage. This huge amount of beef represents a threat to all beef trading countries in the world. It is being placed in other markets with the help of substantial export subsidies from the EC.

As far as we're concerned, beef is beef whether it is walking around in a pasture or being imported in a sixty pound box, frozen.

Therefore, to reiterate, the NCA commends you and supports your efforts with S.1629 will work with you and representatives of other industries affected, including pork to seek a satisfactory solution to this problem.

STATEMENT OF ROBERT T. WRAY, PARTNER, ROBERT WRAY ASSOCIATES, WASHINGTON, DC; ON BEHALF OF THE U.S. LAMB INDUSTRY

Senator DANFORTH. Mr. Wray.

Mr. WRAY. Thank you, Mr. Chairman.

I have been representing the U.S. sheep industry in efforts to obtain relief from the dumping of New Zealand lamb in the U.S. market. These dumping practices have been funded in large part by huge subsidies from the New Zealand Government.

In April 1984, we filed both antidumping and countervailing duty cases with the Department of Commerce and the International Trade Commission. The petitions and the exhibits were extremely detailed and were a result of more than 6 months of intensive study and documentation of the adverse effects that imports of New Zealand lamb have inflicted on an already seriously weakened domestic industry.

At preliminary hearings before the ITC, we produced extensive evidence of substantial subsidies, a selling price of New Zealand lamb much lower than its cost of production, and evidence of significant underselling of domestic lamb. We provided undisputed evidence that American sheep farmers were losing money and were sending their breeding lambs to slaughter to increase their cash flow.

As a result, our Nation's sheep herd was declining year after year and was at the lowest level in the history of this country. We provided evidence and testimony of New Zealand's predatory pricing in selected key markets.

Nonetheless, a mere 45 days after the petitions were filed, by a vote of 4 to 2, the ITC terminated the proceedings by finding there was no reasonable indication of injury by reason of New Zealand lamb imports.

In support of this outrageous finding of no possibility of injury from New Zealand, the ITC asserted that the lamb industry is not experiencing injury; and even if it was, New Zealand was not possibly contributing to it.

The ITC, disregarding its own staff report, reasoned that there was no compelling evidence of herd liquidation, that the volume of imports was only 5 percent of the market, and that it should be expected that frozen lamb would sell for less than domestic lamb.

In our view, the ITC presents obstacles to the effective utilization of the relief from unfair international trading practices that is singular among our trading partners, and is so formidable that U.S. agricultural interests are reluctant to even attempt to utilize these remedies.

We think this results in large part from two factors. The first is that regardless of sector, the ITC requires a level of proof and a measure of damages which is in practice much more rigorous than our trading partners, and much more rigorous, we believe, than the law intends.

Second, the ITC does not seem to have a solid understanding of the agricultural sector. The ITC does not seem to understand the vulnerability of prices for perishable products to relatively small but strategically placed and timed increases in supply. It does not understand the relationship between producers and processors.

For example, the ITC made much of the increase in domestic production of lamb meat during 1983 and 1984, stating that this was an indication of a healthy and thriving industry. The Commission ignored our explanation, and, indeed, the admonition of this committee that increased production of livestock is often an indication of herd liquidation as a result of lower prices and a symptom of losses, not profits.

In the lamb meat case, the ITC regarded the nearly 5 percent market share to be too small to have an adverse effect on the industry. They did this without benefit of an investigation into the elasticity of demand and supply, but rather just an intuitive presumption.

On the other hand, a few months later the Commission preliminarily found that an import market share of just over 2 percent in pork and swine, less than 1½ percent of stainless strip, and just 2 percent of cast iron fittings from Brazil were sufficient to make an affirmative preliminary determination.

If import volumes of less than 2 percent in the steel industry are not too small to affect steel prices, then why is merely 5 percent to affect lamb prices. If pork imports of around 2 percent can affect pork prices, why is it impossible this 5 percent cannot affect the lamb industry.

The ITC position is untenable. In the lamb case, the Commission found that frozen lamb cuts were like fresh lamb carcasses and cuts, and that the industry should be defined as the sheep producers, the feeders, the packers, and the processors.

In the pork case, however, the Commission found that pork and live swine were different products and that hog growers were not part of the industry producing pork. Baffling.

To add further confusion, in a recent case involving ground fish from Canada, the ITC found that fish filets were different products than fresh whole fish; that fresh whole cod is like a fresh whole haddock, but unlike a fresh cod filet. Furthermore, the ITC noted that a fresh cod filet is like a fresh haddock filet, but is not like a frozen cod filet.

The possibility of active minds at work unbounded by the realities of the marketplace are seemingly endless. It would all be a cause of wonderment, even bemused awe if it was not your industry's well-being or survival at stake, in which case it becomes a matter of grave concern.

What is the fisherman, the pork producer, the sheep farmer to do? How can they protect themselves from the predation of foreign government subsidized dumping?

Something clearly needs to be done to encourage and assist the ITC in more effectively and coherently administering the letter of the law and the intention of the Congress with respect to injury determinations. This is particularly critical in cases involving agricultural products.

In my written statement I have suggested four initiatives by the Congress. I hope the committee will consider these possibilities, and that so aided the ITC will promptly begin more informed and even-handed consideration of agricultural cases.

We thank the committee and particularly Senator Grassley for consideration of this bill.

Senator DANFORTH. Mr. Wray, thank you very much.

[The written statement of Mr. Wray follows:]

Summary of Testimony
Robert T. Wray, Esq.
Before The Senate Finance Committee
Subcommittee on International Trade
December 9, 1985

1. The adverse effects on wholesale prices of American lamb meat caused by the sale at dumping prices of subsidized New Zealand lamb meat are passed on to sheep farmers by lamb meat packers and processors.

2. The International Trade Commission's practice of including sheep farmers in the domestic industry producing lamb meat is correct. Any contrary determination would result in the ITC looking only at packers for evidence of injury which in the short term prosper when weak prices force sheep farmers to sell off their herds to generate cash to cover fixed costs.

3. The ITC's negative determinations in lamb meat and pork are a consequence of:
   - A. inadequate understanding of the unique economic behavior of livestock industries such as;
     1. increased production usually is caused by lower prices not higher prices;
     2. the direct pass through of prices for meat to producers of live animals, and;
     3. the unusual price sensitivity of perishable meat to small but strategically placed increases in supply;
   - B. a practice of requiring a more rigorous proof of injury by the domestic industry than Congress intended and more difficult than that required by our trading partners.

4. We recommend that:
   - A. this Committee request USTR to compare the ITC's injury practices to those of our GATT trading partners,
   - B. that the attached amendment be enacted,
   - C. that this Committee request the ITC to conduct and investigation under Section 332 of the Tariff Act of 1930 (19 U.S.C. 1332) into the vulnerability of livestock industries to unfairly traded imports,
   - D. that S.1624 be enacted.

TESTIMONY
OF
ROBERT T. WRAY

LAW OFFICES
ROBERT WRAY ASSOCIATES

BEFORE THE SENATE FINANCE COMMITTEE
SUBCOMMITTEE ON INTERNATIONAL TRADE

For the last several years my office has been representing the U.S. sheep industry in efforts to obtain relief from the dumping of New Zealand lamb in the U.S. market. These dumping practices have been funded in large part by huge subsidies from the New Zealand government. In April 1984, we filed both antidumping and countervailing duty cases with the Department of Commerce and the International Trade Commission (ITC). The Petitions and the Exhibits were extremely detailed and were a result of more than six months of intensive study and documentation of the adverse effects that imports of New Zealand lamb have inflicted on an already seriously weakened domestic lamb industry.

The production and sale of lamb meat, an agricultural industry, has distinctly different economic

characteristics from those governing industrial and other commercial enterprises. These differences arise from the unusually free market pricing mechanism and the presence of many relatively small suppliers who are forced to sell their perishable products at times and prices which they cannot control. Among the livestock industries, lamb meat has its own peculiar characteristics, particularly with regard to the dynamics of the price setting mechanism. The foremost differences are the seasonal and cut specific nature of the demand for lamb.

The price of live lambs and the health of the industry is thus determined by supply and demand for lamb meat at consumer levels which is expressed as the price which consumers are willing to pay at any one time for each of the domestic lamb cuts. The strength of the demand and consequently the price for each of these individual cuts tends to vary along seasonal patterns during which time the total price for the carcass is driven primarily by the demand for one or another of the major cuts. For example, legs which comprise 33% of the lamb by weight are in very strong demand during the spring and especially around Easter. Any unusual increase in supply, particularly if sudden or unexpected, can, and has had an unusually strong

depressing effect on leg prices and consequently on the price of dressed carcasses and live lamb during that season. These effects are felt throughout the year.

At preliminary hearings before the ITC, we produced extensive evidence of substantial subsidies, a selling price of New Zealand lamb much lower than the cost of production, and evidence of significant underselling of domestic lamb. We provided undisputed evidence that American sheep farmers were losing money and were sending their breeding lambs to slaughter to increase their cash flow. As a result, our nation's sheep herd was declining year after year and was at the lowest level in the history of this country. We provided evidence and testimony of New Zealand's predatory pricing in selected key markets. For example, in Easter, 1983, New Zealand hit the New York and Los Angeles markets right at the Easter Season, not only with massive volumes of legs, but also with a coupon program that offered retail purchasers a cash refund of $2.00 per leg of lamb. Given the average weight of the New Zealand leg of 5 pounds, this amounted to a further reduction of $.40 a pound from a wholesale price that was on average already $.40 a pound under the domestic leg price. The effect on

prices was devastating and the industry suffered enormous losses.

From December 1983 through the Spring of 1984, New Zealand announced three major price decreases as well as major targeted advertising and giveaway promotions. Nonetheless, a mere 45 days after the Petitions were filed, by a vote of 4 to 2, the ITC terminated the proceedings by finding that there was no reasonable indication of injury by reason of New Zealand lamb imports.

In support of this outrageous finding of no possibility of injury from New Zealand, the ITC asserted that the lamb industry is not experiencing injury, and even if it was, New Zealand was not possibly contributing to it. The ITC, disregarding the contrary conclusions of its professional staff, summarily reasoned that there was no compelling evidence of herd liquidation, that the volume of imports was only 5% of the market, and that it should be expected that frozen lamb would sell for less than domestic lamb.

So long as the domestic lamb meat industry is viable, New Zealand is unable to dispose of

significant amounts of lamb. Given the European VRA on New Zealand lamb and the increasing sheep herds in New Zealand, new markets must be established. Only with the demise of the U.S. domestic industry (which is now at historic lows) will New Zealand have a position in our market that its national interest appears to require.

Whatever sympathy one has for New Zealand's plight, to use subsidies and dumping practices to destroy our domestic industry is unfair to the hundreds of thousands of sheep farmers and in the longer term unfair to the American consumer.

The problems and frustrations that the sheep growers have experienced at the hands of the ITC has been shared by other groups in our free market agricultural sector who have tried to make use of the trade laws which our government has labored so many years to provide. The denial of relief by the ITC, forces the lamb industry and other agricultural sectors to think of political remedies and quotas. In my view this is unfortunate and, in any case, would not solve the problem of targeted and disruptive marketing practices of those, who like New Zealand,

find it useful in their national interest to disrupt our agricultural sector.

From May of 1984, when the ITC abruptly denied lamb industry access to the relief that Congress and the GATT have provided for violations of the subsidies and dumping codes, we have been engaged in a series of expensive and time consuming appeals. Six months ago, the Court of International Trade (CIT) reversed the ITC's actions in the lamb case, but the ITC has insisted on appealing the CIT's decision to the Circuit Court of Appeals. Now six months later, we have just completed oral arguments in the case. In the interim, many sheep farmers have gone into bankruptcy. The sheep herds of this country have continued to shrink and one of the country's largest lamb packers has closed its doors and terminated its business. We are still years away from getting the ITC to focus on, much less appreciate, the fact that New Zealand lamb is hurting the domestic sheep industry by its illegal subsidies and dumping practices.

Interestingly enough, in a proceeding which did not require the ITC's participation, we were successful in obtaining a significant countervailing duty of approximately 25% in just over five months. This was

The first is that regardless of sector, the ITC requires a level of proof and a measure of damages, which is in practice much more rigorous than our trading partners', and much more rigorous, we believe, than the law intends. For example, in making a preliminary decision to fully investigate cases presented to it, the ITC appears to require a level of proof that is very close to the level of proof required for a final determination.

Secondly, and in our opinion improperly, the ITC focuses on whether the affected U.S. industry is, independently of the effects of imports, healthy or hemorrhaging. If it is not hemorrhaging, the trend of the ITC's decisions is that a prerequisite for relief is absent. The law, however, is directed not toward whether an industry is healthy, but whether imports are adversely affecting an industry to a degree which cannot be considered insignificant.

Thirdly, the ITC does not seem to have a solid understanding of price dynamics in the agricultural sector. The ITC does not seem to understand the vulnerability of prices for perishable products to relatively small but strategically placed and timed increases in supply. It does not understand the

relationship between producers and processors. It does not understand the economic consequences of the long term illiquid investment in herds and inventories of lambs for uncontrollable short term returns.

We provided extensive evidence in the lamb petition demonstrating how increases in the supply of lamb meat in the three to four week period before Easter can have a devastating effect on live lamb prices. But the ITC chose to overlook this factor and focused on the relatively small 5% market share of lamb imports, all bundled together without regard to cut, and cast in forms of annualized market share.

The ITC made much of the increase in production of lamb meat during 1983 and 1984, implying that this was an indication of a healthy and thriving industry. Our explanation and indeed the admonition of the Senate Finance Committee that increased production of livestock is generally an indication of herd liquidation as a result of lower prices and a symptom of injury, not profitable business, were ignored.

In the lamb meat case, the ITC regarded the level of imports to be too small to have an adverse effect on the industry. They did this upon consideration of

made possible in countervailing duty cases since New Zealand's status as a country entitled to the injury test in subsidies cases was terminated on April 1, 1985. For dumping cases involving New Zealand and for virtually every other subsidy and dumping case the ITC's injury determinations are required to obtain relief.

In our view, the ITC presents obstacles to the effective utilization of the relief from unfair international trading practices that is singular among our trading partners, and is so formidable that U.S. agricultural interests are reluctant to even attempt to utilize the "remedies."

In the May 21, 1985, issue of The Journal of Commerce, ITC Commissioner Seeley Lodwick highlighted the fact that the U.S. agricultural sector has been successful in obtaining relief in only one out of eleven cases during a three and a half year period. This contrasts sharply with the results obtained in the cases involving other sectors of our economy, where just less than 50% of the cases were afforded relief. We think this results in large part from three factors.

the case in a brief period and without benefit of an investigation into the elasticity of demand and supply, but rather just an intuitive presumption. On the other hand a few months later the ITC preliminarily found that an import market share of just over 2% in the pork and swine industry was sufficient to have a reasonable indication of injury, and just a few months previous to that, the ITC made an affirmative preliminary determination that less than 1.5% of Stainless Steel Strip from Spain and just over 2% of Cast Iron Fittings from Brazil were sufficient to make a preliminary affirmative determination.

If import volumes of less than 2% in the steel industry are not too small to affect prices than why is more than 4% too small in the lamb industry. If pork imports of around 2% can affect pork prices, why is it impossible that 4% cannot affect the lamb industry? The ITC position is untenable.

In the lamb case the ITC found that frozen lamb cuts were like fresh lamb carcasses and cuts and that the industry should be defined as the sheep producers, the feeders, the packers, and the processors.

The value added to lamb meat by packers and processors is less than 5% of the wholesale price. Their margins, as a percentage of the wholesale value of lamb meat, are less than 1%. They survive by keeping no inventory and processing large numbers of live lambs quickly. They convert live lambs to sales of lamb cuts within a period of 2-3 days. The packers also have the ability to daily adjust the prices they pay for the live lambs to reflect the prices they receive. The lamb producers do of course keep inventory in the form of herds and lamb which, once they have reached market weights in 8-9 months, must be sold at whatever price the packers offer.

Thus when prices for lamb meat are adversely effected by imports the producers of live lambs carry most of the economic burden. In the short run if prices are too low to cover costs, the producers raise cash by selling the lambs they should keep to replace normal herd losses through age, sickness, and predators. When this happens packer volumes and profits increase in the short run, but the packers themselves will within a year or two begin themselves to suffer from the effects of imports because of the lower volume which necessarily follows herd liquidation.

If the Commission were to regard lamb producers as not part of the industry producing lamb meat, it would likely find in a dumping or countervailing duty case that although imports are depressing prices of lamb meat, the packers are doing better because of increased volume and the ability to immediately lower their costs. Thus if the ITC looked only at packers and processors there probably could never be a finding of injury and as a result, subsidized and dumped foreign meat would have a free ride - a blank check to wreak havoc on our livestock industries - the farmers and ranchers would be impotent. Not a very satisfactory result - hardly a worthy objective towards which the Commission should be devoting its considerable creative legal abilities.

In the pork case the ITC found, however, that pork and live swine were different products and that hog growers were not part of the industry producing pork. That's like concluding that bread and sliced bread are not like products and bread bakers are not part of the industry producing sliced bread. Baffling.

To add further confusion, in a recent case involving ground fish from Canada, the ITC found that

fish filets were different products than fresh whole fish, that fresh whole cod is like a fresh whole haddock, but unlike a fresh cod filet. Furthermore, the ITC noted that a fresh cod filet is like a fresh haddock filet, but is not like a frozen cod filet. The possibilities of active minds at work, unbounded by the realities of the marketplace, are seemingly endless. It would all be a cause of wonderment, even bemused awe, if it wasn't your industry's well being or survival at stake, in which case it becomes a matter of grave concern. What is the fisherman, the pork producer, the sheep farmer to do? How can they protect themselves from the predation of foreign government subsidized dumping?

Something clearly needs to be done to encourage and assist the ITC in more effectively and coherently administering the letter of the law and the intention of the Congress with respect to injury determinations. This is particularly critical in cases involving agricultural products. I suggest for consideration the following four initiatives by this Committee and the Congress:

1) that an inquiry be undertaken by the USTR or other appropriate agency to

determine the results of injury determinations by other members of the GATT. We believe that the interpretation and results by the ITC are probably far more rigorous than those employed by our trading partners.

2) that the Congress give favorable consideration to the enactment of the attached amendment to the Trade Act of 1979 which would prohibit the ITC from making a negative determination in agricultural cases solely because the volume of imports is small or declining.

3) that the Congress request that the ITC conduct an investigation under Section 332 of the Tariff Act of 1930 (19 USC 1332) into its methods and criteria for making injury determinations in agricultural cases with specific reference to: a) the perameters of supply and demand dynamics of freely traded perishable products; b) the effects of market specific or

sub-product specific increases in supply on price levels of raw products from which the sub-products are derived; c) the effects of underselling on the price level of domestic perishable commodities, and; d) economic indicia of injury to producers of agricultural products.

4) That it enact S. 1624

We hope the ITC aided by the Congress and this legislation will promptly begin more informed and even-handed consideration of agricultural cases.

PROPOSED AMENDMENT TO THE TRADE AGREEMENTS ACT OF 1979

Add to 19 USC 1677 (7)(D) new subsection (iii);

§1677 DEFINITIONS; SPECIAL RULES.

(7) Material Injury.-

(D) Special Rules for Agricultural Products

(iii) The Commission shall carefully consider the sensitivity of agricultural prices to any increase in supply and shall not determine that there is no material injury merely because the market share of imported merchandise is small or is declining.

Senator DANFORTH. Senator Grassley.

Senator GRASSLEY. Mr. Kahle, what is the total economic impact of both live hogs coming into the country as well as the fresh and chilled pork coming into the country?

Mr. KAHLE. I have some figures here on Canadian impact, Senator Grassley, and we also have figures on EC here. Your question was total impact to the industry?

Senator GRASSLEY. Yes.

Mr. KAHLE. All right, the first 9 months of 1985, the impact would be somewhere between $300 and $667 million.

Senator GRASSLEY. All right.

Mr. KAHLE. And for the EC, the impact for this year is projected to be $270 to $600 million.

Senator GRASSLEY. Again, I would ask you, Mr. Kahle, as a result of the recent pork decision has a precedent been established by the Commission in which pork producers or other entities are not able to bring a countervailing duty case, and how you perceive our trading partners viewing this action; how they would respond to it, particularly as a loophole for diversion?

And I would also like to add will this result in more cases needing to be filed with greater cost to related industries.

Mr. KAHLE. All right. Let me begin with the first question. Yes; it does impact upon pork producers in their efforts to try to seek fairer situations between us and countries who are importing products into the United States. The decision with Canada is going to preempt us in our hopes of going after the EC where there are clearly subsidies.

Senator GRASSLEY. You are talking about from a legal standpoint?

Mr. SANDSTROM. May I speak to that?

Senator GRASSLEY. Yes, you may, but just so I make my point clear. I am talking about is it going to be more difficult to file cases with the Commission as a result of this precedent.

Mr. SANDSTROM. It will. If you read the law as interpreted by the International Trade Commission, it will be impossible for the national pork producers to file a case. There is a certain amount of confusion which I think was made manifest by the prior speakers as to whether or not the Department of Commerce might accept such a case in consultation with the ITC.

If the ITC's interpretation were to hold, we could not file. And surely once and if we got to the ITC, I am sure that this precedent would also work to our disadvantage.

So I think it is important for the committee to realize that we are not talking simply about loopholes or threat. We are also talking about standing to bring a case in the first instance.

Senator GRASSLEY. Do you see our trading partners seeing this action as a loophole for diversion to other products? I should say to the processed product.

Mr. KAHLE. Sure. We knew when we were working on the case that Canada had considerably more packing capacity than they were using, for example. And I think the increase in the numbers in regard to products coming into the United States in the form of pork bears that fact out; that they have the ability to transfer that live product that was coming across alive into fresh pork products.

Senator GRASSLEY. The ITC seems to be focusing more on the legal relationship of an industry in making its determination, and, of course, have a two-prong test that they apply. Is it true that this test has not been consistent, and particularly in the pork case is not a reliable judge for a basis of injury, and we should perhaps be more concerned with the economic relationship as much or more than with the legal relationship; particularly, if producers and processors can demonstrate sufficient commonality of economic interest which will show some degree of continuous line of production relationship?

Mr. KAHLE. I am going to defer to Mr. Sandstrom in just a moment here. But, first, let me say that I think pork producers are really frustrated in that Commerce found subsidies on both live hogs and product. And the fact that the ITC split its determination is really—producers cannot figure out why that happened once the scope of subsidies was declared.

Mr. SANDSTROM. I think you put your finger, Senator Grassley, on one of the main problems. Frankly, the laws that exist today, the legislative history that was adopted in 1979 and the line of cases, at least as they were originally developed by the Commission, would have taken care of the problem. This two-part test did initially focus on the economic aspects or interrelationships between the elements of the industry and the products they produce.

The problem has become that the Commission has now focused less and less on economic aspects and is looking much more at legal relationships. I believe this, by the way, is more a problem of understanding agricultural commodities than any malicious intent vis-a-vis this sector.

For instance, the single, continuous line of production test in our case was met. It was very clear. However, regarding the commonality of economic interest test, the Commission felt it was not met. But rather than looking at the economic interrelationship of the elements of the industry, the pork producers and the packers, the Commission asked two legal questions. One, what percentage of the packers were owned by pork producers. In our case, it was around 5 percent. Therefore, we did not qualify. In the lamb case, it was 30 or 40 percent, as I recall, and that was deemed to be sufficient.

The point being that the impact of the processed product in the market is the same regardless of whether 5, 50, or 90 percent of the industry is owned by producers.

Second, the Commission has looked at whether there was a contractual relationship between the price of the raw commodity and the semiprocessed product. In our case, we have no such legal relationship. We did provide information to the Commission showing that, in fact, there was over a 90 percent de facto price correlation in the market. Again, resulting from the nature of the pork market and the link between these two products. But the Commission, except for one footnote, basically ignored that. It looked again simply at the existence of legal relationships. So they basically have gotten off the track, and in doing so, have created not only tremendous hardship for agricultural producers, but a certain amount of confusion under the statute generally with respect to the handling of agricultural cases.

Senator DANFORTH. Senator Baucus.

Senator BAUCUS. Mr. Wray, on page 9 of your testimony you say one problem the ITC has is its misunderstanding. The first is "regardless of sector, the ITC requires a level of proof and a measure of damages which have been practiced much more rigorous than our trading partners." Could you expand on that, please? What examples do you have that show that other countries do practice a test which is less rigorous than that of the ITC?

Mr. WRAY. Senator Baucus, it was expressed generally because I have just a general knowledge of it. I am familiar with it in the course of my normal practice with the dumping and countervailing duty actions by certain other countries.

One case in particular that I was involved in involved some consideration of the dumping of Korean tires in Australia. And I read the review of the proceedings, as I have of a few Canadian proceedings and one European proceeding, and I was struck by the simplicity of those procedures, by the relative clarity and by the ease with which they found injury to the domestic injury.

Senator BAUCUS. Has anybody looked into that? The degree to which——

Mr. WRAY. The difficulty of my own office making such an assessment—it is well beyond its capacity, but I think it would be very instructive to the administration, perhaps to the Commission, and certainly to the Congress to have such a study undertaken. And I would believe that probably the USTR would be the best place.

Yes; I think it would be very interesting because we have entered into relatively equal obligations among our GATT trading partners thinking they were equal. But if, in fact, their equality is in terms of treaty words and not actual practices, we may need to reassess it.

Senator BAUCUS. Does anyone else on the panel know of any attempts to look at that question?

Mr. SANDSTROM. We do not know of any. We do know the Canadians had no problem imposing countervailing duties on pork from the EC.

Senator BAUCUS. I am sorry. I could not hear you.

Mr. SANDSTROM. We do know that the Canadians had no problems imposing countervailing duties on pork from the European Community just recently.

Senator BAUCUS. Do you know whether the Canadian test is more—is the Canadian standard more rigorous or less rigorous?

Mr. SANDSTROM. I cannot honestly answer that question.

Mr. WRAY. Senator, I do not mean to suggest that their legal standard is necessarily different than our own, but the practical application of it, I think, bears some investigation.

Senator BAUCUS. Mr. Cook, I was struck by your statement that 1 million tons of beef are in storage in Europe. Is that what you said?

Mr. COOK. Yes.

Senator BAUCUS. How do they pay for that? Have those inventories been building up?

Mr. COOK. It has been building up for several years, Senator, but it is now at or in excess of 1 million tons. And they are looking for a home to move it. They are taking away some markets from the

Australians and the New Zealanders and the Pacific Rim countries. And, as a result, that is going to encourage the Australia-New Zealand beef to come to the United States. That is an example of a possible threat to our market.

Senator BAUCUS. Are there any EC subsidies of any kind which pay for that storage?

Mr. COOK. Yes; the domestic common agricultural policy provides for the subsidy of the production of that product. And if it does not sell for a certain price domestically, then the Government buys it and puts it into storage. And the Government owns it, and they pay the exporters a bounty to send it to other markets.

Senator BAUCUS. I think the basic thrust is true. I think a lot of decisionmakers at the ITC and elsewhere in the city do not sufficiently understand the problem facing agriculture. And, second, they do not know which questions to ask because they just haven't grown up with agriculture. There is much more familiarity in this town with other industries because they have in one way or another in their life become more directly associated with or more directly experienced with other industries. So, when it comes to agriculture, I think they are not as knowledgeable as they really should be.

And I, frankly, think that this committee should participate or ask the ITC or USTR to conduct a kind of study somewhere along the lines of Mr. Wray's suggestion. I think it would be very instructive.

Thank you very much.

Senator DANFORTH. Senator Grassley, do you have something further?

Senator GRASSLEY. I have a couple of questions here I ought to ask and then maybe submit some in writing so we do not take anymore time. But I do need to get from Mr. von Unwerth some clarification. In your testimony, you suggest a change in the definition of domestic industry rather than like product. And that the single line of production test be less rigid. That is at the bottom of your summary sheet.

How does this differ from the term "definition" in section 771, which you describe briefly in your testimony? I am not sure that I clearly understand this request and whether such a change would benefit only your industry or if it would be broad enough to cover all agricultural products.

Mr. VON UNWERTH. Senator, our point is that, in the agricultural market, if a product is primarily produced, however it is defined—whether we take a like-product definition, whether we address the injury test or the domestic injury test—that we need to have some threshold that would allow producers who are primarily in the business of producing for the end product that is under investigation to come in and present evidence in the case.

This is what we mean by a less rigid test. And your bill really addresses the less rigid test in that it does not require the two-prong test. Either one will do. And your bill relaxes the standard, the quantitative standard, either way.

We acknowledge what was said on the panel earlier, that perhaps approaching it in the domestic industry definition would be a

better way to comport with the existing statutory scheme. And we have no problem with doing that.

Senator GRASSLEY. All right. Then I also want to say where you do this on pages 11 and 12 of your testimony, a suggestion—I would like to suggest to you that I will take that under advisement.

However, I would like to know whether or not you are saying you would only accept the changes you mentioned or would you be satisfied seeing the bill expanded and taking into account some of the language that you raised?

Mr. VON UNWERTH. We are not rigid, either, on our side. It was simply suggestions to be considered. And, again, I think the bill can be approached through two or three different definitional approaches, each of which would require somewhat different language. But we are in full accord with your thrust, which is to broaden the definition to expand to allow growers' testimony to be introduced.

Senator GRASSLEY. The last question, Mr. Chairman, would be to Mr. Wray. Just to give you an opportunity to emphasize, because I asked the first panel about why agriculture seemed to be not getting the consideration as percent of cases positive—and you made a three-point argument as to why the ITC has tailed to find in the affirmative in no more than 1 out of 11 cases during a 3½-year period of time that you outline on pages 9 and 10 of your testimony.

I would like to have you expound on this in a generic sense.

Mr. WRAY. Senator Grassley, I think Senator Baucus put his finger right on it. That the members of the Commission have less familiarity with the agricultural sector than they do with the industrial and commercial sector.

As Mr. Sandstrom, and I in my testimony and in my oral summary, indicated, there are certain behavioral aspects of agricultural economics that are peculiar. For example, you don't expect an industry in deep trouble to start increasing its production. And that is what happens with agricultural livestock producers. You see an industry whose production is growing and the Commission says, as it did in the lamb case, these people are doing fine; their production is up; their market penetration is up. And that reflects so clearly that they don't understand what economic rules operate in the agricultural sector.

Now, they are not different economic rules. They just operate differently because the agricultural sector is different than the commercial and industrial sector.

I think that that factor along with the second factor—that is, that the Commission has not always adequately utilized its very professional staff. There are a number of reasons for that. I can only speculate to them, but I can say to you that in the lamb meat case the clear conclusion of the professional staff that imported lamb was affecting domestic wholesale prices was ignored by the majority of the Commission.

I know that in the pork case the issue of pork being different than swine was never introduced by the staff report. In fact, I understand the staff report had to be rewritten after one of the Commissioners made such a startling finding.

The second factor I think is that the Commission has evolved into a practice of, instead of having a preliminary determination to throw away frivolous cases and a final determination, as I think this Congress intended, they now have too many final investigations so that the staff is scurrying around to do a final investigation in the first 45 days, and then, when they have a final investigation, simply retreading the same water that they muddied before in their haste.

I think the Commission would be well advised to do that which the Congress instructed them to do. To do a preliminary determination for preliminary purposes and to use that staff support and that staff time to do a very thorough job in the final determination.

Mr. SANDSTROM. Senator Grassley, may I just add something to that point?

Senator GRASSLEY. Yes.

Mr. SANDSTROM. During the discussion by the administration witness and the Commission witness, the question was raised by a number of Senators, and properly so, if there is some intellectual justification for applying this type of statute to just agricultural products.

I think the answer is that, in fact, this legislation and the legislative history upon which it is really based do have an intellectual basis; frankly, one that can be intellectually justified. And that if you were to apply it properly, you would find that it would apply in many more agricultural cases than to industrial cases. This reflects, basically, the nature of agricultural products, which in many cases must be processed in some manner before they can be sold to a processor or a wholesaler or an end user.

And I think the committee should also be very clear that this is very tight legislation. We are talking about a raw commodity and a semiprocessed commodity that are linked with basically a 1-to-1 identity. Very closely. We are not talking about the grape situation. We are not talking about an upstream subsidy situation, where you have a number of components going into the processed product.

And it has already been stated, you are generally talking about a value-added situation where the raw commodity makes up the bulk of the value added of the semiprocessed product, which, of course, removes the concern of Ms. Bello with respect to grouping industries together and thereby lessening your chances of an affirmative injury finding.

Frankly, the reason we had a problem in our case showing causation was that, when the Commission looked at imports of pork from Canada, they looked only at fresh, chilled, and frozen pork and its impact on packers' prices and packers. The USDA, the ITC staff, and everybody else who had ever dealt with this question have always combined imports of hogs and pork, because hogs are nothing basically than pork on the hoof. They all get slaughtered, and the meat all enters into the pork market.

By excluding hogs, the ITC cut the import penetration in half. And, basically, that was why we lost on the causality question on pork.

Mr. VON UNWERTH. Mr. Chairman, may I add an additional thought along that line, of the intellectual justification between in-

dustrial and agricultural products? It seems to me—I don't know that this is the whole answer, but I will venture the thought—that with industrial markets subsidized and dumped products come in and tend to undercut the price of an industrial product and take market share away from specific producers. Agricultural markets are fungible. And so that products coming in, subsidized or dumped, tend to depress the price for the entire market rather than to take market share away from specific producers. That may be an additional thought that would justify different treatment.

Senator DANFORTH. Gentlemen, thank you very much. That concludes the hearing.

[Whereupon, at 4 p.m., the hearing was concluded.]

[The following was received for inclusion in the record:]

FARMLAND INDUSTRIES, INC.,
Washington, DC, December 9, 1985.

Hon. BOB PACKWOOD,
Chairman, Committee on Finance, U.S. Senate, Senate Dirksen Office Building, Washington, DC.

(Attention: Betty Scott-Boom).

DEAR MS. SCOTT-BOOM: Enclosed is a statement of Farmland Industries in support of S. 1629 which we respectfully request be made a part of the hearing record of the Senate Finance Committee.

Farmland Industries is a regional supply manufacture cooperative owned by 2300 cooperatives in 19 midwestern states. These 2300 local cooperatives are in turn owned by 500,000 farm and ranch families. We address the Canadian pork import issue not only from the point of view of a packer (through our subsidiary, Farmland Foods) but also as representative of our farmers who make up the Farmland system, many of whom are hog producers.

We commend you for holding hearings on this subject and hope that there can be early and positive action on S. 1629.

Sincerely,

KENNETH A. NIELSEN, *President.*

Enclosures.

STATEMENT BY FARMLAND FOODS, INC.

Farmland Foods appreciates the opportunity to file a statement on S. 1629. Farmland Foods is engaged in the pork packing and processing business. Farmland Foods has packing plants in Denison and Iowa Falls, Iowa, as well as in Crete, Nebraska, and runs a pork processing plant in Carroll, Iowa. Slaughter capacity for 1984 was over $5 million head of hogs.

Farmland Foods, Inc., is owned both by pork producers nad by Farmland Industries, Inc., which is a regional farm supply and manufacturing cooperative owned by 2,300 member cooperatives in 19 midwestern states. These 2,300 local cooperatives are in turn owned by 500,000 farm and ranch families. Some hogs are purchased from growers who are not owners of Farmland Foods.

Farmland is concerned with the recent ITC decision which imposed duties on live hogs from Canada, but essentially ignored imports of subsidized fresh, chilled, and frozen pork from that country. The decision indicates a lack of understanding on the part of the ITC of the way the pork industry operates.

The ITC distingusihed between swine and pork and seemed to treat hogs as a commodity, but fresh, chilled, or frozen pork as an unrelated, one commodity-type product. In fact, the ITC treated pork as it would an industrial product, which is made up of many components and sold in relatively few discreet sales. Pork is a commodity just as swine is a commodity. It is traded on a commodities market, pork prices appear daily in the Wall Street Journal, and each day National Provisioner yellow sheets are published giving the price of every different cut of pork on the market. These prices fluctuate from day to day and in total have a direct relation to the price of hogs. More importantly, increases in the supply of pork have negative price effects on pork and hog prices.

Now that duties have been imposed on Canadian hogs, but not pork, it is obvious to those of us in the trade that the Canadians will simply slaughter more hogs in

Canada and bring the subsidized product across the border in the form of fresh pork. That, of course, means that the supply of pork will be increased and the prices will remain low. Such imports will adversely affect packers and producers. If a packer cannot sell his product at a high enough price, he will have to cut back on what he pays producers. Both elements of the pork industry will suffer. This will be especially tough on the farmer producers, considering the existing conditions in agriculture. Basically, the benefit of any duties imposed on Canadian swine as a result of the countervailing duty investigation will be undercut by the failure to include pork.

Many packers are already operating at negative margins. The packing industry as a whole is suffering, with may plants not even able to cover their costs.

As confirmed by the ITC in its final determination of live swine and pork from Canada, the condition of the pork packing industry deteriorated over the years 1982-85 and is continuing to decline. Even though the industry has been forced to lower its wage rates and has stepped up productivity, it remains not only unprofitable, but has suffered continuing negative margins.

In our company, we have noticed a specific impact resulting from Canadian sales. For example, in Seattle, we have been selling several loads of pork per month to one large account. Last summer, we lost sales due to lower-priced Canadian imports. Our price for a trimmed pork loin was $1.23 per pound, c.a.f. The Canadian price was $1.17 per pound, c.a.f.

In reality, the price spread was even wider by $0.03 per pound because of the Canadian rebate program. Seattle area retailers have told us that even with the countervailing duty on hogs, the Canadian government or Canadian packers will reimburse them several cents per pound if they contract to buy Canadian products. The Canadians also seem to have a stock of unlimited advertising dollars to promote their products.

In Portland, we have been shipping three loads of fresh pork per month to a major account. That business has been taken away almost entirely by the Canadians. The Farmland Foods price was $1.23 per pound for the trimmed pork loin while the Canadian price was $1.18 per pound. Again, the Canadians gave rebates to retailers and wholesalers which compensated for the extra duties. In this instance, a Canadian packer, Fletcher, pays the retailer or wholesaler $0.03 per pound if the retailer/wholesaler will enter into a pork program.

In the Buffalo area, we shipped three loads a month to one particular account. We have lost 75% of that business to Canadians. The Canadians are selling their pork at an average of $0.10-$0.12 per pound less than the domestic market. In midsummer of this year, a new Canadian packer entered the Buffalo area. Previously, this packer had not done any business that we know of in the United States. That packer quickly expanded and by late summer was in the New York City area. At one point this summer, the packer brought 20 loads of ribs into the United States at $0.23 per pound less than the domestic price. Now, with the approaching holidays, the Canadians are bringing in boneless hams which they are selling at an average of $0.30 per pound lower than domestic offers.

Producers and packers must seriously consider taking some kind of action to neutralize the effect of the ITC's determination. At that time, it might also be wise to address the problem of rapidly increasing imports of fresh and processed pork from the European Community. Particularly over the last year, we have felt increasing adverse effects of pork imports from the EC. The change in volume has forced us to lower our prices in order to compete as we have been virtually pushed out of certain markets.

Farmland Foods supports the amendments embodied in S. 1629. Farmland Foods applauds this initiative to seek relief from unfairly subsidized imports.

○