



Trade Remedies and the WTO Rules Negotiations

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Summary

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). Discussions continue, although negotiations at this time seem to be at an impasse.

One of the negotiating objectives in the DDA called for “clarifying and improving disciplines” under the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Antidumping Agreement or ADA) and the *WTO Agreement on Subsidies and Countervailing Measures* (Subsidies Agreement or ASCM). The frequent use of trade remedies by the United States and other developed nations—and increasingly, developing countries—has come under criticism by some WTO members as being protectionist. In a March 2010 report, the chairman of the rules negotiations mentioned that consensus had been reached on many technical issues, but that there was no agreement on the larger “political” issues.

Some in Congress cite U.S. use of trade remedies as necessary to protect U.S. firms and workers from unfair competition. Some also credit the existence of trade remedies with helping to increase public support for additional trade liberalization measures. These groups would like increased trade enforcement of trade remedies and intellectual property laws. Others in Congress, especially those who represent U.S. importers, manufacturers, and export-oriented businesses, tend to support liberalizing the ADA and ASCM, in ways that could make use of U.S. trade remedy laws less frequent and relief harder to obtain. For example, there is support in Congress for legislation that would require administering authorities to determine whether or not a trade remedy action is in the overall public interest before such a measure can be imposed.

DDA negotiations involve Congress because any trade agreement made by the United States must be implemented by legislation, thus Congress also has an important oversight role in trade negotiations. For example, preserving “the ability of the United States to enforce rigorously its trade laws” was included as a principal negotiating objective in legislation granting presidential Trade Promotion Authority—the Trade Act of 2002 (P.L. 107-210).

In the WTO talks, the positions of major players in trade remedy talks are well-documented by position papers written by WTO members that are circulated through the WTO Negotiating Group on Rules. Major themes that have emerged include limiting the use of trade remedy actions in favor of “price undertakings,” reducing the level of duties assessed per action by ending mandatory offsets (also known as “zeroing”), or limiting the duration of trade remedy measures through mandatory “sunset” reviews. Some members also support placing more restrictions on the ability of officials to grant relief to domestic industries through the use of economic interest tests and other administrative procedures and “special and differential treatment” for developing countries. Some countries see revision of the ADA and ASCM and other WTO disciplines on trade remedies as a “make or break” issue if the Doha Development Agenda is to succeed.

This report examines trade remedy issues in DDA in three parts. The first part provides background information and contextual analysis. The second section focuses on how these issues fit into the DDA. A third section provides a more specific overview of major reform proposals that are being considered.

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DDA talks are being conducted as a “single undertaking,” meaning that nothing will be agreed on unless a consensus is reached in all areas of the discussions. As of this writing, talks in agriculture and on non-agricultural market access are at an impasse. Regarding discussions on trade remedies, during the December 2005 WTO Ministerial in Hong Kong, a “high level of constructive engagement” in trade remedy negotiations was reported, and negotiators were directed to “intensify and accelerate” their work.¹ Since that time, discussions in the WTO Negotiating Group on Rules have continued based on two draft texts of the ADA and ASCM (in November 2007 and December 2008, respectively) prepared by the group’s chairman “with the objective of stimulating serious reflection by Participants on the broad parameters of possible outcomes to the negotiations.”² In March 2010, significant progress was reported in the rules negotiations, but it was also acknowledged that no consensus was likely to be reached on the “big political issues” until the overall direction of the DDA became clearer.³

Trade remedies are laws implemented by the United States and many of its trading partners to attempt to mitigate the adverse impact of various trade practices on domestic industries and workers. Antidumping (AD) laws, for example, provide relief to domestic industries that have been shown to have suffered material injury or are threatened with material injury as a result of competing imports being sold at prices shown to be less than their fair market value. Countervailing duty laws provide a similar form of relief to domestic industries that have been (or may be) injured by foreign subsidies on competing exports.

Historically, multilateral negotiations on trade remedies, particularly on antidumping issues, have been extremely contentious; some analysts claim that a failure to reach consensus on what became the ADA and ASCM was largely responsible for delaying the completion of the Uruguay Round negotiations by as long as two years.⁴ In the DDA, a coalition of developed and developing nations known as the “Friends of Antidumping” are pushing for reforms in antidumping and other trade remedies that many in Congress oppose and U.S. negotiators are resisting. Many WTO members regard trade remedy reform as a “make or break” issue in terms of their acceptance of any final DDA agreement.

¹ World Trade Organization, Doha Work Program, *Ministerial Declaration*. WT/MN(05)/DEC, December 22, 2005, Annex D, paragraph 2.

² World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, November 30, 2007.

³ World Trade Organization, *Negotiating Group on Rules, Report of the Chairman to the Trade Negotiations Committee*, TN/RL/24, March 22, 2010.

⁴ Alan M. Dunn, “Antidumping,” in *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, ed. Terrence P. Stewart (Washington: American Bar Association, 1996), p. 246.

This report analyzes the issue in three parts. First, background information and contextual analysis are presented. This section briefly discusses U.S. trade remedy laws and how they are implemented, and the scope of the trade remedy debate in the United States. This section also provides statistics on U.S. and worldwide use of antidumping and countervailing duty measures.

Second, the report focuses on the WTO discussions on trade remedies and their part in the overall negotiations within the DDA. The general mandate to negotiate is described, and negotiating activity to date summarized. Some of the major reforms suggested are described in general terms.

Third, the report presents a more specific overview of major reform proposals; for example, those that seek to end “zeroing,” to mandatorily shorten the length that trade remedy duties can be assessed, or to provide special treatment for developing country WTO members. Some of these proposals, if implemented, could significantly reduce the number of permissible investigations conducted by the United States or lower the amount of duty margins assessed, thus potentially reducing the protective impact of the remedies. Other proposals might benefit U.S. companies because they could provide more transparency in the AD and CVD investigations on U.S. products being conducted by other WTO members.

The third section also mentions negotiations in two areas not previously discussed in the context of the WTO. First, limitation on the use of subsidies in the fisheries industry are being discussed in the context of the ASCM; and second, a mechanism for WTO monitoring of regional trade agreements (which technically violate WTO non-discrimination principles but are permitted under certain conditions) is also being negotiated. The report ends with some general observations and options for Congress.

Table I. Common Acronyms Used in Report

Acronym	Description
ADA	WTO Antidumping Agreement (formally known as the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)
AD	Antidumping
ASCM	WTO Subsidies Agreement (formally known as the Agreement on Subsidies and Countervailing Measures)
CV or CVD	Countervailing or Countervailing Duties
DDA	Doha Development Agenda
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Administration. A branch of the Department of Commerce that investigates dumping or subsidies
ITC	International Trade Commission. An independent agency that investigates injury to domestic industry in antidumping or countervailing duty investigations.

Background: U.S. Laws and WTO Agreements

This section provides an overview of U.S. trade remedy laws and procedures as well as an overview of the disciplines that the United States and other WTO members agreed to in the Antidumping and Subsidies Agreements.

U.S. Trade Remedy Laws

The three most frequently applied U.S. trade remedy laws are antidumping, countervailing duty, and safeguards.

Antidumping (AD, 19 U.S.C. § 1673 *et seq.*) laws provide relief to domestic industries that have been, or are threatened with, the adverse impact of imports 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.

Countervailing duty (CVD, 19 U.S.C. § 1671 *et seq.*) laws are designed to give a similar kind of relief to domestic industries that have been, or are threatened with, the adverse impact of imported goods that have been subsidized by a foreign government or public entity, 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, though not being addressed in the DDA negotiations, are other important trade remedy measures that are designed to give domestic industries relief from *import surges* of goods that are fairly traded. In the WTO, the Agreement on Safeguards (Safeguard Agreement or ASG) provides disciplines for international use of safeguards. In the United States, the most frequently applied safeguard law is Section 201 of the Trade Act of 1974 (19 U.S.C. §§ 2251-2254). “Section 201” safeguards are designed to give domestic industries 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. As with all safeguard laws, “section 201” safeguard measures require presidential action in order for relief to be put into effect.

Three region-specific U.S. safeguard laws are (1) Section 406 of the Trade Act of 1974 (19 U.S.C. § 2436), which provides a remedy against market disruption caused by imports from Communist countries; (2) Section 421 of the Trade Act of 1974 (19 U.S.C. § 2451) a China-specific safeguard;⁵ and (3) Section 302 of the North American Free Trade Agreement (NAFTA) Implementation Act provides safeguard relief due to surges of imports originating in Canada or Mexico (19 U.S.C. § 3352).

⁵ Inserted by section 103(a)(3) of P.L. 106-286, Normal Trade Relations for the People’s Republic of China.

U.S. AD and CVD Procedures⁶

Since many of the discussions on trade remedies in the WTO deal with suggested changes to trade remedy procedures, it is important to understand how these methods apply to trade remedy investigations. What follows is, first, a very brief description of the AD and CVD investigative process in the United States; and second, a look at the way that safeguard investigations are conducted. Trade remedy actions are presented here in a U.S. context because they are illustrative of how these investigations are conducted by authorities worldwide, and because many of the proposals being presented in the DDA seem to be directed at U.S. methods for implementing these measures.

AD and CVD Investigations

Although AD and CVD investigations address fundamentally different forms of “unfair” trade, the investigative process is similar. First, cases generally begin with the filing of a petition by a U.S. domestic industry or its representative (e.g., a labor group, industry association) alleging that certain products are being imported into the country at less than fair value, thus causing material injury, or threat of material injury, to the petitioners.⁷

These petitions are analyzed for accuracy and completeness, and, if initiated by the relevant agencies, trigger an exhaustive and detailed investigative process. These investigations are carried out by two agencies: the International Trade Administration (ITA) of the Department of Commerce, which investigates allegations of sales at less than fair value (in antidumping cases) or existence of subsidies (in countervailing duty cases); and the International Trade Commission (ITC), an independent U.S. Government agency, which investigates injury allegations. These agencies conduct both preliminary and final investigations within specified time lines.

If affirmative final determinations are made by both agencies, an AD (or CV) *duty order* imposes an additional duty on the targeted merchandise equivalent to the “dumping margin” or amount of subsidy.⁸ This duty—assessed over and above any applicable tariffs—is intended to offset the effects of dumping or subsidies, in order to create a “level playing field” for the domestic producer.

U.S. law also allows the ITA to suspend an investigation (called a “suspension agreement”) at any point in favor of an alternative agreement to (1) eliminate completely sales at less than fair value or to cease exports of the subject merchandise; (2) eliminate the injurious effect of the subject merchandise; or (3) limit the volume of imports of the subject merchandise into the United States, provided the foreign exporters agree to certain specific conditions.⁹ In each case, the ITA must be

⁶ For a more detailed discussion of trade remedy laws and procedures, see CRS Report RL32371, *Trade Remedies: A Primer*, by (name redacted)

⁷ AD: 19 U.S.C. § 1673; CVD: 19 U.S.C. § 1671. The ITA may also self-initiate an investigation (see AD: 19 U.S.C. § 1673a(a); CVD: 19 U.S.C. § 1671a(a)).

⁸ The “dumping margin” is the ITA-calculated percentage difference between the price (or cost) of the good in the foreign market and the price at which it is sold in the U.S. market.

⁹ AD: 19 U.S.C. § 1673c(a)(2) and 19 U.S.C. 1673c(b) and (c); CVD: 19 U.S.C. § 1671c(a)(2), and 19 U.S.C. § 1671c(b) and (c).

satisfied that the agreement is in the public interest and that effective monitoring by the United States is practicable.¹⁰

Reviews

All AD and CV duty orders and suspension agreements are subject to annual review if requested by any interested party to an investigation or deemed necessary by the ITA.¹¹ “Changed circumstances” reviews may be requested at any time, but the ITA must determine whether there is sufficient cause to conduct the review.¹² During the review process, the ITA recalculates the dumping margin for each exporter, thus the AD duties assessed on the subject merchandise may be raised or lowered depending on the price of sales transactions during the period of review (POR).¹³ In a changed circumstances review, the ITA or the ITC “as the case may be” conduct a review of the AD or CVD determination or suspension agreement.¹⁴ In a changed circumstances review involving the ITC, the agency reviews whether revoking the order or suspension agreement is likely to lead to continuation or recurrence of material injury, and, in the case of a suspension agreement, whether it continues to eliminate completely the injurious effects of the imports of subject merchandise.¹⁵

Five-year or “sunset” reviews must be conducted on each AD and CVD order no later than once every five years.¹⁶ The ITA determines whether dumping would be likely to continue or resume if an order were to be revoked or a suspension agreement terminated, and the ITC conducts a similar review to determine whether injury to the domestic industry would likely continue or resume. If determinations by both agencies are affirmative, the duty or suspension agreement remains in place. If the determination by either agency is negative, the duty order is revoked or the suspension agreement is terminated.¹⁷

U.S. Trade Remedy Debate

Antidumping

Of all the trade remedy measures in U.S. law, antidumping actions are by far the most commonly implemented. Thus, the antidumping laws also tend to be the focal point of debates on trade remedies in Congress, the WTO, and the international business community. U.S. stakeholders in favor of preserving and strengthening AD laws include many import-competing industries vulnerable to the effects of increased trade liberalization. The steel and chemical industries are historically the largest U.S. users of trade remedies, but smaller industries (such as honey, candles, shrimp, and crawfish) have also initiated successful petitions. Some in Congress have also expressed a compelling interest in ensuring that the firms and workers they represent are able

¹⁰ CVD: 19 U.S.C. § 1671c(d); AD: 19 U.S.C. § 1673c(d).

¹¹ 19 U.S.C. § 1675(a).

¹² 19 U.S.C. § 1675(b).

¹³ 19 U.S.C. § 1675(a)(2).

¹⁴ 19 U.S.C. § 1675(b)(1).

¹⁵ 19 U.S.C. § 1675(b)(2)(A) and (B).

¹⁶ 19 U.S.C. § 1675(c).

¹⁷ *Ibid.*

to compete on a “level playing field” in the face of increased global competition from firms that they believe to use unfair trade practices to gain greater U.S. market share. These Members believe that the trade remedy laws—especially AD actions—are essential tools to that end.

However, many U.S. stakeholders, especially domestic retailers and importers of intermediate goods used in the manufacturing process, favor eliminating or scaling back these actions. Some consuming industry groups have called for equal status as “interested parties” with allegedly injured petitioners, and/or for a “public interest test” to be added to the AD investigative process to determine whether or not the imposition of an AD duty is in the overall economic interest of the United States. Some U.S. exporters have also expressed support for relaxing trade remedy laws because they face the effects of similar actions in other countries—which they perceive to be in retaliation for U.S. measures. Exporters may also bear the immediate effects of any trade retaliation if any U.S. laws are determined not to conform to WTO disciplines. In an era where the supply chain for goods is increasingly globalized, many manufacturers also favor trade remedy reform because they would have greater freedom to ship products at various stages of development across national boundaries for further transformation. These stakeholder groups often accuse users of trade remedies and their supporters of being protectionist, and administrative officials that carry out investigations of making arbitrary and politically motivated decisions.

Subsidies

Arguments for and against countervailing duty actions are generally similar to those in the AD debate. However, one U.S.-specific subsidies issue is that of conducting investigations in non-market economy countries.

The ITA—the same organization tasked with determination of the existence of subsidies in CVD cases—is also responsible for designating certain countries as non-market economy (NME) countries. The Tariff Act of 1930, as amended, defines an NME country as “any foreign country that the administering authority [ITA] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”¹⁸

After making initial attempts to apply countervailing remedies to allegedly subsidized imports from NME countries in 1983, the ITA determined that subsidies could not be quantified in nonmarket economies. These determinations were challenged in court and were eventually upheld on appeal.

In October 2007, the ITA reversed its ruling that subsidies could not be quantified in NME countries—only with respect to China—in the context of a final affirmative determination of subsidies on Chinese coated free sheet paper.¹⁹ Countervailing duties were not ultimately imposed in this specific case because the ITC made a negative final determination of injury. However, in July 2008, CVD duties were imposed on China in a case involving Circular Welded Carbon-Quality Steel Line Pipe from China.²⁰ These were the first countervailing duties assessed on

¹⁸ 19 U.S.C. § 1677(18)(A). The following countries are ITA-designated NME countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyz Republic, Moldova, Tajikistan, Uzbekistan, and Vietnam.

¹⁹ 72 *Federal Register* 60645.

²⁰ 73 *Federal Register* 42545.

imports from China for the first time since 1983. Since the ITA's ruling only pertained to China, the issue remains for other nonmarket economies, such as Vietnam.

As a result of the definitive imposition of AD and CV duties on these and other products, China requested consultations with the United States through the WTO dispute settlement process on September 19, 2008.²¹ China requested the establishment of a panel in December 2008, and a WTO dispute settlement panel was constituted on January 20, 2009.²²

In a related development, as a result of WTO consultations in the WTO, China terminated all subsidies that the United States and Mexico alleged were WTO-illegal (because they seemed to be tied to exports or favor the use of domestic goods over imported goods) by January 1, 2008.²³ China signed separate Memoranda of Understanding (MOU) with the United States and Mexico promising to permanently eliminate the WTO-prohibited subsidies. The United States reserved the right to re-initiate the dispute if China does not meet its MOU commitments.²⁴ The USTR has monitored the Chinese implementation of these commitments, and has confirmed that China eliminated these subsidies as agreed.²⁵

Another subsidies dispute was initiated in December 2008 by the United States and Mexico alleging that China provides export subsidies in an effort to promote recognition and sales of famous brands of Chinese merchandise.²⁶ As of this writing, consultations are continuing.

WTO Agreements

Antidumping

Article VI of GATT 1994 authorizes WTO members to impose AD duties in addition to other tariffs if domestic officials find that (1) imports of a specific product are sold at less than normal value, and (2) the imports cause or threaten injury to a domestic industry, or materially retard its establishment.

The ADA clarifies and expands Article VI by laying out specific guidelines for determining if dumping has occurred, identifying the "normal value" of the targeted product, and assessing the dumping margin. The Agreement also provides rules for administrative authorities to follow when conducting injury investigations. Detailed methodology is set out for initiating anti-dumping cases, conducting investigations, and ensuring that all interested parties are given an opportunity to present evidence. Specific criteria are set for investigations, including a requirement that investigations must be dropped if authorities determine that the volume of the dumped imports is

²¹ World Trade Organization, *United States - Definitive Anti-Dumping Duties on Certain Products from China. Request for Consultations by China*, WT/DS/379/1, G/L/854, G/SCM/D78/1, G/ADP/D74/1, September 22, 2008.

²² World Trade Organization, *United States - Definitive Anti-Dumping Duties on Certain Products from China. Request for Consultations by China*, WT/DS/379/2 (December 12, 2008), and WT/DS/379/3 (March 11, 2009).

²³ United States Trade Representative, *2009 National Trade Estimate Report on Foreign Trade Barriers*, <http://www.ustr.gov>.

²⁴ U.S. Trade Representative. "China to End Subsidies Challenged by the United States in WTO Dispute." Press Release, November 29, 2007.

²⁵ United States Trade Representative, *USTR Report to Congress on China's WTO Compliance*, December 2008, p. 6.

²⁶ World Trade Organization, *China - Grants, Loans, and Other Incentives, Request for Consultations by the United States*, G/AG/GEN/79, January 7, 2009.

negligible (less than 3% of imports of the product from any one country, or less than 7% for investigations involving several countries). Antidumping measures must expire five years after the date of imposition, *unless* an investigation shows that ending the measure would continue to result in injury. According to the ADA, all WTO member countries must contribute to greater multilateral transparency by informing the Committee on Antidumping Practices about changes to antidumping laws, any antidumping actions taken, and all ongoing investigations.²⁷

Subsidies

Article XVI of the GATT and the ASCM regulate the use of subsidies and countervailing measures. The ASCM defines the term “subsidy” as a financial contribution by a government or public body within the territory of a WTO member, which confers a benefit. Three categories of subsidies are identified in the ASCM:

- *prohibited subsidies*: subsidies contingent on export performance or on use of domestic over imported goods. These subsidies are prohibited because they can be designed to distort international trade, and may hurt the trade of other countries. They may be challenged in WTO dispute settlement proceedings under an accelerated timetable. Countervailing duties may also be imposed in the receiving market (ASCM Part II, Article 3).
- *actionable subsidies*: subsidies that could cause adverse effects to the interest of other WTO members. In this category, the complaining country has to show that the subsidy has an adverse effect on its interests. Three types of damage are defined: (1) injury to the domestic industry of another Member; (2) nullification or impairment of benefits (e.g., favorable tariff benefits); or (3) serious prejudice to the interests of another WTO member. These subsidies may be challenged in dispute settlement proceedings, but the complaining country must prove that subsidy has an adverse effect. If the Dispute Settlement Body rules in favor of the complaining country, the subsidy must be withdrawn or its adverse effect must be removed. Countervailing duties may also be imposed in the receiving market (ASCM Part III, Article 5).
- *non-actionable subsidies*: This category was provided for five years (until December 31, 1999) and was not extended. These subsidies related mainly to research and development or providing economic development to disadvantaged regions of an exporting country (ASCM Part IV, Article 8).

In order to be covered by the SCM Agreement, subsidies need to be specific to an industry, except that prohibited subsidies (i.e., export subsidies and import substitution subsidies) are considered *per se* specific. The ASCM also provides transitional rules for developed countries and members in transition to a market economy, as well as special and differential treatment rules for developing countries.

²⁷ World Trade Organization home page, “Introduction to Antidumping in the WTO.” <http://www.wto.org>.

International Trade Remedy Activity

Many WTO members have long been concerned about an apparent escalation in the use of trade remedies worldwide, especially since the implementation of the ADA and ASCM in 1995. Some have expressed concern especially about the rapid increase of trade remedy actions by “nontraditional” users (developing countries who may or may not have experience implementing these measures in a transparent manner) such as India. In addition, some countries who are frequent targets of trade remedy actions (many of whom are “nontraditional users”) by “traditional” users (the United States, the European Union, and Australia, for example) claim that their industries are adversely affected by the use of trade remedy actions against them. These are some of the reasons that led to the pressure for including WTO disciplines in trade remedies in DDA negotiations.

Supporters of trade remedy action acknowledge that the incidence of AD activity has increased rapidly, but also point to a marked increase in the volume of international trade as a whole, suggesting that, as overall trade increases, the frequency of claims of unfair trading practices, such as dumping, will also have a natural tendency to increase.²⁸ In addition, many supporters believe that the existence of trade remedy laws helps to build support for increased trade liberalization because industries and workers that could be adversely affected by competing imports know that there is a “safety valve” that they can use to protect them from unfair trading practices or import surges.

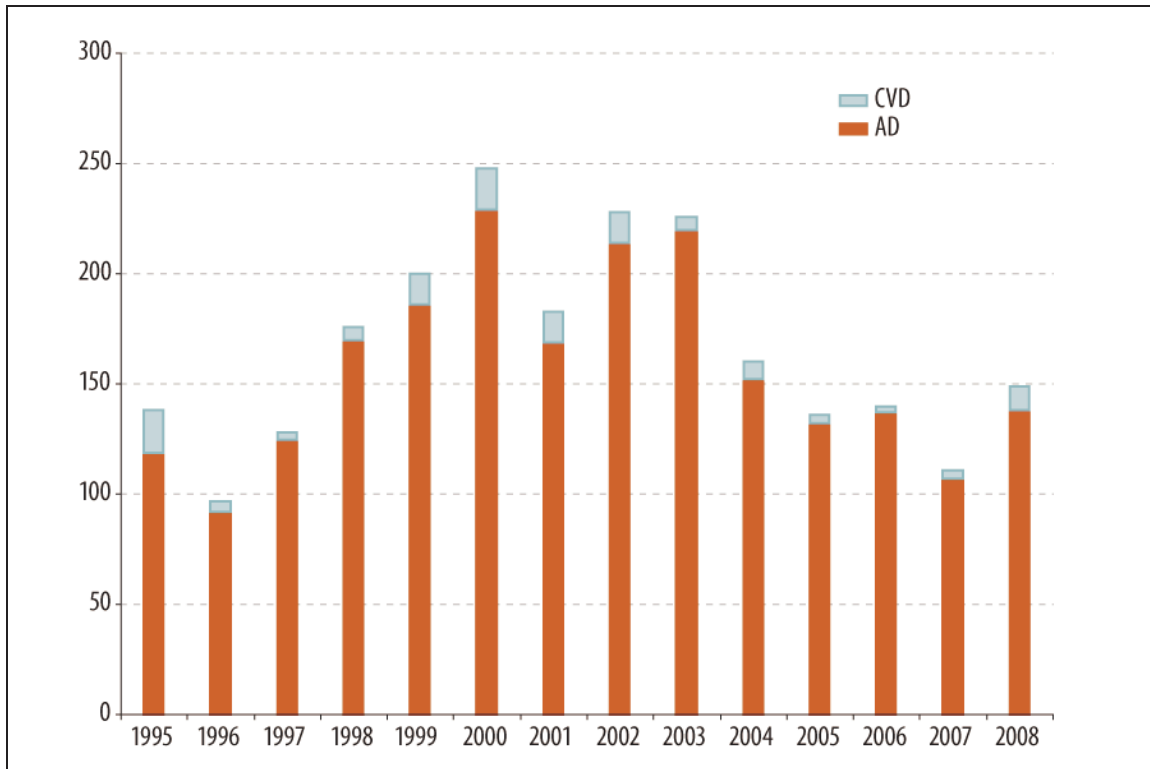
WTO statistics on worldwide trade remedy activity may help illustrate the scope and magnitude of the issue. According to antidumping statistics for 1995 through 2008 (see **Figure 1**), the total number of yearly trade remedy measures rose sharply from 1996 to 2000, decreased in 2001, and peaked again in 2002 and 2003. Worldwide trade remedy activity declined in 2004 and 2005, increased slightly in 2006, and declined once more in 2007. In 2008, AD activity, in particular, appeared to be on the rise, with 208 initiations, as opposed to 163 in 2007.²⁹ A May 2010 World Bank report on trade protectionism indicates that trade remedy initiations decreased by 20% in the first quarter of 2010 relative to the same period in 2009.³⁰

²⁸ World Trade Organization, “Basic Concepts and Principles of the Trade Remedy Rules,” Submission of the United States. TN/RL/W/27, October 22, 2002.

²⁹ World Trade Organization, “WTO Secretariat Reports Increase in New Antidumping Investigations,” Press Release, May 2009, Press/556.

³⁰ Bown, Chad P. , *First Quarter 2010 Protectionism Data: Requests for New Trade Barriers Fall for Second Consecutive Quarter; Newly Imposed Barriers Also Fall*, World Bank, May 25, 2010.

Figure I. Total AD and CVD Measures Worldwide
(number of final measures implemented)



Source: World Trade Organization statistics.

Fluctuations in trade remedy activity in recent years could mean several things. First, some have mentioned that declines in activity during 2004-05 could have been due to active discussions on trade remedies in the Doha Development Agenda. Second, as some observers have mentioned, the process of globalization—especially foreign ownership of factories and industries—is causing industries to become more globally integrated. One notable example of this is the 2005 purchase of Ohio-based International Steel Group (ISG) by the multinational firm Mittal Steel. Moves toward global integration could reduce trade remedy petitions in the future because the domestic producers and the importers could increasingly become one and the same.³¹

A third factor that may have influenced a decline in trade remedy action is that there seem to be fewer trade remedy measures initiated in times of economic prosperity. This may also explain the increase in antidumping investigations reported by the WTO in 2008, since in the latter part of 2007 the world began to experience an economic downturn.

Trade remedy usage by “nontraditional” users (i.e., developing countries) has escalated at a rapid pace in recent years, as **Figure 2** (below) illustrates. Prior to the mid 1990s, the club of “traditional” users of these measures was quite small and consisted primarily of developed countries like Australia, South Africa, the United States, Japan, France, New Zealand, and the

³¹ Panelist remarks, “Trade Remedy Laws: Too Weak, Unfair, Outdated?” Washington International Trade Association, April 18, 2007.

United Kingdom.³² Since the mid-1990s, trade remedy investigations by developing countries, such as India, Argentina, Brazil, Thailand, and Indonesia, have rapidly escalated. Many of these countries did not have trade remedy laws until the 1990s—or if they did have them on the books, did not exercise them.³³ For example, India’s first trade remedy action was not until 1992, against imports of PVC resin from Brazil, Mexico, South Korea, and the United States.³⁴ It was also a group primarily composed of developing country users—known as the “Friends of Antidumping”—that forced U.S. negotiators to accept negotiations on trade remedies as one of the primary objectives in the DDA. Some trade analysts assert that developing countries resorted to using AD and CVD measures because they had frequently become the targets of such action by the “traditional” users of these actions.

The application of AD actions initiated (see **Figure 2**) by developing countries as opposed to developed countries diverged sharply during the global financial crisis. From the beginning of the crisis (about the 1st quarter of 2008) to the present, developing countries have initiated about 69% of all investigations, while developed country initiations were on a steady decline until the first quarter of 2009.³⁵ Data collected over the period also indicates an increasing use of trade remedy measures in “South-South” (developing country importers initiating actions against developing countries) trade, with exports from China being a major target.³⁶ In the 4th quarter of 2009, AD initiations by both developed and developing countries decreased, and in the first quarter of 2010, developed country initiations increased slightly, while developing country initiations continued to fall.³⁷

³² Thomas J. Prusa, “Antidumping: A Growing Problem in International Trade,” *The World Economy*, vol. 28, no. 5 (2005), p. 690.

³³ *Ibid.*, p. 683.

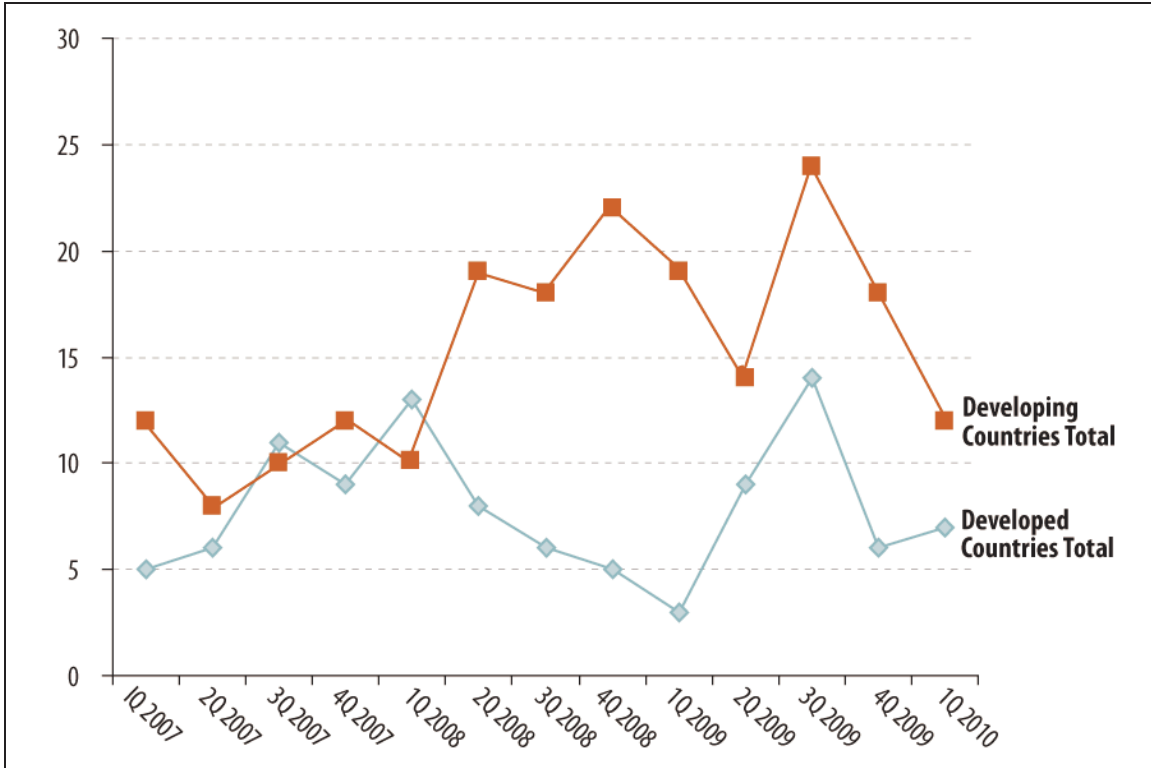
³⁴ V. Lakshmi Kumaran, “The 10 Major Problems with the Anti-Dumping Instrument in India,” *Journal of World Trade*, vol. 39, no. 1 (2005), p. 115.

³⁵ Bown, Chad P., *The Global Resort to Antidumping, Safeguards, and Other Trade Remedies Amidst the Economic Crisis*, The World Bank, Policy Research Working Paper, WPS5051, September 2009.

³⁶ *Ibid.*

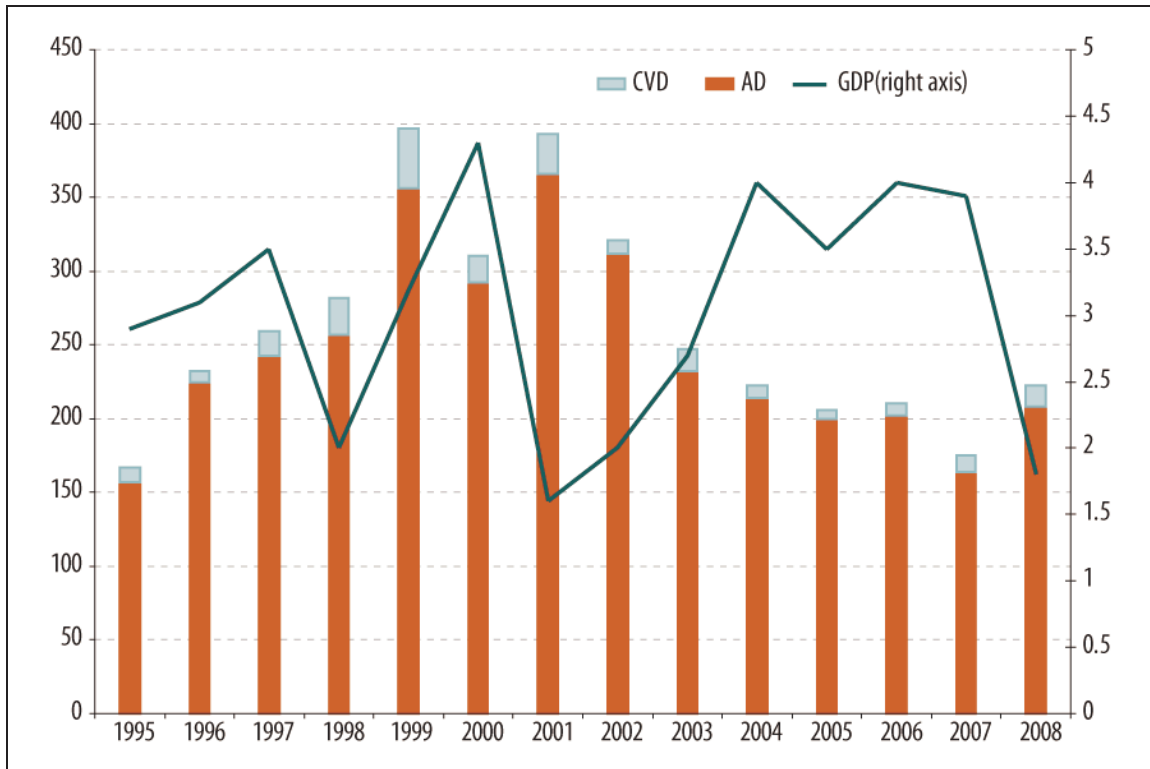
³⁷ Bown, Chad P., *First Quarter 2010 Protectionism Data: Requests for New Trade Barriers Fall for Second Consecutive Quarter; Newly Imposed also Fall*, The World Bank, May 25, 2010, <http://go.worldbank.org/W5AGKE6DH0>.

Figure 2.AD Initiations by Developed and Developing Countries, 2007-2010
 (total number of initiated investigations)



Source: Bown, Chad, "Temporary Trade Barriers Database." The World Bank, May 25, 2010.

Figure 3. Worldwide Trade Remedy Initiations and Real GDP Growth, 1995-2007
Total number of initiations (left scale), annual percentage of GDP growth (right axis)



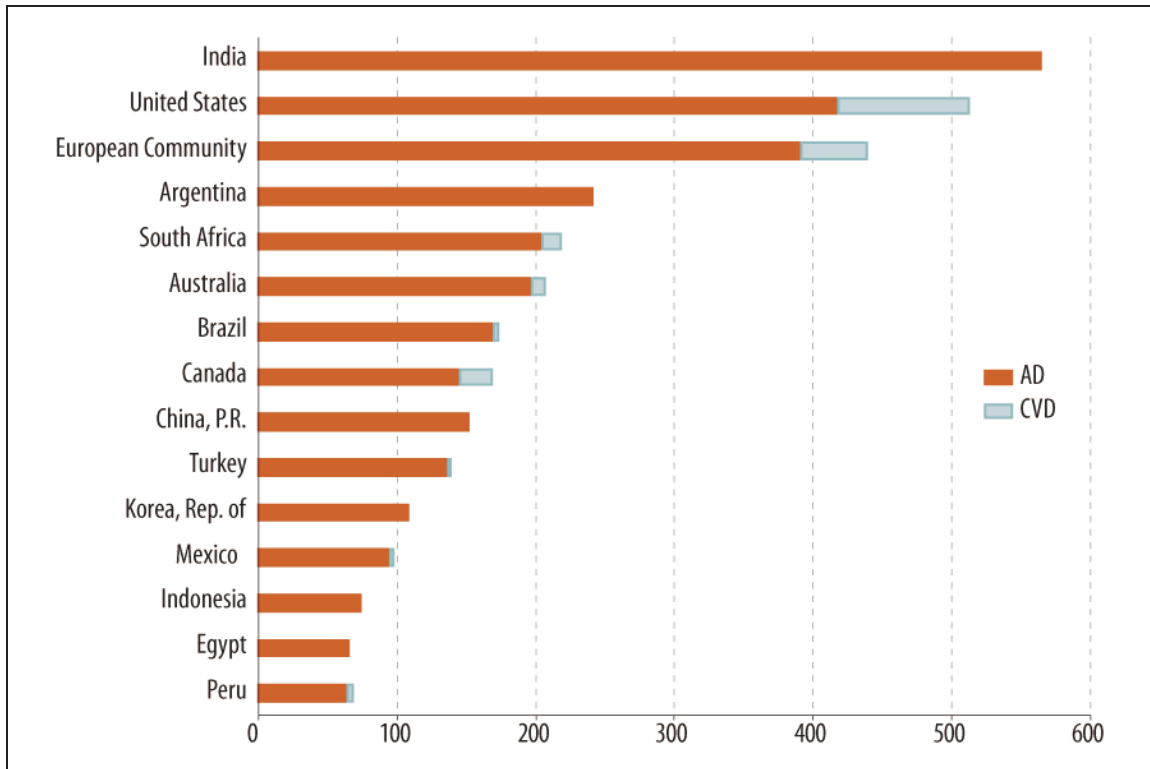
Source: World Trade Organization trade statistics (CVD and AD initiations). EIU Market Forecasts and Indicators (GDP Growth).

Notes: World GDP Growth is percentage change in real GDP, over previous period. EIU calculation based on 51 largest countries covered in Market Indicators & Forecasts.

Figure 3 shows worldwide trade remedy initiations³⁸ from 1995 to 2008. Worldwide real GDP growth (2000 base) is illustrated for the same time period. Trade remedy initiations reached a peak in 1999 (412 initiations), following a 1998 drop in worldwide GDP growth (2.32% in 1998, down from 3.7% in 1997). As GDP growth increased in 2000, trade remedy initiations decreased. In 2001, trade remedy initiations reached another peak, which coincided with a sharp decrease in worldwide GDP growth (1.5%, down from 4.11% in 2000). This figure illustrates that increases in global trade remedy activity seem to roughly coincide with decreases in worldwide GDP growth.

³⁸ Trade remedy *initiations* refer to investigations begun through petition filings or initiated by administrative authorities. The final result of the investigation may result in the imposition of a trade remedy measure, be found to be negative, or terminated/withdrawn.

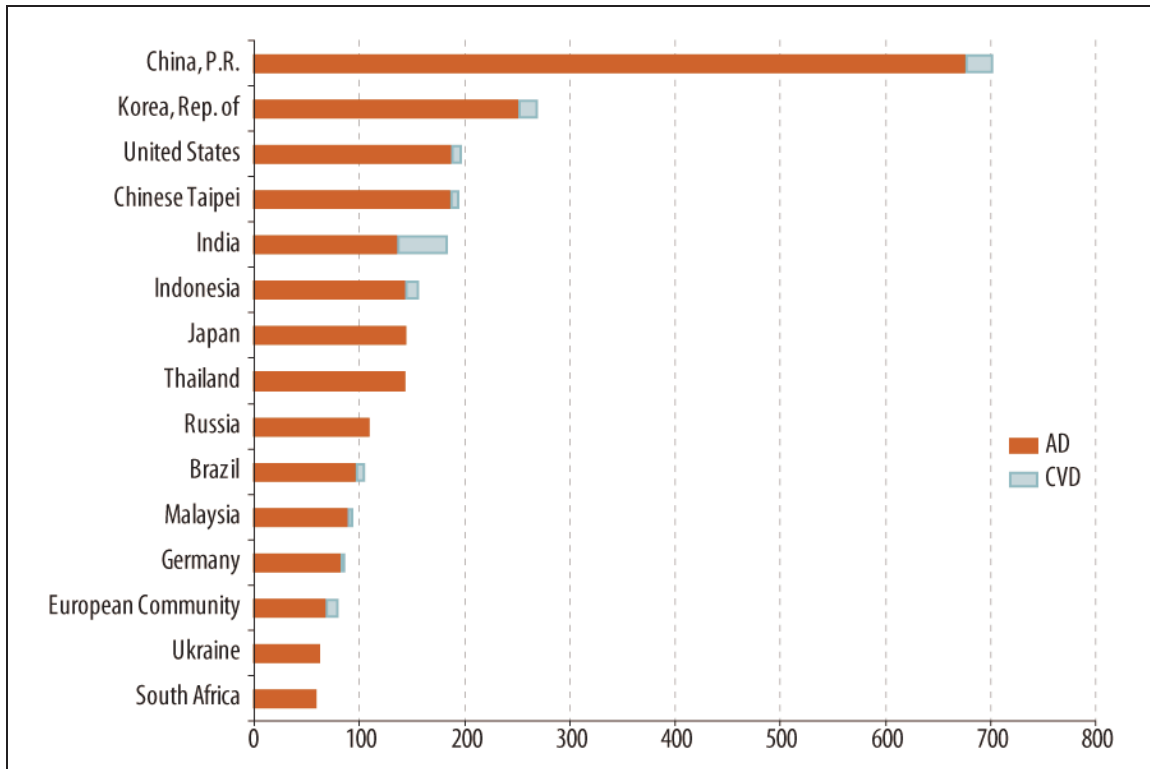
Figure 4. Leading Initiators of Trade Remedy Actions Worldwide, 1995-2008
(Total number of AD and CVD initiations by reporting country)



Source: World Trade Organization statistics.

Figure 4 illustrates the leading initiators (importing countries bringing trade remedy cases) of trade remedy initiations from 1995 to 2008. India leads this group, with 564 AD initiations; followed by the United States (418AD, 94 CVD); the European Community (391 AD, 48 CVD); Argentina (241 AD); South Africa (206 AD, 13 CVD); Australia (170 AD, 9 CVD); Brazil (170 AD, 23 CVD); Canada (145 AD, 23 CVD), China (151 AD); Turkey (137 AD, 1 CVD); South Korea (108 AD); Mexico (94 AD, 2 CVD); Indonesia (73 AD); Egypt (65 AD); and Peru (64 AD, 4 CVD).

Figure 5. Leading Targets of Trade Remedy Actions Worldwide, 1995-2008
(Total number of AD and CVD initiations by exporting country)

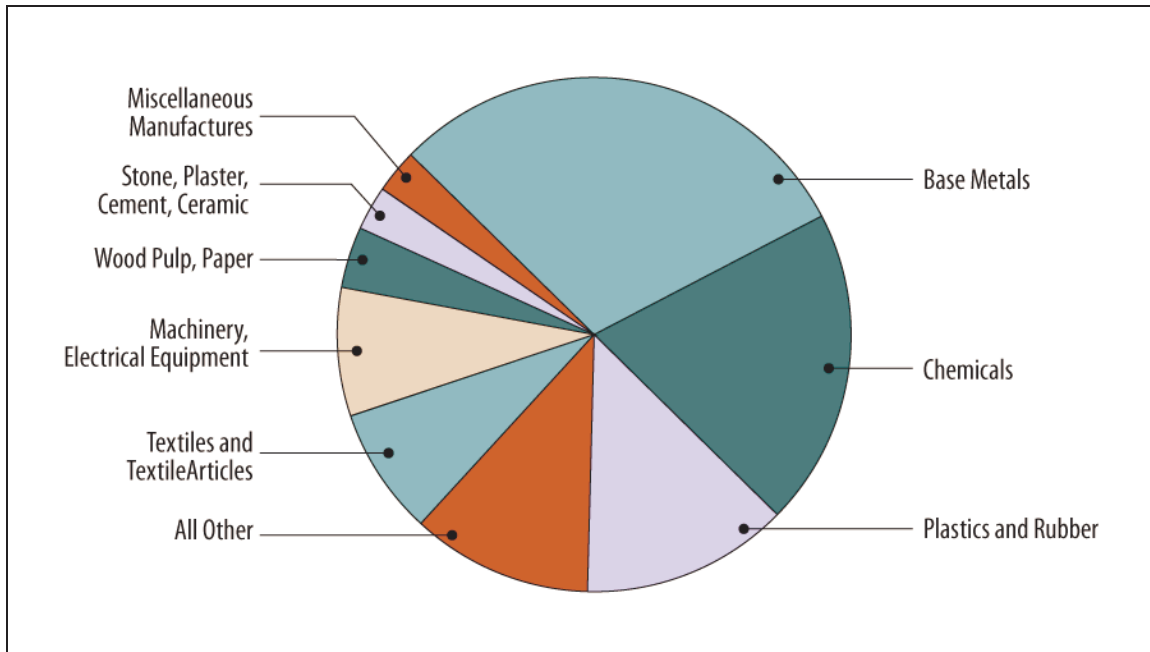


Source: World Trade Organization statistics.

Notes: Safeguard measures are not included in this chart because safeguard measures may be directed at imports from all countries.

Figure 5 depicts the leading targets (exporting countries) of worldwide antidumping and countervailing actions for the same time period. China is currently at the head of this list, with 677 AD initiations and 24 CVD initiations. South Korea is second (252 AD, 16 CVD); followed by the United States (189 AD, 7 CVD); Chinese Taipei (Taiwan, 145 AD); India (137 AD, 46 CVD); Indonesia (144 AD, 11 CVD); Japan (144 AD); Thailand (142 AD; 9 CVD); Russia (109 AD); Brazil (90 AD, 7 CVD); Malaysia (48 AD, 3 CVD); Germany (83 AD; 3 CVD); the European Community (69 AD; 10 CVD); Ukraine (61 AD); and South Africa (58 AD).

Figure 6. Worldwide Trade Remedy Measures by Product Category, 1995-2007
(AD and CVD measures actually imposed)



Source: World Trade Organization Statistics.

As **Figure 6** illustrates, the products that seem to be targeted most in trade remedy initiations tend to be primary products and/or intermediate goods frequently used in the manufacturing process. For example, steel pipe and wire are used in the construction industry, and steel sheet is used to manufacture automobiles. Base metals, such as steel and products manufactured from steel (e.g., steel pipe and wire) head the list of targeted products, followed by chemicals and items made of plastics and rubber.

Reasons that these products are dumped or subsidized more than others might include possible government support for these industries, or overcapacity in the home countries. In developing economies, for example, domestic steel industries are often supported by governments so that the industry can supply the large quantities of steel required for building infrastructure in the initial stages of development.³⁹ As the industry expands, it reaches a level of overcapacity, and pushes some of the excess into exports (sometimes also with government support to expand the export market).⁴⁰ Industries may also face market contractions, fail to gauge future capacity, have certain fixed costs that require manufacturing to continue, or have difficulty retooling factories to make items that may be in limited supply.⁴¹

³⁹ Hans Mueller, *Integrating the Chinese Steel Industry and Trade Policy into the 21st Century*, American Institute for International Steel (AIIS), Washington, DC, August 3, 2006, p. 2.

⁴⁰ *Ibid.*

⁴¹ Wilfred J. Ethier, "Dumping," *Journal of Political Economy*, vol. 90, no. 3 (June 1982), p. 504.

WTO Rules Negotiations⁴²

When the trade ministers of WTO member nations convened at the November 2001 Ministerial of the World Trade Organization in Doha, Qatar, many countries placed launching a new round of trade negotiations high on the agenda. Some Members expected that a new trade round would give the world economy a much-needed stimulus after the economic shock associated with the September 11, 2001 terror attacks. A primary goal of U.S. officials was to negotiate expanded market access for U.S. agriculture, services, and industrial products.⁴³

The DDA is being conducted as a “single undertaking,” meaning that nothing is agreed to individually unless consensus on an entire package is reached. Thus, agreements must be reached in talks on non-agricultural market access, agricultural talks, and in negotiations on trade in services, as well as in the rules negotiations, before any concessions made can go into effect.

Doha Ministerial Debate

As a result of mounting international concern on expanding trade remedy activity in general and antidumping in particular, a coalition of developed and developing WTO member countries called the “Friends of Antidumping” (FANs—a group consisting of the European Union, Brazil, Chile, China, Colombia, Costa Rica, Hong Kong, India, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey—asserted that any new framework for negotiations should include talks on improving WTO trade remedy rules. The European Union may have joined the coalition, in part, because it is a leading target of antidumping measures, and also because it may have issues with the trade remedy practices employed by other developed countries. EU trade officials expressed concern at Doha primarily over major differences among countries in their interpretation and application of WTO rules on AD and CVD investigations.⁴⁴ Many of the developing nations in the FANs group argued that trade remedy action disproportionately affects their economies, and that the ADA should require developed nations to provide some form of “special and differential treatment” when investigating products originating in developing nations.⁴⁵

Then-USTR Robert B. Zoellick, aware of congressional interest in preserving the effectiveness of U.S. trade remedy laws, initially resisted opening negotiations on trade remedies. However, U.S. negotiators relented when it seemed evident that the new round of talks would not go forward without some concessions on antidumping. The United States was able to insert language in the final negotiating documents that limited radical change, and also successfully injected a certain amount of ambiguity in terms of the mandate. The final language of the Doha Ministerial Declaration regarding trade remedies read as follows:

⁴² For an overview of the progress of overall negotiations in the Doha Development Agenda, see CRS Report RL32060, *World Trade Organization Negotiations: The Doha Development Agenda*, by (name redacted).

⁴³ *Ibid.*

⁴⁴ World Trade Organization, Negotiating Group on Rules, *Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994*, TN/RL/W/13, Geneva, July 8, 2002, <http://www.wto.org>.

⁴⁵ *Ibid.*, p. 3.

In light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase ...⁴⁶

Ambassador Zoellick later defended the decision to compromise on negotiations on trade remedies by stressing that the United States would push an “offensive agenda” on trade remedies in order to address the increasing “misuse” of these measures by other WTO Member countries against U.S. exporters.⁴⁷ He added that since WTO dispute panels had gone against the United States in several cases involving trade remedy cases, U.S. negotiators were especially interested in tightening dispute panel and Appellate Body “standard of review” provisions so that panels do not add to the obligations of, nor diminish the rights of, WTO member nations—another matter of concern for many in Congress.

Negotiating Group on Rules

During the DDA, work on trade remedies is being carried out in the Negotiating Group on Rules. Negotiations in the group have taken place in three overlapping phases. First, negotiators presented formal written papers indicating general areas in which they would like to see changes made in the agreements. In the second phase, negotiators are continuing to elaborate on their positions, sometimes proposing legal drafts of suggested changes. This phase helps negotiators develop a clearer idea of what proponents of specific changes are seeking, and develop “a realistic view of what may and may not attract broader support in the group.”⁴⁸ The third phase has consisted of ongoing bilateral and multilateral discussions and technical consultations, partly aimed at developing a possible standardized questionnaire which administering officials could use in AD and other investigations in order to reduce costs and increase transparency.⁴⁹

Given the mandate to preserve “the basic concepts, principles, and effectiveness” of trade remedy rules, negotiators “are not dealing with ... big picture issues, but with a very large number of highly specific issues” and the final result of the talks will be based on the “precise details of the drafting.”⁵⁰ Furthermore, negotiators concede that any consensus on changing the ADA, ASCM, or other trade remedy agreements is likely to involve internal trade-offs on trade remedies in exchange for external linkages—that is, for perceived successes in other areas of DDA negotiations, such as improved agricultural market access or services trade. Therefore, many observers speculate that any agreement on substantive changes to WTO trade remedy obligations is not likely to take place until the end of the round.

⁴⁶ World Trade Organization, *Ministerial Declaration*, WT/MIN(01)/DEC/1, November 14, 2001.

⁴⁷ United States Trade Representative. “USTR Zoellick Says World Has Chosen Path of Hope, Openness, Development, and Growth.” Press Release, November 14, 2001.

⁴⁸ World Trade Organization, Negotiating Group on Rules, *Report by the Chairman to the Trade Negotiations Committee*, TN/RL13, July 19, 2005, p. 2, <http://www.wto.org>, and similar periodic reports.

⁴⁹ *Ibid.*

⁵⁰ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, November 30, 2007.

The DDA mandate also specifies that negotiations on trade remedies are intended to “clarify and improve” the AD and ASCM rather than to eliminate them. Given the narrow parameters of the mandate, as well as the vocal opposition expressed by many in Congress to any agreement that would lessen the effectiveness of U.S. trade remedy laws, any substantive changes that could result in limiting their effectiveness in granting relief to U.S. import-competing industries are likely to be resisted by U.S. negotiators.

In addition, since all WTO negotiations are conducted on a consensus basis, any proposal submitted by the United States—or any proposal submitted by any WTO member—requires the agreement of all other members. Thus, the submission of any substantive proposal on trade remedies is likely to be accompanied by certain calculations on the part of the USTR on whether any consensus can be reached on the issues, and to what concessions the United States may have to agree. This calculation may be especially significant considering the generally defensive nature of U.S. negotiating positions in the Rules talks.

2005 Hong Kong Ministerial

In the negotiating documents in Hong Kong, WTO members reaffirmed that “achievement of substantial results on all aspects of the Rules mandate” is important to the further development of the rules-based multilateral trading system. The group further recognized that negotiations, especially on antidumping procedures, have intensified and deepened and that “participants are demonstrating a high level of constructive engagement.”⁵¹ The Negotiating Group on Rules was directed “to intensify and accelerate the negotiating process” and “complete the process of analyzing proposals by participants on the AD and ASCM as soon as possible.”⁵² The chairman was directed to prepare consolidated texts of the Agreements based on previously distributed negotiating papers. These draft texts were intended to become the “basis for the final stage of the negotiations.”⁵³

2007 Draft Texts

The first draft texts were issued on November 30, 2007.⁵⁴ In part, because the group was still far apart on many issues in the negotiations, the chairman attempted to reflect “a balance that takes into account the interests of all participants” and intended to stimulate discussion rather than directly reflecting previously submitted proposals. Because the texts, in some respects, seemed to favor the U.S. approach on key negotiating issues such as zeroing, members such as the FANs found little in the draft texts to support. U.S. officials were also “very disappointed with important aspects” of the draft.⁵⁵ Thus, the draft texts, while achieving the chairman’s objective of provoking discussion, pleased almost no one.

⁵¹ World Trade Organization, *Doha Work Program: Ministerial Declaration*, WT/MIN(05)/DEC, December 22, 2005.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, November 30, 2007.

⁵⁵ “Joint statement by the Office of the United States Trade Representative and the Department of Commerce’s International Trade Administration,” November 30, 2007.

July 2008 Talks

In mid-July 2008, WTO negotiators met for critical meetings to establish modalities in agriculture and non-agricultural market access. Anticipating that these negotiations would be successful and would accelerate the Round's completion, the chairman reported to the Rules negotiations group that "we must be in a position to move quickly to insure that our work is effectively synchronized with that of other Groups so that Rules can make its contribution to the overall package of results in the Round."⁵⁶ The chairman also acknowledged that "few if any delegations believe that my first Chair's texts struck a proper balance," and that "Members at this stage would prefer that I pursue a bottom-up approach and that I adequately reflect the actual negotiations among Members."⁵⁷

November 2008 G-20 Summit

On November 14 and 15, 2008, a summit of G-20 heads of state meeting in Washington, DC, agreed to work toward reaching an agreement by year's end on modalities leading to an "ambitious outcome" in the Doha Development Agenda, and to resist raising new barriers to international trade and investment. New draft negotiating texts were issued in December in anticipation of a proposed ministerial to finalize modalities, yet that summit never materialized as differences between the parties remained intractable.⁵⁸

December 2008 AD and ASCM Drafts

In that light, in December 2008, the chairman released a second draft text that provided new language "only in areas where *some* degree of convergence appears to exist."⁵⁹ Since, as in all WTO negotiations, the Rules negotiations are consensus-based "a great deal of work remains to be done in order to ensure that we have Rules texts reflecting the greatest convergence possible. Not only are there large gaps where on issues of great importance to delegations no solutions are proposed; but few, if any, of the textual proposals that can be found in these new texts can be considered to attract consensus support."⁶⁰

In November 2009, the Chairman reported progress in the talks, especially in technical areas. However, he acknowledged that "we are no nearer consensus on the big political issues that we were in December 2008, and we are not likely to see the type of engagement that could lead participants to negotiate compromises on these issues until the overall direction of the Round becomes clearer."⁶¹ A similar message was conveyed in a March 2010 report to the Trade Negotiations Committee.⁶²

⁵⁶ World Trade Organization, Negotiating Group on Rules. *Report by the Chairman to the Trade Negotiations Committee*. TN/RL/22, 17 July 2008.

⁵⁷ Ibid.

⁵⁸ CRS Report RL32060, *World Trade Organization Negotiations: The Doha Development Agenda*, by (name redacted).

⁵⁹ World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair texts of the AD and SCM Agreements*, TN/RL/W/236, Washington, DC, December 19, 2008.

⁶⁰ Ibid.

⁶¹ World Trade Organization, Negotiating Group on Rules, *Informal Open-Ended Meeting with Senior Officials: 25 November 2009*, TN/RL/W/246, November 27, 2009.

⁶² World Trade Organization, *Negotiating Group on Rules: Report of the Chairman to the Trade Negotiations* (continued...)

Antidumping

The ADA, perhaps by design, is somewhat ambiguous. Many countries, especially the “Friends of Antidumping,” would like to see more specific definitions and guidelines in order to provide some harmonization of nations’ implementation of trade remedy laws. Some have suggested a kind of “template” format for conducting AD investigations in order to make the procedure more efficient and cost-effective for developing countries. The United States could also benefit from modifications to the ADA, particularly if they enhance the transparency of antidumping investigations in WTO member countries in which the United States has become a target of antidumping action. However, there are trade-offs between these and other proposals which, if adopted, could ultimately have the effect of raising the threshold for domestic petitioners’ ability to obtain relief, lead to lower calculated dumping duty levels, or limit the duration of antidumping orders.

Because the ADA largely consists of administrative guidelines for investigations, including calculating dumping margins, determining injury, and granting relief, many of the proposals offered involve highly technical changes that are beyond the scope of this report. However, there are major themes that have emerged for which there seems to be broad support among WTO members. These include proposals for a ban on “zeroing,” a mandatory “lesser duty” rule, and increased use of procedures known as “price undertakings.” Some of these proposals, if adopted, could result in significant amendments to U.S. laws. Most of these recommendations would also primarily affect administrative methodology. Another proposal seeks mandatory termination of antidumping measures after a certain period.

Many WTO members believe that the methodology used by some countries to calculate duty margins—particularly the United States and its use of “zeroing”—leads to highly inflated duty margins. As a consequence, revisions in the ADA that could lower dumping margins have been a major focus of submissions and discussions in the Rules negotiations.

Ban on “Zeroing”

Many WTO members are opposed to the U.S. practice of calculating dumping margins using “zeroing,” and achieving an outright ban on the practice is a primary objective of the Friends of Antidumping group. This is also an area in which WTO dispute settlement panels have consistently ruled against the United States.

U.S. Methodology

U.S. antidumping laws specify that any AD duties imposed on targeted merchandise must be equal to the dumping margin or “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The International Trade Administration typically calculates the margin by first identifying, to the extent possible, all U.S. transactions, sale prices, and levels of trade for each model or type of targeted merchandise sold by each company in the exporting country. These model types are then aggregated into subcategories,

(...continued)

Committee, TN/RL/24, March 22, 2010.

known as “averaging groups,” which are used to calculate the “weighted-average export price.” These export prices for each subgroup are then compared to the corresponding agency-calculated “weighted-average normal value.” Finally, the results of all of these comparisons are added up to establish an overall dumping margin of the targeted product. This amount is the amount of antidumping duty assessed on the targeted imports in the event that an AD investigation results in final affirmative determinations of dumping and injury.

When authorities add up the dumping margins of each of the subgroups to establish the overall margin, they sometimes encounter negative margins in a subgroup, which could indicate that that particular subgroup is not being dumped. However, rather than including the negative result in their calculations—which could result in a lower overall dumping margin, or, as opponents also charge, a ruling that the targeted merchandise is not being dumped—ITA officials factor in the results of that subgroup as a zero. Officials use a similar practice when re-calculating dumping margins in administrative reviews of AD orders or suspension agreements. One justification for the zeroing practice is that the dumping margin could be skewed if the subgroup that has the negative dumping margin represents a substantial percentage of export sales. Since zeroing is neither required, nor prohibited, by U.S. law, ending the practice could be brought about largely through administrative actions.

Zeroing in Rules Negotiations

Since the U.S. practice has been successfully challenged in WTO dispute settlement proceedings,⁶³ U.S. negotiators are primarily on the defensive when zeroing comes up in negotiations. In addition, since the European Communities has already dropped its use of zeroing as the result of a dispute settlement case brought by India, it is eager to pressure the United States to also abandon the practice. There is still strong domestic support for zeroing among U.S. import-competing industries and some in Congress, despite the WTO determinations.

The position of the FANs is that “zeroing is a biased and partial method for calculating the margin of dumping and inflates anti-dumping duties” that could “nullify the results of trade liberalization efforts” in the multilateral trading environment.⁶⁴

U.S. Position

U.S. negotiators have consistently maintained that dispute settlement panel and Appellate Body rulings have illustrated that WTO members “still have different views on whether ‘offsets’ are required, and when and under what circumstances they must be provided.” Additionally, U.S. officials maintain that, “A prohibition of zeroing, or a requirement to provide offsets for non-dumped transactions, simply cannot be found in the text of the AD Agreement.”⁶⁵

⁶³ For a discussion of WTO challenges of U.S. zeroing practices, see CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by (name redacted).

⁶⁴ World Trade Organization, Negotiating Group on Rules. *Statement on “Zeroing” in the WTO Antidumping Negotiations*, Communication from the Delegations of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Viet Nam, TN/RL/W/214/Rev.3, January 25, 2008.

⁶⁵ World Trade Organization, Negotiating Group on Rules, *Offsets for Non-Dumped Comparisons*, TN/RL/W/208, June 5, 2007. Rather than referring to “zeroing,” U.S. negotiators have chosen to use the term “offsets.”

Further, U.S. negotiators submitted draft language to be added to the ADA that would permit zeroing, stating, in part, that, “When aggregating the results of comparisons of normal value and export price to determine any margin of dumping, ... authorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price.”⁶⁶

Chairman’s Draft Texts

The November 2007 draft text on Antidumping contained language that would have specifically permitted the use of zeroing in all sunset reviews and administrative reviews of dumping margins, and would have allowed zeroing in original investigations if officials used particular methodologies.⁶⁷ This position angered many opponents to zeroing, while it also failed to please U.S. officials, who believe that zeroing should be allowed in all cases.⁶⁸ In the 2008 “bottom-up” approach, the Chairman’s draft of the ADA contained no language on zeroing on the basis that “delegations remain profoundly divided on the issue.”⁶⁹

The USTR’s official statement after the draft’s release stated, “We are deeply disappointed that the chairman has eliminated the limited language on zeroing contained in the November 2007 text. As we have said repeatedly, the United States cannot envision an outcome in the Rules Negotiations that fails to adequately address this critical issue.”⁷⁰

Mandatory Lesser Duty Rule

Article 9.1 of the ADA encourages—but does not specifically require—the imposition of an antidumping duty *lower than the full dumping margin* if investigating authorities determine that the lesser amount is sufficient to offset the injury suffered by or threatened to the domestic industry. Many WTO members favor amending the ADA to require an obligatory, rather than discretionary, “lesser duty rule.”

Several WTO members have already implemented lesser duty rules in their antidumping laws and investigations, including Argentina, Australia, Brazil, the European Community, India, New Zealand, and Turkey. These members “acknowledge that the current provision is not mandatory, but they chose to implement provisions to foster a better system,” and ask that “the positive actions of these Members should not be undermined under the DDA, the spirit of which is, we understand, to increase trade flows, enhance predictability and provide more transparency.”⁷¹

⁶⁶ World Trade Organization, Negotiating Group on Rules, *Proposal for Offsets on Non-Dumped Comparisons*, Communication from the United States, TN/RL/GEN/147, June 27, 2007.

⁶⁷ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/213, November 30, 2007.

⁶⁸ “Revised Doha Text Opens Key Issues; U.S. Critical on Zeroing,” *Inside U.S. Trade*, December 26, 2008.

⁶⁹ World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236, December 19, 2008.

⁷⁰ United States Trade Representative, *Press Statement*, December 22, 2008.

⁷¹ World Trade Organization, Negotiating Group on Rules, *Lesser Duty Rule*, Communication from the Delegations of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand. TN/RL/W/224, March 12, 2008.

There is currently no “lesser duty rule” in U.S. law or practice, and implementation of a mandatory rule would require congressional action.

Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have also proposed that this practice could be included as part of a “special and differential treatment” package of trade concessions offered by developed nations to developing countries.

U.S. Position

U.S. negotiators have resisted these proposals. First, U.S. negotiators contend that if a lesser duty rule were required by the ADA, that would create onerous new obligations and procedures.⁷² Second, says the United States, there is no common practice used among WTO members that have implemented such a rule. Third, U.S. negotiators say that a lesser duty rule would fundamentally change the form of remedy currently provided.⁷³

Fourth, if a lesser duty rule were to be implemented, there is no guarantee that the duty amount would be sufficient to offset the injury, and there might be no way for injured parties to appeal or ask for an increased duty amount.⁷⁴ Fifth, any lesser duty proposals would fail to address the *threat* of material injury, for which the ADA also provides relief.⁷⁵ Sixth, if the investigated parties know that the duty amount charged would be minimal, U.S. negotiators say that it could create an incentive for targeted exporters not to participate in the investigation, which would make it even harder for authorities to make AD duty determinations.⁷⁶

Chairman’s Draft Texts

The Rules chairman’s November 2007 draft ADA text did not suggest that a lesser duty rule be imposed, and in fact, removed the sentence in the original text that suggested its implementation. Rather, the draft of Article 9.1 emphasized that procedures for calculating dumping margins are a matter for national authorities to determine, and that the application of such procedures should not be subject to dispute settlement.⁷⁷ The December 2008 draft text did not contain any draft language on this point, instead citing that WTO members were sharply divided on the issue.⁷⁸

Price Undertakings

Article 8 of the ADA permits authorities to accept “voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices” or “price

⁷² World Trade Organization, Negotiating Group on Rules, *Further Comments on Lesser Duty Proposals*, Paper by the United States, TN/RL/GEN/58, July 13, 2005.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W213, November 30, 2007, pp. 19-20.

⁷⁸ World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair texts of the AD and SCM Agreements*, TN/RL/W/236, Washington, DC, December 19, 2008.

undertakings,” provided that investigating authorities are satisfied that the injurious effect of the dumping is eliminated. Some common negotiated arrangements might involve the exporting country agreeing to (1) import quotas, (2) minimum selling prices, (3) eliminate non-tariff barriers that prevent exporters from the receiving country from entering the market, or (4) any combination thereof. The injured country could agree to a lesser duty amount (“price undertaking”) or agree to limit the duration of the trade measure.

Many WTO members, particularly members of the FANs coalition, favor increased or mandatory use of such alternative arrangements because they believe that these alternatives are less damaging to exporters and to the world market for the targeted merchandise. They contend that these arrangements are sufficient to mitigate the injury to domestic producers.

U.S. Position

U.S. antidumping laws already permit the use of alternative arrangements, referred to as “suspension agreements” in U.S. law.⁷⁹ In antidumping cases, the ITA may suspend an investigation if the exporters accounting for “substantially all” of the targeted merchandise agree to (1) to stop exporting the targeted merchandise to the United States within six months of the suspension agreement or (2) revise their prices so that the amount of dumping is eliminated.⁸⁰

U.S. authorities may also agree to a suspension agreement if they determine that there are extraordinary circumstances,⁸¹ if the agreed-upon settlement will eliminate completely the injury to the import-competing U.S. industry, and if the exporters are willing to revise their prices to completely eliminate the injury.⁸² In practice, however, U.S. authorities do not use suspension agreements very often. As of this writing, there are 8 U.S. suspension agreements in place.⁸³

Chairman’s Draft Texts

Neither the 2007 nor the 2008 draft AD texts make substantive changes to price undertakings or introduce new language that proposes to make them mandatory.

Administrative and “Sunset” Reviews

Article 11.3 of the ADA specifies that each antidumping order must be terminated after five years *unless* authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping and subsequent injury to the domestic producer.

Some WTO members are critical of the length of time that AD measures remain in force. For example, the United States has three AD measures that have been in effect since the 1970s, and

⁷⁹ 19 U.S.C. § 1673c(b) – (f)

⁸⁰ 19 U.S.C. § 1673c(b)(1) and (2).

⁸¹ “Extraordinary circumstances” are described in 19 U.S.C. 1673c(c)(2)(A) as circumstances in which “(i) the suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation is complex.”

⁸² 19 U.S.C. § 1673c(b).

⁸³ For a list of current suspension agreements, see the International Trade Administration’s home page at <http://ia.ita.doc.gov/agreements/index.html>.

about 40 that have been in force since the mid-1980s. In particular, the FANs, Japan, and China, support the mandatory termination of antidumping measures in no later than five years.⁸⁴ South Africa also supports mandatory sunset but believes that the ADA should allow for an extension of a measure for up to three years if the investigating authorities believe that its termination is likely to lead to a recurrence of dumping and injury.⁸⁵ Canada favors, in part, a provision that would provide authorities with a list of criteria that they must investigate (such as whether dumping continued once the duty was in place and current market conditions) before reaching the conclusion that a recurrence of dumping is likely to continue.⁸⁶

U.S. Position

U.S. negotiators have pointed out that the elimination of “underlying trade-distorting practices” that bring about antidumping actions in the first place should be the central objective of the Rules negotiations. Furthermore, implementing a “fully effective dispute settlement system which enjoys the confidence of all members” would also strengthen the effectiveness of trade remedy actions. The United States favors any revisions to the trade remedy rules that would “provide greater predictability in global trade and reduce the need to resort to trade remedy actions,” because they would provide greater stability to world trade than any mandatory limits to the duration of trade remedy measures.⁸⁷

Chairman’s Draft Texts

The November 2007 draft text of the ADA would have specified that a sunset review must be initiated no later than six months from the imposition of the duty, or the five-year period following the most recent review of the antidumping duty. It, further, proposed to limit the duration of the review to six months (in many instances, the reviews themselves can last more than a year). In addition, the 2007 text would have enabled authorities to continue imposition of a duty for an additional five years, but would have required the duty to be terminated after 10 years.⁸⁸

⁸⁴ World Trade Organization, Negotiating Group on Rules, Communication from China, *Proposal on Sunset Reviews*, June 29, 2007, TN/RL/GEN/149. World Trade Organization, Negotiating Group on Rules, Communication from Japan, *Sunset*, TN/RL/W/220, March 12, 2008. World Trade Organization, Negotiating Group on Rules, Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand and Turkey. *Proposal on Sunset*, TN/RL/W/76, March 19, 2003.

⁸⁵ World Trade Organization, Negotiating Group on Rules, Paper from South Africa, *Proposals on Issues Relating to the Antidumping Agreement*, TN/RL/GEN/136, May 29, 2006.

⁸⁶ World Trade Organization, Negotiating Group on Rules, Communication from Canada, *Sunset Reviews*, TN/RL/GEN/61, September 15, 2005.

⁸⁷ World Trade Organization, Negotiating Group on Rules, *Questions from the United States on Papers Submitted to the Rules Negotiating Group*, October 16, 2002, TN/RL/W/25.

⁸⁸ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts of the AD and SCM Agreements*, November 30, 2007, TN/RL/W/213, pp. 26-27.

The provisions in the 2007 text were not included in the December 2008 draft. Rather, the 2008 draft stated that delegations remained widely apart on the mandatory sunset of AD orders, and that convergence on the duration and circumstances had not been reached.⁸⁹

Treatment of Developing Countries

Many developing countries assert that antidumping actions on their products disproportionately affect their economies because they are particularly vulnerable to unpredictable shifts in market access.⁹⁰ Article 15 of the ADA recommends that developed countries show “special regard” for the economic situation of least-developed and developing country members, and suggests that “constructive remedies” be used instead of assessing antidumping duties. However, it does not specifically require developed countries to apply such treatment, nor does it specify any particular course of action that developed countries should employ when conducting antidumping proceedings against industries in developing countries.

As stated in the background section, some developing countries are also becoming avid users of AD measures, possibly in retaliation for the use of these actions by developed nations on their products. For example, in 2007, India was the most frequent user of antidumping action, with 35 new AD measures implemented. In that same year, the United States implemented 4 new AD measures.⁹¹

“Special and Differential Treatment”

The “Friends of Antidumping” and others have proposed that the ADA should include specific provisions that will provide developing countries with “meaningful special and differential treatment” when facing antidumping actions. Some general recommendations for providing special treatment have included requiring developed countries to negotiate/accept mandatory price undertakings (suspension agreements) when investigating products of developing countries, and raising the *de minimis* threshold (i.e., the margin at which the amount of dumping is found to be insignificant).⁹² Member delegations have also suggested that various combinations of the modifications mentioned above—lesser duty rule, mandatory sunset, price undertakings—be part of a package of special and differential treatment in the WTO reserved for developing countries.⁹³

Many developing countries also assert that the cost of initiating antidumping proceedings under the existing requirements of the ADA is especially prohibitive for developing countries. One recommendation calls for standardizing certain investigative procedures in order to make AD

⁸⁹ World Trade Organization, Negotiating Group on Rules, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236, December 19, 2008.

⁹⁰ Harvard University, Center for International Development, *Global Trade Negotiations Home Page*, <http://www.cid.harvard.edu/cidtrade/issues/antidumping.html>.

⁹¹ World Trade Organization statistics and Bown, Chad, *Global Antidumping Database* http://people.brandeis.edu/~cbown/global_ad/. India has AD measures in force on several products of U.S. origin, including newsprint (since 1997) Aniline (since 2000), and Isopropyl Alcohol (since 2002).

⁹² World Trade Organization, Negotiating Group on Rules, Submission by the ACP and African Groups, *Special and Differential Treatment and Technical Assistance in Trade Remedies*, TN/RL/GEN/154, February 25, 2008.

⁹³ For example, see World Trade Organization, Negotiating Group on Rules, Submission by South Africa, *Informal Paper on Anti-dumping and Subsidies Agreements*, TN/RL/GEN/60, July 12, 2005.

action less costly for all countries.⁹⁴ Another suggests that developing countries be provided with technical assistance in bringing trade remedy actions.⁹⁵ Some suggestions in this vein include requiring shorter periods for investigations, mandatory deadlines for reviews, and development of a questionnaire so that all investigators know precisely what information is necessary to extract when investigating a case. One submission advocated that developed WTO members should be required to invite developing country members to pre-initiation consultations before the initiation of an AD investigation, and that the consultations should explore other constructive remedies (such as price undertakings) that could lead to a “mutually agreed upon solution short of investigation or imposition of measures.”⁹⁶

Chairman’s Draft Texts

Neither the 2007 nor the 2008 draft texts made any substantive changes to Article 15 of the ADA. However, the December 2008 draft noted that further consideration of the proposal is required due to the proposal presented by two groups of developing country members following the release of the November 2007 draft.⁹⁷

Subsidies and Countervailing Measures

Since the investigative procedures involved in subsidies actions are very similar to those used to investigate the existence of dumping—and the remedy imposed is also similar—many suggestions related to improved disciplines in the ADA mentioned above (such as price undertakings and compulsory sunset) are also being discussed in relation to proposed modifications to the Agreement on Subsidies and Countervailing Measures. Since they have previously been presented in the context of the ADA, they will not be discussed here.

AD and CVD measures, however, address very different forms of price discrimination. In the case of antidumping investigations, the principal actors are exporting companies who sell goods in the foreign market at less than fair market value. Thus, there is little that exporting governments can do to assist in the elimination of dumping.

In the case of subsidies, however, the actors that provide them are governments and other public entities. Therefore, the ASCM addresses disciplines that exporting governments have agreed to that seek to limit the granting of subsidies in the first place, as well as those related to investigative procedures and mitigation of their injurious effects.

⁹⁴ World Trade Organization, Negotiating Group on Rules, Submission by Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Mexico; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Turkey, *Senior Officials’ Statement*, TN/RL/W/171, February 15, 2005.

⁹⁵ World Trade Organization, Negotiating Group on Rules, Submission by Kenya, *Special and Differential Treatment and Technical Assistance in Trade Remedies*, TN/LR/GEN/143, June 27, 2006.

⁹⁶ World Trade Organization, Negotiating Group on Rules, Submission by the ACP and African Groups, *Special and Differential Treatment and Technical Assistance in Trade Remedies*, TN/RL/GEN/154, February 25, 2008.

⁹⁷ *Ibid.*

The ASCM's role in limiting subsidies has been a primary focus of the Rules negotiations in two major respects. First, developing country members, who maintain that subsidies play an important role in the development programs of many developing nations, seek additional special and differential treatment under the ASCM. Second, the development of a new set of disciplines that seek to limit fisheries subsidies has been a major focus of attention.

Treatment of Developing Countries

In the WTO context, there is no specific definition of what constitutes a “developing country” member. Members, during the WTO membership process, may declare for themselves whether they are “developed” or “developing” countries.⁹⁸

Unlike the ADA, the ASCM identifies three categories of development in WTO members: (1) least-developed members (LDCs);⁹⁹ (2) those with GNP per capita of less than \$1,000;¹⁰⁰ and (3) other developing countries. Article 27 of the ASCM described temporary special and differential treatment available to each member category. The preferential treatment was usually in the form of longer transition periods for compliance with disciplines (such as phasing out export subsidies) agreed to in the ASCM.

The lower the member's level of development, the more favorable treatment it received. For example, LDCs and those with a GNP per capita of less than \$1,000, were exempted from the prohibition on export subsidies (Article 3, paragraph 1(a))¹⁰¹

The special and differential treatment provisions were designed to expire within 5 years for developing country members and 8 years for least-developed countries, unless granted an extension by the Committee on Subsidies and Countervailing Measures.¹⁰² Therefore, a significant portion of the work in the DDA negotiations on the ASCM—especially in the early stages of the talks—deals with negotiations on clarifying and extending the special and differential treatment provisions.

A submission from India provides a representative summary of developing country concerns. India's position is that the special and differential treatment provisions in the ASCM are “inadequate to meet the concerns of developing countries,” and that any imposition of CV duties, or the threat thereof, can have a serious adverse impact on the labor-intensive small and medium enterprises that develop products for export in developing countries. In developing countries, India says, where there is a “high cost of capital, low level of infrastructure development, inadequate integration and organization of the economy, poorly developed information networks” it is necessary for the state to assume “a more active and positive role in assisting its industry.”¹⁰³

⁹⁸See also World Trade Organization, *Understanding the WTO*, <http://www.wto.org>.

⁹⁹ The WTO defines “least-developed” countries (LDCs) based on the list of LDCs acknowledged by the United Nations. There are currently 49 countries on this list, 32 of which have become WTO members.

¹⁰⁰ These countries are listed in Annex VII of the ASCM as Bolivia, Cameroon, Congo, Cote d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka, and Zimbabwe.

¹⁰¹ ASCM, Article 27.4.

¹⁰² World Trade Organization, *Agreement on Subsidies and Countervailing Measures*, Part VIII: Developing Country Members, Article 27.3 and 27.4.

¹⁰³ World Trade Organization, Negotiating Group on Rules, Submission by India, *Proposals on Implementation* (continued...)

India pointed out that “out of the 67 cases which countervailing duty action was taken by various countries during the period 1 January 1995 to 30 June 2001, more than 65% was against developing countries. This is disproportionate in relation to the share of such countries in international trade.”¹⁰⁴ India continues by recommending changes and extensions to Article 27. These proposals include the recommendation that subsidies contingent on the use of domestic over imported goods should always be permitted because they are “crucial to the process of industrialization and development of developing countries.”¹⁰⁵ India also proposed restricting the application of CV duties when the total volume of imports is negligible (i.e., 7% of total imports), banning CV duties on export subsidies when they account for less than 5% of the value (free on-board) of the imported product, and raising the level below which CV duties cannot be imposed on all developing countries (*de minimis* level) to 3%.¹⁰⁶

U.S. Position

U.S. negotiators have expressed the belief that the ASCM envisioned that over time, all countries should be subject to a single set of disciplines on subsidies. They maintain that the special and differential treatment provisions were not meant to be in effect for perpetuity.¹⁰⁷ The United States has also noted that there is “longstanding and widespread agreement” among economists that subsidies can undermine the efficient allocation and utilization of resources, and that they create artificial advantages that distort market signals. Although the ASCM provided transition rules for developing country members of the WTO, the United States views them as “temporary deviations from the normal disciplines necessary to promote trade liberalization and growth that should be used only to the extent necessary and consistent with an individual country’s particular economic, financial, and development needs.”¹⁰⁸ Consequently, the United States does not support the continued expansion of special and differential treatment in the ASCM.¹⁰⁹

Chairman’s Draft Texts

Neither the 2007 nor the 2008 draft texts made any substantive changes to ASCM Article 27.

Fisheries Subsidies

One subsidies area that has not been given much attention in previous trade rounds is that of developing disciplines on subsidies to the fishing industry. During the discussions leading up to the Doha Development Agenda, a loose coalition of countries including the United States, known

(...continued)

Related Issues and Concerns, Agreement on Subsidies and Countervailing Measures, Anti-Dumping Agreement, TN/RL/W/4, April 25, 2002.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid. Article 27.10 set the *de minimis* level for developing countries not referred to in Annex VII to 3% for a period of eight years from the date of the entry into force of the agreement, and 2% thereafter. India’s proposal seeks to raise this level once again to 3%.

¹⁰⁷ World Trade Organization, Negotiating Group on Rules, Communication from the United States, *Special and Differential Treatment and the Subsidies Agreement*, December 2, 2002, TN/RL/W/33.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

as the “Friends of Fish,” pressed for discussions on restricting or prohibiting government subsidies to the fisheries sector.

The group acknowledged that the disciplines in the ASCM deal adequately with *market distortions* that caused harm to fisheries industries in other WTO members. They asserted, however, that the ASCM does not cover the additional negative impacts that fisheries subsidies can have by leading to overcapacity and overfishing, thus causing the depletion of fish stock and environmental destruction of fisheries habitats. Therefore, this group pressed for the insertion of language in the Doha Development Agenda that would specifically provide for the discussion of subsidies on fisheries in the context of the round. The language in the Doha mandate read as follows:

In the context of these [Rules] negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.

Supporters of placing limits on fisheries subsidies (estimated to be between \$14 billion and \$20.5 billion annually)¹¹⁰ asserted that they directly contribute to over-capacity and over-fishing in the fisheries sector. These so-called “Friends of Fish”¹¹¹ argued that these subsidies cause direct commercial harm to trading partners because they lead to stock depletion, thus limiting other countries’ access to the resource.

Other countries that rely heavily on fishing, such as Korea, Taiwan, and Japan, argued against discussing fishing subsidies separately from the ASCM. They pointed to other data that estimated the amount of government subsidies to fisheries industries at a much lower \$6.3 billion. They say that these subsidies are used primarily to fund research, management, and enforcement—activities that would not address fisheries resources or trade negatively.¹¹² They further asserted that stock depletion is caused by poor management of fisheries, not by subsidies.¹¹³

Some developing countries have called for special and differential treatment with regard to fisheries subsidies because the fisheries sector “is a vital source of food security, employment, and foreign exchange.”¹¹⁴ In addition, coastal states such as Antigua and Barbuda, Papua New Guinea, and St. Kitts and Nevis, have pressed for broad exemptions to any disciplines in this area, given the small-scale, “artisanal” nature of their fisheries sector and the importance of fishing to their economies.¹¹⁵ A sub-group of developing countries has also emphasized the need to preserve

¹¹⁰ World Trade Organization, Negotiating Group on Rules, *The Doha Mandate to Address Fisheries Subsidies*, TN/RL/W/3, April 24, 2002. Communication from Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States. This group referred to 1996 data compiled by the Food and Aquaculture Organization to the United Nations.

¹¹¹ A group including Australia, Chile, Ecuador, Iceland, New Zealand, Peru, Philippines, and the United States.

¹¹² World Trade Organization, Negotiating Group on Rules, *Japan’s Basic Position on the Fisheries Subsidies Issue*, July 2, 2002, TN/RL/W/11. This submission relied on data compiled in 2000 by the Organization on Economic Cooperation and Development (OECD) on government financial transfers.

¹¹³ *Ibid.*

¹¹⁴ World Trade Organization, Negotiating Group on Rules, *UNEP Workshop on Fisheries Subsidies and Sustainable Fisheries Management: Summary of the Chairs*, See TN/RL/W/161, Geneva, April 26, 2004.

¹¹⁵ *Ibid.*

small-scale artisanal fishing as necessary as economically important and as a key factor in the drive to eradicate poverty.¹¹⁶

As the international discussion on fisheries subsidies evolved over several years, it seemed that a consensus was reached that WTO disciplines should address these issues. Many WTO members believe that any subsidies that directly contribute to overcapacity, unsustainable fishing efforts or illegal, unreported, and unregulated (IUU) fishing need to be addressed most urgently, but the structure and scope that any prohibitions would take are still a matter of debate.¹¹⁷ Other issues being discussed involve whether aquaculture (i.e., fish farming) should also be addressed within disciplines on fisheries subsidies or in the context of the ASCM.

November 2007 Chairman's Text¹¹⁸

The November 2007 draft text on fisheries subsidies largely reflected the growing consensus that fisheries subsidies should not be continued. Article I of the draft proposed to prohibit any subsidies conferred on the acquisition, construction, or repair of fishing vessels—including any subsidies to boat building or shipbuilding facilities. Any subsidies for operating costs or operating losses would be prohibited, as would be any subsidies that support fishing infrastructure in ports or any facilities that are predominantly used to support “marine wild capture” fishing. Subsidies for transferring boats to third countries would also be prohibited, as well as any price or income supports for people engaged in fishing, or any subsidies supporting IUU fishing.

Article II of the draft sought to permit subsidies for improving vessel or crew safety, provided that they do not involve new vessel construction or lead to an increase in new fishing capacity. The text also proposed permitting subsidies for gear or improvements related to improving selective fishing techniques such as techniques aimed at reducing environmental impact or aiding in compliance with fisheries management regimes aimed at preservation and sustainable development. Government subsidies for personnel costs, re-education, re-training, re-deployment, and retirement of fisheries workers would have been permitted, as well as subsidies for the scrapping or decommissioning of vessels.

Article III contained special and differential treatment provisions that proposed exempting developing country members from most of the prohibited subsidies in Article I, provided that all fisheries activities receiving these subsidies (1) are conducted within the territorial waters of the member, and (2) with non-mechanized net retrieval. Furthermore, subsidized fishing would have been required to be carried out by individuals, including family members, and associations of the same, and there should be no major employer-employee relationship. The catch must be consumed principally by fishing workers, and any commercial activities must not go beyond a “small-profit trade.” Any subsidies permitted to developing countries for (1) enhancements,

¹¹⁶ Small-scale artisanal fisheries include small, diffuse, impoverished low-tech fisheries (e.g., using undecked, owner-operated vessels equipped with non-automatic retrieval gear) that are typically subject to traditional community management arrangements. See World Trade Organization, Negotiating Group on Rules, *Joint Statement on Treatment of Artisanal and Small-Scale Fisheries in Fisheries Subsidies Negotiations*, TN/RL/W/217, February 15, 2008.

¹¹⁷ World Trade Organization, Negotiating Group on Rules, *UNEP Workshop on Fisheries Subsidies and Sustainable Fisheries Management: Summary of the Chairs*, See TN/RL/W/161, Geneva, April 26, 2004.

¹¹⁸ This section is a brief summary of the text on fisheries subsidies drafted by the Chair of the WTO Negotiating Group on Rules. World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts*, TN/RL/W/213, November 30, 2007.

repair, or rebuilding of vessels or (2) operating costs or operating losses are limited to boats under 10 meters (31 ft).

Article IV of the draft proposed prohibiting any subsidies that would cause harm to any straddling or migratory fish stocks whose range extends into the Exclusive Economic Zone (EEZ) of another member, or to fish stocks in which another member has “identifiable fishing interests.”

Article V would have required that any WTO member that grants or maintains any subsidy permitted by Article II or III in the draft text must operate a fisheries management system. This system would have regulated marine wild capture fishing within its jurisdiction and is designed to prevent over-fishing and promote sustainability and conservation. The management program was required to be based on internationally-recognized best practices for fisheries management, supported by the adoption and implementation of “pertinent” domestic legislation and administrative and judicial enforcement mechanisms.

Article VI of the draft would have required each WTO member to notify the WTO Subsidies committee in advance of implementing any of the approved subsidies, except those implemented for natural disaster relief (in which case, the committee should be notified “without delay”). Any transfer of fishing rights from one member to another must also be disclosed. Any applicable legislation and notifications made to other organizations should also be reported to the committee.

Articles VII and VIII of the draft dealt with transitional and dispute settlement provisions.

Members’ Responses

Many WTO members expressed the belief that the broad approach taken by the Chair’s draft was necessary and appropriate in light of the crisis confronting fisheries worldwide. Others acknowledged that effective management of fisheries is still the exception rather than the rule, and that even where perfect management is implemented, subsidies can distort trade, reduce economic flexibility, and create social contexts in which effective management faces political obstacles. Many noted as appropriate the Article V “sustainability criteria” that were included as a core element of the proposed fisheries disciplines.¹¹⁹ However, in a negotiations process where agreements must be established by consensus, the major parties remained very far apart.

Some members criticized the fact that the Chair’s draft did not address subsidies for aquaculture. Others were concerned that the draft—in a similar manner as the ASCM—required subsidies to be “specific” because this could still permit the imposition of certain more general subsidies, such as those to support multi-use port facilities.¹²⁰

There was a sense among some members that the Article II exceptions for developing countries were appropriate, as well as the condition that subsidies should not increase capacity. However, many developed country members were concerned about the potential for abuse of these exceptions—such as the provision of subsidies for environmental improvements that could also increase fishing capacity (e.g., subsidies for fuel-efficient engines). There was also some disagreement as to whether the special and differential treatment provided to developing countries

¹¹⁹ World Trade Organization, Negotiating Group on Rules, *Draft Consolidated Chair Texts*. TN/RL/W/213, November 30, 2007.

¹²⁰“Draft Rules Text Largely Reflects U.S. Demands on Zeroing.” *Inside U.S. Trade*, December 7, 2007.

should be permanent or time-limited (i.e., to give the countries time to catch up to developed country standards).¹²¹

December 2008 Draft

Due to the lack of consensus expressed following the 2007 draft, the December 2008 ASCM draft, rather than including any draft language, contained instead a summary statement of the status of negotiations on fisheries thus far. The Chair recognized that the issue of fisheries subsidies “continues to be the subject of vigorous debate.”¹²² At issue in the debate are (1) varied perceptions as to the scope and meaning of the DDA mandate; (2) which subsidies should not be prohibited, especially as they relate to small-scale operations or special and differential treatment for developing countries; (3) how the existence of overcapacity and overfishing can be judged in an objective manner; and (4) how to ensure adequate implementation, monitoring, and surveillance.¹²³ In this light, the draft provided a series of detailed questions for continued discussion with a view toward arriving at a consensus on these issues.¹²⁴

Status of Negotiations

Many WTO members seem to have reached “substantial common ground” toward creating disciplines restricting fisheries subsidies. Most believe that “the current situation cannot continue and that we must develop fisheries in ways that are economically sustainable and conserve the resource for future generations.”¹²⁵ Possible exceptions to this consensus might be Japan, Taiwan, and Korea, who have expressed no written positions on fisheries subsidies since the chairman’s draft appeared.

In addition, although developing countries (referred to also as Small Vulnerable Economies or SVEs) welcome the special and differential treatment in Article III, they have expressed concern about restrictions on operational costs for fuel, ice, bait, license fees, insurance, landing, handling, and processing because “they are precisely the kinds of government assistance which SVEs could provide to their fishers.” They also suggested that the length of the vessels permitted subsidies for building and repairs should be extended to 25 meters, rather than 10 meters, “to take into account the size of the small scale fishing vessels used in our maritime space.”¹²⁶ They also maintained that additional flexibility is necessary if fisheries subsidies disciplines “are to have real and practical meaning for the developing small island and coastal states of the WTO.”¹²⁷

In a March 2010 report to the WTO Trade Negotiating Committee, the Chair of the rules negotiating committee acknowledge that the urgency to implement disciplines on fisheries subsidies “has been emphasized at some point in all of our meetings by virtually all delegations,

¹²¹ World Trade Organization, *New Draft Consolidated Chair Texts of the AD and SCM Agreements*, TN/RL/W/236, December 19, 2008.

¹²² *Ibid.*, p. 85.

¹²³ *Ibid.*

¹²⁴ *Ibid.*, pp. 86-87.

¹²⁵ World Trade Organization, Negotiating Group on Rules, *Fisheries Subsidies*, TN/RL/W/235, July 21, 2008.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

from every region and at all levels of development.”¹²⁸ However, he reported that consensus has not been reached on limiting fishing subsidies, and expresses concern that, in order to reach agreement, the group may lower its sights too low, thus reaching “a result that is *contrary* to our mandate.”¹²⁹

In April 2010, the United States suggested some changes to the Chair’s November 2007 draft that seek to “tighten up” some of the language, thus trying to eliminate some of the ambiguity in the text. For example, the U.S. proposal provides specific definitions of terms such as “fishing activity;” and gives example of specific situations that could represent “harm” to fish stocks.¹³⁰ The proposal also lays out the elements of a global fisheries management system.¹³¹

Regional Trade Agreements

Under the GATT, WTO members must grant immediate and unconditional most-favored-nation (MFN) treatment to the products of other WTO members with respect to customs duties and import charges, internal taxes and regulations, and other trade-related matters.¹³² While entering into Regional Trade Agreements (RTAs) or Free Trade Agreements (FTAs) would appear to be inconsistent with this obligation, the GATT contains a specific exception to allow such agreements because RTAs are generally viewed as promoting trade liberalization. Article XXIV of the GATT requires that all parties must notify the WTO of these agreements, and that all RTAs are subject to WTO review. The exception applies both to completed RTAs as well as to any interim agreements leading up to their implementation.¹³³

The WTO Secretariat estimated that, if all RTAs currently in some stage of the negotiating process actually enter into force, a total of nearly 400 RTAs worldwide could be scheduled to be implemented by the end of 2010. FTAs and partial scope agreements account for over 90% of these agreements, while customs unions account for less than 10%.

Interpreting the WTO rules governing regional trade agreements has proven to be a challenge to the WTO Regional Trade Agreements Committee, the WTO committee tasked with the oversight of these agreements. As a result, the committee has had some difficulty assessing the individual trade agreements to ensure that they comply with WTO guidelines.¹³⁴

¹²⁸ World Trade Organization, *Negotiating Group on Rules: Report of the Chairman to the Trade Negotiations Committee*, TN/RL/24, March 22, 2010

¹²⁹ *Ibid.*

¹³⁰ World Trade Organization, *Fisheries Subsidies - Articles q.2, II, IV and V: Communication from the United States*, TN/RL/GEN/165, April 22, 2010.

¹³¹ *Ibid.*

¹³² General Agreement on Tariffs and Trade 1994, Text of the General Agreement, Art. I:1 available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

¹³³ CRS Report RS21554, *Free Trade Agreements and the WTO Exceptions*, by (name redacted), (name redacted), and (name redacted).

¹³⁴ *Ibid.*

Doha Mandate

In the Doha Ministerial Declaration, WTO members also agreed to “negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.”¹³⁵ These negotiations are also being carried out as part of the talks in the Negotiating Group on Rules.

Provisional Transparency Mechanism

As a result of the Doha negotiations, on December 14, 2006, the WTO General Council established a provisional transparency mechanism for all RTAs. The new mechanism provides for early announcement of these measures and notification to the WTO. On the basis of a factual presentation by the WTO Secretariat, the Committee on Regional Trade Agreements will consider RTAs falling under Article XXIV of General Agreement on Tariffs and Trade (GATT) and Article V of the General Agreement on Trade in Services (GATS). The Committee on Trade and Development will consider RTAs falling under the Enabling Clause (trade arrangements between developing countries).¹³⁶

In an effort to further increase the transparency of RTAs, the WTO maintains a Regional Trade Agreements Information System¹³⁷ which, as of this writing, has information on 266 RTAs currently in force.¹³⁸ This mechanism is provisional, however, and WTO members are still evaluating its implementation. Some WTO members believe that this mechanism needs to be modified, therefore, the implementation and the structure of the mechanism may continue to be negotiated as a part of the Doha Development Agenda.

In a March 2010 report to the WTO Trade Negotiations Committee, the Chair of the rules negotiating group reported that the provisional mechanism is functioning well, but that consensus on the methodology for a implementing a permanent Transparency Mechanism has not been reached.¹³⁹

Conclusion and Options for Congress

When Congress granted presidential Trade Promotion Authority (TPA) in 2002 (P.L. 107-210), it agreed to consider legislation to implement trade agreements under special legislative procedures that limited debate and allowed no amendments. Since TPA expired in July 2007, these requirements no longer apply. There is some speculation that it will be more difficult to reach any

¹³⁵ World Trade Organization, *Doha Ministerial Declaration*. WT/MN(01)/DEC/1, November 20, 2001, paragraph 4.

¹³⁶ World Trade Organization, *Transparency Mechanism for Regional Trade Agreements*. Decision of 14 December 2006, WT/L/671, December 14, 2006.

¹³⁷ <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

¹³⁸ World Trade Organization, Committee on Regional Trade Agreements. *Draft Report (2008) of the Committee on Regional Trade Agreements to the General Council*. WT/REG/W/52, November 11, 2008.

¹³⁹ World Trade Organization, *Negotiating Group on Rules: Report of the Chairman to the Trade Negotiations Committee*, TN/RL/24, March 22, 2010.

kind of consensus in the WTO without TPA being extended to the current administration. Observers advocating this view argue that the principal actors in other WTO member countries will be reluctant to agree to a WTO pact that could be substantially amended by U.S. lawmakers.

However, in keeping with its constitutional role, as part of the TPA legislation, Congress also gave itself considerable oversight authority over trade negotiations by requiring the President and other executive agencies (particularly the USTR) to consult with Congress, to provide congressional committees with regular, detailed briefings on the status of negotiations, and to coordinate closely with a Congressional Oversight Group consisting of chairmen, ranking members, and other representatives from the House Ways and Means and Senate Finance committees.

Since modifications to the trade remedy laws were of particular concern to many Members, the TPA legislation required the President to report within 180 days prior to acceptance of a trade agreement if *any* of the proposals could require amendments to trade remedy laws. The law also provided specific language for a procedural resolution of disapproval to be introduced in either House if Congress determined that the proposed changes to the trade remedy laws in any agreement are inconsistent with U.S. negotiating objectives on trade remedies. Although the disapproval resolution would not have been binding on the President or on the USTR, such a resolution, if passed, would have sent a clear message that Congress resisted any modifications to the WTO Agreements that would lead to any weakening of U.S. trade remedy laws.

ADA Proposals

Most of the proposed changes in the ADA, if adopted, could further restrict the ability of all WTO members to grant relief to import-competing industries. Import-competing industries in the United States could find it more difficult to obtain relief, could have lower dumping margins assessed on targeted merchandise, or could be authorized to receive the relief for a shorter time period. Industries in other countries would face the same restrictions, however, which could benefit U.S. exporters. U.S. consuming industries, and ultimately consumers, might also benefit from lower prices for production inputs and finished goods.

“Zeroing”

Proposals to change dumping margin calculations (through “zeroing,” for example) might only require administrative changes in the way in which authorities calculate the level of relief. However, there is considerable debate in Congress about whether or not authorities should be permitted to do so. For example, H.R. 496 (Rangel, introduced January 14, 2009) seeks to express the sense of Congress that, in light of “fatally flawed” WTO Appellate Body decisions, that the Department of Commerce should revisit its February 22, 2007 decision to modify its methodology in AD investigations “with respect to the calculation of the weighted- average dumping margin” to ensure that “100% of dumping is addressed under United States antidumping law and practice, while also ensuring that the United States complies with its WTO obligations.”

H.R. 496 would also prohibit the Department of Commerce from implementing any further changes unless and until it consults with the appropriate congressional committees and the USTR, and provides an opportunity for public comment by publishing proposed modifications in the

Federal Register.¹⁴⁰ Further, the legislation would state that a final rule or other modification should not go into effect before the end of a 60-day period beginning on the day consultations were requested. During the 60-day period, the House Ways and Means and the Senate Finance Committee may conduct a non-binding vote to indicate their agreement or disagreement with the proposed rule or modification.

The legislation also proposes to extend the final modification on “zeroing” already approved by the Department of Commerce¹⁴¹ until March 1, 2009, after which the Department is directed to return to the original methodology “unless or until” it issues a revised modification according to the process described in the legislation.

Transparency

Suggestions for changes in improved transparency in injury determinations would probably result in fewer changes to U.S. laws and administrative procedures because U.S. trade remedy actions already provide considerably more quantitative guidance, more specific definitions, and narrower timetables than those in some other WTO member countries. In addition, U.S. exporters could benefit from increased transparency in AD investigations in foreign markets, while U.S. domestic industries’ ability to seek AD action in the United States might be only minimally affected. However, since the overall objective of many WTO members seems to be to restrict the ability of domestic industries in the importing countries to receive relief, it is still possible that concessions to modifications in this area could lead to changes that diminish the use and effectiveness of AD actions.

Other Modifications

Proposals for modifying the duration of AD orders, such as requiring mandatory sunset after five years, could also have a significant effect on U.S. industries seeking relief through the trade remedy laws. The United States currently has about 190 AD orders that have been in effect longer than five years (the oldest as of this writing, on polychloroprene rubber from Japan, dates from 1973). Statistics on five-year reviews conducted from January 2000 to January 2005 indicate in the 116 reviews initiated during the period, the ITA and ITC decided to revoke 37 AD orders, continued 52 orders, and an additional 27 investigations are still pending. These statistics indicate that a number of U.S. AD orders do continue in place beyond the five-year period. Therefore, adoption of a mandatory five-year revocation of AD orders could have a substantial impact on U.S. trade remedy policy, as well as on industries that have benefitted from the protection of these orders.

In addition, since the United States was found to be in violation of its WTO obligations with regard to the CDSOA and the usage of zeroing when conducting initial investigations, some observers suggest that it might be advantageous for the United States to concede on these issues in DDA negotiations, especially if by doing so U.S. negotiators can avoid other changes to the Agreement that might adversely affect U.S. trade remedy laws.

¹⁴⁰ 19 U.S.C. § 3533(g).

¹⁴¹ Department of Commerce, “Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification,” 71 *Federal Register* 77722, December 27, 2006.

Subsidies Issues

Two issues unique to the WTO subsidies debate are (1) special and differential treatment of developing countries relative to relaxing disciplines on subsidies that governments may provide to fledgling industries, and (2) the ongoing discussion on limiting subsidies to fisheries industries worldwide that could contribute to overcapacity and overfishing.

U.S. negotiators have formally opposed any extension of the special and differential treatment on subsidies beyond that which was previously provided in Article 27 of the ASCM. The United States bases this position on economic research indicating that providing subsidies in the long term creates artificial advantages that can lead to distortion of market signals. In turn, the distortions created by subsidies can undermine efficient allocation and utilization of resources.

If concessions were made in favor of extending or granting additional favorable subsidies treatment to developing country WTO members, it would do little to weaken the effectiveness or the administration of U.S. trade remedy laws. However, it could lead to further injury to U.S. import-competing producers who, depending on the nature and duration of the special treatment provided, might not have recourse to subsidies action.

On the issue of fisheries subsidies, the United States is one of the countries in favor of developing disciplines in the fisheries sector. U.S. negotiators have written that the United States especially favors a broad prohibition on any subsidies that contribute to overcapacity and overfishing. Those who oppose this viewpoint include Japan and Korea, who believe that injurious fisheries subsidies can already be dealt with in the context of the ASCM, and developing countries who believe that their small-scale and artisanal fisheries merit special and differential treatment. Even if consensus is not reached on this issue in the context of the DDA, limits on overcapacity and overfishing could possibly be addressed in a context other than international trade through other ongoing international discussions on fisheries conservation.

Regional Trade Agreements

In the area of Regional Trade Agreements, WTO members have already reached consensus on a provisional mechanism designed to enhance transparency. What remains is for WTO members to evaluate its effectiveness and reach consensus on any recommended modifications. While modifications to WTO oversight may be agreed to in the context of the DDA rules negotiations, any provisions that seek to limit the ability of the United States or other WTO members to enter into these agreements are not on the table.

Conclusion

The DDA is being conducted as a “single undertaking,” meaning that no individual concessions are binding unless a total package of obligations and concessions is agreed to by all parties. As of this writing, negotiations on agriculture and non-agricultural market access—not trade remedies—appear to have brought the discussions to an impasse.

However, given the desire of Congress and others to preserve the trade remedy laws and the ability to implement them effectively, reaching consensus on trade remedy issues could prove to be another sticking point. The gap between the U.S. position — especially with regard to antidumping — and that of U.S. WTO trading partners appears to be very wide and may be

difficult to narrow. However, trade negotiators from all countries face a weighing of concessions made against gains in other areas in the WTO negotiations.

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