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Trade Remedies: Antidumping

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SUMMARY

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Trade Remedies: Antidumping

The U.S. Constitution grants to Congress the power to regulate trade with foreign nations and levy tariffs. Since 1922, U.S. law and foreign policy have favored applying tariffs and duties equally to all trading partners. This principle, known as most-favored-nation (MFN) treatment, has been central to the rules-based global trading system since 1947.

One of the most frequently invoked exceptions to MFN treatment are three "trade remedy" laws. These laws are enforced primarily through administrative investigations of two U.S. government agencies: the International Trade Administration of the Department of Commerce (ITA) and the U.S. International Trade Commission (USITC). Trade remedy laws enable the United States to impose additional duties aimed at specific producers or countries to remedy unfair trade practices and to help domestic industries adjust to sudden surges of fairly traded goods. The three types of laws traditionally classified as "trade remedies" are:

Antidumping (AD) laws provide relief to domestic industries that have been, or are threatened with, material injury caused by imported goods sold in the U.S. market at prices that are shown to be less than fair market value. The relief provided is an additional import duty placed on the dumped imports based upon calculations made by the ITA. Antidumping orders are the most frequently used and the most controversial trade remedy.

Countervailing duty (CVD) laws give a similar kind of relief to domestic industries that have been, or are threatened with, material injury caused by imported goods that have been found to have received WTO-inconsistent government subsidies, and can therefore be sold at lower prices than similar goods produced in the United States. The relief provided is an additional import duty placed on the subsidized imports.

Safeguard (also referred to as escape clause) laws give domestic industries relief from surges of imported goods that are fairly traded if serious injury is found or is threatened to the domestic industry. The most frequently applied safeguard law, Section 201 of the Trade Act of 1974, is designed to give domestic industry the opportunity to adjust to the new competition and remain competitive. The relief provided is generally an additional temporary import duty, a temporary import quota, or a combination of both. Safeguard laws also require presidential action in order for relief to be put into effect.

Economists have generally seen antidumping laws and policies as economically inefficient. Some, however, have acknowledged the role that these economically inefficient policies have played in making trade liberalization more politically feasible by providing protection for industries that might otherwise oppose such measures. In recent years, U.S. exports have increasingly become a target of AD measures by several major emerging economies, including India and China. Antidumping laws and policies have also been at the center of dozens of trade disputes between the United States and its trading partners in the WTO. Reports issued by the WTO's Appellate Body (AB) on the subject have been one of the primary targets of the U.S. Trade Representative's criticisms of the AB mechanism in the broader WTO dispute settlement system. If Congress wishes to maintain a functional dispute settlement system at the WTO it may consider either directing the President to seek amendments to underlying WTO agreements such that U.S. practices are internationally compliant or direct the ITA to bring its AD policies into conformity with the AB's interpretation of the WTO's Antidumping Agreement.

Contents

Introduction 1
Background 1
Dumping Defined 1
The Origins of Dumping and Antidumping 2
Present Day Antidumping Laws and Investigations 5
U.S. Statutes 5
U.S. International Obligations 5
Antidumping Investigations and Measures 6
Initiation 6
Preliminary Determinations 6
Final Determinations 7
Critical Circumstances 8
Termination of Investigation and Suspension Agreements 9
Administrative and Sunset Reviews 9
Trends 10
Historical Trends (1947-1995) 10
Global Antidumping Trends, 1995-2018 12
The Growth of Antidumping Investigations and Measures 12
Current Users and Targets of Antidumping Investigations and Measures 12
The Cause of the Growth in Antidumping Investigations and Measures 15
U.S. Antidumping Trends, 1995-2018 18
The United States and Antidumping Investigations and Measures 18
The United States as the Target of Antidumping Investigations and Measures 18
Issues for Congress 19
The Economics of Antidumping 19
Antidumping, Zeroing, and the WTO Appellate Body 20

Figures

Figure 1. Investigation Timeline 8
Figure 2. Imposition of Antidumping Measures, 1995-2018 13
Figure 3. Targets of Antidumping Measures, 1995-2018 14
Figure 4. Percentage of Measures by Industry, 1995-2018 15
Figure 5. Average Tariff Rates and AD Measures in Force for Top Developing Country Users of AD Measures 17
Figure 6. Total Number of AD Measures in Force 17
Figure 7. AD Measures in Force Among Historical Users 18

Tables

Table 1. Administrative Responsibilities in Antidumping Policy 11
Table 2. Initiations of Antidumping Investigations, Imposition of Antidumping Measures, and Measures in Force, 2009-2018 12

Table 3. Targets of Antidumping Investigations and Imposition of Antidumping Measures, 1995-2018 13
Table 4. Example of Zeroing 21

Contacts

Author Information 25

Introduction

In general, the rules of the World Trade Organization (WTO), of which the United States is a member, require each member to apply tariffs and duties equally to all other members. This principle, known as unconditional most-favored-nation (MFN) treatment, has been central to the rules-based global trading system since 1947 and part of U.S. law and foreign policy since 1922.[1]

The WTO agreements allow exceptions to this treatment in certain circumstances, including to remedy unfair trade practices and to help domestic industries adjust to sudden surges of fairly traded goods. The three most frequently applied U.S. trade remedy laws permit the imposition of antidumping duties, countervailing duties, and safeguards. These laws are enforced through administrative investigations and actions of two U.S. government agencies: the International Trade Administration of the Department of Commerce (ITA) and the U.S. International Trade Commission (USITC).

The most commonly used of these remedies are antidumping (AD) laws. AD laws provide relief to domestic industries that have been, or are threatened with, material injury caused by imports sold in the U.S. market at prices that are shown to be less than fair value. The relief provided is an additional import duty, calculated by the ITA and placed on the dumped imports.[2] Antidumping orders are the most frequently used and the most controversial trade remedy.[3]

Background

Dumping Defined

In general, dumping occurs when manufacturers export goods for less than they sell similar goods in their domestic market.[4] The controlling international agreement in the World Trade Organization (WTO) – the Antidumping Agreement (ADA) – defines dumping as the introduction of a product "into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[5] U.S. law similarly defines dumping as the "sale or likely sale of goods [in the United

[1] Unconditional MFN treatment came into being as a result of both legislative and executive action. First, section 317 of the Fordney-McCumber Tariff Act of 1922, P.L. 67-318 (September 21, 1922), 42 Stat. 858, empowered the President to impose duties or exclude imports from any country that treated U.S. goods differently than another country. Second, President Harding gave permission to his Secretary of State to conclude commercial treaties based on unconditional MFN treatment. *Foreign Relations of the United States* 1923, v. 1, pgs. 130-131.

[2] The Tariff Act of 1930, P.L. 71-361, as amended, Title VII, subtitle B. Codified, as amended, at 19 U.S.C §§1673 *et seq*. Further references will be to the United States Code.

[3] The reason for covering dumping and countervailing duties in separate reports is that although the procedures are similar, as one scholar put it, "the policy discourses of antidumping and of countervailing duties are […] quite different." J.M. Finger, *Antidumping: How it Works and Who Gets Hurt* (Ann Arbor: University of Michigan Press, 1993), p. 7.

[4] See, e.g., Walter Goode, *Dictionary of Trade Policy Terms*, 5th ed. (Cambridge: Cambridge University Press, 2007), s.v. "dumping"; Jacob Viner, *Dumping: A Problem of International Trade* (Chicago: University of Chicago Press, 1923), p. 1.

[5] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 201. "Comparable price" refers to the "normal value," that is the domestic price.

States] at less than fair value,"[6] with the fair value defined as "the price at which the foreign like product is first sold … for consumption in the exporting country."[7] Simply put, dumping is the sale of goods abroad for less than the price the goods would have commanded in the home market.

The Origins of Dumping and Antidumping

Economists have long written about the practice of selling exports for a lower price than in the home market.[8] In 1776, Adam Smith noted the practice by manufacturers to export some of their surplus goods for sale at a loss for the purpose of "[doubling] the price of their goods in the home market."[9] Several years later, Alexander Hamilton expressed concern with the practice and its potential to stymie the development of domestic industry.[10] However, such mentions were sporadic and generally isolated to economic treatises.[11]

As more countries industrialized in the late-nineteenth century, exporting goods for a price below the price that could be commanded in the domestic market (whether at a loss or not) became an economic strategy used to maintain domestic prices while establishing footholds in foreign markets. The expansion of these practices resulted in more sustained scholarly and political attention—not all negative.[12] In 1880, for example, the U.S. Secretary of State encouraged cotton manufacturers to "sacrifice profits for a time, if necessary, to secure trade-standing in … several markets."[13] Twenty-five years later, the U.S. Department of Commerce and Labor was still dispensing similar advice to manufacturers.[14]

Because of this strategic deployment of dumping, and the reemergence of state-directed trade policies at the turn of the twentieth century, politicians and the public (if not always the economists) began to argue that the practice was unfair. Accusations of using foreign markets as "dumping-grounds" became frequent and the term "dumping" to describe the practice of selling surplus goods abroad at a lower price began to be used more frequently.[15] British industrialists protested dumping from German and French manufacturers, while Canadian millers grumbled about the dumping of American steel.[16] While accusations of dumping were common, the actual prevalence of the practice is hard to calculate, in part because there was no administrative

[6] 19 U.S.C. §1677(34). "Fair value" is determined by comparing the export price and the "normal value," which is itself defined as the either the price at which the good is sold in the domestic market or in a third country (so long as that price is found to be representative." 19 U.S.C. §1677b.

[7] 19 U.S.C. §1677b(a)(1)(B)(i).

[8] J.M. Finger, "The Origins and Evolution of Antidumping Regulation," in Robert Howse, ed., *The World Trading System* vol. 3 (London: Routledge, 1998), p. 32.

[9] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London: Methuen, 1904) p. 2:19.

[10] Alexander Hamilton, "Report on the Subject of Manufactures, 1791," in F.W. Taussig, ed., *State Papers and Speeches on the Tariff* (Cambridge, MA: Harvard University Press, 1892), p. 31.

[11] Viner, *Dumping*, ch. 4.

[12] Ibid., ch. 4.

[13] Qtd. in Department of Commerce and Labor, Bureau of Statistics, "Foreign Markets for American Cotton Manufactures," *Special Consular Reports* 36 (Washington, D.C.: GPO, 1905), p. 45.

[14] Ibid.

[15] Viner, *Dumping*, p. 1.

[16] Ibid., chs. 3-5.

apparatus to investigate such complaints.[17] Nevertheless, experts generally agree that there was, in fact, at least a modest increase in the practice.[18]

There were several possible causes for whatever dumping existed at the time. First, higher tariffs in general encouraged the practice. As a leading scholar of antidumping has argued, "These tariffs provided national firms the opportunity to price monopolistically at home and at the same time protected them from reimports of goods they sold competitively abroad."[19] Other observers have noted that dumping was, in some respects, a natural development of trade in industrially advanced countries as large manufacturers attempted to offset changes in domestic demand by selling large surpluses abroad.[20]

During the first decades of the twentieth century, countries began to take action to prevent dumping or, at least, protect their domestic industries from dumping. In 1904, Canada enacted the world's first modern antidumping (AD) law.[21] By 1921, Australia, New Zealand, South Africa, France, Japan, the United States, and Britain had proposed or enacted AD statutes or other legislation giving administrative officials discretion to alter tariffs in response to influxes of goods at abnormally low prices.[22] Many of the statutes, including the American, were modeled on the Canadian law.[23] The Economic and Financial Section of the League of Nations Secretariat (the precursor to the United Nations) also commissioned studies on the issue to survey AD legislation and see if there was a need for international regulation.[24]

U.S. AD law had precursors in late-nineteenth-century antitrust legislation.[25] Some early observers argued that dumping was a strategy used to injure or hinder development and maintain monopolistic dominance over foreign countries. In 1916, Congress passed the Antidumping Act, which imposed criminal and civil penalties on any person importing and selling articles in the United States "at a price substantially less than the actual market value or wholesale price of such articles" so long as they had the intent of injuring or preventing the establishment of an industry

[17] United States Tariff Commission, *Information Concerning Dumping and Unfair Foreign Competition in the United States and Canada's Antidumping Law* (Washington, DC: GPO, 1919), p. 18.

[18] Viner, *Dumping*, chs. 3-5; United States Tariff Commission, *Information Concerning Dumping*.

[19] J.M. Finger, "The Origins and Evolution of Antidumping Regulation," in *The World Trading System: Critical Perspectives on the World Economy* vol. 3 (Administered Protection), edited by Robert Howse (London: Routledge, 1998), p. 35.

[20] United States Tariff Commission, *Information Concerning Dumping*, p. 19.

[21] Finger, "Origins and Evolution," p. 32.

[22] United States Tariff Commission, *Information Concerning Dumping*; Viner, *Dumping*. However, the law was rarely applied in an anti-dumping context. Diane M. Keppler, "The Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement," *George Washington Journal of International Law and Economics* 32 (1999), p. 293-294.

[23] Finger, "Origins and Evolution," p. 35. The American statute that was more directly modeled on the Canadian was the Antidumping Act of 1921, P.L. 67-10 (May 27, 1921), Title II.

[24] See, e.g., Jacob Viner, *Memorandum on Dumping, Submitted to the Preparatory Committee for the International Economic Conference*, Publications of the League of Nations, 1926.II.63 (Geneva: 1926); Ernst Trendelenburg, *Memorandum on the Legislation of Different States for the Prevention of Dumping, Submitted to the Preparatory Committee for the International Economic Conference*, Publications of the League of Nations, 1926.II.66 (Geneva: 1926).

[25] Douglas A. Irwin, "The Rise of U.S. Anti-dumping Activity in Historical Perspective," *The World Economy* 28, no. 5 (May 2005), p. 652.

in the United States.[26] The law was rarely applied, in part because it was difficult to prove such an intent.[27]

U.S. antidumping law took its modern form with the passage of the Antidumping Act of 1921, which adopted a more globally common administrative (rather than judicial) procedure that enabled the imposition of additional duties on imports rather than civil or criminal penalties (as the antitrust branch of legislation had).[28]

The Antidumping Act of 1921 became the textual basis for Article VI of the General Agreement on Tariffs and Trade (GATT) in 1947,[29] the multilateral trade agreement that established the post-World War II rules-based trading system and which was later incorporated into the World Trade Organization (WTO) agreements.[30] As such, the U.S. model of antidumping has become the global standard.

Since 1921, Congress has amended and adjusted U.S. antidumping law many times, but has maintained the basic administrative framework and Article VI was clarified and amended by the ADA as part of the establishment of the WTO in 1995.[31]

[26] P.L. 64-271 (September 8, 1916), Title VIII. However, the law was rarely applied in an anti-dumping context and later was found to violate U.S. trade obligations under the GATT. Appellate Body Report, *US – 1916 Act*, WTO Doc. WT/DS136/AB/R; WT/DS162/AB/R (adopted September 26, 2000). See also Diane M. Keppler, "The Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement," *George Washington Journal of International Law and Economics* 32 (1999), pp. 293-294.

[27] Irwin, "The Rise of U.S. Anti-dumping Activity in Historical Perspective."

[28] P.L. 67-10 (May 27, 1921), Title II: "[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 a finding public…. [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, in addition to the duties imposed thereon by law, a special dumping duty in an amount equal to such difference."

[29] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Irwin, "The Rise of U.S. Anti-dumping Activity in Historical Perspective," p. 654.

[30] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT 1994).

[31] While originally its own act, the Trade Act of 1979 repealed the Antidumping Act of 1921 and amended the Tariff Act of 1930 to include Countervailing and Antidumping Duties. Trade Act of 1979, P.L. 96-39 (July 26, 1979) §§101, 106.

Present Day Antidumping Laws and Investigations

U.S. Statutes

Statutory authority for AD investigations and remedial actions is found in Subtitle B of Title VII of the Tariff Act of 1930, as amended (codified, as amended, at 19 U.S.C. §§1673 *et seq*.). The law requires the imposition of an antidumping duty if (1) the International Trade Administration of the Department of Commerce (ITA) determines that imported merchandise is being, or likely to be, sold in the United States at less than fair value;[32] and (2) the U.S. International Trade Commission (USITC) determines that an industry in the United States is materially injured or is threatened with material injury,[33] or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.[34] The statute requires that the AD duty equal the amount by which the normal value (a calculation of the fair value)[35] of the merchandise exceeds the export price of the merchandise.[36]

The International Trade Administration (ITA) and the U.S. International Trade Commission (USITC)

Two U.S. agencies are involved in antidumping investigations: The International Trade Administration (ITA) of the U.S. Department of Commerce and the U.S. International Trade Commission (USITC).

International Trade Administration: Established in 1980, the ITA is an agency within the U.S. Department of Commerce charged with promoting trade and investment and enforcing trade laws and agreements.

U.S. International Trade Commission: Established in 1916 as the U.S. Tariff Commission, the USITC is an independent, nonpartisan, quasi-judicial federal agency charged with investigating and making determinations in proceedings involving unfair trade practices, providing analysis and information on U.S. trade, and maintaining the Harmonized Tariff Schedule of the United States (HTSUS).

U.S. International Obligations

The United States is a party to several international agreements that govern the use of AD laws, including Article VI of the General Agreement on Tariffs and Trade (GATT), which was incorporated into the agreements establishing the WTO, and the WTO's Antidumping Agreement (ADA).[37] Both of these agreements were based upon U.S. AD law and practice and the United States was a proponent of both agreements.[38]

All WTO members are subject to the terms of Article VI of the GATT and the Antidumping Agreement. Article VI of GATT allows the imposition of antidumping duties in cases where dumping "causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry."[39] The ADA elaborates on the basic principles established in Article VI of the GATT by providing more detail

[32] 19 U.S.C. §1673(1).

[33] 19 U.S.C. §1673(2)(A). "Material injury" is defined at 19 U.S.C. §1677(7) as "harm which is not inconsequential, immaterial, or unimportant."

[34] 19 U.S.C. §1673(2)(B).

[35] 19 U.S.C. §1677b.

[36] 19 U.S.C. §1673e(a)(1).

[37] Agreement on the Implementation of Article VI of GATT 1994, 1868 U.N.T.S. 201.

[38] Irwin, "The Rise of U.S. Anti-dumping Activity in Historical Perspective," p. 654: "The United States was the main proponent of including AD procedures in Article VI of the [GATT] in 1947. Indeed, the 1921 legislation formed the textual basis for Article VI."

[39] GATT 1994 art. 6, para. 1.

on several issues, including how WTO members may determine whether dumping is occurring, how they determine whether there has been an injury to a domestic industry, what kinds of evidence can be used, and other issues.[40] WTO members whose antidumping laws or practices violate the terms of the ADA may be subject to WTO dispute settlement proceedings.[41]

Antidumping Investigations and Measures[42]

Initiation

The ITA initiates antidumping investigations either on its own initiative or in response to a petition filed by a representative of a domestic industry with the USITC and the ITA.[43] If the ITA receives a petition, it must normally initiate an investigation within 20 days after it receives a petition and determines that the petition contains the necessary elements for imposing a duty.[44]

Preliminary Determinations

The USITC begins the investigation. The central question of its investigation is whether there is a reasonable indication of an injury or likely injury to a domestic industry.[47] If the USITC's preliminary determination is negative or the USITC determines that imports of the subject merchandise are negligible, then proceedings end.[48] In most circumstances, the USITC must make a preliminary determination no later than 45 days after the start of the investigation.[49]

Dumping Margins

The term "dumping margin" means the amount by which the normal value (the ordinary price in the exporting country) exceeds the export price or constructed export price (the price paid in the importing country) of the subject merchandise.[45]

The term "weighted average dumping margin" means "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" of such an exporter.[46] For an example of this in practice, see **Table 4**.

If the USITC's preliminary determination is affirmative, then the ITA begins its preliminary investigation to determine whether dumping exists. The ITA must make its determination within 140 days, or within 190 days at the petitioner's request or if the case is extraordinarily complicated.[50]

[40] Antidumping Agreement arts. 2, 3, 6.

[41] CRS In Focus IF10436, *Dispute Settlement in the World Trade Organization: Key Legal Concepts*, by Brandon J. Murrill.

[42] See **Figure 1** below. Section adapted from a report originally authored by Cathi Jones. Throughout the investigation, all phases of an investigation are announced in the *Federal Register*, and any hearings are announced in advance so that all interested parties have an opportunity to present their cases.

[43] 19 U.S.C. §1673a(a).

[44] 19 U.S.C. §1673a(c)(1)(A).

[45] 19 U.S.C. § 1677(35).

[46] Ibid.

[47] 19 U.S.C. §1673b(a)(1).

[48] 19 U.S.C. §1673b(a)(1).

[49] 19 U.S.C. §1673b(a)(2). In cases that Commerce has taken extra steps to determine industry support, the ITC has 25 days from the time it is notified of Commerce's initiation to make a preliminary determination.

[50] 19 U.S.C. §1673b(b) and (c). Expedited time lines are provided for Commerce to make its preliminary determination for short life cycle merchandise when foreign manufacturers are shown to be repeat offenders. 19 U.S.C.

If the ITA's preliminary determination is affirmative, then ITA also estimates a weighted-average dumping margin for each exporter or producer individually investigated and an "all-others rate" for all other exporters.[51] The ITA publishes its preliminary results in the *Federal Register* and orders U.S. Customs and Border Protection (CBP) to delay the final computation of all duties on imports of the targeted merchandise ("suspend liquidation") until the case is resolved and to require the posting of cash deposits, bonds, or other appropriate securities to cover the duties (plus the estimated dumping margin) for each subsequent entry into the U.S. market.[52]

If the ITA's determination is negative, the ITA continues the investigation to the final stage (without ordering a suspension of liquidation) and the USITC continues its investigation as well. Because this is a preliminary determination, agencies may not have obtained all possible evidence, and this allows interested parties a final opportunity to put information and evidence before the two bodies.[53]

Final Determinations

Generally, the ITA must make its final determination within 75 days of the preliminary determination.[54] Before issuing a final determination, the ITA must hold a hearing upon request of any party to the proceeding.[55] If the ITA's final determination is negative, the proceedings end, and any suspension of liquidation is terminated, bonds and other securities are released, and deposits are refunded.[56] If the ITA's final determination is affirmative, it orders the suspension of liquidation if it has not already done so.[57] The ITA will publish the order in the *Federal Register* and direct CBP to continue or resume (if provisional measures expired) suspension of liquidation and collection of cash deposits at the rate determined in the ITA's final determination.

§1673b(b)(1)(B).

[51] 19 U.S.C. §1673b(d). See **Table 4**.

[52] 19 U.S.C. §1673b(d)(2).

[53] ITA: 19 C.F.R. §351.205; USITC: 19 C.F.R. §207.20

[54] 19 U.S.C. §1673d(a)(1). However, the ITA may postpone making a final determination to 135 days at the request of the party to whom the preliminary determination was adverse. 19 U.S.C. §1673d(a)(2).

[55] 19 C.F.R. §351.310(c).

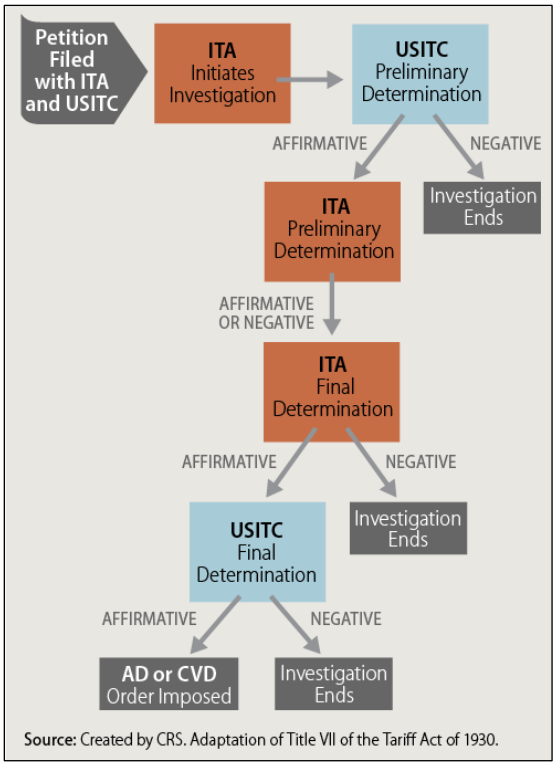
[56] 19 U.S.C. §1673(c)(2).

[57] 19 U.S.C. §1673d(c)(1)(C). Commerce would not suspend liquidation if its preliminary determination were negative.

Critical Circumstances

Congress enacted the critical circumstances provision in order "to provide prompt relief to domestic industries suffering from large volumes, or a surge over a short period, of imports and to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by the [ITA]."[58]

Figure 1. Investigation Timeline



Source: Created by CRS. Adaptation of Title VII of the Tariff Act of 1930.

If a petitioner alleges that critical circumstances exist in an antidumping case (which would impose additional retroactive AD duties that one would not normally obtain), then the ITA determines whether:

- (1)(a) there is a reasonable basis to suspect that there is a history of dumping (combined with material injury due to the imports), or (b) that the importer knew or should have known that the exporter was selling the merchandise at less than fair value, and also knew that there was likely to be material injury due to the sales;[59] and
- (2) whether massive imports of the merchandise have occurred over a relatively short period.[60]

If the ITA makes an affirmative critical circumstances finding, it extends the suspension of liquidation of any unliquidated entries of merchandise (entries for which estimated AD duties have not been paid) into the United States *retroactively* to 90 days before the suspension of liquidation was first ordered or the date on which notice of the determination to initiate the investigation is published in the Federal Register, whichever is later.[61]

Whether or not the ITA's initial critical circumstances determination is affirmative, if its final determination on subsidies or dumping is affirmative, the ITA must also include a final determination on critical circumstances. If the final determination on critical circumstances is

[58] U.S. Congress, House Committee on Ways and Means, *Trade Agreements Act of 1979*, report to accompany H.R. 4537, 96th Cong., 1st sess., H.Rept. 96-317 (Washington, DC: GPO, 1979), p. 63.

[59] When determining whether importers knew, or should have known, the exporter was selling the merchandise at less than fair value, the ITC generally considers estimated margins of 25 percent or greater on sales to unrelated parties and margins of 15 percent or greater on sales through related parties to constitute constructive knowledge of sales at less than fair value. Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Italy, 52 *Federal Register* 24198-02, June 29, 1987. Notice of Preliminary Critical Circumstances Determination: Honey From the People's Republic of China (PRC), 60 *Federal Register* 29824-01, June 6, 1995.

[60] 19 U.S.C. §1673b(e)(1).

[61] 19 U.S.C. §1673b(e)(2).

affirmative, retroactive duties, if not yet ordered, are ordered on unliquidated entries at this time.[62] If the critical circumstances determination is negative, all retroactive suspension of liquidation is terminated, and bonds, securities, or cash deposits related to the retroactive action are released.[63]

If the ITA makes an affirmative determination of critical circumstances, the USITC's final determination must include a finding as to whether the subject imports are likely to undermine seriously the remedial effect of the AD order.[64] If both the USITC and the ITA make affirmative critical circumstances determinations, any AD duty order applies to the goods for which the retroactive suspension of liquidation was ordered.[65] If the final critical circumstances determination of either agency is negative, any retroactive suspension of liquidation is terminated, bonds and securities are released, and any cash deposits are refunded.[66]

Termination of Investigation and Suspension Agreements

The ITA or the USITC may terminate an investigation if the petitioner withdraws the petition or of its own accord if the ITA self-initiated the investigation.[67] Additionally, the ITA may, in certain circumstances, suspend an antidumping investigation in favor of an agreement with foreign exporters (known as "suspension agreements") that either eliminates the sales of less than fair value or the injurious effect.[68] One example of such an agreement is the recent suspension agreement between the various Mexican growers associations and the United States with respect to fresh tomatoes.[69] The United States agreed to suspend its antidumping investigation in exchange for a promise by various Mexican growers associations accounting for substantially all imports of fresh tomatoes from Mexico not to sell fresh tomatoes in the United States at a price less than an established reference price.[70]

Administrative and Sunset Reviews

Periodic Review

Each year, during the anniversary month of the publication of a final AD order, any interested party may request an administrative review of the order. The ITA may also self-initiate a review.[71] During the review process, the ITA recalculates the dumping margin and may adjust the amount

[62] 19 U.S.C. §1673d(c)(4).

[63] 19 U.S.C. §1673d(b)(3).

[64] 19 U.S.C. §1673d(b)(4).

[65] 19 U.S.C. §1673d(c)(4).

[66] 19 U.S.C. §1673d (c)(3).

[67] 19 U.S.C. §1673c(a)(1)(A).

[68] 19 U.S.C. §1673c(b)-(c).

[69] International Trade Administration, "Fresh Tomatoes From Mexico: Suspension of Antidumping Duty Investigation," 84 *Federal Register* 49987, September 24, 2019; Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico, September 19, 2019, available at https://enforcement.trade.gov/tomato/2019-agreement/Mexican_Tomatoes_Suspension_Agreement.pdf; U.S. Commerce Department, "U.S. Department of Commerce Finalizes Suspension Agreement on Fresh Tomatoes from Mexico," September 19, 2019, available at https://www.commerce.gov/news/press-releases/2019/09/us-department-commerce-finalizes-suspension-agreement-fresh-tomatoes.

[70] Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes from Mexico.

[71] 19 U.S.C. §1675(a).

of AD duties on the subject merchandise.[72] Suspension agreements are also monitored for compliance and reviewed in a similar fashion. The ITA must make a preliminary determination within 245 days after the last day of the anniversary month of the order or suspension agreement under review, and must make a final determination within 120 days after the publication date of a preliminary determination.[73] New exporters, who were not part of the original review, may also request an expedited review.[74]

Changed Circumstances Review

An interested party may also request a "changed circumstances" review from the ITA or the USITC at any time. Under current regulations, upon receipt of such a request, the ITA must determine within 45 days whether to conduct the review. If the ITA decides that there is good cause to conduct the review, the results must be issued within 270 days of initiation, or within 45 days of initiation if all interested parties agree to the outcome of the review.[75]

Sunset Reviews

Sunset reviews must be conducted on each AD order no later than once every five years after its publication.[76] In such a review, the ITA determines whether dumping would likely continue or resume if an order were to be revoked or a suspension agreement terminated, and the USITC conducts a similar review to determine whether injury to the domestic industry would be likely to continue or resume. If both determinations are affirmative, the duty or suspension agreement remains in place. If either determination is negative, the order is revoked, or the suspension agreement is terminated.[77]

Trends

Historical Trends (1947-1995)

During the first two decades of the GATT, countries infrequently imposed antidumping measures. Only four parties—the United States, the European Union (EU)[78], Canada, and Australia—made use of the practice, and even that was infrequent.[79] Scholars have given several non-exclusive explanations for the relative dearth of antidumping measures in this period in both the international and U.S. contexts.

In the international context, ambiguity within Article VI of the GATT may have discouraged GATT members from making use of the antidumping provisions. Specifically, Article VI does not specify a methodology for deciding whether a product is dumped nor does it set out procedures for AD investigations. Additionally, tariff rates among GATT members were still relatively high,

[72] 19 U.S.C. §1675.

[73] 19 U.S.C. §1675(a)(3)(A).

[74] 19 U.S.C. §1675(a)(2)(B).

[75] 19 C.F.R. §351.216.

[76] 19 U.S.C. §1675(c).

[77] 19 U.S.C. §1675(c); 19 C.F.R. §351.218. These sunset reviews are required in the ADA (Article 11.3).

[78] While this entity was referred to as the European Communities (EC) at the time, European Union (EU) is used here for simplicity.

[79] Mark Wu, "Antidumping in Asia's Emerging Giants," *Harvard International Law Journal* 53 (2012), p. 8.

which may have dampened the need for industries to petition for protection through antidumping measures.[80]

Table 1. Administrative Responsibilities in Antidumping Policy

	Dumping Determination	Injury Determination
1921-1954	Treasury Department	Treasury Department
1954-1979	Treasury Department	Tariff Commission (Predecessor to the USITC)
1979-Present	Commerce Department (ITA)	U.S. International Trade Commission (USITC)

Source: Douglass Irwin, "U.S. Antidumping Activity in Historical Perspective," p. 655.

Likewise, in the United States, the Antidumping Act of 1921 was enacted during a period when tariff rates were relatively high, which may have limited the usefulness of AD duties as a form of protection.[81] Administrative exigencies may have also been a factor. For example, one historian has noted that the Carter Administration shifted responsibility for making the less than fair value determination from the Treasury Department to the Department of Commerce because the "perceived indifference of Treasury to the plight of petitioning firms" may have led to fewer findings of dumping and thus fewer measures.[82]

Finally, countries, particularly those who were not GATT signatories, had higher average tariff rates and were able to impose other non-tariff barriers to trade to reduce importation of allegedly dumped products, which made resorting to AD measures unnecessary. Over the subsequent decades, dozens of developing countries entered the rules-based trading order, which restricted the use of many non-tariff barriers to trade and encouraged the reduction of tariffs. The reduction of tariffs may have led to an increase in the use of AD measures as an alternative form of protection.[83]

[80] Ibid., p. 8 n.24.

[81] Irwin, "The Rise of U.S. Anti-dumping Activity," p. 655; Wendy L. Hansen and Thomas J. Prusa, "Cumulation and ITC Decision-Making: The Sum of the Parts is Greater than the Whole," *Economic Inquiry* 34 (October 1996), pp. 746-748.

[82] Irwin, "The Rise of U.S. Anti-dumping Activity," p. 655. At the time of the change, the House Ways and Means Committee had expressed that it had "long been dissatisfied with the administration of the antidumping and countervailing duty statutes by the Treasury Department. Investigations and determinations are often too lengthy, and assessment and collection of duties are often unreasonably delayed….Given Treasury's performance over the past 10 years, many have questioned whether the dumping and countervail investigations and policy functions should remain in the Treasury Department." U.S. Congress, House, Committee on Ways and Means, *Trade Agreements Act of 1979*, report to Accompany H.R. 4537, 96th Cong., 1st sess., July 3, 1979, H.Rept. 96-317 (Washington, DC: GPO, 1979), p. 24.

[83] See, e.g., J. Michael Finger, Francis Ng, and Sonam Wangchuck, "Antidumping as Safeguard Policy," World Bank Policy Research Working Paper 2730 (December 2001); Bruce A. Blonigen and Thomas J. Prusa, "Antidumping," in E. Kwan Choi and James Harrigan, eds., Handbook of International Trade (Oxford: Blackwell, 2003). See also the discussion below.

Global Antidumping Trends, 1995-2018

The Growth of Antidumping Investigations and Measures

AD investigations and actions were uncommon in the decades following the establishment of the GATT. Before the 1990s, the United States, the European Union,[84] Canada, and Australia were responsible for more than 95% of AD actions. Many developing countries did not even have AD laws and procedures.[85] Beginning in the 1990s, however, the number of countries with AD laws multiplied; approximately half of all AD laws in effect today were implemented after 1990.[86]

With the increase in the number of countries with AD laws, the major users of AD measures have changed dramatically. In 1994, for instance, India had zero AD measures in force. [87] Twenty-five years later, in 2019, India had 275 AD measures in force, ranking second behind the United States.[88] Between 2008 and 2018, India ranked first in terms of the number of AD measures imposed per year, followed by the United States, Brazil, China, and Argentina.[89] Of the top five users of AD measures prior to 1995, only the United States remains in that top five (see **Table 2**). However, if adjusted for per-dollar imports, both the United States and the EU are relatively light users of AD measures.[90]

As more countries have begun to use AD measures, the total number of AD measures in force has increased by more than 600%, jumping from 264 measures in force in 1994 to 1,860 in 2018.[91]

Current Users and Targets of Antidumping Investigations and Measures

Many of the largest users of AD investigations and measures are also among the top targets of AD investigations and measures. China, the United States, and India, are among the top users of AD investigations and measures and are, likewise, the top targets of AD investigations and measures. AD measures are imposed primarily on heavy industrial products from the base-metal and chemical industries. **Figure 4**.

Table 2. Initiations of Antidumping Investigations, Imposition of Antidumping Measures, and Measures in Force, 2009-2018

Country	Total Initiations	Total Measures	Measures in Force in 2018
India	358	304	275
United States	275	195	361
Brazil	246	173	168

[84] While this entity was referred to as the European Communities (EC) at the time, European Union (EU) is used here for simplicity.

[85] Blonigen and Prussa, "Dumping and Antidumping Duties," NBER Working Paper 21573 (September 2015) pp. 15-16.

[86] Zanardi, "Anti-dumping: What Are the Numbers to Discuss at Doha?" p. 408; Blonigen and Prussa, "Dumping and Antidumping Duties," NBER Working Paper 21573 (September 2015) pp. 15-16.

[87] WTO Statistics on AD Measures in Force.

[88] WTO Statistics on AD Measures by Reporting Member.

[89] WTO Statistics on AD Measures by Reporting Member.

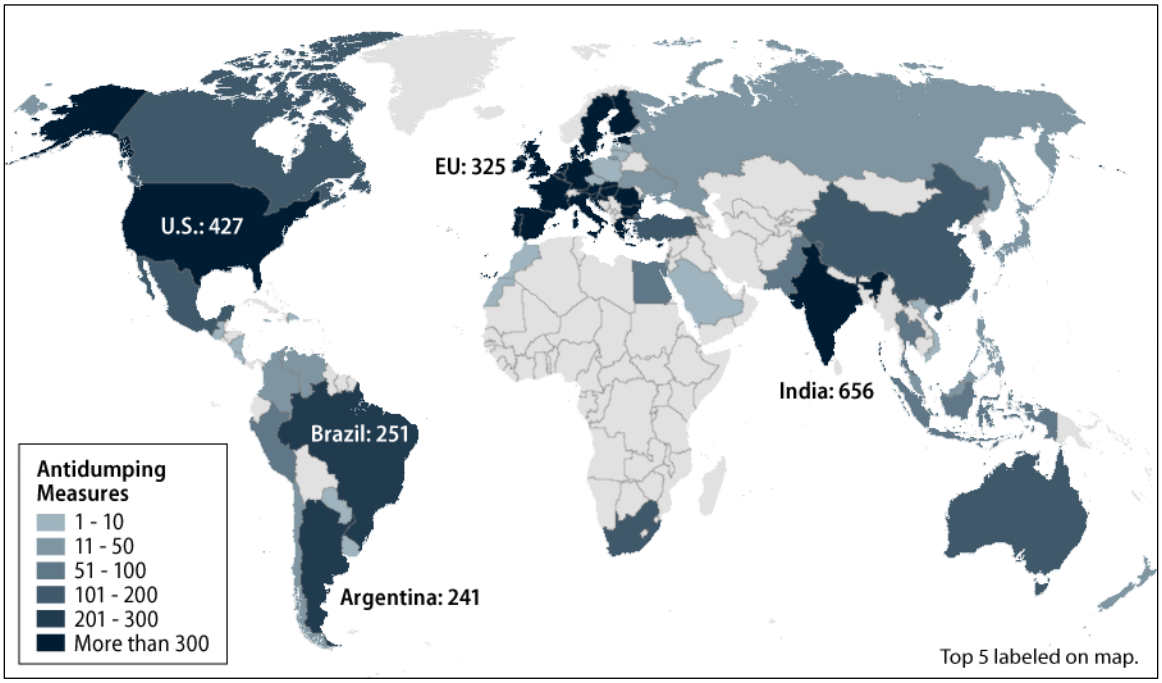
[90] Finger, et al., "Antidumping as Safeguard Policy," p. 16.

[91] WTO Statistics on AD Measures in Force.

Country	Total Initiations	Total Measures	Measures in Force in 2018
China	113	102	106
Argentina	139	93	97
Australia	143	76	64
Turkey	89	75	182
European Union	120	70	121
Pakistan	102	65	45

Source: WTO Statistics on AD Measures by Reporting Member; WTO Statistics on AD Initiations by Reporting Member; WTO Statistics on AD Measures in Force.

Figure 2. Imposition of Antidumping Measures, 1995-2018



Source: WTO Statistics on AD Measures by Reporting Member; WTO Statistics on AD Initiations by Reporting Member.

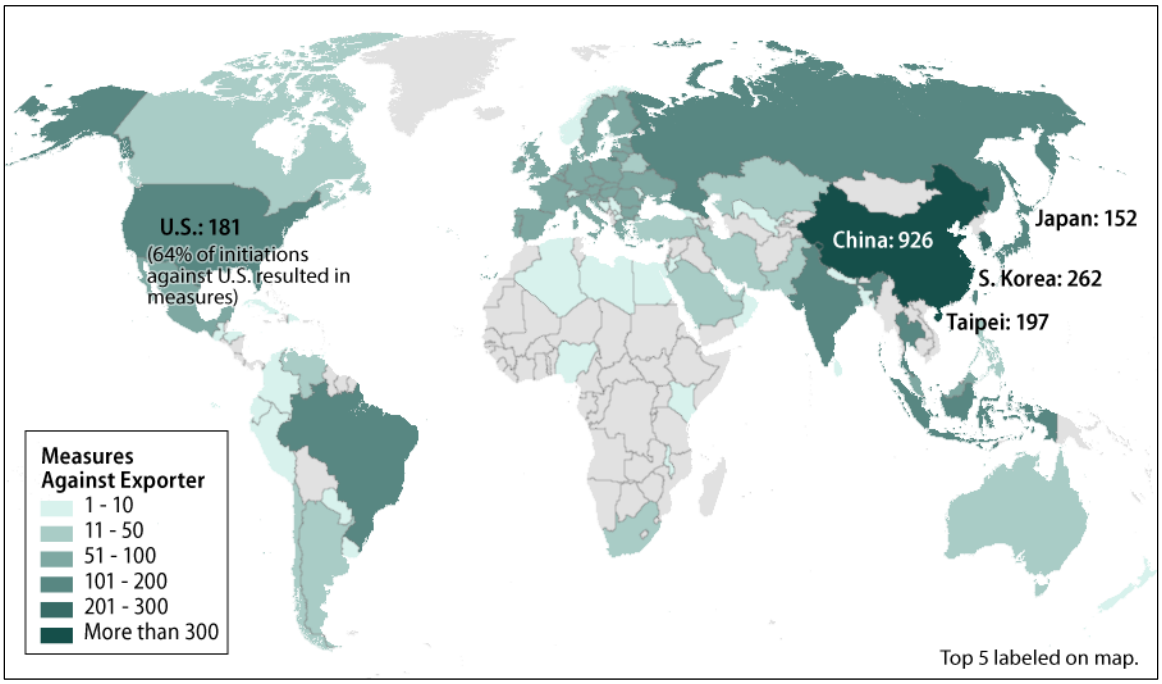
Table 3. Targets of Antidumping Investigations and Imposition of Antidumping Measures, 1995-2018

Country	Initiations Against	Measures Against
China	1269	926
Republic of Korea	417	262
United States	283	181
India	227	130
Thailand	221	146
Japan	215	152

Country	Initiations Against	Measures Against
Indonesia	208	130
Russian Federation	162	122
Brazil	148	101

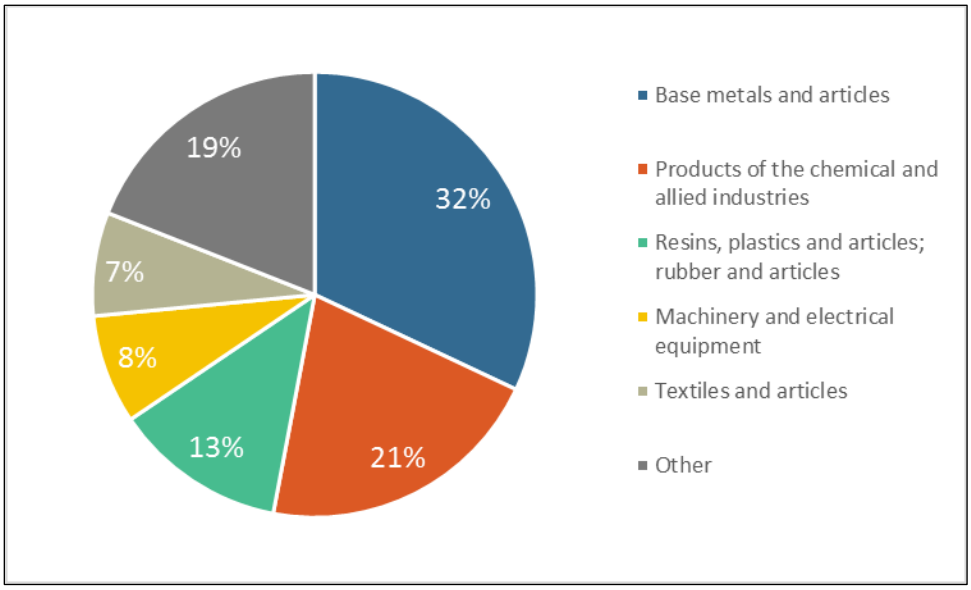
Source: WTO Statistics on AD Measures by Exporter; WTO Statistics on AD Initiations by Exporter.

Figure 3. Targets of Antidumping Measures, 1995-2018



Source: WTO Statistics on AD Measures by Exporter; WTO Statistics on AD Initiations by Exporter.

Figure 4. Percentage of Measures by Industry, 1995-2018



Source: WTO Statistics on AD Measures by Industry.

The Cause of the Growth in Antidumping Investigations and Measures

The adoption of AD laws and the imposition of measures generally occur following moments of increased market integration and trade liberalization, which may explain their expanded use. In effect, AD measures blunt the impact of new imports.[92] For example, many developing countries reduced their tariffs significantly following the Uruguay Round of trade negotiations, which created the WTO.[93] With significantly lower tariffs and fewer other means available to restrict trade, developing countries (like their developed counterparts before them) may have turned to AD laws and AD measures as a preferred means of protecting select domestic industries during their adjustment to the lower average tariff rate.[94] For example, since their entry into the WTO, India, Brazil, China, and Argentina have collectively reduced their tariffs by an average of 63% from a 17.6% applied weighted mean for all products to 6.5%. In that same time, those four countries increased their use of AD measures dramatically. In 1995, those countries had 13 measures in force. By 2018, they had a total of 646 measures in force, an increase of more than 4,800%. **Figure 5**.

[92] Blonigen and Prusa, "Dumping and Antidumping Duties," p. 14.

[93] See, e.g., Wu, "Antidumping in Asia's Emerging Giants," p. 15: "It was only after the Uruguay Round that antidumping measures became a relatively attractive instrument for most developing countries. … [The Uruguay Round] dramatically lowered tariffs and severely constrained the ability of countries to use non-tariff instruments to protect domestic industry."

[94] Two prominent scholars in their survey on antidumping noted "that waves in AD law adoption occurred when there were substantial market integration events occurring in the world economy. The first wave occurred during, and in the wake of, a number of initial successful GATT rounds, as well as the beginning integration of developed Europe. The second wave was in the wake of substantial trade liberalizations in the developing world, the successful conclusion of the Uruguay Round, and the rising membership of countries to GATT/WTO." Blonigen and Prusa, "Dumping and Antidumping Duties," p. 14.

As for AD measures being used rather than some other trade remedy, at least one scholar has argued that AD measures are the most attractive alternative legal form of contingent protection.[95] In general, AD measures are easier to impose.

Benefits of AD over Countervailing Duties and Safeguards

- **AD measures are subject to a more deferential standard of review in the WTO than countervailing duties and safeguards.** Specifically, the ADA provides that dispute settlement panels are limited to determining "whether the authorities' establishment of facts was proper and whether their evaluation of those facts was unbiased and objective." If the establishment of the facts was unbiased and objective, then a panel may not overturn the AD evaluation "even though the panel might have reached a different conclusion."[96] Countervailing duties do not receive such a deferential review.
- **AD measures are less likely to create international controversy than countervailing duties.** Specifically, countervailing duty cases require a finding that a foreign government is providing an illicit subsidy. In contrast, AD cases only require making a finding about the pricing practices of foreign producers.
- **Long term AD measures are cheaper than safeguards.** The WTO Safeguards Agreement requires that a country imposing a safeguard measure "endeavour to maintain a substantially equivalent level of concessions and other obligations" between it and the exporting Members which would be affected by such a measure.[97] Should a country fail to maintain such concessions, retaliation is authorized after three years.[98]
- **AD measures are easier to impose than safeguards.** The WTO AB has held that safeguards may only be used to manage surges in trade that were unforeseen at the time a tariff concession was negotiated.[99]
- **AD measures can be kept in place longer than safeguards.** Safeguards can be in place for a maximum of eight years.[100] AD measures in contrast can remain in place indefinitely so long as the government conducts a review of the measures every five years.

[95] Wu, "Antidumping in Asia's Emerging Giants," pp. 15-16.

[96] ADA art. 17.6(i).

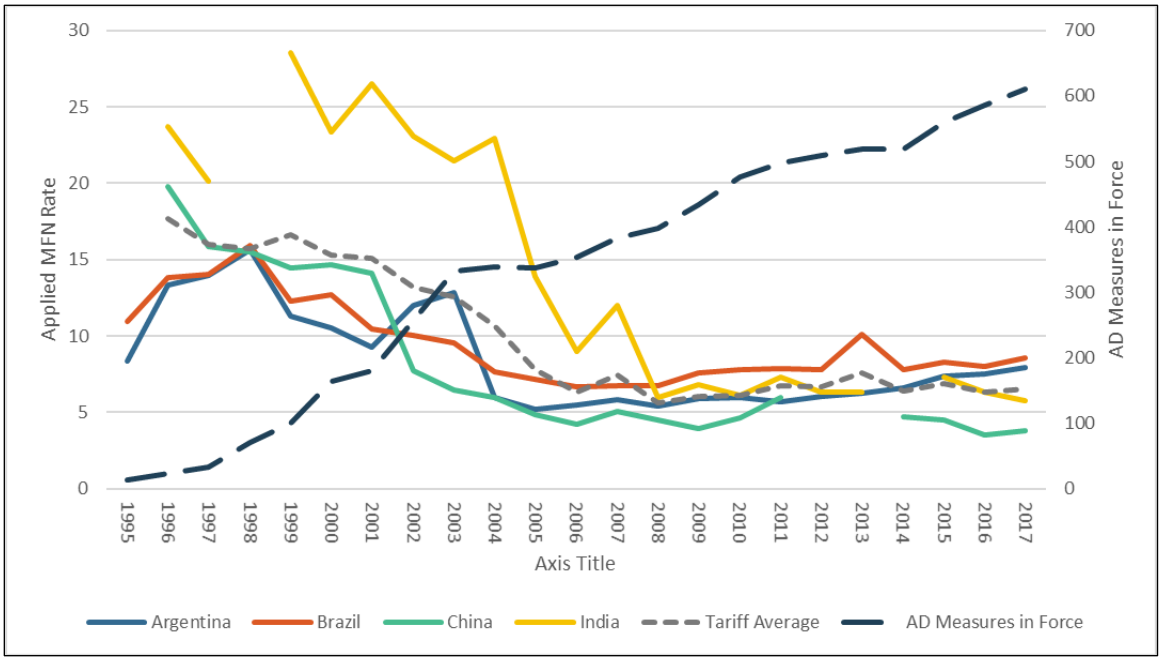
[97] Agreement on Safeguards, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments, 33 ILM 1125 (Safeguards Agreement) art. 8.

[98] Ibid.

[99] Safeguards Agreement, art. 19; Appellate Body Report, *Korea — Definitive Safeguard Measure on Imports of Certain Dairy Products* ¶85, WT/DS98/AB/R (December 14, 1999).

[100] Safeguards Agreement, art. 7.3.

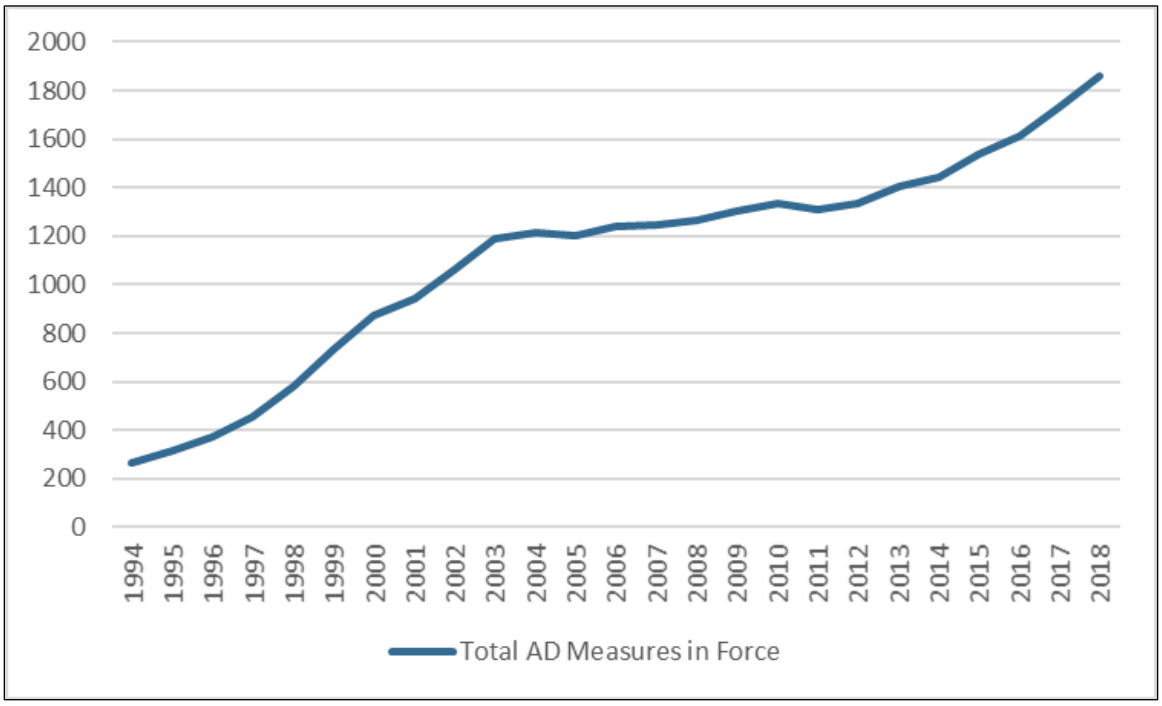
Figure 5. Average Tariff Rates and AD Measures in Force for Top Developing Country Users of AD Measures



Source: WTO Statistics on Tariff Rates; WTO Statistics on AD Measures in Force.

Notes: Tariff rate, applied, weighted mean, all products. Gaps indicate no reported rates for that year.

Figure 6. Total Number of AD Measures in Force



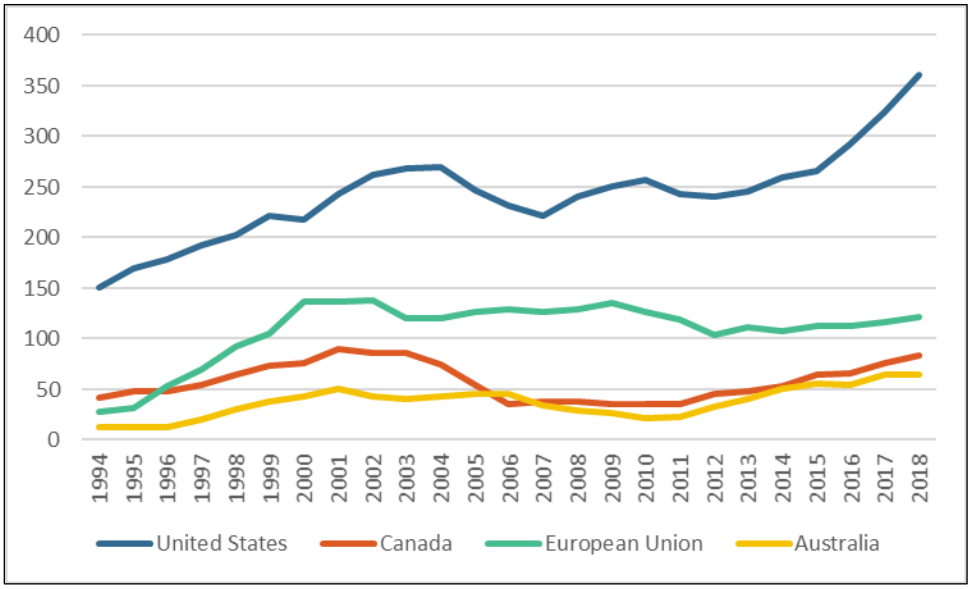
Source: WTO Statistics on AD Measures in Force.

U.S. Antidumping Trends, 1995-2018

The United States and Antidumping Investigations and Measures

As of February 2020, the United States has 384 AD orders in place affecting imports from 53 countries.[101] The oldest order, which places AD duties on pressure sensitive tape from Italy, has been in place continually since 1977. Seventy-five of the orders have been in place since before the turn of the millennium. The United States is alone among the original four users of AD measures (U.S., EU, Canada, and Australia) in significantly increasing its use of AD measures over the past two decades. The U.S. currently has the highest number of AD measures in force in its history. In comparison, the other three original users have kept the number of measures in force at or below levels reached around the millennium.

Figure 7. AD Measures in Force Among Historical Users



Source: WTO Statistics on AD Measures in Force.

The United States as the Target of Antidumping Investigations and Measures

The United States has been a frequent target of AD investigations initiated by other countries. Between 1995 and 2017, the United States was the target of 296 investigations, 181 (61%) of which led to the imposition of AD measures.[102] The largest user of AD measures against the United States is China (37), with India (30), Brazil (24), Mexico (23), and Canada (12) rounding out the rest of the top five. The reasons for the targeting of the United States are uncertain. They may, however, relate to the use of AD measures as a form of protection during a period of trade liberalization or be viewed as retaliation for the United States' heavy use of AD measures against these countries.

[101] USITC, Antidumping and Countervailing Duty Orders in Place.

[102] WTO, Statistics on Anti-Dumping, Anti-dumping initiations: by exporter; WTO, Statistics on Anti-Dumping, Anti-dumping measures: by exporter.

Issues for Congress

The Economics of Antidumping

Some argue that antidumping measures constitute "the first and best line of defense for the U.S. economy against companies and countries that resort to predatory and mercantilist tactics to make trade gains."[103] Most empirical research, however, has found such predatory pricing is rare.[104]

Furthermore, most academic analysts are highly critical of U.S. AD law and practice.[105] Economic analysts in particular note that AD policy is trade distorting. For example, AD duties deflect trade, by causing exporters to seek out markets where their goods are not subject to AD duties.[106] As one pair of economists noted, the suspension agreement on fresh tomatoes from Mexico caused Mexico to make more tomato paste to ship to the United States and to ship more fresh tomatoes to Canada, which in turn shipped more fresh tomatoes to the United States.[107] Many scholars also conclude that AD duties depress consumer activity by raising costs for consumers and propping up unproductive businesses.[108]

According to one survey, AD policies globally affect somewhere between 3% and 8% of a country's total imports, making them one of the most costly commercial policies.[109] There is also a general consensus that AD duties, when analyzed economically without consideration of their political benefits for encouraging trade liberalization, depress overall trade.[110]

Congress has generally been supportive of AD duties, and reform efforts have been limited despite the generally negative view of the practice held by many economists. Phillip Swagel, the now-director of the Congressional Budget Office and former Assistant Secretary of the Treasury for Economic Policy, recently referred to antidumping as the "third rail of trade policy," arguing that "few politicians of either party [are] willing to point out its broadly negative impact."[111] While many argue that AD laws are economically inefficient if evaluated on their face, some of

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[103] Greg Mastel, *Antidumping Laws and the U.S. .Economy* (Armonk, NY: M.E. Sharpe, 1998), p. 5.

[104] See, e.g., P.K. Matthew Tharakan, "Predatory Pricing and Anti-dumping" in George Norman and Jacque-François Thisse, eds., *Market Structure and Competition Policy.* (Cambridge: Cambridge University Press, 2004), p.71; Blonigen and Prusa, "Dumping and Antidumping Duties," p. 22.

[105] Writing in 2003, Bruce A. Blonigen and Thomas J. Prusa argued that "over the past 25 years antidumping (AD) has emerged as the most widespread impediment to trade" and observed that "AD no longer has anything to do with predatory pricing […and] all but AD's staunchest supporters agree that AD has nothing to do with keeping trade 'fair.'" Blonigen and Prusa, "Antidumping," pp. 251-253. In 2015, Blonigen surveyed the literature with respect to antidumping and found that the literature, in general, found that the newest research into antidumping continued to find that the policies were highly distortionary. Blonigen and Prusa, "Dumping and Antidumping Duties," pp. 42-61.

[106] Chad Bown and Meredith A. Crowley, "Trade Deflection and Trade Depression," *Journal of International Economics* 72, no. 1 (2007); Chad Bown and Meredith A. Crowley, "Policy Externalities: How U.S. Antidumpming Affects Japanese Exports to the E.U.," *European Journal of Political Economy* 22, no. 3 (2006).

[107] Kathy Balis and Jeffrey M. Perloff, "Trade Diversion from Tomato Suspension Agreements," *Canadian Journal of Economics* 43, no. 1 (2010), p. 129. The economists estimated that 84% of the Mexican tomatoes turned back by the trade barrier made their way back into the United States through trade diversion.

[108] See, e.g., Blonigen and Prusa, "Dumping and Antidumping Duties," p. 46: "Put bluntly, AD protection appears to be good for bad firms, but bad for good firms."

[109] Ibid., p. 47.

[110] Bown and Crowley, "Policy Externalities."

[111] N. Gregory Mankiw and Phillip L. Swagel, "Antidumping: The Third Rail of Trade Policy," *Foreign Affairs* (July 2015).

those critics have conceded "that even if AD is the largest and most frequently used contingent trade remedy (and the most costly single commercial policy), AD may nevertheless be a desirable policy as it serves an important role in promoting overall trade liberalization by acting as a pressure release valve."[112]

As Congress considers its overall goals with respect to trade policy, it might weigh dumping's economic costs against its potential role in supporting trade liberalization. Congress could, for example, encourage (in committee hearings) or direct (through legislation) Commerce to change the *de minimis* thresholds for finding that dumping has taken place or that the dumped goods have caused an injury. Such changes could reduce or encourage the use of the policy.

Antidumping, Zeroing, and the WTO Appellate Body

During the negotiations over the establishment of the WTO, the United States persistently advocated for the establishment of robust dispute settlement provisions and Congress required the President to ensure that dispute resolution provisions were included in the final agreement.[113] As a result, the agreements establishing the WTO included the Dispute Settlement Understanding (DSU), which provides for an enforceable means by which members can resolve disputes over WTO commitments and obligations.[114]

In recent years, however, several administrations have been critical of the WTO's dispute settlement system in general and with the role of the Appellate Body (AB) in particular. In December the AB ceased to function as the United States continued to block the appointment of new AB members to replace those whose terms had expired. U.S. AD policies have been at the center of that dispute and Congress might consider reevaluating those policies or renegotiating the agreement underlying the WTO DSU and ADA if it wishes to maintain a functional dispute settlement system at the WTO.

The United States has generally been successful in DSU proceedings with the exception of one area—trade remedies. Indeed, trade remedy cases in general make up the largest portion of the WTO's dispute settlement docket, with AD being the most frequently disputed policy.[115] Time and time again dispute settlement (DS) Panels and the AB have found U.S. AD policy to conflict with its international commitments. The United States is not alone. Other WTO members have also been unsuccessful in defending challenges to their implementation of the ADA.[116]

The AD policy that has been at the center of many (although not all) of these disputes is a calculation method referred to as "zeroing." In general, when calculating the dumping margin to

[112] Blonigen and Prusa, "Dumping and Antidumping Duties," p. 47.

[113] The legislative authority for the negotiations over the establishment of the WTO directed the executive "to ensure that such mechanisms within the GATT and GATT agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights." Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418 (August 23, 1988). See also CRS In Focus IF10645, *Dispute Settlement in the WTO and U.S. Trade Agreements*, by Ian F. Fergusson.

[114] See also CRS In Focus IF10645, *Dispute Settlement in the WTO and U.S. Trade Agreements*, by Ian F. Fergusson.

[115] Blonigen et al., "Dumping and Antidumping Duties," p. 41.

[116] See, e.g., Appellate Body Report, *European Communities --- Anti-Dumping Duties on Imports of Cotton-type Bed Linen from* India, WT/DS141/AB/R (March 1, 2001) (DS141); There have been at least 71 cases as of January 1, 2020 that dealt with antidumping and resulted in an adverse finding against the respondent leading either to implementation, the authorization of retaliation, or compliance proceedings finding non-compliance. Of those 71, the United States was a respondent in 27. See also Chad P. Bown and Soumaya Keynes, Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0, Peterson Institute for International Economics Working Paper 20-4 (March 2020).

determine whether the imposition of antidumping measures on exporters of a product is justified, the ITA will usually average together numerous comparisons between sales in the United States (the export prices) and sales in the home market (the normal value). The ITA will aggregate hundreds or even thousands of individual transactions together in this process. The amount by which the normal value exceeds the export price of a given product is the dumping margin. However, if the export price exceeds the normal value (that is, if the price in the United States is greater than the domestic price) and thus produces a negative result, the United States, in certain circumstances, will adjust the negative values to zero. As an economist at the Department of Justice put it, "The use of 'zeroing' will almost always increase the level of any antidumping duty, and will sometimes create a duty where none would have been imposed, had the methodology not been used."[117]

Consider the following simplified example: the average home market price and export price for a product for the entire month were both $100. As such, the dumping margin and weighted average dumping margin when averaged without zeroing were both zero because the transaction on September 7, for example, was offset by the transaction on September 25. However, when zeroing is applied, the September 25 transaction is set to zero. When this is applied across all values, the aggregate dumping margin is $55 leading to a weighted average dumping margin of 7.85%. One pair of economists determined in 2010 that if the United States were to stop zeroing, "then perhaps as much as half of all U.S. AD measures would be removed and the duties in the other cases would fall significantly."[118]

Table 4. Example of Zeroing

Sales Date	Home Market Transaction ("Normal Value")	Export Transaction ("Export Price")	Dumping Margin: No Zeroing	Dumping Margin: Zeroing
09/02/2020	$80	$70	$10	$10
09/07/2020	$100	$80	$20	$20
09/08/2020	$90	$95	-$5	$0
09/14/2020	$110	$100	$10	$10
09/20/2020	$120	$105	$15	$15
09/25/2020	$100	$120	-$20	$0
09/30/2020	$100	$130	-$30	$0
Aggregate Export Prices	$700	$700		
Wtd. Avg. Price	$100	$100		
Aggregate Dumping Margin			$0	$55
Weighted Average Dumping Margin			0.0%	7.85%

Source: Adapted from Chad P. Bown and Thomas J. Prusa, "U.S. Antidumping: Much Ado about Zeroing," World Bank Policy Research Working Paper 5352 (June 2010), p. 17.

[117] William W. Nye, "The Implications of 'Zeroing' on Enforcement of U.S. Antidumping Law," Economic Analysis Group Discussion Paper, EAG 08-10, Department of Justice (August 10, 2008).

[118] Chad P. Bown and Thomas J. Prusa, "U.S. Antidumping: Much Ado about Zeroing," World Bank Policy Research Working Paper 5352 (June 2010), p. 10. See also the example in Edwin Vermulst, *The WTO Anti-Dumping Agreement: A Commentary* (Oxford: Oxford University Press, 2005), p. 51.

The U.S. Trade Representative (USTR) asserts that this method allows the United States to "focus on those transactions in which dumping occurs."[119] Under the relevant WTO agreements, the USTR argues, "Members may calculate a margin of dumping on a transaction-by-transaction basis, and, thus, collect duties only on dumped imports, while collecting no duties on non-dumped imports. There is no requirement to offset dumped transactions with transactions in which dumping did not occur."[120] The U.S. Trade Representative has asserted that this is a common-sense method of calculating the extent of dumping that is injuring a domestic industry"[121] and that the elimination of zeroing "artificially reduces the margin of dumping,"[122]

Opponents of zeroing argue that its effect is to artificially increase dumping margins and increase the likelihood that AD measures will be imposed.[123] Specific concerns include that "zeroing makes it extremely difficult for a firm to avoid dumping" because the reasons for price variation, such as seasonality, exchange rates, and variations in shipping costs, are not taken into account. [124] As a result, products subject to greater price variation will be more frequently subject to AD duties.[125] As the United States is the only country to actively zero, it seems unlikely that zeroing is strictly necessary to ensure that AD policy is effective at preventing dumping. One economist estimated in 2008 that "zeroing could add perhaps 3-4 % to the typical U.S. antidumping duty with a cost to the U.S. of around $150 million per year when all existing U.S. antidumping orders were determined by zeroing."[126]

Since 1995, more than 30 Panel and Appellate Body (AB) decisions have found the use of zeroing in specific AD investigations to be inconsistent with the ADA;[127] the AB has held more than a dozen times that zeroing in one form or another cannot be used.[128] In all but two cases involving zeroing, the United States has been the respondent. In two early cases, the EU was the

[119] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), p. 10.

[120] Ibid., p. 97.

[121] Ibid., p. 2.

[122] Ibid., p. 10.

[123] Bown and Prusa, "Antidumping," pp. 20-22.

[124] Ibid.

[125] Ibid. This exacerbates an already problematic margin determination that is biased against seasonal or cyclical products. See James Rude and Jean-Phillipe Gervais, "Biases in Calculating Dumping Margins: The Case of Cyclical Products," *Review of Agricultural Economics* 31, no. 1 (Spring 2009); Bown and Prusa, "Antidumping," 23; Courtney Cox, "International Trade's Zero-Sum Game: How Zeroing in Accordance with the Tariff Act of 1930 Harms the American Economy and Why it Must Go," *Loyola Consumer Law Review* 28, no. 1 (2015).

[126] Nye, "The Implications of 'Zeroing' on Enforcement of U.S. Antidumping Law."

[127] Petros C. Mavroidis and Thomas J. Prusa, "Die Another Day: Zeroing in on Targeted Dumping: Did the AB Hit the Mark in *US – Washing Machines*?" European University Institute Working Papers (2018), pp. 4-5.

[128] See, e.g., Appellate Body Report, *United States---Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R (July 4, 2015); Appellate Body Report, *United States---Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (January 9, 2005). See also Chad P. Bown and Thomas J. Prusa, "U.S. Antidumping: Much Ado about Zeroing," World Bank Policy Research Working Paper 5352 (June 2010), p. 3. However, a dispute panel recently upheld the use of zeroing when applied through the weighted average-to-transaction (W-T) methodology provided in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, which can only be used in certain exception circumstances. Panel Report, *United States — Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WT/DS534/R (September 4, 2019). Although, its application was still further restricted to a specific set of circumstances. See Mavroidis and Prusa, "Die Another Day," pp. 4-5.

respondent, but it changed its practices after the AB found its implementation of the practice to be inconsistent with the terms of the ADA.[129]

The United States has been a respondent in more than 150 disputes before the WTO. Fifty-six of those involved the ADA and many of those cases involved zeroing.[130] In all the finalized cases, the United States lost or settled.[131] Indeed, CRS analysis has found that nearly half of all cases where the WTO found a U.S. practice to not be in compliance with WTO obligations involved dumping.

Much of the U.S. criticism levied at the WTO's AB over the past decade, some have argued, has been primarily the result of cases involving U.S. implementation of the ADA.[132] In a recent report listing U.S. concerns about the AB, the USTR identified six areas of "Appellate Body errors in interpreting WTO agreements" that it argues have "raised substantive concerns and undermine the WTO."[133] Five of the six concerned trade remedies, including dumping.[134] Indeed, "dump" was the most common trade-related verb in the report.[135] With respect to zeroing, the USTR argues, "The Appellate Body's invention of a prohibition on the use of "zeroing" to determine dumping margins has diminished the ability of WTO members to address dumped imports that cause or threaten injury to a domestic industry."[136]

The WTO AB's approach to trade remedies in general, and antidumping in particular, have been central in USTR's critique of the AB and thus has likely played a significant role in its decision to block appointments to the AB. However, WTO DSB debates are not over. The USTR has approvingly cited a recent DSB decision that upheld the use of zeroing in certain limited circumstances.[137]

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[129] Bown and Prusa, "Antidumping," p. 4; Appellate Body Report, *European Communities---Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (January 3, 2001).

[130] Mavroidis and Prusa, "Die Another Day," p. 7; WTO Index of Disputes by Agreement.

[131] In one of the 49, the authority for the panel lapsed. Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico, DS282.

[132] This has been a common contention of Chad Bown, one of the premier scholars of zeroing, who goes further to assert that the AB's approach to zeroing has been a central motivation for U.S. skepticism of the body. See, e.g., Bown and Prusa, "Antidumping," p. i: "The United States use of 'zeroing' in its [AD] procedures has become a political flash point threatening the legitimacy of the WTO's dispute settlement system;" Chad Bown, "Can we Save the WTO Appellate Body," (testimony, European Parliament Committee on International Trade, December 3, 2019): "The United States places a political priority on maintaining vibrant access to antidumping. Antidumping is often referred to as the 'third rail' of U.S. trade policy….[while there are many U.S. procedural concerns about the WTO AB] to some in America, there is a much bigger concern. Beginning in 1995, trading partners filed a lot of WTO disputes over U.S. use of trade defense instruments, and the [AB] simply did not show the deference that the Americans anticipated they had negotiated. There have been dozens of WTO disputes over 'zeroing' alone. Many more disputes challenge how US investigating authorities have conducted other aspects of AD investigations;" Chad Bown and Soumaya Keynes, "Zeroing: The Biggest WTO Threat You've Never Heard Of," April 9, 2019, *Trade Talks*, podcast, https://piie.com/experts/peterson-perspectives/trade-talks-episode-80-zeroing-biggest-wto-threat-youve-never-heard; Chad Bown and Soumaya Keynes, "Tarrified of Trade Talks?" (lecture, 2020 Washington International Trade Conference, Washington, DC, February 4, 2020); Chad Bown and Soumaya Keynes (lecture, 20th Judicial Conference of the United States Court of International Trade, November 18, 2019);

[133] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), pp. iii-iv. Capitalization altered.

[134] Ibid.

[135] Textual analysis done by CRS.

[136] United States Trade Representative, Report on the Appellate Body of the World Trade Organization (February 2020), pp. iii-iv. Capitalization altered.

[137] United States Trade Representative, "United States Prevails on "Zeroing" Again: WTO Panel Rejects Flawed

Appellate Body Findings," April 9, 2019, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/united-states-prevails-%E2%80%9Czeroing%E2%80%9D. Panel Report, United States — Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada, WT/DS534/R (April 9, 2019).

As Congress considers the future U.S. relationship with the WTO and the multilateral rules-based trading order, it might address the role that antidumping has played in straining that relationship. For example, Trade Promotion Authority (TPA) expires in 2021. Should Congress decide to reauthorize TPA, it may choose to direct the President to seek revisions to the WTO's DSU of the ADA to address some of these issues. Alternatively, Congress could encourage or direct Commerce to address some of the WTO members' and Appellate Body's concerns. For example, the EU and Canada once employed zeroing in antidumping investigations, but no longer do so.

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