HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING-DUTY POLICY

The Congress of the United States
Congressional Budget Office

NOTES

GATT refers to the General Agreement on Tariffs and Trade.

Unless stated otherwise, all years referred to in the text are calendar years.

Numbers in the text and tables may not add up to totals because of rounding.

Cover photo shows cargo being unloaded at the port of Newark, New Jersey, in 1971. (*U.S. News & World Report* Collection, Prints and Photographs Division, Library of Congress.)

Preface

The Congressional Budget Office (CBO) studied U.S. antidumping and countervailing-duty laws and policy at the request of the Ranking Minority Member of the Subcommittee on Trade of the Committee on Ways and Means. In May 1994, CBO published a paper, "A Review of U.S. Antidumping and Countervailing-Duty Law and Policy," in order to assist the Congress as it developed legislation to carry out the agreement reached during the Uruguay Round of the General Agreement on Tariffs and Trade. This report, which was prepared by Bruce Arnold of CBO's Natural Resources and Commerce Division, under the supervision of Elliot Schwartz and Jan Paul Acton, contains a more detailed discussion of the topic.

The study concludes that U.S. laws treat the pricing of imports in the U.S. market differently than they treat the pricing of domestically produced goods. Over time, the antidumping and countervailing-duty laws have become a general source of protection for U.S. firms from foreign competition. In keeping with CBO's mandate to provide nonpartisan analysis, the study makes no recommendations.

The earlier drafts of this study were reviewed by a number of individuals representing a variety of viewpoints on trade law and policy. Their comments and questions led to a clarification and strengthening of the analysis, although they do not necessarily agree with the conclusions. The author particularly wishes to thank Joseph E. Stiglitz, Council of Economic Advisors; Susan G. Esserman, Department of Commerce; Nancy E. Schwartz, Office of Management and Budget; Alfred E. Eckes, Ohio University; Emil Friberg, General Accounting Office; Leonard M. Shambon, law firm of Wilmer, Cutler & Pickering; and Thomas R. Howell and Alan William Wolff, law firm of Dewey Ballentine. Within CBO, Mark Booth, Robert A. Dennis, Daniel Gadra, Nicola O. Goren, and Christopher Williams provided many useful suggestions on earlier drafts.

Paul L. Houts edited the manuscript and Christian Spoor provided editorial assistance. Donna Wood typed the many drafts. With the assistance of Martina Wojak-Piotrow, Kathryn Quattrone prepared the study for publication.

Robert D. Reischauer
Director

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Summary

The antidumping and countervailing-duty laws provide protection to domestic firms from import competition. Because U.S. law and procedures have changed substantially over the last century, U.S. antidumping law is now a tangled and confusing subject. It was once a reasonably close approximation of a prohibition on predatory pricing of imports, and served as a complement to antitrust law, which prohibited predatory pricing by domestic firms. Over the years, however, antidumping law and antitrust law have evolved in different directions, so that now the United States treats similar pricing practices differently depending on whether the product being sold is domestically produced or imported.

Predatory pricing, as the term is currently used, refers to the practice of intentionally selling a product at a loss in order to drive competitors out of business, thereby establishing increased market power that allows the seller to raise prices above competitive market levels and increase profits. Predatory pricing is one of a number of unfair competitive practices that the Sherman Act has been interpreted to prohibit. An early Supreme Court decision, however, ruled that acts committed in other countries were beyond the jurisdiction of the Sherman Act. Among other things, that interpretation effectively ruled out most prosecutions of predatory pricing of imports under the Sherman Act.

The Antidumping Act of 1916 specifically applied to the practice of pricing imports substantially below their normal market value with the intent of destroying, injuring, or preventing the establishment of an industry in the United States. Over time, however, antidumping law and policy have evolved along a path of ever-increasing protection for U.S. firms from imports and decreasing concern for consumers and the economy as a whole. In contrast, antitrust law relating to predatory pricing, at least in recent decades, has taken a path of increasing concern for consumers and the economy as a whole and decreasing concern for firms suffering intense competition.

Antidumping law no longer acts primarily against predatory pricing. It acts against international price discrimination (sales at a lower price in the United States than in the home country of the exporter) and sales below cost, regardless of whether the sales are predatory or not. Yet the relevant provisions of the antitrust laws prohibit only predatory pricing; they do not prohibit below-cost selling or price discrimination, as prohibited by the antidumping laws, except in cases where it is predatory. That difference is important.

Predatory pricing impairs economic welfare because it leads to monopolies, which cause economic inefficiency and raise concerns about social equity. It seldom occurs, however, because it is rarely a profitable strategy. Moreover, it is usually not possible to establish a monopoly. By contrast, nonpredatory price discrimination and sales below cost generally provide net benefits to the country receiving the lower price, and both are relatively common. Moreover, seldom do cases of price discrimination or selling below cost have anything to do with predatory pricing.

Countervailing-duty laws provide for added duties on imports that have been subsidized by the government of the exporting country. They date from before the turn of the century. Unlike the antidumping laws, these laws have not changed in character over time, though they have become more inclusive. The first such U.S. law covered only imports of sugar. A later law covered all dutiable imports, and a later revision expanded coverage to include both dutiable and non-dutiable imports.

Over the years since World War II, U.S. tariffs have steadily declined in accord with agreements reached in successive rounds of negotiations to liberalize the General Agreement on Tariffs and Trade (GATT). This decline has resulted in increasing competition for domestic firms from imports. For such firms, and their workers U.S. trade law provides two forms of assistance: Trade Adjustment Assistance and protection under the Section 201 escape clause. Trade Adjustment Assistance consists of training, employment services, job-search and relocation allowances, and other forms of aid to displaced workers in industries adversely affected by increased import competition. The Section 201 escape clause provides temporary protection from imports to give domestic industries breathing room to adjust to increased competition. It contains several restrictions designed to ensure that the protection it provides is used only for such temporary adjustment purposes--not for permanent protection--and only when the adjustment costs are large and the costs of the protection to the economy and the national interest are not large.

In the case of industries unable to become competitive with imports (such as unskilled-labor-intensive industries), temporary breathing room for adjustment may be better than no protection at all, but it is not what the industries really want. Anything short of long-term protection would force painful contractions on them that trade adjustment assistance will not completely ameliorate. Further, those industries want protection from imports that cause *any* injury, not just those that cause substantial injury, and they would rather such protection be automatic, regardless of any harm it might cause to the rest of the economy or to the national interest generally. Not surprisingly, they have found the escape clause to be inadequate.

As the antidumping and countervailing-duty (AD/CVD) laws became more inclusive and protection under them easier to obtain, industries more and more frequently were able to obtain better protection, and to obtain it more easily, under those laws than under the escape clause. Gradually, many groups came to view the laws as an alternative to the escape clause for uncompetitive industries and for those industries unable to meet the stringent criteria that the escape clause sets for the protection it provides.

As more people accepted this view, the laws and the procedures for administering them--especially the antidumping law and procedures--began to serve this more general protective purpose more effectively. If the purpose of AD/CVD laws is to prevent, punish, and offset predatory pricing, subsidies, and other unfair practices relating to U.S. imports, many of the legal provisions and procedures that have evolved--especially those used for calculating dumping margins--are biased against foreign exporters (and against U.S. consumers of foreign goods). But if one believes that the AD/CVD laws should offer more general protection for domestic industries from troublesome import competition, those same provisions and procedures appear more reasonable, even if a bit ad hoc. Moreover, from that perspective, they have been quite effective.

How the Laws Currently Function

The antidumping law, and to some extent the countervailing-duty law, are now a fairly general source of protection from foreign competition. In practice, the main hurdle to an industry seeking protection under the AD/CVD laws is to demonstrate that it has been injured by the imports, not that the imports are dumped or subsidized. The Department of Commerce (DOC) found no dumping in only 7 percent of the cases that came before it from 1980 through 1992, while the International Trade Commission (ITC) found no injury in 34 percent of those cases that subsequently went to final injury determination. From 1988 through 1992, the numbers were even more lopsided: 3 percent for DOC and 41 percent for the ITC. Countervailing-duty cases were slightly less skewed: DOC found no subsidies in 14 percent of cases from 1980 through 1992, and the ITC found no injury in 57 percent of those that went on to final injury determination. For 1988 through 1992, the numbers were 32 percent for DOC and 38 percent for the ITC.

Those statistics suggest that the main hurdle in AD/CVD cases is establishing injury. However, the degree of injury that must be demonstrated in AD/CVD cases is less than in Section 201 cases. For that and other reasons, the Section 201 escape clause is now seldom used. An industry generally finds it much easier to obtain protection under the AD/CVD laws. Unfortunately, using those laws as a general source of protection from imports has several disadvantages.

First, the AD/CVD laws do not have the restrictions that the Section 201 escape clause has to ensure that protection is granted only temporarily for the purpose of aiding adjustment and only in cases where the benefit to the protected industry outweighs the harm to the rest of the country in economic, foreign policy, and security matters. To get an antidumping order revoked, a foreign firm usually must get a determination from the Commerce Department that it has ceased dumping. But that determination is difficult to get because of biases in the Commerce Department's procedures. Hence, protection under the antidumping law tends to be permanent for all practical purposes. Furthermore, permanent protection of industries is almost always detrimental to the economy and is contrary to the basic thrust of U.S. trade policy since World War II, which has supported the philosophy that all countries should eliminate trade barriers.

Second, other countries have begun to follow the U.S. lead. They are now using antidumping laws to protect their industries, and in fact many of them are targeting U.S. exports in retaliation for U.S. use of antidumping laws against them. As a result, although support for U.S. antidumping law and procedures among import-competing firms remains strong, sentiment against them is rising in the growing community of U.S. exporting and importing firms.

Third, even in those cases in which the protection is considered desirable, the AD/CVD laws sometimes provide inadequate protection. They apply only to imports of the product in question from particular countries or firms and not to all imports of the product from any source. Therefore, they can be, and sometimes are, circumvented either by the firm on whose products the duties are imposed or by the impersonal workings of the international market. Consequently, the United States has had to devote considerable attention in recent years to modifying the AD/CVD laws to make them apply to upstream dumping, downstream dumping, dumping routed through third countries, and various other routes by which AD/CVD orders have been circumvented. ("Upstream dumping" refers to the dumping of the intermediate goods or raw materials used as inputs in the production of the product in question. "Downstream dumping" refers to the dumping of products made from the product in question).

Finally, with increasing globalization of markets, it is becoming less clear which firms should be identified with which country. (That problem applies to other forms of protection as well as to the AD/CVD laws.) Increasingly, firms located in foreign countries and wishing to export to the United States are actually U.S. owned or partially U.S. owned. Conversely, domestically located firms that could be protected by trade laws are now often foreign owned or partially foreign owned. Such a melange of nationalities can make it unclear which countries are benefited or harmed most by protection granted by the AD/CVD laws.

A Look at the New GATT Antidumping and Subsidies Codes

Under the final "Agreement on Implementation of Article VI of GATT 1994" (Antidumping Code) and "Agreement on Subsidies and Countervailing Measures" (Subsidies Code) negotiated in the Uruguay Round, the United States and other countries will have to reform some of the more protectionist aspects of their AD/CVD laws. The reforms are modest, but for the United States they are nonetheless significant: they mark a change in direction from the 100-year trend in U.S. AD/CVD policy of ever-increasing protection of particular domestic industries and decreasing emphasis on the welfare of consumers and the economy generally.

Unlike the case for the old codes, which only some GATT signatories signed, all signatories to the GATT will be signatories to the new codes. Among the most important provisions in the new codes are new procedures for settling disputes, which cannot be blocked by a country that receives an adverse ruling. Also important is a sunset provision for automatically terminating

AD/CVD orders after five years unless a likelihood of continued dumping or subsidies and resulting harm is shown. The new codes provide for increased transparency and judicial review. They establish *de minimis* levels of dumping and subsidies that are higher than current U.S. levels, though still quite low, and they establish rigid levels of negligibility for imports, which the United States does not currently have. They also require greater evidence of industry support for initiating AD/CVD investigations than the United States currently requires.

The new codes contain provisions relating to many aspects of AD/CVD policy. A number of provisions attempt to ease the burden on investigated firms in complying with requests for information and ensure that firms know that the so-called "best information available," including information supplied by the domestic industries, can be used against them if they do not comply. Other provisions make it clear that administrative authorities may refuse to accept suspension agreements on grounds of general policy, which U.S. authorities often do.

For the first time, the codes explicitly recognize and legalize the practice of cumulating imports in determining injury, which the United States and other countries have already been doing without explicit legalization from the old codes. The new codes do not, however, allow the current U.S. practice of cross-cumulation of imports from firms subject to either antidumping or countervailing-duty investigations. They urge, but do not require, countries to consider the interests and views of parties in their own countries that might be injured by AD/CVD orders on imports.

The new Antidumping Code requires in most cases weighted-average-to-weighted-average comparisons of import prices with prices in the exporter's home market, which would eliminate a bias in current U.S. methodology. The new code also requires eliminating the current statutory minima that the United States maintains for profit and overhead in constructed-value calculations. It places new conditions on the ability of administrative authorities to eliminate sales below cost in the exporter's home market. Those conditions may reduce such eliminations by U.S. authorities, though it is not entirely clear they will do so since the effects of those conditions and related provisions will be mixed.

Furthermore, the new code requires considering the dumping margin in determining injury. Also, for the first time, the new code explicitly recognizes and legalizes, though subject to certain conditions, the practice of sampling, which the United States and other countries have practiced without explicit authorization under the old code. The conditions may require some changes in U.S. policy.

The new Subsidies Code for the first time defines the terms "subsidy" and "specificity." It incorporates a "traffic-light" approach to subsidies, with "red-light" subsidies, which are prohibited in almost all circumstances; "yellow-light" subsidies, which are prohibited if their effects on trade would cause injury to other countries' industries; and "green-light" subsidies, which are not prohibited and against which other countries cannot retaliate in almost all circumstances. It also establishes new rules for determining serious prejudice and phases out many of the exemptions that developing countries currently have under the old code's restrictions on subsidies.

The Status of Legislation

As this study goes to press, the House and Senate committees with jurisdiction over the GATT are meeting in conference to reconcile different versions of the bill needed to implement the trade agreement. Once the bill has been reconciled, the Administration will submit legislation for Congressional vote. Consideration of that legislation will follow so-called "fast-track" procedures. Under fast-track procedures, the Congress must vote on the bill within a prescribed time limit and the bill cannot be amended.

At present, the House and Senate versions of the bill, with respect to changing antidumping and countervailing-duty laws, differ on numerous points. For example, differences exist in such areas as the method for determining appropriate export prices, the treatment of countries in transition from centrally planned to market-based economies, and the rules to prevent the circumvention of duties. Resolving these and other differences will strongly affect the fortunes of many individual firms, workers, and consumers.

Neither version, however, significantly changes the overall stance of U.S. law. In general, the different versions of the bills either codify or revise the procedures the Department of Commerce and the International Trade Commission already use, or they put into law those agreements reached in the Uruguay Round negotiations. The underlying philosophy and operating procedures of the AD/CVD laws remain unchanged.