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WTO: Antidumping Issues in the Doha Development Agenda

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Summary

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives called for "clarifying and improving disciplines" under the WTO Antidumping and Subsidies Agreements. Since antidumping is the most frequently used trade remedy action worldwide, most of the discussion focused on changing ways that WTO members administer antidumping (AD) actions.

WTO negotiations in the DDA directly involve Congress since any trade agreement made by the United States must be implemented by legislation. In addition, Congress has an important oversight role in trade negotiations as provided in legislation granting presidential Trade Promotion Authority in the Trade Act of 2002 (P.L. 107-210).

The frequent use of antidumping actions by the United States and other developed nations has come under criticism by other WTO members as being protectionist. Many Members of Congress defend the use of U.S. antidumping actions brought as necessary to protect U.S. firms and workers from unfair competition. However, because the United States is also a leading target of antidumping actions by other countries, some U.S. export-oriented firms may support changes to the Antidumping Agreement.

The positions of major players in trade remedy talks are well-documented by position papers circulated through the WTO Negotiating Group on Rules. At the December 2005 WTO Ministerial in Hong Kong, rules negotiators were called upon to further "intensify and accelerate the negotiating process."

Most of the proposals on trade remedies focus on changing the Antidumping Agreement, currently a somewhat ambiguous document that gives broad guidelines for conducting AD investigations, in order to provide more specific definitions and stricter procedures. The goal of many of the WTO members seems to be to lower the level of antidumping duties provided per investigation and/or to provide more restrictions on the ability of officials to grant relief to domestic industries. The gap between the U.S. position, where there is strong support in Congress to preserve the rights of WTO members to provide AD relief to domestic industries, and the viewpoints of other countries appears to be wide and may be difficult to narrow, but some countries see revision of the Antidumping Agreement and other WTO disciplines on trade remedies as a "make or break" issue if the DDA is to succeed.

This report examines antidumping issues in DDA negotiations by analyzing the issue in three parts. The first provides background information and contextual analysis for understanding why the issue is so controversial. The second section focuses on how antidumping issues fit into the DDA, and the third section provides a more specific overview of major reform proposals that are being considered. This report will be updated as events warrant.

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Introduction

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives members agreed to address, in spite of opposition from U.S. negotiators, called for "clarifying and improving disciplines" on trade remedies. At the December 2005 WTO Ministerial in Hong Kong, the " high level of constructive engagement" in the trade remedy area was acknowledged, and negotiators were directed to "intensify and accelerate the negotiating process."[1]

Trade remedies are laws used by countries to mitigate the adverse impact of various trade practices on domestic industries and workers. Antidumping (AD) laws provide relief to domestic industries that have suffered material injury or are threatened with material injury as a result of competing imports being sold at prices shown to be less than their fair market value (LTFV). AD laws and actions are often controversial because many trade experts view them as protectionist. Others believe that they are an essential means of mitigating the adverse impact of unfair trade on domestic companies, workers, and the communities in which they are located.

Historically, multilateral negotiations on antidumping have been extremely contentious; in fact, some analysts claim that a failure to reach consensus on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) was largely responsible for delaying the completion of the Uruguay Round negotiations by as long as two years.[2] In the DDA, a coalition of developed and developing nations known as the "Friends of Antidumping" are pushing for reforms that many in Congress oppose and U.S. negotiators are resisting. However, many WTO members regard trade remedy — especially antidumping — reform as a "make or break" issue in terms of their acceptance of any final DDA agreement. The gap between the U.S. position and that of other countries is wide and may be difficult to bridge.

Negotiations on antidumping in the DDA are taking place within the framework of the WTO Negotiating Group on Rules. In the initial phase of Rules negotiations,

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[1] World Trade Organization. Doha Work Program. Ministerial Declaration. WT/MN(05)/DEC, December 22, 2005, Annex D, paragraph 2.

[2] Dunn, Alan M. "Antidumping." In Stewart, Terence P., ed., *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, DC: American Bar Association, 1996, p. 246.

the major issues on antidumping and the positions of interested parties were established through position papers written by WTO members.[3] At this point in the negotiations, WTO members are suggesting changes to the text of the Antidumping Agreement that will be incorporated into a draft revision of the document. The chairman of the rules negotiations has requested that all of these changes be submitted by the end of April so that there is sufficient time to complete draft texts by July.[4] On May 1, 2006, the chairman reported to the Trade Negotiations Committee that "[t]he Group has further intensified and accelerated the negotiating process, and is working hard to complete the necessary analysis of the AD and SCM Agreements as soon as possible."[5]

This report analyzes the issue in three parts. Section one provides background information and contextual analysis for understanding why the issue is regarded as controversial. It briefly discusses the Antidumping Agreement, U.S. antidumping laws and how they have worked in practice. Some U.S. stakeholders, including many U.S. industries and workers, believe that U.S. laws are effective and should not be changed or weakened. Others, including many foreign exporters to the U.S. market, U.S. exporters to international markets, U.S. manufacturers dependent on lower-cost inputs for their products, and other domestic importers of goods subject to AD actions, want to change the allegedly arbitrary way in which they are implemented.

The second section focuses on how antidumping issues fit into the DDA. The mandate to negotiate is explained and negotiating activity to date summarized. The nature of the reforms being considered is described in general terms.

Section three provides a more specific overview of major reform proposals. Many proposals attempt to regulate the manner by which countries assess dumping margins. Other submissions call for tightening rules or providing more specific definitions for terminology used in the WTO Antidumping Agreement. These proposals, if implemented, could significantly reduce the number of permissible AD investigations and/or the amount of duty margins assessed, thus reducing significantly the protective impact of the remedies.

Background and Analysis

"Dumping" is defined in U.S. law as the actual or likely sale of merchandise imported into the United States at "less than its fair value" (LTFV)[6] when these sales

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[3] See World Trade Organization, Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*, Note by the Chairman, TN/RL/W/143, August 22, 2003.

[4] World Trade Organization, Negotiating Group on Rules. Report by the Chairman to the Trade Negotiations Committee. TN/RL/16, March 28, 2006, p. 1.

[5] World Trade Organization, Negotiating Group on Rules. *Report by the Chairman to the Trade Negotiations Committee,* TN/RL/17, May 1, 2006.

[6] "Less than fair value" is determined by making a "fair comparison" between the export

(continued...)

cause or threaten material injury to a U.S. industry manufacturing similar goods, or materially retard the establishment of a U.S. industry.[7] This practice is condemned in WTO rules as an unfair trade practice that can cause market disruption and injure producers of like products in the receiving market.[8] Antidumping laws are used by the United States and many U.S. trading partners in an effort to lessen the adverse impact of unfairly traded imports on domestic industries, producers and workers.

Trade remedy actions, particularly AD actions, continue to be a subject of intense debate within Congress, the WTO, and the international business community. Stakeholders in favor of preserving and strengthening AD laws include many U.S. import-competing industries vulnerable to the effects of increased trade liberalization. The steel and chemical industries have used antidumping measures frequently, but smaller industries (such as honey, candles, and crawfish) have also initiated successful AD petitions. Many in Congress have expressed a compelling interest in ensuring that the firms and workers they represent are able to compete on a "level playing field" in the face of increased global competition from firms that use unfair trade practices to gain greater U.S. market share, and believe that AD laws and actions are essential tools to that end.

Stakeholders in favor of eliminating or scaling back these actions include domestic retailers and U.S. consuming industry sectors, such as the automobile or construction industries, that import raw materials or other inputs to include in their downstream products. U.S. exporters have sometimes expressed support for relaxing AD laws because they face similar actions in other countries, and could bear the immediate effects of any trade retaliation if any U.S. laws are determined not to conform to WTO disciplines. Many multinational corporations also favor AD reform because they might have greater freedom to ship products at various stages of development across national boundaries for further transformation. These stakeholders, concerned about selling or producing goods at the lowest cost so that their end-use goods are also competitive, often accuse users of AD action of being protectionist and administrative officials of making arbitrary and politically motivated decisions.

WTO Antidumping Agreement

The General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Antidumping Agreement set forth general governing principles applicable between WTO members, including the "most-favored-nation" principle and guidelines for market access and treatment of imported goods. Article VI of GATT 1994 authorizes WTO members to impose AD duties in addition to other tariffs if domestic officials

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[6] (...continued)
price (price at which the subject merchandise is first sold, or agreed to be sold, before importation to the United States) or constructed export price (the export price adjusted by, e.g., certain duties, costs of the sale, commissions, or profits) and its normal value (see 19 U.S.C. 1677a and b).

[7] 19 U.S.C. 1673.

[8] General Agreement on Tariffs and Trade (GATT) 1994, Article VI (1).

find that (1) imports of a specific product are sold at less than normal value, and (2) the imports cause or threaten injury to a domestic industry, or materially retard its establishment.

The Antidumping Agreement clarifies and expands Article VI by laying out guidelines for determining if dumping has occurred, identifying the "normal value" of the targeted product, and assessing the dumping margin. The Agreement also provides specific rules for administrative authorities responsible for conducting injury investigations. Detailed methodology is set out for initiating anti-dumping cases, conducting investigations, and ensuring that all interested parties are given an opportunity to present evidence. Specific criteria are set for investigations, including a requirement that investigations must be dropped if authorities determine that the volume of the dumped imports is negligible (less than 3% of total product imports from any one country, or less than 7% for investigations involving several countries). Antidumping measures must expire five years after the date of imposition, unless an investigation shows that ending the measure would continue to result in injury. According to the Antidumping Agreement, all WTO Member countries must inform the Committee on Antidumping Practices about anti-dumping actions, promptly and in detail, and must also report on all ongoing investigations.[9]

U.S. AD Laws

Although U.S. laws generally conform to the current WTO Antidumping Agreement, some U.S. laws and investigations have been successfully challenged through the WTO dispute settlement process. Recently, in response to an adverse WTO ruling, Congress repealed the Antidumping Act of 1916, which provided for criminal and civil penalties for any person importing goods in the U.S. market with the intent of destroying a domestic industry in the United States.[10] WTO dispute settlement panels and the WTO Appellate Body have also ruled against the Continued Dumping and Subsidy Offset Act (CDSOA), or "Byrd Amendment," which requires that all duties collected pursuant to antidumping and countervailing investigations must be redistributed to qualified petitioners and interested parties that have been injured by the subject imports.[11] A U.S. administrative practice known as "zeroing" faces WTO challenges from a number of countries, and had been found in WTO dispute settlement proceedings to violate WTO obligations. This practice and the subsequent panel determinations are discussed in a later section.

In the United States, AD investigations generally begin with the filing of a petition by a domestic industry or representative (e.g. labor group, industry association) alleging that certain products are being imported into the country at less

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[9] World Trade Organization. "Introduction to Antidumping in the WTO," [http://www.wto.org].

[10] 15 U.S.C. 72. The Antidumping Act of 1916 was repealed in the Miscellaneous Tariff and Technical Corrections Act of 2004 (P.L. 108-429). Cases currently pending under the act were permitted to go forward.

[11] 19 U.S.C. 1675c. The CDSOA was repealed in the Deficit Reduction Act of 2005 (P.L. 109-171) but disbursements under the law were permitted to continue, as if the law were not repealed, for all goods entering the United States before October 2007.

than fair value, thus causing material injury, or threat of material injury, to the petitioners.[12] Investigations are carried out by two agencies: the International Trade Administration (ITA) of the Department of Commerce, which investigates allegations of sales at less than fair value (LTFV); and the International Trade Commission (ITC), which investigates injury allegations. These agencies conduct preliminary and final investigations in a detailed administrative process with specific time lines.[13]

If affirmative final determinations are made by both agencies, an "AD duty order" imposing a duty equivalent to the "dumping margin"[14] is issued for the targeted product. This duty is intended to offset the effects of dumping by creating a "level playing field" for the domestic producer. According to current U.S. law, all duties collected as a result of AD duty orders are distributed to the petitioners and interested parties as provided by the CDSOA.[15]

U.S. law also allows the ITA to suspend an investigation at any point in favor of an alternative agreement to: (1) eliminate completely sales at less than fair value or to cease exports of the subject merchandise; (2) eliminate the injurious effect of the subject merchandise or; (3) limit the volume of imports of the subject merchandise into the United States, provided the foreign exporters agree to certain specific conditions.[16] In each case, the ITA must be satisfied that the agreement is in the public interest and that effective monitoring by the United States is practicable.[17]

All AD duty orders and suspension agreements are subject to annual review if requested by any interested party to an investigation or deemed necessary by the ITA.[18] "Changed circumstances" reviews may also be requested at any time, but the ITA must determine whether there is sufficient cause to conduct the review.[19] During the review process, the ITA recalculates the dumping margin for each exporter, thus the AD duties assessed on the subject merchandise may be raised or lowered depending on the price of sales transactions during the period of review (POR). In a changed circumstances review, the ITC also reviews whether a revocation of the order is likely to lead to continuation or recurrence of material injury, or whether a

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[12] 19 U.S.C. 1673. The ITA may also self-initiate an investigation (19 U.S.C. 1673a(a)).

[13] For a more thorough discussion of U.S. antidumping laws and administrative procedures, please see CRS Report RL32371, *Trade Remedies: A Primer*, Vivian C. Jones.

[14] The "dumping margin" is the ITA-calculated percentage difference between the price (or cost) of the good in the foreign market and the price at which it is sold in the U.S. market.

[15] 19 U.S.C. 1675c.

[16] 19 U.S.C. 1673c(b) and (c).

[17] 19 U.S.C. 1673c(a)(2) applies to quantitative restrictions. 19 U.S.C. 1673c(d) applies to other alternative agreements.

[18] 19 U.S.C. 1675(a).

[19] 19 U.S.C. 1675(b).

suspension agreement continues to eliminate completely the injurious effects of the imports of subject merchandise.[20]

"Sunset" reviews must be conducted on each AD order no later than once every five years.[21] The ITA determines whether dumping would be likely to continue or resume if an order were to be revoked or a suspension agreement terminated, and the ITC conducts a similar review to determine whether injury to the domestic industry would be likely to continue or resume. If both determinations are affirmative, the duty or suspension agreement remains in place. If either determination is negative, the order is revoked, or the suspension agreement is terminated.[22] In practice, sunset reviews of AD orders resulted in continuations about 53% of the time, according to ITA statistics, and several U.S. AD orders have been in effect since the mid-to-late 1970s.[23]

International AD Activity

Many WTO members are concerned about an apparent escalation of AD activity worldwide, especially since the implementation of the Antidumping Agreement in 1995. Some have also expressed concern about the apparent increase in these measures by developing countries — considered "nontraditional" users of AD measures. This is one of the reasons that led to the pressure for including WTO disciplines on antidumping in DDA negotiations.

Supporters of antidumping measures acknowledge that AD activity has increased (at least prior to 2003), but also point to a marked increase in the volume of international trade as a whole, suggesting that as overall trade increases the frequency of claims of unfair trading practices, such as dumping, will also have a natural tendency to increase.[24]

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[20] 19 U.S.C. 1675(b)(2).

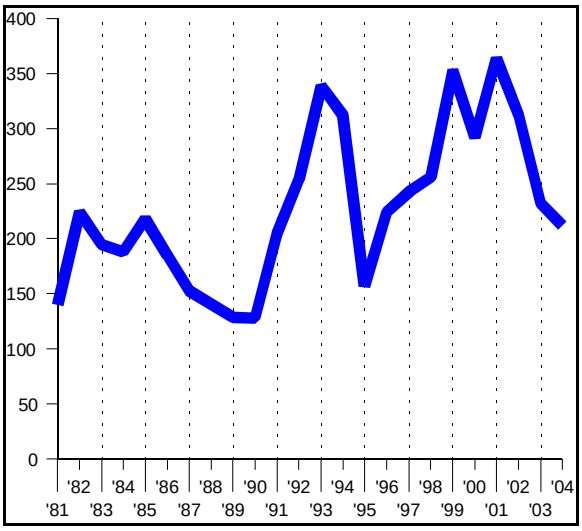
[21] 19 U.S.C. 1675(c).

[22] 19 U.S.C. 1675(d).

[23] ITA investigation statistics [http://www.ia.ita.doc.gov/stats/].

[24] World Trade Organization. "Basic Concepts and Principles of the Trade Remedy Rules," Submission of the United States TN/RL/W/27, October 22, 2002.

Figure 1. Worldwide Antidumping Initiations, 1981-2004



WTO statistics on worldwide AD activity may help illustrate the scope and magnitude of the issue. According to antidumping statistics for January 1981 through June 2005 (see **Figure 1**), the total number of AD initiations rose steadily from 1990 to 1993, decreased sharply in 1994 and 1995 and peaked again in 1999, before reaching an all-time high of 366 in 2001.[25] However, AD activity has been declining since then. In fact, on November 1, 2004, the WTO Secretariat announced that from the period of January 1, 2004 to June 30, 2004 there were 52 final AD measures implemented (duties imposed as well as suspension agreements), as opposed to 114 during the same period in 2003.[26] The rapid decline has led some more skeptical observers to speculate that countries are curbing their appetite for antidumping activity due to the ongoing DDA negotiations. Since international activity seems to vary widely from year to year, it is unclear if the trend toward fewer measures will continue.

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[25] All AD statistics in this section originate from the following sources, unless otherwise indicated: World Trade Organization, *Report of the Committee on Anti-Dumping Practices to the General Council,* 2003, and *Report of the Committee on Anti-Dumping Practices under Article 16.4 of the Agreement*, various years and countries. Tables reflecting AD activity since 1995 are available at [http://www.wto.org/english/tratop_e/adp_e/adp_e.htm].

[26] World Trade Organization, "WTO Secretariat Reports Significant Decline in New Final Antidumping Measures." Press Release, November 1, 2004, PRESS/387, [http://www.wto.org/english/news_e/pres04_e/pr387_e.htm].

Figure 2. Leading Targets of Worldwide AD Initiations, January 1995 - June 2005

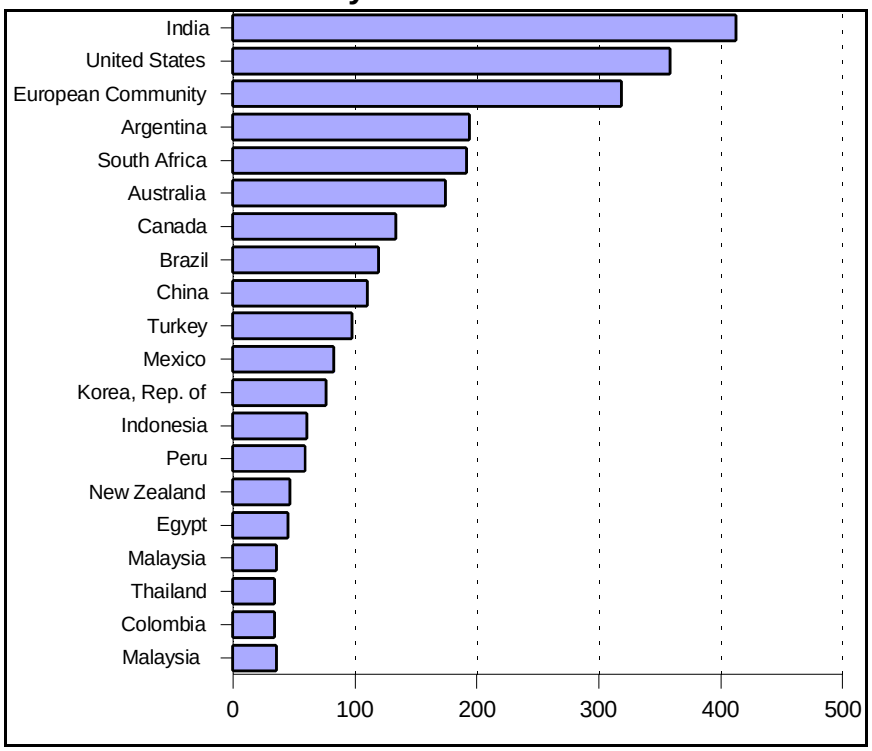
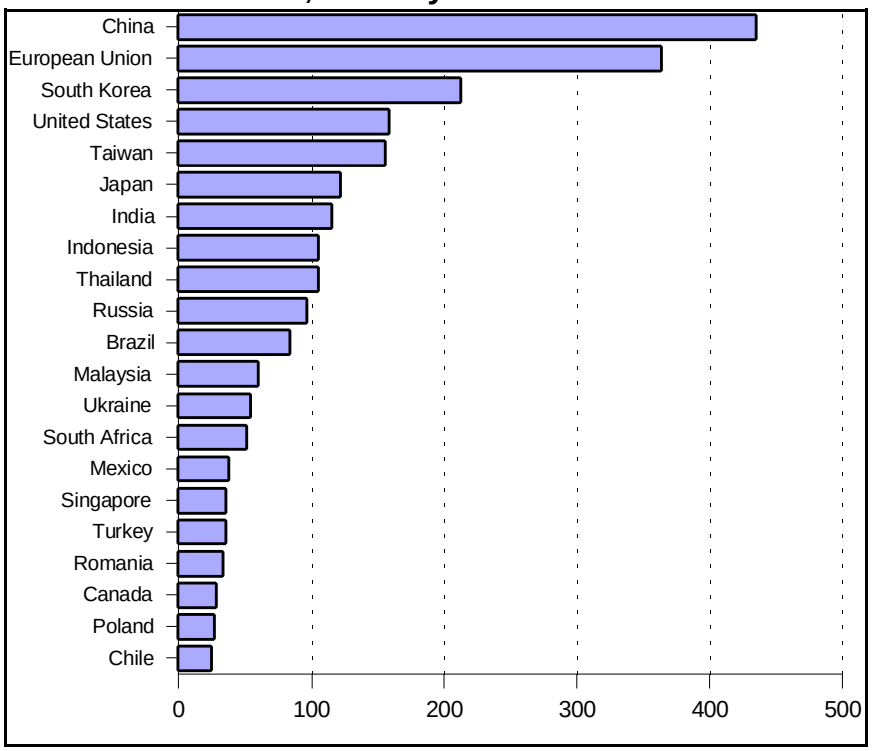
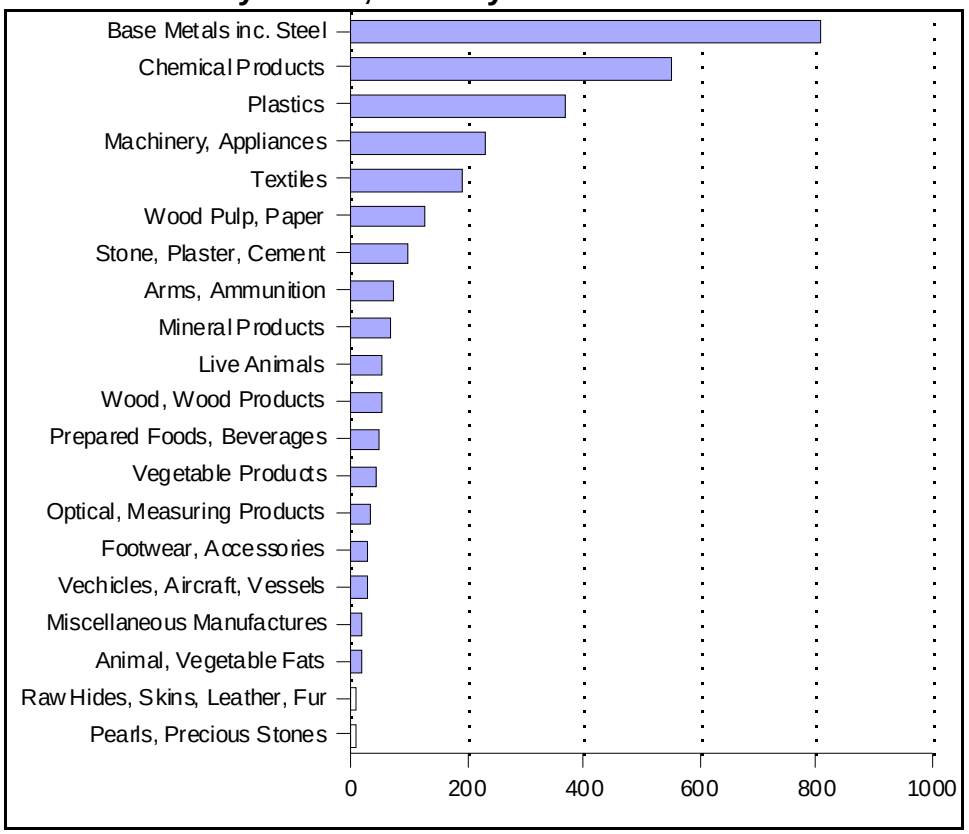


Figure 3. Antidumping Initiations by Selected WTO Members, January 1995 - June 2005



Figures 2 and 3 illustrate the lead AD initiators and targets of AD initiations from the beginning of 1995 to the first six months of 2005 according to WTO statistics. Initiations were chosen to illustrate AD activity because, according to some economic studies, even the initiation of AD procedures has been shown to cause negative economic effects.[27] According to WTO statistics, India, a developing country who has had antidumping laws in place only since 1992, initiated the most AD petitions in the time period (412), followed by more "traditional" users of these actions, the United States (358) and the European Union (318). Other traditional users of antidumping were lower down on the list, including Australia (174), Canada (133), and New Zealand (46). Other developing countries that were leading initiators of AD actions include Argentina (193), South Africa (191), Brazil (119), China (110), and Turkey (97). **Figure 3** illustrates the leading exporter targets of AD initiations from January 1995 to June 2005. China heads this list (434), followed by the European Union (363),[28] followed by Korea (212), the United States (158), Taiwan (155), and Japan (121).

Figure 4. Worldwide Antidumping Initiations (WTO Members) by Sector, January 1995-June 2005



[27] See especially Prusa, Thomas J. "On the Spread and Impact of Antidumping," *Canadian Journal of Economics*, 34:3, August, 2001, p.601.

[28] Includes those AD cases initiated on the European Communities collectively and those pursued against products of individual EU countries.

Figure 4 illustrates worldwide antidumping initiations by sector. Most antidumping action is related to inputs used in the manufacturing process, including steel and chemical products.[29]

Antidumping Negotiations in Doha

When the trade ministers of WTO member nations convened at the November 2001 Ministerial of the World Trade Organization in Doha, Qatar, many countries placed launching a new round of trade negotiations high on the agenda. Some observers believed that a new trade round would give the world economy a much-needed stimulus. U.S. officials wanted to negotiate expanded market access for U.S. exporters, especially in the agriculture and service sectors.[30]

As a result of mounting international concern on expanding trade remedy activity in general and about antidumping in particular, a coalition of developed and developing WTO member countries called the "Friends of Antidumping" — a group consisting of the European Union, Brazil, Chile, China, Colombia, Costa Rica, Hong Kong, India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey — believed that any new framework for negotiations should include talks on improving WTO trade remedy rules.

The European Union may have joined the coalition of developing countries, in part, because it is a leading target of antidumping measures. EU trade officials expressed concern at Doha, primarily concerning major differences among countries in their interpretation and application of WTO rules in their domestic trade remedy procedures.[31] Many of the developing nations in the "Friends of Antidumping" group argued that trade remedy action disproportionately affects their economies, and that the Antidumping Agreement should require that developed nations provide some form of "special and differential treatment" when investigating products originating in developing nations.[32]

Then-U.S. Trade Representative (USTR) Robert B. Zoellick, aware of congressional interest in reserving the effectiveness of U.S. trade remedy laws, initially resisted efforts to open negotiations on the Antidumping Agreement. However, U.S. negotiators relented when it seemed evident that the new round of talks would not go forward without some concessions on antidumping. They were able, however, to include language in the Doha negotiating documents that limited radical change, and were also successful in injecting a certain amount of ambiguity

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[29] See CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

[30] See CRS Report RL32060, *The World Trade Organization: The Doha Development Agenda*, by Ian Fergusson.

[31] World Trade Organization, Negotiating Group on Rules. *Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement).* TN/RL/W/13, July 8, 2002. [http://docsonline.wto.org/].

[32] Ibid., p. 3.

in terms of the mandate. The final language of the Doha Ministerial Declaration regarding trade remedies read as follows:

> In light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase...[33]

Ambassador Zoellick later defended the decision to compromise on negotiations on trade remedies by stressing that the United States would push an "offensive agenda" on trade remedies in order to address the increasing "misuse" of trade remedy measures by other WTO Member countries against U.S. exporters.[34] He also said that since WTO dispute panels had gone against the United States in several cases involving trade remedy cases, U.S. negotiators were especially interested in tightening dispute panel and Appellate Body "standard of review" provisions so that panels do not add to the obligations of, nor diminish the rights of, WTO Member nations.[35] Many congressional supporters of trade remedy laws believe that Zoellick did not try hard enough to leave them off the table, and subsequently are concerned about the ability of the USTR to negotiate in this area in a manner that is favorable to their manufacturing constituents.[36]

Recent Developments

According to a report by the Chairman of the Negotiating Group on Rules prior to the Hong Kong Ministerial, work on trade remedies has taken place in three overlapping phases. First, negotiators presented formal written papers indicating the general areas in which the participants would like to see changes in the agreements. A compilation of the 141 proposals was published by the Chairman in August 2003, just prior to the Cancun Ministerial.[37] Second, after Cancun ministerial and through other ongoing negotiations, negotiators began discussing their positions in more

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[33] World Trade Organization, Ministerial Declaration. WT/MIN(01)/DEC/1, November 14, 2001, paragraph 28.

[34] "USTR Zoellick Says World Has Chosen Path of Hope, Openness, Development, and Growth." Office of the U.S. Trade Representative. Press Release, November 14, 2001. [http://www.ustr.gov/].

[35] Ibid, p. 5.

[36] "Rockefeller Attacks Zoellick for Doha, Failure to Appear at Markup." *Inside U.S. Trade*, December 13, 2001. [http://www.insidetrade.com/].

[37] WTO Negotiating Group on Rules. Note by the Chairman. "Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules." TN/RL/W/143, August 22, 2003, p. 1.

detail, sometimes proposing legal drafts of suggested changes.[38] This phase helped negotiators develop a clearer idea of what proponents of specific changes are seeking, and "a realistic view of what may and may not attract broader support in the group."[39] The third phase consists of bilateral and plurilateral meetings for technical consultations, partly aimed at developing a possible standardized questionnaire which administering officials could use in AD investigations in order to reduce costs and increase transparency.[40]

The Chairman's report emphasizes "we are not dealing with ... big picture issues, but with a very large number of highly specific issues" and the result of discussions will be based on the "precise details of the drafting." Therefore, he said, traditional means of arriving at consensus in WTO discussions such as "modalities" may not work in this context.[41]

The Chairman of the Rules Committee further noted that any consensus on changing the ADA, SCM, or other trade remedy agreements is likely to involve internal trade-offs on trade remedies in exchange for external linkages — that is, perceived successes in other areas of DDA negotiations, such as improved agricultural market access or services trade.[42] Others agree, speculating, therefore, that any agreement on changes to trade remedies is not likely to take place until the end of the round. However, some speculate that, given the opposition expressed by many in Congress to any changes in the WTO agreements that would lead to lessening the effectiveness of U.S. trade remedy laws, some Members may not be willing to yield on such modifications *even if* major concessions were reached in other areas deemed critical to U.S. interests.[43]

Hong Kong Ministerial Text. In Appendix D of the Hong Kong Ministerial Declaration issued on December 18, 2005, WTO members reaffirmed that "achievement of substantial results on all aspects of the Rules mandate" is important to the further development of the rules-based multilateral trading system. The document recognized that negotiations, especially on antidumping procedures, have intensified and deepened and that "participants are demonstrating a high level of constructive engagement."[44] The Group was directed "to intensify and accelerate the negotiating process" and complete the process of analyzing proposals by Participants on the AD and SCM Agreements as soon as possible."[45] The Chairman was then directed to prepare consolidated texts of the Antidumping and Subsidies Agreements

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[38] See WTO Negotiating Group on Rules. Report by the Chairman to the Trade Negotiations Committee. TN/RL/13, July 19, 2005, p. 2.

[39] Ibid., pp. 1-2.

[40] Ibid.

[41] Ibid., p. 2.

[42] Ibid.

[43] Comments by speakers at Global Business Dialogue event on November 8, 2005.

[44] "Ministerial Declaration, Annex D, paragraph 2.

[45] Ibid, paragraph 10.

based on the previous negotiating papers which will become the "basis for the final stage of the negotiations."[46] This assertion is controversial given the opposition of many in Congress to any concessions that may weaken U.S. trade remedy laws.

The draft document also suggests that WTO members are committed to "enhancing the mutual supportiveness of trade and the environment, note that there is broad agreement that the Group should strengthen disciplines on subsidies in the fisheries sector" through prohibiting subsidies that lead to over-fishing and overcapacity.[47] In this context, the draft directs the Negotiating Group on Rules to intensify and accelerate the negotiating process.[48]

Major Issues in Negotiations

The Antidumping Agreement, perhaps by design, is somewhat ambiguous. Many countries, especially the "Friends of Antidumping," would like to see more specific definitions and guidelines in order to provide some type of harmony in nations' implementation of trade remedy laws. However, most of the proposals, if implemented, could also lessen the ability of petitioners to obtain relief. Because the Agreement, in essence, is designed to provide general rules for various administrative officials in WTO member countries to follow when calculating dumping margins, determining injury, and granting relief, many of the proposals involve highly technical changes that are beyond the scope of this report. However, there are some specific discussion threads in presentations to date that can be explained in a very general way.

It is important to note that the DDA mandate specifies that negotiations on trade remedies are intended to "clarify and improve" the WTO Agreements rather than to eliminate them. With this in mind, many WTO members have identified key provisions they seek to address in future negotiations through proposals formally submitted to the WTO Negotiating Group on Rules.[49]

Because the United States is a large user, but also a large target, of AD actions, there is a trade-off between the costs and benefits of modifications to the Antidumping Agreement. The United States could benefit from some of the suggested modifications, especially if they enhance the transparency of trade remedy procedures in other WTO Member countries. However, other proposals could raise the threshold for domestic petitioners' ability to obtain relief, lower calculated dumping margin levels, or mandatorily limit the duration of antidumping orders.

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[46] Ibid, paragraph 11.

[47] Ibid, p. D-2.

[48] Ibid.

[49] World Trade Organization, Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, [http://docsonline.wto.org/].

In addition, all WTO negotiations are conducted on a consensus basis. Any proposal submitted by the United States would require the agreement of all other members, perhaps in conjunction with U.S. acceptance of other members' proposals. Thus, the submission of any proposal on trade remedies likely is accompanied by certain calculations on the part of the USTR on whether any consensus can be reached on the issues, and to what negotiating concessions the United States may have to agree. This calculation may be especially significant considering the generally defensive nature of U.S. negotiating positions at the rules talks.

This discussion of DDA negotiations on antidumping focuses on suggested changes (1) for which there seems to be broad support among WTO members, and (2) which could potentially result in significant amendment to U.S. laws or administrative procedures. Several of these recommendations could affect methodologies used by authorities to determine injury and calculate dumping margins. Another proposal seeks mandatory termination of AD orders after a specified period.

Antidumping Duty Assessment

Many WTO members believe that the methodology used by some countries to calculate dumping margins leads to highly inflated duties that are disproportionate to the amount needed to mitigate the injury to the domestic industry, as well as the level of dumping practiced by the exporters. Some Members have particularly criticized U.S. methodology, where ITA-calculated dumping margins typically average between 60 and 70 percent.[50] Consequently, revisions in the Antidumping Agreement that could lower dumping margins have been major focus of submissions to the Rules Committee.

Some proposals that have drawn broad support include a ban on "zeroing," a mandatory "lesser duty" rule, and increased use of "price undertakings." These proposed changes would affect primarily ITA administrative rules for calculating dumping margins, but may also require some modification to U.S. law.

Ban on Zeroing. In U.S. law, AD orders imposed on targeted merchandise must be equal to the dumping margin or "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise."[51] The ITA typically calculates the margin by first identifying, to the extent possible, all U.S. transactions, sale prices, and levels of trade for each model or type of targeted merchandise sold by each company in the exporting country. These model types are then aggregated into a subcategories, known as "averaging groups," which are used to calculate the "weighted average export price." The export prices for each subgroup are then compared to the corresponding agency-calculated "weighted

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[50] Prusa, Thomas J. "Anticompetitive Effects of Antidumping." Presentation at American Enterprise Institute, March 18, 2004.

[51] 19 U.S.C. 1677(35)(A).

average normal value." Finally, the results of all of these comparisons are added up to establish the overall dumping margin of the targeted product.[52]

When authorities add up the dumping margins of each of the subgroups to establish an overall dumping margin for the subject merchandise, they sometimes encounter negative margins in a subgroup, an indicator that the items in that category are not being dumped. However, rather than including the negative margin in their calculations, which might result in a lower overall dumping margin, ITA officials factor in the results of that subgroup as a zero.[53] Officials use a similar practice when re-calculating dumping margins in administrative reviews of AD orders or suspension agreements. One justification for the zeroing practice is that the dumping margin could be skewed if, when determining the weighted average dumping margin, the subgroup that has the negative dumping margin represents a substantial percentage of export sales.

The U.S. practice is currently being challenged in the WTO on a number of fronts. On February 6, 2004, the European Union formally requested the establishment of a dispute settlement panel on zeroing, citing 31 U.S. AD cases targeting products of the EU. The EU claims that in these cases the dumping margin would have been minimal, or even negative, if U.S. officials had not used zeroing. A panel was established on March 19, 2004.[54] In a split decision, in late October 2005, the dispute settlement panel report found for the United States in its use of zeroing in the course of administrative reviews, but against U.S. practice when conducting initial investigations.[55]

In part, the Panel determined that the denial of offsets when calculating the weighted average dumping margin using the "average-to-average" comparison methodology when conducting original investigation was inconsistent with U.S. obligations under Article 2.4.2 of the Antidumping Agreement — an aspect of the ruling that the United States did not appeal. In early March 2006 the International Trade Administration began the process of amending its procedures by soliciting public comments on amended methodology.[56]

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[52] See Department of Commerce, Import Administration. *Antidumping Manual,* Chapter 6, "Fair Value Comparisons." 1997 edition. [http://ia.ita.doc.gov/admanual/index.html].

[53] 19 U.S.C. 1677f-1(d)(A)(i) and (ii).

[54] World Trade Organization, Dispute Settlement Body. *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing").* Request for the establishment of a panel by the European Communities, WT/DS294/7, February 6, 2004. Ruling of the Panel distributed October 31, 2005. Available at [http://docsonline.wto.org/].

[55] World Trade Organization, Dispute Settlement Body. *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing").* Report of the Panel. WT/DS294/R, October 31, 2005.

[56] 71 F.R. 11189.

On April 18, 2006, the WTO Appellate Body overturned the dispute panel's ruling that "zeroing" methodology was permissible in administrative reviews.[57] While the European Union welcomed the decision, USTR responded that "the Appellate Body's analysis failed to address many of the important issues raised in the appeal, and appears difficult to reconcile with other areas of antidumping."[58]

On November 24, 2004, Japan also requested consultations with the United States on zeroing, citing 15 cases that the practice was used when calculating dumping margins on Japanese merchandise.[59] Mexico requested consultations on zeroing on January 10, 2005, as it related specifically to a dumping determination on stainless steel products.[60] A dispute settlement panel has been established on one other complaint by Mexico, involving U.S. zeroing practices on oil country tubular goods from Mexico.[61] On December 10, 2004, Thailand also requested WTO consultations on zeroing, challenging use of U.S. practice when establishing provisional duties on shrimp exports.[62]

Since the European Union's practice of zeroing had already been found to violate the Antidumping Agreement in a dispute settlement case brought by India, many observers speculated that any dispute proceeding against the United States on the practice will produce a similar result.[63]

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[57] World Trade Organization, Appellate Body. *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing").* Report of the Appellate Body. WT/DS294/AB/R, April 18, 2006.

[58] "WTO Appellate Body Reverses Panel Decision For U.S. on Zeroing in Administrative Reviews." BNA Daily Report for Executives, April 19, 2006.

[59] World Trade Organization, Dispute Settlement Body. *United States — Measures Relating to Zeroing and Sunset Reviews.* Request for Consultations by Japan, WT/DS322/1, G/L/720, G/ADP/D58/1, November 29, 2004. Dispute panel established, January 2005. The panel has announced that its determination will be delayed at least until March 2006.

[60] World Trade Organization, Dispute Settlement Body. *United States — Anti-dumping Determination Regarding Stainless Steel from Mexico.* Request for Consultations by Mexico, WT/DS325/1, G/L/727, G/ADP/D60/1, January 10, 2005. No dispute settlement panel has been established to date.

[61] World Trade Organization, *United States — Anti-dumping Measures on Oil Country Tubular Goods from Mexico*. Request for the Establishment of a Panel by Mexico. WT/DS282/2, February 26, 2003. World Trade Organization, *United States — Anti-Dumping Determinations Regarding Stainless Steel from Mexico.* Request for Consultations by Mexico WT/DS325/1, January 10, 2005.

[62] World Trade Organization, Dispute Settlement Body. *United States — Provisional Anti-Dumping Measures on Shrimp from Thailand.* WT/DS324/1, G/L/726, G/ADP/D59/1, December 14, 2004.

[63] World Trade Organization, Appellate Body. *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R, March 1, 2001.

The U.S. practice of zeroing is neither required, nor prohibited, by U.S. law; therefore it is not clear if congressional action would be required if the United States loses one of these disputes or if the DDA changes the rules.[64]

Mandatory Lesser Duty Rule. Article 9.1 of the Antidumping Agreement encourages the imposition of an AD duty lower than the full dumping margin if investigating authorities determine that the lesser amount is sufficient to offset the injury suffered or threatened to the domestic industry. Many WTO members favor amending the Antidumping Agreement to require a *mandatory*, rather than discretionary, "lesser duty rule." Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have proposed this measure as part of a "special and differential treatment" package of trade concessions offered by developed nations to developing countries.[65] There is currently no "lesser duty rule" in U.S. law or practice, and enactment of a mandatory rule might require congressional action.

"Price Undertakings". Article 8 of the Antidumping Agreement allows the use of "voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices" provided that investigating authorities are satisfied that the injurious effect of the dumping is eliminated. Many WTO members favor increased use of "price undertakings," because they believe that the practice is less damaging to exporters, while also mitigating the injury to domestic producers.[66] Some developing countries favor mandatory use of price undertakings by developed country members in AD cases involving developing countries.

U.S. antidumping law allows for similar alternative arrangements, known in U.S. law as suspension agreements,[67] but in practice, the ITA does not use them very often. At present, there are only six U.S. suspension agreements and one quantitative restriction agreement in place, in comparison to more than 260 active AD orders.[68]

Proposed Changes in Injury Determinations

Another major focus of proposals for amending the Antidumping Agreement is redefining and streamlining the methodology by which administrative authorities determine injury. Some WTO members believe that the guidelines and definitions in the Agreement are too subjective and that procedures lack transparency in many

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[64] See *Serampore Industries Pvt. Ltd. v. U.S. Department of Commerce*, 696 F. Supp. 665 (1988).

[65] World Trade Organization, Negotiating Group on Rules. Note by the Chairman. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*, TN/RL/W/143, August 22, 2003, p. 49.

[66] Ibid., page 46.

[67] See 19 U.S.C. 1673c.

[68] ITA statistics [http://www.ia.ita.doc.gov/stats/]. Quantitative restriction agreement is on 15 steel products from Russia. See also CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

countries.[69] Some proposals in this area involve designing new rules that provide more precise guidance or objective criteria when making injury determinations, while others favor more precise definitions for the terms in Agreement such as "material injury," "material retardation," or "threat of material injury." Some negotiators believe that factors other than dumping are often to blame for industry declines and consequently favor more objective criteria for establishing the existence of a clear and substantial link to dumping before determining injury.[70]

Mandatory Sunset of AD Orders

The current Antidumping Agreement specifies that each antidumping order must be terminated after five years *unless* authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping and subsequent injury to the domestic producer.

Some WTO members are critical of the use of sunset and administrative reviews that determine if relief is still needed. In particular, many have complained that U.S. authorities base sunset review determinations inordinately on submissions by the domestic industry. They claim that, consequently, U.S. AD orders are likely to remain in place as long as the domestic industry opposes their removal.[71]

There seems to be strong support among WTO members for a mandatory termination of AD orders within five years. Other Members favor a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending AD orders. Others criticize the length of time that sunset review procedures take to complete and favor a mandatory twelve- month time limit.[72]

Treatment of Developing Countries

Many developing countries complain that antidumping actions on their products, as well as illegal dumping in their countries, affects their economies disproportionately. Article 15 of the Antidumping Agreement recommends that

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[69] See World Trade Organization, Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules.* Note by the Chairman. August 22, 2003, TN/RL/W/143, [http://docsonline.wto.org/], pp. 15-20.

[70] World Trade Organization, Negotiating Group on Rules. *Antidumping: Illustrative Major Issues.* Submission by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey. April 26, 2002, p. 3.

[71] One representative example of this view is World Trade Organization, Negotiating Group on Rules. "Proposal on Reviews." Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand. TN/RL/W/83, April 25, 2003 [http://docsonline.wto.org/].

[72] World Trade Organization, Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, pp. 58, 143 [http://docsonline.wto.org/].

developed countries show "special regard" for the economic situation of least-developed and developing country members, and suggests that "constructive remedies" be used instead of assessing antidumping duties. However, it does not require or specify a particular course of action for antidumping proceedings.

The "Friends of Antidumping" and others have proposed that developing countries should include specific provisions that will provide these countries with "meaningful special and differential treatment" when facing antidumping actions.[73] Some general recommendations for providing special regard have included requiring developed countries to negotiate/accept mandatory price undertakings (suspension agreements) when investigating products of developing countries, and raising the *de minimis* threshold (i.e. the margin at which the amount of dumping is found to be insignificant).

Many developing countries also maintain the cost of initiating an antidumping proceeding under the existing requirements of the Antidumping Agreement is prohibitive. One recommendation calls for standardizing certain investigative procedures in order to make AD action less costly for all countries.[74] Some suggestions in this vein include requiring shorter periods for investigations, mandatory deadlines for reviews, and development of a questionnaire so that all investigators know precisely what information is necessary to extract when investigating a case.[75]

Possible Effects of Changes

Most of the proposed changes in the Antidumping Agreement, if adopted, would further restrict the ability of all WTO members to grant relief to import-competing industries. Import-competing industries in the United States may find it more difficult to obtain relief, could have lower dumping margins assessed on targeted merchandise, or could be authorized to receive relief for a shorter time period. Other countries would face the same restrictions, however, which could benefit U.S. exporters. U.S. consuming industries, and ultimately consumers, might also benefit from lower prices for production inputs and finished goods.

More specifically, proposals to change dumping margin calculations likely would require changes in the way in which the ITA calculates the level of relief that domestic companies will gain from AD action. Most of these changes can be accomplished administratively, via regulations and procedural changes. However, legislation may be necessary to enact some of the proposals, at least for the sake of greater official transparency. Lower dumping margins would, in turn, reduce the

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[73] World Trade Organization, Negotiating Group on Rules. Paper by Brazil; Colombia; Costa Rica; Hong Kong, China; Israel; Korea; Japan; Mexico; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey. TN/RL/W/46, January 24, 2003 [http://docsonline.wto.org/].

[74] World Trade Organization, Negotiating Group on Rules. Paper by the European Communities and Japan. TN/RL/W/138, July 17, 2003.

[75] Ibid.

amount of CDSOA disbursements that U.S. petitioners and interested parties receive as the result of AD action.

Suggestions for changes in procedures for determining injury could result in fewer changes to U.S. laws and administrative procedures (which already provide considerable quantitative guidance, narrow definitions, and specific timetables) than they would in other WTO member countries. U.S. exporters might benefit from enhanced transparency in AD investigations in receiving markets, while industries seeking AD action in the United States might be only minimally affected. However, since the overall objective of many WTO members seems to be to restrict the ability of domestic industries in the importing countries to receive relief, it is still possible that modifications in this area could lead to changes that could diminish the use and effectiveness of AD actions.

Proposals for modifying the duration of AD orders, such as requiring mandatory sunset after five years, could have a significant effect on U.S. domestic industries. The United States currently has about 190 AD orders[76] that have been in effect longer than five years (the oldest, on polychloroprene rubber from Japan dates from 1973). Statistics on five-year reviews conducted from January 2000 to January 2005 indicate in the 116 reviews initiated during the period, the ITA and ITC decided to revoke 37 AD orders, continued 52 orders, and an additional 27 investigations are still pending.[77] These statistics indicate that a number of U.S. AD orders do continue in place beyond the five-year period. Therefore, adoption of a mandatory five-year revocation of AD orders could have a substantial impact on U.S. trade remedy policy, as well as on industries that have benefitted from the protection of these orders.

Conclusion and Options for Congress

When Congress granted presidential Trade Promotion Authority (TPA) in 2002 (P.L. 107-210), it agreed to consider legislation to implement a trade agreement under special legislative procedures that limit debate and allow no amendment. Therefore, any negotiated WTO agreement must be subject to an "up or down" vote with limited debate in both Houses.

However, Congress also gave itself considerable oversight authority over trade negotiations by requiring the President and other executive agencies (particularly the USTR) to consult with Congress, to provide congressional committees with regular, detailed briefings on the status of negotiations, and to coordinate closely with a Congressional Oversight Group consisting of chairmen, ranking members, and other representatives from the House Ways and Means and Senate Finance committees.[78] Since many members were particularly concerned about modifications to the

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[76] ITC statistics at [http://www.usitc.gov/ trade_remedy/731_ad_701_cvd/index.htm].

[77] Ibid.

[78] 19 U.S.C. 3807. See CRS Report RL31974, *Trade Agreements: Requirements for Presidential Consultations, Notices, and Reports to Congress Regarding Negotiations*, by Vladimir Pregelj.

Antidumping Agreement, the TPA approval legislation required the President to report within 180 days prior to acceptance of a trade agreement if any of the proposals could require amendments to trade remedy laws.[79] The law also provided specific language for a procedural resolution of disapproval to be introduced in either House if Congress determined that the proposed changes to the trade remedy laws in any agreement are inconsistent with U.S. negotiating objectives on trade remedies.[80] Although the disapproval resolution would not be binding on the President or on the USTR, such a resolution, if passed, would send a clear message that Congress resists any modifications to the WTO Agreements that would weaken U.S. trade remedy laws.

It should be noted that TPA expired on June 1, 2005, and continues now under a two-year extension as requested by the President and approved by Congress. Although the President received the extension, some are concerned that DDA negotiations must be concluded before this grant of TPA terminates on June 1, 2007, if any substantive agreement is to be reached.[81]

In addition, since United States was found to be in violation of its WTO obligations with regard to the CDSOA and the usage of zeroing when conducting initial investigations, some observers suggest that it might be advantageous for the United States to concede on these issues in DDA negotiations, especially if by doing so U.S. negotiators can avoid other changes to the Agreement that might adversely affect U.S. trade remedy laws.

Currently, the gap between the U.S. position on antidumping and that of our WTO trading partners appears to be very wide and may be difficult to narrow. However, trade negotiators from all countries must weigh concessions made against gains in other areas in the WTO negotiations.

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[79] 19 U.S.C. 3804 (d)(3)(A).

[80] 19 U.S.C. 3804(d)(3)(C).

[81] Comments by speakers at Global Business Dialogue event on November 8, 2005.