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Trade Remedies: Countervailing Duties

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SUMMARY

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Trade Remedies: Countervailing Duties

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 and is one of the foundational principles of the World Trade Organization (WTO).

The most frequently invoked exceptions to MFN treatment are three "trade remedy" laws. These U.S. laws, which implement multilateral trade rules and agreements among WTO members, are enforced primarily through administrative investigations by two U.S. government agencies: the International Trade Administration (ITA) of the Department of Commerce 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 or 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.

Countervailing duty (CVD) laws provide 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—or threat thereof—to the domestic industry is found. 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 require presidential action in order for relief to be put into effect.

Many Members of Congress have long been interested in trade remedies. Petitioners seeking to have antidumping and countervailing duties imposed often contact their Senators and Representatives about these issues. Members also hear from importers and consumers about adverse effects when they are faced with rising duties.

While economists note that subsidies may distort markets and harm certain domestic businesses, most economists have generally seen countervailing laws and policies as economically inefficient and trade distorting. Many note that CVDs often seem to be used for protectionist purposes rather than to offset harmful trade-distorting subsidies. Some economists and policy experts, however, have acknowledged the role that these policies have played in making trade liberalization more politically feasible by providing protection for industries that might otherwise oppose such measures.

While antidumping duties are the most frequently used trade remedy, CVDs have grown in recent years, particularly against imports from China. CVDs are also of particular interest to the United States, as it is the largest user of CVDs. This report provides an overview of the current CVD laws and regulations. It also analyzes a number of recent major issues with respect to U.S. CVD policy, including whether and how to apply CVDs to nonmarket economies, and related negotiations to update WTO rules; the definition of a public body; whether to use CVDs to address currency manipulation; how to manage increasingly common transnational subsidies; the role CVDs may play in addressing subsidies granted during the COVID-19 pandemic; and the high legal costs associated with seeking the imposition of CVDs.

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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 countervailing duties, antidumping duties, and safeguards. Countervailing duty (CVD) and antidumping duty laws are enforced through administrative investigations and actions by two U.S. government agencies: the International Trade Administration (ITA) of the Department of Commerce and the U.S. International Trade Commission (USITC).[2]

CVD laws are the second most commonly used of these remedies. CVD laws provide 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 are therefore found to be sold at lower prices than similar goods produced in the United States. The relief provided is an additional import duty, calculated by the ITA, placed on the subsidized imports. Government subsidies and CVD measures can be controversial and are actively debated by proponents and opponents of these measures, as well as by policymakers While some economists acknowledge the theoretical benefits of CVDs, including to address market imperfections and potential economic harm to U.S. firms and workers from government subsidies that may be provided to foreign industries, other economists and experts argue that the economic cost of their uneven application may be greater than their theoretical benefits.[3] Specifically, many economists argue that CVDs serve as trade-distorting protectionist measures. Other experts contend that, while inefficient, CVDs may make trade liberalization more politically feasible and serve to counter potentially harmful government subsidies in global market competition.[4] The United States has long been, and remains, the most frequent user of CVDs relative to other countries.[5]

Article I, Section 9 of the U.S. Constitution empowers Congress to regulate trade with foreign countries. While Congress has delegated some of that authority to the President, it continues to play a major role in making U.S. law and shaping multilateral rules with respect to these remedies. The rise of China and its state-led economy has presented challenges to the multilateral regime that regulates the imposition of CVDs. As such, subsidies and CVDs have become more salient to policymakers in the United States and other market-led economies.

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[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, pp. 130-131.

[2] 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; CRS Report R46296, *Trade Remedies: Antidumping*, by Christopher A. Casey; CRS In Focus IF10018, *Trade Remedies: Antidumping and Countervailing Duties*, by Vivian C. Jones and Christopher A. Casey.

[3] See "Economics of Countervailing Duties" below.

[4] Ibid.

[5] See "Countervailing Duty Trends" below.

This report begins with background on the development of CVDs, a summary of the current CVD process, and an analysis of trends. It then analyses major issues with respect to U.S. CVD policy, including whether and how to apply CVDs to nonmarket economies and current discussions to revise trade rules; the definition of a public body; whether to use CVDs to address currency manipulation; how to manage increasingly common transnational subsidies; the role CVDs may play in addressing subsidies granted during the COVID-19 pandemic; and the cost of seeking the imposition of CVDs to small and medium-sized businesses.

Background

Countervailing Duty Defined

A countervailing duty is an additional tax or tariff placed on imported goods to offset certain kinds of subsidies provided by an exporting country.[6] The governing international agreements—Article VI of the General Agreement on Tariffs and Trade (GATT) and the WTO's Agreement on Subsidies and Countervailing Measures (SCM Agreement)—define a subsidy as a financial contribution, made by a government or any public body, that confers a benefit.[7] The U.S. laws implementing the agreements similarly define a subsidy as certain kinds of financial contributions, income or price supports, or certain indirect payments that confer a benefit.[8]

Not all subsidies are countervailable. Under both the SCM Agreement and U.S. law, a subsidy must be "specific" or be explicitly prohibited in order to be countervailable.[9] A subsidy is specific if it is limited in law, or in fact, to a specific industry or enterprise.[10] This requirement of specificity ensures that common government programs like financing infrastructure and funding public education are not included in the scope of countervailable subsidies.[11] A subsidy is prohibited if it is contingent upon export performance, or the use of domestic goods.[12]

Additionally, if the subsidizing country is a party to the SCM Agreement (as all WTO members are), the subsidy must be "actionable" to be countervailable. An actionable subsidy is one that causes an injury to a domestic industry, nullifies or impairs a benefit of other WTO members, or causes "serious prejudice" to the interests of another member.[13]

[6] Walter Goode, *Dictionary of Trade Policy Terms*, 5th ed. (Cambridge: Cambridge University Press, 2020), s.v. "countervailing measures."

[7] Agreement on Subsidies and Countervailing Measures art. 1.1, 1869 U.N.T.S. 154 (SCM Agreement); Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 2.195, WTO Doc. WT/DS436/AB/R (adopted December 19, 2014).

[8] Tariff Act of 1930, P.L. 71-361 (June 17, 1930), 46 Stat. 590, as amended by the Trade Agreements Act of 1979, P.L. 96-39 (July 26, 1979) § 771; 93 Stat. 144, 176, codified as amended at 19 U.S.C. § 1677 (2018).

[9] SCM Agreement arts. 2-3; 19 U.S.C. § 1677(5A).

[10] SCM Agreement art. 2; 19 U.S.C. § 1677(5A)(D).

[11] Alan O. Sykes, "Countervailing Duty Law: An Economic Perspective," *Columbia Law Review* 89, no. 2 (March 1989), p. 204.

[12] SCM Agreement art. 3; 19 U.S.C. § 1677(5A)(B)-(C).

[13] SCM Agreement art. 5.

The Origins and Development of Countervailing Duties

The turn of the twentieth century was a time of vigorous debate in the United States and Europe about the meaning of free trade and the role of subsidies in international commerce.[14] Much of the debate centered on sugar. Various European states had placed high tariffs on imports of sugar, while also subsidizing its export to bolster domestic production. By the 1880s, global sugar prices were plummeting.[15] Many political advocates of more open trade were unsure of what to do. Frank Taussig, a leading U.S. economist (who would later become chair of the U.S. Tariff Commission), noted that "the situation was so exceptional that even a convinced free-trader might accede to [measures for] ending it [because] the bounty system was certainly a greater violation of the principle of free-trade than the prohibition or taxation of bounty-fed imports."[16]

One of the outcomes of this debate was the creation of what was arguably the first modern multilateral trade institution—the Permanent Commission established by the Brussels Convention.[17] Another was the development of the modern regime of countervailing duties—the oldest of the modern trade remedies—at both the national and international levels.

Beginning in the 1890s, U.S. trade laws began to include countervailing duty provisions designed to offset export subsidies (then known as "export bounties"). The Tariff Act of 1890 included an additional duty on certain sugar from "any country when and so long as such country pays or shall hereafter pay, directly or indirectly, a bounty on the exportation of [certain sugars]."[18] In 1897, Congress expanded countervailing duties to cover all goods receiving an export bounty. The new act provided

> That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise … there shall be levied … an additional duty equal to the net amount of such bounty or grant…. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury….[19]

This provision remained relatively unchanged for two decades.[20] In 1922, Congress expanded the CVD provision beyond export bounties to include subsidies granted for the "manufacture or production" of goods.[21] Administration of CVDs remained with the U.S. Treasury.

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[14] E.g., Frank Trentmann, *Free Trade Nation: Commerce, Consumption, and Civil Society in Modern Britain* (Oxford: Oxford University Press, 2008), pp. 1-7; Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014), pp. 43-59.

[15] Fakhri, *Sugar and the Making of International Trade Law*, p. 42.

[16] Frank W. Taussig, "The End of Sugar Bounties," *Quarterly Journal of Economics* 18, no. 1 (November 1903), pp. 133-134.

[17] International Convention Relative to Bounties on Sugar, March 5, 1902, 95 B.F.S.P. 6. Michael Fakhri, "The Institutionalisation of Free Trade and Empire: A Study of the 1902 Brussels Convention," *London Review of International Law* 2, no. 1 (2014), p. 50; Fakhri, *Sugar and the Making of International Trade Law*, pp. 21-25.

[18] Tariff Act of 1890, P.L. 51-1244 (October 1, 1890) Schedule E, 26 Stat. 567, 584. Congress slightly modified this version of the countervailing duty in 1894. Tariff Act of 1894, P.L. 53-349 (August 27, 1894) Schedule E, 28 Stat. 509, 521.

[19] Tariff Act of 1897, P.L. 55-11 (July 24, 1897) § 5, 30 Stat. 151, 205.

[20] Tariff Act of 1909, P.L. 61-5 (August 5, 1909) § 6, 36 Stat. 11, 85; Tariff Act of 1913, P.L. 63-16 (October 3, 1913) § 4(E), 38 Stat. 114, 193.

[21] Tariff Act of 1922, P.L. 67-318 (September 21, 1922) § 303, 42 Stat. 858, 935-946. The expansion was suggested by William S. Culbertson, then President of the U.S. Tariff Commission. He also noted that such an expansion should be considered closely with congressional action on antidumping. U.S. Congress, Senate Committee on Finance, *Tariff Act*

In 1947, 23 countries, including the United States, signed GATT, a multilateral agreement with the objective of "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."[22] The agreement established the foundation of the post-World War II rules-based trading system. Article VI of that agreement allowed the imposition of CVDs to offset bounties or subsidies on manufacture, production, or export of a product.[23]

By the 1970s, the United States was growing increasingly concerned about subsidies[24] and many Members of Congress frequently critiqued the Treasury Department's infrequent application of CVDs.[25] Treasury imposed CVDs 41 times between 1897 and 1959; it imposed none between 1959 and 1968.[26] Throughout the late 1960s and 1970s, many Members of Congress, the Senate Committee on Finance, and the House Committee on Ways and Means expressed dissatisfaction with the administration of CVD laws, particularly with the time Treasury took in responding to industry petitions.[27] Perhaps in response to congressional pressure or changing economic circumstances in the late-1960s, Treasury began issuing more CVDs.[28] Between 1967 and 1974, Treasury imposed 17 CVDs, including its first ever on a domestic subsidy (all previous CVDs had been placed on export subsidies).[29] Despite the increase in CVD orders, in 1974, Congress amended U.S. CVD law to make the petition and investigation process more formal and to limit Treasury's discretion in the timing of investigations. Treasury was now required to make a

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of 1921, hearing on H.R. 7456, vol. 1, 67th Cong., 2nd sess., S.Doc. 67-108 (Washington, DC: GPO, 1922), pp. 60-61. A number of the expanded provisions related to countervailing duties were noted to be "similar in principle to that imposed, under the Brussels sugar convention, by the major European countries upon bountied exports of sugar." U.S Congress, House, *Sixth Annual Report of the United States Tariff Commission*, 67th Cong., 4th sess., December 5, 1922, H.Doc. 67-480 (Washington, DC: GPO, 1923), p. 52.

[22] General Agreement on Tariffs and Trade Preamble, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

[23] Ibid. art. VI.

[24] In 1972, in response to a request by the United States, a GATT Working Group was established to consider the impact of domestic subsidies on stimulating exports and on refining a definition of what constituted a subsidy. U.S. Congress, Senate Committee on Finance, GATT Provisions on Unfair Trade Practices, committee print, 93rd Cong., 1st sess. (Washington, DC: GPO, 1973), p. 5.

[25] E.g., U.S. Congress, Senate Committee on Finance, *Trade Reform Act of 1974*, report to accompany H.R. 10710, 93rd Cong., 2nd sess., S.Rept. 93-1298 (Washington, DC: GPO, 1974), p. 183.

[26] Richard N. Cooper, "U.S. Policies and Practices on Subsidies in International Trade," in *International Trade and Industrial Policies*, ed. By Steven J. Warnecke (London: Macmillan, 1978), p. 114.

[27] E.g., U.S. Congress, Senate Committee on Finance, *Trade Reform Act of 1974*, report to accompany H.R. 10710, 93rd Cong., 2nd sess., S.Rept. 93-1298 (Washington, DC: GPO, 1974), p. 183: "In the past, the administration of countervailing duty law has been subject to considerable criticism…The Committee [on Finance] has been concerned that the Treasury Department has used the absence of time limits to stretch out or even shelve countervailing duty investigations"; 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: "The Committee has 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. Staffing in terms of manpower clearly is inadequate. Far too little attention has been paid to the need for qualified specialists such as engineers and accountants to deal with the growing complexity of countervailing duty and antidumping cases. […] 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."

[28] Cooper, "U.S. Policies and Practices on Subsidies in International Trade," p. 114.

[29] Ibid.; John J. Barceló III, "A History of GATT Unfair Trade Remedy Law—Confusion of Purposes," *World Economy* 14, no. 3 (September 1991), p. 324; Department of Treasury, Bureau of Customs, " X-Radial Steel Belted Tires from Canada," 38 *Federal Register* 1018-01, January 8, 1973.

preliminary determination on a petition within six months and a final determination within 12.[30] The amendment led to a record number of investigations in 1975 leading to 30 CVD orders; the added procedures and formalities also increased the cost to file petitions.[31]

Despite the increase in CVDs, many Members of Congress and the House Committee on Ways and Means continued to express concerns over the handling of CVD investigations.[32] In response, the Carter Administration shifted responsibility for making determinations on the existence of a subsidy to the newly created ITA in the Department of Commerce in 1979.[33]

During the GATT's Tokyo Round (1974-1979) of multilateral trade negotiations, 27 members of GATT negotiated the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code) of 1979.[34] The Subsidies Code provided guidance on the interpretation of Article VI of the GATT. Specifically, the code disciplined both the provisioning of subsidies and the imposition of CVDs. During the negotiations, the United States agreed to add an injury determination to its CVD laws, which it had been exempted from under GATT 1947.[35] The USITC was charged with administering the injury determination.[36] According to one commentator, "To the United States, the [Subsidies] Code is an instrument to control subsidies. To the rest of the world, it is an instrument to control US countervailing duties."[37]

In the years after the Commerce Department took over the administration of CVD laws and following the drafting of the Subsidies Code, U.S. use of CVDs increased dramatically relative to the rest of the world. According to a pair of scholars, "between 1979 and 1988 the United States initiated 371 actions while all other countries combined initiated only 58."[38] As countries came together during the Uruguay Round (1986-1993) of multilateral trade negotiations, which led to the creation of the WTO, participants drafted the SCM Agreement and included, for the first time, a definition of subsidy.[39]

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[30] Trade Act of 1974, P.L. 93-619 (January 2, 1975) chap. 3, §331, 88 Stat. 1978, 2050.

[31] Cooper, "U.S. Policies and Practices on Subsidies in International Trade," p. 114; Jürgen Stehn, " Subsidies, Countervailing Duties, and the WTO: Towards an Open Subsidy Club," Kieler Diskussionsbeiträge, No. 276, Institut für Weltwirtschaft, p. 4. See "Small and Medium Sized Business Access," below.

[32] U.S. Congress, *Trade Agreements Act of 1979*, p. 24.

[33] Department of Commerce, Department Organization order No. 10-3, Transmittal No. 484, "Under Secretary for the International Trade Administration; Authority and Functions," 45 *Federal Register* 6141, January 25, 1980; Executive Office of the President, "Reorganization Plan No. 3 of 1979," 44 *Federal Register* 69273, December 3, 1979.

[34] Agreement on the Interpretation and Application of Articles VI, XVI, and XVIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 1186 U.N.T.S. 204 [hereinafter Subsidies Code].

[35] Trade Agreements Act of 1979, P.L. 96-39 (July 26, 1979) §701(a); 98 Stat. 144, 151.

[36] Ibid.

[37] Attributed to Patrick Maserlin. qtd. in Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995), p. 183.

[38] Trebilcock and Howse, *The Regulation of International Trade*, p. 183. At the time the United States was the single largest import market.

[39] SCM Agreement art. 1.

Countervailing Duty Laws and Investigations

U.S. Statutes

Statutory authority for CVD 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. §§1671 *et seq.*). The law requires the imposition of a countervailing duty if (1) the ITA determines that the government or a public entity of a foreign country is providing a countervailable subsidy for the manufacture, production, or export of merchandise imported into the United States;[40] and, in most cases, (2) the USITC determines that an industry in the United States is materially injured or is threatened with material injury or that the establishment of an industry is materially retarded, by reason of imports of that merchandise.[41] The statute requires that a countervailing duty be imposed equal to the amount of the net countervailable subsidy.[42]

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

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

ITA: 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.

USITC: 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 unilateral imposition of CVDs, including Article VI of the GATT 1994[43] and the WTO's SCM Agreement.[44] Both of these agreements were based on U.S. CVD law and practice and the United States was a proponent of such agreements.

All WTO members are subject to Article VI of the GATT and the SCM Agreement. Article VI of the GATT allows the imposition of CVDs to offset a subsidy provided for the manufacture, production, or export of merchandise.[45] The SCM Agreement elaborates on the principles established in Article VI of the GATT[46] and provides more detail on several issues including the definition of a subsidy, the kinds of subsidies that may be countervailed, how often CVDs must be reviewed once imposed, special treatment for developing countries, and more.[47]

[40] 19 U.S.C. §1671(a)(1).

[41] 19 U.S.C. §1671(a)(2). This injury requirement is waived if the country in question is not a party to the WTO Agreement on Subsidies and Countervailing Measures (see below).

[42] 19 U.S.C. §1671(a).

[43] General Agreement on Tariffs and Trade 1994 art. 6, 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].

[44] SCM Agreement.

[45] GATT 1994 art. VI, ¶ 3.

[46] Appellate Body Report, *Brazil-Desiccated Coconut*, p. 14, WTO Doc. WT/DS22/AB/R (adopted March 20, 1997).

[47] SCM Agreement. The agreement also defined subsidy for the first time in a major multilateral instrument.

The SCM Agreement allows the imposition of CVDs in cases where a government or public body provides certain kinds of subsidies and those subsidies injure the domestic industry, nullify or impair a benefit, or seriously prejudice the interests of a member.[48] Additional remedies include certain provisional measures, price undertakings, and multilaterally sanctioned countermeasures under the WTO's dispute settlement system.[49]

WTO members with CVD laws or practices that violate the terms of the SCM Agreement may be subject to WTO dispute settlement proceedings, if challenged by other members.[50]

Countervailing Duty Investigations and Measures

Initiation

The ITA initiates countervailing investigations either on its own initiative[51] or in response to a petition filed by a domestic interested party simultaneously with the USITC and the ITA.[52] Once a petition is received, the ITA has 20 days to determine whether it contains the necessary elements and has been filed by an eligible party.[53] If the petition meets the requirements, the ITA must initiate an investigation (**Figure 1**).

Any domestic interested party can file a petition for relief under U.S. CVD law.[54] The USITC and the ITA have published guidance on the type of information that must be submitted as part of a petition.[55] The USITC's Trade Remedy Assistance Office provides technical assistance and advice to interested parties and provides legal assistance to eligible small businesses to enable them to prepare petitions.[56]

[48] SCM Agreement art. 5.

[49] Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, p. 87, WTO Doc. WT/DS217/AB/R; WT/DS234/AB/R (adopted January 27, 2003).

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

[51] 19 U.S.C. §1671a(a).

[52] 19 U.S.C. §1671a(b). Department of Commerce regulations on what a petition must contain are codified at 19 C.F.R. § 351.202.

[53] 19 U.S.C. §1671a(c)(1)(A).

[54] 19 C.F.R. §351.202.

[55] The requirements for a petition are codified at 19 C.F.R. §351.202 (ITA), and 19 C.F.R. §§ 207.10, 207.11. The ITA has published guidelines for the petitions. ITA, Guidelines for Requesting Relief Under U.S. Countervailing Duty Law, https://enforcement.trade.gov/petitioncounseling/Guidelines-for-CVD-Petitions-09-30-2015.pdf. The USITC publishes a handbook that includes guidance on the petition process. USITC, Antidumping and Countervailing Duty Handbook, 14th ed., Publication 4540, June 2015, https://www.usitc.gov/trade_remedy/documents/handbook.pdf.

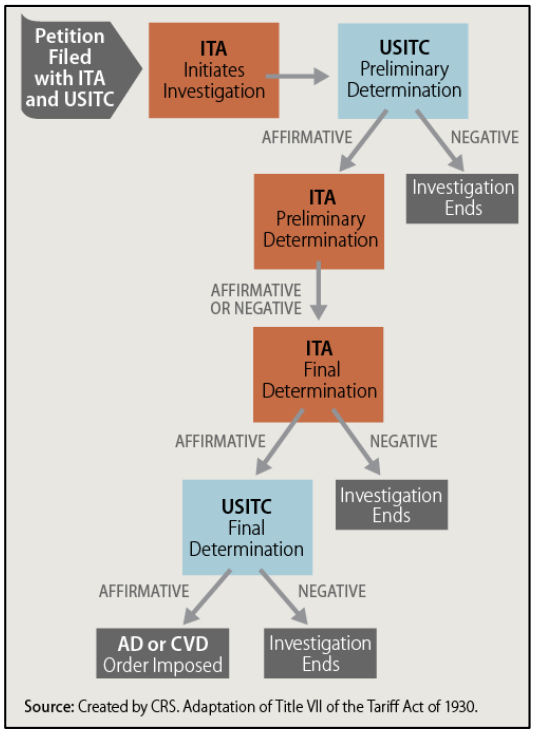
[56] 19 U.S.C. §1339.

Preliminary Determinations

The USITC begins the investigation. The central question of its investigation is whether there is a reasonable indication that the relevant imports have caused injury or likely injury to a domestic industry, or materially retarded the establishment of an industry.[57] The USITC must also determine whether the size of the imports are negligible. In most circumstances, the USITC must make a preliminary determination no later than 45 days after the day the petition was filed or when ITA initiated the investigation.[58] If the USITC issues a negative preliminary determination or finds negligible imports, the investigation ends.[59]

The ITA's preliminary investigation is concerned with determining whether there is a reasonable basis to suspect that a countervailable subsidy is being provided.[60] In most cases, the ITA must make its determination within 65 days after it initiated the investigation, but not before the USITC has issued its preliminary determination.[61]

Figure 1. CVD Investigation Process



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

If the ITA's preliminary determination is affirmative, it estimates a countervailable subsidy rate for each exporter and producer individually investigated, as well as an "all others rate."[62] If producing individual estimates is not practicable, the ITA may issue a single country-wide subsidy rate instead.[63] These estimated rates are published in the *Federal Register* and the Secretary of Commerce will normally then order 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, but to require the posting of cash deposits, bonds, or other appropriate securities to cover the duties (plus the estimated CVD) for each subsequent entry into the U.S. market.[64]

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[57] 19 U.S.C. §1671b(a)(1).

[58] 19 U.S.C. §1671b(a)(2). In cases in which 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. Ibid.

[59] 19 U.S.C. §1671b(a)(1); 19 C.F.R. §207.18.

[60] 19 U.S.C. §1671b(b)(1).

[61] 19 U.S.C. §1671b(b)(1); 19 C.F.R. § 351.205(b)(1). If an investigation is extraordinarily complicated, the Secretary may give notice and the ITA will have 130 days to complete its investigation. 19 U.S.C. §1671b(c); 19 C.F.R. § 351.205(b)(2). If there is an upstream subsidy allegation, the ITA will have 250 days. 19 U.S.C. §1671b(g); 19 C.F.R. § 351.205(b)(3). If an investigation is both extraordinarily complicated and includes an upstream subsidy investigation, the ITA will have 310 days. 19 C.F.R. § 351.205(b)(3).

[62] 19 U.S.C. §1671b(d)(i).

[63] 19 U.S.C. §1671b(d)(ii).

[64] 19 U.S.C. §1671b(d); 19 C.F.R. § 351.205(c)-(d).

Whether the ITA's preliminary determination is affirmative or negative, the ITA continues the investigation to the final stage (if it is negative, the ITA does not order a suspension of liquidation) and the USITC continues its investigation. 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 (for a timeline on CVD investigations, see **Figure 2**).[65]

Final Determinations

Unless the Secretary has determined that the case is extraordinarily complicated, the ITA must make its final determination within 75 days of the preliminary determination.[66] Before issuing a final determination, the ITA must hold a hearing upon request of any party to the proceeding and permit the parties to file written materials.[67] 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.[68] If the ITA's final determination is affirmative, it orders the suspension of liquidation if it has not already done so.[69] 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.[70]

If the ITA's final determination if affirmative, the USTIC must usually finalize its determination within 45 days.[71] If the ITA's final determination is negative, then the USITC may take up to 75 days. (See **Figure 2**.)[72]

Critical Circumstances

Following continued congressional concerns about delays in imposing CVDs,[73] Congress enacted a "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]."[74]

If a petitioner alleges in its original petition or at any time more than 20 days before ITA makes a final determination that critical circumstances exist in a CVD case[75] (which would impose

[65] ITA: 19 C.F.R. §§351.309-351.310(c); USITC: 19 C.F.R. §207.21.

[66] 19 U.S.C. §1671d(a)(1).

[67] 19 C.F.R. §§351.309-351.310(c).

[68] 19 U.S.C. §1671d(c)(3).

[69] 19 U.S.C. §1671d(c)(1). Commerce would not suspend liquidation if its preliminary determination were negative.

[70] 19 U.S.C. §1671d(d).

[71] 19 U.S.C. §1671d(b)(2).

[72] 19 U.S.C. §1671d(b)(3).

[73] See "Origins and Development of CVDs" above.

[74] 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. . This practice has since been incorporated into the WTO regime, subject to specific conditions, in Article 20.6 of the SCM Agreement.

[75] 19 U.S.C. §1671b(e).

additional retroactive CVDs that one would not normally obtain), then the ITA determines whether

- (A) the countervailable subsidy is inconsistent with the SCM Agreement, and
- (B) there have been massive imports of the subject merchandise over a relatively short period.[76]

If the ITA makes an affirmative critical circumstance finding, it extends the suspension of liquidation of any unliquidated entries of merchandise (entries for which estimated CVD 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.[77]

Whether or not the ITA's initial critical circumstances determination is affirmative, if its final determination on subsidies is affirmative, the ITA must also include a final determination on critical circumstances. If the final determination on critical circumstances is affirmative, retroactive duties, if not yet ordered, are ordered on unliquidated entries at this time.[78] 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.[79]

The USTIC also evaluates whether retroactive application is appropriate. If the ITA finds that critical circumstances exist, the USITC evaluates the timing and volume of imports, the rapid increase in inventories and any other circumstances that might undermine the CVD order.[80]

Termination of Investigation and Agreements

The ITA or the USITC may terminate an investigation if the petitioner withdraws the petition. If the ITA self-initiated the investigation, the ITA may terminate the investigation of its own accord.[81] Additionally, the ITA may, in certain circumstances, suspend a CVD investigation in favor of a "suspension agreement" with the country of export (or with exporters who account for substantially all the exported merchandise at issue) that either eliminates or offsets the alleged subsidy, eliminates the injurious effects of the imports, or imposes a quantitative restriction on the exports.[82]

One example of such an agreement is the suspension agreement between Mexico and the United States with respect to sugar.[83] The United States agreed to suspend its CVD investigation in exchange for a promise by Mexico "not to provide any new or additional export or import substitution subsidies on the subject merchandise and has agreed to restrict the volume of direct

[76] 19 U.S.C. §1671d(a)(2).

[77] 19 U.S.C. §1671d(e)(2).

[78] 19 U.S.C. §1671d(c)(4).

[79] 19 U.S.C. §1671d(c)(4).

[80] 19 U.S.C. §1671d(c).

[81] 19 U.S.C. §1671c(a)(1)(A).

[82] 19 U.S.C. §1671c(b)-(c).

[83] Department of Commerce, International Trade Administration, "Sugar from Mexico: Suspension of Countervailing Duty Investigation," 79 *Federal Register* 78044, December 29, 2014.

or indirect exports to the United States of sugar from all Mexican producers/exporters in order to eliminate completely the injurious effects of exports of this merchandise to the United States."[84]

Administrative and Sunset Reviews

Periodic Review

Each year, during the anniversary month of the publication of a final CVD order, any interested party may request an administrative review of the order.[85] The ITA may also self-initiate a review.[86] During the review process, the ITA recalculates the CVD margin and may adjust the amount of CVD duties on the subject merchandise.[87] 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.[88] New exporters, who were not part of the original review, may also request an expedited review.[89]

Changed Circumstances Review

An interested party may also request a "changed circumstances" review from the ITA or the USITC at any time.[90] Under current regulations, upon receipt of such a request, the ITA must determine within 45 days whether to conduct the review.[91] 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.[92]

Sunset Reviews

Sunset reviews must be conducted on each CVD order no later than once every five years after its publication.[93] In such a review, the ITA determines whether a countervailable subsidy would likely continue or resume if an order were to be revoked or a suspension agreement terminated, and the USITC determines 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.[94]

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[84] Ibid.

[85] 19 U.S.C. §1675(a)(1); 19 CFR §351.213.

[86] 19 U.S.C. §1675(a)(1).

[87] 19 U.S.C. §1675(a)(1)(A).

[88] 19 U.S.C. §1675(a)(3)(A).

[89] 19 U.S.C. §1675(a)(2)(B).

[90] 19 U.S.C. §1675(b).

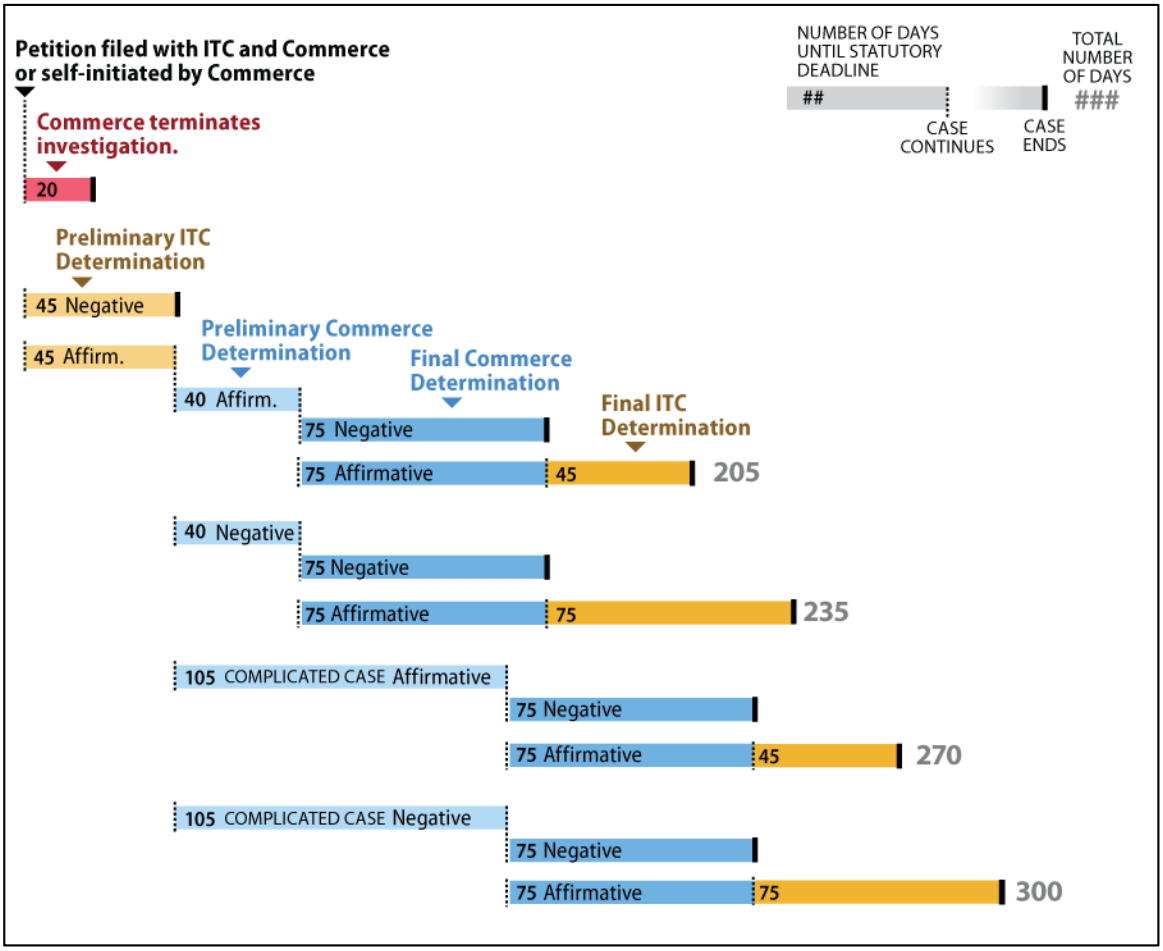
[91] 19 C.F.R. §351.216(b).

[92] 19 C.F.R. §351.216(e).

[93] 19 U.S.C. §1675(c).

[94] 19 U.S.C. §1675(c); 19 C.F.R. §351.218. These sunset reviews are required in the SCM Agreement (Article 21).

Figure 2. Countervailing Duty Investigation Timeline



Source: CRS, based on USITC, Antidumping and Countervailing Duty Handbook, 14th ed., June 2015, p. B-3.

Countervailing Duty Trends

U.S. CVD investigations and actions were relatively uncommon until the 1970s. Despite having CVD statutes on the books since the late nineteenth century, between 1897 and 1967, the United States imposed CVDs 41 times.[95] The use of CVDs by the United States began to increase in the late 1960s, leading to a dramatic increase in use during the 1970s and 1980s, with a slight decline in the late 1980s.[96] The increase has been attributed to various economic changes, including the decline in overall tariff rates during the earlier GATT rounds, more export competition as other countries developed or rebuilt their economies, increased congressional interest, oversight, and

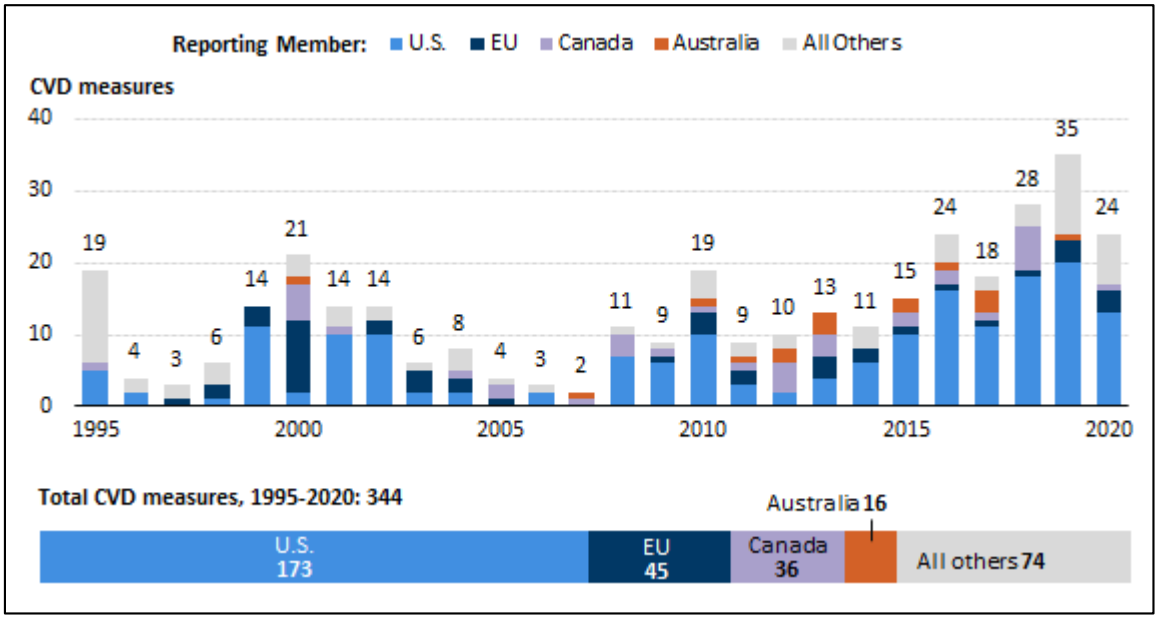
[95] Richard N. Cooper, "U.S. Policies and Practices on Subsidies in International Trade," in *International Trade and Industrial Policies*, ed. By Steven J. Warnecke (London: Macmillan, 1978), p. 114.

[96] Ibid.: "From 1897 to 1959 countervailing duties were imposed on only 41 occasions, and between 1959 and 1967 none were imposed. Between 1967 and 1974, in contrast, countervailing duties were imposed 17 times. The large increase reflects in part the overvaluation of the dollar starting in· the late sixties, the successful conclusion of the Kennedy Round of trade negotiations (negotiations in process usually inhibit any restrictive action), and perhaps also increasing reliance by other countries on various export-promoting devices." After 1979, U.S. CVD investigations increased at a rapid pace relative to the rest of the world.

legislative action that shifted responsibility for administering CVDs from Treasury to Commerce in 1979.[97] Following the establishment of the WTO in 1994, the use of CVDs began to increase again, and has continued to do so for the past 25 years (**Figure 3**).[98]

A minority of WTO members make use of the remedy. Over the past 25 years, 24 of 159 WTO member countries have imposed CVD measures.[99] During that time, the United States been the single largest user of CVD measures.[100] The European Union, Canada, and Australia have been the other major historical users of CVDs, although no other country approaches the United States in terms of frequency of initiating investigations and imposing countervailing measures.[101] Between 1995 and 2020 the United States was responsible for approximately half of all CVD measures put in place (**Figure 3**).[102]

Figure 3. CVD Measures by Reporting Member



Source: WTO Statistics on CVD Measures by Reporting Member.

[97] Ibid.; John Jackson, *The World Trading System: Law and Policy of International Economic Relations* (Cambridge, MA: MIT Press, 1989), p. 257; see also "The Origins and Development of CVDs" above.

[98] WTO Statistics on CVD Measures by Reporting Member.

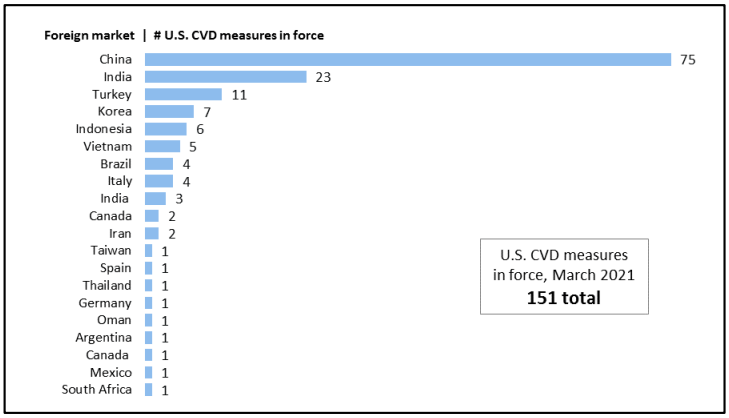
[99] Ibid.

[100] Ibid.

[101] Ibid.

[102] Ibid.

Figure 4. U.S. CVD Measures in Force



Source: USITC, available at https://www.usitc.gov/trade_remedy/documents/orders.xls.

During this time, the United States imposed 173 CVD orders, nearly four times that of the European Union (45), the next largest user of CVDs.[103] U.S. use of CVD measures declined between 2003 and 2005 before increasing rapidly after 2006. This followed Commerce's decision to allow the simultaneous imposition of antidumping duties and CVDs and to allow the imposition of CVDs on nonmarket economies (previously they had argued that they had no authority to do so).[104] Since then, China has become the largest target of U.S. CVD orders.[105] The United States is alone among the four major historical users of CVD measures in increasing its use of CVDs over the past decade.[106] However, China and India have gradually increased their use of CVDs during this period.[107] As of March 2021, the United States had 151 CVD orders in place affecting imports from 21 countries (**Figure 4**).[108] Nearly half of CVD orders are imposed on base metals and articles, an industry long plagued by global excess capacity and a frequent recipient of government support (**Figure 5**).[109] The chemical, plastic, and machinery industries are the next largest targets of CVD orders imposed between 1995 and 2019.[110]

In the United States, CVD investigations and orders are less common than their antidumping counterparts. CVD orders represent 27% of all trade remedies in place, with AD orders making up the remaining 73%.[111] By country, China is the target of nearly half of all U.S. CVD orders currently in force, followed by India with 15%.[112] All the U.S. CVD orders on China have been put in place since 2007, when the United States reversed its long-standing opposition to placing CVDs on nonmarket economies.

[103] WTO Statistics on CVD Measures by Reporting Member.

[104] See "Non-Market Economies and CVDs," below.

[105] United States International Trade Commission, Antidumping and Countervailing Duty Orders in Place, March 17, 2021, available at https://www.usitc.gov/trade_remedy/documents/orders.xls.

[106] WTO Statistics on CVD Measures by Reporting Member.

[107] WTO Statistics on CVD Measures by Reporting Member.

[108] United States International Trade Commission, Antidumping and Countervailing Duty Orders in Place, March 17, 2021, available at https://www.usitc.gov/trade_remedy/documents/orders.xls.

[109] WTO Statistics on CVD Measures by Industry; OECD, Latest Developments in Steelmaking Capacity 2020, DSTI/SC(2020)3/FINAL; Global Forum on Steel Excess Capacity, 2020 GFSEC Ministerial Report, available at https://www.steelforum.org/events/gfsec-ministerial-report-2020.pdf.

[110] WTO Statistics on CVD Measures by Industry.

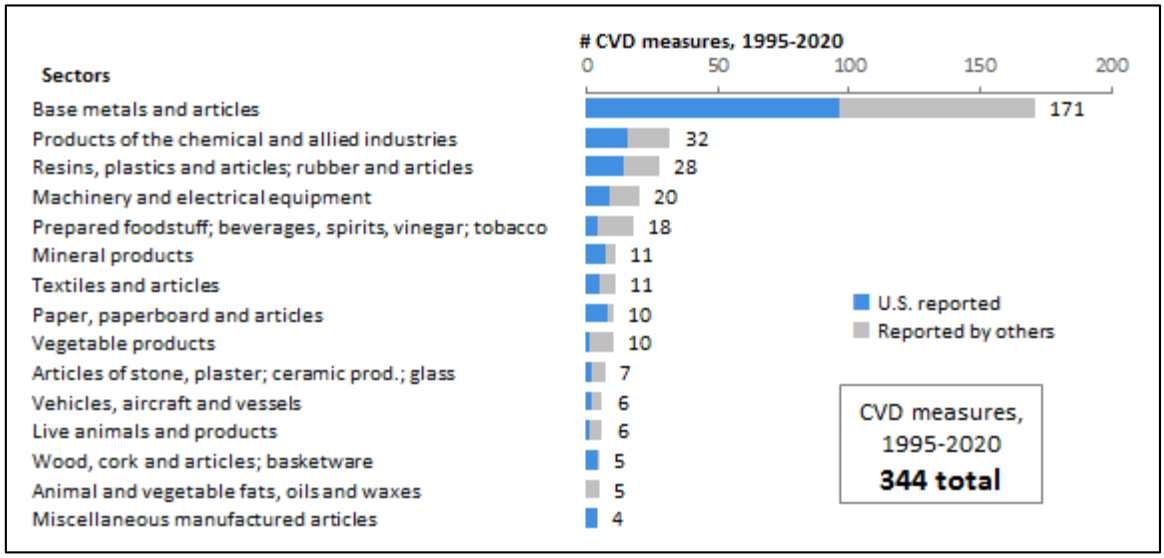
[111] United States International Trade Commission, Antidumping and Countervailing Duty Orders in Place, March 17, 2021, available at https://www.usitc.gov/trade_remedy/documents/orders.xls.

[112] Ibid.

The United States rarely revokes CVD orders. The oldest order, which places CVD duties on welded carbon steel pipe from Turkey, has been in place since 1986.[113] Between 2006[114] and 2021, the United States issued 140 CVD orders. Of those 140 orders, the USITC has revoked eight (6%).[115] Nineteen of the orders in place are more than 15 years old.[116]

The United States is the subject of 12 CVD measures put in place by six countries.[117] China has placed the most CVDs on U.S. exports (6) followed by Peru (2), Australia (1), Chile (1), and the EU (1).[118] The plurality of CVDs are on U.S. chemical products (3) and prepared foodstuffs (3), with CVDs also on U.S. mineral products (2), live animals (2), base metals (1), and vehicles (1).[119]

Figure 5. CVD Measures by Sector



Source: WTO Statistics on CVD Measures by Reporting Member.

Issues for Congress

In general, for the past century Congress has supported using and enhancing trade remedies, including CVD laws.[120] In the most recent Trade Promotion Authority (TPA), which authorizes

[113] Department of Commerce, International Trade Administration, "Certain Welded Carbon Steel Pipes and Tubes From India, Thailand, and Turkey; Certain Circular Welded Non-Alloy Steel Pipe From Brazil, Mexico, the Republic of Korea, and Taiwan, and Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Continuation of Antidumping Duty Orders and Countervailing Duty Order," 83 *Federal Register* 5402, February 7, 2018.

[114] 2006 is the limit of the current ITA data on revocations.

[115] Between January 1, 2006 and March 17, 2021. Ibid.

[116] United States International Trade Commission, Antidumping and Countervailing Duty Orders in Place, March 17, 2021, available at https://www.usitc.gov/trade_remedy/documents/orders.xls.

[117] WTO Statistics on CVD Measures by Exporter.

[118] WTO Statistics on CVD Measures, Reporting Members vs Exporter.

[119] WTO Statistics on CVD Measures, Sectoral Distribution of Measures by Exporters.

[120] E.g., Bipartisan Congressional Trade Priorities and Accountability Act of 2015, P.L. 114-26 (June 29, 2015), §102(a)(17), 129 Stat. 320, 331 (hereinafter TPA 2015); Trade Preferences Extension Act of 2015, P.L. 114-27 (June 29, 2015) §503, 129 Stat. 362, 384; An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to

the President to negotiate trade agreements and was in effect from 2015 to July 2021, Congress included as a principal negotiating objective the preservation of "the ability of the United States to enforce rigorously its trade remedy laws."[121] Although many economists argue that CVDs are economically inefficient, other experts highlight their political utility and the importance of offsetting potentially harmful government subsidies to ensure the playing field is level for U.S. firms and workers. In the past decades, changes to state practice with regard to subsidies, particularly by nonmarket economies, have presented new challenges for CVDs. As practices with respect to subsidies have changed, and new members have joined the WTO, the multilateral instruments used to address subsidies, like the SCM Agreement, have come under stress. For example, the United States has frequently expressed its concern about the lack of compliance with the SCM Agreement's requirement that WTO members notify the WTO's secretariat of any subsidies covered by the agreement.[122] This section covers several issues that may be of interest to Congress as it considers how to regulate international trade, including the economics of CVDs, the applicability of CVDs to both nonmarket economies and transnational subsidies, the use of CVDs to address currency manipulation, the cost of petitioning for CVDs, and other issues.

Economics of Countervailing Duties

Economists, law and economics scholars, and policy experts have been relatively less critical of CVDs than antidumping duties.[123] Nevertheless, current scholarship is generally skeptical of the theoretical basis of CVDs and critical of their application in the United States.[124] As one scholar of law and economics summarized, "economic theory on CVDs is clear and unambiguous—there is nothing to be said for them—and law and economics scholars have an obligation not to obfuscate this simple truth."[125]

Such critics argue that, as a tariff, CVDs lower overall economic welfare and are a costly and economically inefficient form of protection for a few specific industries and, in doing so, harm consumers and downstream producers.[126] Several decades ago, the USITC conducted a study on the economic impact of antidumping and CVDs and found that such remedies "typically benefit successful petitioning industries by raising prices and improving output and employment

Nonmarket Economy Countries, and for Other Purposes, P.L. 112-99 (March 13, 2012) §1; 126 Stat. 265; codified as amended at 19 U.S.C. §1671(f).

[121] TPA 2015 §102(b)(17). For more on Trade Promotion Authority, see CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by Ian F. Fergusson .

[122] SCM Agreement art. 25; United States, Committee on Subsidies and Countervailing Measures, Proposed Guidelines for Submission of Questions and Answers under Articles 25.8 and 25.9, WTO Doc: G/SCM/W/557/Rev.4, October 26, 2020.

[123] Most studies of CVDs were conducted in the late-1980s and 1990s in the lead up to, and following, the Uruguay Round, the drafting of the SCM Agreement, and the establishment of the World Trade Organization.

[124] Howard P. Marvel and Edward John Ray, "Countervailing Duties," *Economic Journal* 105 (November 1996), p. 1576: "Since they may mitigate distortions, CVDs are generally not condemned as strongly as other supposed 'safeguards' such as antidumping tariffs and escape clause protection." Katherine Baylis, "Unfair Subsidies and Countervailing Duties," in *Handbook on International Trade Policy*, ed. William A. Kerr and James D. Gaisford (Cheltanham, UK: Edward Elgar, 2007), p. 348: "CVD is often perceived as a less-evil brother to AD." Perhaps because of this general perception, there has been less research on CVDs over the past few decades, with the bulk of the economic research having been completed during the Uruguay Round (1986-1993).

[125] Michael J. Trebilcock, "Is the Game Worth the Candle? Comments on *A Search for Economic and Financial Principles in the Administration of Countervailing Duty Law*," *Law and Policy in International Business* 21, no. 4 (1990), p. 728.

[126] Ibid.; Sykes, "Countervailing Duty Law: An Economic Perspective."

[however] the costs to the rest of the economy are far greater."[127] A recent empirical study suggests that the USITC conclusions remain true today, concluding that "protectionism [provided by trade remedies] has small, short-lived, and mostly insignificant beneficial effects in protected industries[; in] contrast, protectionism has long-lasting and significant negative effects in downstream industries."[128] The same study found similar effects on downstream employment.[129]

Some experts argue that CVDs may have theoretical benefits in certain circumstances.[130] Specifically, these experts argue that CVD laws may deter governments from providing market-distorting subsidies and thereby increase global economic welfare.[131] As one Nobel-prize winning economist observed, "such laws can be beneficial if they are carefully crafted and implemented."[132] Proponents of the view that CVD laws may have some theoretical benefits have acknowledged that such claims have limited empirical support,[133] although there has been some.[134]

Like with other forms of contingent protection, some policy experts argue that CVDs may encourage trade liberalization by providing policy tools to address trade practices of concern to certain constituencies that might otherwise strongly oppose trade liberalization efforts.[135] In doing so, they argue, CVDs may be economically efficient by making trade liberalization politically possible.[136] One trade expert argued that in his research he "found that government officials in India, China, and Mexico all stressed the opportunity to use trade remedy laws when discussing trade liberalization with constituents."[137] Similarly, one expert observed that trade remedies like CVDs were included in the GATT because "some countries (the United States … in particular) would not otherwise have agree to other aspects of [the] liberalization mandated by the agreement."[138] Some economists and legal scholars have expressed doubts about such claims. As

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[127] USITC, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements*, Investigation No.332-344, Publication 2900 (June 1995), p. III.

[128] Alessandro Barattieri and Matteo Cacciatore, "Self-Harming Trade Policy? Protectionism and Production Networks," *NBER Working Paper Series*, July 2020, p. 31.

[129] Ibid., p. 22.

[130] For a brief survey of that literature, see Joseph E. Stiglitz, "Dumping on Free Trade: The U.S. Import Trade Laws," *Southern Economic Journal* 64, no. 2 (October 1997), p. 406.

[131] Ibid.; John H. Jackson, "Perspectives on Countervailing Duties," *Law and Policy in International Business* 21, no. 4 (1990), pp. 742-745, 754-755: "The unfettered use of subsidies in international trade can lead to counter-subsidies, and counter-counter-subsidies in an escalating progression, all of which can seriously damage world welfare." However, others have taken issue with the deterrence claim. E.g., J.G. Castel and C.M. Gastle, "Deep Economic Integration between Canada and the United States, the Emergence of Strategic Innovation Policy and the Need for Trade Law Reform," *Minnesota Journal of International Law* (1998), pp. 19-22.

[132] Stiglitz, "Dumping on Free Trade: The U.S. Import Trade Laws," p. 421.

[133] Jackson, "Perspectives on Countervailing Duties," p. 743: "whether or not this [deterrence of subsidies and predation, and monopoly seeking] actually occurs is an empirical question that has been little studied."

[134] E.g., Adam Rose, Zhenhua Chen, and Dan Wei, "Estimating US Antidumping/Countervailing Duty Enforcement Benefits," in *Development Studies in Regional Science*, ed. Zhenhua Chen et al. (Singapore: Springer, 2020), p. 470.

[135] C. Michael Hathaway, Gary Horlick, Terence Stewart, Angela Ellard and Greg Mastel, "Antidumping, Countervailing Duties and Trade Remedies: Let's Make a Deal??," *The International Lawyer* 37, no. 3 (Fall 2003), p. 825. For an example of this claim in the antidumping context, see Bruce A. Blonigen and Thomas J. Prusa, "Dumping and Antidumping Duties," NBER Working Paper 21573 (September 2015), p. 47; Douglas Nelson, "The Political Economy of Antidumping: A Survey," *European Journal of Political Economy* 22 (2006), p. 573; Maurizio Zanardi, "Anti-dumping: What Are the Numbers to Discuss at Doha?" *World Economy* 27 (2004), p. 410.

[136] Hathaway et al., "Antidumping, Countervailing Duties and Trade Remedies," p. 825.

[137] Ibid.

[138] Tania Voon, "Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements,"

one legal scholar put it, "There is little evidence that existing law is or was essential to facilitate politically sensitive tariff concessions, or that the overall level of protection in the United States would be greater in the absence of a countervailing duty policy."[139] Some experts, including those who acknowledge theoretical situations in which CVDs may be beneficial, have criticized how CVD laws have been crafted and administered by governments and used by industry.[140] The timing of petitions for relief and the manner in which such petitions are filed are seen by many economists and policy experts as evidence that CVDs are "protection measures obtained by rent-seeking domestic industries," particularly in economic downturns.[141]

One issue that many economic analysts have with how CVDs are used, including many who support the theoretical basis of CVDs, is that when and how petitions for relief are filed by industries rarely matches up with expected behaviors if the purpose was to offset harmful, trade-distorting subsidies. For example, as one analysis noted, it would be expected that, when a subsidy is found to have violated the SCM Agreement, many countries would subsequently launch CVD investigations against the offending country.[142] For example, if Country A imposed a CVD on widgets from Country B, it would be expected that Countries C, D, E, and F would all also open investigations into widgets from Country B. But such things rarely happen.[143] Instead, petitions are often filed by one petitioner or industry against many countries simultaneously.[144] Some analysts have suggested that this pattern indicates that CVDs are being used for protection from changes in the global market for a good rather than in response to any particular subsidization by a particular country.[145]

Many economists have expressed similar concerns about the choice to file petitions for CVDs and antidumping duties simultaneously. As two economists wrote, although subsidies are a threat to a "level playing field" for world trade, "the close association of CVDs and antidumping duties suggests that alleged subsidies are ancillary to the real motivation for countervailing duties to achieve trade-distorting protection employing whatever arguments fall readily to hand."[146] That petitions often allege both dumping and subsidy simultaneously, may be an indication that CVDs were viewed by petitioners merely as an alternative means of getting protection rather than a

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International and Comparative Law Quarterly 59 (2003), p. 95.

[139] Sykes, "Countervailing Duty Law: An Economic Perspective," p. 263.

[140] Many proponents of CVD laws have also acknowledged that CVDs are not often put in place to maximize deterrence or global economic welfare, but rather to protect important political constituencies. Stiglitz, "Dumping on Free Trade: The U.S. Import Trade Laws," p. 421: While such laws can be beneficial, "they must no longer be used as a form of protection against market surges." Jackson, "Perspectives on Countervailing Duties," 743: "This approach [of deterring subsidies] can be countenanced even though the motives of governments in applying countervailing duties are really not to maximize world welfare, but are instead to maximize the welfare of the producers who constitute important political constituencies within the country."

[141] Marvel and Ray, "Countervailing duties," p. 1579; Michael J. Trebilcock, "Is the Game Worth the Candle?," 728. However, there is some evidence that CVDs and other trade remedies have been less correlated with broad economic downturns during the past several decades than in the past. Andrew K. Rose, Daniel M. Sturm and Jeromin Zettelmeyer, "The March of an Economic Idea? Protectionism Isn't Counter-cyclic (anymore)," *Economic Policy* 28, no. 76 (October 2013).

[142] Katherine Baylis, "Unfair Subsidies and Countervailing Duties," in *Handbook on International Trade Policy*, ed. by William A. Kerr and James D. Gaisford (Cheltenham, UK: Edward Elgar, 2007), p. 355.

[143] Ibid.

[144] Based on CRS analysis.

[145] Baylis, "Unfair Subsidies and Countervailing Duties," 354.

[146] Marvel and Ray, "Countervailing duties," p. 1577.

response to the threat of a countervailable subsidy.[147] Twenty-five years later, CVD and antidumping petitions remain closely correlated in the United States.[148] However, it is possible that the close correlation is driven by increasing numbers of CVD petitions with respect to imports from nonmarket economies, which were originally subject only to antidumping duties.

Congress has been generally supportive of CVDs, including as part of U.S. trade negotiating objectives in TPA. (See **Text Box** below.) Although economists have generally found CVDs to be economically inefficient, they provide temporary protection (at a larger cost for the overall economy) for key industries. Protecting such industries through CVDs may be more politically feasible than providing a counter subsidy (generally considered more economically efficient). For decades, some Members have advocated for expanding the contexts in which CVDs can be used.[149]

Trade Remedy Negotiating Objectives in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (P.L. 114-26)

The principal negotiating objectives of the United States with respect to trade remedy laws are—

(A) to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions; and

(B) to address and remedy market distortions that lead to dumping and subsidization, including overcapacity, cartelization, and market access barriers.

Developing Economies and CVDs

The WTO agreements, including the SCM Agreement, provide for special and differential treatment for developing economies. The United States has raised concerns and issued proposals about how WTO members should determine the countries that qualify for such treatment.[150] Under the SCM Agreement, a WTO member must terminate a CVD investigation if the amount of subsidy is *de minimis* (less than a specified amount) or the volume of subsidized imports is negligible.[151] Developing and least-developed countries are given higher thresholds in both cases (**Table 1**).

[147] Ibid.; Baylis, "Unfair Subsidies and Countervailing Duties," 354.

[148] Between January 1, 2018 and April 1, 2021, approximately 80% of investigations conducted by the USITC involved both dumping and subsidy allegations.

[149] E.g., Fair Trade with China Enforcement Act, S. 1060, 117th Cong., 1st sess. (2021); Eliminating Global Market Distortions To Protect American Jobs Act of 2021, S. 1187, 117th Cong., 1st sess. (2021); An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes, P.L. 112-99 (March 13, 2012), §1; 126 Stat. 265; Currency Exchange Rate Oversight Reform Act of 2010, S. 3134, 111th Cong., 2nd sess. (2010); To amend title VII of the Tariff Act of 1930 to provide that the provisions relating to countervailing duties apply to nonmarket economy countries, H.R. 3198, 106th Cong., 1st sess. (1999); To expand the coverage of the countervailing duty law with respect to international consortia, S.Amdt. 321, 100th Cong, 1st sess. (1987).

[150] Draft General Council Decision: Procedures to Strengthen the Negotiating Function of the WTO, WTO Doc. WT/GC/W/764, February 15, 2019.

[151] SCM Agreement art. 11.9.

Table 1. *De Minimis* and Negligible Import Thresholds

	De Minimis Threshold	Negligible Import Threshold
Developed Countries	1%	3%
Developing Countries	2%	4%
Least-Developed Countries	3%	4%

Source: Uruguay Round Agreements Act (URAA), P.L. 103-65 (December 8, 1994) § 222(d), 263(a), 108 Stat. 4809, 4871, 4911, codified as amended at 19 U.S.C. §§1671b(b)(4), 1677(24)(b).

The United States Trade Representative (USTR) determines eligibility for special and differential treatment under U.S. CVD law.[152] USTR published the first list of eligible countries on June 2, 1998.[153] On February 10, 2020, the USTR revised that list for the first time.[154] As part of its revision, the USTR took into consideration (1) whether the per capita gross national income (GNI) is below the World Bank's high-income classification ($12,375 in 2019); (2) whether the country accounts for more than 0.5% of world trade; and (3) other factors such as membership in the OECD, the European Union, or Group of 20 (G-20).[155] Because of the new criteria, several countries became ineligible for special and differential treatment under U.S. CVD law (**Table 2**).

In addition, the USTR changed the rules for modifying the list to make future changes without having to go through a rulemaking.[156] The new list and the changes for how USTR will update the list comport with long-running U.S. concerns about eligibility for special and differential treatment under various trade commitments, and signals that the United States will take a more targeted approach with respect to eligibility for such treatment under U.S. CVD law. Which WTO members qualify for special and differential treatment has been an issue of concern for many Members of Congress.[157]

[152] Uruguay Round Agreements Act, P.L. 103-65 (December 8, 1994) §§ 222(d), 263(a), 108 Stat. 4809, 4871, 4911. codified as amended at 19 U.S.C. §1677.

[153] USTR, "Developing and Least-Developed Country Designations under the Countervailing Duty Law," 63 *Federal Register* 29945, June 2, 1998.

[154] USTR, "Designations of Developing and Least-Developed Countries under the Countervailing Duty Law," 85 *Federal Register* 7613, February 10, 2020.

[155] Ibid.

[156] USTR, "Removal of Rule Designating Developing and Least-Developed Country Designations Under the Countervailing Duty Law," 85 *Federal Register* 7448, February 10, 2020.

[157] Expressing the sense of the House of Representatives that the United States should reaffirm its commitment as a member of the World Trade Organization (WTO) and work with other WTO members to achieve reforms at the WTO that improve the speed and predictability of dispute settlement, address long-standing concerns with the WTO's Appellate Body, increase transparency at the WTO, ensure that WTO members invoke special and differential treatment reserved for developing countries only in fair and appropriate circumstances, and update the WTO rules to address the needs of the United States and other free and open economies in the 21st century, H.Res. 382, 117th Cong., 1st sess. (2021).

Table 2. Countries Removed from the List of Countries Eligible for Special and Differential Treatment under U.S. CVD Law

Country Removed	Reasons for Removal
Antigua and Barbuda	World Bank High Income Country
Argentina	G20 Member
Bahrain	World Bank High Income Country
Barbados	World Bank High Income Country
Belize	Not Stated
Brazil	G20 Member, Significant Share of World Trade (>0.5%)
Chile	World Bank High Income Country
Colombia	OECD Member or Applicant
Republic of the Congo	Not Stated
Costa Rica	OECD Member or Applicant
India	G20 Member, Significant Share of World Trade (>0.5%)
Indonesia	G20 Member, Significant Share of World Trade (>0.5%)
Malaysia	Significant Share of World Trade (>0.5%)
Malta	EU Membership, World Bank High Income Country
Panama	World Bank High Income Country
Slovenia	EU Membership, World Bank High Income Country
South Africa	G20 Member
St. Kitts and Nevis	World Bank High Income Country
Thailand	Significant Share of World Trade (>0.5%)
Trinidad and Tobago	World Bank High Income Country
Uruguay	World Bank High Income Country
Vietnam	Significant Share of World Trade (>0.5%)

Source: CRS Comparison of USTR, "Developing and Least-Developed Country Designations under the Countervailing Duty Law," 63 *Federal Register* 29945, June 2, 1998 and USTR, "Designations of Developing and Least-Developed Countries under the Countervailing Duty Law," 85 *Federal Register* 7613, February 10, 2020.

Nonmarket Economies and CVDs

The application of CVDs to nonmarket economies (NMEs) has been an area of debate and congressional action in the past decade. Much of the debate has centered on whether CVDs may be applied to NMEs and, if so, how they should be applied. The debate has largely focused on the application of trade remedies to goods imported from, and allegedly subsidized by, China.

For decades, Commerce had determined that nonmarket economies (NMEs) were not subject to U.S. CVDs because subsidies could not exist in such economies.[158] Antidumping was the remedy

[158] In 1984, Commerce determined "that bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (the Act), cannot be found in nonmarket economies." Department of Commerce, "Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination," 49 *Federal Register* 19370-01, May 7, 1984. In 1986, the Federal Circuit agreed with commerce that NMEs were not subject to CVDs. Georgetown Steel

traditionally applied to NMEs. In 2007, Commerce changed its policy.[159] After an adverse ruling in the courts,[160] Congress amended the Tariff Act of 1930 to explicitly authorize Commerce to place CVDs on NMEs.[161] NMEs are now frequently subject to both antidumping duties and CVDs,[162] which has led to some adverse opinions on U.S. policies from the WTO's Dispute Settlement Appellate Body.[163]

NMEs, CVDs, and the WTO's Appellate Body

U.S. CVD policies, and trade remedies in general, have been one of the central points of contention between the United States and the WTO's Appellate Body (AB), as WTO members have increasingly filed disputes contending U.S. policies and practice violate WTO obligations.[164] Congress might consider reevaluating those policies or renegotiating the agreement underlying the WTO Dispute Settlement Understanding (DSU) and SCM Agreement.

During negotiations to establish the WTO, Congress required the President to ensure that robust dispute resolution provisions were included in the final agreement.[165] As a result, the agreements establishing the WTO included the DSU, which provides for an enforceable means by which members can resolve disputes over WTO commitments and obligations.[166]

The United States has generally been successful in DSU proceedings with the exception of one area—trade remedies.[167] Trade remedy disputes in general make up the largest portion of the WTO's dispute settlement process with CVDs being the second most frequently disputed remedy

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Corp. v. United States, 801 F.2d 1308, 1314 (Fed. Cir. 1986). The European Union (EU) similarly had long held that NMEs were not subject to CVDs before changing its policies with respect to China in the past decade.

[159] Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Policy, Imp. Admin., to David M. Spooner, Asst. Sec'y, Imp. Admin., Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China - Whether the Analytical Elements of Georgetown Steel Opinion Are Applicable to China's Present-Day Economy (Mar. 29, 2007); Department of Commerce, International Trade Administration, "Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination," 72 *Federal Register* 60645, October 25, 2007; Wentong Zheng, "Trade Law's Responses to the Rise of China," *Berkeley Journal of International Law* 34, no. 2 (Fall 2016), p. 132.

[160] GPX Int'l Tire Corp. v. United States, 666 F.3d 732 (Fed. Cir. 2011).

[161] An Act to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes, P.L. 112-99, §1; 126 Stat. 265.

[162] Richard Lockridge, "Doubling Down in Non Market Economies: The Inequitable Application of Trade Remedies Against China and the Case for a new WTO Institution," *Southern California Interdisciplinary Law Journal* 118 (2015).

[163] E.g., Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted March 25, 2011).

[164] E.g., Chad P. Bown and Soumaya Keynes, *Why Trump shot the sheriff: The end of WTO dispute settlement 1.0*, Working Paper 20-4, Peterson Institute for International Economics, March 2020. Terence P. Stewart and Elizabeth J. Drake, *How the WTO Undermines U.S. Trade Remedy Enforcement* (Washington, DC: Alliance for American Manufacturing, 2017).

[165] 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. The Trade Promotion Authority granted in 2015 continues to support the inclusion of dispute resolution provisions in trade agreements. TPA 2015 §102(b)(16)(A), 129 Stat.at 330, codified as amended at 19 U.S.C. 4201(b)(16)(A).

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

[167] Based on CRS analysis.

(after antidumping).[168] Of the first 600 disputes filed under the DSU, at least 42 centered on the application of CVDs.[169] As the most frequent user of CVDs, the United States was the respondent in most of those disputes.[170] Respondents have generally lost cases brought against trade remedies and the panel reports in disputes on trade remedies are appealed more often than not.[171]

Because of the AB and panel opinions on trade remedies, recent U.S. administrations have criticized the WTO's dispute settlement system. Congress has also expressed concerns about the DSU and the AB.[172] During the Obama Administration, the United States began blocking the appointment of new AB members to replace those whose terms had expired.[173] This policy continued under the Trump Administration and, in December 2019, the AB fell below the required number of members necessary to function.[174] The AB's opinions on trade remedies were one of the factors cited by the USTR that motivated the decision to block the appointments.[175] In a report issued shortly after the AB ceased to function, USTR identified six areas of AB interpretive "errors" that the USTR argues have "raised substantive concerns and undermine the WTO."[176] Five of the six concerned trade remedies; three of those five concerned CVDs.[177]

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

[169] Based on CRS analysis.

[170] The United States was a respondent in at least 26 CVD cases. It is difficult to categorize DSU outcomes in terms of wins and losses. But, of those 26 CVD cases, 18 have advanced past the panel stage or been otherwise dispensed with. Of those 18, in at least 12 the complainants have requested authorization to retaliate, been granted that authorization, initiated compliance proceedings, or the United States has notified that it has implemented the DSB's recommendations.

[171] Bown and Keynes, *Why Trump Shot the Sheriff*, p. 12.

[172] TPA 2015 §102(b)(16)(C), 129 Stat. at 330, codified as amended at 19 U.S.C. §4201(b)(16)(C):

> The principal negotiating objectives of the United States with respect to dispute settlement and enforcement of trade agreements are … to seek adherence by panels convened under the Dispute Settlement Understanding and by the Appellate Body to (i) the mandate of those panels and the Appellate Body to apply the WTO Agreement as written, without adding to or diminishing rights and obligations under the Agreement; and (ii) the standard of review applicable under the Uruguay Round Agreement involved in the dispute, including greater deference, where appropriate, to the fact finding and technical expertise of national investigating authorities.

[173] "United States Continues to Block New Appellate Body Members for the World Trade Organization, Risking the Collapse of the Appellate Process," *American Journal of International Law* 113, no. 4 (October 2019); CRS Legal Sidebar LSB10385, *The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"?*, by Brandon J. Murrill.

[174] Ibid. CRS Report R45417, *World Trade Organization: Overview and Future Direction*, coordinated by Cathleen D. Cimino-Isaacs.

[175] United States Trade Representative, *2019 Trade Policy Agenda and 2018 Annual Report*, p. 148:

> For many years, the United States and other WTO Members have also been sounding the alarm about the Appellate Body in areas as varied as subsidies, antidumping and countervailing duties, standards under the TBT Agreement, and safeguards. Such overreach restricts the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices. The United States shares the view that it is "the collective responsibility of all Members to ensure the proper functioning of the WTO dispute settlement system, including the Appellate Body."
>
> As a result, the United States was not prepared to agree to launch the process to fill vacancies on the WTO Appellate Body without WTO Members engaging with and addressing these critical issues.

[176] United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, February 2020, pp. iii-iv. Capitalization altered. Hereinafter "USTR Report."

[177] Ibid.

USTR's CVD-related concerns expressed in the report were primarily related to the AB's decisions on the application of CVDs to NMEs in general, and to China in particular.[178]

In the 117th Congress, some Members have continued to express concerns about the AB's reports with respect to CVDs. A resolution introduced in the Senate would direct the USTR to "ensure that incorrect interpretations by the Appellate Body, including with respect to … the Agreement on Subsidies and Countervailing Measures, are corrected, and not to be deemed precedential."[179]

As Congress considers the future U.S. relationship with the WTO and the multilateral rules-based trading system, it might address the role that its CVD policies have played in straining that relationship. For example, the most recent TPA expired on July 1, 2021. Should Congress reauthorize TPA, it may choose to include as negotiating objectives that the President revise the WTO's DSU or the SCM Agreement to address some of these issues. One trade policy expert and former Appellate Body member, has suggested a more specific approach to address some of the U.S. concerns, namely that disputes over trade remedies might be handled by a specialized chamber of the Appellate Body or by eliminating appeals from panel decisions in trade remedy disputes.[180] Alternatively, Congress could amend U.S. CVD laws (as it has done in the past) or encourage or direct Commerce to address some of the WTO members' and Appellate Body's concerns. Congress could also weigh in on proposals to reform the SCM Agreement as a whole to address some of the concerns expressed by policymakers about the AB's interpretation of the agreement (see "Reforming the SCM Agreement" below).

The USTR has highlighted the following concerns with respect to the AB's handling of CVD issues.

What is a "Public Body?"

The SCM Agreement allows the imposition of CVDs on certain subsidies provided by "by a government or any public body."[181] The WTO AB interpreted "public body" to mean entities that have the power to regulate, control, supervise, or control the conduct of individuals.[182] As a result, the AB held that "the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority" and thus the fact that an enterprise is state-owned is not enough to bring it within the scope of the SCM Agreement.[183] The USTR, however, contends that by interpreting the term so narrowly, the AB

[178] Ibid. See discussion below.

[179] Expressing the sense of the Senate that, while the United States finds value and usefulness in the World Trade Organization in fulfilling the needs of the United States and other free and open economies in the 21st century, significant reforms at the World Trade Organization are needed and the United States must therefore continue to demonstrate leadership to achieve those reforms, S.Res. 101, 117th Cong., 1st sess. (2021).

[180] Jennifer Hillman, "Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, the Bad and the Ugly," Institute of International Economic Law Issue Briefs, December 10, 2018, pp. 4-7, available at https://www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf.

[181] SCM Agreement art. 1(a)(1).

[182] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 290, 310, 317, WTO Doc. WT/DS379/AB/R (adopted March 25, 2011); Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.29 ¶ 4.37, WTO Doc. WT/DS436/AB/R (adopted December 29, 2014).

[183] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 318: "[T]he mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has

has impermissibly excluded many state-owned enterprises from counting as public bodies and "significantly limited the ability of governments to effectively combat unfairly subsidized imports."[184] Other WTO Members have also raised concerns about the AB's interpretation.[185] For example, in January 2020, the European Union, Japan, and the United States issued a joint statement in which they "agreed that the interpretation of 'public body' by the WTO Appellate Body in several reports undermines the effectiveness of WTO subsidy rules" and argued that "[t]o determine that an entity is a public body, it is not necessary to find that the entity 'possesses, exercises or is vested with governmental authority.'"[186]

Can Members Use Out-of-Country Benchmarks to Measure a Subsidy?

Under the SCM Agreement, when a government provides or purchases goods or services for "less than adequate remuneration," it has "conferred a benefit" within the meaning of the agreement.[187] The agreement provides the adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase."[188] In the past, the United States has used out-of-country measures when Commerce has determined that a government's involvement in the relevant market was so pervasive that there was no undistorted domestic market that could serve as a benchmark for determining whether remuneration was adequate and determining the amount of the subsidy to be offset by CVDs. While the AB has held that using an out-of-country benchmark is permissible under the SCM Agreement,[189] it has required extensive quantitative documentary evidence presented on a case-by-case to justify using one.[190] The USTR has argued that the requirements are too onerous and may be "impossible to meet…in an economy dominated by state-owned enterprises."[191]

Can WTO Members Impose both Antidumping and Countervailing Duties?

Since 2006, Commerce has argued that CVDs and antidumping duties may be applied simultaneously. According to the USTR, "the sole limitation on the simultaneous application of antidumping and countervailing duty measures applies in certain circumstances of export subsidization."[192] However, because of the methods used by Commerce to determine antidumping

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bestowed it with governmental authority."

[184] USTR Report pp. 82, 85.

[185] World Trade Organization, Dispute Settlement Body, Minutes of the Meeting Held on March 25, 2011, ¶¶ 103-127, WTO Doc. WT/DSB/M/294.

[186] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020.

[187] SCM Agreement art. 14(d).

[188] SCM Agreement art. 14(d).

[189] Appellate Body Report, *United States—Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, ¶¶ 96, 103, WTO Doc: WT/DS257/AB/R, (adopted February 17, 2004).

[190] Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.153, WTO Doc: WT/DS436/AB/R (adopted December 19, 2014); Article 21.5 DSU Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China (Article 21.5)*, ¶¶5.155, 5.250, WTO Doc: WT/DS437/AB/RW (adopted August 15, 2019): In a separate opinion, one member disagreed with the majority's view, which he or she argued had imposed "an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record."

[191] USTR Report, p. 109.

[192] Ibid., p. 114.

duties for NMEs, applying both types of duties to NMEs may result in a subsidy being offset twice. The AB has held that countries must avoid such "double counting."[193] The USTR has asserted that the AB's decision imposes a significant burden on administering authorities that will make addressing trade-distorting subsidies by NMEs more difficult.[194]

New Applications of CVDs

CVDs to Address Currency Manipulation

Over the past decade, currency manipulation, particularly that allegedly done by China, emerged as a key concern among certain U.S. policymakers and Members of Congress.[195] Some analysts have argued that "currency manipulation is the functional equivalent of […] a subsidy,"[196] and have advocated using countervailing duties as a "sector-specific, microeconomic response to the across-the-board, macroeconomic problem of currency manipulation."[197] Congress has also, in the past, considered amending U.S. CVD law to define currency undervaluation as a countervailable subsidy, but declined to do so.[198]

In 2019, Commerce proposed a rule that would allow it to consider currency undervaluation to be a countervailable subsidy.[199] The 47 comments that were submitted in response were mixed.[200]

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[193] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc: WT/DS379/AB/R (adopted March 25, 2011); *Appellate Body Report, United States—Countervailing and Anti-dumping Measures on Certain Products from China*, WTO Doc: WT/DS449/AB/R (adopted July 22, 2014).

[194] USTR Report, p. 119.

[195] E.g., Title VII of the Trade Facilitation and Trade Enforcement Act of 2015, P.L. 112-125 (Feb. 24, 2016) § 701, 130 Stat. 122, 195, codified as amended at 19 U.S.C. §4421; The United States-Mexico-Canada Agreement, U.S.-Mex.-Can. art. 33.4, agreed to Oct.1, 2018; U.S. Department of the Treasury, Office of International Affairs, Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States, Report to Congress, May 2019; U.S. Department of the Treasury, "Treasury Designates China as a Currency Manipulator," August 4, 2019, available at https://home.treasury.gov/news/press-releases/sm751. See also CRS In Focus IF10049, *Exchange Rates and Currency Manipulation*, by Rebecca M. Nelson; CRS Insight IN11138, *Currency Manipulation and Countervailing Duties*, by Rebecca M. Nelson and Christopher A. Casey. Such concerns have emerged periodically since the collapse of the Bretton Woods monetary system. E.g., Title III, Subtitle A of the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418 (August 23, 1988), 102 Stat. 1107, 1373-1374, codified as amended at 22 U.S.C. §§5304-5305: The Secretary of the Treasury must "consider whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade."

[196] C. Fred Bergsten, "Commerce Departments Proposal to Curb Currency Manipulation Uses the Wrong Tool," Peterson Institute for International Economics, June 4, 2019, available at https://www.piie.com/blogs/trade-investment-policy-watch/commerce-departments-proposal-curb-currency-manipulation-uses.

[197] C. Fred Bergsten and Joseph E. Gagnon, *Currency Conflict and Trade Policy: A New Strategy for the United States* (Washington, DC: Peterson Institute for International Economics, 2017), pp. 163-165.

[198] E.g., Currency Reform for Fair Trade Act, H.R. 2378, 111th Cong. (2009) §2; Trade Facilitation and Trade Enforcement Act of 2015, S. 1269, 114th Cong. (2015) §702. See also Doug Palmer, "Lawmakers Launch New Effort to Pass China Currency Bill," *Reuters*, March 20, 2013; Jonathan Weisman, "Debate Over Currency Cheating Intensifies in Trade Talks," *New York Times*, May 19, 2015; Jackie Calmes, "Senate Sends Sweeping Trade Enforcement Bill to Obama," *New York Times*, February 11, 2016.

[199] Department of Commerce, International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings; Proposed Rule and Request for Comments," 84 *Federal Register* 24406 (May 28, 2019).

[200] Docket ITA-2019-0002, FR Doc # 2019-11197, available at https://www.regulations.gov/document/ITA-2019-0002-0002/comment.

Firms and trade groups associated with the steel and auto industries and other groups supported the proposed change. Opponents to the proposed rule included the China Chamber of International Commerce, U.S. Chamber of Commerce, policy experts from several research organizations, and a former U.S. Treasury official.

Some experts have suggested that currency manipulation lacks the required specificity to be countervailable under the SCM Agreement and note that such a policy will likely be challenged at the WTO.[201] Commerce asserts that "enterprises that buy or sell goods internationally (i.e., enterprises in the traded goods sector of an economy) can comprise a 'group' of enterprises for specificity purposes."[202] That is, currency manipulation is specific in that it benefits exporters.[203] At least one expert has argued that currency manipulation constitutes a "prohibited" export subsidy since they are effectively contingent on exports (a producer gains no advantage from a manipulated currency if they do not export their goods) and thus does not require specificity.[204] Furthermore, an interpretive note to Article VI of the GATT provides that "[m]ultiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties."[205]

Additionally. India and Brazil in their submissions to Commerce suggested that currency undervaluation might not count as a "financial contribution," as defined in the SCM Agreement and U.S. law and because it was not a "direct transfer of funds."[206] In response, Commerce reiterated its position that "[t]he receipt of domestic currency from an authority…in exchange for U.S. dollars could constitute the financial contribution."[207]

In 2020, the Commerce Department issued a final rule implementing this policy administratively, without the need for amending legislation.[208] These new regulations direct Commerce to "consider whether a benefit is conferred from the exchange of United States dollars for the

[201] C. Fred Bergsten and Joseph E. Gagnon, "Comments on Proposed Modification of Regulations for Countervailing Duty Proceedings," June 25, 2019, available at https://www.piie.com/commentary/testimonies/comments-proposed-modification-regulations-countervailing-duty-proceedings.

[202] Department of Commerce, International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 *Federal Register* 6031, February 4, 2020; 19 C.F.R. § 351.502.

[203] International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 *Federal Register* 6031.

[204] Alusio de Lima-Campos, "Currency Misalignments and Trade: A Path to a Solution," Society of International Economic Law Working Paper No. 2014/1, June 16, 2014, p. 21; Aluisio de Lima-Campos, Juan Antonio Gaviria, "A Case for Misaligned Currencies as Countervailable Subsidies," *Journal of World Trade* 46, no. 5 (2012).

[205] GATT 1994 art. 6 (Ad Note).

[206] E.g., Government of Brazil, Submission of the Government of Brazil on Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, Comment on FR Doc # 2019-11197, Comment ID: ITA-2019-0002-0030, https://downloads.regulations.gov/ITA-2019-0002-0030/attachment_1.pdf; Government of India, Comments on U.S. Commerce's Proposal to Modify Regulations in Countervailing Duty Proceedings, Comment on FR Doc # 2019-11197, Comment ID: ITA-2019-0002-0014, https://downloads.regulations.gov/ITA-2019-0002-0014/attachment_1.pdf; Jeffrey M. Winton et al., Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, Comment on FR Doc # 2019-11197, Comment ID: ITA-2019-0002-0021, https://downloads.regulations.gov/ITA-2019-0002-0021/attachment_1.pdf. U.S. law defines a financial contribution as "the direct transfer of funds," "foregoing or not collecting revenue that is otherwise due," "providing goods or services, other than general infrastructure," or "purchasing goods." 19 U.S.C. §1677(5)(D).

[207] International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 *Federal Register* 6031, 6034.

[208] International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 *Federal Register* 6031.

currency of a country under review or investigation."[209] In making that determination, Commerce is directed to "request that the Secretary of the Treasury provide its evaluation and conclusion."[210] In its final rule, Commerce noted that "In recognition of Treasury's experience in the area of evaluating currency undervaluation, Commerce will defer to Treasury's expertise," but, they continued, "[Commerce] will not delegate to Treasury the ultimate determination of whether currency undervaluation involves a countervailable subsidy in a given case."[211]

In its 2020 annual report on the United States, the International Monetary Fund (IMF) raised concerns regarding the new rule, including the risks it poses to the multilateral trade and international monetary system and potential influence on monetary policy.[212] IMF staff also warned that the new rule may encourage other countries to establish similar policies.[213]

Critics have suggested that CVDs are the wrong tool to address currency manipulation. As a pair of economists argued

> Like all countervailing duties, it would require the petitioning industry to demonstrate that it was injured by the subsidized product. It would cover only US imports of the individual product and exclude the harm caused by all other exports from the subsidizing country as well as the implied protection against all imports to the subsidizing country from the United States and elsewhere.[214]

Congress has considered, and declined, to enact legislation on this issue in the past. Congress may consider whether the ITA's new policy effectively addresses concerns some Members have raised about the impact of currency manipulation on U.S. trade, or whether additional or different tools may be necessary, as well as concerns about whether the policy complies with the SCM Agreement. Some Members have recently introduced legislation that would provide further guidance on this issue.[215]

Since going into effect, the ITA has made two affirmative findings, one against twist ties from China[216] and another against tires from Vietnam.[217] The WTO Dispute Settlement Body (DSB) and AB have not yet been asked whether the measures comply with the SCM Agreement.

Transnational Subsidies and Applications of CVDs to Third Countries

Recently, the EU (the second largest user of CVDs) applied CVDs to goods manufactured in one country yet subsidized by another. In June 2020, the EU imposed CVDs on certain glass fiber fabrics imported from Egypt.[218] The merchandise at issue was manufactured by Jushi Egypt and

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[209] 19 C.F.R. § 351.528(a).

[210] 19 C.F.R. § 351.528(c).

[211] Department of Commerce, International Trade Administration, "Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings," 85 *Federal Register* 6031, 6038.

[212] International Monetary Fund, "Staff Report," *2020 Article IV Consultation*, July 17, 2020, p. 3.

[213] Ibid., p.43.

[214] Bergsten and Gagnon, "Comments on Proposed Modification of Regulations for Countervailing Duty Proceedings."

[215] Eliminating Global Market Distortions To Protect American Jobs Act of 2021, S. 1187, 117th Cong., 1st sess. (2021).

[216] Department of Commerce, International Trade Administration, "Twist Ties From the People's Republic of China: Final Affirmative Countervailing Duty Determination," 86 *Federal Register* 10542, February 22, 2021.

[217] Department of Commerce, International Trade Administration, "Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination," 86 *Federal Register* 28566, May 27, 2021.

[218] Implementing Regulation 2020/776, "Imposing Definitive Countervailing Duties on Imports of Certain Woven and/or Stitched Glass Fibre Fabrics Originating in the Chinese Mainland and Egypt," *Official Journal of the European*

Hengshi Egypt, two Egyptian subsidiaries of the China National Building Materials Group, a Chinese SOE.[219] Jushi and Hengshi manufactured the merchandise in the Suez Economic and Trade Cooperation Zone (SETC-Zone), a special economic zone which was jointly established by the Government of China (GOC) and Government of Egypt (GOE).[220] The EU determined that "the GOE has actively sought to support the zone not only directly by the provision of land and tax breaks but also indirectly, through agreed assistance of the Chinese government for the development of the SETC-Zone in its territory."[221] The EU concluded that countervailable subsidies "should include not only measures directly emanating from the GOE but also those measures by the GOC which can be attributed to the GOE on the basis of the available evidence."[222] The GOC and GOE objected. The imposition of these CVDs was followed by a new White Paper by the EU Commission proposing a new approach to managing foreign subsidies.[223]

As the EU moves to counter new forms of foreign subsidization abroad, Congress may be interested in reviewing U.S. CVD laws and regulations to determine whether they wish to legislate similar changes, or take an alternative approach. A recently introduced bill proposes a similar solution, amending U.S. CVD law to include transnational subsidies.[224]

Reforming the SCM Agreement

The increase in the use of CVDs, a measure designed to deal with subsidies that are not in compliance with the SCM Agreement, as well as the controversies over the applicability of the agreement to certain types of subsidies (such as SOEs), has led some WTO Members, including the United States, to propose reforming the SCM Agreement, which has not been updated since it was drafted in 1994.

In December 2017, then-USTR Robert E. Lighthizer and his counterparts in the EU and Japan announced plans to increase trilateral cooperation between the three countries to address "severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state owned enterprises, forced technology transfer, and local content requirements and preferences."[225] In January 2020, the three countries presented a set of proposed reforms to the SCM Agreement (Trilateral Proposal). The Trilateral Proposal included the expansion of the list of prohibited subsidies to include

- unlimited guarantees;

Union, L 189, June 15, 2020, pp. 1–170.

[219] Ibid. ¶¶88, 93.

[220] Ibid. ¶15.

[221] Ibid. ¶676.

[222] Ibid. ¶684.

[223] European Commission, White Paper on Levelling the Playing Field as Regards Foreign Subsidies, COM(2020) 253, June 17, 2020; European Commission, Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, COM(2021) 223.

[224] S. 1187 §201.

[225] USTR, Joint Statement by the United States, European Union and Japan at MC11, December 12, 2017, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states; USTR, Joint Readout from Meeting of the United States, European Union and Japan in Brussels, March 10, 2018, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/joint-readout-meeting-united-states.

- subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan;
- subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; and
- certain direct forgiveness of debt.[226]

The Trilateral Proposal also addressed other issues including the relative lack of compliance with the requirement to notify the WTO Secretariat of a subsidy, and potential methods of addressing overcapacity in certain industries.

Additionally, the proposal included several changes that would impact CVDs. First, the Trilateral Proposal would shift the burden of proof for the imposition of CVDs. Currently, a country imposing CVDs must demonstrate that a subsidy has caused or threatened material injury to a domestic industry.[227] The Trilateral Proposal inverts that burden to require the subsidizing member to "demonstrate that there are no serious negative trade or capacity effects and that there is effective transparency about the subsidy in question."[228] Second, the Trilateral Proposal also clarifies that the term "public body" includes SOEs, and would overturn the WTO AB's determination that a public body must "possesses, exercises or [be] vested with governmental authority."[229]

Congress, as it considers whether to renew the recently expired TPA, or more generally may weigh in on these proposals and provide guidance to the administration on reforming the SCM Agreement to address these new concerns.

Cost of Seeking the Imposition of CVDs and Small and Medium-Sized Businesses Access

Since the Trade Agreements Act of 1979 made the CVD petitioning process more legalistic and expensive,[230] Many Members of Congress have repeatedly expressed concern with the challenges small businesses face when pursuing the imposition of trade remedies.[231] Just four years after the new process went into effect, Senator George J. Mitchell noted, "$100,000 is regarded as a bare minimum to prosecute a case, and total costs are frequently much greater … in some cases the legal and consulting fees have approached the amount of subsidies to be countervailed."[232] Then-

[226] USTR, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/joint-statement-trilateral-meeting-trade-ministers-japan-united-states-and-european-union.

[227] GATT Article VI, para. 6; SCM Agreement art. 15.1.

[228] USTR, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020.

[229] Ibid.

[230] U.S. Congress, House Committee on Ways and Means, Subcommittee on Trade, *Options to Improve the Trade Remedy Laws, Part I*, hearings, 98th Cong., 1st sess., 1983, Serial 98-14 (Washington, DC: GPO, 1983), p. 244; U.S. Congress, House Committee on Ways and Means, Subcommittee on Trade, *Options to Improve the Trade Remedy Laws, Part II*, hearings, 98th Cong., 1st sess., 1983, Serial 98-15 (Washington, DC: GPO, 1983), p. 538.

[231] U.S. Congress, *Options to Improve the Trade Remedy Laws, Part I*, p. 1: "The subcommittee is particularly interested in determining how the expense and time involved in processing cases under current procedures might be reduced in order to ensure U.S. industry and labor, including small business, access to trade remedies." See Also, U.S. Congress, *Options to Improve the Trade Remedy Laws, Part II*, p. 1.

[232] U.S. Congress, Senate Committee on Finance, Subcommittee on International Trade, *Problems of Access by Small*

Deputy Assistant Secretary for Import Administration at Commerce Gary Horlick observed that the new procedures had "increased the expense of these cases and made [trade remedies], in essence, unavailable to small business."[233]

Nearly 40 years later, concerns about the cost and difficulties of pursuing CVDs for small and medium-sized businesses remain. In 1983, it was estimated that pursuing antidumping or countervailing duties cost a minimum of $100,000 (approximately $235,000 in 2013 dollars).[234] In 2013, the GAO found that the cost had increased to approximately $1-2 million,[235] five to ten times in excess of inflation.[236]

To help small businesses jump through what one congressional hearing witness described as "a series of flaming hoops before they can get the kind of import relief they are entitled to,"[237] Congress established the Trade Remedy Assistance Office (TRAO) in the USITC in 1984 to provide information and technical assistance to eligible small businesses.[238] Today, TRAO provides "informal advice and assistance, including informal legal advice, intended to enable eligible small businesses to determine the appropriateness of pursuing particular trade remedies, to prepare petitions and complaints (other than those which are frivolous in the opinion of the agency) and to seek to obtain the remedies and benefits available under the trade laws."[239] In addition, the ITA provides petition counseling services.[240]

Despite these programs, filing a CVD petition is still a costly endeavor and tends to be used by a few large industries.[241] Access to trade remedies by small and medium-sized businesses continues to be of concern to many Members of Congress.

Business to Trade Remedies, hearings, 98th Cong., 2nd sess., April 6, 1984, S.Hrg. 98-1043, p. 4-5. Senator Mitchell attributed the cost to the changes in the AD/CVD process that made it more litigation-like and along with the surplusage of lawyers in the United States, joking: "Under [a recent trade agreement], China will sell to the U.S. 500,000 square yards of surplus fabric, and the U.S. will ship to China 500,000 surplus lawyers. The agreement will help each country produce frivolous suits."

[233] U.S. Congress, *Options to Improve the Trade Remedy Laws, Part II*, 538.

[234] U.S. Senate Committee on Finance, *Problems of Access by Small Business to Trade Remedies*, p. 4. Adjusted using the Consumer Price Index.

[235] U.S. Government Accountability Office, *Antidumping and Countervailing Duties: Key Challenges to Small and Medium-Sized Enterprises' Pursuit of the Imposition of Trade Remedies*, GAO-13-575, June 2013, p. 16.

[236] Adjusted using the Consumer Price Index. Recently, in testimony before the Senate Committee on Finance, Michael R. Wessel, a Commissioner on the bipartisan U.S.-China Economic and Security Review Commission, estimated that "each trade case takes about a year and a half for the first result and as much as five for a final and costs generally between $1.5 and $3 million." Qtd. in Margaret Spiegelman, "Lawyers: Portman, Brown-backed bill could bring big changes to AD/CVD laws," *Inside U.S. Trade*, April 22, 2021.

[237] U.S. Congress, *Options to Improve the Trade Remedy Laws, Part I*, p. 241.

[238] P.L. 98-573 (October 30, 1984) § 221, 98 Stat. 2948, 2989, codified as amended at 19 U.S.C. § 1339.

[239] 19 C.F.R. §213.2(d); Regulations and guidance are available at 19 C.F.R. §213. See also USITC, "Trade Remedy Assistance Program," available at https://www.usitc.gov/offices/operations/trao.

[240] ITA, "Petition Counseling," available at https://www.trade.gov/ec-petition-counseling.

[241] Spiegelman, "Lawyers: Portman, Brown-backed bill could bring big changes to AD/CVD laws."

One potential source of the increasing costs of petitioning for CVDs, according to industry advocates, has been the need to file successive petitions for CVDs after offenders relocate production or to respond to fraudulent repackaging, relabeling, and transshipment.[242] Some industry observers and policymakers have responded, in part, to the problem of successive petitions by advocating for what one recently introduced bill calls "successive investigations," which would expedite and simplify the CVD investigation process when a petition is filed within two years to merchandise that is the same or similar to merchandise at issue in a concurrent or recently completed investigation.[243]

Another possible solution to increasing costs, suggested by some policy analysts and Members of Congress, has been to have the government more involved in identifying potential countervailable subsidies. One proposal has been to encourage the ITA to self-initiate more investigations, something it did for the first time in more than 25 years in November 2017.[244] Congress may also consider introducing legislation to encourage or require self-initiation. For example, a bill introduced in the 117th Congress would create a task force charged specifically with identifying potential countervailable subsidies.[245] Others might argue that such changes could politicize CVDs more than the current quasi-judicial process.

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[242] Scott Horsley, "A Mysterious Pencil Factory Sharpens Focus On Tariff Scams," *NPR*, September 25, 2019, available at https://www.npr.org/2019/09/25/763537209/a-mysterious-pencil-factory-sharpens-focus-on-tariff-scams; Sidley Austin, LLC, "As Part of Trend to Target China, Sens. Brown and Portman Introduce Updates to U.S. Antidumping Duty/Countervailing Duty Laws," April 28, 2021, available at https://www.sidley.com/en/insights/newsupdates/2021/04/as-part-of-trend-to-target-china-antidumping-dutycountervailing-duty-laws; Pamela Bucy Pierson and Benjamin Patterson Bucy, "Trade Fraud: The Wild, New Frontier of White Collar Crime," *Oregon Review of International Law* 19, no. 1 (2018).

[243] S. 1187, Title I.

[244] 19 U.S.C. §1671a(a); Department of Commerce, International Trade Administration, "Common Alloy Aluminum Sheet From the People's Republic of China: Initiation of Less-Than-Fair-Value and Countervailing Duty Investigations," 82 *Federal Register* 57214, December 4, 2017. Prior to this case, last time the ITA self-initiated a CVD investigation was 1991. Department of Commerce, "U.S. Department of Commerce Self-Initiates Historic Antidumping and Countervailing Duty Investigations on Common Alloy Aluminum Sheet From China," *Commerce News*, November 28, 2017.

[245] Self-Initiation Trade Enforcement Act of 2021, S. 1510, 117th Cong., 1st sess. (2021).

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