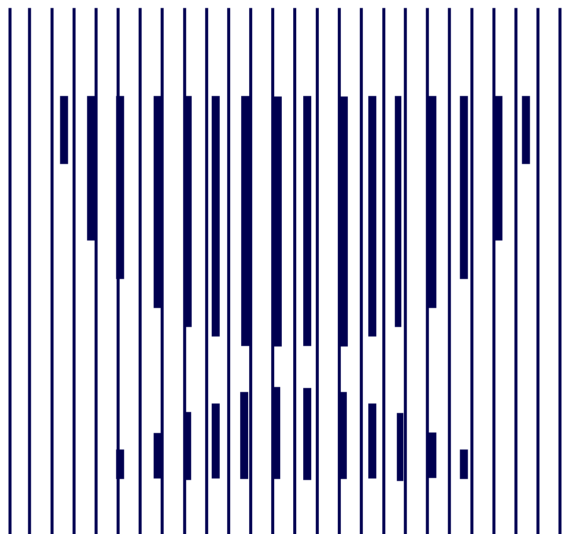
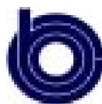
A REVIEW OF U.S. ANTIDUMPING AND COUNTERVAILING-DUTY LAW AND POLICY

May 1994





CBO MEMORANDUM

A REVIEW OF U.S. ANTIDUMPING
AND COUNTERVAILING-DUTY
LAW AND POLICY

May 1994

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The Congressional Budget Office (CBO) is studying U.S. antidumping and countervailing-duty laws and policy at the request of the Ranking Minority Member of the Subcommittee on Trade of the Committee on Ways and Means. This memorandum summarizes the main features of CBO's ongoing analysis of the topic. It was prepared by Bruce Arnold of CBO's Natural Resources and Commerce Division under the supervision of Elliot Schwartz and Jan Paul Acton.

The analysis concludes that U.S. laws treat the pricing of imports in the U.S. market differently from how they treat the pricing of domestically produced goods. The antidumping law imposes duties on imports sold in the U.S. market at prices below what is charged in the foreign exporter's home market or at prices below cost. Whether the prices are predatory is not considered. The antitrust laws impose no similar restrictions on the pricing of domestically produced goods, prohibiting mainly predatory pricing. Similarly, the countervailing-duty laws impose duties on imports that are subsidized by, or at the direction of, the foreign exporter's home government. Within the United States, however, states are allowed to subsidize production of goods shipped to other states, and other states are not allowed to offset such subsidies. Over time, the antidumping and countervailing-duty laws have become a general source of protection for U.S. firms from foreign competition.

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INTRODUCTION

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

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

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

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

This difference is important. Predatory pricing is detrimental to economic welfare because it leads to monopolies, which cause economic inefficiency and raise concerns about social equity. It seldom occurs, however,

because it is rarely a profitable strategy and is usually not possible. By contrast, nonpredatory price discrimination and sales below cost generally provide net benefits to the country receiving the lower price, and both are relatively common. Moreover, seldom do cases of price discrimination or selling below cost have anything to do with predatory pricing.

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

Over the years since World War II, U.S. tariffs have steadily declined in accord with agreements reached in successive rounds of negotiations to liberalize the General Agreement on Tariffs and Trade (GATT). This decline has resulted in increasing competition for domestic firms from imports. For industries suffering from such increased competition, U.S. trade law provides two forms of assistance: trade adjustment assistance and protection under the

Section 201 escape clause.[1] Trade adjustment assistance consists of training, employment services, job search and relocation allowances, and other forms of aid to displaced workers in industries adversely affected by increased import competition. The Section 201 escape clause provides temporary protection from imports to provide breathing room for domestic industries to adjust to increased competition. It contains several restrictions designed to ensure that the protection it provides is used only for such temporary adjustment purposes--not for permanent protection--and only when the adjustment costs are large and the cost of the protection to the economy and the national interest is not large.

In the case of industries unable to become competitive with imports (such as unskilled-labor-intensive industries), temporary breathing room for adjustment may be better than no protection at all, but it is not what the industries really want. Anything short of long-term protection would force painful contractions on them that trade adjustment assistance will not completely ameliorate. Further, those industries want protection from imports that cause *any* injury, not just those that cause substantial injury, and they would rather such protection be automatic, without regard to any harm it

1. Trade adjustment assistance is provided for in Chapters 2, 3, and 5 of Title II of the Trade Act of 1974, as amended. The Section 201 escape clause consists of Sections 201 through 204 of the Trade Act of 1974, as amended.

might cause to the rest of the economy or to the national interest generally. Consequently, they have found the escape clause to be inadequate.

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

As more people accepted this view, the laws and the procedures for administering them--especially the antidumping law and procedures--began to evolve in the direction of serving this more general protective purpose more effectively. From the point of view that the purpose of AD/CVD laws is to prevent, punish, and offset predatory pricing, subsidies, and other unfair practices relating to U.S. imports, many of the legal provisions and procedures that have evolved--especially those used for calculating dumping margins--are biased against foreign exporters (and against U.S. consumers of foreign goods). From the point of view that the AD/CVD laws should offer more general protection for domestic industries from troublesome import

competition, these same provisions and procedures appear more reasonable, even if a bit ad hoc, and they have been quite effective.

HOW THE LAWS CURRENTLY FUNCTION

The antidumping law, and to some extent the countervailing-duty law, are now a fairly general source of protection from foreign competition. In practice, the main hurdle to an industry seeking protection under the AD/CVD laws is to demonstrate that it has been injured by the imports, not that the imports are dumped or subsidized. Such injury is what the Section 201 escape clause is designed to address. However, the degree of injury that must be demonstrated in AD/CVD cases is less than that for Section 201 cases. As a result of this and other factors, the Section 201 escape clause is now seldom used. It is generally easier for an industry to obtain protection under the AD/CVD laws. The Department of Commerce found that there was dumping or subsidies in 89 percent of the cases that came before it from 1980 through 1988.

Using the AD/CVD laws as a general source of protection from imports has several disadvantages. First, the AD/CVD laws do not have the restrictions that the Section 201 escape clause has to ensure that protection

is granted only temporarily for the purpose of aiding adjustment and only in cases where the benefit to the protected industry outweighs the harm to the rest of the country in terms of economic, foreign policy, and security interests. Protection under the AD/CVD laws is permanent for all practical purposes and is given without regard to the effects on the rest of the economy and foreign-policy and national-security concerns. Permanent protection of industries is almost always detrimental to the economy and is contrary to the basic thrust of U.S. trade policy since World War II, which has supported the elimination of trade barriers by all countries.

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

Third, even in those cases in which the protection is deemed desirable, the AD/CVD laws sometimes provide inadequate protection. They apply only to imports of the product in question from particular countries or firms and not to all imports of the product from any source. Therefore, they can be, and sometimes are, circumvented either by the firm on whose products the

duties are imposed or by the impersonal workings of the international market. As a result, the United States has had to devote considerable attention in recent years to modifying the AD/CVD laws to make them apply to upstream dumping, downstream dumping, dumping routed through third countries, and various other routes by which AD/CVD orders have been circumvented.[2]

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

A LOOK AT THE NEW GATT ANTIDUMPING AND SUBSIDIES CODES

Under the final "Agreement on Implementation of Article VI of GATT 1994" (Antidumping Code) and "Agreement on Subsidies and Countervailing

2. "Upstream dumping" refers to the dumping of the intermediate goods or raw materials used as inputs in the production of the product in question. "Downstream dumping" refers to the dumping of products made from the product in question.

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

Unlike the case for the old codes, which only some GATT signatories signed, all signatories to the GATT will be signatories to the new codes. Among the most important provisions in the new codes are new dispute settlement procedures that cannot be blocked by a country that receives an adverse ruling. Also important is a sunset provision for automatically terminating AD/CVD orders after five years unless a likelihood of continued dumping or subsidies and resulting harm is shown. The new codes provide for increased transparency and judicial review. They establish *de minimis* levels of dumping and subsidies that are higher than current U.S. levels, though still quite low, and they establish rigid levels of negligibility for imports, which the United States does not currently have. They also require greater evidence of industry support for initiating AD/CVD investigations than the United States currently requires.

The new codes contain provisions relating to many aspects of AD/CVD policy. A number of provisions are aimed at easing the burden on investigated firms in complying with requests for information and at ensuring that firms know that so-called "best information available," including information supplied by the domestic industries, can be used against them if they do not comply. Others make it clear that administrative authorities may refuse to accept suspension agreements on grounds of general policy, which U.S. authorities often do. The codes explicitly recognize and legalize for the first time the practice of cumulating imports in determining injury, which the United States and other countries have already been doing without explicit legalization from the old codes. They do not, however, allow the current U.S. practice of cross-cumulation of imports from firms subject to either antidumping or countervailing-duty investigations.[3] They urge, but do not require, countries to consider the interests and views of parties in their own countries that might be injured by AD/CVD orders on imports.

The new Antidumping Code requires weighted-average-to-weighted-average comparisons of import prices with exporter's home-market prices in most cases, which would eliminate a bias in current U.S. methodology. The new code requires eliminating the current statutory minima that the United

3. "Cross-cumulation" refers to cumulating all imports of the product in question--from all firms or countries--that are *either* dumped or subsidized. The new Antidumping Code allows cumulation only of dumped imports. The new Subsidies Code allows cumulation only of subsidized imports.

States maintains for profit and overhead in constructed-value calculations.[4] It places new conditions on the ability of administrative authorities to eliminate sales below cost in the exporter's home market. These conditions may reduce such eliminations by U.S. authorities, though it is not entirely clear they will do so since the effects of these conditions and related provisions will be mixed. The new code requires considering the dumping margin in determining injury. Also, for the first time, the new code explicitly recognizes and legalizes, subject to certain conditions, the practice of sampling, which the United States and other countries have practiced without explicit authorization under the old code. The conditions may require some changes in U.S. policy.

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

4. "Constructed value" is the calculated cost of production of the foreign exporter used when the U.S. import price is compared with the exporter's cost of production rather than with the exporter's home-market price.

Although the new Antidumping and Subsidies Codes require the changes just described, the Congress and the President retain some flexibility in implementing legislation and regulations. In general, nothing prevents the Congress from going further than the new codes require in eliminating or revising the protectionist aspects of the AD/CVD laws. Similarly, in some cases, further tightening of the laws to increase the protection they provide can be accomplished without violating the new codes.

In January 1994, the Industry Policy Advisory Committee (IPAC) submitted to the U.S. Trade Representative its report analyzing the Uruguay Round agreements and what the members of the committee thought of them.[5] In general, this committee, like the other policy advisory committees, presented in its report common positions on which members of the committee could agree. In considering the new Antidumping Code, however, the committee could not agree on a common position. Rather, it presented two separate analyses: one reflecting the views of companies whose interests lie primarily with exporting or importing (including importing raw materials and intermediate goods for their production processes) and one reflecting the

5. Office of the U.S. Trade Representative, *The Uruguay Round of Multilateral Trade Negotiations: Report of the Industry Policy Advisory Committee* (IPAC) (January 1994).

views of companies that tend more to compete with imports in the U.S. market.

The analyses of both groups agreed that the provisions in the new code to increase transparency and require independent judicial or other arbitral review of administrative decisions would benefit the United States and were positive changes from the old codes. Beyond these provisions, however, agreement between the groups broke down.

The importers' and exporters' group argued that the new Antidumping Code is basically good as it stands. In addition, the group strongly encouraged

> the Administration to monitor closely the compliance of foreign antidumping proceedings with GATT rules. The implementing legislation should require the preparation of an annual report by USTR on all antidumping actions against U.S. exports, and what actions the U.S. has taken to assist U.S. exporters, including, but not limited to, recourse to WTO dispute resolution.

If the group expressed any dissatisfaction at all with the new code, the dissatisfaction was that the code did not go far enough in restricting antidumping laws.

The import-competing group was not satisfied with the new code and gave its approval only if (1) the implementing legislation was "fashioned to minimize, to the extent possible, the diminishing of relief available to injured domestic industries," and (2) the implementing legislation contained a number of provisions not prohibited by the code that would have the effect of tightening up U.S. antidumping enforcement and raising antidumping duties. These include, among others, provisions to bolster anticircumvention measures; establish procedures for the United States to issue antidumping orders at the request of third countries; provide for using antidumping duties to compensate domestic industries; treat antidumping duties as costs in calculating exporters' sale prices; and specify that the profits of foreign exporters' wholly owned distributors in the United States be removed from the price in calculating exporters' sale prices.[6]

The two options in the IPAC report do not define the full range of choices facing the Congress. Rather, they occupy a narrow band of policy alternatives that would tilt current policy slightly one way or the other. The Congress may want to consider other options that move further in the direction of consistent treatment of pricing practices by both domestic and foreign firms.

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6. "Exporter's sale price" is the price at which a foreign exporter sells a product to a wholly owned subsidiary in the United States. Rather than use the price listed in the firm's books, which is subject to manipulation, the Department of Commerce takes the price of the first sale in the United States to an unrelated party and subtracts from that price the direct and indirect selling expenses incurred in the United States.