Chapter Six

The Uruguay Round Agreement

As in previous negotiating rounds of the General Agreement on Tariffs and Trade, the anti-dumping and countervailing-duty laws were a major issue in the Uruguay Round. The negotiations produced new Antidumping and Subsidies Codes with a number of changes from the old codes. This chapter discusses the changes in the codes.

Provisions of the Agreement

In the Uruguay Round, the objectives of the United States included protecting its current AD/CVD laws and extending the antidumping provisions to allow retroactive duties and possibly a reduced standard for injury in cases of diversionary dumping (input dumping or downstream dumping), repeat corporate dumping (in which a firm has a history of dumping one product after another), and country hopping (in which a firm changes the country of production repeatedly to avoid anti-dumping duties). U.S. objectives also included increasing the transparency and due process of AD/CVD adjudication by other countries. That objective reflected the increasing use of AD/CVD laws against U.S. firms.

The United States was virtually alone in trying to extend the scope of restrictions against dumping and subsidies; most of the rest of the world lined up against it. The United States, Canada, Australia, and the European Union represent the four major users of AD/CVD legislation--and of these, Canada supported restrictions on AD/CVD legislation and duties until late in the negotiations. Significantly, Canada initially lined up against the United States, and Australia and New Zealand have eliminated the use of antidumping laws on trade between them in favor of antitrust laws.

The final "Agreement on Implementation of Article VI of GATT 1994" (Antidumping Code) and "Agreement on Subsidies and Countervailing Measures" (Subsidies Code) take some modest steps toward making the AD/CVD laws of the United States and other member countries less protectionist, but they leave much of current U.S. law and policy intact.

The new codes, unlike the old ones, will be signed by all signatories to the GATT. Perhaps the most important provisions in the new codes are new procedures for settling disputes that cannot be blocked by a country receiving an adverse ruling, and a sunset provision for automatically terminating AD/CVD orders after five years unless a likelihood of continued harm from dumping or subsidies can be shown. The new codes also provide for increased transparency and judicial review.

Definition of Subsidy and Specificity

Until now, the term "subsidy" has never been defined in a GATT agreement. The new Subsidies Code changes that. It defines a subsidy as existing in two situations.[1] The first is when a government or public body makes a financial contribution where:

1. Article 1, paragraph 1 of the Subsidies Code.

- o A direct transfer of funds occurs (for example, grants, loans, equity infusions) or a potential direct transfer (for example, loan guarantees);
- o Government revenue is forgone (for example, tax credits);
- o A government provides goods or services (other than infrastructure) or purchases goods;
- o A government makes payments to a funding mechanism or entrusts or directs a private body to carry out one of the above.

The second is when there are income or price supports in the sense of Article XVI of the GATT and a benefit is thereby conferred.

That definition would appear to include the vast majority of subsidies that might be encountered, but actually it does not include all of them. For example, Argentina once embargoed the export of leather hides, causing the price of hides in Argentina to decline and thus in effect subsidizing the Argentine tanned leather industry. Under the new definition, the tanned leather industry would not be considered to be subsidized.

The code stipulates that only specific subsidies are subject to being prohibited, retaliated against, or countervailed, and it provides the following principles for determining whether a subsidy is specific:[2]

- o Explicit limits of subsidies to certain enterprises by the granting authority or legislation make a subsidy specific.
- o If there are objective criteria governing eligibility for the subsidy that are clearly spelled out and strictly adhered to, specificity does not exist.
- o Notwithstanding appearances of the first two principles, if in fact a subsidy goes to a limited number of enterprises or goes disproportionately to particular enterprises, it may be specific anyway.
- o Subsidies limited to enterprises in regions smaller than the jurisdiction of the government granting the subsidy are specific. (Thus, a subsidy by a state or provincial government in the United States or Canada that is limited to enterprises in the state or province is not specific, but subsidies by the respective federal governments that are limited to a state or province are specific.)
- o "Red-light" subsidies (discussed in the next section) are specific.

Those principles do not significantly change U.S. policy. The United States does not impose countervailing duties on nonspecific duties, and this definition of specificity is largely the same as the one the United States currently uses.

Which Subsidies Are Allowed and Which Are Not: The Traffic-Light Approach

The Subsidies Code makes a number of changes regarding which subsidies are allowable and which are not. It takes a "traffic-light" approach, with so-called "red-light" subsidies being prohibited in almost all circumstances, "green-light" subsidies being allowed in almost all circumstances, and "yellow-light" subsidies being allowed or not allowed depending on their effects on trade.

Red-Light Subsidies. Except as provided in the GATT Agreement on Agriculture, the category of red-light, or prohibited, subsidies includes all subsidies that depend, in law or in fact, at least partially on export performance, and all that depend at least partially on how much the manufacturer of the good uses domestically produced inputs over imported inputs.[3]

This category of red-light subsidies is an expansion of the prohibited one in the old Subsidies Code. In the old code, only export subsidies fell in this category, and moreover only export subsidies on products other than certain primary ones. Export subsidies on primary products were prohibited only when they resulted in an inequitable share of world trade or prices materially below those of other suppliers to the same market. Subsidies depending on the use of domestic inputs were not in this category.

2. Article 1, paragraph 2, and Article 2, paragraphs 1-3.

3. Article 3 of the Subsidies Code.

Green-Light Subsidies. The green-light category of subsidies is new to the Subsidies Code.[4] These subsidies are nonactionable in almost all cases, meaning that countries are free to impose them without being retaliated against and that countervailing duties cannot be imposed against them.[5] The old code did not explicitly spell out any subsidies as being carte blanche nonactionable. Under the new code, the following subsidies are nonactionable:

- Nonspecific subsidies;
- Assistance for research--up to 75 percent of the cost of industrial research and 50 percent of the cost of precompetitive development activity, subject to certain limitations, where precompetitive development activity refers to development from the stage at which research brings results through the creation of a first prototype not capable of commercial use;
- Assistance to disadvantaged regions that is otherwise nonspecific, subject to certain restrictions; and
- Assistance for adapting facilities to new environmental requirements, subject to certain restrictions.

The United States already exempts nonspecific subsidies from countervailing duties. The other subsidies in this category may require a change in U.S. policy. The extent to which research subsidies belong in this group has been a matter of some dispute. Most people agree that basic research is a legitimate activity for governments to subsidize. The question is when research stops being basic research and starts being applied product research, which many people believe should not be subsidized.

Yellow-Light Subsidies. All other specific subsidies except those for agriculture fall into the yellow-light category.[6] Agricultural subsidies are covered by the Agreement on Agriculture and will not be discussed in this study. Other GATT members can take action against yellow-light subsidies in accord with other provisions of the code (described below) only if the subsidies cause one or more of the following: injury to a domestic industry of the member taking action, nullification of benefits of the member under the GATT, and serious prejudice to the interests of the member. Those stipulations are the same as in the old Subsidies Code, but the new code contains new provisions relating to what constitutes serious prejudice.

Serious Prejudice. Under Article 6 of the new code, serious prejudice is presumed to exist in any of the following cases: ad valorem subsidization exceeding 5 percent;[7] subsidies to cover operating losses of an industry; subsidies to cover operating losses of an enterprise other than one-time measures to give the firm time to adjust; and direct forgiveness of debt and grants to cover debt repayment.

The subsidizing member can rebut that presumption by demonstrating that none of the following trade effects apply to the subsidy:

- It displaces or impedes imports by the subsidizing country;
- It displaces exports of another member from a third country;
- It causes significant price undercutting compared with another member or lost sales by another member in the same market; and
- It increases world market share of the subsidizing member in a subsidized primary product or commodity.

A contingency does, however, come into play--namely, that certain conditions that could cause the above effects but have nothing to do with the subsidy do not apply. Those conditions are listed in the code.

If the four cases in Article 6 do not apply, then serious prejudice *may* still exist if the complaining member satisfactorily demonstrates one or more of the trade effects listed above. In effect, if at least one of the four cases holds, the burden of proof is on the subsidizing

4. Article 8 of the Subsidies Code.

5. As a safeguard, remedies are allowed in certain restricted circumstances as described in the subsection on Remedies, Consultation, and Dispute Settlement Relating to Subsidies.

6. Article 5 of the Subsidies Code.

7. The code stipulates that this case is not to apply to civil aircraft, which are to be covered by a separate agreement yet to be negotiated.

country to show that none of the four trade effects apply. If none of the four cases hold, the burden of proof is on the complaining country with regard to the trade effects.

Provisional Application. Under Article 31 of the Subsidies Code, the green-light subsidy provisions and the four factors giving a presumption of serious prejudice apply for five years. The Committee on Subsidies and Countervailing Measures must review the operation of the provisions over that period to determine whether to extend them for a further period, either in their present form or in modified form.

Remedies, Consultation, and Dispute Settlement Relating to Subsidies

Under the old Subsidies Code as well as other parts of the GATT, decisions to take action against unfair trade practices involved lengthy procedures for settling disputes and required consensus, which meant that the country committing the unfair practice could block action. The difficulty of meeting that requirement is a large part of the reason that the United States has relied so much on countervailing duties rather than consultating and settling disputes by consensus.

The new Subsidies Code (as well as other parts of the Uruguay Round agreements) changes that. It shortens the dispute settlement process, and it changes the decision rule in most cases from one in which no action is taken without a consensus to one in which action is taken barring a consensus not to take action. It makes Articles XXII and XXIII of the GATT, as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes, applicable to subsidy and countervailing-duty disputes except as otherwise specifically provided in the code.[8] The major exceptions, specifically provided, follow.

Red-Light Subsidies. When a member thinks another is granting a prohibited subsidy, it can request consultations with the member. If no mutually acceptable solution is reached in 30 days, either party may refer the matter to the Dispute Settlement Body (DSB) to establish a panel immediately unless the DSB decides by consensus not to do so.[9]

Under the old Subsidies Code, after 30 days of consultation, the dispute went to the Committee on Subsidies and Countervailing Measures rather than the DSB. The committee would attempt to mediate conciliation between the parties. If conciliation did not solve the matter after 30 days, the committee would appoint a panel. The new code eliminates this 30-day period of conciliation and goes directly to the appointment of a panel. The decision to appoint a panel under the old code had to be made by consensus, but it has been the practice not to deny a complaining country access to a panel.

Under the new code, the panel may request assistance from the Permanent Group of Experts (PGE), which is a new group provided for in the new code. The PGE decides whether the subsidy is prohibited, and the panel must accept its conclusion. The panel must also issue a report with its finding within 90 days of its establishment. If the finding is that the subsidy is prohibited, the panel report must recommend dates by which the subsidy should be withdrawn. The Dispute Settlement Body must adopt the report within 30 days unless it is appealed or the DSB decides by consensus not to adopt it. If it is appealed, the Appellate Body must issue a decision within 30 days, and the DSB must adopt the decision barring a consensus not to do so.

Under the old code, the committee could decide to adopt a panel finding only by consensus--the opposite of the new procedure under which the report is adopted barring a consensus not to adopt it. As a result, the subsidizing country could block the adoption, which is not possible under the new code. Also, the previous code contained no provision for appeal.

If a country ignores a panel report adopted by the DSB under the new code and refuses to withdraw the subsidies in question, the DSB must grant authorization for appropriate countermeasures unless it decides by consensus not to. Parties can request arbitration under the Understanding on Rules and Procedures Governing Settlement of Disputes to determine the appropriate-

8. Article 30 of the Subsidies Code.

9. Article 4 of the Subsidies Code. (The establishment of the Permanent Group of Experts is provided for in Article 24, paragraphs 3-4 of the Subsidies Code.)

ness of countermeasures. Under the old code, a decision by the committee to grant authorization for countermeasures required consensus, which meant that the subsidizing country could block it. There was no provision for arbitration beyond the deliberations of the committee.

Yellow-Light Subsidies. Under Article 7 of the Subsidies Code, if a member believes a subsidy by another member causes injury to its domestic industry, nullification or impairment, or serious prejudice, it may request consultations. If no mutually acceptable solution is found within 60 days, the procedure for settling the dispute is essentially identical to that for red-light subsidies.

The differences between this remedy process and the process in the old code are analogous to the differences in the case of red-light subsidies. First, the DSB handles disputes rather than the committee. Second, the old code had a 60-day period of conciliation mediated by the committee after the 60 days of consultation and before any settlement of the dispute by the committee. In contrast, the new code skips conciliation and goes directly to settlement of the dispute. Third, at each step along the way where a decision by the DSB is required, action against subsidies is taken under the new code unless the DSB decides by consensus not to act, whereas under the old code the committee could not take action without consensus. Thus, the subsidizing country could block action under the old code but cannot under the new code. Finally, the new code includes provisions for appeal and arbitration about the appropriateness of countermeasures, whereas the old code did not.

Green-Light Subsidies. Under Article 9 of the Subsidies Code, although green-light subsidies are generally nonactionable, a safeguard provision does exist. If a member thinks one or more of its domestic industries has suffered severe adverse effects as a result of such a subsidy, it may request consultations with the subsidizing member. If no mutually acceptable solution is reached within 60 days, the requesting member may refer the matter to the Committee on Subsidies and Countervailing Measures. If the committee determines that the harmful effects do exist, it may recommend a modification of the subsidy program. It must, though, present its conclusions within 120 days of the referral. If the recommendation is not followed within six months, it must authorize appropriate countermeasures.

Unlike the case for red-light and yellow-light subsidies, in which action against subsidies is taken unless the committee decides by consensus not to, the converse is true for green-light subsidies: the committee does not take action unless it decides by consensus to do so. Hence, the subsidizing country could block action if it so desired.

Consultation and Dispute Settlement Relating to Dumping

Like the new Subsidies Code, the new Antidumping Code makes the Understanding on Rules and Procedures Governing the Settlement of Disputes applicable to disputes under the code except as otherwise provided.[10] Disputes are referred to the Dispute Settlement Body rather than to the Committee on Antidumping Practices as they are under the old code. The DSB does the same thing that the committee did under the old code except that the three-month period of conciliation is eliminated. Settlement goes immediately to the appointment of a panel by the DSB to settle the matter. The DSB must accept the findings of the panel barring a decision by consensus not to accept it, so an offending country cannot block action as it could under the old code.

The U.S. government has been unhappy with the propensity for dispute panels to overturn the findings and rulings of the Department of Commerce and the International Trade Commission on dumping cases. Until now, the United States could block the adoption of such panel reports if it was sufficiently unhappy with them. With the new code, it will not be able to do so. Because of concern over this fact, the United States insisted on including the following restrictions on when the panels can overturn the decisions of national authorities:

> (i) If the establishment of the facts [by the national authorities] was proper and the evaluation was unbiased and objective,

10. Article 17 of the Antidumping Code.

even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and

(ii) Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation [in accordance with customary rules of interpretation of public international law], the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[11]

On the one hand, previous chapters of this study have demonstrated a rather pronounced bias in U.S. antidumping procedures. On the other hand, the main GATT agreement and the GATT Antidumping Code allow many of the biased procedures. Thus, it is not clear how much protection these provisions will provide for the decisions of the relevant U.S. authorities.

The possibility that a panel may someday overrule U.S. authorities in an antidumping or countervailing-duty finding brings up another issue that the Congress must consider. Such a ruling would mean one of two things: the United States would have to eliminate or change the duty imposed in the case at issue, or the complaining country would be authorized to retaliate against the United States. Thus, the Congress must consider whether it wants to grant blanket authority--perhaps with some restrictions--to the Department of Commerce and the International Trade Commission to change rulings and policies as required by DSB rulings, or whether it would prefer to decide on its own whether to change policy or allow retaliation to occur in each case as it arises.

Determination of Dumping

The new Antidumping Code has several changes that will affect U.S. methodology in calculating dumping margins.[12]

Individual to Weighted-Average Price Comparisons. Under the new code, DOC will have to compare the weighted-average import price over the period of investigation with the weighted-average home-market price of the foreign exporter over the same period, or compare individual import prices with individual home-market prices of the foreign exporter.[13]

The current U.S. practice in antidumping investigations of comparing individual import prices with the average home-market price of the foreign exporter over the six-month period of investigation will not be allowed unless the authorities find a pattern of price differences among different purchasers, regions, or time periods (such as targeting or rifle-shot dumping), and explanation is provided.

That change will eliminate a bias in current U.S. methodology that increases the likelihood of affirmative determinations of dumping and inflates dumping margins. The provision requiring the change mentions only investigations and not administrative reviews. Hence, the new code would appear to allow the current U.S. policy for administrative reviews to continue. That policy is to compare individual import sales with average foreign home-market sales on a monthly basis (rather than a six-month investigation period). Some people have argued, however, that a later provision of the code makes the change applicable to administrative reviews as well.[14] Such an interpretation would require changing the U.S. policy in administrative reviews, thereby eliminating another bias in U.S. procedure.

Administrative Selling Costs and Profits. The new code requires that profits and administrative selling and other costs that are used in computing constructed values be based on actual data on production and sales in the ordinary course of trade. If that is not possible, the code gives three alternatives and stipulates that the amount used for profit cannot exceed the profit normally realized by other exporters and producers of the product.[15]

The new provision will require the United States to eliminate the statutory minima for administrative over-

11. Article 17, paragraphs 17.6 (i) and (ii) of the Antidumping Code.

12. Article 2 of the Antidumping Code.

13. Article 2, paragraph 4.2 of the Antidumping Code.

14. The provision in question is Article 18, paragraph 3.

15. Article 2, paragraph 2.2 of the Antidumping Code.

head and profits. In line with those statutory minima, DOC normally uses the administrative overhead and profit from the firm's financial statement unless they are less than 10 percent and 8 percent, respectively; if they are less than those figures, DOC uses 10 percent and 8 percent. Eliminating the 10 percent and 8 percent minima will decrease the constructed value whenever the minima would have kicked in.

In the opposite direction, the new code requires the use of data on the ordinary course of trade. The code in many situations allows sales below cost to be considered not in the ordinary course of trade. Thus, one would expect the profit calculated from such data to be higher than the profit on the financial statement, which includes all sales whether above or below cost.

Overall, the effects of this provision of the new code will be mixed: it will decrease calculated dumping margins in some situations and increase them in others.

Disregarding Sales Below Cost. The new code for the first time explicitly allows the U.S. policy of disregarding sales below cost when computing the average home-market price of the exporter.[16] The conditions under which it allows such disregard, however, are somewhat different from those in U.S. law, and probably more stringent overall. The new code allows disregard only if the sales "are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time," where:

- "Extended period of time" is normally one year, but in no case less than six months;
- "Substantial quantities" means that the weighted-average price is less than weighted-average cost or that the volume of below-cost sales is at least 20 percent of sales under consideration; and
- Prices that are above the weighted-average cost for the period of investigation must be considered to provide for costs to be recovered within a reasonable period of time. Adjustments must be made for startup costs or other one-time costs during the investigation period that are not otherwise accounted for by the ordinary capitalization and depreciation of the firm's accounting statement, and the adjustment for startup costs must "reflect the costs at the end of the startup period."

Current U.S. law stipulates that sales below cost be disregarded if they are "made over an extended period of time and in substantial quantities." To carry out the law, DOC performs a two-part test. It determines if below-cost sales occurred in three of the six months covered by the investigation, and if the below-cost sales represent more than 10 percent of the sales volume during the six months.

Thus, on the one hand, the new code will increase the period of investigation from six months to one year and raise the percentage of sales in the investigation period that are below cost from 10 percent to 20 percent. As a result of both of these stipulations, sales below cost are less likely to be disregarded. On the other hand, if these conditions are met, the new code would allow below-cost sales to be disregarded if they were concentrated in one of the 12 months under investigation rather than distributed over three of the months as with current U.S. policy. That provision would make disregard of sales more likely.

The third condition above could be open to several interpretations. As DOC interprets it, costs during a suitably defined startup period would be ignored, and if the weighted-average price is higher than the weighted-average cost after that startup period, below-cost sales could not be disregarded. Current U.S. policy is to distribute high startup cost over a suitably long period. In theory, the current U.S. policy makes more sense than the new code as interpreted by DOC, although some analysts have argued that DOC distributes costs over periods that are too short and thereby leads to findings that sales are below cost when they in fact are not.

Assuming that DOC's interpretation is correct, the question remains as to what the length of the startup period should be. Too short a period would lead to findings that sales are below cost when they actually are not, and too long a period would lead to findings that sales are not below cost when they actually are. Leaving this issue aside, the changes required by the new code are likely, though not certain, to reduce the frequency with which below-cost sales are disregarded. Even if they do, however, the changes will not even

16. Article 2, paragraph 2.1 of the Antidumping Code.

come close to eliminating the problems with this procedure.

Cost Calculations Based on Records of Exporter. The new Antidumping Code requires that costs "normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs. . . ."[17] In theory, that statement represents DOC's current policy, so the provision should have no effect on U.S. policy. In practice, disputes between DOC and the investigated firms as to whether various details in the records reasonably reflect costs are common. Undoubtedly, those disputes are the reason for this provision. Presumably the provision would enable a firm that is sufficiently unhappy with a DOC decision in this regard to appeal it through the new dispute settlement process to have it overturned. Thus, the significance of the provision depends on the fairness of DOC's decisions, on which the Congressional Budget Office has no basis to judge.

Determination of Subsidies: A Benefit to Recipient Standard

The new Subsidies Code specifies that the rate of subsidy in countervailing-duty cases be calculated on the basis of the benefit the subsidy provides to the recipient rather than on its cost to the government.[18] That stipulation reflects the professed U.S. view that subsidies are objectionable primarily because they distort the workings of the market--not because they cost governments money.

Cost, however, may indeed be a major reason (perhaps even *the* major reason) U.S. policymakers object to subsidies. Certainly subsidies in most cases reduce the efficiency and output of the world economy. The effect on the economy of the importing country, however, is not the same as the effect on the world economy. Countries generally benefit from the distortions caused by foreign subsidies of their imports. Such subsidies lead to political pressures from competing domestic industries for assistance, however, and the assistance that is least detrimental economically (though still detrimental) to the importing country is its own countersubsidies. Current pressures for balancing the budget make such countersubsidies difficult for the U.S. government to provide. Thus, the cost of a subsidy is an important consideration for U.S. policymakers.

In the past, other countries have complained about cases in which DOC changed its methods of calculating subsidies for a given case, resulting in the finding of a subsidy when the previous method used by DOC would not have. Therefore, the new Subsidies Code specifies that the method a country uses to calculate the benefit of a subsidy must be provided for in the country's legislation or regulations, and its applications to individual cases must be transparent. The code also specifies that:

- Government provision of equity capital does not confer a benefit unless it is inconsistent with the practice of private investors;
- Government loans do not provide a benefit unless the amount the firm must pay on the loan differs from that for commercial loans;
- A loan guarantee provides a benefit only if it results in the firm paying less than it would on a comparable loan without the guarantee; and
- Providing or purchasing goods and services does not confer a benefit unless they are provided without adequate remuneration demanded of the firm or purchased at higher than market prices.

Of these four requirements, only the last is inconsistent with current U.S. policy. Under current U.S. policy, the price at which a good or service is provided (or at which the government purchases the good or service) is compared with the price charged to (or paid to) other firms, not with the price required for adequate remuneration (or the market price).

17. Article 2, paragraph 2.1.1 of the Antidumping Code.

18. Article 14 of the Subsidies Code.

Determining Injury

Several new provisions in the codes relate to determining injury in AD/CVD investigations.[19]

Cumulation of Imports. The old codes make no mention of cumulating imports--that is, adding together all dumped or subsidized imports from all countries when determining injury. The new codes for the first time explicitly allow it when:

- The margin of dumping or subsidy in each country is not *de minimis* and the volume of imports from each country is not negligible, and
- "[C]umulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic products."[20]

In and of itself, the first of these conditions would have little or no effect on U.S. policy. U.S. law does not require cumulation when imports are negligible, and cases with *de minimis* dumping or subsidy margins do not reach the ITC for final determination of injury because they fail DOC's dumping or subsidy determination. As will be discussed shortly, however, the new codes set new *de minimis* margins and levels of negligibility.

The significance of the second condition is unclear, since no standard is given for determining what is appropriate. From the standpoint of the economic well-being of the country as a whole, the only condition of competition for which cumulative assessment would be appropriate would be *lack* of competition among imports--that is, one firm supplies the imports from all countries or there is collusion among the suppliers. Only under such lack of competition could predatory pricing occur. Since that interpretation of the provision is directly contrary to U.S. law (which calls for cumulation when the imports compete with one another and with U.S. production) and the United States has not objected or paid much attention to it, that is probably not the meaning intended. The meaning that *is* intended is unclear.

The Antidumping Code allows cumulating imports from all countries subject to antidumping investigations for the product, and the Subsidies Code allows cumulating imports from all countries subject to countervailing-duty investigations for a product. Neither code allows the current U.S. practice of cross-cumulation--that is, cumulation of imports from all countries subject to either antidumping or countervailing-duty investigations.

***De Minimis* Margins and Negligible Imports.**[21] Current U.S. policy considers dumping and subsidy margins of 0.5 percent or less to be *de minimis*. The new codes raise the level for dumping to 2 percent and the level for subsidies to 1 percent for developed countries. For developing countries, the *de minimis* level of subsidies is 2 percent. For developing countries that eliminate export subsidies before the eight-year limit imposed on them, the *de minimis* level is 3 percent. Clearly, the U.S. *de minimis* standards will have to be changed, resulting in fewer positive determinations of dumping and subsidies. The new standards remain quite low, however.

The United States has no fixed level of imports that it considers negligible; rather, it determines negligibility of imports by their effects. Under the new Antidumping Code, imports from a particular country are negligible if both of the following are true: the imports are less than 3 percent of total imports of the same product from all countries, and the imports from all countries that each supply less than 3 percent total up to no more than 7 percent of all imports of the same product. The new Subsidies Code does not stipulate any fixed level of negligibility for developed countries. For developing countries, it stipulates that imports are negligible if both of the following are true: the imports represent less than 4 percent of total imports of similar products from all countries, and the imports from all countries that each supply less than 4 percent total up to no more than 9 percent of all imports of similar product.

19. Article 3 of the Antidumping Code and Article 15 of the Subsidies Code.

20. Article 3, paragraph 3 of the Antidumping Code, and Article 15, paragraph 3 of the Subsidies Code.

21. Article 5, paragraph 8 of the Antidumping Code, and Article 11, paragraph 9, and Article 27, paragraphs 9-10 of the Subsidies Code.

The effect of the required changes in U.S. negligibility standards depends on the changes that the United States chooses to make. The codes stipulate that imports below the indicated levels must be considered negligible, but they do not require that imports above the indicated levels be considered nonnegligible. If the United States keeps its current standard except for cases in which import levels are below the negligibility levels set in the new codes, the effect will be fewer findings of injury, although the effect should be small.

If, however, the United States scraps its old standard and replaces it with one in which imports below the new levels are considered negligible and imports above the new levels are considered nonnegligible, findings of injury might increase. The new levels in the codes are indeed trivial. They constitute small percentages of total imports, which in turn might be a small percentage of the U.S. market for the product in question. Thus, the current U.S. standard might find levels of imports above the current negligibility limits under the new codes to be negligible. Predatory pricing would require much higher levels--imports from one firm (no cumulation among countries and firms) equal to perhaps 70 percent or 80 percent not just of total U.S. imports but of the entire U.S. market.

Factors That Must Be Considered in Determining Injury. The new Antidumping Code adds the margin of dumping to the list of factors that must be considered in determining injury.[22] Under current U.S. law, the ITC has discretion about whether to consider the dumping margin. Some commissioners consider it; others do not. Presumably, considering the margin would reduce the likelihood of finding injury in cases in which imports clearly injured an industry but the margin of dumping was very small. In such cases, a commissioner could conclude that the dumping is having little effect on either prices or the level of imports and therefore is not responsible for the injury.

Initiating Investigations

AD/CVD investigations are very expensive for the firms under investigation even if they end up with negative dumping, subsidy, or injury determinations. Consequently, the new codes have several provisions to make sure that investigations are not started without adequate justification and support.[23] Each code devotes a half page to discussing the evidence that AD/CVD authorities must require in applications for relief by domestic industries, and they require the authorities to check the accuracy and adequacy of the evidence. The old codes had merely stated that applications should include sufficient evidence of dumping or subsidy, injury, and a causal link between them. The new codes also require authorities to verify that an application for initiation is supported by at least 50 percent of the industry (as measured by production) that expresses an opinion and at least 25 percent of the total industry (as measured by production).

Under current U.S. policy, DOC assumes that an application for relief by some firms in an industry is supported by the rest of the firms unless they say otherwise. Requiring DOC to actually verify the industry support and check the accuracy of the evidence supplied with the application may mean that DOC will be unable to initiate investigations within the 20-day time limit set by U.S. law.

"Best Information Available" and the Difficulty of Fulfilling Demands for Information

The new codes have several provisions relating to the difficulty investigated firms have providing the information requested by AD/CVD administrative authorities and the use of "best information available" against such firms when they are not sufficiently forthcoming with information.[24]

Both new codes go into greater detail than the old codes about the requirement that exporters accused of dumping and their governments be informed and given a chance to provide all the evidence they consider relevant. They require that firms be given at least 30 days to reply to questionnaires and that requests for exten-

22. Article 3, paragraph 4 of the Antidumping Code.

23. Article 5, paragraphs 2-4 of the Antidumping Code, and Article 11, paragraphs 2-4 of the Subsidies Code.

24. Article 6, paragraphs 1, 1.1-1.3, 8, and 13 of the Antidumping Code, and Article 12, paragraphs 1, 1.1-1.3, and 11 of the Subsidies Code.

sions be given due consideration. They further require that "authorities . . . take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested and provide any assistance practicable."

Under current U.S. policy, foreign firms are given two weeks to respond to an initial questionnaire asking for basic general information and 30 days to respond to a questionnaire asking for more detailed information. Clearly, the two-week deadline is inconsistent with the new codes. DOC believes that it is generous with extensions, but in fact it has only limited flexibility on deadlines and extensions, since it operates under the constraint of tight deadlines for decisions imposed by law. Current law requires DOC and the ITC to provide assistance to domestic firms filing petitions for relief under the AD/CVD laws, but it has no similar requirement for assistance to foreign firms being investigated. The new codes require some assistance, but how much and of what kind is not clear.

The new Antidumping Code (but not the new Subsidies Code) contains an annex with a detailed list of restrictions related to questionnaires and use of BIA. Some of the restrictions are as follows:

- Authorities should ensure that investigated firms know that BIA can be used if they do not supply information in a reasonable time and that BIA can include information contained in the application for relief made by the domestic industry.

- Authorities should not: (1) request a company to use a computer system for its response other than that used by the firm, (2) maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, and (3) maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party.

- In their determinations, authorities should take into account all information that is verifiable and appropriately submitted.

- Even if submitted information is not ideal in all respects, it should not be disregarded if the party has acted to the best of its ability.

- Parties should be informed when their information is not accepted and given an opportunity, if possible, to provide further explanations.

In the past, critics of AD/CVD policy in the United States have complained about the difficulty of meeting DOC deadlines for responding to questionnaires, the requirement that information be provided in particular computer formats when foreign firms do not maintain computer records, and DOC's propensity to disregard information provided for various reasons.

Sampling and Other Cases in Which Duties Are Imposed on Firms Not Investigated

Until now, the Antidumping Code has not mentioned sampling, but the United States and other countries do use it. Strictly speaking, the normal U.S. practice is to examine a sufficient number of the largest suppliers to account for 60 percent of the imports in question. Regardless of whether that meets the definition of sampling, it may be affected by provisions in the new code.

The new Antidumping Code (but not the new Subsidies Code) for the first time allows sampling, but it does so only in cases where the number of firms to be investigated is so large as to make individual determinations for all firms impracticable.[25] In other cases, all firms must be investigated individually. That stipulation may require the United States to use the 60 percent rule less often than is currently the practice. When sampling is used, the new code requires that:

25. Article 6, paragraphs 10 and 10.1-10.2 of the Antidumping Code. The reason the Subsidies Code does not contain such a provision may be that the United States, which is the largest user of countervailing duties, does not often use sampling in subsidy cases. In CVD cases with many firms, DOC typically calculates an aggregate countrywide rate rather than rates for individual firms.

- o The sample chosen be statistically valid or be the largest volume of exports that can be investigated;
- o The selection preferably be chosen in consultation with and with the consent of the exporters, producers, and importers concerned; and
- o If possible, any firm that submits the necessary data in a timely fashion receive an individual margin even if not chosen for the sample.

As to the third requirement, DOC now does not absolutely refuse requests for individual rates made by countries not chosen for the sample (or for the 60 percent rule), but it tries to discourage countries from making such requests. Thus, this requirement might have some effect.

When sampling is used, the new code places limits on the antidumping duties that may be applied to imports from firms not included in the sample.[26] Of interest to the United States, the code mandates that any such duty shall not exceed the weighted-average margin of dumping of firms examined. Moreover, any zero and *de minimis* margins and any margins calculated on the basis of BIA must be disregarded in calculating the weighted average.

Current U.S. policy is to apply duties equal to the weighted-average margin. Zero and *de minimis* margins are disregarded but margins calculated on the basis of BIA are included. Excluding the zero and *de minimis* margins biases the calculated margin upward. Including margins based on BIA also biases margins upward and penalizes uninvestigated firms for the failure of other firms to comply with information requests. Thus, this provision of the new Antidumping Code would require eliminating part of the bias in current U.S. methodology but not all of it, and would thereby result in lower antidumping duties being applied to firms not investigated.

Both the new Antidumping Code and the new Subsidies Code require expedited reviews for exporters that did not supply exports during the period of investigation.[27] The new Antidumping Code (but not the new Subsidies Code) prohibits imposing antidumping duties while the review is carried out, but it allows retroactive assessment if the determination is positive. That prohibition would affect U.S. policy. Current policy requires a deposit of duties on imports from such firms that is equal to the margin estimated for the countries investigated until the normal administrative review (or the date of the first opportunity for someone to request such a review).

26. Article 9, paragraph 4 of the Antidumping Code.

27. Article 9, paragraph 5 of the Antidumping Code, and Article 19, paragraph 3 of the Subsidies Code.

Suspension Agreements

The codes have several new provisions relating to suspension agreements (referred to in the codes as "undertakings").[28] Of interest to the United States is a provision stating that general policy concerns are legitimate reasons for not accepting such agreements.[29] U.S. law provides for suspension agreements, and the statistics indicate that the United States has made substantial use of them (see Chapter 5). DOC claims, however, that normal U.S. policy is not to accept such agreements and that the statistics are distorted by the large number of steel import cases, for which exceptions were made. Thus, this provision makes clear that the new code allows the "normal" U.S. policy.

Sunset Provisions for Antidumping and Countervailing Duties and Suspension Agreements

The new Antidumping and Subsidies Codes require terminating antidumping and countervailing duties not later than five years from imposition, or five years from the date of the most recent review covering both dumping or subsidy (whichever is applicable) and injury.[30] An exception is made if a review determines that such termination would be likely to lead to continuation or recurrence of the dumping or subsidy and consequent injury. The codes also set the same requirement for

28. Article 8 of the Antidumping Code, and Article 18 of the Subsidies Code.

29. Article 8, paragraph 3 of the Antidumping Code, and Article 18, paragraph 3 of the Subsidies Code.

30. Article 11 of the Antidumping Code and Article 21 of the Subsidies Code.

terminating price undertakings negotiated instead of antidumping and countervailing duties.

The sunset provision will require changes in U.S. law and policy. Under current U.S. policy, a foreign exporter has difficulty getting an AD/CVD order terminated. (See Appendix B for a discussion of how AD/CVD orders can be terminated.) As a result, orders often remain in place for long periods of time. Some outstanding antidumping orders have been in effect for more than 25 years, and some countervailing duty orders have been in effect more than 15 years. The sunset provisions of the new codes should result in terminating a number of outstanding orders.

Transparency and Judicial Review

As other countries have begun to follow the U.S. lead in using AD/CVD laws to protect their industries, U.S. exporters have begun to feel the effects of those policies. In many countries, the administration of such laws is not as open as it is in the United States, leaving U.S. firms in the dark regarding the basis for decisions against them. Further, U.S. firms view the opportunities for appeal of such decisions in many countries as inadequate.

To answer those problems, the new codes greatly expand requirements that administrative authorities give public notice of, or inform interested parties of, such things as initiations of investigations, firms and countries involved, preliminary and final determinations, the data on which such determinations are made, and various other important aspects of antidumping and countervailing-duty cases.[31] They also require that countries provide for judicial, arbitral, or administrative tribunals, independent of the administrative authorities, to review AD/CVD administrative actions.[32]

Subsidies in Developing Countries and Formerly Communist Countries

The current Subsidies Code treats the subsidy programs of developing countries more leniently than those of other countries, placing greater restrictions on countermeasures against them than is the case for the subsidy programs of other countries.[33] It states that developing countries *should endeavor* to phase out export subsidies (the current code's red-light subsidies) and protects them from countermeasures if the developing country is committed to such a phaseout, but the code does not *require* such a phaseout. Further, it makes no mention of phasing out yellow-light subsidies.

The new code provides similar restrictions on countermeasures against the subsidy programs of developing countries. Rather than state that developing countries should endeavor to phase out such programs, however, it stipulates rigorous phaseout requirements. Thus, many subsidy programs in developing countries will with time either be eliminated or become subject to U.S. countervailing duties or other countermeasures in line with the provisions of the code for subsidy programs of other countries.

As discussed above, the new code requires larger *de minimis* values for subsidies by developing countries and larger negligible values for subsidized imports from developing countries. It also makes exceptions for certain temporary subsidies connected with privatization programs, and it provides for a seven-year period for countries in transition from centrally planned economies to market economies, during which time many subsidies are not actionable and subsidies must be phased out or brought into conformity with the code.

Transition to the New Antidumping and Subsidies Codes

The new codes apply to all investigations and reviews of existing measures initiated in response to applications made after the codes enter into force.[34] Subsidy

31. Article 6, paragraph 9, and Article 12 of the Antidumping Code, and Article 12, paragraph 8, and Article 22 of the Subsidies Code.

32. Article 13 of the Antidumping Code and Article 23 of the Subsidies Code.

33. Articles 27 and 29 of the Subsidies Code.

34. Article 18 of the Antidumping Code and Articles 28 and 32 of the Subsidies Code.

programs existing before a country signed the Agreement Establishing the World Trade Organization (WTO) and inconsistent with the provisions of the Subsidies Code must be brought into conformity with the Subsidies Code within three years of entry into force of the WTO agreement for the country. Until then, the program is not subject to the provisions of the Subsidies Code or to red-light subsidies.

The Status of Legislation

Because they are typically granted so-called "fast track" status, trade bills usually follow different procedures from other legislation. As this study goes to press, the House and Senate Committees with jurisdiction over the GATT are working to reconcile different versions of the bill needed to implement the trade agreement. After those differences are reconciled, the Administration will submit legislation for a Congressional vote. Under fast-track procedures, the Congress must vote on the bill within a prescribed time limit and the bill cannot be amended.

The House and Senate versions of the bill, with respect to changing antidumping and countervailing-duty laws, differ on numerous points. Those points include the method for determining appropriate export prices, the treatment of countries in transition from centrally planned economies to market-based economies, and rules to prevent the circumvention of duties. Neither version, however, significantly changes the overall stance of U.S. law. In general, the different versions of the bill either codify or revise the procedures already in use by the Department of Commerce or the International Trade Commission, or put into law those agreements reached in the Uruguay Round negotiations. The underlying philosophy and operating procedures of the AD/CVD laws remain unchanged.