The Antidumping Act of 1921

Between 1920 and 1922, 10 countries passed antidumping laws, including the United States and Great Britain, the latter of which had historically been a strong advocate and practitioner of free trade. A number of reasons accounted for this spate of antidumping laws (or at least for the U.S. law), most of them involving national security concerns and protectionist pressures resulting from the just-ended World War I.[29]

One reason was an erroneous fear that Germany had amassed huge stockpiles of goods during the war to dump on the world market in an attempt to win on the economic battlefield through predatory pricing what it had lost on the military battlefield. Another was fear that the cessation of trade during the war had caused the growth of surplus stockpiles of goods in Europe that would be dumped on the world market, and that U.S. industries that were important for national security might be damaged. Still another was increased political pressure from uncompetitive firms. The war had disrupted international trade, which had resulted in the growth of domestic industries in each country that enabled it to supply the products that previously had been imported but no longer could be. With the end of the war, the goods could once again be imported and therefore were a threat to the new domestic industries. These factors played themselves out amidst a wave of isolationism and protectionism that enveloped the United States after the war.

The U.S. law--the Antidumping Act of 1921--was part of the Emergency Tariff Act of 1921. Its basic substance is contained in the following excerpts:

> [W]henever the Secretary of the Treasury finds that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation into the United States of foreign merchandise, and that merchandise of such class or kind is being sold or is likely to be sold in the United States or elsewhere at less than its fair value, he shall make such finding public.[30]

> [I]f the purchase price or the exporter's sales price is less than the foreign market value (or, in the absence of such value, than the cost of production) there shall be levied, collected, and paid a special dumping duty in an amount equal to such difference.[31]

The 1921 law differs substantially from previous laws. First, it is not a criminal law with criminal punishments. Determinations of dumping are made administratively by the Department of the Treasury rather than judicially. The change allowed for greater latitude in the procedures used for determining dumping, and so it was likely to (and did) lead to a greater probability of findings of dumping.

A second difference is that no longer was there a need to show intent to destroy, injure, or prevent the establishment of an industry. The mere fact of injury of the industry--or even the likelihood of injury--was enough. Furthermore, actual sales below the foreign market value need not cause the injury or threat of injury of the industry. Mere likelihood of such sales is enough.

A third difference is that the act specified a different kind of relief. Previous laws specified fines, imprisonment, and civil liability, which primarily punish the dumper and only indirectly through deterrence protect competing domestic firms. The new law specified imposing antidumping duties, which primarily protect competing domestic producers and only secondarily (if at all) punish the dumper. Duties punish a dumping firm only if that the firm wishes to continue to dump in the U.S. market. If the firm continues selling in the U.S. market but without dumping, it will pay no duty. If changing economic conditions cause the firm to quit exporting to the United States, it will pay no duty. In either case, the initial dumping that led to the dumping investigation goes unpunished.

A fourth difference is the use of "constructed value." Constructed value is the cost of production that the export price is compared with when few or no foreign prices exist. Its use is consistent with a desire to protect domestic firms from import competition, but it is not consistent with a rationale of preventing, punishing, or offsetting predatory pricing. The reason few or

29. This discussion draws heavily on Wares, *The Theory of Dumping and American Commercial Policy*, pp. 15-20.

30. 42 Stat. 11, Sec. 201(a).

31. 42 Stat. 11, Sec. 202(a).

no foreign prices would be available for comparison is that there are few or no sales in the foreign country. If too few foreign sales exist to make a comparison of prices possible, a firm would be highly unlikely to have such a large market share as to make monopoly, and therefore predatory, pricing possible. Further, a lack of foreign sales also means that low prices in the United States are not merely local price cutting. They are price cutting on all or almost all of the firm's products, which makes predatory pricing unlikely to succeed (see Appendix A).

The History of Countervailing-Duty Law Through World War II

Subsidies existed much further back in history than did dumping. Economist Jacob Viner reports that they were common in the mercantilist era of the 17th and 18th centuries.[32] The earliest attempts to control them (the first known example of which was in 1862) involved placing clauses in trade treaties pledging the countries not to grant various kinds of subsidies.[33] The first countervailing-duty law was a provision in the U.S. Tariff Act of 1890 that applied to certain grades of sugar.[34] The first general CVD law for any and all subsidized imports was enacted by Belgium in 1892.[35]

The first general CVD law in the United States was contained in the U.S. Tariff Act of 1897 (and repeated in the Tariff Acts of 1909 and 1913).[36] It provided that any dutiable import receiving a direct or indirect export subsidy by the exporting country should have a CVD imposed on it equal to the amount of the subsidy. That law was replaced by Section 303 of the Fordney-McCumber Tariff Act of 1922, which broadened the coverage to include imports that benefited from production subsidies as well as those that benefited from export subsidies.[37] The law eventually became Section 303 of the Tariff Act of 1930, but it was not significantly changed until 1974, when it was expanded to cover nondutiable as well as dutiable imports.[38]

Two facets of the CVD law bear note at this time for later reference. The first is the restriction of coverage to dutiable imports. The second is the lack of an injury test. CVDs are imposed on subsidized imports regardless of whether those imports harm U.S. firms.

After the initial general U.S. CVD law in 1897, other countries followed suit: India in 1899, Switzerland in 1902, Serbia in 1904, Spain in 1906, France and Japan in 1910, Portugal in 1921, British South Africa in 1914, and New Zealand in 1921.[39] The Indian law was modeled on the U.S. law. Thus, the United States was a pioneer in the use of CVD law. Further, the CVD laws in most of these other countries made imposing CVDs subject to the discretion of the government, whereas the U.S. law made imposition mandatory. Partly as a result of that difference, the United States has made much greater use of CVDs than have other countries.[40]

The best domestic analog to subsidized products in international trade is the subsidies granted to firms by state and local governments (often in the form of tax breaks) in exchange for the firms' locating in the state or locality. The products the firm then produces in that location and "exports" to other states are subsidized in the same fashion as the subsidized foreign exports on which the United States imposes CVDs. The United States has no law against state- and local-government subsidies, and states are not allowed to countervail the subsidies of other states. In the case of dumping, the policy for imports was originally similar to that for the products of domestic firms and then diverged. From its

32. Viner, *Dumping*, p. 163.

33. Ibid., pp. 166-168.

34. 26 Stat. 567, Schedule E.237.

35. Viner, *Dumping*, p. 169.

36. 30 Stat. 151, Sec. 5; Viner, *Dumping*, p. 169.

37. 19 U.S.C. 127, 42 Stat. 935.

38. The material in this paragraph is taken from Terence P. Stewart, ed., *The GATT Uruguay Round: A Negotiating History (1986-1992)*, vol. 1 (Boston: Kluwer Law and Taxation Publishers, 1993), pp. 812-813; House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, pp. 53-54; and Viner, *Dumping*, pp. 169, 187-188, and 268.

39. This paragraph largely follows the discussions in Viner, *Dumping*, pp. 170-172, and Stewart, *The GATT Uruguay Round*, vol.1, pp. 812-813.

40. Another reason that will be discussed in the next section is that most countries disagree with the U.S. contention that subsidies are unfair and should be restricted by international law.

inception, however, U.S. policy on subsidies has been to countervail foreign subsidies but to neither prohibit nor countervail their domestic analogs.

Antidumping and Countervailing-Duty Law Since World War II

The evolution of the antidumping and countervailing-duty laws in the direction of greater protection for domestic industry has continued up to the present day. Since World War II, however, the General Agreement on Tariffs and Trade has played a central role in that evolution. The issue of AD/CVD laws has arisen repeatedly in GATT rounds as a center of controversy. The United States has fairly consistently taken positions in favor of limiting subsidies and allowing for expanded coverage and more aggressive enforcement of AD/CVD laws. In that stand, it has frequently faced substantial opposition from other countries that have viewed U.S. AD/CVD law, or at least certain aspects of it, as unfair protectionism and have sought restrictions on it.

The Beginnings of the GATT

The GATT resulted from a round of negotiations held in Geneva in 1947 to create an International Trade Organization.[41] A major goal of the GATT was to reduce and eliminate barriers to trade, and two of its fundamental principles and policies were and are the most-favored-nation (MFN) principle and tariff bindings. According to the MFN principle, whatever forms of protection a member country maintains should be imposed on a nondiscriminatory basis to imports from all other member countries. Tariff bindings prohibit a country from later raising tariffs that it has agreed to reduce.

U.S. AD/CVD law was seemingly at odds with this goal and these two principles. By insisting that foreign firms selling in the U.S. market not discriminate in pricing or receive subsidies from their governments without demanding the same of U.S. firms selling in the U.S. market, and by imposing added duties on imports from firms engaging in these practices, the United States was in fact imposing trade barriers. Antidumping and countervailing duties varied from country to country, thereby violating the MFN principle. Moreover, by changing from year to year in response to foreign behavior, they would violate tariff bindings.

The original GATT agreement, however, contained an exception to allow for antidumping and countervailing-duty laws subject to certain restrictions. The exception--Article VI--was derived from a U.S. proposal based on the Antidumping Act of 1921. In addition, Article XVI placed restrictions on subsidies.

On its face, Article VI is clearly at odds with the GATT goal and principles discussed above. Yet some analysts believe that at least part of it may be necessary in order to maintain political support for an open international trading system.[42] In particular, it is widely viewed as unfair for unsubsidized domestic firms to have to compete with subsidized foreign firms. If a country such as the United States that generally does not like to subsidize its own firms is not allowed to offset foreign subsidies with countervailing duties, political support for the GATT in that country might deteriorate. Hence, allowance for countervailing duties might be a necessary concession in order to maintain the greater good of the overall GATT. One might make a similar argument for allowing antidumping duties, but the argument is much less compelling: having to compete with products sold at prices below cost or below prices at which they are sold elsewhere is not so widely viewed as unfair as is having to compete with subsidized products.

The negotiators did maintain some deference to GATT principles and economic efficiency by stipulating in Article VI that antidumping and countervailing

41. This section is based on factual material taken from House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, p. 63; Stewart, *The GATT Uruguay Round*, vol. 1, pp. 809 and 813-815, and vol. 2, pp. 1405-1410, 1413, and 1417; and J. Michael Finger, "The Origins and Evolution of Antidumping Regulation," in Finger, ed., *Antidumping: How It Works and Who Gets Hurt* (Ann Arbor, Mich.: University of Michigan Press, 1993), pp. 13-34.

42. See, for example, Jagdish Bhagwati, *Protectionism* (Cambridge, Mass.: MIT Press, 1988), pp. 34-35.

measures be duties rather than quotas. (Duties are generally less detrimental to economic efficiency and productivity than equally restrictive quotas.) They also limited the duties to the dumping or subsidy margin--no higher duties to punish the offender--and prohibited a country from levying both antidumping and countervailing duties on the same product for the same offense.

Article VI allows CVDs on subsidized imports only if they "cause or threaten material injury to an established domestic industry, . . . or retard materially the establishment of a domestic industry." U.S. CVD law at the time of the agreement still did not require a showing of injury before CVDs were imposed. It provided for CVDs on any dutiable import that was subsidized. A grandfather provision allowed the United States to continue imposing CVDs without an injury requirement. When and if the United States ever decided to expand the coverage to nondutiable imports, however, it would have to impose a material injury standard for those imports, though it would still not have to impose one for the dutiable imports.

In 1954, responsibility for determining injury in antidumping cases was shifted to the Tariff Commission (the name of which was later changed to the U.S. International Trade Commission), whereas investigating the existence and margin of dumping was left with the Treasury Department.

After the initial round, dumping and subsidies receded as an issue for several decades. The following four GATT rounds were primarily devoted to tariff reduction. In response to a request in October of 1956, the GATT Secretariat made a comparative study of the antidumping laws of the member states. Although 20 member states had AD/CVD legislation of some sort, the study found that only eight of them actually used the legislation.[43] A tally in 1958 showed a total of only 37 antidumping decrees in effect in all GATT member countries except Canada and New Zealand, for which comparable figures were not available.[44]

43. The eight countries were Australia, Belgium, Canada, New Zealand, South Africa, Federation of Rhodesia and Nyasaland, Sweden, and the United States.

44. Finger, "The Origins and Evolution of Antidumping Regulation," pp. 13-34. For comparison, Finger notes that, in December 1989, 530 antidumping decrees were in effect in just Australia, Canada, the United States, and the European Community.

The Kennedy Round and the Antidumping Code

One reason many countries did not enforce AD/CVD laws was that high tariffs adequately protected their firms. As succeeding GATT rounds reduced tariffs, however, more countries began enforcing such laws, which then led to complaints and disputes. As a result, dumping and the laws against it were again an issue in the Kennedy Round of the GATT, which was held from 1964 to 1967.[45]

The antidumping debate in the Kennedy Round brought forth arguments and positions that would crop up again in the Tokyo Round and the recently completed Uruguay Round. U.S. exporters were increasingly facing accusations of dumping in other countries, and they found the judgments of many countries on U.S. dumping to be incomprehensible because the relevant facts and reasoning were not made public. Hence, the major U.S. concern was to improve the "transparency" of the administration of other countries' antidumping laws. In turn, many other countries viewed various aspects of U.S. antidumping law as unfair. The United States was a major (though not the only) target of criticism because of the importance of the U.S. market in the world economy, the advanced state of development and specificity of U.S. antidumping law, and the transparency of U.S. antidumping proceedings, which made the workings of the system visible for all to see and criticize.

The Negotiations Produce an Antidumping Code. The result of the antidumping negotiations in the Kennedy Round was the "Agreement on the Implementation of Article VI," often referred to as the Antidumping Code. The Antidumping Code was a separate agreement from the GATT and only some of the signatories to the GATT became signatories to the code.

The Antidumping Code differed from U.S. law in several ways, not the least of which was its definition of "material injury." According to the code, to find "material injury" in a dumping case, the authorities must determine that the dumped imports are "demonstrably the

45. This section is based on factual material taken from Stewart, *The GATT Uruguay Round*, pp. 1418-1433, and from House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, p. 63.

principal cause" of injury to the domestic industry. U.S. policy had a much lower standard.

The Congress Rebels Against the Code's Restrictions on Antidumping Policy. The executive branch took the position that nothing in the new code was counter to existing law and that therefore the code could be implemented without Congressional approval.[46] Many Members of Congress disagreed, and many disliked the new injury standard. In fact, the Congress requested a Tariff Commission study of the issue, which found several areas of conflict with U.S. law. That finding led to the passage of a 1968 law stipulating that the code would apply in the United States only to the extent that it did not conflict with existing U.S. law and policy regarding injury.[47] That issue was a sore point with other countries that would come back in the next GATT round.

The Trade Act of 1974

The Trade Act of 1974 significantly expanded the coverage of U.S. antidumping law.[48] Before the act, dumping meant selling exports at a price below the home-market price. If the volume of home-market sales was too small, the export price was compared with the price of sales in other export markets. Only if the volume of sales was too small in the home market and all other export markets would the export price be compared with the cost of production.

The Trade Act of 1974 required the Treasury, when calculating the average home-market (or third-country export market) price, to disregard any sales that were made in that market in substantial quantities for an extended period of time at prices below the average total cost of production.[49] As a result, the so-called average home-market price would always be above cost even during recessions. The effect of the change therefore was to make selling exports below cost another form of dumping.

As mentioned above, many legitimate reasons exist for selling below cost, and such sales can benefit the selling firm, the consumer, and the efficiency of the economy. Although domestic firms are allowed to sell below cost whenever they like (except in cases of predatory pricing), this change in the law makes foreign firms who do so in the U.S. market subject to antidumping duties. Thus, it puts foreign producers at a disadvantage relative to U.S. domestic producers.

The change also marks a further departure from the original function of antidumping law as a protection from predatory pricing. In most cases, successful predatory pricing requires the foreign firm to restrict its losses during the price-war phase by lowering its prices only in the U.S. market. If the firm must also incur losses in its own market, it will lose much more money during the price war, making it much less likely to drive other firms out of the U.S. market without going bankrupt itself or being unable to recoup its losses through higher prices later. That change in U.S. antidumping law was aimed at precisely the situations--those in which the firm is losing money in its home market--in which predatory pricing is least likely to be successful.

The consistency of the change with the requirements of the GATT was questionable. According to GATT Article VI, a product is dumped if "the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

  (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

  (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."

46. Much of this paragraph follows the discussion in Stewart, *The GATT Uruguay Round*, vol. 2, pp. 1431-1433.

47. 82 Stat. 1347, Sec. 201.

48. 19 U.S.C. 2101, 88 Stat. 1978.

49. 88 Stat. 2046, Sec. 321(d). For this provision, average total cost does not include an allowance for profit.

Thus, selling below cost could be considered to be dumping only when there is no domestic price for comparison (part (b)(ii) above). The change in U.S. law was defended by arguing that sales below cost in substantial quantities for substantial periods of time were not "in the ordinary course of trade" as stipulated in part (a) of the definition.[50] That argument is at odds with a long list of legitimate reasons for selling below cost (see Chapter 2). Canada had used the argument before in 1971, but it was not universally accepted. The issue again became a subject of controversy in the Tokyo Round.[51]

The Trade Act also expanded the CVD law to cover nondutiable imports as well as the dutiable imports already covered.[52] Since the GATT grandfather rights did not cover changes in the law, an injury test was included for this expansion to cover imports from GATT members, but not imports from non-GATT members and not the dutiable imports already covered by the law. The responsibility for determining injury was given to the International Trade Commission, which already had that responsibility in antidumping cases.

The Trade Act of 1974 imposed time limits within which the Treasury had to reach final determinations.[53] Although understandable and neutral on their face, one of the effects of those limits and their later tightening was to force the Treasury (and later the Department of Commerce) to put tight time limits on investigated firms when they responded to questionnaires soliciting the data required for determining the cost discussed above. Those limits place great difficulties on the firms being investigated (see the next chapter for a more detailed discussion).

The Tokyo Round

The Tokyo Round of GATT negotiations was held from 1973 to 1979.[54] Antidumping law was again an issue, and increasing use of subsidies led to subsidies and CVD law being issues also. On the issues of subsidies and CVD law, the lineup was largely one of the United States against most of the rest of the world.

The United States came in for criticism on several issues relating to its antidumping law. The European Community was unhappy with a provision of U.S. law requiring that at least 10 percent and 8 percent, respectively, be added for administrative overhead and profit in constructed-value calculations. Many countries argued that the U.S. injury standard was too lenient and that the United States began investigations without enough evidence of injury. The latter was viewed as a problem because investigations are a burden on foreign firms. The issue of whether and in what circumstances countries should be allowed to disregard sales below cost because they are not in the ordinary course of trade was a center of controversy, although the United States was not alone on this issue. Those questions would resurface in the Uruguay Round.

Regarding subsidies, the United States wanted to rein in their use by other countries. In particular, it wanted to rein in not only export subsidies but also domestic subsidies that had effects on international trade. Most other countries saw little if anything wrong with domestic subsidies, and many viewed them as important internal policy tools with which there should be no international interference. Those countries wanted to restrain U.S. CVD law. One complaint in particular was the U.S. refusal under its grandfather rights to put a material injury test in its CVD law in line with the requirements of Article VI.

The negotiations on these issues resulted in some modifications to the Antidumping Code and the writing of a new Subsidies Code that (like the Antidumping Code) was not signed by all signatories to the GATT. Among the changes to the Antidumping Code was no longer to require that dumping be the principal cause of

50. Gary N. Horlick, "The United States Antidumping System," in John H. Jackson and Edwin A. Vermulst, eds., *Antidumping Law and Practice: A Comparative Study* (Ann Arbor, Mich.: University of Michigan Press, 1989), p. 134.

51. Stewart, *The GATT Uruguay Round*, vol. 2, pp. 1440-1444.

52. 88 Stat. 2049, Sec. 331(a). This paragraph follows the discussion in House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, pp. 54-55.

53. 88 Stat. 2043, Sec. 321(a), and 88 Stat. 2049, Sec. 331(a).

54. This section is based on Stewart, *The GATT Uruguay Round*, vol.1, pp. 815-819, and vol. 2, pp. 1435-1461; and House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, pp. 54, 55, and 63.

injury to meet the material injury requirement for imposing duties. Thus, U.S. law was no longer violating the Antidumping Code on that issue.

In large part, the Subsidies Code was a compromise between the European Community, which agreed to limits on domestic subsidies that affect international trade, and the United States, which agreed to an injury test for CVD cases relating to dutiable imports. The code prohibits export subsidies on nonprimary products and primary mineral products (basically all nonagricultural products). It also prohibits export subsidies on agricultural products when they displace the exports of other countries or undercut prices in a market. It contains a new, more detailed description of what constitutes an export subsidy, and it permits countermeasures against domestic subsidies that cause certain injurious trade effects.

The code set up two procedures for handling problem subsidies. One involves CVDs; the other involves government-to-government consultation and negotiation with a provision for appeal to the Code Committee, which can authorize countermeasures. Historically, the United States has generally used the first of these procedures, finding the second ineffective.

Finally, the Subsidies Code attempted to ensure greater transparency in the procedures and practices of both governments granting subsidies and governments administering CVD laws.

Trade Legislation from 1979 to the Present

From 1979 to the present, three major pieces of trade legislation have been enacted in the United States. All three had provisions that continued the Congress' long push for stronger AD/CVD protection for U.S. firms.[55]

The Trade Agreements Act of 1979. The main purpose of the Trade Agreements Act of 1979 was to carry out the agreements on nontariff measures negotiated in the Tokyo Round, among them the revised Antidumping Code and the Subsidies Code.[56] The Antidumping Act of 1921 was repealed, and new antidumping and countervailing-duty laws conforming with the revised codes were enacted as a new Title VII to the Tariff Act of 1930.[57] To make U.S. CVD law conform with the Subsidies Code, the 1979 act included an injury test for imports from code signatories and other countries assuming obligations substantially equivalent to those of the code.[58] Other imports remained subject to the imposition of CVDs without an injury test.[59]

To beef up AD/CVD protection for U.S. industry, the act imposed still shorter time limits for the investigation and decision of AD/CVD cases.[60] It also provided for annual reviews to ensure that antidumping and countervailing duties were maintained at the proper levels.[61]

Of particular note, the act permitted moving the investigation and determination of margins in AD/CVD cases from the Department of the Treasury, which tends to favor free trade, to the Department of Commerce (DOC), which is more inclined to protect domestic firms from imports.[62] Such a move was made soon thereafter.

The move reflected a Congressional desire for more zealous enforcement of the AD/CVD laws and for less concern about their being used in a protectionist manner. Its significance goes beyond the difference in insti-

55. This section is based on Robert E. Baldwin and Michael O. Moore, "Political Aspects of the Administration of the Trade Remedy Laws," in Richard Boltuck and Robert E. Litan, eds., *Down in the Dumps: Administration of the Unfair Trade Laws* (Washington, D.C.: Brookings Institution, 1991), pp. 256-260; Tracy Murray, "The Administration of the Antidumping Duty Law by the Department of Commerce," in Boltuck and Litan, eds., *Down in the Dumps*; House Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes*, pp. 55, 63, and 64; and Judith Hippler Bello and Alan F. Holmer, *The Antidumping and Countervailing Duty Laws: Key Legal and Policy Issues* (Washington, D.C.: American Bar Association, 1987), pp. 104-105.

56. 19 U.S.C. 2501, 93 Stat. 144.

57. The repeal of the Antidumping Act of 1921 is in 93 Stat. 193, Sec. 106. The new AD/CVD laws are in 19 U.S.C. 1671; 93 Stat. 151, Sec. 101.

58. Section 701 of the Tariff Act of 1930 as amended by 19 U.S.C. 1671, 93 Stat. 1510.

59. 19 U.S.C. 1303; 93 Stat. 190, Sec. 103.

60. Sections 703, 705, 733, and 735 of the Tariff Act of 1930 as amended by 19 U.S.C. 1671b, 1671d, 1673b, 1673d; 93 Stat 152, 159, 163, 169.

61. Section 751 of the Tariff Act of 1930 as amended by 19 U.S.C. 1675, 93 Stat. 175.

62. The act did this by referring to "the administering authority" rather than "the Department of the Treasury" on these functions throughout Section 101.

tutional sympathies. One of DOC's functions is to serve as an advocate for U.S. firms.[63] Thus, the move placed responsibility for deciding AD/CVD cases in the hands of an advocate of U.S. parties to the cases.

Also of note, determining the cost of production requires the Treasury Department or DOC to obtain relevant data from the firms being investigated. To ensure that such firms were forthcoming, the act allowed the use of "best information available" whenever a foreign firm did not provide needed data.[64] In practice, the "best information available" is usually information supplied by the U.S. industry seeking protection, and therefore can be expected to be biased in the direction of high costs and consequent findings of dumping.

The Trade and Tariff Act of 1984. The Trade and Tariff Act of 1984 required that the International Trade Commission cumulate the imports of all countries subject to an AD/CVD investigation when making its injury determinations if the imports compete with each other and with like products of the domestic industry in the United States.[65] Clearly, firms that compete with each other cannot be a monopoly. Therefore, if one is trying to prevent predatory pricing, imports from different countries should be cumulated in determining injury only if evidence exists that the firms in the different countries are colluding. This provision mandates just the opposite: that they should be cumulated when they compete.

The act also allowed DOC to find an import to be subsidized and subject to CVDs if the inputs used to produce the import are subsidized and the subsidies give a competitive benefit to the producer of the import by lowering the price of the inputs below what others would have to pay.[66] DOC was already doing that, so the provision merely codified DOC practice.

The act also created the Trade Remedy Assistance Office in the International Trade Commission to give information about procedures for filing petitions, and it required all agencies administering U.S. trade laws to give technical assistance to small U.S. firms filing petitions and applications for relief under the laws.[67] Small foreign firms being investigated for dumping or subsidies get no such help. Moreover, as will be discussed in Chapter 4, the burden of AD/CVD investigations on such firms can be quite large. That legal requirement is an example of the administrative agencies' being asked to play an advocacy role in proceedings for which they are supposed to be an impartial judge.

The act also permitted DOC in antidumping investigations to compare the average price in the United States with the average price in the exporter's home market, rather than comparing individual prices in the United States with the average price in the exporter's home market.[68] Contrary to most changes the Congress has enacted in recent years, this change would have made findings of dumping less likely if DOC had made use of it (for further explanation of this issue, see Chapter 4).

The Omnibus Trade and Competitiveness Act of 1988. In the past, AD/CVD orders typically specified that antidumping or countervailing duties were to be levied on particular products from particular countries or on particular products from particular firms in particular countries. Firms sometimes tried to circumvent the duties in various ways. One way was to export only the parts and then conduct final assembly in the United States, changing the country from which the parts were exported to the United States by moving the location of final assembly and slightly altering the product from that specified in the AD/CVD order. The Omnibus Trade and Competitiveness Act of 1988 contained provisions to extend AD/CVD orders to constituent parts, slightly altered products, and products assembled in third countries.[69]

The act also contained a provision for the U.S. Trade Representative to request antidumping action by other countries when products that are dumped in those

63. Baldwin and Moore, in "Political Aspects of the Administration of the Trade Remedy Laws," state that "Some members of the House and Senate want DOC administrators to act more as an 'advocate' of U.S. domestic producer interests. For example, in nomination hearings for Michael Farren, Senator John C. Danforth (Republican of Missouri) stated, 'we count on the Commerce Department in particular to be the advocate for U.S. commercial interests.' "

64. Section 776(b) of the Tariff Act of 1930 as amended by 19 U.S.C. 1677e, 93 Stat. 186.

65. 19 U.S.C. 1677; 98 Stat. 3034, Sec. 612(a)(2)(A).

66. 19 U.S.C. 1677-11; 98 Stat. 3035, Sec. 613.

67. 19 U.S.C. 1339; 98 Stat. 7989, Sec. 221.

68. 19 U.S.C. 1677f-1, 1677b; 98 Stat. 3039, Sec. 620.

69. 19 U.S.C. 1677; 102 Stat. 1192, Sec. 1321.

countries materially injure U.S. firms that export to them.[70] If the country refuses to take action, the U.S. Trade Representative is to consult with the U.S. firms about possibilities for action under other U.S. laws. Whether the provision does much to help U.S. firms competing with dumped goods is not clear, but its mere existence illustrates further how far apart in purpose antidumping law and predatory pricing law now are. The purpose of predatory pricing law is to protect the public from the inefficiencies and high prices that result from monopolization of an industry; it is not concerned with protecting the competing firms, except insofar as it is necessary to do so to protect the public from monopoly. This antidumping provision is concerned only with protecting competing U.S. firms; the U.S. public and consumers are not involved since the markets in question are in other countries.

As Chapter 2 discussed, subsidies that are generally available to all industries do not affect trade. As a result, the 1988 act provides that CVDs can be imposed on subsidized products exported to the United States only if the subsidies involved are specific to certain industries and are not generally available to all industries in the exporting country.[71]

The act also contained a provision to the effect that subsidies that by law are available to all industries but in practice end up going only to one or a few industries should be treated as specific subsidies rather than generally available, and therefore should be subject to CVDs. The Department of Commerce was already doing that on its own, but the law required it to do so. The policy gets around a possible evasion of the CVD law: a country might make its subsidies by law and other appearances available to all industries so that U.S. CVDs would not be applied; it could then make sure by secret bureaucratic machinations that the subsidies go only to a particular industry.

Finally, the 1988 act eliminated drawbacks on antidumping and countervailing duties for firms that import inputs that are under AD/CVD orders and then export the products they make containing them.[72] Before that change, AD/CVD laws protected two groups of U.S. firms: those that produce products for U.S. consumers, and those that produce products for sale to other U.S. firms for use as inputs in the production of goods sold to U.S. consumers. The provision discussed above about the U.S. Trade Representative was intended to provide a modicum of protection to firms that produce products for sale to foreign consumers and firms. The provision at issue here extended protection to the last group of U.S. firms: those that produce goods for sale to other U.S. firms for use as inputs in products sold abroad.

In the tiny percentage of relevant dumping and subsidy cases that actually involve predatory pricing, that provision would protect U.S. export industries from having the prices of their inputs go up as a result of foreign monopolization of the industries producing those inputs. In the vast majority of cases, however, the provision merely places U.S. exporters at a disadvantage in the international market because their imported inputs are more expensive as a result of antidumping and countervailing duties.

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70. 19 U.S.C. 1677k; 102 Stat. 1188, Sec. 1317.

71. 19 U.S.C. 1677; 102 Stat. 1184, Sec. 1312.

72. 19 U.S.C. 1677h; 102 Stat. 1209, Sec. 1334.