

# Agribusiness USA

Looking further in to the issues surrounding the Agribusiness industry in the USA, *Lawyer Monthly* speaks to Michael J. [REDACTED] Partner at Kelley Drye & Warren LLP. Kelley Drye is a 400-lawyer law firm with six offices across the U.S. – three in the Greater New York City Area, and one each in Washington D.C., Chicago and Los Angeles.

**Please introduce yourself, your role and your firm.**

I practice in our Washington office within the firm's International Trade and Customs Law Group, which includes 20 attorneys and paralegals, and ten professionals within my firm's economic consulting subsidiary, Georgetown Economics Services. I have specialized in international trade and customs law for 26 years, including the four years I served as a political appointee at the U.S. Commerce Department ("Commerce") during President Ronald Reagan's second term. At Commerce, I managed the office responsible for conducting the "unfair trade" part of antidumping ("dumping") and countervailing duty ("subsidy") investigations under U.S. law.

**What are the main types of cases you deal with within the agribusiness area?**

Over the years since I left government service, I have been accused – quite accurately – of specializing in "international food fights." These include all legal disputes that arise in connection with the movement of food and agricultural commodities across international boundaries. For example, over the past two decades I have represented major parties in many U.S. dumping and subsidy investigations involving agricultural imports, including:

- Fresh Garlic from China
- Honey from China
- Farmed Atlantic Salmon from Norway and Chile
- Preserved (i.e., Canned) Mushrooms from Chile, China, India and Indonesia

- Table Grapes from Mexico and Chile
- Ammonium nitrate and other fertilizer products from a range of countries
- Citric Acid from China

There have also been many other unfair trade investigations of agricultural imports in the U.S. in which I have not represented a participant. These include, among others, softwood lumber, swine and cattle from Canada; tomatoes from Mexico; catfish from Vietnam; and frozen shrimp from China, Vietnam, India and Ecuador.

The amount of annual trade involved in the U.S. dumping and subsidy investigations of the agricultural products mentioned above has ranged from \$100 million to \$3 billion-plus. Thus, the stakes for each "player" in an unfair trade investigation tends to be quite high.

In U.S. "unfair trade" cases, I have most often represented the domestic industry, although I have often represented U.S. importers and purchasers. I have also advised many U.S. producers and shippers involved in unfair trade cases brought by the Mexican government against U.S. exports, such as pork, live swine and bovine meat.

**Can you give me a brief overview of the legal framework this industry is subject to?**

"Unfair trade" cases – dumping and subsidy cases – involve two questions. First, are the relevant imports being (a) "dumped" in the U.S. market (basically, sold here at below-cost prices), or (b) sold here at prices that have been unfairly subsidized by the government of the country of production? If yes, the second question is: are the imports harming ("materially injuring") the domestic producers that compete

here against the imports, based on the imports' "unfair" low price? If yes, an order is put in place under which ongoing imports are closely monitored, and are subject to the amount of additional taxes, or "duties," required to increase the imports' U.S. sales price to a non-dumped or non-subsidized level. Such orders have an initial term of five years, which can be renewed in five-year increments if the competing domestic producers demonstrates that they remain "vulnerable" to being re-injured by unfairly-priced imports. Some U.S. AD/CVD orders have been in place for more than 20 years.

Unfair trade investigations are conducted over a one year period by two federal agencies: Commerce, which determines whether imports have been dumped or unfairly-subsidized; and the U.S. International Trade Commission ("ITC"), which determines whether such imports are "materially injuring" the competing domestic producers. Each agency receives a huge amount of production, sales and financial data for sales made during a recent one- to three-year period from the participating domestic and foreign producers, U.S. importers and domestic users. This requires counsel for these companies to thoroughly understand all aspects of the production, sales, distribution and use of the domestic and foreign-made goods.

Unfair trade investigations are lengthy and intense pieces of administrative litigation, with the losing parties able to appeal Commerce's and the ITC's decisions through the three levels of the federal court system. The investigations, however, are run under strict statutory deadlines that the agencies rarely miss. Offsetting duties can be imposed quickly on new imports, typically halfway through an investigation, after an affirmative preliminary determination of unfair trading by Commerce), for the benefit of the domestic producers that petitioned for the duties. But a negative preliminary or final injury decision from the ITC will terminate the investigation without the imposition of duties, and thus presents the foreign producers and U.S. importers the most effective path to victory from their perspective.

**What has been the most significant development in this area of the law over the past 10 to 15 years?**

Twenty years ago, unfair trade investigations were almost exclusively conducted by the United States and the European Union. That has changed dramatically, led by the creation in 1995 of the World Trade Organization ("WTO"). The WTO recognizes the substantial injury that can be inflicted on domestic producers in any

of its member countries by "unfairly traded" imports, and expressly allows all member countries to maintain dumping and subsidy laws within their national legal regimes as long as those laws are in compliance with the WTO's general guidelines for unfair trade investigations. In fact, for several years China has been the world's most request "user" of dumping and subsidy investigations, and other major country-users of the unfair trade laws include Mexico, Canada, Australia, Brazil and South Africa. Indeed, these countries have performed unfair trade investigations of imports into their countries of most of the agricultural products listed above in the context of U.S. investigations.

Many of the WTO members that have become significant users of dumping and subsidy investigation have wholly adopted the WTO's unfair trade guidelines as their own national unfair trade laws. Because the unfair trade laws of the U.S. and the EU served as models in many respects for the WTO guidelines, many experienced international trade lawyers in those two countries frequently advise U.S. exporters on how to win, or at least survive, unfair trade investigations brought against their shipments to other WTO countries. Further, since 1995, many WTO members – including the United States – have collectively filed scores of cases within the WTO's dispute resolution procedures challenging the results of other countries' dumping and subsidy investigations as violating the WTO's guidelines. Many private U.S. and EU trade lawyers have become actively involved in advising the countries involved in these disputes.

**What other legal work do you perform as an international trade attorney specializing in agricultural products beside representing clients in unfair trade investigations?**

Like most trade attorneys, I have become quite familiar through my work in unfair trade investigations with the complex web of rules and regulations to which imported and domestically-made agricultural products are subject. A foreign or domestic producer that is participating in an unfair trade investigation must accurately report to Commerce and the ITC all of the processes and costs involved in producing, distributing and selling their product in the U.S. market. Thus, the trade attorney representing such a producer in the investigation by necessity must develop a full understanding of all the relevant production, distribution and sales steps, as well as all the rules and regulations with which the producer must comply, and which add to the ultimate costs of producing, moving and selling the relevant product. By the investigation's



completion, the attorney will have gained much of the knowledge needed to advise the producer on complying with what has become the matrix of U.S. laws and regulations that apply to most domestic and foreign-made goods sold in this country. That knowledge will be increased and perfected through the attorney's frequent representation of producers in unfair trade investigations of agricultural goods.

For example, all imports, including imported agricultural goods, must comply with the wide and deep laws and regulations administered by U.S. Customs and Border Protection ("CBP"). Many of these regulations add not-inconsiderable costs to selling imports in this country, and thus must be accurately reported in unfair trade investigations. Thus, attorneys that represent companies in such investigations by force gain expertise in complying with CBP's regulations. Further, all agricultural goods sold in the U.S., foreign as well as domestic, are subject to a wide range of regulations issued by agencies such as the U.S. Food and Drug Administration, the U.S. Department of Agriculture, and the U.S. Environmental Protection Agency. Producers and importers that have participated in unfair trade investigations often find it efficient to turn to their trade counsel regarding compliance issues related to these agencies' regulations, particularly if counsel can team up with attorneys at his or her firm who specialize in those agencies' regulations, as is the case at Kelley Drye.

#### What are the main challenges that face the food and agriculture industry?

As noted above, the dumping and subsidy laws of the United States and many other countries have been heavily used in recent decades against a wide variety of agricultural and food products. Given the strategic importance of food production generally, and the continued growth in food production in developing countries generally – much of it export driven – there is every reason to believe that there will be even more of these cases over the next ten years or so.

Focusing on the U.S. market, I believe that U.S. producers of the high-value "cash crops" produced in the West Coast states, Texas and Florida will increasingly face pressure from imports from lower-cost producers in Asia, Mexico, South America and Africa, particularly as new, high-tech transport makes it possible to preserve and ship "perishable" crops into the U.S. market much more quickly than has been possible. Such domestic producers may increasingly seek protection under the unfair trade laws.

Counter-balancing this is the ever-increasing complexity of the heavily-litigated investigations run by Commerce and the ITC. Such complexity has significantly increased the cost to domestic producers of petitioning for relief under the dumping and subsidy laws, and fully participating in the ensuing investigations.

Looking abroad, foreign producers and U.S. users of imported food and agricultural products have to date generally remained hidden from U.S. regulators from their perches beyond the U.S. border. Foreign producers thus have gotten a "free ride" for many years with regard to the heavy regulatory burdens faced by their U.S. competition for sales in this country. However, foreign producers that ship goods to the United States – particularly agricultural and food products – will increasingly be subjected to the scrutiny of the U.S. regulators as the policing technology available to, and used by, the regulators continues to dramatically improve. This will require foreign producers and their U.S. importers to develop and maintain what have been known as socially-reliable distribution chains, to guarantee the wholesomeness and safety of their products from the foreign source of production to the point of domestic consumption – and to pay for any damage caused in this country by their non-compliant imports. **LM**

#### Contact Details:



Michael J. [redacted] Partner  
International Trade and Customs Law  
Kelley Drye & Warren LLP  
3050 K Street, NW, Suite 400,  
Washington, DC 20007-5108

Fax: 202-342-8451  
Email: [mcoursey@kelleydrye.com](mailto:mcoursey@kelleydrye.com)  
Web: [www.kelleydrye.com](http://www.kelleydrye.com)

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