Commission Appoints Government Affairs Taskforce

By Ken Melban
Vice President, Industry Affairs & Operations

As California avocado growers entered the 2023 season, field pricing was under a dollar. Understandably, industry frustration was high and California Avocado Commission Board Members and staff heard increasing grower concern. As the abysmal field pricing lingered, a few growers contended import volumes were creating an oversupply resulting in a depressed market. These growers were asking the Commission to explore actions they believed may provide relief to the downward pressure on grower revenue.

At the Commission's June 8 Board meeting, a discussion ensued regarding possible efforts the Commission could undertake in pursuit of a remedy to low field pricing. After some discussion, Jason Cole, Commission Treasurer, recommended the formation of a Government Affairs Taskforce, which received unanimous Board support.

Acting in urgency, Chair Rob Grether appointed the following members to the Taskforce:

Robert Jackson (Chair)
Board Alternate, District 1

Michael Perricone
Board Member, District 1

Al Stehly
Grower, District 1

Ohannes Karaoghlanian
Board Member, District 2

Joanne Robles
Grower, District 2

Jamie Shafer
Board Alternate, District 3

Jason Cole
Board Member, District 4

Megan Shanley Warren
Grower, District 5

Maddie Cook
Board Public Member Alternate

The appointment of these individuals to the Taskforce was intended to provide balanced representation of the California avocado industry in terms of geography and scale of operation. Both small- and large-scale growers have a seat and voice at the table.

The Taskforce convened their first meeting on June 16 with the following Scope of Work:

1. Research existing federal/state government programs, primarily with a focus on trade, to determine potential utilization of existing programs to benefit growers.

2. Explore the potential for creation of other non-existing remedies to benefit growers.

The Taskforce's Goal:

1. Identify and recommend (if available) potential pathway(s) to support grower viability. The Taskforce analysis and recommendation will include assessing the likelihood for success(es) and potential costs.

   a. To best inform the Taskforce's research and subsequent recommendations experts are to be utilized (e.g., trade attorneys, lobbyists, researchers, federal/state agency personnel, elected officials, etc.) throughout the process.

Members were asked to provide ideas at the first meeting and the following list was put forward:

- Tariffs
- Quotas
- Subsidies
- Possible remedies under the United States/Mexico/Canada Free Trade Agreement (USMCA)
- Crop insurance: modify to include market performance conditions.
- Assembly Bill 865: "Sale of agricultural products: requirements for sale"
- White House Competition Council
- Minimum Risk Levels: MRLs are more stringent in the European Union. Could the United States or California create similar more stringent requirements?

- HAB assessment: the HAB assessment has remained $0.025 per pound since its inception, although the HAB board has authority to increase it up to $0.05 per pound. If HAB's assessment were increased, CAC's assessment could be reduced to maintain the same combined cost to growers.

The Taskforce utilized three attorneys: Carolyn Gleason, McDermott Will & Emery; Ed Ruckert LLC; and, George Soares, Kahn, Soares & Conway. After listening to the members' suggestions, the attorneys reviewed and researched the ideas and provided both a policy and political overview analysis for the Taskforce to consider at their next meeting.

The Taskforce met on August 3 and the attorneys provided specific responses to the potential remedies that had been suggested for consideration. The suggested ideas within the trade remedy arena (e.g. Section 201; Section 301; tariffs; quotas; etc.) would first require conducting a feasibility study. The purpose of a feasibility study is to determine if the industry can demonstrate the level of injury necessary for a successful outcome should one of these options be pursued. The estimated cost of such a feasibility study ranges from $100,000 to $200,000. In addition, information from as many growers as possible would be necessary to ensure the study accurately reflects the aggregate industry.

Legal counsel, based on their experience in federal trade issues, reported pursuit of any existing trade remedy at the federal level will face significant challenges at a significant cost to the industry. In addition, the general consensus was that the industry would have a significant uphill battle based on legal requirements along with the Administration's current stance — with likely limited opportunity for success.

A third meeting was held September 19 and the Taskforce met with California Department of Food and Agriculture personnel to learn about possible programs or efforts CDFA provides that may be of help to growers. In addition, discussion about creating new legislation or program(s) was discussed. CDFA staff are reviewing the input they received from the Taskforce and will provide an update in the future.

As of this writing, based on the aforementioned information, the Taskforce has not made any recommendation to the Board for possible action. Below is more detailed information provided by legal counsel to the Taskforce on specific items:

Trade Enforcement Actions that Authorize the Imposition of Tariffs, Quotas, or Related Restrictions on Imports if They Result in Affirmative Determinations

1. Antidumping (AD) Actions

Legal standard

AD cases are the most common import relief action. They are targeted at a specific supplying country, or countries, and broadly require proof of both "dumping" and injury to the U.S. industry in order to prevail. The dumping component of an AD case requires a showing that the imported product is being sold in the U.S. market at prices that are "less than normal value." The "normal value" of the imported product at issue is determined, in order of priority, by the price the exporter sells the product in the home market; if there are too few home market sales, by the price at which the exporter sells the product in third countries; or if home market and third-country prices cannot be determined or if those prices are below the cost of production, by a "constructed value." The amount by which the exporter's U.S. price falls below normal value establishes the "dumping margin." The injury component of an AD case requires a showing that the dumped goods are causing or threatening "material injury" to the U.S. industry. Material injury is defined as injury that is "not inconsequential." The issue of whether the domestic industry is or is not materially injured turns on a careful analysis of import levels and shares, price effects in the U.S. market, and the impact the imports are having on the domestic industry.

Initiation and proceedings

AD actions may be initiated by a petition filed by an eligible interested party or be self-initiated by the Department of Commerce (Commerce). Two agencies conduct AD investigations: Commerce investigates the dumping issues, and the International Trade Commission (ITC) investigates the injury issues. Commerce and the ITC conduct their investigations in two stages, leading to the issuance of preliminary and final determinations by both agencies. If an AD action clears the required legal hurdles at Commerce and the ITC, AD duties are imposed on the covered imports in an amount sufficient to offset the dumping margin.

In a few AD cases, if certain requirements have been met, Commerce has pursued (with the U.S. industry's consent) a "suspension agreement" in lieu of AD duties. AD suspension agreements suspend the pending AD case in exchange for a commitment by the foreign exporters of the product at issue to sell the covered goods in the U.S. market at or above one or more established reference prices.

Comments

Over the past few decades there have been several AD actions against Mexican agricultural products (e.g., fresh toma-

toes, sugar, lemon juice, table grapes, cattle, cut flowers). Some of these actions have succeeded in bringing relief to the petitioning U.S. industries and others have not. The AD case against fresh tomatoes from Mexico, filed in the mid-90s, resulted in a suspension agreement that has been amended five times over the years to try to curb unfair pricing by the Mexican shippers. In June of this year, faced with continued unfair pricing by Mexican exporters, the Florida tomato industry requested that Commerce terminate the suspension agreement and resume normal AD procedures.

AD cases are resource-intensive and should not be pursued unless the U.S. industry has conducted a feasibility study to determine whether filing an AD action has a reasonable likelihood of resulting in satisfactory AD duties for the industry.

2. Countervailing Duty (CVD) Actions

Legal standard

CVD cases are the next most common import relief action. They are targeted at a specific supplying country, or countries, and broadly require proof of both actionable government subsidies and injury to the U.S. industry in order to prevail. In general terms, there are two types of countervailable subsidies: export subsidies and domestic subsidies. All export subsidies are actionable. Domestic subsidies to a country's agricultural sector are only actionable if they are deemed to be "specific." If a foreign industry is determined in a CVD action to be receiving countervailable subsidies, the "CVD margin" is the percentage those subsidies represent of the exporter's sales impacted by the subsidies. The injury standard in CVD actions is the same as the one that applies in AD actions-- i.e., the U.S. industry must show that the unfairly subsidized imports are causing or threatening "material injury" to the U.S. industry.

Initiation and proceedings

CVD actions may be filed alone or in conjunction with an AD action. They may be initiated by a petition filed by an eligible interested party or be self-initiated by Commerce. As in AD actions, Commerce investigates the unfair trade elements (here, the subsidy issues), and the ITC investigates the injury issues. If a CVD action clears the required legal hurdles at the ITC and Commerce, CVD duties are imposed to offset the margin of subsidization benefiting the foreign exporters. If a CVD case is filed together with an AD action, and margins are found in both cases, the AD and CVD duties are totaled and applied to imports of the covered product.

As in AD cases, Commerce in a few cases has pursued (with the U.S. industry's consent) suspension agreements in lieu of CVD duties. CVD suspension agreements suspend the pending CVD case in exchange for a commitment by the foreign government to apply and enforce specified export quotas on the product of concern.

Comments

In recent decades, there has only been one CVD action against Mexican agriculture -- the 2014 combined AD/CVD petition against sugar from Mexico, which resulted in AD and CVD suspension agreements. Those suspension agreements have been modified once and remain in effect.

Like AD cases, CVD actions are resource-intensive and should not be pursued until the U.S. industry has first conducted a feasibility study to determine whether filing a CVD petition has a reasonable likelihood of resulting in satisfactory CVD duties for the industry.

3. Sec. 201 Actions

Legal standard

Unlike AD and CVD cases, actions brought under Sec. 201 are not pegged to unfair trade practices or to any specific country. Sec. 201 actions, also called "global safeguard" actions, are brought against imports of a covered product from all foreign-supplying countries and, to be successful, must demonstrate that the covered goods are being imported in such

increased quantities as to be "a substantial cause" of "serious injury" to the U.S. industry. This injury standard is more rigorous than the one applicable in AD and CVD actions.

Initiation and proceedings

Sec. 201 cases may be lodged by an eligible interested party filing a petition or be self-initiated by the Office of the United States Trade Representative (USTR), ITC, or trade committees in Congress. The ITC is responsible for investigating Sec. 201 cases. If, after filings and hearings, the ITC affirms that imports are a substantial cause of serious injury to the domestic industry, it will then assemble recommendations on the measures that should be taken to help the domestic industry adjust to the import levels at issue. The ITC's remedy recommendations may include increased duties, tariff rate quotas, and other domestic adjustment measures. Its recommendations are sent to the President, who has final authority to determine what, if any, relief to provide the impacted industry. If the President determines to impose Sec. 201 relief, any approved measures will typically apply for four years but may be extended for a maximum of eight years.

Comments

Like AD and CVD actions, Sec. 201 cases are resource-intensive. They are difficult to win and should only be filed if the industry has first undertaken a feasibility study to determine whether it has a reasonable likelihood of prevailing. In 2020, when USTR self-initiated a Sec. 201 blueberry action without first undertaking a feasibility study, the ITC voted 5-0 against the U.S. industry, leaving the U.S. industry with substantial legal fees and import levels that accelerated after the Sec. 201 action failed.

4. Sec. 301 Actions

Legal standard

Sec. 301 authorizes cases to investigate foreign trade practices that violate U.S. trade rights or, in the absence of a trade violation, that may nevertheless be considered "unreasonable" and "burdensome and restrictive" on U.S. commerce. The latter terms are expansively defined under Sec. 301 but in the past have generally been deemed to apply to significant trade measures that fall into gray areas not squarely covered by existing trade rules and obligations (e.g., intellectual property theft, currency manipulation, digital taxes). Sec. 301 is a highly discretionary trade remedy that USTR, as the lead agency, can elect to pursue, or decline to pursue, for wide-ranging reasons.

Initiation and proceedings

Sec. 301 cases may be initiated by any interested party filing a petition or be self-initiated by USTR. If a case is accepted for review, USTR and others in the U.S. Government will either investigate the matter on their own authority or pursue the Sec. 301 case under the dispute settlement mechanism of the World Trade Organization (WTO) or U.S. Free Trade Agreements (FTAs) (see below). If USTR makes a determination at the end of a Sec. 301 investigation that the practices at issue are in violation of U.S. trade rights, or are unreasonable and burden and restrict U.S. commerce, Sec. 301 authorizes USTR to impose retaliatory measures against the offending country. Retaliation generally takes the form of additional U.S. tariffs, but Sec. 301 grants USTR broad scope to apply a diverse range of measures.

Until 2016, Sec. 301 was used almost entirely as a platform for USTR to prepare cases for WTO dispute settlement. The Trump Administration departed from that practice by self-initiating Sec. 301 investigations six times on country practices that were investigated solely by the U.S. Government. The largest of these self-initiated investigations was a case against China, which resulted in $360 billion dollars of retaliatory U.S. tariffs on imports from China that are still in place today. To date, the Biden Administration has not initiated any new investigations under Sec. 301 but continues to maintain several of the actions begun during the Trump years.

Comments

In August of 2022, most of the Florida Congressional delegation filed a Sec. 301 petition asking USTR to investigate a pattern of "export targeting" by the Government of Mexico involving decades of subsidy benefits to its "protected" fruit and vegetable sectors exported to the U.S. market. USTR determined that it could not make a determination on whether to accept the petition in the 45-day petition review period but committed to establishing an Advisory Panel to determine how best to assist producers of seasonal and perishable fruits and vegetables in the Southeast to overcome the trade measures raised in the petition. The Federal Register Notice announcing the creation of that Advisory Panel is expected to be issued in the near future and is expected to be specific to produce sectors in the Southeast.

5. United States-Mexico-Canada Agreement (USMCA) Dispute Settlement Actions

Legal standard

USMCA, like NAFTA (the predecessor agreement to USMCA) and other U.S. FTAs, is aimed at eliminating barriers to trade and investment, and facilitating stronger trade and commercial ties between the participating countries. It has 34 chapters and numerous side letters, and retains most of the market-opening commitments established under NAFTA. In the agricultural sector, USMCA, like NAFTA, requires duty-free market access treatment on most products (including on fresh avocados, HS 0804.40). It also prohibits the use of export subsidies, unjustifiable sanitary and phytosanitary (SPS) measures, technical barriers to trade, and certain Geographical Indications, and lays down certain rules for tariff rate quotas that were grandfathered into USMCA on dairy. The countries participating in USMCA may invoke the agreement's dispute settlement mechanism if they believe that one of their USMCA partners has failed to carry out a USMCA obligation.

Initiation and proceedings

USMCA dispute settlement is initiated and litigated government-to-government. The dispute settlement procedures begin with consultations to explore whether a mutually agreeable negotiated solution can be found. If no solution is reached, the case proceeds to litigation before a USMCA, arbitral panel. After filings are submitted and hearings held, the panel rules on whether the respondent country has violated its USMCA obligations. If a violation has occurred, and the offending country refuses to bring its violation into compliance, the complaining country is authorized under USMCA to impose increased tariffs on goods from the offending country.

Comments

To date, the Biden Administration has initiated only a few USMCA dispute settlement procedures. It has twice taken Canada to USMCA dispute settlement over its tariff quota allocations on dairy, but has yet to obtain an acceptable solution to that dispute. It has also begun dispute settlement procedures against Mexico's biotech corn policies, which the U.S. Government alleges are a violation of Mexico's SPS obligations under that agreement. Mexico has recently compounded U.S. concerns in the corn dispute by imposing additional tariffs on white corn. The Biden Administration has said that while these new tariffs will not impact 97% of U.S. corn shipments to Mexico, the United States nevertheless intends to address these tariffs in the USMCA corn dispute settlement procedures.

6. WTO Dispute Settlement Actions

Legal standard

The WTO is a multilateral trade agreement covering 60 different agreements and hundreds of commitments governing trade in goods, subsidies, SPS measures, technical barriers to trade, and numerous other trade issues. The United States, Mexico, and 162 other countries are WTO members, all of which have the right to invoke dispute settlement procedures if their WTO rights have been breached.

Initiation and proceedings

As with USMCA dispute settlement, WTO cases are initiated and litigated government-to-government and are generally confidential. They are typically filed by a government to address export concerns, not import concerns. Once a government initiates WTO dispute settlement, the WTO contemplates an initial review and decision by an arbitral panel, followed by the right to an appeal. If a complainant country wins a WTO dispute settlement action, and the offending country fails to come into compliance, the WTO may authorize the winning country to take retaliatory measures, typically in the form of increased tariffs on the offending country's goods.

Comments

For years, WTO dispute settlement was USTR's primary trade recourse, including against countries that have established FTAs with the United States. A great many of USTR's actions in the WTO have been against unfair foreign agricultural practices, including, e.g., foreign agricultural subsidies, food safety standards, and market access violations. Those U.S. cases have occasionally led the United States to impose retaliatory tariffs on foreign goods.

Since 2020, however, the United States has been block-

ing the WTO appellate process from functioning, which has impaired the entire WTO dispute settlement process. The Biden Administration's systemic concerns about the WTO have prevented it from taking any new cases to WTO dispute settlement.

7. Sec. 307/Withhold Release Orders (WROs)

Legal standard

Sec. 307 of the Tariff Act authorizes U.S. Customs and Border Protection (CBP) to issue WROs to prevent goods produced in whole or in part in a foreign country using forced labor from entering the U.S. market. U.S. law defines forced labor as any work or service exacted from any person under the menace of any penalty for non-performance and for which the worker does not offer work or service voluntarily.

Initiation and proceedings

Allegations of forced labor, preferably with supporting documentation, may be submitted by interested parties or anonymously on the CBP website platform established for these actions. CBP will investigate any allegations made and will thereafter issue its findings together with a WRO if it confirms the use of forced labor.

Comments

In October 2021, CBP issued a WRO on fresh tomatoes produced on two Mexican tomato farms, Agropecuarios Tom S.A. de C.V., and Horticola Tom S.A. de C.V.

8. Sec. 232 National Security Actions

Legal standard

In Sec. 232 actions, if specific goods are being imported in such "increased quantities or under such circumstances" as to impair U.S. "national security" interests, import restrictions and non-trade related actions may be taken to "adjust" those imports.

Initiation and proceedings

Sec. 232 investigations may be initiated by a petition from an interested party or be self-initiated by the U.S. Government. Commerce investigates these actions and sends its conclusions to the President along with recommendations on what, if any, measures should be taken. The President then has full discretion to decide what measures, if any, to take on the covered imports.

Comments

In 2018, Sec. 232 actions led to additional tariffs on steel and aluminum imports from most foreign countries, which tariffs are still in effect. In prior years, Sec. 232 authority has also led to oil imports from certain countries being embargoed. Sec. 232 has never been applied to imports in the food or agribusiness sectors.

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